

## EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:  
Employee

CASE NO.  
MN89/2007  
RP45/2007

against

Employer

under

### **MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 REDUNDANCY PAYMENTS ACTS, 1967 TO 2003**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. McGrath

Members: Mr. M. Flood  
Ms K. Garvey

heard this appeal at Dublin on 21st June 2007

Representation:

Appellant:

In person

Respondent:

Mr Eddie Keenan, Construction Industry Federation, Construction House,  
Canal Road, Dublin 6

The decision of the Tribunal was as follows-

#### **Claimant's case**

The claimant had been employed by the respondent since 6<sup>th</sup> April 1998. The claimant was told he was on temporary lay off on 25<sup>th</sup> August 2006. He heard nothing from his employer for 13 weeks, at which point he contacted his union to ask if they knew anything of the situation with the firm. His union told him that they were arranging a meeting with his employer, as they had been contacted by several other employees of the respondent who were in the same situation. On 22<sup>nd</sup> November 2006 the claimant got a letter from his union saying they had had discussions with his employer and inviting him to a general meeting on 29<sup>th</sup> November. On 29<sup>th</sup> November the meeting took place between the union

representatives, the claimant, other staff members who had also been laid off on 25<sup>th</sup> August and the respondent. The respondent told the workers present that things were not looking good for the company. He apologised to the workers for the situation and said that the lay-offs would be indefinite and anyone who wanted to apply for redundancy could do so. The respondent said there would be no work in the foreseeable future. The claimant felt that he had no alternative but to apply for redundancy. He was under pressure, as he had a family and had been trying to manage on social welfare payments since August. He signed the form given to him. The redundancy was described as voluntary but the claimant did not accept that it was voluntary. He believed the respondent had made him redundant, as an indefinite lay off, which had already gone on for over three months, was not the same as a temporary lay-off. The claimant received a cheque for his redundancy payment some time later, but believes that it was some €400-€500 short. He had confirmed his calculations with Redundancy Payments Section in the Department of Enterprise Trade and Employment, but had not mentioned his period of lay-off to them. No payment in lieu of notice was made to him.

### **Respondent's case**

The respondent asserted that the claimant had made himself voluntarily redundant due to lay off and was therefore not entitled to payment in lieu of notice. The respondent operates in a very competitive environment and in August 2006 he found himself in the situation where he had to put 22 employees on temporary lay off. He lost a contract on a job in Cork, which had employed 16 people. These employees had to be taken back to Dublin and put on jobs there. He then lost a contract suddenly in Dublin when a competitor undercut him. He then lost a third contract. He was confident that he would get jobs and the situation could change quickly in his business. The company had no history of lay-offs on this scale. As the weeks passed he began to get `phone calls from staff on lay off and from the union wanting to know when they would be back working. He had to explain to them that there was no work at present but he hoped there would be. He did not want to make staff redundant as this would be an additional financial burden on the company at a time when things were not good. He was close to losing his company at one stage. He responded to union pressure and attended the second part of a general meeting of laid off employees on 29<sup>th</sup> November 2006. At this meeting he said that anyone who wanted to do so could apply for redundancy. In response to questions at the meeting, he informed his employees that they would not be entitled to payment in lieu of notice if they applied for redundancy and signed the relevant form in this situation. He offered staff the alternative to stay on lay-off, as he was confident he would get work.

Of the 22 staff on lay-off, 18 chose redundancy and the other four came back to work with him around January 2007. All of the staff who chose redundancy did so voluntarily and signed the relevant forms acknowledging that they were not entitled to notice or payment in lieu of notice. He has since taken on more staff. The respondent did not write to his employees to explain the situation, however his accountant had been available in the office to answer any telephone queries. Under cross examination, the respondent agreed that he had told the meeting on 29<sup>th</sup> November 2006 that there was no work available for the foreseeable future.

The respondent explained that the amount of the redundancy payment paid to the claimant was correct, as the period of lay-off from 28<sup>th</sup> August 2006 to 15<sup>th</sup>

December 2006 counted as a break in service and was discounted for the purposes of calculating redundancy payment.

### **Determination**

The Tribunal has carefully considered the evidence adduced. The claimant and his colleagues were laid off in and around August 2006. The Tribunal does not doubt that a genuine lay-off situation existed. Up to twenty-two employees were laid off as work contracts unexpectedly dried up over a period from August 2006.

The Tribunal would be critical of the respondent company's failure to keep its laid off employees notified about what was going on and what their realistic prospects were. The legislation clearly states that an employee who has been laid off is entitled to look for voluntary redundancy after four weeks. This option was not made known to the claimant and his colleagues and, instead, the situation was allowed to drag on for three months – made all the more frustrating because there was no direct line of communication between the employer and employee.

Ultimately, and in response to union pressure, a meeting was called at the end of November 2006. At this meeting it was made clear that lay-offs would continue into the future as the company was trying to chase contracts.

Of the twenty-two employees, eighteen chose to take voluntary redundancy, which was the alternative open to them. The obvious disadvantage to an employee who chooses to take voluntary redundancy in a situation of lay-off is that that employee disentitles himself to work out a notice period or get paid in lieu. This posed a significant loss to the claimant, who had worked with the company for eight years.

What the Tribunal has to ask itself is whether this lay-off was a genuine one and not some ploy on the part of the employer to avoid paying substantial notice entitlements where, in fact, a genuine redundancy existed.

The Tribunal is satisfied, on the uncontradicted evidence, that the company was going through difficult times and had lost good contracts and was desperately trying to compete for others. It is fair to assume that the company could not know if, or when, work would become available again. In taking this view the Tribunal is mindful of the four employees who held out for another two months and returned to the workplace when things looked up.

In calculating redundancy, the company did not include the period of lay-off. This is provided for under the Acts and no advantage or disadvantage arises in consequence of this.

It has not been satisfactorily explained to the Tribunal how the claimant came to sign the appropriate paperwork some four weeks before the meeting at the end of November. However, it ultimately has no bearing on the fact that the claimant took voluntary redundancy in the full knowledge that he would not also be getting payment in lieu of working out his notice period.

The Tribunal has every sympathy for the applicant herein, but finds that he has been

paid his full entitlement in the circumstances presented.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and under the Redundancy Payments Acts, 1967 to 2003 both fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)

