EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE –**Claimant** UD1088/2010
RP1509/2010
MN1055/2010

against

EMPLOYER - **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms K.T. O'Mahony BL

Members: Mr D. Hegarty
Mr J. Flavin

heard these claims at Cork on 24 October 2011
and 6 February 2012

Representation:

Claimant:
Ms Rachel O'Flynn BL instructed by Ms Marian O'Tuama, O'Sullivan & Co. Solicitors, Joyce House, Barrack Square, Ballincollig, Co. Cork

Respondent:
Mr Conor O'Connell, Construction Industry Federation, Construction House, 4 Eastgate Avenue, Little Island, Cork

The determination of the Tribunal was as follows:

Summary of the Evidence

The respondent is a property management company. It owned and managed a fourteen unit ground-floor shopping centre, which opened around 1990. In the same complex as the shopping centre there was a library and over it, on the upper floor, a shop. The latter part of the complex is owned by a different company (DC), a director of which is the son of a director of the respondent.

Under a contract with DC the respondent was also responsible for the maintenance of that part of the complex owned by DC. The tenants/lessees were responsible for the internal maintenance of their units.

The claimant was employed by the respondent as caretaker of the shopping centre from 1 June 2000. He was provided with a list of around 30 duties, which involved responsibility for the maintenance of the communal and open areas including the car park which were owned by the respondent and DC.

The claimant worked Monday to Friday 8-00am to 10-00am and 2-30pm to 6-00pm. Around mid-2008 due to the recession and competition from a new local shopping centre, the number of units leased out by the respondent dramatically decreased and the claimant agreed with the respondent that he take over the opening up of the centre on Saturdays and have his hours of work during the week reduced, commencing later in the afternoons. According to a director of the respondent (the director) the respondent did not have sufficient work for the claimant in 2009 but maintained him in employment, on full wages, hoping for an upturn in the economy and business.

By late 2009 the three remaining units leased out in the shopping centre were occupied by two businesses both of which had external access for customers such that they were not reliant on access through the mall. During this time a community welfare organisation (CWO) agreed with the respondent to take out a lease on the eleven unoccupied units. The shopping centre area including the mall area was closed from 1 January 2010 until 17 March 2010 to allow for renovation works to facilitate the new tenant, CWO. In early February 2010 DC notified the respondent that, effective from April 2010, it was terminating the maintenance contract held by the respondent.

On 25 February 2010, the respondent gave the claimant written notice that his position as caretaker was to be declared redundant as and from 31 March 2010 and details of his redundancy paymentwere included. By letter dated 15 April 2010 the respondent informed the claimant that his redundancy lump sum payment was in the respondent's office for collection. The claimant neithercollected the redundancy payment nor signed form RP50. The director's position was that she hadasked the claimant to spend the last two weeks of his employment familiarising CWO with therunning of the property. The claimant's position was that at the director's request he had spent thosetwo weeks training in one of CWO's employees in his job and that particular person is now doinghis job, including maintaining access to and egress from the car park.

The respondent's position is that there was no transfer of any undertaking; rather that part of the centre owned and formerly leased out as individual/separate units is now leased out as a single unit to CWO, which is responsible for the maintenance of its property under thelease, with the mall area of the former shopping centre now no longer a communal area but formingpart of the renovated single unit. There is no longer access between this unit and that part of thecomplex owned by DC, which is now responsible for maintenance of its open and communal areas.

Determination:

The Tribunal is satisfied that the change in the nature of the respondent's business from multiple lettings of its property, where the majority of the units were vacant, to a single letting did not involve a transfer of an undertaking.

While the respondent only produced a copy of its original contract with DC in respect of its carrying out certain maintenance duties for DC and failed to produce the original contract later to the claimant's representatives, the Tribunal on the balance of probability, accepts the respondent's evidence in respect of the existence of the contract and that the respondent and DC are distinct companies. The Tribunal is further satisfied from the claimant's own evidence as to the duties he performed that he was not responsible for the maintenance of the internal property owned by DC.

That part of the building, which was formerly a shopping centre owned by the respondent and leased out by it as individual and separate units is now leased out as a single unit to CWO (a community welfare organisation) with its mall area no longer a communal area but forming part of the renovated single unit. As was the case with the former tenants, CWO the new tenant is responsible for the internal maintenance of the property it holds under the leasing agreement. While the claimant laid emphasis on his duties in the car park he accepted in cross-examination that the vast majority of his duties as listed in the document dated June 2001 no longer existed. In these circumstances the Tribunal is satisfied that the respondent is entitled to rely on section 7(2)(b) of the Redundancy Payments Acts, 1967 to 2007, which provides:

"an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish".

Accordingly, the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The claimant is entitled to a lump sum payment under the Redundancy Payments Acts, 1967 to 2007 in accordance with the terms set out by the respondent and based on the based on the following criteria:

Date of Birth: 20 April 1937
Date of Commencement: 1 June 2000
Date of Termination: 31 March 2010
Gross Weekly Wage: €317.00

As the evidence shows that the claimant received in excess of his statutory entitlement to notice the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)