EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

Employee MN607/07

RP397/07

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: Mr S. Ó Riordain B.L.

Members: Mr. C. Ormond
Mr. P. Woods

heard this appeal at Dublin on 4th January 2008.

Representation:

Appellant: Ed Penrose, IMPACT, Nerneys Court, Dublin 1

Respondent: Sinead Mullins, IR/HR Executive, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2.

The decision of the Tribunal was as follows:-

At the outset of the hearing the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 was withdrawn.

Respondent's Case:

The XXXX is a registered charity providing learning and related services mainly for teenagers. It receives funding from a number of State Departments and agencies including, up to June 2007, from FAS. The withdrawal of FAS funding resulted in the termination of the appellant's employment and her being made redundant.

The respondent's Manager gave evidence. The appellant commenced employment with the respondent in April 1977 and was at the level of FAS Assistant Supervisor when her employment terminated on 1 June 2007.

The appellant was on certified sick leave from 2 October 2006 to 1 June 2007. At the time of her redundancy on 1 June 2007 her gross weekly wage was €454.96. This figure was specified in the RP50 form signed by the appellant. Pay rates of the FAS related personnel in the Centre were determined by FAS. FAS met staff in relation to the withdrawal of funding and the calculation ofthe minimum notice and redundancy payment.

In February 2007, FAS issued a standard fax authorising revised salary rates for FAS supervisory personnel in community employment. These rates incorporated the final phase of benchmarking and current social partnership agreements. Payment was subject to agreement with individual supervisors of what might be broadly termed a scheme of productivity and change. A framework for implementation in the community sector was subsequently drawn up. The appellant was on certified sick leave and redundancy was imminent and no scheme was put to her for acceptance. The only figure that could properly be used as a basis for calculation of the statutory redundancy was the actual pay rate on 1 June 2007 as agreed by the appellant in the RP 50 form.

Given the central involvement of FAS in the pay and redundancy arrangements, the respondent had requested that FAS personnel would attend the hearing. They initially understood that FAS would attend but, in the event, this did not happen.

Appellant's Case:

The appellant's union representative gave evidence. He referred to pay arrangements for the FAS supervisory personnel in community service employment and the implementation of public service pay agreements as they impacted on the appellant and her grade and on public service related employment generally.

The only point of contention related to the basis for the calculation of the statutory redundancy entitlement. He stated the gross weekly wage of €454.96 used by the respondent was out of date. He believed the correct figure was €506.55. This was based on the application of the final phase of benchmarking plus the three phases of Sustaining Progress plus the first phase of Towards 2016. Evidence was given that the effect of these on the salary of the appellant would result in her salarymoving from €454.96 (the figure used by the respondent) to €472.71 with effect from 1 June 2005to €479.80 with effect from 1 December, 2005 to €491.80 with effect from 1 June 2006 and €506.55 with effect from 1 December, 2006.

There had been delays centrally with FAS in relation to agreement on the application of these pay increases but these had been resolved before the appellant was made redundant and the fact that she had been on certified sick leave should not result in her being penalised in the calculation of her redundancy. A framework for implementation across the community sector had been drawn up on which work could have been done by both FAS and the Centre which would have facilitated any necessary formal agreement by the appellant but for her sick absence and the redundancy.

The increases in question had been applied retrospectively to the 1000 plus FAS supervisory personnel without any difficulties arising either in the drawing up of the relevant documentation in the community sector or in the formal verification process. It would be fundamentally unfair to the appellant if, in effect because of delays in drawing up a scheme outside her control and sick leave, her final salary was not retrospectively re-adjusted for the purposes of redundancy. All the increases at issue had been paid retrospectively across the public service.

The appellant should not have been penalised for agreeing to the figure used in the Form RP 50. She was on certified sick leave at the time of the redundancy and was unaware of the negotiations about pay arrangements.

Determination:

A situation of redundancy was established with employment terminated on 1 June 2007.

The only issue in dispute is whether the calculation of the statutory redundancy (which allowed for sick leave) should be based on the FAS Assistant Supervisor maximum salary scale point of €454.96 per week on 1 June 2007 as argued by the respondent and as set out in the Form RP50 or whether, as argued by the appellant, the salary should reflect the retrospective application of the pay increases under benchmarking and the relevant social partnership agreements which resulted in a maximum salary scale point of €506.55 with effect from 1 December 2006 for the FAS Assistant Supervisor grade.

The Tribunal, in considering this matter in the light of the evidence given, attaches particular importance to the fact that public service pay practice, in effect, determines the pay arrangements which apply to such bodies as the Carline Learning Centre in relation to staff, like the appellant and her former colleagues, whose salary is authorised by and fully refunded by State departments or agencies. In this regard, the retrospective adjustment of salary scales to give effect to pay agreements is a frequent feature often resulting in a recalculation of final salary to give the actual pay, which should correctly apply on termination of employment.

The appellant has argued that, in a situation where payment of increases was authorised but, in this case, not given effect due to delays in drawing up a formal productivity type agreement and due to redundancy, which are outside the control of appellant who was on certified sick leave, it would be wrong to penalise the appellant especially in a situation where, in practice, the collectively negotiated pay increases were retrospectively applied to 1000 plus other FAS supervisory personnel employed across the country, not to mention the rest of the public service.

The attachment of productivity type conditions to pay increases is a normal feature of social partnership in the public service and there is no suggestion that compliance previously created any problem for the appellant or any other FAS related staff since the appellant joined the Centre in 1997. It would not be unreasonable, in circumstances where productivity and change type agreements leading to the retrospective application of the relevant increases were accepted by other FAS supervisory personnel, and across public service related employment generally, to imply that the appellant, but for being on sick leave, would have accepted such a scheme in the Centre had it been drawn up before redundancy arose or had the employment continued. No suggestion was made that staff continuing with the Centre, whose salary is authorised by or refunded by State Departments or agencies (other than FAS), did not similarly receive retrospective payment. The payment of benchmarking and partnership increases to retired staff in line with that authorised for the serving grade is also a regular feature of public service related employment. Retrospective implementation of these awards to retired staff is, of course, not subject to their being required to sign up to future productivity.

The Tribunal considers that the rate for the job, i.e. €506.55 per week with effect from 1 December 2006, incorporating the revised payments under the relevant partnership agreements is the correct basis for calculating the entitlement to statutory redundancy. The Tribunal fully appreciates the basis of calculation used in good faith by the respondent but it considers

that, in all the circumstances outlined, the strict application of the respondent's formula would constitute a substantive injustice to the appellant.

The Tribunal finds that the appellant is entitled to an additional redundancy payment based on an amended gross weekly wage of €506.55 as and from 1st December 2006 per week and based on the following criteria:

Date of Birth:	2/6/58
Date of Commencement:	28/4/97
Date of Termination:	1/6/07
Amended Gross Weekly Wage:	€506.55

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)