EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	CASE NO.
EMPLOYEE	RP1923/2010
Claimant	UD1419/2010
	MN1364/2010
	WT585/2010

Against

EMPLOYER
Respondent

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. Ryan

Members: Mr. J. Goulding
Mr. P. Woods

heard this claim at Dublin on: 1st December 2011
and: 14th February 2012
and: 15th February 2012

Representation:

Claimant: Mr. Rory Costelloe B.L., The Law Library, The Four Courts, Dublin 7

Respondent: Mr. Eamonn McCoy, Ibec, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:-

The claimant's representative formally withdrew the claim under the Redundancy Payments Acts, 1967 to 2007 at the outset of the hearing.

Respondent's Case

The Tribunal heard evidence from NOC, the Vice President of human resources in the respondent company who was part of the senior management team with responsibility for running the operations of the company in Dublin. NOC told the Tribunal that the company publicly announced redundancies on 12th December 2008. On the Monday prior to this announcement he had travelled to the company's offices in Zurich, as part of a team, to present a business plan on how to improve the performance of the Dublin team. When they arrived in Zurich the presentation was set aside and they were presented with a number of slides which showed that the intention was to close down the Dublin operation. NOC and the team had no prior knowledge of this before arriving at the company's offices in Zurich.

At the meeting in Zurich NOC and the chief financial officer were asked to co-operate with the company's plans. They were told that the company would pay the employees their statutory redundancy but it was not in a position to pay anymore than that. NOC and the chief financial officer were required to sign confidentiality agreements prior to leaving Zurich.

The first stage of redundancies took place on 3rd April 2010 and 600 employees were made redundant at this time. This did not include the claimant or anybody in the claimant's area of work. The claimant was not made redundant until 18th December 2009.

In April 2009 the Dublin operations employed over 1100 people in a number of divisions. The claimant worked in line maintenance and in April 2009 there were 205 employees in this area. The majority of people in other areas had already been made redundant.

The selection criteria and formula used throughout the redundancy process and in respect of the claimant was established at the first stage of redundancies in April 2009.

On returning from Zurich, NOC agreed to help with the administration and winding down of the company in Dublin. At the time the company had 9 Trade Unions and they held meetings with all of them on the day of the announcement. A union forum was organised which met with the company on a regular basis until the first redundancies took place.

Between April and September 2009 the company told the union forum that it expected to dissolve the line maintenance operations in Dublin in August. This was then changed to 31st October. During this time it was explained to the union forum that efforts were being made to sell the line maintenance operations and they were kept up to date of all commercial developments.

There were three companies, potential buyers, in the running for taking over the operations of the line maintenance. Two of these did not come to fruition. The union forum was updated throughout the expressions of interest process.

On 7th August 2009 NOC received correspondence from one of the unions within the union forum signalling to the company that it was their view that the workers involved in line maintenance should be covered by the Transfer of Undertakings Regulations and have a natural entitlement to transfer to a new service provider should the company successfully outsource the line maintenance

operations.

At this stage it was not clear what was going to happen to the line maintenance operations. There were discussions that took place from September that NOC was not involved in. He had been involved in the discussions with one of the interested companies in relation to due diligence, rates of pay, types of work. This company had previously sent over senior members of staff to take part in the discussions but ultimately the discussions did not mature.

The respondent company were intent on finding someone to take over the line maintenance operations and looked at line maintenance as a stand alone business. Some of the 3rd parties who the respondent company had line maintenance contracts with pulled out of these contracts because of the uncertainty surrounding the continuation of the line maintenance operations. This resulted in line maintenance being over manned.

By October 2009 NOC was meeting with the union forum fortnightly and at these meetings he provided the parties with a rundown of numbers and headcounts.

At a meeting on 28th October 2009 the parties were informed that in respect of the line maintenance operations, the respondent company were now having discussions with one company, ALT, who were coming into the picture as a potential company that could take over the line maintenance business. The deadline for winding down of the respondent company was now moved from 31st October to 30th November to allow for the progress being made in discussions with ALT. At the meeting on 28th October the parties were also told that ALT were in the process of working out the skills and competencies they would require to run the operation. ALT had told the respondent company that they were already overmanned by 650 people.

On the 12th November 2009 the company met with the union forum again, advising of the outcome of a meeting with ALT on 10th November at which ALT outlined the qualifications required of any employees who may potentially transfer over with the line maintenance operation. ALT wanted 82 technical engineering staff with B1/B2 and Cat A or higher qualifications. NOC told the Tribunal that the claimant possessed an A qualification. In total ALT required 82 of the 205 line maintenance staff.
The fact that the claimant did not receive the appropriate training to make it on the list being transferred is not relevant Tribunal does not have to trouble itself as to whether the What is relevant is whether the claimant had the right to transfer under TUPE
123 line maintenance staff were made redundant on 18th December 2009 including the claimant.
In order to determine what staff would be made redundant the respondent company used the selection criteria set down by ALT in their briefing on 10th November 2009. It was accepted that moving people who had the longest service would be unfair and unworkable. There were a significant number of staff who had greater service than the 82 chosen but did not possess greater qualifications.

There were 3 main elements to the criteria used for the selection process for the transfer of employees from the respondent company to ALT.

Qualifications and Role
Does the employee have the qualifications specified by ALT and are they in an equivalent position

Location within Line Maintenance Service
The respondent company were also advised by ALT that staff being transferred must have a statement from the respondent company's quality assurance stating what each person has in relation to their certifying authorisations, i.e. B1/B2, Cat A etc.

NOC told the Tribunal that the claimant had Cat A qualification but there was approximately 30 people with the same qualification who had longer service than the claimant.

The Respondent company put in place a group of competent individuals to devise and oversee the selection procedure. The group was comprised of MT, Head of Aircraft Services, FB, Quality Manager and LD, Line Maintenance Manager. This group was assembled because they were recognised as competent and could deal with factual and technical qualifications of employees. This group had responsibility for considering and reviewing suggested amendments to the criteria as well as any grievances/appeals raised. In the event of an employee being dissatisfied with the decision of the group the matter may be pursued to NOC, VP of Human Resources. NOC told the Tribunal that he was there to deal with issues that were not factual and technical and acknowledged that the claimant did raise an appeal.

In respect of the 205 remaining staff affected by the impending redundancies and transfer, a number of meetings were held explaining that their date of termination would be the same and they would not receive ex gratia payments, only statutory. NOC held a number of question and answer sessions with the line maintenance staff to explain what would be happening. NOC told the Tribunal that the operation continued to run un-faltered. It was also explained that letters of redundancy had been finalised and passed to the relevant line managers of the shifts in the area to hand out to individuals. NOC told the Tribunal that there would have been no doubt that all staff were aware of what was happening within the respondent company.

The respondent submitted a document to the Tribunal that showed where the claimant would have been placed among the staff who transferred to ALT. The claimant was inserted into this list to show where he would stand among his comparators. The two employees above the claimant had less service than the claimant but a higher qualification, B1 mechanical unrestricted. All of the people on this list were there because they either had higher qualifications than the claimant, authorisation for the area and then their service was considered.

The respondent submitted a document to the Tribunal containing 23 employees with the same qualification as the claimant but longer service. All of these employees listed in this document were made redundant.

NOC told the Tribunal that the claimant did not transfer to ALT because of the qualifications he possessed. The requirements had been satisfied earlier by people with higher qualifications than the claimant and also people with the same qualifications as the claimant but longer service.

On 16th November 2009 NOC received an email from the claimant wishing to enter the appeal process with a view to being included in the transfer of staff to ALT on the grounds of his technical qualifications. He also listed his qualifications in the email but these were not relevant to ALT and not required. He was making NOC aware that he had these qualifications. NOC responded to the email and told the claimant he would get back to him. He copied this email to LD and MT of the competent group.

On 30th November 2009 MT emailed the claimant to emphasise the process that was used and how people were selected. He explained to the claimant that he did not satisfy the requirements to move to ALT. MT told the claimant that if there was any new information that he wished to have taken into account he should bring it to the attention of the competent group immediately. MT further informed the claimant of his right to appeal this decision to NOC but disagreement with the criteria did not constitute a basis for appealing the decision.

NOC told the Tribunal that he was involved in the selection criteria process with the union forum but MT ultimately decided who was to be made redundant. NOC was involved in the selection process and the methodology used was applied across the whole organisation in respect of effecting the redundancies. MT is no longer in the country and was not available to provide the Tribunal with evidence.

When the claimant received his written offer of employment with the respondent company in 2007 he was informed therein that the offer was subject to him achieving a Category A licence within one year of the offer. The claimant achieved this qualification and on 6th May 2008 he was informed of his promotion to the position of Aircraft Engineer in the line maintenance department with a commencement date of 14th January 2008.

NOC provided the Tribunal with information about the extensive training and upskilling offered to employees post the announcement of the respondent company's closure. When the decision was made to close the respondent company the training department underwent a period of trying to get employees as highly qualified as possible and provide them with accreditation before the training school within the respondent company closed down. The reason for this training was to help employees improve their CV's, therefore improving their individual situations when seeking future employment. The offer of training was open to all employees within the respondent company.

On 28 July 2009 the administration manager advised staff not to apply for any new approvals/training. A notice was issued to all line maintenance employees informing them of the termination of company approvals due to the impending closure of the respondent company.

NOC did not give the claimant his written notice of redundancy or it's accompanying document, declaration of acceptance of redundancy from the respondent company. These documents were issued to each individual via their line managers and the process was fair and transparent.

There were a lot of people dissatisfied with the situation. Some employees chose not to sign the documents on the day they received them. Some signed them a few days later. Some people did

not sign the documents until January. The claimant never signed or accepted the documents. NOC

made direct contact with the claimant by phone and email to try to resolve the situation.

During cross examination NOC explained that the claimant provided employees with on the job training after 12th February 2009 on the line maintenance operations. These employees were mechanics, who sought to upskill together, without Cat A licences who subsequently received the licences as a result of the training. All of these mechanics transferred over to ALT. These mechanics identified themselves as needing Cat A training and this training was provided to them. NOC maintained that the training of these mechanics did not displace the claimant on the line or put him at a disadvantage because at the time of the training of these mechanics there was no notion of the requirements that ALT would set down.

NOC confirmed that these mechanics received their qualifications after the announcement to close the respondent company. He said there was nothing untoward about training these mechanics and the selection criteria set down by ALT was not about when people got qualified, it was just that they were qualified. The intent of training these employees was never to disadvantage anyone it was to provide employees with an advantage when seeking future employment.

Prior to the announcement to close the respondent company the claimant, in January, had requested to take part in training for a B1 qualification. It was decided based on the claimant's qualifications to deny this request. This decision was not revisited after the announcement to close the respondent company.

ALT was not a competitor of the respondent company but a customer.

On the 16th November 2009 the claimant emailed NOC stating that he wished to enter the appeals process on the grounds of his technical qualifications. He received a reply from NOC saying "we will consider the points you have raised and come back to you." The appeal then went to the competent group, MT head of aircraft services, FB, quality manager, and LD the line maintenance manage. This group was collectively responsible for deciding who would transfer to ALT and who would be made redundant. They made their decision based on the selection criteria of qualifications, location and service.
They were made redundant prior to the Transfer. This is specifically what TUPE was brought in to counteract.
NOC confirmed that the same people who made the original decision, re selection of staff to transfer to ALT, were responsible for dealing with any appeals received in respect of their decision.

On 30th November 2009 the claimant received an email from MT, chairman of the competent group, informing him that he had not been selected as one of the 96 to transfer to ALT. He reminded him that if he was dissatisfied with the decision he had the "right to appeal to NOC, by means of writing to me detailing the grounds for your appeal. Please note that disagreeing with the criteria does not constitute a basis for appealing the decision." The claimant subsequently appealed this decision on a number of grounds on 1st December 2009.

On 2nd December 2009 MT emailed the claimant stating that he did not consider the issues he raised to be grounds for appeal and as such would not be granting the claimant an appeal hearing. NOC maintained that the claimant raised 3 issues, none of which changed the criteria, these points

were considered and responded to.

On 21st December 2009 the claimant sent an email to NOC seeking to appeal the decision of MT not to grant him an appeal hearing. No appeal hearing ever took place in respect of the claimant. NOC replied to the claimant's email on 22nd December 2009 asking him to call LD, his line maintenance manager to clarify his situation and status. The claimant responded stating that he had tried to make contact with LD. ON 23rd December NOC sent another email to the claimant explaining that he could contact ML to arrange a suitable time to complete all necessary paperwork. At the claimant's request all of the necessary paperwork was sent to him for his perusal.

In reply to questions from the Tribunal NOC said that the transfer of the 82 employees took place on the same day as the redundancies, 18th December 2009. No P45's were issued to the staff that transferred. They signed a number of documents to effect their transfer and did not receive any redundancy payments. They also received a new contract of employment from ALT. NOC told the Tribunal that ALT had a massive input into the selection criteria that was established for the transfer of employees, they stated how many they wanted and the qualifications they must possess.

The Tribunal heard evidence from FB who explained that he was not involved in the selection process nor did he have any responsibility for valuing appeals. He explained that the existence of the claimant's extra qualifications, other than his Cat A and authorisation of ramp approval did not give him any advantage in the selection process.

During cross examination FB confirmed that even though he was listed as a member of the competent group his main role was to set up the criteria used.

Claimant's Case

The claimant told the Tribunal that the list submitted by the respondent which purported to contain staff senior to him was inaccurate and that he should have been placed second on it.

The claimant told the Tribunal that in January 2009 he sought further training from the respondent company. He needed to get a B type course, which came up in January 2009. He applied for a place on this course but was refused because he had limitations on his B1 qualification. When such courses were being provided by the respondent company participants would sign a bond which the claimant was willing to do it in order to receive the training.

The claimant was working in line maintenance and was carrying out daily inspections on aircraft. The claimant worked four 12 hour shifts, two at night and two during the day. During these shifts he supervised the ramp checks and trained employees on wheel and brake inspections. They got trained up to Cat A level and subsequently displaced him on the line. They had more seniority than the claimant and then displaced him in the transfer to ALT. All of the employees to whom the claimant provided training subsequently transferred over to ALT. The claimant did not receive any training in 2009 and was not aware of a notice from HR seeking expressions of interest for training.

On 14th and 15th November 2009 the claimant was working on the day shift. There was a man

putting up a list on a notice board and if your name was on it you were part of the transfer and if your name was not on it you were being made redundant. He did not receive an individual notice of redundancy. On Monday 16th November 2009 the claimant was working on the night shift. There was an issue with his B Licence, the respondent company did not recognise his B1 licence internally which would cover him for daily inspections. The claimant felt that this could have been addressed at an appeal.

The claimant did not, at any point, get an opportunity to address the competent group dealing with appeals. He never saw or met with NOC, MT, FB until December 2009. There was a process of emails because 95% of the time he was based airside, outdoors, past security. The HR office was approximately 2 miles away.

On 1st December 2009 the claimant emailed the competent group and thought that they would deal with his appeal and his issue surrounding his B1 Licence. He was surprised to hear at the Tribunal hearing that FB was not an active member of this group. The claimant never received an appeal hearing. He was surprised and disappointed when his request for an appeal hearing was rejected.

On 21st December 2009 the claimant emailed NOC. He thought this was the last stage in the appeal process. He did not get an appeal hearing at any point in the process.

The claimant maintains that he is entitled to transfer to ALT under the Transfer of Undertakings Regulations, and believes he should have been included in the number of staff that transferred to ALT. The claimant asked the Tribunal to reinstate him in order for a transfer to take effect otherwise this has all been a waste of time.

During cross examination the claimant confirmed that a number of employees who transferred to ALT had higher qualifications than him but disputed that they possessed these qualifications at the time of the announcement to close the respondent company. He accepted that between the 12th February and 28th July 28 employees from line maintenance had their approvals authorised by quality but he said there was no breakdown given of how many were new approvals and how many were renewed approvals. The claimant accepted that the company were public and transparent about the training, through the union forum.

The claimant felt that it was known in January, when he sought to attend the B1 training course, that the minimum requirements of ALT would be Cat A and the lads working in ALT would have know that he was only in the respondent company for 2 years. He felt there was close contact between the respondent company and ALT but he could not prove this.

When the announcement was made that the respondent company was to close the claimant was aware that there was significant interest in the line maintenance operations from outside parties. He said that some of the staff were smug that there would be a transfer of undertakings with a potential buyer. He agreed that he did not know this as a fact.

In respect of seeking an appeal hearing the claimant agreed that he received a reply from MT but he was dissatisfied with the reply because it did not address that he had structural experience, he felt he could have been trained to B1 14 and if he had been given an appeal hearing he would have

discussed this at same.

Although the claimant did not specifically say that he was unhappy with the response he received from MT he did however email him again asking for an appeal.

The claimant agreed that he only had a Cat A licence approved by the respondent company. He also possessed a B1 licence from the Irish Aviation Authority which he feels should have been recognised and approved by the respondent company as B1R-08, thus making him eligible to transfer to ALT. The claimant felt this issue could have been addressed at an appeal hearing if such a hearing had been granted to him.

The claimant maintained that he never received individual notification of termination of his employment. He went to work as normal on 16th and 17th December 2009 when he was rostered to work two 12 hour day shifts. The claimant attended for work on Friday 18th December 2009 and discovered the place was deserted and he had nothing to do. On Monday 21st December 2009 he sent an email to NOC because he thought there was to be a period of an overlap for any outstanding issues. He directed the tribunal to two documents issued by the respondent company which mentioned an overlap period to help insure employees were treated properly. The claimant thought he could use this overlap period to sort out his issues and at this stage he still was not in receipt of his notice of redundancy.

The claimant told the Tribunal that when he spoke to LD, the line maintenance manager, on the phone he was told that all the staff were now gone and the respondent company was effectively closed down. He told LD that he had not received any notification or documents in respect of his redundancy and LD told him that it was common knowledge that the place was closing down. He asked the claimant if he would come in and cooperate with the system.

The claimant received emails in January, after the Christmas holidays, with a copy of his final payslip and a letter of declaration to sign. He did not sign this declaration. The claimant confirmed, that at this point in January 2010, he was aware that he was being made redundant.

The claimant confirmed that he was a member of a trade union that formed part of the union forum. He told the Tribunal that the union signed off on all proceedings on behalf of its members. No ballot took place among the members of the trade union.

In reply to questions from the Tribunal the claimant explained that he requested training in 2009 and this request was refused. He did not apply for any further training after January 2009 because there was nothing suitable.

The claimant explained that there was no physical move of people to ALT as it took over operations in the existing area. Only the respondent company's offices were closed down.

In reply to questions from the Tribunal JOS, the respondent company's secretary confirmed that the respondent company received confirmation that there was an agreement between ALT and the respondent company. He could not recall the exact details but the consideration from ALT in return for facilitating the transfer of line maintenance operations and staff was that the respondent

company were released from their obligation to provide line maintenance services to ALT. Thus the consideration provided was the cancelling of the contract.

DETERMINATION

The Respondent was suffering serious losses and publicly announced redundancies on 12th December 2008.

The first stage of redundancies took place on 3rd April 2010 and 600 employees were made redundant at this time. This did not include the claimant or anybody in the claimant's area of work. The claimant worked in line maintenance and in April 2009 there were 205 employees in this area. The majority of people in other areas had already been made redundant. The claimant was not made redundant until 18th December 2009.

In April 2009 the Dublin operations employed over 1100 people in a number of divisions. The selection criteria and formula used throughout the redundancy process and in respect of the claimant was established at the first stage of redundancies in April 2009.

Between April and September 2009 the Respondent told the union forum (referred to above) that it expected to dissolve the line maintenance operations in Dublin in August. This was then changed to 31st October. During this time it was explained to the union forum that efforts were being made to sell the line maintenance operations and they were kept up to date of all commercial developments.

There were three companies, potential buyers, in the running for taking over the operations of the line maintenance. Two of these did not come to fruition. The respondent entered negotiations with the third potential buyer – ALT. The union forum was updated throughout the expressions of interest process.

On 7th August 2009 the respondent received correspondence from one of the unions within the union forum signalling to the company that it was their view that the workers involved in line maintenance should be covered by the Transfer of Undertakings Regulations and have a natural entitlement to transfer to a new service provider should the company successfully outsource the line maintenance operations.

ALT were in the process of working out the skills and competencies they would require to run the operation. ALT had told the respondent company that they were already overmanned by 650 people.

On the 12th November 2009 the respondent met with the union forum again, advising of the outcome of a meeting with ALT on 10th November at which ALT outlined the qualifications required of any employees who may potentially transfer over with the line maintenance operation. ALT wanted 82 technical engineering staff with B1/B2 and Cat A or higher qualifications. NOC told the Tribunal that the claimant possessed an A qualification. In total ALT required 82 of the 205 line maintenance staff. The Claimant gave evidence that he was not provided with proper

training so that he could obtain the technical skills which ALT required.
The fact that the claimant did not receive the appropriate training to make it on the list being transferred to ALT is not relevant in this Tribunal's opinion. Neither does the Tribunal consider thelimited appeal mechanism, offered to the claimant, relevant. What is relevant is whether the Claimant had the right to transfer to the new employer under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003) (hereinafter referred to as the "the Regulations") The respondent was transferring part of its business (line maintenance) to ALT. ALT did not want all the employees which the respondentcurrently had in the line maintenance section. ALT stipulated the qualifications that any employeemust have before he/she could transfer and even then only 82 employees in the line maintenance section were required. The remaining employees (positions) not having the required qualificationswere made redundant on the same day (the 18th December 2009) that the 82 employees were transferred to ALT. The claimant explained that there was no physical move of people to ALT as ittook over operations in the existing area. Only the respondent company's offices were closed down.

The Tribunal has to consider whether the claimant is protected by the Regulations.

Applicable Law:

The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (S.I. No. 131 of 2003)has as its main aim the safeguarding of the rights of employees in the event of a transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger.

The Tribunal considered the Regulations in detail and the relevant case law as follows:

- **Clause 3 (1)** *"These regulations apply to any transfer of an undertaking, business, or part of an undertaking or business from one employer to another employer as a result of a legal transfer (including the assignment or forfeiture of a lease) or merger".*
  Without question the Regulations apply in the case before the Tribunal since "part" of thebusiness (the line maintenance section) transferred from the Respondent to ALT and thuscomes within the ambit of Clause 3 (1). .

- **Clause 3(2)** inter alia defines "Transfer" in the following terms:
  "transfer" means the transfer of an ecomomic entity which retains its identity'. Clearly the line maintenance section transferred to ALT and retained its economic identity. Not only this but there was no physical movement of employees or resources. The employees who transferred continued working in the same physical location that they always worked in.

- **Clause 4 (1)** of the Regulations states

  "The Transferor's rights and obligations arising from a contract of employment existing on

the date of the transfer, shall by reason of such transfer, be transferred to the Transferee". This clearly did not happen in the claim before this Tribunal since the claimant's position was made redundant on the same day that 82 of the claimant's colleagues were transferred to the Transferee (ALT).

- **Clause 5 (1) stipulates**:
  "The transfer of an undertaking, business or part of an undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee and such a dismissal, the grounds for which are such a transfer, by a transferor or a transferee is prohibited". The dismissal of the claimant by the Respondent is exactly what is prohibitedby this clause.

- **Clause 5 (2)** deals with the circumstances in which dismissals can take place. This clause reads:
  "Nothing in this Regulation shall be construed as prohibiting dismissals for economic, technical or organisational reasons which entail changes in the workforce".

  The respondent's representative has argued that nothing in the Regulations prevents the respondent from reducing his workforce prior to dismissal and then transfer the business orpart of the business in a slimmed down fashion and pretty much to the transferees' requirements. This proposition was not supported by any case law. For the Tribunal to accept such proposition it would mean reversing the order in which Clause 5 was drafted, whereby a Transferor could for economic, technical or organisational reasons reduce his workforce (as envisaged by Clause 5 (2) and then transfer the business in such a way thatwould not fall foul of clause 5 (1) because there would be no dismissals - the cull alreadyhaving taken place.
  If the legislature had intended this then it would have drafted this clause accordingly.
  [It is clear of course that post transfer the regulations do not prohibit dismissals for economic technical or organisational reasons]

- **Clause 9(1)** of the Regulations provides as follows:
  "A provision in any agreement shall be void in so far as it purports to exclude or limit the application of any provision of these regulations or is inconsistent with any provisions ofthese regulations". It is clear from this that the Transferee (ALT) cannot only takeemployees with certain qualifications and not take the other employees.

  The fact that the transfer of the employees' rights are automatic has been reinforced by voluminous case law. In the case of **Rotsart de Hertaing V J Benoidt SA (in liquidation)and Another Case C-305/94** (hereinafter referred to as "the Rotsart Case") heard in the European Court of Justice in 1994 the court stated as follows:

  "The contracts of employment and employment relationships existing on the date of the Transfer of an undertaking were automatically transferred by the mere fact of the transferof the undertaking, despite any contrary intention on the part of the transferor or transfereeand despite any refusal by the transferee to fulfil l his obligations. The transfer of such contracts and relationships took place on the date of the Transfer of the

undertaking and could not be postponed to another date at the will of the transferor or the transferee".

In the claim before the Tribunal it is instructive that the date of the redundancies, the 18th December 2009, was also the date that ALT took over the 82 employees it wanted. The transferor and transferee cannot pick and chose dates to suit their particular purposes. There is an automatic transfer of the employees' rights.

Most tellingly **the Rotsart case** goes on to say:
"it should be noted that, by reason of the mandatory nature of the protection afforded by the Directive, and in order not to deprive workers of that protection in practice, the transfer of the contracts of employment could not be made subject to the intention of the transferor or transferee, and more particularly that the transferee could not obstruct the transfer by refusing to fulfil l his obligations". Clearly in the case before the Tribunal the Respondent and ALT entered into anAgreement which deprived the employees of the protection afforded by the Directive.

The Tribunal considered whether a single employee was protected by the Regulations in circumstances where there were extensive discussions with the Union forum in relation to the transfer/redundancies. The European Court of Justice decided in the case of **Christel Schmidt V Spar und Leihkasse der fruheren Amter Bordesholm, Kiel und Cronshage (Case C-392/92)** that "the protection afforded by the Directive (Regulations)extended to all staff and had therefore to be guaranteed even where only one employee was affected by the transfer"

Having carefully considered all the evidence, the relevant legislation, and case law the Tribunal determines that the Respondent did not act reasonably and accordingly determines that the dismissal was unfair. Having regard to the satisfactory employment history of the claimant the Tribunal determines that re-instatement is the most appropriate remedy.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
Chairman