EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	**CASE NO.**
EMPLOYEE - appellant	UD2099/09

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. MacCarthy SC

Members: Mr. N. Ormond
Mr C. Ryan

heard this appeal at Naas on 26th November 2010.

Representation:

Appellant: Mr Conor O'Toole, Coughlan White O'Toole, Solicitors, Moorefield Road, Newbridge, Co Kildare

Respondent: Mr. Stephen Sands, Construction Industry Federation, Construction House, Canal Road, Dublin 6

The determination of the Tribunal was as follows:-

This case came by way of an appeal by the employee against the recommendation of the Rights Commissioner (ref. R-073087-ud-08/D1).

Opening Statement by appellant's legal representative:

The appellant commenced employment on 2nd February 1999. He was employed as a metal fabricator until 2006. He also had other duties, purchasing and procurement and some driving duties. The practice in the company was last in first out. At the time of his dismissal company employees were on overtime and there was sufficient work for him to be retained. In July 2008 an employee was hired as a metal fabricator and he continued working after the claimant was dismissed.

A letter dated 28th April 2008 issued to the appellant notifying him of the risk of lay-off, short time and/or redundancy occurring within the following week. A small number of redundancies occurred in April/May 2008. There was no further discussion with the appellant until his dismissal.

Following the claimant's return from holidays on 3rd November 2008 the MD informed him that he was being made redundant. He was handed an RP50 and two letters. One letter notified him of the company's intention to terminate his contract of employment by reason of redundancy with effect from 1 December 2008. The second letter outlined his redundancy lump entitlement together with other monies owed to him.

The appellant had no prior warning of his redundancy and it came as a bolt out of the blue. He had no prior consultation and no discussion leading up to his redundancy. He believed it to be a fait accompli. The respondent did not engage in discussing an alternative role. The company failed and should have engaged in fair procedures. The claimant was the longest serving employee in the company and he was surprised to be singled out.

The appellant accepted he was made redundant. He did not receive advice between 3rd and 5th November 2008.

Opening statement by respondent's representative:

There was a downturn in the industry and turnover decreased. Several redundancies occurred early in 2008.

The appellant was employed as a workshop and procurement manager as outlined in his contract of employment. The respondent no longer required that role. A meeting was held on 3rd November 2008. An RP50 and two letters were furnished to the appellant and he was asked to read these over. On 5th November 2008 the appellant returned and signed the RP50 and received a cheque in respect of his statutory redundancy entitlement. The cheque also included other monies owed to him.

Since the appellant's redundancy other employees have been let go. Employees taken on after that were employed for only a few weeks to finish off site work.

The appellant's role was a stand-alone role. He had attended management meetings on a fortnightly basis. In 2007 the company employed 24 and now employs 12. In November 2008 the claimant together with a driver were made redundant.

Determination:

The appellant did not dispute that he was made redundant within the meaning of the Unfair Dismissals Act 1977 and therefore the respondent has shown "a substantial ground" justifying the dismissal under Section 6(4) (c).

Section 6 (3) of the Unfair Dismissals Act, 1977 states:

> "Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either –
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> (a) the selection of that employee for dismissal resulted wholly or mainly from one or more of the matter specified in subsection (2) of this section or another matter that would not be a ground justifying dismissal, or
>
> (b) he was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union, or an excepted body under the Trade Union Acts, 1941 and 1971, representing him or has been established by the custom and practice of the employment concerned) relating to redundancy and there were no special reasons justifying a departure from that procedure,
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> then the dismissal shall be deemed, for the purposes of this Act, to be an unfair dismissal".

The appellant was unable to point to any other manager or person "in similar employment" to whom "the circumstances constituting the redundancy applied equally". He did say that he was capable of doing other work as metal fabricating. However, a metal fabricator is in entirely different employment and paid at only little over half of the pay the appellant received as a manager. In order to achieve the same cost reduction, the respondent would have to make two metal fabricators redundant. The Tribunal finds that Section 6(3) does not apply in the present case.

The appellant's final argument was that the dismissal was unfair under Section 5 (a) of the Unfair Dismissals (Amendment) Act, 1993. He argued that the manner of the dismissal was unreasonable, because he was given no warning of his impending redundancy and it came "as a bolt out of the blue". The appellant argued that his redundancy was a fait accompli and the respondent would not listen to any alternatives he tried to offer.

At first the Tribunal was under the impression that the appellant was called to a meeting on 3rd November 2008 and then was presented with two letters relating to his dismissal and an RP50 and was given a cheque on that day. It transpired, however, that he was advised by the MD to go home and come back the next day as he was in a state of shock. The appellant took the two letters and the RP50 home with him and returned the next day and again the following day, 5th November 2008. He was unsure as to whether he also took the cheque home with him but the Tribunal considers it unlikely that he would have been given the cheque on 3rd November 2008.

While the appellant may have been surprised on 3rd November 2008 it is clear the general

redundancy situation had been well flagged several months earlier. He received a letter dated 28th April 2008 advising that redundancies might occur. Within weeks of that letter ten employees out of the workforce of twenty-four were made redundant and the appellant as a manger handled some of those redundancies.

Moreover, the respondent advised the appellant on 3rd November 2008 to go home and return the next day. In fact, the meeting was postponed to 5th November 2008 so the appellant had two days to consider the matter. When he returned he signed the RP50 and accepted the cheque.

On balance the Tribunal does not find that the respondent was unreasonable in the way the redundancy was handled. Accordingly, the Tribunal finds the dismissal was not unfair and disallows the appeal under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)