EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:		CASE NO.
EMPLOYEE (claimant 1)		UD1402/2010 MN1349/2010 RP1898/2010 WT572/2010
EMPLOYEE *(claimant 2)*		RP1899/2010 UD1403/2010 WT573/2010 MN1350/2010
EMPLOYEE	*(claimant 3)*	RP1900/2010 UD1404/2010 WT574/2010 MN1351/2010
EMPLOYEE	*(claimant 4)*	RP1901/2010 UD1405/2010 WT575/2010 MN1352/2010
EMPLOYEE	(*claimant 5)*	RP1902/2010 UD1406/2010 MN1353/2010 WT576/2010
EMPLOYEE	*(claimant 6)*	RP1903/2010 UD1407/2010 MN1354/2010 WT577/2010
EMPLOYEE	*(claimant 7)*	RP1904/2010 UD1408/2010

MN1355/2010
WT578/2010

EMPLOYEE
(claimant 8)

RP1905/2010
UD1409/2010
WT579/2010
MN1356/2010

EMPLOYEE *(claimant 9)*

RP1906/2010
UD1410/2010
WT580/2010

Against

EMPLOYER
under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath

Members: Mr T. O'Grady
Mr P. Trehy

heard this claim at Dublin on 29th November 2011

Representation:

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Claimant(s) :
Mr. Paul O'Reilly, Northside Centre For The Unemployed, The Glin Centre, Glin Road, Coolock, Dublin 17

Respondent(s) :
Peninsula Business Services (Ireland) Limited, Unit 3, Ground Floor, Block S, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:

Claimants Case

Giving evidence, PB stated that he worked with the respondent company for 25 years. The company proposed short time for one year in 2009, which the employees agreed to. The following year a number of proposals were being made by the company and as a result the employees put forward a Mr. O'R to represent them. Meetings fell and items were not agreed with the company. PB stated that in 2010 another company (company B) became part of the respondent company. The witness wanted to hold on to his forty hour contract. A Manager with the respondent company, MF, had stated that there would never be a forty hour contract with the respondent company in the future. PB stated that his job was not made redundant as there are other employees doing his job now. After the year on short time PB took a 5% pay cut and was getting 18 hours per week.

As a result of failed negotiations with the respondent company, the employees issued strike notice. On 23rd April a letter issued to employees informing them of a programme of redundancies to take place. PB signed the RP9 offered to him as he felt under enough stress.

Under cross-examination, PB stated that he read the RP9 and that Mr. O'R had explained it to him. He agreed that there had been an attempt by the company in the form of various discussions but that the respondent company had refused to engage with Mr. O'R, the claimants representative. The respondent's representative explained that Mr. O'R had misrepresented himself as being from the National Employment Rights Authority and that meetings had taken place with crew representatives when it had been explained that reduced hours would have to continue or there would be redundancies.

In reply to the Tribunal as to whether it was known that redundancies were likely, the witness stated that it was not explained to them. PB stated he was objecting to working on a day to day basis.

The respondent representative stated that the employees left the company before the contract was finalised which was based on the fact that in the event of redundancy, a 40 hour week would apply. There had been 4 months of discussions and the claimants had refused the agreement of short time and then the redundancies were made. A number of other employees stayed on the old contracts and are currently still on the 40 hour contract.

When asked by the Tribunal if he knew redundancy was based on forty hours, PB stated that he asked for a 24 hour contract and had said he would even accept 18 hours. There was no assurance of a certain amount of hours guaranteed.

The claimants representative, Mr. O'R stated that the company refused to deal with him. He told the claimants to look for forty hour contract to cover them.

The respondent's representative stated the right for a forty hour contract had never been removed from the claimants. The claimants refused overtime and sub-contractors were brought in.

P.O'R stated the claimants were not given the forty hour contract. He said that what was being

offered was not workable, a couple of hours work here and there. If the company put the claimants on short time how could they implement a forty hour contract.

In reply to the Tribunal as to whether there was a lack of communication, PB stated that there had been a lack of communication. He said he did not see the letter of 23rd April which had been put in his locker. He does not remember what was said to him about minimum notice entitlements. The respondent's representative stated that the information was on the RP9 and that the witness had a representative.

The respondent stated that re-instatement was not an option for the company.

Giving evidence, JL stated that he was at the meetings held with the respondent. He was told that there would be no jobs if the zero hours contract was not signed. He had been working 50-60 hours per week. The witness stated that the company was supposed to train everyone up on everyone's job but they never did.

When asked by the Tribunal as to what lead him to take redundancy, JL stated that he did not feel he was getting anywhere with the company. The claimants wanted to protect their forty hour contract. He said the letter of 23rd April was proposing a contract that was not suitable and nothing followed in writing. The RP9 was given by the employer and was not requested by the claimants. No-one explained the minimum notice to the witness.

Giving evidence, JD stated that he was told on 5th January 2010 that his contract was ceasing. He was told that his forty hour contract was gone no matter what. Up until 23rd April he thought the company was getting rid of the forty hour contract. He said the company did not inform them what they could lose and acted in an underhanded manner.

Respondent's case

Giving evidence, DD told the Tribunal that he is Financial Controller with responsibility for the HR Department of the respondent company. DD stated that the company have always employed sub-contractors as they were expanding the business up to 2007. After the housing market collapsed in 2008, the company lost over €600,000. There was always overtime and a large amount of country work. In 2008 a number of office and road crew were made redundant and there was a 10% cut in wages for some employees. There had been forty redundancies over a period of four years.

In January 2009, the company met with crew and explained the need to move to a new flexible contract. A reduced hours agreement was introduced and this worked well. Staff were guaranteed a minimum of eighteen hours. The agreement had a clause stating that redundancies would be based on forty hours. This expired at the end of 2009. On 16th December 2009 the company wrote to staff asking for volunteers to represent the road crew as the reduced hours agreement was due for review. No staff member came forward.

On 5th January, 2010 the situation was explained to crew and they were told that the company wanted to keep them employed and they could work through it. The crew then nominated Mr. P O'R to represent them. It was explained that redundancies would be based on forty hour week. Contractors had to be brought in as the crew refused an early start/finish time and overtime. Notice of strike action was served on the company on 12th April, 2010. This strike action was averted. DD explained that the crew would not listen to the company and they said

they were taking advice from Mr. P O'R. In relation to the status of company B, DD stated that the respondent company is a service partner of Company B but there was never a merger between the two companies.

In relation to the company refusing to meet Mr. P.O'R, DD stated that he had misrepresented himself as being from the National Employment Rights Authority and therefore the company could not deal with him. The company was still willing to meet the crew. RP9s were given to the crew members in March 2009 when negotiations failed.

Under cross-examination, DD denied that the crew had been intimidated. The crew would have been guaranteed a minimum of eighteen hours work and it meant no redundancies. 5% of the 10% pay cut was given back in March 2010 and the subsistence rate was increased. DD said he went through the RP9 with the crew line by line.

Determination

The Tribunal has carefully considered the evidence herein. The claimants claim that they were constructively dismissed in circumstances were they felt that their contracts of employment were being interfered with to such an extent that they could no longer have confidence in their employer and indeed there had been a break down in the relationship between each of the nine employees and the employer.

In 2008 the respondent company was facing a severe downturn in business and opened up full and frank discussions with its workforce explaining the situation. The claimants herein are road crew and as part of the necessary restructuring of the company they agreed to work in 2009 on the basis of a reduced hour week. Each of the claimants held 40 hour basic contracts of employment and the agreement to reduce to a minimum 18 hour contract was a significant change in their working terms and conditions. The evidence demonstrated that the claimants accepted this reduction in good faith and as part of the overall desire to keep as many people employed as possible.

By the start of 2010, it was clear to both employer and employees that the outlook had not significantly improved. The Tribunal accepts as a fact that whether by design or default the impression was created in the minds of the claimants that their 40 hour contracts of employment were going to be done away with and their new contracts of employment allowing for significantly reduced working hours were going to be introduced on a permanent basis. Quite rightly, the claimants were concerned that their statutory rights under redundancy, minimum notice and other legislation would be irrevocably changed if they agreed to the formal recognition of what in fact was a day to day reality: the fact that they were working short time weeks.

There followed a period of the most extraordinary chaotic negotiation between the respondent company and a Mr. O'R on behalf of the claimants. The only thing that the Tribunal can say is that it cannot be certain that either of the negotiating parties ever clarified with the claimants the details of what was being negotiated on their behalf. For example, the claimants did not seem to know that the respondent company had conceded in open correspondence (April 23rd) written to each and every claimant that the 40 hour contract of employment was being preserved and would be operative in the event of redundancy and for notice calculation.

In addition, the Tribunal finds that the claimants were not made aware of the fact that the

operation of the RP9 was possibly the least favourite of the options open to the claimants. In particular, the Tribunal notes that the loss of minimum notice entitlements was not explained to the claimants by either their employer (who owe the claimants a fiduciary duty as employer) or Mr. O'R who primarily appears to have concentrated on the IR issues.

In particular, this is significant where a voluntary redundancy policy appears to have been in operation or on the point of becoming operative again.

The Tribunal notes that the claimants took their redundancy packages in and around May of 2010 on foot of the RP9 option.

The Tribunal finds that the plaintiffs were unfairly dismissed. However, in signing the RP9 forms the Tribunal has to find that each of the claimants contributed significantly to the termination of his own employment however ill-informed he was. There has to be an onus on the employee to make reasonable efforts to understand the actions he has undertaken.

In acknowledging the fact that the claimants have already had redundancy lump sum payments made to them, the Tribunal awards the following claimants the following sums under the Unfair Dismissal Acts. No evidence was adduced under the Organisation of Working Time Act. The claims under the Redundancy Payments Acts are dismissed. This being a claim under constructive dismissal, a claim under the Minimum Notice and Terms of Employment Acts does not arise.

Claimant 1: €4,700
Claimant 2: €3,200
Claimant 3: €2,400
Claimant 4: €2,400
Claimant 5: €10,000
Claimant 6: €4,800
Claimant 7: €3,200
Claimant 8: €4,000
Claimant 9: €2,800

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)