EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
Employee	UD826/2007 MN653/2007 WT282/2007
against	
Employer	
Under	

UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Mr. D. Hegarty
Mr. J. McDonnell

heard this appeal at Cork on 13 May and 11 November 2008

Representation:

Claimant:
Mr. John Boylan, McNulty Boylan & Partners Solicitors,
26/28 South Terrace, Cork

Respondent:
Mr. John Doyle, Dillon Eustace Solicitors,
33 Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows:

At the outset the claim under the Organisation of Working Time Act, 1997 was withdrawn.

In 2003 the claimant was one of the founders and CEO of a company which was involved in the electronic provision of credit top-up for pre-pay mobile telephones as well as associated software. The company had operations in both the domestic and international markets. The company had already undergone one significant refinancing when, in the autumn of 2006, merger talks began with another company (AC) with a view to a further refinancing.

The claimant was involved in the merger discussions and played a leading role in the preparation of

a business overview, vision and strategy document which formed the basis of the business plan being proposed for the merger. The claimant and his co- director made strong proposals to focus on the international markets, thinking that the greater opportunity lay there. The merger talks were successfully concluded in January 2007. The merger became effective as of 2 February 2007 and the respondent became the vehicle to develop the new business. From that time the claimant became the head of international business development, a position he had sought for himself. The claimant's service agreement provided for him to be an employee of a subsidiary company for reasons of maximising tax efficiency within the respondent. At this time the international division had one operation up and running, several prospects (two of which were forecast to start generating income in 2007) and one failed operation.

Following the merger the CEO of AC became Acting CEO (CEA) of the respondent and the claimant reported to CEA. By late April 2007 CEA had become dissatisfied with the results being achieved by the international division: two promised contracts did not materialise, costs and expenses on the international markets venture were escalating and no new sales were being developed. On 25 April 2007 CEA met with the claimant for an informal discussion about the business, in particular about the prospects for the international business. The market was not developing in the way that CEA had envisaged because of rapid changes in the technology sector and the presence of new competitors. At this meeting the need for a reassessment of the business plan was canvassed by CEA and a number of possibilities for the business going forward were discussed including *inter alia* their parting company or staying as they were for a few months to see if the international market would generate any business. The claimant was still adamant that the international business would work. The claimant was given time to think about matters. The situation was further discussed during a telephone conversation between the parties on 2 May 2007and at a further meeting on 11 May 2007. There was a dispute between the parties as to who initiated the discussion on the proposal that the respondent would become a contractor providing software services to the claimant for a fee. Whilst it was CEA's evidence that he was hoping to puttogether some proposal that would keep the claimant in the company the claimant believed that asof 25 April 2007 there was no possibility of his remaining with the respondent. CEA wrote to theclaimant on 17 May 2007 putting three options to the claimant, namely: -

- A gratuitous redundancy payment in lieu of his notice period
- Statutory redundancy
- A consultancy agreement

The letter set out the details of the consultancy proposal. It also stated that the respondent would not be investing further in the development of international business. After an exchange of emails on 25 May 2007 the claimant, on 29 May 2007, rejected CEA's proposals. CEA took the decision to discontinue developing the international business and to close down the international division. The one successful contract, which had been up and running at the time of the merger, was retained. On 30 May 2007 CEA dismissed the claimant, giving him his contractual three months' notice, which was to be taken as garden leave. In the dismissal letter it was made clear to the claimant that his shareholding in the respondent was a separate issue from his employment. Whilst the international division had six members of staff who worked for it, equating to three full time equivalents, the claimant was the only employee who worked exclusively in the international division. Others were made redundant around this same time. There was a further recapitalisation of the respondent in July 2007 and further redundancies.

The claimant's position is that he was never given proper targets to work to; he was never counselled about his performance and was not given time to put into effect the business plan for the

international division. Furthermore, he was not considered for redeployment and should not have been selected for redundancy when compared to another employee involved in business integration and sales. The respondent's position is that this was not a question of performance and the claimant was well aware of his targets, having been intimately involved in the development of the business plan. The claimant's dismissal was on grounds of redundancy. The respondent decided to cease operations in the development of the international division but maintained the one successful operation.

Determination:

This Tribunal is satisfied that this was not a performance related dismissal. The evidence is that in May 2007 CEA decided, for business reasons, to cease operations in the development of the international division in which the claimant was employed. The Tribunal finds that the dismissal comes within the terms of section 7(2) of the Redundancy Payments Acts, 1967 to 2007 which provides that:

> " an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to –
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for he purposes of which the employee was employed by him, or has ceased or intends to "

The claimant was the only employee working solely in the international division. His selection as a candidate for redundancy was not unfair. The respondent made an effort to establish an alternative working relationship with the claimant but it did not succeed. In the circumstances the Tribunal finds that the dismissal was not unfair. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

The claimant was paid his contractual notice which was in excess of the statutory notice applicable in this case. Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 fails.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)