EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Employee UD654/2008

Against

Employer

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Hayes B.L.

Members: Mr. D. Winston
Mr. B. Byrne

heard this claim at Dublin on 6th October 2008 and 12th January 2009

Representation:

Claimant: Ms. Kara Turner B.L. instructed by
Mr. Philip O'Riada of O'Riada Solicitors, Liffey House, Primrose Hill, Celbridge, Co. Kildare.

Respondent: Ms. Ruth Mylotte B.L. instructed by
Ms. Joanne Redmond of Mason Hayes & Curran Solicitors, South Bank House, Barrow Street, Dublin 4.

The determination of the Tribunal was as follows:

The fact of dismissal was not disputed.

Determination

The respondent engages in the business of property restoration in the aftermath of fire or water damage. Its parent company is Swedish and it operates as a branch of a sister UK company. It was set up in 2005 in Ireland. Between 1996 and 2003 the claimant worked for the UK company. He then went to work for a competitor, initially in Denmark and latterly in Ireland, from where he was headhunted to work for the respondent. He commenced employment in November 2005 as team manager.

The respondent's business failed to take off as anticipated and by 2007 was still making losses. It was coming under pressure from its Swedish parent and began looking for ways to cut costs.

Several options were examined but it was determined that a redundancy was necessary.

The respondent's country manager told the Tribunal that they could not afford to do without either business development manager. They needed people to secure more business. The company also needed an office administrator. There were three technicians, of whom one was on long-term sick leave. They needed to employ at least two technicians and there was, accordingly, no room for manoeuvre. It was decided that the most expendable member of staff was the claimant because the country manager could take up the slack and supervise the technicians and the technicians could begin to price the jobs. This was decided in early November but it was decided not to tell the claimant until he had returned from two weeks' annual leave at the end of November.

The claimant was called to a meeting with RT on 3rd December 2007 to be told of his redundancy. The conversation lasted for a couple of minutes. The claimant did not initially realise that it washim who was to be dismissed. RT asked the claimant to take two days' leave so as to consider anysuggestions that he might have.

The claimant met RT and PN on 5th December. PN was from HR in the UK company. An RP50 was produced at this meeting, although he was told not to sign it until he had sought legal advice. The claimant had no alternative to suggest. PN suggested three jobs available in the UK, two in Cambridgeshire and one in Norfolk. The claimant was not interested in moving to the UK, given that he had recently bought a house here. In any event, the claimant told the Tribunal that he was not qualified for any of the jobs offered. This was not disputed by the respondent.

The claimant was surprised and shocked to be told that he was to be made redundant. There hadbeen no indication that redundancies were likely. It was suggested on behalf of the respondent thatthere had been regular emails over the preceding months in which the company's financial difficulties were discussed and that the claimant ought, therefore, to have been aware of the possibility. However, there is quite a distance between a manager exhorting greater effort to increase business and being told that redundancies are likely. Indeed, in the last such email, dated 2nd November 2007, RT wrote:

> "I am due to have a full budget 2008 review meeting around 21st of month. This meeting will be with Alasdair and or Sweden. It is vital that we have best figures possible going into this meeting as we lost 45K in October – over 120K in last four months. Please make every effort to get business approved prior to this meeting."

It is striking that there was no reference to redundancy in this email given that it was written after the decision to make a redundancy had been taken.

The Tribunal is not satisfied that there was any discussion of redundancies or indeed that it was reasonable for the claimant to have known. The first that the claimant knew of redundancy was when he was told on 3rd December at a meeting that was described as the opening of a period of consultation.

The Tribunal is satisfied that there was a genuine redundancy situation. However, even where such a situation exists, an employer must nonetheless employ fair procedures in dismissing an employee. The claimant was not treated fairly in that he was given no warning either of impending redundancies or of his own dismissal. This is surprising given that the decision about redundancies was made almost two months before and the decision about his dismissal was made one month before.

The respondent devised no criteria for selection. It appears to have considered which employee to dismiss rather than which position to make redundant and then decide which employee to dismiss. The claimant was a qualified technician but no consideration was given to employing him in that capacity and then considering which of the four technicians to dismiss. The respondent decided that the claimant would not want the reduction in pay. This was a decision that would have been better left to him.

The respondent made the case that, although he was not offered employment as a technician, nor did he make that suggestion when he was asked for any that he might have. It seems to the Tribunal to be unreasonable for an employer to expect that any suggestions as to how an employee might avoid redundancy should come from the employee himself. In essence, this would have required the claimant to suggest the dismissal of another employee so as to save himself. This is a decision that the employer has to make.

The Tribunal is satisfied that the claimant was unfairly dismissed by reason of the procedures used to dismiss him and by reason of the unfairness of the selection.

Almost immediately after notice of dismissal the claimant incorporated a company and has starter work in the same area of business. A claimant is required to make efforts to mitigate his loss. If he goes into business on his own account, he cannot expect to be compensated until such time as he goes into profit. The claimant chose to go into business rather than attempt to mitigate his loss in some other way.

Compensation is the preferred remedy of both parties and it is the appropriate remedy in the opinion of the Tribunal. Pursuant to the Unfair Dismissals Acts, 1977 to 2001, the Tribunal awards to the claimant compensation in the amount of €10,000 as being just and equitable in all the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)