EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: **CASE NO.**
UD532/2010

EMPLOYEE ***-claimant 1***

UD533/2010

EMPLOYEE ***- claimant 2***

against
EMPLOYER ***- respondent***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey B.L.

Members: Mr. J. Reid
Mr P. Trehy

heard this claim at Dublin on 16th June 2011 and 26th September 2011

Representation:

Claimants: Mr. Paul O'Reilly, Northside Centre For The Unemployed, The Glin Centre, Glin Road, Coolock, Dublin 17

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

Respondent's Case:

Giving evidence the Financial Controller stated that the company was formed in 1988. The company's business is the relocation of residential and commercial customers as well as operating alogistics store with the distribution of electrical equipment and the movement of heavy objects. Owing to this the company's business is very labour intensive.

The respondent company suffered substantial losses during 2008, as a consequence of the property market collapse. In order to protect the jobs of the employees the company had to implement a number of changes in relation to working practices. These included the introduction of a 10% reduction in the pay of office staff, the introduction of a three day week, increased responsibility for some roles. Also, the company had a large number of competitors and it was forced to cut rates in order to secure business.

In addition to this the company renegotiated with the road crew to a more flexible working arrangement. The crew and their representatives negotiated and agreed to a reduced working

hour's arrangement. Prior to this they had a rigid contract of 8am to 5pm with overtime paid on hours worked before and after those times. As part of the new agreement the company would now guarantee a minimum of 24 hours per week as it could no longer guarantee a 40-hour week to the crew. The crew would also work Saturdays but without an overtime payment. In addition overtime would only be paid when an employee had worked over 40 hours whereas previously overtime was calculated on a daily basis. Both of the claimants signed their agreement to this working arrangement. As the employees were often required to work weekends to re-locate office customers the reduced hours agreement was essential to the company staying in business and projecting the jobs of the employees. The agreement came into effect at the end of January 2009 and it was agreed that the arrangement would be reviewed in January 2010.

However, 2009 was another horrendous year for the company and it suffered further financial losses. The Managing Director wrote to staff on the 9th December 2009, outlining the company's strategy for the next three years. Labour costs at that time accounted for 52% of the company's overall costs. Subsequently, the Financial Controller sent a memo dated 16th December 2009 asking for up to 4 members of staff to nominate themselves to represent the road crew in the review process of the flexible working arrangement. There was no response.

As no one came forward to discuss the review of the working arrangement, management met with staff in small groups on the 5th January 2010 and informed them that the company wanted to review the reduced working hours arrangement. In or around the time of mid-December the Financial Controller had prepared the monthly management accounts and as a result management raised the issue of redundancy at the meetings and enquired if any of the employees were interested in taking voluntary redundancy. Again there was no response to these issues.

In mid-January a number of crew representatives were nominated and management met with the representatives on the 27th January 2010 and explained that the company was in dire financial circumstances given the previous two years. Management asked the representative to enquire if any members of staff were interested in taking redundancy. In or around mid-January 2010 the company received written requests en masse from the crew stating that they were opting out of the reduced working hour's arrangement and seeking a return to a 40 hour week. The claimants' requests in this regard were received by the company on the 14th and 15th January, respectively.

There had previously been some redundancies in the office during 2008 and 2009 but the management team had now realised that additional redundancies needed to be implemented. However, as no one had opted for voluntary redundancy the company selected four employees from the crew and one senior office manager for redundancy via a scorecard process. There were no alternative positions available in the company. Notice was given to the employees in question (including the claimants) on the 27th January 2010. It was a tense time when the employees were informed that their positions had been selected and management did not have an opportunity to go through the scorecards with them.

The crew representatives met with management but stated that they were there under protest. They informed management that they had a representative. The Financial Controller was under the impression that the representative was an employee of the National Employment Rights Authority. When the Financial Controller received a telephone call from the representative he was told that the company had broken the law and that the redundancies of the claimants were unlawful. The Financial Controller enquired from the representative if he was from the National Employment Rights Authority and the representative confirmed he was but later said he was from a branch of

that Authority. However, when the Financial Controller telephoned the National Employment Rights Authority he was informed that the person was not an employee. Using an internet search engine he established that the telephone number was linked to a centre for the unemployed.

At a meeting on the 29th January 2010 the Financial Controller asked the representative for his business card. It was from the centre for the unemployed. The Financial Controller told the representative that he had misrepresented himself and for that reason was unhappy to proceed with the meeting on that basis. They subsequently met in February 2010 but the claimants were not discussed at that meeting.

During cross-examination it was put to the witness that the section of the contract relating to redundancy states that the company will take all steps possible to avoid redundancies and that any redundancies will be discussed with the employees. The Financial Controller replied that the company had attempted to have discussions with the employees on the 5th and 22nd January 2010.

In reply to questions from the Tribunal, he confirmed that 20 employees were made redundant after the claimants. These redundancies occurred across all divisions.

The Financial Controller was recalled on the second day of hearing. The claimants both refused to meet with the respondent so had to be made redundant. The respondent was in such trouble that the reduced hours would not have prevented redundancies. The respondent said there would be no redundancies in the context of the staff accepting the reduced hours. The reduced hours were guaranteed at 18 and spread as evenly as possible. There was no possibility of returning to a 40-hour week as requested by both claimants.

Claimants' Cases:

Claimant 2 gave evidence that he had been employed for 3 years as a general operative and driver for the respondent working mainly in the household department. Prior to the 27th of January 2010 the claimant was unaware that redundancy was a possibility for him or anyone else within the respondent company. The claimant asked the respondent on numerous occasions if there would be redundancies and was informed that there would not be. The claimant attended work as normal on the 27th of January 2010 and was asked to attend a meeting; there was no prior notice of the meeting and he was not offered any representation. At the meeting the claimant was handed two pieces of paper and told he was being made redundant. The claimant asked if the last in first out policy was being applied. The claimant chose to work his two weeks' notice but was called to a meeting after the first week and asked to leave. The claimant had no further contact with the respondent after that.

The claimant does not recall seeing the memo issued by the respondent dated the 9th of December 2009 which outlined that business conditions were 'extremely tough.' The claimant did not receive the memo from the respondent dated the 16th of December 2009 requesting staff representatives to be part of the reduced working hours arrangement review. The claimant is aware that two staff were nominated. The claimant was at a meeting on the 5th of January to discuss the reduced working hour's agreement. The reduced working hour's agreement was originally implemented as the respondent was losing money, but the claimant only agreed to the reduced hours for one year. After the year expired the respondent requested that the agreement continue as the company was still in trouble; the claimant opted out of this agreement by letter dated the 15th of January 2010 and requested that he be returned to his original terms and conditions of employment. The claimant requested his 40-hour week as he thought there was plenty of work available. The claimant was

never informed he would be returned to a 40-hour week but presumed after the year expired that he would resume full-time hours. The claimant commenced work for the respondent as a contractor so was aware that they used contractors.

Claimant 1 gave evidence that he commenced employment with the company in 2003 as a driver in the warehouse until he was diagnosed with epilepsy in 2005. The claimant did not get any notice of redundancy. The claimant was called to a meeting, which he attended with his representative and was given the RP50 form and told he was being made redundant.

The claimant requested his full-time 40-hour week returned to him as he did not want to remain working the 18-hour reduced week. The claimant opted out of the reduced working hours agreement by letter dated the 14th of January 2010. The changes to the terms and conditions of employment were put to all the staff at a meeting on the 5th of January 2010. The negotiations on the changes stalled but the respondent repeatedly said the company was in trouble and that the new terms and conditions and the continuation of the reduced hours were a necessity. The claimant does not recall seeing the memo issued by the respondent dated the 9th of December 2009. The staff were on reduced hours as there was not enough work and the respondent was losing money. The respondent offered the claimant employment post being made redundant but the claimant refused.

Another ex-employee (JL) of the respondent gave evidence that he was aware that there wasn't enough work for a 40-hour week but that they were advised to request a 40-hour week by the representative. The hours available were not being distributed evenly; this witness was working 50-60 hours per week. This witness was involved in the review of the reduced working hours and the revised terms and conditions of employment but left the meeting as 'the negotiations were not meaningful.'

An additional ex-employee (FB) gave evidence that there was a number of consultation meetings in January and that a notice did go up in the canteen in December 2009.

Another ex-employee (JD) gave evidence that the proposed new terms and conditions of employment were not a proposal but the 'bottom line.' JD stated that under advice they requestedthe 40-hour week to be re-instated. There was always the 'threat' of redundancy within the respondent but never any discussion regarding redundancy. The staff were officially on short-timefrom the 27th of March 2010. The respondent issued RP9s to a number of staff.

Determination:

Having considered all the evidence it would appear on the face of it there was a genuine redundancy, particularly in circumstances where there was an expectation from all staff to return to a 40-hour week, which was not possible, and negotiations on this issue were at a standstill.

However, the selection process was not discussed with the two claimants. It is also clear that, notwithstanding that fact that had the selection criteria been discussed with the claimants, they would still have been made redundant in any event. Due to the respondent's failure to discuss with redundancy with the claimants and the failure to follow correct overall procedures in this regard the Tribunal awards both claimants four weeks gross wages under the Unfair Dismissals Acts, 1997 to 2007.

These sums are as follows:

First Named Claimant: € 2,632.40

Second Named Claimant: € 2,720.00

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)