EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	**CASE NO.**
EMPLOYEE	UD1385/10
	MN1331/10

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)

Chairmant: Mr. P. O'Leary BL

Members: Mr. B. Kealy
Mr. S. O'Donnell

heard this case in Dublin on 29 May 2012 and 14 September 2012.

Representation:

Claimant: Ms. Louise Fogarty BL instructed by
Hamilton Turner, Solicitors,
66 Dame Street, Dublin 2

Respondent: Mr. Dudley Potter, Malone & Potter, Solicitors,
7 Cope Street, Dublin 2

The determination of the Tribunal was as follows:-

The above case was originally listed for hearing on 24 November 2011.

By letter dated 26 October 2011 the claimant's solicitors, wrote to the Tribunal saying that the matter was no longer proceeding as the claimant had passed away.

By letter dated 2 November 2011 the claimant's solicitors withdrew the case.

By letter dated 7 November 2011 the claimant's solicitors wrote to the Tribunal and indicated

that the claimant's representatives instructed them to proceed with the hearing on 25 November 2011 on behalf of the claimant's estate and to disregard the letter of 2 November 2011.

The case was put in for mention on 16 November 2011 at 2 pm.

Counsel for the personal representative of the claimant (the claimant's widow) indicated that, due to a breakdown of communication, the case had been withdrawn by the claimant's solicitors but that an order for reinstatement was sought.

The claimant died on 24 September 2011. Significant distress had been suffered.

The claimant's counsel asked to annul the withdrawal.

The Tribunal division agreed to list the matter for hearing "without prejudice" and the legal representation was so informed.

The case was relisted for hearing on 29 May 2012 before the above Tribunal division

On 29 May 2012 the Tribunal asked to hear arguments as to whether or not it had jurisdiction to hear the case.

Counsel for the claimant's personal representative asked that the Tribunal hear all the evidence. It was submitted that the death of the claimant was not a bar to proceeding, that the last wish of the claimant had been for his case to proceed and that the claimant's widow wished to have an opportunity to proceed on behalf of her late husband. It was submitted that it would be a great disservice to the claimant's widow if she were not allowed to proceed, that neither side had suffered any detriment, that the claimant's side was the only one to have been prejudiced and that, in the five-day period from 2 November 2011 to 7 November 2011, a wrong call had been made.

A solicitor appeared for the respondent. There was no dispute as to the essential facts.
The case was in for mention on 16th November 2011. It was sought to reinstate a case that had been withdrawn by a solicitor. No decision was made on that day.

The case was put back for hearing without prejudice. The letter from the claimant's solicitor dated 2 November 2011 had been concise.

Evidence had to be tendered regarding letters and issues dealt with.

The division adjourned to consider.

The chairman referred to the Trimboli case in the Supreme Court.

This was a situation where a solicitor had been acting without instructions from a deceased client.

It was open to both sides to make legal submissions.

The Tribunal ruled that the fact that the claimant's solicitor wrote to rescind had confirmed that the solicitor had not, in fact, had authority to withdraw the case and that, in fact, authority rests solely with the claimant and the personal representative of the claimant. The Tribunal considered the Trimboli case.

The case was to proceed but on a further day.

The respondent confirmed claimant went out sick on 18 December 2009 and never came back. He got notice on 23 December 2009.

Counsel for the claimant said that the claimant had been diagnosed with cancer in April 2010.

A full day was set down for the hearing of this case and agreed with the parties and the Tribunal division.

The case was adjourned to the full day of 14 September 2012.

Giving sworn testimony the Tribunal hearing, BW (the general secretary of the respondent) said that he was now the respondent's only employee and that, in late 2008, problems had arisen in that there was money unaccounted for. A firm of accountants (GT) did a study. Over a million euro was lost over five years. The respondent's national executive council (hereafter referred to as the NEC) met GT in late 2009 and subsequently held a meeting of its own.

In addition to the above, the respondent's accounts were in deficit of between €0.3m and €0.5m for 2008, 2009 and 2010. In mid-December 2009 the NEC engaged in the consideration of redundancies. There were to be three in Dublin and one in Wexford.

The claimant was made redundant having ten years' service. A colleague (JS) was part-time. JS was made redundant in April (2010) having been given notice in late February. A Ms. LM, as of February 2010, was on temporary lay-off and was subsequently made redundant.

Financial investigations coincided with staff departures. There was suspension and dismissal. BW was appointed as acting general secretary in early 2010. He gave notice of redundancy to the claimant. The claimant was an area representative (for the respondent) who collected subscriptions and represented the respondent at the Labour Relations Commission and at the Labour Court.

JS (the abovementioned colleague of the claimant) had twenty years' service and was the respondent's principal official in Dublin although the claimant did deal with many cases.

On 18 December 2009 the claimant refused to take (redundancy) documentation but later took it saying that BW would post it anyway. The claimant attended work from 18 to 23 December 2009. BW did not see him in early January 2010. A copy of a January 2010 medical certificate was furnished to the Tribunal.

The respondent sent the claimant a bank draft for over twelve thousand euro for redundancy. In May 2010 the claimant alleged unfair dismissal. In December 2010 the respondent was aware that an unfair dismissal would take place.

At this point, the claimant's representative said to the Tribunal that she did not dispute that the claimant had received the notice due to him.

Resuming his testimony to the Tribunal, BW said that the respondent's membership had dropped significantly. It had had some eight thousand members around 2005 but had fallen aslow as six hundred and was still at slightly less than seven hundred.

BW spoke of two crises in that there had been a crash in the construction industry and that over a million euro of union funds was missing and unaccounted for. He did not deny that things had been slack and said that there had been two chequebooks which were being signed blank. However, BW added that this practice had stopped when he came in. The GT (abovementioned accountants) report was now the subject of police investigation. Figures had not reconciled. Receipts would be given for subscriptions. Members were paying by standing order rather than by paying cash on site.

Regarding 2010 BW said that he had been the only employee of the respondent and that he had dealt with the accounts and with industrial relations. He declined to claim that he was a computer expert simply stating that he was computer literate and used his car as an office. He confirmed that direct debits were used and said that he was not keen on it when people occasionally paid union subscriptions in that he would not take money if he did not have a receipt book.

Regarding another person (Mr. D but not the claimant) BW said that a former general secretary had taken him on, that subscriptions had been paid, that Mr. D had been a consultant who had been found not to have been an employee and whose involvement had ended in early 2009.

Under cross-examination, BW said that he had been on the NEC from 2005 (as well as a period from 1994 to 1998 in that, being a plasterer, he had become an employer in 1998). While on the NEC he had attended council meetings.

While an assistant to the NEC from late 2009, BW had been paid expenses and had been paid for his time though he was not deemed an employee. He was appointed as a special assistant to carry out duties given to him by the NEC. He had not paid PRSI.

BW said that he had not thought of bringing the 12 December 2009 agenda to the Tribunal hearing and that he did not have any handwritten notes of the meeting.

On 20 February 2010 GL (a former president of the respondent) went to meet three others in a restaurant for more than an hour but ultimately ended up resigning his post after a row.

Regarding the 12 December 2009 meeting BW said that four employees were picked to be made redundant. BW said that the respondent used LIFO (last in, first out) and proceeded to tell the Tribunal of the respective service lengths of various employees including the claimant who

had a little over ten years' service. He conceded that there was no set procedure in the respondent for redundancies saying that LIFO was "the procedure under the Act". He made a point of saying that the claimant had been a fine man and a very good trade union official who had "helped him out". Asked if redundancy criteria had been discussed at the meeting, he replied that the respondent's procedure had been "in line with the Act" and that LIFO had been applied. Asked if there had been any consultation with the employees made redundant, BW had replied that the claimant and others had refused to consult with the respondent and that, therefore, he had not had any consultation with the claimant before the claimant was told of his redundancy.

BW named three others and said that they all turned up on a given day to talk to the staff but that the staff would not talk to them. Therefore, the redundancies went ahead.

BW had spoken to FW from the Irish Congress of Trade Unions (ICTU) and had told FW that the respondent had to let people go whereupon FW had bade him to "throw money at the situation" but the respondent had no money.

It was put to BW that he himself had stepped into the shoes of the claimant and had taken the claimant's role. BW denied this and said that the abovementioned JS had carried on with industrial relations work. BW admitted that he did not have with him documentation relating to events of February 2010.

In re-examination, BW confirmed that in February (2010) he had become acting general secretary of the respondent and that he had taken the chief executive role in the union. He did not claim to have all relevant minutes from the time at the Tribunal hearing but he said that there had been no objections voiced to the truth and accuracy of minutes around the time in question. BW said that the general secretary post had been vacant when he had been appointed.

Giving sworn testimony to the Tribunal, the abovementioned JS said that he had been a plasterer before his appointment in early 1990 as an official with the respondent. He appeared at employment law fora. He acknowledged that the respondent had been in a bad state after the construction crash in that the respondent wage bill had been "way beyond what was coming in". Employees of the respondent had become members of another trade union "because they could see redundancies coming". JS had worked part-time but, after he told the respondent that he wanted to return to working full-time, he was given notice of redundancy in late February 2010, and his employment with the respondent ended in April 2010.

In cross-examination JS was asked if the respondent had consulted with him about redundancy. JS simply replied that he had wanted to go to full wages (from part-time) and had been told that he was redundant. He said that there had been no consultation with him but that he had been in hospital around that time. Asked how much notice he had got, he replied that he had got none in writing and that he had seen "one hell of a mess". When he had wanted full pay BW had said that there was no money to pay him. For this reason he received a car in lieu of notice pay because "there was no money to pay" him especially because he wanted to get his notice pay at the full rate as opposed to his part-time rate.

Giving testimony to the Tribunal after making a formal affirmation, FW said that he was an industrial officer with the Irish Congress of Trade Unions and had been kept informed of the respondent's situation by BW. FW had thought that BW had handled the role of secretary of the respondent well. BW had said that the respondent was broke and would have to make people redundant. At that time the respondent had the problems of both the construction industry crash and the issue as to loss of union funds possibly as a result of misappropriation. FW had said that there would be a cost and a saving for redundancies.

FW did not think that BW had told him who would be made redundant. Names would not have meant anything to FW. Regarding any possible difficulty with employees made redundant, FW told the Tribunal that BW had said that the respondent's executive council had said "F**k them!" and that they (redundant employees) could establish their grounds/rights if they had them.

Under cross-examination, FW said that any trade union executive council that would say: "Fuck them!" would not be trade unionists.

When it was put to FW that the respondent had incurred a serious monetary deficit (whether or not as a result of misappropriation of funds) FW countered the point that the respondent had been insolvent when this situation had come up by saying: "It would cost nothing to sit down with trade union representatives."

When it was put to FW that BW had told the Tribunal that the redundant employees had refused to see him, FW replied that the said employees should have had the right to have their trade union representatives with them.

Giving sworn testimony, WLC said that he was a regional co-ordinating officer for the trade union which represented some employees of the respondent. WLC said that there had been no consultation. He had tried to engage with two of the respondent's principals but he had been ignored. There was no response to correspondence sent by him. WLC's union was just trying to engage by asking the respondent to talk. It knew that the respondent had problems. WLC stated that any employer should look at voluntary severance or job-sharing before making employees redundant. WLC acknowledged that LIFO was the fairest way of making people redundant unless there was an issue as to people's skills.

WLC concluded his direct evidence by saying that he had been "more than disappointed" and that this had been "the worst kind" of industrial relations. The respondent's representative objected at this point.

In cross-examination it was said that the respondent had lost more than a million euro in five years and had had a deficit in successive years. WLC replied by asking what question was being put to him and by saying that his union was not given a chance to sit down with the respondent.

When it was put to WLC that the respondent had just kept BW as its only employee, WLC accepted that "they were all redundant" but said that there had been "no procedure" and that "the right of representation was denied them".

It was put to WLC that there had been a consultation conference between the respondent and a

union other than that of WLC. WLC replied that he had not been invited and that the consultation in question had been about the redundancy amount whereas WLC's union's issue was with the redundancy itself.

WLC told the Tribunal that his union sent two letters to the respondent. He acknowledged that his union did receive one fax but said that it had been illegible.

It was put to WLC that unfair selection had been alleged but that all employees had been made redundant. WLC replied: "Not at the same time" and said: "The employees were not dealt with fairly in my view."

Giving sworn testimony, GL said that he had been a member of the respondent's national executive and union president over many years until his resignation. He said that redundancies had been discussed without names of individuals. A vote was taken that redundancies would be brought forward but the respondent's BW was to talk to FW from ICTU. There was no vote to make the claimant redundant. GL would sign minutes if given them. Handwritten notes would be taken on the day of a meeting. NEC (national executive council) minutes would only be passed at the next meeting. GL had no further involvement after his own resignation as president.

GL told the Tribunal that the respondent's attitude was one of having blinkers on and that the case was closed. He said that "it made no sense that (the respondent) would treat its own employees like this".

Under cross-examination, GL accepted the respondent's situation at the end of 2009 and that over a million euro had gone missing on his watch and that there had been annual deficits between 2008 and 2010. Regarding a meeting on 12 December 2009, GL was resolute in his testimony that a general redundancy situation had been discussed but that names of individuals had not been used. GL opined that some people could have been put on 2.5 days per week.

GL said that "it was the way the redundancies were done" that there had been no attempt at engagement with any of the redundant employees and that there had been "no chance to explore alternatives".

Giving sworn testimony, JB (formerly of the respondent's Cork committee) said that he had no knowledge of the respondent's redundancies.

Giving sworn testimony, BOL (a Cork member of the respondent's national executive council) spoke of December 2009 and said that BW and three named figures within the respondent had been picked out to deal with redundancies of employees.

Under questioning at the Tribunal hearing BOL said that individual names of employees to be made redundant had not come up at a meeting that he had attended or, at least, that he could not recall it. He said that he and others had never received minutes of meetings after they had sought them. He said that all in attendance at a meeting had the right to vote on minutes but that he was not sure of his recollection. He could not recall minutes being read out. He thought that sometimes minutes were read out and sometimes not but he then said that he could not recall

any more.

The claimant's representative then announced that she had copies of WLC's letters for the Tribunal and offered to recall WLC to prove them. The respondent's representative then said that he would not require them to be proved.

Giving sworn testimony, ED (the claimant's widow) said, after condolences were expressed, that the claimant had loved working for the respondent for ten years but had ultimately felt very strongly that he had been unfairly dismissed. When ED stated that there had been no misappropriation of funds by the claimant the respondent's representative was quick to state that there was no suggestion against the claimant with regard to funds. The Tribunal duly took note of this. The respondent's representative stated that there had been no suggestion of impropriety by the claimant over the long course of the hearing of this case.

ED stated that the claimant had wanted WLC (his trade union representative) there when meeting the respondent. The claimant was ill at the turn of 2009 into 2010. Regarding redundancy the claimant had said that he wanted his phone number back but she opined that there had been "a belligerent attitude to (the claimant)" and that the respondent had been "playing hard ball".

In May 2010 the claimant was diagnosed with cancer. ED said that he was well until the end of November 2010 in that he was renovating a house up to then and that if not redundant from early 2010 he could have been on sick pay from the respondent. She said that a construction industry fund had told her that there was an entitlement to death-in-service benefit which was worth some sixty-three thousand euro.

At this point the respondent's representative submitted that death-in-service benefit was nothing to do with the respondent as it was a construction industry fund.

ED told the Tribunal that the claimant had said that he had been unfairly dismissed. She opined that "he could have done the work a couple of days per week". She added that the claimant had felt that his job was being done by somebody else. His employment ended in January 2010 and he lost the use of his car.

Under cross-examination, ED said that the jobseeker's benefit and disability benefit which the claimant had received between his redundancy and his passing away were actually the same figure.

Determination:

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails because the claimant was given his notice.
Regarding the claim under the Unfair Dismissals Acts, 1977 to 2007, having carefully considered the evidence adduced and submissions made, the Tribunal finds that the claimant was unfairly dismissed because of the failure of the respondent to implement proper procedures

and, in particular, the failure of the respondent to heed and react to the letters sent them by the representatives of the claimant prior to his dismissal and, also, their failure to explain the method or procedure adopted in deciding to dismiss the claimant on the date that notice was given.

The Tribunal determines that, had the claimant been retained, his employment would have continued no longer than 1 June 2011 due to the financial position of the union. In the circumstances the Tribunal determines that the most appropriate remedy in this case would be compensation and unanimously awards the sum of €28,000.00 (twenty-eight thousand euro) under the Unfair Dismissals Acts, 1977 to 2007 , in addition to the payment made to theclaimant at the end of his employment including those made by reason of redundancy under theRedundancy Payments Acts to which he would have been entitled.

In the circumstances it is not within the jurisdiction of the Tribunal to determine the claimant's rights under the death-in-service provision as addressed in submissions made which is a matter for another forum.

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Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)