EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	**CASE NO.**
EMPLOYEE – *claimant*	UD1007/2009

Against the recommendation of the Rights Commissioner in the case of:

EMPLOYER - *respondent*

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms C. Egan B.L.

Members: Mr T. Gill
Ms. R. Kerrigan

Heard this appeal at Castlebar on 4th March 2010

Representation:

Claimant Ms. Martina Weir, SIPTU, Mayo No. 2 Branch, Moneen Road, Castlebar, Co. Mayo

Respondent: Mr. John Flannery, John F Flannery & Associates, 4 Father Griffin Road, Galway

This case came before the Tribunal by way of an employee appealing against the Recommendation of the Rights Commissioner ref :(r-069245-ud-08/EOS)

The determination of the Tribunal was as follows:-

Respondents Case

The general foreman gave evidence on behalf of the respondent. The respondent is a subcontractor on the gas terminal site. He supervises all of their employees working this site. In June 2008 the job had reached its peak and they were notified by their prime contractor (hereinafter referred to as AB) that they would have to lay off five employees. AB, being the company they worked to as subcontractors, would review and assess the ongoing project from time to time.

This witness and a director of the company decided to assess the skills required to finish the project. The claimant was involved in steel fixing in several areas including steel fixing chambers in manholes. The steel fixing aspect of the project had peaked in May so they required more general operatives to complete the contract. As a result, one carpenter and four steel fixers, including the

claimant, were let go. The witness explained that these five employees should have been let go in June, however, they decided to keep them until the builder holidays. They passed on the information as to how they selected the employees that they were letting go to AB, so AB could establish that they would not require the selected employee's skills going forward. The Industrial Relations officer of the site also approved the redundancies. This witness also explained that there has never been an agreement with the unions that redundancy would be based on a last in first out basis. The norm in the construction industry is that redundancies are based on the skill requirements of the company. He maintained that the claimant was not unfairly selected for redundancy.

Under cross-examination he was asked to explain the term "hammer hand" that the claimant was employed as per his contract of employment. A "hammer hand" is somebody who would assist a carpenter and also would cover more general areas of formwork e.g. steel fixing, formwork, and concrete. The carpenters do the formwork. At the time not all of their employees were classed as "hammer hands". They also employed carpenters. Prior to the claimant finishing up they had not subcontracted their employees to any contractor other that AB. The respondent was only contracted to do formwork on this site. AB did not tell them to let go individual employees; this was decided by himself and a director of the company. It was based on best skills. He explained "you get to know the capabilities of the individual workers "and he was in the position to assess them on a one to one basis. They had looked to the future and had to ensure that they had the right capable skilled employees to finish the contract. They had to select the redundancies from forty-two employees. AB directed them to let go four steel fixers and a carpenter. The company had a ten-week probationary period and during this period there had been a few issues with the claimant, however, they retained him after this period was up.

The duties of the steel fixers, retained after the claimant's redundancy, included finishing concrete, shuttering, helping carpenters. When asked about the service of the employees retained in comparison to the claimant he referred to a list of employees. He referred to one employee (JM) who had less service than the claimant but was retained. He explained that this employee was an excellent steel fixer with great capabilities who reacted well with people. At the time he was of more value to their client than the claimant. He and a director of the company had jointly selected the employees to be let go. Two fixers worked on the manholes at one time. They tried to keep the same teams together. When the appellant was let go there was a lot of finishing work to be done, grouting, and rubbing up concrete, different to the work that the appellant normally performed.

Appellant's Case

The claimant confirmed he had commenced work for the respondent in June 2007 and his employment was terminated the end of July 2008. He is a steel fixer and he stated that "you have to be able to read drawings, understand the types of steel and follow schedules ". He has been in the construction business since he was 18 years of age. He stated that he was familiar with concrete finishing and specific employees did the concrete finishing for the respondent, but he would have been capable of doing this task also. He mostly worked on the manholes; however, if there was a rush on for concrete, he would have helped. Occasionally there would be a delay on the manholes and he would have to do another task. He stated that JM was not on manholes and that he was working on a different task.

During the course of his employment the appellant stated that he had received no warnings nor was he disciplined. He was aggrieved when he was let go as "there was plenty of work to do and others were doing the manholes ". His issue was how he was selected and that when he asked the general foreman why he was let go, that the general foremen had informed him that he did not have to give

a reason. He has not worked since he was let go by the respondent. He understood that normally on sites the selection criteria for redundancy was first in last out. He was also due a pylon payment that was negotiated by the union on the 30th September 2008 in the amount of €3,250.00, which he did not receive as he was let go. He further stated when his employment was terminated there were 20 more manholes to be completed.

Under cross-examination he agreed that there was one steel fixer retained (JM), who had less service than him. It was put to him that JM had skills such as shuttering and concrete finishing that the respondent needed. The appellant explained that JM was a steel fixer and that he was working on a tank; however JM was doing the manholes when he left. The Appellant stated that he had taken this case, as he "was disgusted as to how he had been treated ". He went to state that the pylon bonus had nothing to do with it because he did not know at the time when and how it was going to be paid.

Determination

In a downsizing operation, as in the present case, the construction industry is bound by the Construction Industry Registered Employment Agreement, which does not concede last in, first out. The employer is entitled to consider the particular skills of the individual employee needed to complete the project in hand.

Having heard the evidence adduced in this case and the submissions of the parties, the Tribunal unanimously decided that the claimant did not prove that he was unfairly selected for redundancy. Therefore, the Tribunal dismisses the appeal under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)