EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: **CASE NO.**
EMPLOYEE - claimant

UD1598/2010

against
EMPLOYER - respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr. L. Tobin
Mr J. Jordan

heard this claim at Wexford on 15th February 2012 and 9th May 2012 and 8th October 2012

Representation:

Claimant: Ms Ger Malone, SIPTU, Assistant Branch Organiser, Connolly Hall, Summerhill, Waterford

Respondent: Mr. Padhairc Lyons B.L. instructed by McDowell Purcell, Solicitors, The Capel Building, Mary's Abbey, Dublin 7

The determination of the Tribunal was as follows:

Respondent's Case:

The respondent is a voluntary charitable organisation established in 1985 which operates support services to people living with depression. Their services include a helpline, a website, school information talks and other support group services. It is 80% funded by private donations, with the remainder funded by the Health Service Executive. The Chief Executive Officer role is filled on a voluntary basis.

In 2009 the charity employed twenty-two staff, six of whom were full-time regional executive officers (hereinafter referred to as REOs) and one part-time REO. The REOs had a number of functions, the most important of which was organising regional support groups in addition to providing information talks. Following the resignation of the CEO in 2009, DL became Acting CEO in around August/September 2009. He was previously a voluntary board member

In early 2009 the Board had approved a strategic review process. Following on from the

completion of the review by a consultant (SC) the Board asked DL to devise a future strategy and organisational resources plan. This included evaluating current services and the delivery of services in the future. He met each of the REOs individually and he was aware from them that most of their time was spent on support groups. He met with the claimant in or around November 2009 to get his views. DL examined all of the services provided and the staffing resources required

DL presented a report to the Board on the conclusions reached through evaluation and review. The conclusion was that the REO roles did not serve the service users in the most efficient manner and it was DL's recommendation to streamline these functions. DL gave evidence to the Tribunal that there was a 16% downturn in donations and the objective of the review was to deliver a better service for less money.

The Board met during December 2009 and a strategic review announcement meeting was held on 26 January 2010. Each employee was provided with a copy of the strategy. The staff were informed that the members of the Board had agreed that the role of REO no longer met the needs of the organisation or its future strategic direction. The staff were informed in the announcement that, "this restructure will affect all full-time and part-time Regional Executive Officer positions. These roles in their current format are being made redundant."

As part of the planned restructure the Board approved the creation of three new positions referred to as support group co-ordinators (SGC). The existing REOs could apply for these posts and a job specification for the role was provided. The roles were open solely to the REOs for a period of time. Those who did not wish to apply could opt for voluntary redundancy. There was also the option of applying for proposed contractor positions as part of a schools programme. Any staff being made redundant would have first option to express their interest in this contractor opportunity.

DL and a human resources consultant were available that afternoon to speak with staff individually. However, only one REO post holder approached DL. DL was subsequently surprised when none of the existing REOs applied for the new positions.

DL informed the staff affected that the respondent would cover the cost of an employee support service and reiterated that he was available to meet with staff to discuss the proposed new roles of support group co-ordinator or to discuss the contractor roles. He was shocked that none of the existing employees showed an interest.

He again emailed the affected staff on 17 February 2010 informing them that as no applications had been received in relation to either the new posts or voluntary redundancy it was planned that the respondent would engage with two employee representatives as nominated by the affected staff. DL stated that he would have been open to any suggestions from staff and that on numerous occasions he had attempted to engage affected staff in the process. Subsequently, an email was received from the claimant and a colleague to the effect that they had been nominated as employee representatives and they agreed to meet with DL and the human resources adviser to the respondent. They stated that they intended to be accompanied by their union adviser.

A response issued to the employee representatives indicating that it was not the respondent's intention to consult with trade unions during the consultation period as it had not been the practice of the organisation to conduct collective bargaining negotiations with trade unions to

date.

As the respondent was engaging in collective redundancies, a thirty day time limit had to be given before notice of dismissal. It was planned to give notice of the redundancies during March. The REOs were asked for suggestions and feedback on the possibility of reducing the proposed redundancies, the possibility of an alternative to redundancies and identifying what supports could be put in place to support the team during this transition.

A meeting was held on 2 March 2010 with the employee representatives. A follow up email from the human resources consultant to the employee representative asked them to inform their colleagues that the three support group co-ordinator positions were still available if they were interested in applying for them and that the roles would be opened up to other applicants after the conclusion of the consultation process.

The claimant requested by email dated 4 March 2010 that DL would inform the Board that the REOs believed there was a difference of just 45 hours between the hours worked by the REOs and the proposed hours for the support group co-ordinators and that they were willing to negotiate on the difference. Further written correspondence was received from the employee representatives to the effect that the REOs did not accept that the current situation warranted dismissals nor did they accept the proposal to outsource parts of their current work remit. They wanted the matter referred to the Labour Relations Commission. As the consultation process was already underway the Board rejected the proposal to meet with the Labour Relations Commission.

On 19th March 2010 the employee representatives sought a formal meeting with their union representative present. DL responded on 30 March 2010 stating that there was no entitlement outlined within the respondent's terms and conditions to entitle employees to union representation. In the interim DL had issued a letter dated 29 March 2010. The letter informedthe REOs of the respondent's intention to proceed with compulsory redundancies in the absenceof other feasible options and requested attendance at a meeting on Wednesday, 31 March 2010.

The REOs stated that they were prepared to meet on 31 March 2010 but only on a collective basis, as some colleagues felt intimidated by the whole process. DL refuted that intimidation had occurred during the process. However, due to further disagreement between the parties surrounding the issue of individual meetings versus a collective meeting, the parties did not meet on that date.

A subsequent letter was received from the employee representatives stating that they had lost confidence in DL's handling of the matter and they requested that the Board deal with the matter directly. A subsequent collective meeting was held on 13 April with the Chairman and the HR consultant.

The REOs were subsequently informed by letter dated 15 April 2010 that the respondent's intention was to proceed with the compulsory redundancies as no feasible options were agreed at that meeting. One employee who held an REO position continues to work for the respondent in one of the new positions.
The HR consultant gave evidence that he was approached by the respondent to assist in the consultation process having previously consulted on other matters. He attended the meeting on 26 January 2010 when staff were informed of the process that would take place. He was

available to meet with REOs after this meeting and four of them met him individually after the meeting.

The tone of the meeting of 2 March 2010 was professional although he accepted that it was a difficult subject. The only proposal put forward was that of the negotiation on the difference in hours.

Following emails from the employee representatives the Chairman asked for examples of intimidation and for further proposals from the REOs as an alternative to redundancies, however neither was put forward.

The voluntary chairperson of the board gave evidence. He attended a board meeting on 15 December 2009 and a strategic review announcement meeting was held on 26 January 2010. Each employee was provided with a copy of the strategy. Staff were informed that the members of the board had agreed that the role of REO no longer met the needs of the organisation or its future strategic direction. The staff were informed in the announcement that, *"this restructure will affect all full-time and part-time Regional Executive Officer positions. These roles in their current format are being made redundant."*

The witness was not present at the 26 January 2010 meeting. On 9 April 2010 he emailed all & REO's to inform them of the times for their individual meetings with himself and the HR consultant. However the 7 REO's requested a collective meeting which took place in a hotel on 13 April 2010. In an email from the claimant the issues to be raised at the meeting were:

1. *"fear of intimidation".*
2. *Response to our earlier suggestions re: Proposed Dismissals.*

The meeting lasted around 45 minutes and all present had lunch. There were no facts as to issue of intimidation. The claimant was given a formal notice of redundancy dated 15 April 2010.

On cross-examination he said no new proposals were given. He refuted that he had left the meeting first.

Claimant's Case:

The claimant gave evidence. He commenced employment with the respondent in April 2001 reporting to the CEO and the General Manager. His role was as a support group co-ordinator (SGC) for five south eastern counties.

He had a good working relationship with the CEO but she left in 2009 and he was asked to take over a project – Cognitive Behaviour Method. A review was carried out by the sub-group of the Board who then submitted a report. DL became Acting CEO in around August/September 2009. He was previously a voluntary member of the Board.

On 26 January 2010 a strategic review announcement was made to all staff. All staff were informed that the members of the Board had agreed that the role of REO would no longer exist. They were told the restructure will affect all full-time and part-time REO positions and these positions would be made redundant. The claimant told the Tribunal that he was shocked and surprised at the announcement and did not think he would be made redundant. There had been

no prior indication of any possible redundancies. The review also announced that 3 new positions as new support co-ordinators which the Board hoped would be filled internally. He told the Tribunal that he felt he did not have to apply for the new position as he was already doing the job.

He felt the respondent could have redeployed him. He had been involved in the development of the "Beat the Blues" program in 2009. He asked DL if he could work on it part-time but was told he could apply for the contractors' position. The 3 new positions would work a larger geographical area but these areas were not specified.

The claimant told the Tribunal that he felt the consultation offered after the announcement was not genuine. He felt he and his colleague were out of their depth acting as representatives for their colleagues as they were not equipped with a full knowledge of labour law compared to management. There was no offer of re-training the staff.

The staff meeting on 2 March 2010 was very tense. DL was very impassive and just wanted to "move on". The claimant felt it was a done deal. No minutes were taken at the meeting. On 9 March 2010 he wrote to DL concerning the proposed dismissals and wanting to clarify the staff's positions. There were 3 points:

1. *"We do not accept your contention that the current situation warrants any dismissals.*
2. *We do not accept your contention that the positions which have been advertised are not proper to current staff.*
3. *We do not accept your proposal to outsource parts of our current work remit.*

Given our differences in regard to this dispute, we would propose that the matter would be referred to the Labour Relations Commission Services (LRC*) for hearing and in this regard our interest would be represented by our union SIPTU.*

We trust that you would agree with our proposal, given that representation in relation to Grievance is enshrined in our Collective Agreement."

This letter was also sent to the members of the Board but they were told to deal with DL. The staff's, relating to impending redundancies, contact details were removed from the respondent's magazine. The respondent would not attend the LRC meeting. Correspondence passed between the claimant and DL. A collective meeting was held on 13 April 2010. The discussion regarding intimidation went nowhere.

A letter dated 15 April 2010 was sent to the claimant to inform him of his redundancy. The claimant gave evidence of loss.

On cross-examination he said he, and his colleagues, felt the respondent had an agenda to get rid of them.

During cross-examination the claimant stated that the respondent could have set down a consultation period in advance of the announcement on 26 January 2010, however he felt that the redundancies were presented as a "done deal" on that date. The consultation period only arose afterwards when the REOs had not applied for the available positions. Had there been a

consultation period in advance of the meeting of 26 January, the claimant would have suggested other options such as surveying staff to see if there were any employees interested in suggested the selection process of last in, first out; as he was the longest serving and when he was employed in April 2001 his role was described as that of support group co-ordinator in the job description that he received.

In reply to questions from the Tribunal, the claimant stated that when he was originally recruited in 2001 it was to the position of support group co-ordinator for the southeast. The claimant stated that the three posts to be created were in fact exactly the same as his current role but that he was never offered the position.

He stated that the employee representatives had specifically wanted union representation at the various meetings, as they did not have previous experience of such a process. The claimant confirmed that he did not put such options as job-sharing and early retirement etcetera to his colleagues but might have done had there been a period of consultation prior to 26 January 2010. The claimant stated that he did not apply for the available positions as he felt that it was his own job in nature and name.

The claimant's colleague (MO) who was also an employee representative gave evidence to the Tribunal. He had discussed the option of other positions and job-sharing with his colleagues.

At the meeting on 2 March 2010 he and the claimant had put forward the proposal of negotiating on the difference in hours. However, they were not listened to in any reasonable manner and there were no counter-proposals put forward. He did not apply for the positions as he saw it as applying for the job he held.

In reply to questions from the Tribunal, MO stated that another proposal which could have been considered was re-deployment to other available positions such that of web design manager, helpline manager or the CEO position which the claimant could have fulfilled.

Majority Decision:

The Tribunal determines by a majority decision, with Mr. Jordan dissenting, that the termination of the claimant's employment was not an unfair dismissal and accordingly her claim under the Unfair Dismissals Acts, 1977 to 2007 fails.

Dissenting Opinion:

The following is Mr. Jordan's dissenting opinion:

1. I find that the three new Regional Co-ordinator Posts created by the respondent in 2010 were simply the renaming of the existing Regional Executive Officer posts and, therefore, should have been allocated to three of the existing regional executive officers. In the absence of any agreed method on the allocation of these posts amongst the existing seven post-holders, then in my opinion that allocation should have been effected on the basis of LIFO. As the claimant had the longest service he should have been offered one of the three renamed positions.

2. The respondent engaged the services of an outside HR specialist to advise them on how the redundancies should be handled notwithstanding that the acting CEO was an expert in this area. At the same time the respondent refused to allow the claimant to use his trade union official to accompany him to meetings concerning his future employment with the respondent. This, in my view, placed the claimant at a disadvantage and was, therefore, unreasonable and unfair.

3. The respondent also refused the request of the claimant to utilise the services of the Labour Relations Commission. I believe that this said refusal again placed the claimant at a disadvantage and was, therefore, unreasonable and unfair.

4. I find that the lack of consultation with the claimant prior to his being told that his post was being made redundant was a flaw in the process and in my opinion could have led the claimant to believe that any further attempt by the respondent to engage in a consultation process was simply in order to implement the decision that had already been made.

Accordingly, I believe that the claimant was unfairly dismissed.

Determination:

The following is the majority decision of the Tribunal.

The Tribunal having considered the evidence adduced at the hearing finds that a redundancy situation arose due to restructuring and that the respondent acted reasonably and fairly towards the claimant in addressing that situation. The Tribunal accepts that the said restructuring was carried out in order to more effectively achieve the aims of the respondent and to get the best value from the funds raised by the respondent.

The Tribunal accepts that there was some misunderstanding when the alternative positions were first notified to the claimant but finds that this was remedied as soon as the respondent became aware of the misunderstanding and well in advance of any termination date.

The Tribunal finds that there was a failure by the respondent to consult or engage with the claimant prior to announcing a restructuring of the company but the Tribunal finds that this failure was effectively cured by the fact that the claimant remained in employment some three months after the notification of the restructuring and before the restructuring was implemented thus giving the claimant a reasonable opportunity and time to consider the matter and engage

with the respondent.

The Tribunal finds that the claimant in law had no right to be accompanied by his Union representative. However, the Tribunal is of the view that if union representation is requested it is preferable that this request be acceded to if possible.

The Tribunal finds that the three new positions as advertised were in effect the positions that had been carried out by the seven Regional Executive Officers ("REOs"). However, the respondent's restructuring required a need for three as opposed to seven. There was a further new managerial post and some contract work. All of the REOs, including the claimant, were given the opportunity to apply for these new positions and if they did not wish to so apply they had the option of statutory redundancy. The Tribunal is absolutely satisfied that the respondent intended that some of the REOs would take up the alternative positions but none of them, including the claimant, took up the opportunity.

The Tribunal whilst acknowledging that they found the claimant to be a committed, dedicated and very credible witness nonetheless is satisfied that the only alternative that would have been accepted by him was the retention by the respondent of the entire seven REOs albeit that the REOs, including the claimant, were prepared to offer some compromise regarding hours worked.

The Tribunal would like to note that it does not believe the claimant meant to be offensive when the word "cloak" was used in his Form T1A submitted to the Tribunal but rather the word was used to convey his belief regarding the redundancies.

In the circumstances the Tribunal, by majority, finds that the claimant was dismissed by reason of redundancy and that the procedures used by respondent were fair and reasonable. Accordingly, the claim under the *Unfair Dismissals Acts 1977-2007* fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd) _____
(CHAIRMAN)