EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:	**CASE NO.**
EMPLOYEE - *claimant*	UD1004/2010
	MN982/2010

against

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 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 B.L.

Members: Mr D. Hegarty
Ms S. Kelly

heard this claim at Ennis on 24th January 2012

Representation:
Claimant: Louise Merrigan BL instructed by Cahir & Co, Solicitors, 36 Abbey Street, Ennis, Co Clare

Respondent: Sinead Mullins Ir/Hr Executive, Ibec, Gardner House, Bank Place, Charlotte Quay, Limerick

The determination of the Tribunal was as follows:

The claim under the Minimum Notice and Terms of Employment Act1973 to 2005 was withdrawn at the commencement of the hearing.

The respondent owns and runs a crash-repair centre, repairing crashed vehicles. The claimant commenced employment in the business in 2004 when it was owned by his brother (BO), a sole trader. Prior to this between 1989 and 2001 the claimant had worked for BO on a casual/part-time basis when his main duties were valeting and car recovery.

DN, who had been a friend of BO from their school years and at the relevant time was working in England, had given him personal loans over the years when he was expanding his business and in answer to his calls to pay employees' wages. In late 2006 the amount owing to DN was over €70,000.00. In late 2006 BO approached DN with a business plan to open a state of art car repair body shop. The plan required an investment of between €400,000.00 and €500,000.00. DN brought his uncle DU on board as a third investor and a limited liability company was

incorporated in 2008 to take over the business with DN having a 19% share holding, DU a 30% share holding and BO, who made no financial investment at this time, having 51%. The combined investment by DN and DU was in excess of €400,000. The respondent had €98,000.00 working capital in the bank on its opening day and around 25 employees. DU andDN were silent directors and were not signatories to cheque payments. Various pieces ofequipment had to be purchased. An opening date was set for August 2008. Over the next fewmonths both DN and DU each spent a further €20,000, on equipment for the business.

In December 2008 BO informed the two other directors that he had not enough money to pay the next week's wages, that the company was on the stop-list of a number of suppliers and that it did not have the parts to repair some of the cars in the workshop. DU, who did not want any more equity, loaned the business €100,000.00 at this point. In January 2009 all bills were cleared but the bad administration continued. In early March 2009 BO presented the accounts which showed that the business required a further €100,000.00 investment. By this time DN and DU were very concerned. They were dependent on BO to provide them with information on the business. However, wishing to protect their earlier investments, the morale of the employees and give the business a fighting chance they decided that the financial input would be split three ways between the three director, each paying €33,000.00; BO was given 14 days to put in is share but he never did. Three positions in the company were made redundant around this time.

In July 2009 DN and DU became aware that the business was losing on average between €10,000 to €12,000 per month and in May 2009 the loss sustained was €24,00.00. All three directors approached the bank and secured an additional €170,000.00 loan, for which they hadto give personal guarantees. This money was used to pay off large VAT bills and their suppliers. Losses for year ending May 2009 were €309,449 including an operational loss of€104,000.00.

In August 2009 BO was seeking a further cash injection to enable the business to survive up to and beyond Christmas. BO informed DN and DU that he had exhausted all avenues for securing investment but they told him to find his own investment. In October 2009 BO called an EGM that continued over three days (14th to 16th October, both inclusive) at which, BO presented them with a cash-flow crisis and debts and told them that a further cash investment was needed. DN and DU realised that the company was in dire straits and was facing insolvency, the employees would lose their jobs, suppliers would not be paid and their own investments in the company and guaranteed loans in the amount of €170,000.00 with the bank were in jeopardy. BO could not get money and offered DN and DU his equity in the company if they invested further. The company in-house accountant valued BO's shareholding. BO offered to drop his shareholding to 5.2% but DN and DU, out of goodwill, insisted that he retain 10% and they would give him a further 5% if he turned the company around.

The meeting was reconvened the next day, 15th October. The directors addressed certain practices in the workshop and BO advised on the roles and abilities of all staff members
At this stage the respondent had 31 employees and the company's annual wage bill was around €640,000.00, which was its biggest cost. The directors unanimously identified six positions for redundancy. The respondent needed to retain key productive staff as they generate the business income; the six selected for redundancy were in non-productive roles.

The six employees to be made redundant were the senior estimator whose work could be done by BO, an administrative assistant (who had formerly been the manager of the body shop but

finding it too stressful had requested to be moved from the position), one apprentice mechanic, two general operatives and the claimant. Two of BO's brothers, including the claimant, were included on this list. The respondent's case was at that time the claimant predominantly looked after vehicle recovery, collection and delivery of customer vehicles, collection of parts from dealerships and he would do minor prep/strip work under the guidance of an experienced worker. They had two trucks at this time, GB who maintained the respondent's premises also held a C1 licence and operated the recovery truck. DN's father also worked on a casual basis driving the truck when required. Later that day BO informed both the claimant and MOD that they were being made redundant with immediate effect. The claimant questioned why he was being made redundant when others; less skilled than he, were being retained. BO informed them he had no choice in the matter and he would speak to the claimant privately. He later told the claimant that he was bullied into making this decision. The respondent's position was that the company was on cliff edge, haemorrhaging money and a swift decision was necessary.

PX, who had around thirty years' experience as a body-shop controller. was recruited from London in early 2009, to manage the body shop and was responsible for 12 floor staff. The former holder of this position found it too stressful and at his request he was moved from it toan administrative role and was one of the six made redundant in October 2009. GB's role wasin maintenance and recovery; he had a C1 licence for several years and could absorb the claimant's recovery work. Up to around a year before the redundancy the claimant was drivingunder supervision. The number of recovery trucks was reduced from two to one. Having a roadside recovery certificate was good but not a necessary requirement. The respondent no longerdoes big valeting jobs and has reduced this service to washing and hovering cars. Therespondent has a number of employees trained in glassmatix..

At the October meeting it was also decided to implement a 10% pay cut across the board with the exception of the workshop manager and the parts logistics manager who would be taking on more responsibility. BO's new role was senior estimator and DU became acting managing director. All staff were informed of the restructure. BO informed those selected that they were being made redundant with immediate effect. Following the restructure in mid-October 2009 the business continued to struggle; currently six staff are employed in it and it is hoped to bring it to profitability.

The claimant, unlike the others who were made redundant, did not invoke the grievance procedure and did not speak to anyone in the company of his concerns regarding his redundancy.

The respondent subsequently recruited three more staff but these were for different roles: a general manager who had twenty years' experience in the motor industry was recruited toconsolidate and turn around the business, BO recruited an administrative assistant in January2010 who was with them for three month and an estimator was also recruited and he has sinceleft the company. The claimant accepted he could not have performed any of these three rolesand maintained his strengths lay elsewhere.

The claimant's position was that he was in a semi management position and held a pivotal role within the respondent. He denied that his role was confined to vehicle recovery and valeting. He did vehicle recovery when there was a major or difficult job on; he was the most experienced at car valeting but it was time consuming and his time was too valuable; he mostly remedied defects in painting when cars came out of the spray booths; he met and greeted customers, did estimates on small damage and did promotional work. He did the vehicle recovery in the

evenings as he was on a salary it saved the respondents money. He always gave over and above to the respondent, did whatever needed to be done and could not be 'pigeon-holed' in any specific role. The respondent denied the claimant's assertions that he was responsible for quality control and checked the efficiency of workers. While he was not qualified to do panelbeating or spray painting (both required a four-year apprenticeship) he could do other bodyshop tasks. He had done a one-day course in glassmatix (a software package for estimatingrepair jobs) and a two-day course in vehicle recovery. When MOD stepped aside as body shopmanager in late 2008, he assumed this role for some time. This involved commencing at 7.30amand planning the work programme for the day for all 15 body shop workers who reported tohim. When PX was recruited as body shop manager the claimant worked side by side with himand showed him the respondent's ways. PX looked to him for advice as to who was the bestperson to assign to a job. He also had spent about 20% of his time liaising with the partslogistics manager, familiarising him with where to get parts; he was from the USA and lackedknowledge of the area. In cross-examination the claimant accepted that PX was on a higherlevel but still maintained that he could manage the body shop.

A witness on behalf of the claimant agreed that the claimant's main roles were valeting and vehicle recovery along with managing the shop floor. The witness reported to the claimant along with the parts logistics manager to see what he would do for the day. The witness accepted that when PX arrived in 2009 he reported to him.

A second witness gave evidence that he was employed as a panel beater and reported to the claimant on a daily basis even when PX was there. He maintained that the claimant did more than valeting and vehicle recovery. The witness regarded PX as his overall boss.

The claimant was provided with two contracts, the first one was dated 14th June 2004 and his responsibilities set out in this are: "To carry out general day-to-day duties and tasks for valeting and 24hr recovery". The second, dated 18th August 2008, described his position as Vehicle Body Repair Technician but stipulated that he must be prepared to undertake such other work as may be assigned to him from time to time".

Determination

The claimant alleged that he had been unfairly selected for redundancy.

The term in the claimant's contract of employment relating to redundancy states:

: *Where employees are made redundant, the prime consideration will be to protect the employment of as many people as possible, consistent with maintaining a fully efficient operation. Therefore, selection will be on the basis of retaining key employees required to maintain an efficient operation. All else being equal, a policy of last in first out will apply".*

The claimant contended that he could have performed a number of roles. Having considered the evidence the Tribunal is satisfied that the claimant was not unfairly selected for redundancy. His experience as an assistant in the body shop and his short stint as controller there did not compare to the extensive experience of PX for this role. Similarly, giving some assistance on local knowledge to the parts logistics manager did not equip the claimant to take over that role. GB who had maintenance duties and was also a very versatile employee could absorb the claimant's vehicle recovery duties. The claimant spent most of his early years valeting as well

as doing vehicle recovery. The respondent had reduced its valeting service to washing and hovering cars. Considering the foregoing and all the other evidence the Tribunal is satisfied that it was reasonable for the respondent to believe that the skill sets of those retained in the employment at the time were more likely to create and maintain an efficient organisation going forward and bring the company to profitability. Thus, the Tribunal finds that the claimant was not unfairly selected for redundancy. The failure of the respondent to consult with the claimant was not fatal. Accordingly, the claim under the Unfair Dismissals Acts 1977to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN