EMPLOYMENT APPEALS TRIBUNAL

Appeals Of:	Case No.
Noel Burke -*Appellant* 5 Westfield, Outrath Road, Kilkenny	UD836/2010

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

Langton Hotel Limited -*Respondent*
69 John Street, Kilkenny

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms K.T.O'Mahony B.L.

Members: Mr J. Hennessy
Mr J. Dorney

heard this appeal at Kilkenny on 3rd April 2012

Representation:

Appellant: Ms Geraldine Cleere, 19 Hazelbrook, Parcnagowan, Kilkenny

Respondent: Ms. Margaret Somers O'Brien. Tankardstown, Baltinglass, Co. Wicklow

The determination of the Tribunal was as follows:

This claim came before the Tribunal by way of an employee appealing against the recommendation of a Rights Commissioner dated 3rd February 2010 reference r-078955-ud-09/JT.

At the commencement of the hearing the respondent raised the preliminary point that the appellant had accepted a severance package and signed an agreement waiving his rights pertaining to his employment both at common law and under statute and confirming his acceptance of the terms of package 'in full and final settlement'.

Having heard submissions on the point from both sides the Tribunal determined to hear the entirety of the evidence in this case.

Summary of Evidence

From late 2008 the business was affected by the economic downturn and around that time the business in its entirety was examined in terms of what areas could be re-organised. There were two

full-time employees, including the appellant who was stores manager, working in the stores. A director of the company (the director) raised with them the possibility of reducing to a three-day week and also what other roles they would consider to maintain a five-day working week. The appellant failed to give a written reply to this query, as had been requested by the director in his letter of 5 November 2008 and according to the director the appellant's attitude, as verbally communicated to him, was that that he had been employed as a store man and would not be willing to work in another area of the business. The other employee in the stores, who had only four years' service, was willing to perform other duties and agreed that he would help out in any way he could to maintain five-day work per week. In any event, the respondent company managed to maintain a full working week for some time due to the Christmas season. The appellant denied that he had demonstrated any such inflexible attitude and was adamant that he had indicated a willingness to work in the bar.

In early 2009 the director was faced with the decision of making one of the employees in the stores redundant. Selection for redundancy was based on the flexibility of the employees going forward. The appellant was selected as he was less flexible than the other employee in the stores.

The appellant's position was that he was employed by the respondent for almost nine years. When he attended for work on 10th February 2009 he was told by the director that his position was being made redundant, as there was not enough work for the two full-time employees in the stores and that a decision had been taken to retain the other employee over the appellant. The director advised him to get advice. The appellant spoke with his union the following day and a meeting was arranged between the parties for the 16th February 2009.

At that meeting the parties were in separate rooms and the union representative (TU) liaised between them. TU informed the appellant that having spoken with the director there would be no reversal of the decision to make him redundant but there was an offer of a settlement including a financial sum in addition to the redundancy lump sum. The appellant's position was that he had attended the meeting to negotiate an alternative role such as bar work but TU told him that continuing in employment was not an option open to him. TU advised him to go home and think about it.

TU subsequently committed the agreement to writing. The meeting resumed the following morning and TU provided the document to the appellant and informed him that if he did not sign the document he would not receive the settlement on offer. He was given about five minutes to read it. It stated that the agreement was in full and final settlement of any issues pertaining to his employment and that he would have no claim at either common law or under various employment statutes, including the Unfair Dismissals Acts, the Redundancy Payments Acts the Minimum Notice Acts as well as other specified Acts as a result of the agreement. Finally, the document stated that the parties had read and understood the document and had been entitled to seek independent advice. TU had explained to him that there was an offer of money but that he would be signing away his rights and would have no come-back. There was no discussion with TU concerning the legislation listed in the document. The appellant told the Tribunal that he understand the document. He signed the document on 17th February 2009, believing the redundancy to be genuine.

It was the appellant's position that a short time later, as he was passing the premises, he saw another person carrying out his duties. He believes that his redundancy was not bona fides. The respondent's evidence was that others are employed in the stores part-time on an as needs basis, such as busy weekends, as had been the case in the appellant's time there. To date the

appellant's former colleague in the store remains in full-time employment but his work is not solely based inthe stores as he carries out deliveries, moves furniture for functions and sets up for various events inaddition to cleaning the bar area. The director believed that the fairest thing was to offer theappellant a redundancy package and in any event TU did not request a part-time position for theappellant. While there had been some expansion in the business in the period 2008 to 2010 butdespite this there was still a significant downturn in turnover and if employees left of their ownaccord, the respondent did not re-employ in certain posts. While he had advertised for replacementsenior bar staff in March and October 2009 he did not contact the appellant as he had refused barwork in late 2008. The appellant vehemently disagreed that he had told the director that he wouldnot carry out bar work.

Determination:

Having regard to the case law on valid severance agreements the Tribunal finds that the appellant was advised, albeit not in writing, by the respondent to get advice; the written agreement listed the employment statutes governing the rights being waived and while the Tribunal has some concern as to the extent of the advice, if any, received by the appellant on the entitlements being waived, his evidence to the Tribunal was that he understood the document. Accordingly, the Tribunal is satisfied that the agreement dated 17 February 2009 is valid and the appellant is precluded from bringing a claim or appeal under the Unfair Dismissals Acts 1977 to 2007.

However, should the Tribunal be wrong on this issue, accepting the respondent's evidence on theissues in dispute between the parties, it is satisfied that a genuine redundancy existed, that theappellant was fairly selected for redundancy on the basis of objective criteria and that the dismissalwas fair in which circumstances the appeal under the Unfair Dismissals Acts, 1977 to 2007, wouldin any event fail. (reference: r-078955-ud-09/JT).

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)