EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:		**CASE NO.**
Employee		UD1111/08
	- claimant	
		UD1112/08
	- claimant	
		UD1113/08

against

Employer - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary BL

Members: Mr. A. O'Mara
Mr. G. Lamon

heard these claims in Dublin on 2 February 2009 and 15 April 2009.

Representation:

Claimants: Ms. Jolanta Kuflewska, 128 Meadow Mount, Churchtown, Dublin 16

Respondent: No legal representation

The determination of the Tribunal was as follows:-

The Contracts Manager (McC) gave evidence. The respondent was engaged in roofing and cladding and had employed 70 employees. Staff were interchangeable between various sites. The workforce was significantly reduced in late August 2008 and twelve contracts were terminated on 9th September 2008. The claimants' contracts were terminated at this time. They were employed as general operatives/helpers. Two worked on the IKEA project in Dublin and one on a Lidl project in the country. Their work entailed assisting the skilled workers. The roofers employed by the company possessed the Construction Skills Certificate Scheme Registration Cards. The three claimants did not. Last in first out did not apply in the company.

With the downturn in the economy in 2008 work was less available to the company. Both

the Managing Director and the Contracts Manager had to make a decision to lay off workers. Out offifteen general operatives working with the company at the time of the claimants' dismissal, twelvewere laid off and three remained working for the company. All twelve were given the same noticeand all were paid their redundancy entitlements and dismissed on the same day, 9th September2008.

The criteria used were based on attendance/timekeeping, health and safety on the site and the contribution each individual made to the company e.g. how employees performed and the amount of work completed in a day. The decision to retain three employees was based on their overall performance and commitment to the job. One of the three has since been laid off leaving two of the 15 remaining and had been working on a specific job and it was more beneficial to keep him in his job in the interests of the company. Another one had contributed a lot more to the company than others.

The Contracts Manager made the decision as to whom he deemed eligible to undertake CSCS training based on how quickly each individual is to pick up the skills.

At the beginning of the second day of the hearing scheduled for the three claimants it was noticed that only two of the claimants were in attendance. No postponement had been sought or granted in respect of the absent claimant in advance of the 15 April hearing. Neither was the Tribunal on written notice that this claimant would be absent nor that he had any difficulty with attending the hearing scheduled for him. At the commencement of the 15 April hearing the Tribunal enquired about the absent claimant. Only then was it said that he could not attend because he had a sick child. The Tribunal ruled that the absent claimant's claim failed for want of prosecution.

Giving sworn testimony, the respondent's owner (hereafter referred to as BS) confirmed that the respondent did cladding on many sites. He said that in August 2008 the respondent had some seventy people on sites working on various contracts but that at the start of September no work was coming in whereupon the respondent engaged in a policy of reducing numbers. It looked at what work the respondent had and "the best way of bringing the company forward". The respondent split people into G.O.s (general operatives) and roofers.

When it was put to BS that the respondent's previous witness (McC) had said that there was no such thing as a roofer, BS replied that F.A.S. was trying to create the title and that the respondent had crews of two i.e. a roofer and a G.O.. At end August 2008 he gave notice to about a dozen employees and let them go. In mid-October a group of employees was given notice of termination of their employment and before mid-November another employee was let go.

In mid-November 2008 the respondent called in about forty employees and said that the respondent had no work for December and January. The respondent offered a longer Xmas break. About twenty employees took that up. Most went around the first week of December (e.g. 1 December and 5 December) and returned in late January or at the start of February.

The respondent had no work coming up. The respondent cut numbers to two dozen people. It went to putting a roofer with another roofer in its crews so that it could retain its most skilled people. BS said that the respondent's best asset was its workers and that LIFO (last in, first out) did not apply in the respondent. People came in in May 2008 and were kept on. BS had two men with him thirteen years but they had not progressed to roofing skills. McC's son was let go. BS named another man whose son was let go and said that another man's wife was let go. BS said that the respondent had had to make decisions about what was best for the respondent going forward.

BS told the Tribunal that the three claimants were G.O.s who had got an about-average rating but that there had been health-and-safety breaches although the claimants' claim forms had said that they had received no warnings. One could speak English which was a benefit but other employees could do the job irrespective of their level of English. BS said that the respondent's insurance premium and health-and-safety were taken very seriously and that the respondent could not afford breaches. Asked who had infringed in respect of health-and-safety, BS said that he thought that warnings had been given to two of the claimants (PW and AK).

It was put to BS that PW would say that he had got no warnings about his work. BS replied that he had not been at the previous Tribunal hearing and that the respondent's contracts manager (the abovementioned McC) had given evidence about people's ability to work. BS reiterated that there had been a slowdown and that "people had to be let off". Asked if he had had a problem with PW's work, he replied: "Personally, no. We have a team of five who evaluate employees. I took the advice of my senior management."

It was also put to BS that the claimants would allege that SN (a Polish contracts manager whom BS had recruited in Poland) was very biased. BS replied that the claimants had conducted a campaign of intimidation against SN (who had been with the respondent since 2004 or 2005) but that SN had never had the final decision. BS said that that he (BS) decides these matters but that respondent people had been insulted and that there had been personal abuse.

It was put to BS that SN had spread wrong information about the claimants and had said whatever he wanted to BS about them. BS replied that it had not been SN but McC who had spoken to him about who should go but that BS, who had twenty years' experience in the business, decides these matters. BS said that SN "had a limited opinion in it", that "others are involved" and that "these suggestions are laughable".

BS was asked how somebody who had just started could be better than somebody who had been there for two or three years. It was put to him that there had been an unfair selection, that the claimants should not have been chosen for redundancy and that they had been replaced by people who had been taken on the preceding summer. BS replied:

"It's their opinion that they were better. That's not our opinion. Our workforce has gone down by a sixty or sixty-five per cent reduction. Of the current twenty-four men twelve work Monday, Tuesday, Wednesday and twelve work Wednesday, Thursday, Friday. We've two people with us thirteen years. Everyone was given a chance to expand their skillbase."

Asked if employees had had a chance to do a roofing course, BS said:

"There is no qualification. Something at F.A.S. has failed. Courses for Irish people have failed. Nobody becomes a roofer in three days. A lot of our best employees are Polish. We have an office in Poland as well. Most people on our list are Polish. We can't employ seventy people if we only have work for twelve."

Asked if he had a matrix of redundancy selection criteria, BS said that he had a spreadsheet which took account of factors such as work ability, timekeeping and health-and-safety. Stating that the respondent did flat roofing and other roofing, he added: "We've two lads who are good at zinc."

BS stated that the IKEA project finished, that his computer had evidence which he had not brought with him and that "a lot of things were not considered". He said: "The people costing us most money were staying." He stated that the respondent graded its employees A to D and that all of its remaining employees (who had the most experience) were A or B. He added that it would be easier to get lower skilled people when the economic situation changed.

When the Tribunal asked BS to send on a copy of the computer criteria that had been used the claimants' representative stated that it had been said by McC at the previous hearing that nothing like this existed and that McC had said that he had looked at each person who was being dismissed and that their performance was not as good as that of those who had stayed. BS countered by saying that McC "is not a computer expert".

Claimants' Case

Giving sworn testimony through his representative, PB (a claimant) said that he thought that there had been men left working after he left, especially those taken on before he was made redundant. He thought that his selection was unfair. He thought that people did not like him and were biased and malicious towards him. He alleged that McC had regarded him as having worked too slowly.

PB denied that he had got warnings about health-and-safety but did recall an incident in autumn 2006 where there had been danger and when he had said that it was dangerous to work there but he said that he had had been paid to do the work anyway.

Asked about his work ability and whether he had been better or worse than others, PB said that he had been better than some of those who were left behind at the job.

Asked about his timekeeping, PB said that he had tried to be always on time and that, on an occasion when McC was on-site and said that PB was absent, PB had been in a distant toilet (which was quite far away when one had to come down from a roof) because the nearer ones had been unfit for use.

Asked about the type of work he had been able to do, PB said that he had been able to do all types of work on-site and that he had been the main person to explain to a new person what to do.

PB acknowledged that he had been graded as D (which was the lowest of the respondent's grades) but contended that there had been many D workers still there when he had left. He confirmed that he had received €14.88 per hour as a category D worker.

Asked if he had welded membrane, PB said that he had done so with a workmate. He felt that he had developed himself and that, having started as a G.O., he had then been "like a roofer". Asked if he had got extra pay for welding membrane, he replied that, when he had asked SN, the answer that he had got was that people got less in Poland. Asked at the Tribunal hearing how often he had done this work, he replied that he had done it quite often but that he could not say how often and that this was just an example of the work he could do.

PB told the Tribunal that, when he got notice of redundancy, he had not asked why he had been selected. He said to the Tribunal that he had got the notice just after a holiday and that he had been surprised.

Giving sworn testimony through his representative, PW (another claimant) said that he was both qualified and experienced and had worked as a roofer for four years in the U.S.. He had worked with copper and zinc and, in the course of his life, had done all jobs connected to roofing and walls. He was already experienced before working for the respondent.

PW confirmed that he had begun working for the respondent in 2006 (after three months working for another company owned by BS) and that he had worked for the respondent for twenty-seven months with no complaint. His timekeeping was good and none of his bosses or supervisors complained about him. In fact, this hearing was the first time that he had met BS.

However, it was acknowledged that PW had got a final written warning in April 2006 (sic). It was to last for six months. His contract said that there should be a verbal warning and written warning before a final written warning but, in PW's case, the first two steps were not taken and it went straight to final written warning. The Tribunal was referred to a letter from April 2007. PW contended that he had been forced to work in a dangerous place by SN who had threatened him with dismissal if he did not do so. PW was then spotted in this dangerous place by someone else. H contended that he had had no choice and that it had also happened to others who refused to go to dangerous places and got warnings. When a man refused that man would be frightened that he could be dismissed. PW wanted to follow all the rules but men were forced to work in a particular place. SN did not like PW for speaking out.

PW told the Tribunal that, when he had asked SN for two days off in April 2008 to go to Poland, SN had refused to give those days and had said to PW that, if he went to McC, PW would be dismissed. As a result, PW was afraid to go to McC to ask for the two days off.

At this point in the Tribunal hearing, BS said that they were all members of S.I.P.T.U.. There was no shop steward on site. PW said that he felt sure that BS had not been aware of how employees were treated by SN and that SN could do whatever he wanted.

It was now put to PW that BS had said that he made the redundancy decisions after listening to four other people and only to a small extent listened to SN. PW did not agree that BS made the decisions and believed that BS had not even known that PW had been made redundant. PW said that there were photographs taken of those who were left in employment and that, before that, nobody knew who was who in the respondent.

BS told the Tribunal: "We photograph everyone for the HR file." Asked if this had been done before PW's employment had been terminated, BS replied: "I would say yes. I'd know them by face rather than name."

Although it was not disputed that PW had been a category D employee, his representative submitted that he had wanted to improve and change his category and that he had worked in different crews in which there were sometimes higher-grade workers. It was contended that PW, although he had been told that he was too old, did not feel old. He believed that the workers who were perceived as difficult were made redundant.

Asked if it was true that he had given the respondent a photo of himself, PW agreed but said that the respondent had taken photos on-site of other employees.

PW denied that he had ever argued with other employees on-site and said that no one had ever told him that there were some workers who did not want to work with him.

Regarding health-and-safety, PW said that instructions had been given by a lady (hereafter referred to as J). He did not say how many "toolbox talks" he had received from J but acknowledged that J had sometimes talked to him and to other employees. Asked what had been J's clear instruction about dangerous situations that arose on-site, he replied that it had been to follow health-and-safety rules and to look after colleagues if there was a dangerous situation. He liked this because it was very professional and he agreed with it. When there was any question of conflict SN was involved. He tried not to break any rules but, when he was forced, he did it. Asked if he had ever complained to J, he said that he had not done so because he had been afraid that SN would make him redundant and he had not wanted to lose his job.

Asked if he had been aware of anybody else employed by the respondent who had been terminated by SN, PW replied that the first group made redundant were all suggested by SN because they had all argued when SN had forced them to do something dangerous.

Asked if he accepted BS's statement that SN had had no part in terminating people or in making people redundant, PW said that he did not believe that it had been BS but rather that it had been SN.

Asked who had told him that he was too old to get training, PW said that it had been SN and named a site on which SN had said this in February 2006.

Asked why he had been so antagonistic to SN, PW said that there was no reason other than that SN had threatened him at work. The Tribunal was told that this was not just PW's feeling but that others had been afraid to speak. PW said that there had been a big problem.

PW acknowledged that McC had had an involvement in introducing him to the respondent and that PW's son-in-law had asked that PW be given a job. However, PW said that SN had refused him a job. Asked how he had then come to get a job with the respondent, PW said that he could not recall exactly.

At this point in the Tribunal hearing BS said that SN had come to him about a job for PW.

Questioned by the Tribunal, PW said that, just after a holiday, SN had given him a form and had laid him off saying that there was no work.

Asked why he had received a final written warning, PW replied that he had climbed on to a roof to do a silicone finish and that there was no barrier on the site. Asked who had been responsible for the barrier, he said that he did not know. Asked why he did not say that he had been told to do work that was not safe, PW replied that he had never done this because he had been afraid of being dismissed. He added that the barriers were taken off when the job was nearly finished. Asked how long a final written warning stays on the record, PW replied that he did not know according to the contract but that the letter had said it would be for six months from April 2007.

At the end of the hearing BS confirmed to the Tribunal that he would send in documentation.

Determination:

The onus of proof in this case was placed on the respondent to establish that the procedure used to select employees for redundancy (at the time that they were made redundant) was a reasonable one. Having heard the evidence and taken the matrix documentation sent to the Tribunal by the respondent into consideration, the Tribunal was not satisfied that the respondent had discharged the onus of proof required or that they took any or any proper procedure in selecting the claimants for redundancy. In view of the above finding the Tribunal allows the claim of unfair dismissal of the first-named claimant (PB) and the third-named claimant (PW). Under the Unfair Dismissals Acts, 1977 to 2007, the Tribunal deems it just and equitable to award compensation in the amount of€10,000.00 (ten thousand euro) to each of the abovementioned claimants.

In respect of the case of the second-named claimant (AK), the claim under the Unfair Dismissals Acts, 1977 to 2007, fails. The legal requirements place an onus on a claimant to prosecute his case and to be present for the hearing. The claimant failed to attend the second day of the hearing and failed to advise the Tribunal that he would not be in attendance. The Tribunal was not satisfied that he had made any or any sufficient effort to notify the Tribunal of his inability to attend the hearing of the 15 April 2009 and he made no effort to seek a postponement of that hearing the date of which he had been made aware of for some considerable time prior to the date set.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)