EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.
EMPLOYEE UD2390/2009

against

EMPLOYER
under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O' Mahony B.L.

Members: Mr D. Hegarty
Mr O. Wills

heard this claim at Cork on 21st October 2010 and 3rd February 2011

Representation:

Claimant: Mr David Waters, Sullivan Waters & Co, Solicitors, 19 West End, Mallow, Co Cork

Respondent: Mr. David Gaffney, Coakley Moloney, Solicitors, 49 South Mall, Cork

Summary of the Evidence

The claimant commenced employment as a counter assistant on 18 of August 2006. Up to early 2010 the respondent operated 3 retail branches in the southwest of the country. It relied heavily on the building and construction industry for its business which was mainly supplying that sector with tools and equipment and repairing machinery. Its financial controller (DF), who was also a director of the company and her husband who was another director (DA) submitted figures which showed significant reductions in its turnover from 2008 to 2009. Those falls were more pronounced in the branch where the claimant was working. At that time the respondent was leasing the premises in that area and had advanced plans to set up and own its own shop there.

The respondent had helped the claimant in many ways and valued his input as he was a good worker. In 2007 when the claimant was about to leave to go to a better paid job the respondent increased his pay. In May 2008 the claimant sustained an injury to his finger in the course of his work. The respondent paid him during the 6/7 weeks of his absence as well as all the related medical bills the claimant presented to them. According to DF, the claimant clearly indicated, at the time, that the accident was his fault. The claimant felt that the respondent's attitude towards him changed on his return to work.

The respondent was encouraging the claimant to go on the road selling and, while he did some work on the road, in early April he informed the HR person (HR) that he did not want to do it as it was "wrecking his head". DAs' evidence was that the claimant was told at this time that his job

was at risk. By this time redundancies had already occurred in the company and DA's position was that this constituted an offer of alternative employment. The claimant denied being told at this time that his job was at risk. It was HR's evidence that she did not warn the claimant that his job might be made redundant.

On 4 June 2009 both DA and DF had a meeting with the claimant where they discussed with him their concerns about his performance and measures for his improvement. At the meeting they issued him with a letter of warning listing the six areas of concern with his work and further stated: *"You will be supported as much as possible by Management (sic) and if you have any questions we will be glad to address them with you. I hope we will see an immediate improvement in your work."* The claimant's position was that this was an indication that the respondent viewed his position with it as continuing.

On 12 June 2009 the claimant's solicitor wrote calling on the respondent to admit liability for the personal injuries, which the claimant had sustained in the course of his work in May 2008 or face litigation on the matter. It was the respondent's position that it did not receive this letter until Tuesday 16 June.

On Monday 15 June 2009 DF noticed that the claimant had only dealt with two customers by 14.00. In the course of a phone conversation with the claimant about this the claimant told her that he was sick and tired of telling her that "this place is shagged". The claimant was always negative about the business. DF then decided to terminate his employment as there was no longer any role or work for him with the respondent. FD was annoyed to have received the solicitor's letter from the claimant's solicitor. The timing of her decision on the claimant's redundancy and the receipt of the letter were coincidental and had no bearing on that decision. DA and HR met the claimant the next day, 16 June 2009, and informed him of the decision to make him redundant. The claimant's redundancy was to take effect from 30 June 2009 and he was given two weeks' pay in lieu of notice. The claimant accepted his redundancy without complaint in June 2009. He signed for his RP 50 and took his statutory payment on 1 July 2009.

The claimant was very surprised that he was made redundant as two weeks prior to this the Directors met him to discuss the improvement of his performance going forward. The claimant believes he was made redundant as a result of his personal injuries claim. The claimant was aware that the respondent was under pressure, that business was quiet and that the Directors were no longer taking a salary from the business.

The respondent's evidence was that the business went into serious decline from mid-2008 on. From 26 July 2008 to 1 May 2009 inclusive the respondent had made 15 employees redundant between the three branches. The staff were aware of the dire situation and the extent of the redundancies taking place; each time a redundancy took place the staff in all three branches were informed. When business was at its peak in the branch where the claimant worked there were six employees working there, three of whom (including the claimant) were counter assistants. Two of those counter assistants were made redundant, one in July 2008 and one in February 2009. In the branch there were three members of staff remaining: a driver, a fitter and the claimant on the counter. The claimant did not have a C1 licence and it was vital to retain a driver who had one in order to deliver and collect the diggers and dumpers; the claimant was not a mechanic and could not do the repairs, which was a major and vital part of the business. DA and his sons could cover the counter until his sons returned to school in September. Furthermore, the driver could work on the counter and often had done so. A counter assistant from another branch was drafted into the branch for two days each week over the summer and he eventually worked there five days when the

Director's sons returned to school. That counter assistant had a CI licence and could do repairs. The respondent's situation worsened and it was forced to close the branch in January 2010. DA's position was that the decision to make the claimant redundant had been taken the weekend before receiving the letter from the claimant's solicitor and they had intended informing him the following week.

In acknowledging that the claimant had undertaken some work in another branch the respondent insisted that his role and function within the respondent was confined to serving customers at the counter. Unlike other employees he neither undertook driving duties nor was he involved in repair work. His job was not replaced by new staff as his former functions were done by others including the directors' sons during their school holidays. One of the sons confirmed that he had helped out in the branch when the claimant left.

It was planned to wait until the end of that week to inform the claimant about his forthcoming dismissal for redundancy in order to allow the Directors' sons to have some time off but as a result of the solicitor's letter the meeting was moved forward.

Determination

The Tribunal accepts that the respondent's business was in serious and continuing decline in 2009 and that there were ongoing discussions on redundancies. However, in light of the respondents letter of 04 June to the claimant and in particular the statement therein: *"You will be supported asmuch as possible by Management (sic) and if you have any questions we will be glad to addressthem with you. I hope we will see an immediate improvement in your work,"* the Tribunal is satisfied that the notification to the claimant of his redundancy on 16 June and its taking effect as of30 June was precipitated by the letter from the claimant's solicitor at that time. Accordingly, theclaimant's dismissal on 30 June was for an unfair reason under Section 6 (2)(c) of the Unfair Dismissal Act, 1977.

When considering the compensation to be awarded in this case the Tribunal accepts that the claimant would have been fairly made redundant at the end of August and the two members of staff working in the branch were capable of and experienced in a variety of functions. In the circumstances, the Tribunal awards the claimant €5,054.40 as compensation under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)