EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE **–First Named Claimant**	UD1054/2009 RP1193/2009
EMPLOYEE **–Second Named Claimant**	UD1055/2009 RP1194/2009

against

EMPLOYER
–Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. J. Goulding
Ms. M. Maher

heard these claims at Dublin on 16 April
and 9&10 September 2010

Representation:

Claimant:
Mr. Conor Kearney B.L. instructed by Ms. Grainne Hassett,
Donal Taaffe & Co. Solicitors, Malthouse Square,
Smithfield Village, Dublin 7

Respondent:
Mr. Conor Power B.L. instructed by Ms. Sarah Conway
and Ms. Triona Sugrue, Eugene F. Collins, Solicitors,
Temple Chambers, 3 Burlington Road, Dublin 4

The determination of the Tribunal was as follows:

Determination:

It is common case that the claimants had received lump sum payments under the Redundancy Payments Acts, 1967 to 2007.

The claimants joined the respondent company in and around 1988 or 1989. They joined together as a blocklaying team and worked together for the best part of twenty years with the respondent. They were directly employed by the respondent company as PAYE employees. When they started there were four full-time blocklayers. At the height of the upturn the numbers of blocklayers increased to over 100.

There can be no doubt that it was understood by employer, employees and union alike that this workplace operated a last in first out policy when it came to selection for redundancy. In these circumstances the claimants should have been the last persons to be made redundant by the respondent company in the event of a diminution in the work available. The tribunal accepts that this presumption formed a part of the individual contract of employment as between the respondent company and each of the employees. By 2006 it seems that the respondent company could see that the building and development industry was slowing down and that redundancies would have to be implemented across the board. This included the blocklaying fraternity who, to a man, were members of the Building and Allied Trade Union (the union).

In 2006 the Assistant General Secretary of the union, in his capacity as Secretary of the Dublin branch committee, acting on behalf of his members, submitted a proposal to the employer which would affect the position of shop stewards nominated by the union such that these persons would be the last blocklayers to be laid off/made redundant from the respondent company's sites. The rationale behind seeking this deviation from the "last in first out" norm seems to have been an honest desire to ensure an orderly implementation of any redundancy plan and, indeed, a consistency in lines of communication between the respondent and the union to deal with any and all issues which might arise in a market downturn. It is to be presumed that in late 2006 nobody could have foreseen the ultimate wipeout that occurred in the building industry.

Throughout 2008 wholesale redundancies started being made in the workplace. Blocklayers with anywhere between one and ten years employment with the respondent company were being let go as the work dried up. By the end of 2008 the only blocklayers being directly employed by the respondent company were the two claimants and three other persons, being shop stewards (S1, S2 and S3) recognised as such by the employer, employees and the union alike. It is worth noting that the claimants had eleven years more service than S1, twelve years more service than S2 and fifteen years more service than S3.

The claimants acknowledge that they acquiesced to S2 being nominated as a shop steward and being given the entitlement to go "to the top of the list". This decision was taken by way of a show of hands and the claimants gave evidence that they did not vote either way. It is not clear to the Tribunal that the implications of what had been sought by the union back in 2006 had ever really been made clear to the claimants. The union had approached the respondent company looking for favourable treatment for its shop stewards. In consequence the company agreed to the deviation from its stated norm of "last in first out". However, neither of these parties was able to satisfactorily

demonstrate that the change in policy was fully explained to the claimants and more importantly whether it was explained what impact this change would have for these particular individuals. There can be no doubt that the change agreed to by the respondent and the union effectively negated the value of over ten years service in employment given by the claimants for the purpose of deciding who should be the last man standing in the event of redundancies.

The Tribunal accepts that there was a need for redundancies throughout 2008. The Tribunal further accepts that the union was actively trying to get assurances from the company that the company would re-employ blocklayers as jobs and contracts were being picked up. The company states it never gave such assurances and, indeed, it does seem that over the next twelve-month period the respondent company opted to sub-contract out its blocklaying work and steadily moved away from the policy of direct employment.

The Tribunal accepts that the claimants believed in November 2008 that they and their three shop steward colleagues were all due to be made redundant before Christmas 2008 and would, hopefully be re-employed as work became available in 2009. In those circumstances the claimants did not raise any issue at the fact that they, with their longer service, were being let go in November 2008 whilst their three colleagues, with shorter service, would be kept on for another few weeks. The evidence was that they did not feel it was worth making an issue over. The union advice was to take the redundancy package (which represented the bare minimum), not to make a fuss and the prospect of being re-employed would be realised in due course.

As for the shop stewards left behind in November 2008 it seems that they continued in the employment of the respondent for a considerable period after November 2008. S1 was made redundant in August 2009 whilst S2 and S3 were made redundant in April 2010, some seventeen months after the claimants. The Tribunal must extrapolate from the evidence presented that the respondent company had an ongoing need for full-time blocklayers for a not inconsiderable period after the claimants were made redundant. There was in fact some 43 months of blocklaying work to be carried out on the respondent's sites post November 2008, albeit on an ever-decreasing rate of pay. Had the union and the respondent not agreed to giving preferential treatment to the shop stewards it seems inevitable that the claimants would have been the blocklayers to work up to April 2010. Even if the claimants knew that S2 had gone "to the top of the list" and fully understood the implications of that fact, the claimants could have assumed that one or other of them would not have been made redundant until August 2009 and the other in April 2010.

The Tribunal must ask itself whether it is fair and reasonable in all the circumstances that an agreement reached between the respondent and the union should have such an adverse effect on the contractual terms as understood between the respondent and the employees pursuant to the individual employee's contract of employment.

The claimants have been denied their entitlement (earned by twenty years of service) to be the last persons to be made redundant by reason of an agreement (to which they were not a party) reached by the respondent and the union for reasons of expediency and orderliness which, whilst desirable to the organisations involved, may not necessarily outweigh the rights and entitlements of the individual.

In conclusion the Tribunal finds that in November 2008 the claimants were unfairly selected for redundancy. That they would eventually be made redundant is clear. That they are therefore entitled to retain their redundancy package is beyond question. The Tribunal finds that the claimants should have been treated no less favourably than the shop stewards who had been ring fenced for special privileges. But giving special privileges should never have given rise to a diminution of the contractual entitlement of the claimants. The claimants had as much entitlement to carry out the work to be done post November 2008 as any of the shop stewards did.

Taking into account the number of months of work generally available and the fact that there was reduced capacity to earn (as reflected in the P60's presented) the Tribunal awards the two claimants €48,000-00 each under the Unfair Dismissals Acts, 1977 to 2007 to represent their loss of earnings from November 2008 onwards.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)