EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	**CASE NO.**
Employer	PE2/2006

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

Employe & 3 Others

under

PROTECTION OF EMPLOYMENT ACT, 1977
EUROPEAN COMMUNITIES (PROTECTION OF EMPLOYMENT) REGULATIONS, 2000

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr S. Mahon

Members: Mr. D. Morrison
Mr. J. LeCumbre

heard this appeal at Carrick-On-Shannon on 13 June 2007

Representation:

Appellant:
Mr. Tim O'Connell, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

Respondents:
Mr. Arthur Hall, Regional Secretary, T.E.E.U.,
5 Cavendish Row, Dublin 1

The decision of the Tribunal was as follows:-

This case came before the Tribunal as a result of an appeal by an employer (Jetwash Limited) against a decision of the Rights Commissioner under the Protection of Employment Act, 1977, R-036886-pe-05/JT, in the case of Employee and three others, (the respondents).

Background:

The appellant's position was that the facts as set out by the Rights Commissioner were not in dispute. Their position was that the letters dated 13 & 20 May 2005 satisfied the Employers obligation to initiate consultation in compliance with Section 9 of the Protection of Employment Act 1977. It was further their position that the letter from the first named respondent dated 25 May 2005 constituted a unilateral withdrawal from the consultation process initiated by the appellant. Submissions were made regarding the fact that the appellant did not engage in collective bargaining with any third party.

The respondent's position was that the appellant company have, albeit reluctantly, dealt with the TEEU and engaged in collective bargaining over the years. In any event collective bargaining was different

from the statutory obligation regarding collective redundancies. The appellant company was aware that the first named respondent was the shop steward but yet did not reply to his letter.

Both parties jointly submitted that the issue to be determined was as follows: -

> Taking as read the facts set out in the decision of the Rights Commissioner, was the Rights Commissioner wrong in law in finding that the five letters dated 13 March 2005, 16 May 2005, 20 May 2005, 25 May 2005 and 27 May 2005 did not satisfy the obligations imposed by Sections 9 & 10 of the Protection of Employment Act 1977 regarding collective redundancies.

Issues:

The Tribunal having considered the oral submissions made by the parties representatives and the documentation submitted by the various parties, in particular the above referred five letters, and it being agreed by the parties that the matter could proceed on the said basis without the parties going into oral evidence, the Tribunal is of the opinion as follows: -

1. The facts as submitted and agreed between the parties give rise to a collective redundancy.

2. A collective redundancy as envisaged by the Protection of Employment Act 1977 and the obligations imposed by Section 9 & 10 of the said Act are applicable. The redundancy is a collective redundancy within the meaning of the Act.

3. Section 9(1) of the Act states that " *Where an Employer proposes to create collective redundancies he shall, with a view to reaching an agreement, initiate consultations with employees' representatives representing the employees affected by the proposed redundancies*."The Act envisages in the first instance a proposal shall be forthcoming from an employer regarding collective redundancies and, for the purposes of "reaching an agreement", the Employer "shall" initiate consultations. The employer's letter of 13 May 2005 states, " it is withregret….that I now inform you, that from 17 June 2005 your position within the Company willbecome redundant". The Tribunal is not of the view that this letter meets the obligations imposedby Section 9 (1) which imposes a statutory imperative and directs that an employer initiate consultation when the employer proposes to create collective redundancies. The said letter constitutes not a proposal but rather a formal notification that the relevant employees have beenmade redundant.

4. The response from the employees' representative of 16 May 2005 interprets the letter of 13 May in the same fashion, namely that it is a redundancy notice. Further it points out that the Act requires the appellant company to initiate consultations when collective redundancies are being considered and at least 30 days before the dismissals take effect. By way of letter of 20 May 2005 the employer responded directly to the employees (as distinct from corresponding with their representative) regarding " the proposed redundancies" within the company. In this letter the redundancies are described as proposed as distinct from the earlier correspondence where it was a matter of fact that the redundancies were taking place from 17 June 2005. It is accepted as a matter of fact that the redundancies did take effect from 17 June 2005. In the circumstances this letter could not constitute consultation as envisaged under Section 9 (3) of the said Act on the basis that the Act clearly stipulates that the consultations "shall be initiated at the earliest opportunity and in any event at least 30 days before the first dismissal takes effect".

5. Regarding the letter of 13 May 2005 from the employer, Section 10 of the Act obliges the employer to supply all relevant information to the employees' representative. In particular subsection 10 (2) (b) stipulates that the number and description of categories of employees who,

it is proposed to make redundant. The Tribunal is of the view that this information should be furnished at the time the proposal is being made i.e. before the 30-day consultation period commences.

6. Further the Tribunal do not accept that the letter from the first named respondent of 25 May 2005 constituted a unilateral withdrawal from the consultation process.

7. On the issue of the obligation on the part of the employer to consult with the employees' union, this is not an issue that the Tribunal need to make any determination on in view of the fact that the appellant company has failed to initiate the consultations within the time stipulated by Section 9 (3) of the said Act. However the Tribunal's view of the matter is that the redundancy scheme is a creature of statute and it would seem to the Tribunal that the rationale for the introduction of the obligation to introduce a statutory scheme of redundancy and in particular in a collective redundancy scenario was "with a view to reaching an agreement between the employer and the employees". The legislation envisages that the employer will initiate consultations with employees' representatives. It is not accepted that the constitutional right asserted by the employer "not to engage in collective bargaining with any third party" is relevant in the context of the statutory redundancy scheme. Where an employee indicates that he wishes to engage the services of his union or some such representative with the view to reaching an agreement with the employer then the employer cannot refuse to deal or negotiate with the nominated person simply because of their assertion of their constitutional right not to engage in collective bargaining. There are instances where employers may call upon employees in a collective redundancy. However such an unwieldy situation does not arise in this instance and the simple assertion of a constitutional right not to engage in collective bargaining with the union is not a sufficient reason to refuse to consult with the union in a collective redundancy situation.

Determination:

The Tribunal is satisfied that the statutory obligation on the appellant company is to both inform and consult with the employees at least 30 days before dismissal. The Tribunal finds that the appellant company failed to either inform or consult with the employees, or their representatives, within the time set out in the Act. Accordingly the Tribunal upholds the decision of the Rights Commissioner in his interpretation and application of the obligations imposed on the employer in this instance and finds that the complaint was well founded and awards each of the respondents four weeks remuneration as provided in regulation 5 (2) (c) of the European Communities (Protection of Employment) Regulations 2000.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)