EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

EMPLOYEE **- claimant** UD868/2008

against

EMPLOYER **- respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. D. Hegarty
Mr. K. O'Connor

heard this claim in Tralee on 31 March 2009

Representation:

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Claimant:
Ms. Diane Reidy, Edward O'Sullivan, Solicitors,
Courthouse Lane, Tralee, Co. Kerry

Respondents:
Mr. Paudie O'Mahony, Babington, Clarke & Mooney, Solicitors,
48 South Mall, Cork

The determination of the Tribunal was as follows: -

Note of the Evidence

The respondent supplies materials to the construction industry. It has operations at a number of locations which are geographically close to one another. If somebody is sick or out for the day at one of the locations the respondent sends in a worker from another location and pays his travel expenses to the new location. This temporary change of location does not change the employee's permanent location. However, on the rare occasion that there is a permanent transfer from one location to another a transfer fee is paid. Location B remained the claimant's permanent location throughout his employment with the respondent although, on occasion, he worked at

location K.

The claimant commenced employment as a general operative at location B on 24 August 2006. It is part of the company agreement that an employee's seniority only begins to accumulate from the date he commences at his permanent location. Redundancies are based on the employee's seniority at his permanent location but in some cases skills are taken into account because of the need for certain crafts. In early 2008 there was a significant and continuing downturn in the respondent's business. This resulted in the respondent's deciding to cut costs. The measures adopted to deal with the downturn included cutting costs by reducing the workforce. The respondent let the unions know what was happening. All employees are members of SIPTU and there is consultation about all redundancies. The Kerry Area Manager (KAD) looked at the employees of location B. LIFO, on a site-by-site basis, is the agreed criterion with skills being considered where appropriate. As of March 2008 the respondent had had about sixteen general operatives at location B. The claimant was the second most junior of the general operative at location B. On 16 May 2008 the most junior general operative at location B left the employment.

On 20 May 2008 the claimant telephoned HRM complaining that he had issues with a co-worker and of back problems from accidents he had sustained at work in October 2006 and on 8 February 2008. It was the respondent's evidence that these accidents had not been reported to management. In this conversation the claimant said that he understood that he would be next to be let go because of the downturn. HRM advised him to talk to KAD. On 9 June 2008 the claimant telephoned again regarding his position whereupon HRM informed him that all employment across the company was under review due to the downturn. It was the claimant's case that he had told the shopsteward about the 2006 accident but had not reported it to management so as not to put his prospects of permanent employment at risk. He had reported the February 2008 accident to the manager at location B (BM).

Safety is paramount in the company and the respondent has stringent reporting structures for accidents at work. Employees are made aware at their induction and at ongoing toolbox talks that accidents must be reported immediately and an accident report form completed. Following the 20 May telephone call HRM set an investigation in train and an accident report form was filled in. On 22 May the claimant attended the company doctor and was thereafter certified unfit for work. He later had an MRI scan. The claimant sought disability benefit around 22 May 2008 but had difficulty getting social welfare because the respondent would not concede that an accident had occurred at work. The claimant received disability benefit due to the efforts of his trade union representative.

KAD met the claimant and his trade union representative on 20 June 2008. At this meeting the claimant stated that his telephone records would show that he had a three-minute telephone call with BM on 8 February. During the investigation, BM denied that he had been informed of the accident and any telephone call to him had

been about other matters. It is common case that in March 2008 the claimant's doctor supplied a letter asking that the claimant be moved from a machine because he felt that operating it was aggravating his back problem. In this letter there was also a suggestion that the claimant was being bullied. The claimant was not moved from the machine. It was the claimant's evidence that he was absent from work on various occasions before 22 May because of the second accident.

On 26 June the trade union official took no issue when told by KAD that the claimant would be let go. On 27 June KAD informed the claimant that his employment was being terminated by reason of redundancy. HRM issued a written notice to the claimant on 30 June. The claimant's employment ended on 11 July 2008 and he was given one month's pay as a goodwill gesture. A personal injuries claim had not been issued at the time of the claimant's dismissal. The claimant accepted that there was a downturn in business and that he was the last in. He also accepted that the trade union would have had a problem if someone more senior had been selected.

According to the claimant "some lads in the yard said that, if they were offered enough money" they would go. The claimant's position was that the accident was a contributory factory in his selection for redundancy. If somebody worked the hours he had worked the respondent should have found some way of keeping him on and it was unfair to let him go because he did everything that was asked of him.

While the claimant complained that he had not been offered voluntary redundancy it was the respondent's position that it was not offered to the claimant because he did not have the required two years' service in order to qualify for a lump sum payment under the Redundancy Payments Acts.

It was the claimant's case that another employee (AE) had been taken on at location B subsequent to his dismissal. The respondent's position was that AE was an existing employee from location K who had worked in location B for a day or two on a few occasions as a substitute for employees who were sick or otherwise unavailable. No new employees had been taken on at location B since the claimant's dismissal. Nor had any employees been transferred thereto.

There were further redundancies in location B during the remainder of 2008, all more senior than the claimant. The remaining employees at location B, of whom three or four were craftsmen and two or three were general operatives, had longer service than the claimant.

Determination:

The claimant contended that he was unfairly dismissed because of a proposed civil action against the respondent arising from accidents at work and/or he was unfairly selected for redundancy. The Tribunal is satisfied that respondent was not on notice of any proposed civil action at the time of his dismissal. The Tribunal is satisfied that the evidence shows that a genuine redundancy situation existed in the respondent. It is common case that LIFO, on a site-by-site basis, applied in the respondent and that the claimant was, at the time of the dismissal, the most junior general operative at location B. The Tribunal is further satisfied that the use of AE at location B was merely to cover for absences and not to replace the claimant. For all these reasons the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____