EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	**CASE NO.**
2 Employees	UD539/2007
	MN397/2007
	UD540/2007
	MN398/2007

Against
Employer

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms E. Daly B.L.

Members: Mr D. Morrison
Mr G. Hunter

heard these claims at Letterkenny on 1st May and 30th July 2008

Representation:

Claimants : P.A.Dorrian & Co, Solicitors, Main Street, Buncrana, Co. Donegal

Respondent : Mr. Loughlin Deegan, IBEC, Mid West Regional Office, Gardner House, Charlotte Quay, Limerick

The determination of the Tribunal was as follows:

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 were withdrawn by both claimants at the outset of the original hearing.

Respondent's Case
The respondent is a timber importer and supplier of building products to the construction industry. The claimants were employed as lorry drivers in its transport section. Following a transfer of undertakings it was decided to outsource the company's transport division. The company to which the transport division would be outsourced was called B-Fast. There was eight staff attached to the transport section. The current regional manager was the general manager in the relevant period up to the cessation of the claimants' employment in April 2007. He joined the respondent in June 2006 around the same time the transfer of undertaking occurred. This general manager issued a memorandum to all staff on 29 January 2007.

That memorandum emphasised that while its contents did not amount to a formal notice of redundancy it did state that eight employees would be dismissed for that reason. All affected

werelorry drivers and helpers linked to the respondent's transport operations. Advertisements were posted on the notice board that indicated that the respondent was seeking positions for a van driver,a sales person, a good inwards person and a security officer. The witness detailed and identifiedemployees involved in these applications and those affected by the restructuring of the company.By March 2007 the only employees to be issued with redundancy notices were the claimants as theother six employees were accounted for by other means.

The witness stated that it was the respondent's preference to retain the claimants' skills and experience. He gave evidence that the criteria that was relied on was interest in the advertised positions and in hindsight after that a skills based criteria. However the regional manager was unable to recall the criteria used in the redundancy process and indicated this was a matter for the human resources section.

The first named claimant applied for the van driver vacancy, but was not successful. The employee who secured this position had less service with the company than this claimant, but held a higher qualification.

The second named claimant did not apply for any of the internal vacancies. The claimants' representative raised possible comparisons with employees who were selected to fill internal posts in the company.

The claimants were encouraged to apply for jobs with B-Fast the Northern Ireland outsourcing company. The witness asked a director of this transport company by email, to call and speak with the two claimants with a view to taking them on. He had previously discussed with the director of this company about transferring the pensions of employees over to this company. At the time this company was operating out of Northern Ireland and was not registered within the State. He understood that the first named claimant on termination of his employment had worked with this transport company for eight days.

Only one division within the company was shut down so no other employees were made redundant, therefore service was not a criterion for selection. In response to questions from the Tribunal, he said he thought it was likely that the company taking over their distribution would take on some of the redundant employees. He had also spoken to affected employees about other options. He later accepted in evidence that he may have told the claimants that they might finish with the respondent on a Friday and start with the Northern Ireland company the following Monday.

The HR and Health and Safety Manager of the group gave evidence. The group had reduced its employees from 650 to approx 400 through redundancy. He was made aware of the impending redundancies of this branch in January and was asked to guide the local management through the process. He was satisfied that the company had met their obligations under the Redundancy Act 1977.

The Training Manager, who is based in Limerick, facilitated the training requirements of managers for their staff and provided training for employees throughout the country. The claimants were excluded from the manual-handling course, held in October 2006 and January 2007, as were two other drivers. The witness explained that this course would be mandatory for all staff in the group. Those who attended these courses were available on the days in question.
He confirmed that both claimants had cashed their redundancy cheques and at no stage invoked the company's grievance procedure.

Under cross-examination he confirmed that the first notice of dismissal issued on the 29th January 2007 and his understanding was that the Regional Manager would have spoken to all staff affected beforehand. The selection for redundancy appeared to be twofold (1) application for advertised position and (2) skills based. The advertised positions provided some staff within the distribution section the opportunity to avoid redundancy. He reiterated that employees who were trained on the 29th January 2007 were not being retrained.

An email dated the 16thMarch 2007 from this witness to the Regional Manager was referred to. Within this email mandatory consultation of employer with employees is outlined.

He guided the regional manager through redundancy process and had handled the documentation. He wrote to the Minister for Enterprise Trade and Employment on the 5th February 2007 informing the office of the company's intention to make eight employees redundant. The company had fulfilled their obligations in relation to the thirty days consultation period. He confirmed that no documents had issued to employees from HR between the time of the informal notice of the 29th January 2007 until the issue of the RP50 forms.

First named Claimants' case:
The first named claimant gave evidence that he had commenced employment in 1999 as a delivery driver and his duties included loading and getting materials ready. When the notice of impending redundancies was posted up in January 2007 the Regional Manager held a meeting with all affected employees. At this meeting the Regional Manager said he would try and secure alternative vacancies in-house or jobs with the company taking over the distribution contract for those employees affected.

The claimant applied for the job of van driver but was unsuccessful. The employee who obtained the job of the van driver had less service than the claimant but had a qualification to operate a crane arm. The claimant assumed his service would have been taken into account and did not think that the extra qualification of his work colleague was relevant at the interview stage. He would have obtained this qualification if necessary.

The claimant did not apply for any of the other jobs posted. He said he thought the goods inwards job was already filled at the time of the advertisement. When he learnt that he had been unsuccessful in obtaining the van driver's position, the other jobs had been filled. Had he known he would not get the van drivers job he would have applied for the other vacancies. The claimant explained that the Regional Manager had said that if there were jobs with the company taking over the distribution, employees being made redundant would have first option. He applied for a job with this company and filled in temporarily for eight days. He then gave evidence of loss.

Second named Claimant's case:
The second named claimant gave evidence that he commenced employment in July 2004 and was primarily employed as a delivery driver. He saw the notice for the internal vacancies but did not apply for any, as he understood at that time that he would finish with the Respondent and then commence employment with the company who was taking over the distribution. The claimant had said at the time he was not interested in applying for the vacancies, but would have applied for them if he had known he would not get a job with the distribution company.

The claimant said that the Regional Manager had implied that the employees affected would finish with the respondent on a Friday and start with the distribution company the following Monday. The Claimant completed an application form for the distribution company, but was unsuccessful in

obtaining a position. He then gave evidence of loss. The claimants' legal representative raised the vagueness of the internal memos advertising the internal posts in respect of no closing date, method to apply or indication that his claimants should have applied. He also raised the issue of whether the 30 days consultation period under the collective redundancies legislation was applied correctly by the company in this case

Determination:

If there is a breach for failing to consult adequately under the Protection of Employment Act, 1977 then there are penalty provisions dealing with such a breach. An offence under the Protection of Employment Act, 1977 is dealt with by these penalties and there is no provision in that Act whereby an offence can be relied upon to prove that an unfair dismissal has occurred. Accordingly the Tribunal rejects the claimants' argument in that regard.

Considering the first named claimant's case the Tribunal finds that the failure by the respondent to set-out clearly the criteria they later relied upon, prior to making the redundancies, permits this case to succeed. There is an onus on the respondent when making redundancies to have a clear and transparent selection process. This is in order that a challenge to the fairness of the selection process can be raised and that the ultimate selection for redundancies is therefore fair and proper. The first named claimant responded to an advert but it was only when he was unsuccessful in obtaining the position that a skills based criteria, of which he had no knowledge, was being applied against him. The selection process commenced once the adverts were posted; therefore the selection process was flawed. Taking into account as a set-off, the redundancy payment already paid to the first named claimant and that he has suffered financial loss since March 2007, the Tribunal awards the claimant the sum of €8,000.00 as compensation, under the Unfair Dismissals Acts, 1977 to 2001.

Considering the second named claimant's case the Tribunal finds that the respondent failed to set-out clearly the criteria they later relied upon, prior to making the redundancies. However thesecond named claimant did not engage in the process; he did not express an interest and did notapply to any of the adverts posted. Therefore because he failed to engage in the selection processthis prevents him from making a case that the process was flawed in a way that affected himspecifically. The reason he gave for not applying for the advertised position was not that he had adifficulty with this mode of selection but rather that he understood that he would automatically begiven a job in another distribution company. The Tribunal is not persuaded that this job wasguaranteed to him nor is it reasonable to consider that could it have been guaranteed to him. Therefore the Tribunal dismisses his claim under the Unfair Dismissals Acts, 1977 to 2001.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)