EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
EMPLOYEE	*- claimant*	RP885/2009 UD800/2009
MN828/2009		
Against		
EMPLOYER	*– respondent*	

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan

Members: Mr J. Browne
Ms S. Kelly

heard this claim at Carlow on 23rd March 2010

Representation:

Claimant: Ms Catherine Day, W.A. Smithwick & Son Solicitors, 43 Parliament Street, Kilkenny

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

The determination of the Tribunal was as follows:-

Claimant's Case
The claimant was employed as a maintenance technician by the respondent. The respondent is a dimensional stone quarry. Blocks are cut out of the quarry and then transported to the factory where they are finished.

During direct evidence the claimant told the Tribunal that in 2004, an apprentice, DOL, started working for the respondent. The claimant was not his master but he did help him along with his work because he felt it was a positive role. The claimant felt that this began to affect his wages because he was no longer receiving overtime. Up until 2004 the claimant carried out maintenance work in the factory. In 2004 he was moved from the factory into the quarry. The apprentice, DOL, began to do some of the same work as the claimant. The claimant raised this issued with management at the time. DOL was being given work directly as opposed to receiving direction from a master.

The claimant told the Tribunal about an accident involving another employee, PH. The claimant said the accident happened because that employee did not have the skill for the job. The day the accident occurred the claimant was sent home at 4:30pm. The claimant normally worked until 7pm. The claimant told the Tribunal that this was a skill issue relevant to his case because it showed that there was a preference to get ordinary workers to carry out maintenance. He felt there was a preference to give his work to a person from South Africa.

The claimant was made redundant on 14th November 2008. The claimant said there was no alternatives to redundancy put to him. He told the Tribunal that the quarry was changing hands and this meant there was a clash between him and another employee for a senior fitter position.

The claimant told the Tribunal that he felt he had no choice but to sign the redundancy form and the reason he accepted the cheque was because he had nobody to get information from.

Cross examination
Under cross examination the claimant told the Tribunal that he received payment for his minimum notice and his redundancy. He agreed that he received an enhanced redundancy package as opposed to the statutory entitlement.

The claimant agreed that from 2004 onwards he carried out all of his work in the quarry and only worked in the factory in emergency situations. The claimant told the Tribunal that he had a vague recollection of a meeting that the respondent held in June 2008 to provide information to management and employees about the position the respondent found itself in. The claimant was aware of people being made redundant in June. The claimant felt that the reason for the redundancies was that during the good times the respondent had employed extra staff, farmers and foreign workers, and they were just shedding these staff.

In relation to the Carlow site commencing the operation of a 3 day week the claimant felt that he would still be required for maintenance. The claimant told the Tribunal that when he was informed of his redundancy he told the respondent that he would challenge it. He came back to the company two or three times to collect tools. On the 17th November 2008 the claimant collected his cheque for redundancy, which he subsequently cashed.

The claimant told the Tribunal that he contacted his trade union about the situation but he said they were not very interested. He agreed that the trade union wrote to the respondent in December on his behalf and the respondent replied to this letter in January stating their position. The claimant approached management himself and questioned why he was being selected for redundancy as opposed to two other employees, PK and MG. He was informed that it was his position that was being made redundant. The claimant said that his trade union were not recognised by the respondent. The respondent refuted this.

Respondent's Case
The Tribunal heard evidence from DE, the general manager of the respondent's site in Kilkenny. DE told the Tribunal that in 2007 the respondent had three production facilities. These were Carlow, Kilkenny and Belgium. The machinery was smaller on the Irish sites. The respondent decided to close the Belgium facility and process the stone in Kilkenny. This was to come into effect in 2008. In order to do this, the respondent had to create a big stock level and this resulted in the quarry being extremely busy. By the time the respondent received the stock, demand had dropped and the situation needed to be reviewed.

The respondent decided to make changes to the shifts in the quarry and the factory. Up to this point, both the quarry and the factory, operated on a two shift pattern. These were cut back to one shift. In March 2008, SB, was let go. He had been employed to float between the quarry and the factory to pick up the slack.

DE told the Tribunal that the claimant worked in the quarry and would have carried out a good bit of welding on machinery. The respondent brought in new machinery which cut down on the maintenance. The first of these new machines was installed in February 2008, then March and April. These machines were assembled on site by MG as they involved a lot of drainage and pipe work that MG carried out. DE told the Tribunal that the claimant was not qualified to operate this machinery.

DE said that the respondent let people go in June and subsequently in November because after getting the project going all of the blocks were gone from the quarry. 95-99% of what the respondent does is exported to the Belgian market.

DE told the Tribunal that the claimant's position was made redundant for a number of reasons. The respondent had installed 3 new saws and gotten rid of the old ones. This resulted in less maintenance. Also, the site was now operating from 8am to 4:30pm, there was no overtime and there was not enough work.

DE and CD, the factory manager, spoke to the claimant and informed him that he was being made redundant. The claimant asked how much he would get and before DE could answer the claimant asked would it be €12,000. DE told the claimant he would receive twice that amount and more. The claimant came back to DE after lunch and wanted to know when he would get the cheque. DE told him that he would find out and when the claimant asked about tools DE told him there would be no problem. DE told the Tribunal that the claimant did not raise any issue about why he was being selected.

When the claimant came looking for his cheque DE told him he could have it for him that evening. DE waited until 6pm for the claimant to collect the cheque but he never arrived. As it was a Friday evening, DE brought the cheque home with him and brought it back on Monday morning. The claimant collected the cheque on Monday and cashed it on Wednesday.

Since the claimant's redundancy a further 14 employees have been let go. The respondent operated a 3 day week for the summer and the Carlow site is again operating a 3 day week. DE told the Tribunal that there was no option of alternative work for the claimant on another site.

Cross Examination
Under cross examination, DE told the Tribunal that MG is still employed as a maintenance fitter in

the factory. The claimant could not have been trained on the new factory machines because MG had already spent 40 days training with the Italian fitters. Furthermore, the claimant worked in the quarry and MG worked in the factory.

The maintenance on the new machines in the quarry was minimal and could be carried out by the employees operating them. DE told the Tribunal that the apprentice, DOL, did have a master, PK. DOL was not assigned to the claimant because the claimant had not provided the respondent with the qualifications he requested.

DE told the Tribunal that the criteria used for redundancy selection was based on skills. The claimant's work was made redundant and the first time anyone came in to do his work was six months later in May. It was a contractor who carried out 4 hours maintenance. DE did not contact the claimant about this work because he did not think he was insured.

Determination:
The claimant was made redundant on 14th November 2008 and was paid an enhanced redundancy of four weeks per year of service capped at €650 per week. The claimant signed the RP50 form on 17th November 2008 and accepted a cheque in respect of redundancy in the amount of €26,325.00. On or about 6th April 2009 the claimant lodged a claim with the Tribunal alleging he believed he was unfairly selected for redundancy. No evidence was adduced by the claimant that he challenged the redundancy with the respondent. The Tribunal noted that the claimant lodged his claim with the Tribunal in excess of four months from the notification of redundancy and the acceptance of the redundancy sum offered. The claimant stated that at the time he accepted the redundancy he felt somewhat pressurised.

The claimant also lodged claims in respect of Minimum Notice and Terms of Employments Acts, 1973 to 2005 and under the Redundancy Payments Acts 1967 to 2007.

The Tribunal having carefully considered the evidence adduced at the hearing. The Tribunal finds that a genuine redundancy situation existed in relation to the claimant's employment as a result of a downturn in the respondent's company. The Tribunal noted, however, that even if there was a redundancy a claimant may succeed in a claim under the Unfair Dismissals Acts if he can firstly demonstrate that the circumstances constituting the redundancy applied equally to one or more employees in similar employment with the respondent and who were not dismissed. Where this is established the claimant will succeed if he shows that the actual reason why he, and not one of any comparable employees, was selected is a ground which would not justify his dismissal. (See Michael Forde, *Employment Law* 2nd edition, published Round Hall Dublin 2001 at page 208). The Tribunal felt in circumstances where the claim submitted by the claimant to the EAT did not set out any reason why the claimant believed he was unfairly selected for redundancy that the onus lay on the claimant to state such reason. The Tribunal further felt this would assist both the claimant and the Tribunal. Notwithstanding the burden of proof to establish that the claimant was fairly selected for redundancy lay on the respondent and the Tribunal determined this strictly on the basis that the onus of so proving lay firmly and fully on the respondent. The Tribunal does not find that the claimant was unfairly selected for redundancy but rather that he was selected on the basis of selection criteria agreed with the Union, albeit in respect of a sister company, and which selection criteria was last in/first out subject to the need to retain skills. In the circumstances the Tribunal finds the selection of the claimant for redundancy was fair and reasonable. Therefore, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

In circumstances where the claimant received the appropriate level of payment in respect of minimum notice and received enhanced redundancy payment in respect of the redundancy no issue arises for determination by the Tribunal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 or under the Redundancy Payments Acts, 1967 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)