EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:		**CASE NO.**
EMPLOYEE		UD141/10 RP200/10
	- claimant	MN141/10 WT82/10

Against

EMPLOYER

- repondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Taaffe

Members: Mr M. Noone
Mr J. Jordan

heard this claim at Wicklow on 1st April 2011, 10th June 2011 and 25th October 2011.

Representation:

Claimant: Ms Mary Honan BL., instructed by Thomas E. Honan & Co., Solicitors, Ferrybank, Arklow, Co. Wicklow

Respondent: Ms Catherine Day, Peninsula Business Services (Ireland) Limited, Unit 3, Ground Floor, Block S, East Point Business Park, Dublin 3

At the outset of the hearing the claims under the Redundancy Payments Acts, 1967 to 2007, the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 were withdrawn.

The determination of the Tribunal was as follows:-

Respondent's Case:

The respondent is a facilities management company. Company E located in Wicklow where the claimant had worked decided to outsource its facilities function to a third party and the respondent was the successful tenderer. A transfer of undertaking subsequently occurred on 1st May 2009.

A draft contract of employment was drawn up for the claimant. The claimant communicated his concerns with the draft and these were subsequently addressed and rectified by the respondent. The claimant continued to work at his site in Wicklow.

As early as August 2008 Company E had discussed the outsourcing of its facilities department. Meetings took place with the respondent's representative AB, who was the Facilities Manager. The claimant agreed his new contract of employment and it was sent to him on 14th April 2009 together with the employee handbook. AB was handed a copy of the contract of employment on 6th May 2009 and presumed the original had been sent to the HR department on 1st May 2009.

It was not unusual for the respondent following the acquirement of a new contract to review structures. Both AB and J. McG, Safety Manager reviewed the position of Safety Officer on the site in Wicklow. J.McG viewed the health and safety systems in place. He concluded that the system was up and running and could be maintained by a remote resource once or twice a month. It was a low risk site, which housed a call centre. At no time was the claimant informed that his role was being reviewed.

On 6th May 2009 AB informed the claimant that his position was being made redundant. The decision was made in consultation with the General Manager (DR) and the HR Manager. A new facilities assistant position was being created in another location in Dublin and this position was offered to the claimant. His salary was to remain the same. AB did not believe that travelling to this alternative site would be a problem for the claimant. The only change was the location. On 8th May AB wrote to the claimant outlining changes to the new role. AB again spoke to the claimant on 11th May 2009 and asked the claimant to review the role and revert to him by 14th May 2009. The respondent was agreeable to offer the claimant a travel allowance of €100 per month. His hours of work would normally be 8 – 4.30 pm but could vary slightly. They wanted to retain the claimant, as he was a valuable employee.

The claimant did not accept the offer of an alternative role and unfortunately was made redundant and paid all monies owed to him. AB presumed the claimant was looking at health and safety roles outside the company. The claimant was offered a right of appeal but chose not to appeal the decision.

Claimant's Case:

The claimant commenced employed in June 2003 as a Facilities Assistant and worked for company E as part of the Facilities Team. He was responsible for the maintenance of facilities. In 2006 he became the Health and Safety Officer for company E. In his new role some of his responsibilities included health and safety management, fire drills and ensuring the company complied with health and safety. He was Arklow based.

In August 2008 the Team were informed of the outsourcing of the Facilities Department. In February 2009 the Team were told that the respondent would be the transferee. The claimant

furnished AB with his job description but his future role was not discussed. Some casual meetings took place thereafter.

The claimant agreed to transfer to the respondent company and was furnished with a draft contract of employment. He was most unhappy with the draft contract as it did not reflect his job description. The draft contract outlined a new location of work together with working shift hours. He communicated his concerns to AB by email on 6th and 8th April 2009. AB reverted to him with a revised contract. He was unhappy with the revised contract as there were still discrepancies as to his location of work and start time and shift work. His understanding was that his existing contract should remain intact. He again raised his concerns both by telephone and in direct conversations with AB. He was not reassured.

He had a meeting at 9.30 am on 6th May 2009 with AB and signed his new contract of employment and inserted the date of 1st May 2009 as this was the date the transfer to the respondent company took place. He raised his concerns with the new contract at that meeting. It was paramount he retain his job. AB then informed him that he was required to attend a meeting in an hour's time. He was told at that meeting that his role was effectively made redundant. He was dumb struck andshocked and could not believe what had happened. He was offered an alternative position a sFacilities Assistant in Dublin. His salary was to remain the same. The claimant felt this was a stepback to the role he had in 2003. He said he would have to give it consideration.

By letter dated 11th May 2009 AB furnished the claimant with the new Facilities Co-Ordinator Job Description.

The claimant thought long and hard about the alternative role. He had progressed to the role of Health and Safety Officer. He had signed a contract of employment in good faith as a health and safety officer. Having given careful consideration to the alternative position offered to him the claimant decided to reject the role of Facilities Assistant and duly informed AB of that decision on 19th May 2009. This new position did not reflect his original role as Health and Safety Officer. He had acquired qualifications for that role and travel to and from the location in Dublin amounted to three hours per day.

The claimant had lost trust in the respondent. He had signed a new contract of employment on 6th May 2009 and approximately one and a half hours later he was informed his role was being made redundant. He worked for the respondent for a further four weeks. He chose not to appeal the decision to make him redundant.

The claimant initially applied for some positions following his termination of employment but was unsuccessful. In both 2009 and 2010 the claimant secured a small amount of contract work and also once in 2011.

Determination:

The Tribunal carefully considered all of the evidence adduced and the submissions made.

It is for the respondent to establish that (a) a redundancy situation arose and (b) that they acted fairly and reasonably towards the claimant in addressing that situation.

It is determined that a redundancy situation arose and that the respondent did not behave fairly and reasonably with the claimant. The Tribunal sets out hereunder the reasons why it is so found:

1. Failed to consult or engage with the claimant prior to restructuring the health and safety operations of the company.

2. Implemented this restructuring without giving the claimant any opportunity to consider it or make any submissions in respect of it.

3. Entered into a contract in respect of his position as a health and safety officer having pre-determined, prior to its exchange, to make his position redundant.

4. Appointed a health and safety manager to supervise its health and safety operations without giving the claimant any opportunity to apply for this position thus excluding him from these operations.

The Tribunal therefore determines that the claimant was unfairly selected for redundancy and was dismissed. Section 6(3) of the Unfair Dismissals Act, 1977 as amended by Sections 5(b) (a) of the 1993 Act states that "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, considers it appropriate to do so to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal".

The Tribunal therefore determines that the redundancy of the claimant by the respondent was an unfair dismissal within the meaning of the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal gave consideration to the failure of the claimant to appeal the decision to make him redundant and is satisfied in the circumstances of the case that this failure does not disallow his claim and in addition further finds that in so failing that he did not contribute to his dismissal.

Having examined and considered the alternative position of facilities co-ordinator offered to the claimant which was refused by him the Tribunal is satisfied from a comparison with his previous position as a health and safety officer that the claimant did not act unfairly and unreasonably in refusing it.

The evidence finally of the claimant in respect of his partial success in obtaining alternative employment and of his efforts to obtain employment is noted and it is determined that the claimant made reasonable efforts to mitigate his loss in this regard.

The Tribunal awards the claimant a sum of €41,246.00 having allowed for a redundancy payment of €7,332.00 paid to the claimant and the Tribunal so determines.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)