EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: CASE NO.

EMPLOYEE - **Claimant** UD2201/2010
MN2165/2010
WT985/2010

against

EMPLOYER - **Respondent**

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. Levey BL

Members: Mr L. Tobin
Mr J. Flannery

heard these claims at Dublin on 20 March
and 21 & 25 May 2012

Representation:

Claimant:
Mr John Curran BL instructed by, on the first day,
Ms Carol Fawsitt and, on the subsequent days,
Ms Nuala Clayton both of Hayes Solicitors,
Lavery House, Earlsfort Terrace, Dublin 2

Respondent:
Ms Mary Fay BL instructed by, on the first day,
Mr Seamus Given and, on the subsequent days,
Ms Gill Woods both of Arthur Cox Solicitors,
Earlsfort Centre, Earlsfort Terrace, Dublin 2

The determination of the Tribunal was as follows:

The claimant, who is an advertising art director, was employed by the respondent, which was a traditional advertising business but part of a multi-disciplinary communications group, in October 2007 after the respondent obtained an advertising contract with a large financial institution (the institution). A colleague of the claimant (CW), who is an advertising copy writer, was employed at the same time. It is common case that the claimant was effectively head hunted by the respondent

following an approach from the creative director (CD) to the claimant's partner.

Under his contract of employment the respondent would fund 100% of the cost of a particular health insurance package. The contract makes clear that this is subject to benefit in kind tax. As part of his induction process into the respondent met an administrator. There is a dispute between the parties as to whether the claimant exercised his option to avail of the health insurance package by filling out the relevant paperwork and giving it to the administrator. While this dispute has resulted in action being taken in other fora it will be necessary to refer to it in relation to the matter in consideration by the Tribunal.

The claimant as art director, CW and a consumer planner made up a so-called triumvirate which dealt with, amongst others, the institution's account. There is no suggestion other than that the institution's account was handled in an entirely satisfactory manner by the triumvirate and the claimant in particular. It is clear that the respondent regards the claimant as having a high level of capability.

When the economic downturn began after 2008 this had a serious effect on the fortunes of the respondent and in 2009 the respondent merged with another company in the group which had a more tactical role in the area of sales promotion. The combined income of the merged companies fell by about a third from 2008 to 2009 and by another 10% in 2010. The respondent's position is that this period has been marked by a rapid decline in traditional TV advertising compared to a growth in digital advertising. In 2009 all staff on a salary above €55,000 accepted a 10% pay cut which while described as temporary was still in place at the hearing of this case.

In December 2009 the respondent sought to make changes to the health insurance package offered to employees. In this regard the human resource director (HR) sought written agreement from individual employees to the proposed changes. When HR received a response from the claimant, there being no record of the claimant having completed an enrolment form, this caused HR to contact the claimant to discuss the matter. HR met the claimant around 19 January 2010 and put inprocess the claimant's application to join the scheme. The claimant was enrolled in the scheme from 1 February 2010. At this stage the claimant was subject to a 26 week waiting period as therehad been a break in his cover.

Unfortunately the claimant was taken ill around 18 March 2010, required hospital treatment including a surgical procedure and did not return to work until 2 June 2010. During his time in hospital the question of whether the claimant was in benefit from the scheme was raised and it is common case that this made an already stressful time for the claimant even more stressful. Additionally the claimant's medical advice was that it would take him perhaps six months before he could expect to be back to normal. A freelance art director was brought in during the claimant's absence on sick-leave.

The respondent was continually reviewing its future in what was, indeed still is, a rapidly changing landscape. These reviews were initiated by the CEO and involved major change throughout the respondent. The process was described by the CEO as delayering and it affected people at the highest level of the group. As part of the shift towards more emphasis on digital advertising when the review focussed on the area of art directors a choice was made between the claimant who had been hired to specialise in TV advertising and another art director (AD) who was considered to have more experience and background in digital advertising. The CEO's decision was to retain AD, whose rate of pay was less than that of the claimant despite his having more service, and for the claimant's position to be declared redundant.

The decision to make the claimant redundant was taken at a management meeting on 29 June 2010 attended by the CEO, the finance director, CD and HR. The claimant was informed of this decision, in what has been described as an informal manner, by CD on 30 June 2010. The claimant met CD again the following morning.

On 2 July 2010 HR was in contact with the claimant by an email exchange in which HR gave the claimant rough details of the redundancy package this amounted to a payment of the claimant's statutory entitlements. On 5 July 2010 HR wrote to the claimant setting out the terms of the redundancy and giving the claimant one month's notice of termination. It is the respondent's position that this letter was given to the claimant at a meeting with HR and CD on 6 July 2010. It isthe respondent's position that the claimant asked why he and not CW who had been selected. Theclaimant's position is that it was not him that brought CW into the conversation. The claimant, whohad initially announced his intention to work out his period of notice, left after seeing a freelanceart director at the respondent's premises.

Determination:

There is no doubt that the respondent suffered an adverse effect on its business as a result of theeconomic downturn. The Tribunal is satisfied that a redundancy situation existed as amongst theadvertising art directors. When it comes to the question of a selection between the claimant and ADthe Tribunal has not been provided with any documentation to support the respondent's selection ofthe claimant for redundancy. It follows that the Tribunal is not satisfied that the selection was impersonal as regards the claimant. Accordingly, the Tribunal finds that the selection was unfair. Incircumstances where the Tribunal accepts that there was a redundancy situation and the claimanthas received his statutory entitlements under the Redundancy Payments Acts, 1967 to 2007 the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €50,000-00.

The evidence having shown 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 must fail.

No evidence having been tendered in this regard the claim under the Organisation of Working Time Act, 1997 fails for want of prosecution.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)