EMPLOYMENT APPEALS TRIBUNAL

Appeals of:		CASE NO.
Employee	**-Appellant A**	UD1318/2009
Employee	**-Appellant B**	UD774/2009

against the recommendations 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. T. Taaffe

Members: Mr. J. Browne
Ms. E. Brezina

heard this appeal at Carlow on 27th January 2010

Representation:

Appellants: Ms. C. Minihane, SIPTU, 18 Patrick Street, Kilkenny

Respondent: A director of the company

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of the appellants (employees) appealing against Rights Commissioner Recommendations reference r-067347-ud-08/RG and r-066823-ud-08/RG.

Background:

The appellants were employed in the sanding section of the respondent company. In March 2008 the respondent agreed with the union that five redundancies would occur utilising the process of last in, first out and one further redundancy on a voluntary basis. The union contended that the respondent had breached the agreement.

Respondent's Case:

A director of the company gave evidence that the redundancies were carried out as per the agreement with the union. The discussions with the union concerning the redundancies were person specific from the beginning. The agreement between the company and the union allowed for the company to phase the redundancies, as the need required. Therefore, some employees

worked for a few extra months after the redundancies occurred on the 1st May 2008.

An issue arose concerning another employee (PS) who was not one of the six employees selected for redundancy. The director was informed that this individual had less service than Appellant A. When it became an issue for Appellant A that PS had longer service than he had, the director offered redundancy to PS but he declined and continued working, this was in agreement with the union. PS was not a full-time sander and he carried out other duties as well.

Appellant B had an issue with the fact that there were two non-nationals working in the factory. Their work involved keeping the factory in good order, one is a qualified fitter and the other a carpenter. The director and the Branch Organiser of the union discussed this issue when Appellant B voiced that he had issue. The non-nationals continue to work in the factory on a part-time basis. The director did not think that any employees had been employed after the redundancy agreement.

In cross-examination the director stated that as the sanding section was coming to an end, the respondent needed multi-skilled workers such as PS going forward. It was put to the director that the union had agreed to the phased redundancies once based on seniority. The director did not accept that it was part of the agreement to phase the redundancies based on seniority.

It was put to the director that prior to the redundancies on the 1st May 2008 the company engaged two new employees. The director stated the two individuals were not employees of the respondent company but were employed by him personally. As the director owns the premises within which the respondent company operates, the company pays rent to the director. In return the premises must be kept in good working order and the director employs the two individuals to carry out maintenance work in the factory. They work on the premises but not full-time and sometimes they only work one day. The director reiterated that they were not employees of the respondent company.

It was put to the director that the appellants could have carried out this work as it was similar to their roles but the director said the work could not be offered to the appellants, as they did not possess the skills required to maintain the factory. The appellants had worked in the sanding section and the work in this section was coming to completion. The director stated that the appellants may have been able to carry out some of the maintenance work but they did not have the qualifications to carry out the role in its entirety.

In reply to questions from the Tribunal, the director stated that the company had to reduce staffing levels as the sales price of coffins had reduced. There was a transfer of undertakings to the respondent in 2007. Prior to this there had been inefficiencies in the company. The manufacturing costs were too high and the respondent company had to make the decision to import coffins from the UK rather than manufacture them at their premises. As a result a number of redundancies had to occur.

Appellants' Cases:

Appellant A gave evidence that his work was mainly based in the sanding section of the respondent company but at times he also assisted with deliveries. Appellant A was informed his position was being made redundant and he was informed that the process of last in, first out had been utilised in making the selection for redundancy.

Appellant A subsequently became aware that another employee (PS) with less service had not been

selected for redundancy. When this issue was raised with the director, the director stated that Appellant A had to accept redundancy or the director would make both Appellant A and PS redundant. Appellant A did not want to cause an issue for PS so he accepted the redundancy. He was subsequently made redundant from the 1st May 2008.

However, two employees were retained in the sanding section for a number of months after the 1st May 2008. The two non-nationals carried out work in the respondent company, which Appellant A could have undertaken. Appellant A would have liked the opportunity to remain in the respondent's employment beyond the 1 st May 2008 and he would have accepted maintenanceduties.

Appellant A gave evidence pertaining to loss.

During cross-examination Appellant A admitted that he could not spray coffins, make the lids for the coffins or make the coffins themselves. It was put to Appellant A that the non-nationals carried out this work from time-to-time with the exception of spraying the coffins.

In reply to questions from the Tribunal, Appellant A stated that the two non-nationals worked in the respondent everyday for some seven or eight months.

Appellant B gave evidence that his position was also selected for redundancy. He had the least amount of service of those selected. He was also made redundant on the 1st May 2008. Appellant B was not offered the possibility of continuing in employment past the 1st May 2008 even though he could have carried out maintenance work. During his employment with the respondent there were occasions when he had carried out maintenance duties for the respondent. Appellant B gave evidence pertaining to loss.

In reply to questions from the Tribunal, Appellant B stated his main duties were spraying and sanding. Although he was not qualified in sanding he was competent in his duties and could have carried out maintenance work if given the opportunity.

He was unaware that the non-nationals were employed by the director personally as they worked on the factory floor alongside Appellant B in weeks leading up to the 1st May 2008. Appellant B had informed the director that he was willing to accept part-time hours if it avoided a termination of his employment. Appellant B further stated that other individuals received work from the respondent company after the 1st May 2008. Appellant B found this unfair, as he had been redundant.

A Branch Organiser with the union gave evidence to the Tribunal. There was a transfer of undertakings to the respondent in January 2007. In February 2008 the respondent contacted the union concerning a number of redundancies. The possibility of voluntary redundancies was first considered but no agreement was reached. The respondent was to utilise the last in, first out selection process. The union entered into terms with the respondent as outlined in a letter dated 20 th March 2008.

However, it was subsequently discovered during the negotiations that Appellant A had longer service than another employee (PS) who had not been selected for redundancy. When it was brought to the respondent's attention the director made it clear that if he was put in the position hewould make both Appellant A and PS redundant. This distressed Appellant A as he did not wantPS to lose his job and so Appellant A agreed to leave the employment. PS continued

to work in thesanding section some thirteen months after the 1st May 2008.

The issue of the two non-nationals was raised with the director in February 2008. In or around the 18th March 2008 the director categorically assured the union that the two individuals would not be retained either prior to, or after the 1st May 2008. Then in April 2008 the director told the Branch Organiser that another company had employed the two individuals. The two individuals were in fact carrying out the work that was proper to the union's membership. If there was work availableit should have been offered to the employees who had been selected for redundancy.

The appellants became redundant on the 1st May 2008. The Branch Organiser immediately became aware that two other selected employees were asked to remain in the respondent's employment. Appellant A was very upset by this. It was the Branch Organiser's clear understanding that the process of last in, first out was to be adhered to by the respondent company but the employees whoremained in the sanding section has less service. The Branch Organiser informed the director thatin his opinion it was a situation of unfair selection for redundancy. The Branch Organiser was theninformed that two non-nationals were working in the factory. In June 2008 he was informed that astudent was employed in the transport section. This was work, which Appellant B could have beenoffered.

During cross-examination it was put to the Branch Organiser that their discussions about the redundancies had been person specific in the case of each of the six employees who were to be made redundant and it had not been agreed that the phased redundancies would take place by seniority. The Branch Organiser replied that it was his understanding that the six redundancies would be selected using the last in, first out process but two of three female employees who were also to be made redundant were retained in the respondent's employment, despite having less service than Appellant A.

In reply to questions from the Tribunal, the Branch Organiser stated that he was aware that the sanding section continued to operate for some thirteen months after the redundancies on the 1st May 2008.

Determination:

The Tribunal is satisfied that the redundancy situation that arose in the respondent company and that was addressed in the respondent's discussions with the union acting on behalf of the employees, was resolved on the basis of length of service and that those with the greater length of service would be given priority when redundancies were being decided upon.

The Tribunal notes that while Appellant A did not accept the evidence of the director that the two part-time workers were not employed by the respondent company, Appellant A was not in a position to contest this evidence.

In relation to the redundancy situation that arose in relation to Appellant A being made redundant before a fellow employee (PS) who had less service than him, the Tribunal accepts the evidence presented that this was agreed. The Tribunal was not presented with any such evidence in respect of the two female employees who were not named but whom it was agreed had less service than Appellant A but who both had not been made redundant until six weeks after Appellant A.

It is therefore determined that Appellant A was unfairly selected for redundancy, should not have been made redundant prior to the two female employees and was therefore unfairly dismissed.

Appellant A is awarded the sum of €3,000.00 under the Unfair Dismissals Acts, 1977 to 2007, in respect of his dismissal, thereby upsetting the Rights Commissioner Recommendation reference r-067347-ud-08/RG.

The Tribunal awards Appellant B the sum of €2,660.00 under the Unfair Dismissals Acts, 1977 to 2007, in respect of his unfair dismissal, thereby upsetting the Rights Commissioner Recommendation reference r-066823-ud-08/RG.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)