EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
Employee	UD102/2008 RP99/2008 WT66/2008 MN106/2008

against

Employer

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

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

Members: Ms M. Sweeney
Mr J. McDonnell

heard this claim at Cork on 26th August 2008

Representation:

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Claimant :
Terence J O'Sullivan, Solicitors, 32 Washington Street West, Cork City

Respondent :
Killian O'Mullane, Solicitor, "Sunville", Cork Road, Carrigaline, Co. Cork

The determination of the Tribunal was as follows:

Summary of the Evidence

The respondent is a sub-contractor in the business of second-fix carpentry. The claimant worked for the respondent from June 2005 to October 2007. He had previously worked with the respondent and left in April 2005 for a better-paid job. When things did not work out for the claimant in his

new employment the respondent took him back some seven weeks later in June 2005 on the same terms as he had in his earlier employment.

Work started to dry up in the building sector. The respondent was working on a housing development where there was a contract for seventy-six houses but only twenty-eight of these were built and when three of the houses had been second fixed the contract was stopped because the houses could not be sold. The respondent had a contract in Blackpool and another in Cork airport. The claimant was working on the latter contract and work there was coming to an end.

In August 2007 the respondent made three employees redundant due to the downturn in the construction sector. It was MD's evidence that he spoke to all his employees, working on different sites, in August 2007 and told them that things were drying up and he would have to let some of them go. In late September 2007 before the claimant went on two weeks' holidays MD told him that work was drying up and that he would be finishing in two to three weeks. On his return to work on 8 October 2007 (the claimant's first day back after his two weeks' holidays) MD told him that he would more than likely be let go by the end of the week but work came up on the units in the airport and MD was able to give the claimant an extra week's work there. The claimant denied getting any prior notice of his dismissal. It was MD's case that when he spoke to the claimant on Friday 12 October 2007 the claimant believed that he was entitled to a six-week redundancy payment. The following week MD, having established the claimant's correct entitlement, telephoned him to ask him to sign a RP50 and the claimant "exploded" when MD told him that he was entitled to four weeks redundancy payment and he indicated that he would seek legal advice. The claimant was made redundant on 19 October 2007. The date of termination of employment indicated on the P.45, as being 31 October 2007, is an error. Three employees were let go on 10 August 2007 and another on 3 October 2007. Subsequent to the claimant's redundancy (19 October 2007), one employee was made redundant on 12 December 2007 and two more on 8 February 2008.

Employees were selected for redundancy as contracts on which they were working came to an end and further work was not available. The LIFO principle did not apply in the respondent's business. There was about one-and-a-half week's work left for one man on the units at the airport at that stage. The other employee who worked with the claimant on the units at the airport was laid off a few weeks later. That employee had less service than the claimant with the respondent but the contractor on site requested that he be kept on. The claimant was an average to good worker but on price work he would not make his wages. Work was available on the Blackpool site but the main contractor there would only employ workers who were members of the trade union and the claimant was not a member of the trade union at that stage. On a number of occasions MD had called his employees together to encourage them to join the trade union and to tell them they had to be members of the trade union to work on that site. The claimant denied ever having been told this. Following the claimant's redundancy ten carpenters continued in the respondent's employment and three of these had commenced employment with the respondent later than did the claimant.

It was the claimant's evidence that at 7.55am on 19 October 2007 MD telephoned asking to meet him and when they met MD told him that his employment was being terminated that day. The respondent did not refer to a downturn in the business or membership of the trade union. He did not receive any prior notice of the termination of his employment. It did not cross his mind that the respondent had financial difficulties and he was not aware that some employees had been made redundant. During their conversation the claimant told MD that the site supervisor (on the airport site) had told him that he would be fitting window boards the following Monday. The claimant did not sign the redundancy form RP50 because it incorrectly stated that he received notice of his

redundancy on 12 September 2007. He received a redundancy payment.

The claimant had raised a number of issues with the respondent about his pay to no avail. He had terminated his trade union membership in December 2006.because of the union's failure to pursue the issue with the respondent. MD maintained that, at all times, he paid his employees over the union rates. The respondent's finances were in decline and on occasions he made out cheques to his employees on the assumption that the contractors would pay him on time but this did not always happen and a number of the pay cheques, including a number of the claimant's, bounced. However, all monies owing to all employees were paid to them within a few weeks. The claimant contended that he was selected for redundancy because he was the only one of the respondent's employees to confront the respondent about both his pay (including the number of hours he worked) and about their pay cheques bouncing.

Determination:

The Tribunal unanimously accepts that there was a downturn in the building sector and that a genuine redundancy situation existed in the respondent company. LIFO did not apply in the respondent's business and employees were selected for redundancy as the contracts on which they worked were ending or coming to an end, as occurred in the claimant's case. The Tribunal does not accept the claimant's argument that he was selected for redundancy because he was the only employee who confronted the respondent about the rate of pay or the pay cheques being dishonoured. Whilst the respondent did not say to the claimant on 19 September 2007 that there was work available on the site in Blackpool if he was a member of the trade union the Tribunal accepts that employees had been made aware on a number of occasions that only trade union members could work on that site. Having considered the evidence on the issue, the Tribunal is satisfied that the claimant was not unfairly selected for redundancy. Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2001 fails.

Because the claimant voluntarily left his employment with the respondent in April 2005 his service with the respondent, for the purposes of a redundancy payment under the Redundancy Payments Acts, runs from his re-employment with the respondent in June 2005 to 19 October 2007 (Section 4 of Schedule 3, of the Redundancy Payments Acts 1967, as amended, applied). Due to the respondent's accountant's misinterpretation of the bonus/additional week's payment, provided for in the payment of the redundancy lump sum, the claimant was paid the bonus week as an extra week's income through the payroll thus incurring a tax liability on the sum of €600 which liability would not have been incurred had the payment for the bonus week formed part of the redundancy payment. In the circumstances the Tribunal awards the claimant the one week's bonus payment due to him as part of his redundancy payment under the Redundancy Payments Acts, 1967 to 2003. Whilst the Tribunal acknowledges that the claimant has been paid the sum of €600 in error that is a matter for the parties themselves to resolve.

There was a dispute between the parties as to whether the claimant was given notice of the termination of his employment. The Tribunal accepts the respondent's evidence on this issue. The Tribunal examined the Managing Director's statements to the employees in August 2007 and to the claimant both in late September 2007 before he went on his two weeks' annual leave and on his return to work on 8 October 2007 to establish whether any of these comply with the requirement of section 4 of the Minimum Notice and Terms of Employment Acts, 1973 as amended, which provides:

An employer shall, in order to terminate the contract of employment of an employee, who

has been in his continuous service for a period of thirteen weeks or more, give to that employee a minimum period of notice, calculated in accordance with the provisions of subsection (2) of this section.

Under the provisions of subsection (2) of the section the claimant in this case is entitled to two weeks' notice of the termination of his employment.

Section 4 was considered by the Supreme Court in ***Boland's Limited (in receivership) v Ward*** [1988] ILRM 382 and applied in ***Waterford Multiport Limited (in Liquidation) v Margaret Faganand Others,*** High Court, 13 May 1999. In the ***Boland' s*** case Henchy, J stated at page 389:

The Act is concerned only with the period referred to … and it matters not what form the notice takes so long as it conveys to the employee that it is proposed that he will lose his employment at the end of a period which is expressed or necessarily implied in that notice. There is nothing in the Act to suggest that the notice should be stringently or technically construed as if it were analogous to a notice to quit. If the notice actually given – whether orally or in writing, in one document or a number of documents – conveys to the employee that at the end of the period expressly or impliedly referred to inthe notice or notices it is proposed to terminate his or her employment, the only questionnormally arising under the Act is whether the period of the notice is less than the statutoryminimum (emphasis added)

Further, in judgment McCarthy J. stated:

The subsequent weekly extension or postponement of such notice coming into effect did not negate the compliance by the employer with the requirements of section 4

In late September 2007 before the claimant went on two weeks' holidays the Managing Director told him that work was drying up and that he would be finishing in two to three weeks. Following the above judgments, the Tribunal is satisfied that the notice issued in late September contains the two weeks' minimum statutory notice to which the claimant was entitled under the Act. It is further satisfied that the later extension did not negate the respondent's compliance with the statutory requirements. Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 fails.

The claim under the Organisation of Working Time Act 1997 was withdrawn.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)