EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
EMPLOYEE	- claimant	UD1255/2009
Against		
EMPLOYER	- respondent	
EMPLOYER	- respondent	

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. O'Connell BL

Members: Mr. J. Flanagan
Mr N. Dowling

heard this claim at Dublin on 27th May 2010 and 15th October 2010.

Representation:

Claimant: Mr. John Curran B.L., instructed by Manus Sweeney & Co., Solicitors, Suite 226 Capel Building, Mary's Abbey, Off Capel Street, Dublin 7

Respondent: Mr. Alastair Purdy, Purdy Fitzgerald, Solicitors, Kiltartan House, Forster Street, Galway

The determination of the Tribunal was as follows:-

A preliminary issue arose in relation to the lodging of the claimant's appeal. The respondent submitted that the Tribunal did not have jurisdiction on the grounds that the Form T1A was delivered out of time. The Tribunal rejected this submission and accepted jurisdiction.

Respondent's Case:

The respondent is a family run business engaged in the collection and recycling of waste material. It was incorporated in 1979. It has 4/5 depots. It processes 250,000 tons of waste per year and has 120 compactors on sites and collects 1500 bins.

The claimant commenced employment in 2004 and worked in the bin repair area, welding and repairing bins. In early 2006 the claimant was interested in moving to the compactor section and as

a vacancy had arisen in that area he was subsequently transferred there and worked with JS. When JS was promoted to manager the claimant assumed his role. His job entailed servicing on site compactors and attending to breakdowns on site compactors. Fifty per cent of his work was on planned maintenance. If he needed assistance garage personnel assisted him.

At the end of 2007 there was fall off on construction waste which had been 30% of the company's intake. In the period 2007/2008 the respondent felt the effects of the downturn in the economy and turnover decreased. This was communicated to employees and redundancies had to be made. No one had an issue with redundancy. The respondent tried to be as fair as possible. Overtime had to be cut as far as possible and bonuses ceased. The maintenance manager (EM) was responsible for all maintenance, the plant, staff and costs. He attended management meetings and was asked to make a 20% cut in the maintenance department.

In September 2008 two staff worked in the bin repair area, 1 in the compactor area, and a total of 10 in maintenance. One fitter left and one employee from the bin repair area also left and were not replaced. In December 2008 further cuts were necessary. EM identified two redunancies in his area. One employee who worked in stores was made redundant and a further redundancy was required.

EM looked at the claimant's role and it was decided that it was no longer a full time role. The garage employees could assume his work. The duration of work on compactors was between ten and fifteen hours per week and fitters could assume this work. They all had longer service than the claimant.

A decision had been taken to make the claimant's position redundant. EM had looked for an alternative role for the claimant but to no avail. On 5th December 2008 EM asked the claimant to call to his office. EM said he was sorry but that he would have to make his role redundant. He gave the claimant two weeks notice and said he did not expect him to work out his notice. The conversation was very amicable. The claimant said he was not surprised. The meeting lasted approximately five minutes. He had furnished the claimant with references on a number of occasions. He had no dealings with the claimant after that.

Claimant's Case:

The claimant commenced employment on 18th October 2004. He had much experience as he had previously worked in waste management companies. He started working in the garage section and repaired trucks. At times he worked in the bin repair area. During that time he was moved around frequently. When he complained he was told that he knew where the door was.

In 2006 an employee who worked in the compactor section moved to another section and the claimant was transferred to that area and worked with JS. Following JS's promotion in 2007 the claimant assumed his role on a three month trial. Everything was ok. He sought a pay increase as he had more responsibility but this was declined but following discussions with the respondent he received a quarterly bonus in lieu of a pay increase.

He never received any complaints concerning his work during his tenure.

On 5th December 2008 while working on a compactor in Dalkey he received a telephone call from EM who asked to see him. The claimant called to his office at 3 pm. EM said he had bad news for him and that he had to let him go and make him redundant. EM said the work would have to be

outsourced. The claimant said that this could not be economically feasible as a contractor would charge the respondent a lot more money. Any suggestion to an alternative to his redundancy was shrugged off. He had no inclination prior to this that he was going to be made redundant and had no communication in writing to that effect either. He was aware that two staff had been made redundant in June and July 2008. All the claimant wanted to do was to work. He signed the redundancy form and said he was not happy. He felt the respondent no longer wanted him there. He felt unfairly treated as there were other jobs in the company he was capable of doing. The claimant was shocked as he had still been working overtime. He had never seen his job to be under threat. He was being sacked and told EM that this was not the end of it. He was not told that he could appeal the decision to make him redundant. The meeting lasted approximately fifteen minutes.

In May 2008 he had asked the respondent to sign a mortgage form for him. The form was completed citing the claimant to be a permanet employee.

He registered with Obair and sent 500 CVs to numerous companies. He attended a security licence course and obtained his security licence. In September 2009 he secured work as a driver for a large grocery store.

Determination:

In this case, the respondent was under an onus to prove that the dismissal of the claimant on the 5th of December, 2008:

1) arose as a result of a genuine redundancy, strict proof of same being required; and,
2) was implemented in circumstances which were fair and reasonable.

In relation to the first point, the Tribunal was not convinced that a genuine redundancy situation existed. This opinion was based solely on the evidence tendered by a single witness on behalf of the respondent. Mention was made by him of the fact that the company's turnover had fallen, that some contracts had been lost and that others had been reduced in value. This witness, though honest and helpful, could furnish only figures relating to the number of people who had been made redundant before and after the date of the claimant's dismissal. Through no fault of his own, he was not in a position to provide the Tribunal with the required financial information relating to the company's turnover, order book and profit/loss account. In short, the respondent's purported trading difficulties were not adequately presented to the Tribunal.

Secondly, the Tribunal had significant concerns about the manner in which the dismissal of the claimant was conducted. While there was a conflict in the evidence given by the respondent and the claimant, the Tribunal's misgivings are once more, based solely on the evidence presented by the Respondent.

It was clear that the financial problems which the respondent was apparently experiencing, were never formally communicated to the claimant. The decision to make him redundant was presented to him on the 5th of December, 2008 without any formal or informal notification.

Furthermore, it was the respondent's evidence that while alternatives to redundancy existed – wage reductions and a switch to an on-call working system was inquired of by the Tribunal – no other choices were canvassed or offered. The respondent also accepted that the claimant was never given

any right of appeal. It was clear to the Tribunal that the redundancy process was largely influenced by the need to save money. While this motivation may have been justified, the process was conducted without any detailed, equitable methodology or criteria. It was the view of the Tribunal that this represented a signficiant defect in the dismissal process.

On this issue, consideration was given to Section 6(3) of the Unfair Dismissals Act 1977 as amended by Section 5(b) of the Unfair Dismissals Act 1993 which states: "… in determining if a dismissal is an unfair dismissal, regard may be had, if the rights commissioner, the Tribunal or the Circuit Court, as the case may be, coniders it appropriate to do so- (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal…"

The Tribunal did not believe the respondent discharged the onus under which it found itself. Accordingly, the Tribunal allows the claim the Unfair Dismissals Acts 1977 to 2007 and there being general agreement between the parties in relation to the claimant having mitigated his loss, makes an award of €50,000 which is inclusive of the redundancy payment already paid to the claimant.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)