EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD2268/2010
	RP3062/2010
	MN2217/2010

against

EMPLOYER

and

EMPLOYER

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: Mr. T. Ryan

Members: Mr. J. Horan
Mr. N. Dowling

heard this case in Dublin on 2 May 2012 and 24 July 2012

Representation:

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Claimant(s):
Mr. Francis McGagh BL instructed by
O'Sullivan & Associates, Solicitors,
10 Herbert Street, Dublin 2

Respondent(s):

Ms. Deirdre Lynch, Matheson Ormsby Prentice, Solicitors,
70 Sir John Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows:-

Claims were brought on behalf of the claimant, a chartered engineer, in respect of the Unfair Dismissals Acts, 1977 to 2007, and the Minimum Notice and Terms of Employment Acts, 1973 to 2005. An appeal was also brought under the Redundancy Payments Acts, 1967 to 2007. 17 September 2007 was given as the commencement date and 16 July 2010 was given as the termination date. It was alleged that the claimant had been summarily dismissed without notice pursuant to contract and without proper procedures. It was further alleged that the claimant's employment had ended without arrears of wages being paid or payment in lieu of notice.

It was contended that, since the dismissal had been conducted by the receiver/manager of a company (hereafter referred to as LX) purportedly on grounds of redundancy, the "job of work" had been transferred to others and continued to exist. It was argued that the claimant was not considered for the on-going work nor afforded any opportunity to secure it.

The defence offered that the claimant was employed by LX from September 2007. On 2 July 2010 a receiver (hereafter referred to as SC) was appointed and, at all times acted as the agent of LX.

The appeal against SC under the Redundancy Payments Acts, 1967 to 2007, was denied on the grounds that he had not, at any time, been employed by SC and, therefore, it was submitted, had no claim to a statutory redundancy payment from SC. Insofar as the appellant claimed a statutory redundancy payment as against his employer, LX, which was insolvent, the relevant form was furnished to the appellant by the receiver (SC) in order to submit a claim for payment from the Social Insurance Fund.

With regard to the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, this was admitted as against the company (LX). In this respect, the EIP1 form had been submitted to the Department of Jobs, Enterprise and Innovation and the claimant was paid the monies which were owing to him in this respect. It was respectfully submitted that the claimant was not entitled to make any claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, against SC. In this respect, the claimant was at no time employed by the receiver and, as such, the receiver could have no claim against him for payment in respect of statutory minimum notice.

The claim against the receiver (SC) under the Unfair Dismissals Acts, 1977 to 2007, was similarly denied on the basis that the claimant was not at any time employed by the receiver.

In sworn testimony to the Tribunal, SC (the receiver) confirmed that he had been appointed on 2 July 2010. He had tried to save the project of the company (LX) but had not been able to do so. On 2 July 2010 the claimant had not been present when staff were informed of the receivership. SC did not meet the claimant then but he accepted that it was for him to

understand the claimant's role. Documentation was opened to the Tribunal but SC averred that he had not employed the claimant. He denied that there had been any transfer of undertaking to him and said that there had been no trading going on. His role had been to realise the value of company assets.

Sworn testimony was also given by NOD (who had been employed with the receiver). NOD met directors on 5 July 2010 and met the claimant on 6 July 2010. There was a desire to retain key staff. He met the claimant, asked about his role and tried to assess whether the claimant was required or not. In NOD's view, there would not be a long-term requirement for the claimant. E-mail correspondence was opened to the Tribunal but it was contended in NOD's testimony that the claimant had not been employed by SC but by the company in receivership.

Giving sworn evidence, IMcC (also employed in the receivership) said that he was present when SC was appointed and that he would look at roles going forward. IMcC knew the respondent's state of financial affairs. The claimant was asked about his role but only one employee of LX was retained for the long term and this was not the claimant.

Giving sworn testimony, the claimant confirmed that he had commenced in 2007 and that, in his employment, he had performed the role of chief operations officer such that he had been the primary contact regarding important functions for many entities. Documentation was opened to the Tribunal. The claimant acknowledged that he had not been a director of the company (LX) but said that he had been an important point of contact while an employee. He named other entities which had employed him and said that they had been appointed by LX.

The claimant denied that IMcC had sat down with him and gone through his role. He was not told of the 2 July 2010 meeting and did not attend it. LX had had over twenty-five employees in 2008. The claimant had been involved in reducing that number to seven.

The meeting on 6 July 2010 was held in a public foyer at Beacon South Quarter. The claimant wanted clarity but there was no employee meeting longer than fifteen to twenty minutes. The claimant replied negatively when his Tribunal representative asked him if his role had been discussed in depth or at all. There had been a desire to receive outstanding employee payments but there was "utter confusion" according to the claimant. The claimant was not dismissed on 6 July 2010. He was not told that he would be surplus to requirements and understood that he would be paid as before. He continued to go to work. Not having attended the 2 July 2010 meeting he had been unable to contact the receiver. He was paid up to September at his previous rate. The environment had changed but he kept doing the work. He attended a meeting in late August 2010. He was told that his services were not needed. At the beginning of September he was phoned by IMcC and told of his redundancy. He had received "an incorrect version" of a P45 and previously "was being told there was a role for me going forward". He "was to be paid the same rates". The claimant claimed that he was not given a reasonable opportunity to talk about his role and that he knew that a lot of his duties were being done.

Determination:

The claimant commenced employment with the abovementioned LX ("the company") in September 2007. In 2010 the company went into receivership and SC (hereinafter called "the receiver") was appointed receiver on the 2nd July 2010.
The claimant has brought proceedings against the company and the receiver under the Redundancy Payments Acts 1967 to 2007; the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Unfair Dismissals Acts 1977 to 2007.

The receiver called a meeting of all the workers on the 2nd July 2010 but unfortunately the claimant was not notified, and accordingly did not attend, this meeting. By letter dated the 15th July 2010 the receiver wrote to the claimant advising him that his employment had ceased when the receiver was appointed receiver and manager on the 2nd July 2010. It is not uncommon for a receiver to retain the services of some employees for a short period of time after a receiver's appointment. This is what happened in the case before this Tribunal in that claimant was retained for a short period of time and was paid for this work out of receivership funds. Indeed this arrangement between the receiver and the claimant is clearly set out in an email (dated the 12th July 2010) from IMcC to the claimant in which the claimant was advised that he would be retained on an "as required" basis and that he would be notified of such requirements in advance. This email also notified the claimant that they did not propose to issue a P45 so as to facilitate any further payments the receiver "might need to make to you for specific work that we may request".

The claimant did undertake some work for the receiver and he was asked to submit a claim for the work undertaken. By letter dated the 21st September 2011, to the receiver, the claimant claimed payment for four days work and was paid for this. While the claimant gave evidence to the Tribunal that he attended at work constantly between 16th July and the 16th September the Tribunal is absolutely satisfied that this was not at the behest of the receiver but rather of the claimant's own volition.

While the receiver did retain one employee who dealt exclusively with lettings this was entirely within the powers of the receiver and the Tribunal does not believe that the claimant was unjustly treated because of this.

It is clear that the claimant's role became redundant and his claim under the Redundancy Payments Acts 1967 to 2007 succeeds.

Under the Redundancy Payments Acts, 1967 to 2007, the Tribunal finds that the appellant was entitled to a redundancy lump sum (from the respondent company only as opposed to its receiver in his personal capacity) based on the following details:

Date of birth:	26 September 1973
Date of commencement:	17 September 2007
Date of termination:	16 September 2010
Gross weekly pay:	€2375.00

It should be noted that payments from the Social Insurance Fund are limited to a maximum of €600.00 per week.

The redundancy award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Based on the totality of the evidence the claim under the Unfair Dismissals Acts, 1977 to 2007, fails against the company as the Tribunal does not believe that the claimant was unfairly selected for redundancy. The Tribunal is satisfied that there is no legal basis for the receiver having any personal liability to the claimant under the said Unfair Dismissals Acts arising out of the claimant's employment with his former employer. But the claimant's own evidence was that he only worked four days for the receiver between mid-July and September 2010.

The Tribunal is satisfied that the claimant received his proper notice and accordingly his claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)