EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: **CASE NO.**

UD661/09

EMPLOYEE - claimant

Against

EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr E. Handley
Mr P. Trehy

heard this claim at Dublin on 12th February 2010.

Representation:

Claimant : In person

Respondent: Ms Rosemary Mallon B.L., instructed by the respondent.

The determination of the Tribunal was as follows:-

Respondent's Case:

The Managing Partner (MP) gave evidence. The respondent has two offices, one in Sandyford, and the other in Smithfield, which is their head office. The Sandyford office is involved exclusively in telecommunications licensing work. The respondent provides legal resources to telecom companies who rent the site in Sandyford. The office in Smithfield is involved in commercial and private client work.

The claimant commenced employment as a trainee solicitor in the Sandyford office on 16th June 2003. He was engaged mainly in debt collection work. In February 2008 the claimant wanted to broaden his experience in commercial and private client work. At that time work was slowing down in Sandyford. MP told the claimant that he could not give him any guarantees of work in Smithfield but would give him whatever work he had. The claimant was not replaced in the

Sandyford office. Two solicitors still work there, PM and CL.

The Smithfield office is the mainstay of the business. Both OC and DMcN are also Managing Partners. D.McN is working in Smithfield since 2002 and TP who also works there was sourced through a recruitment agency and came from a large firm of solicitors. She joined the company on 18th September 2006 with commercial experience.

MP became concerned in 2008 that there was a 20% fall off in business. The company was having difficulties in being paid for their work. He discussed the downturn in business with both DMcN and OC. They looked at work streams and current work and any options open to them. Up to this time no one in the company had been made redundant.

MP e-mailed staff on 23 September 2008 with his concerns about the downturn in work. He informed the staff that he would be taking a close look at how the business could be managed more effectively and asked for their assistance by offering any suggestions where cost savings could be achieved and to look at providing legal services to new or existing clients. He said it would be helpful if suggestions in this area could focus on actual opportunities and values for new work with potential clients.

MP looked at the commercial side. Both DMcN and TP were engaged on a project. TP was recruited for commercial work and was working exclusively with MP in the commercial department. As the private client area had been seriously hit they looked at that side and came to the conclusion that two positions would have to be made redundant. At that time RB was on maternity leave.

He attended a meeting with the claimant on 13th October 2008 and informed him that he was being made redundant due to the serious downturn in business and that regretfully they had no option but to make him redundant. MP explained that the claimant's position was being made redundant due to lack of work and he very much regretted this decision. The claimant was very disappointed which MP said was understandable. MP also said that he would be having discussions with other members of staff.

By letter of even date he confirmed the company's decision in writing to the claimant and attached the terms of the redundancy payment. He asked the claimant to e-mail him files that he was working on. He also stated that the claimant was held in the highest esteem.

Prior to MP's decision to make staff redundant he had considered redeploying the claimant to the Sandyford office but unfortunately at that time work was not available. The claimant had been a good solicitor but his experience was narrow.

By arrangement MP met the claimant on 14th October 2008. His termination date was changed to 7th November 2008 as he had more than five years service with the company. His termination date had been incorrectly cited as 24th October 2008. The claimant enquired if other employees were being made redundant. MP said the company would be proceeding with less people because of the downturn in business.

The claimant enquired about payment of redundancy terms, a reference and a Christmas bonus. He was assured he would be provided with a positive reference and it was highly unlikely Christmas bonuses would be paid and that in any event these were discretionary payments. MP said it was most likely that the claimant would be paid his statutory redundancy.

On 7th November 2008 MP met with the claimant at 5.15 pm. MP discussed the hand over of files that he had been working on and that he very much regretted having to make him redundant. The claimant signed the RP50 redundancy form and MP paid him by cheque. The letter of reference was to follow. MP also asked the claimant to sign a letter saying he had no outstanding claims against the company and with that letter was a cheque, being an ex gratia payment. The claimant declined to sign the letter and said he would have to think about it. MP withdrew the letter and the cheque. The claimant contended that he had been unfairly treated in that he should not be the one selected for redundancy. MP explained he had been in discussions with other employees and that he had not been unfairly treated.

The claimant was furnished with a reference by letter dated 25 November 2008. In January 2009 following her return from maternity leave, RB was made redundant.

Approximately two months later MP was made aware from a company that additional legal services were required at their Sandyford office. The work involved additional work on the licences for telecommunications sites. A six-month contract commencing on 1 February 2009 was offered. As this work was similar to the work the claimant had done in the past MP wrote to the claimant on 14 th January 2009 indicating that the company was disposed to appointing him if he could commit to the position for the six month period. As he had no response from the claimant he again wrote to the claimant on 19th January 2009. The claimant did not communicate with the company. Ultimately, DB was appointed to that position. The position was subsequently extended by three-month extensions and the company was told that the final extension would be March 2010.

Staff in the company had reduced from sixteen to eleven.

Under cross-examination MP did not agree that the business was a general practice. He contended that it was largely categorised as a commercial practice. The purpose of the e-mail sent by MP to all staff was to try and get the solicitors to focus on securing new work for the company. While the claimant was on sick leave in the period 22nd September 2008 to 6th October 2008 and the e-mail had been sent by MP on 23 September 2008 to all staff, there had been ongoing discussions in the office concerning the downturn in business.

MP had been involved in discussions with the Partners in the run up to the decision to make staff redundant. They had looked at the options of redeployment and short time working. The criteria used were experience and the qualifications to do the work in front of them and the work in prospect. Staff members considered for possible redundancies were RB, CL, TP, PM and the claimant. The partners were heavily engaged and experienced and more in demand.

MP saw that the cash position of the company was diminishing. He recalled speaking to each solicitor about his or her files. While the claimant had been absent from the office MP was aware of his workload. MP said he was unaware that the claimant had been working an 80/90-hour we ek. MP had brought the claimant into the commercial department to work on a €1m project under his supervision. MP contended that while the claimant could have been very busy at the end of the day it had to make business sense.

He had made it clear to the staff that redundancies were pending. It had got to the point where the business was endangered. He did not use a matrix skills in a formal way. MP considered the process to be fair and reasonable. MP contended that the claimant had a right to appeal his redundancy. The disciplinary procedures were outlined in the company's handbook. At

the meeting held with the claimant regarding his redundancy, MP stated that the claimant had a right totalk to other Partners but the claimant said he knew his rights. The claimant had been furnished with his contract of employment by e-mail at the commencement of his employment.

MP had discussions with the staff but the staff had said they wanted to hold on to their jobs, as there were no alternative jobs available. Everyone was committed to stay in the company. Before the decision to make two solicitors redundant all solicitors had been looked at. The claimant did not have the experience.

MP explained that once a solicitor is assigned to a particular project that solicitor continues to work on the project until completion. Consideration could not be given to removing a solicitor from the project in Sandyford and replacing him with the claimant.

Claimant's case:

The claimant gave evidence. He commenced employment as a trainee solicitor on 16th June 2003 and qualified as a solicitor in January 2006. He worked in the Sandyford office. He became unsettled in that office and considered leaving the company. He met MP on 29th January 2008. MP was keen that he continue working in the company and outlined a proposed role for him in the Smithfield office. He met MP again on 5th February 2008 and discussed the new role further. Two days later he accepted the position.

He had a busy workload. Three to four weeks later he was asked to work on a commercial court case. This was on top of his workload. He worked 80/90-hour weeks and also worked weekends. The court case concluded in August 2008 and a significant fee accrued.

Two meetings were scheduled to take place in September 2008 to discuss his pay reviews but he could not attend either. The pay review meeting was rescheduled for 13th October 2008. At that meeting MP discussed the slow down in business and informed him that he was being made redundant. He had no prior notice of this. All he could say at that meeting was ok. He was told that similar discussions were taking place within the company. The claimant was informed that he lacked experience. He said he was there longer than TP.

He had two meetings with MP on 13th and 14th October 2008. At that latter the claimant pointed out that his notice period was incorrect, he sought a reference and annual leave entitlements due to him. He also referred to a portion of the €4000 bonus being paid to him.

On 15th October 2008 MP informed him that he could work until 7th November 2008. He met MP that evening at 5.45 pm to tie up outstanding work. MP thanked him. He apologised, as he had not the reference available. The claimant did not receive his reference until 28th November 2008 and this was a major disadvantage to him. MP offered him an ex gratia payment and asked him to sign a letter to waive any legal rights to any action against the company. The claimant asked him for time to think about this. MP was annoyed and said if he did not sign the letter the payment was being withdrawn. He had wanted a period of time to consider the contents of the letter before signing it. He did not sign the letter.

The claimant was unemployed for three weeks after 7th November 2008. He signed a new contract on 1st December 2008 with a company. His salary has reduced.

Under cross-examination the claimant said that his new contract is due to expire at the end of April

2010. He is working in the telecommunications area and his experience with the respondent stood to him on securing this new contract.

He was unaware that bonuses were reduced to €250 for staff and to €1000 for partners in the year that he had left the company. If he had still being there he would not have considered the reduction. This would have changed his terms of employment. He never considered the €4000 bonus to be discretionary and this had never been communicated to him.

The claimant could not say if there was an economic downturn in 2008. He believed that PM could have been removed from Sandyford and that he could have worked in PM's role rather than be made redundant.

The claimant contended that there should have been fair procedures. There was no prior consultation and he had no input into the process.

The claimant did not reply to the respondent's letters offering him a position in the Sandyford office because he did not think the contract would be secure. He contended that the redundancy procedure was flawed, there was no consultation, no prior notice of his redundancy and no appeal process.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. The Tribunal finds that the claimant was not unfairly selected for redundancy. It appears from the evidence that the claimant had less experience in the commercial area than the co-worker who wasn't made redundant. This was the area the MP needed to focus on to improve the business and the claimant's experience was narrow in this field. At that time there was no work in the Sandyford office and the claimant could not be redeployed there.

It was suggested by the claimant that he would have preferred to return to the Sandyford office rather than be made redundant even though another employee had already filled that position. It appears to the Tribunal that the respondent would have been expected to request his client to re-employ the claimant, who on the claimant's own evidence, had requested to be removed from that type of work. The claimant had been very clear when he informed the respondent that he did not want to continue doing the licensing work and was going to leave the company in February 2008. The claimant's return to the Sandyford office was not an option for the respondent.

Furthermore, when additional legal services were required for their Sandyford office the MP wrote to the claimant offering him a six-month contract. The claimant did not communicate with the company and he was written to again and did not respond on that occasion either. He had gained other employment some three weeks after his redundancy.

The claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)