EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	**CASE NO.**
Employee	RP358/2007
Against	
Employer	
under	

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr. D. Winston
Mr B. Byrne

heard this appeal at Naas on 10th March 2008.

Representation:

Appellant : Mr Conor O'Toole, Coughlan White O'Toole, Solicitors, Moorefield Road, Newbridge, Co Kildare

Respondent : In Person.

The decision of the Tribunal was as follows:-

Background:

The appellant joined the company in 1971. In 1983 she applied for a different position. This position was offered to another colleague. She continued working until 1985 when she became ill suffering from stress and was certified sick from work. In the first two to three years of her illness she furnished the company with medical certificates. She was in receipt of sickness benefit. She was treated by her own doctor and referred to a Neurologist. In 2000 the respondent set up a new plant and the appellant submitted an application for a new post there and was offered the position.

The respondent says the period 1985 – 2000 was not reckonable because the appellant signed a contract of employment upon her return in 2000. The appellant was never issued with a P45. She did not submit a letter of resignation. A colleague with whom she had worked commenced sick leave in 1990 and was afforded a redundancy sum payable from his commencement date in the company i.e. 4th December 1972.

The company paid the appellant a redundancy lump sum of €8,616.00 + an ex gratia payment of €27,723.00 + additional payment of €3,000.00. Gross figure = €39,339.00 Net figure was €32,391.00.

The statutory lump sum calculated from 1971 was €43,980. Having received €8,616.00 left a figure of €35,364.00.

Another colleague in the company from 1972 – 2007 received a statutory redundancy lump sum of €39,126.00 for 34.42 years. He did not receive an ex gratia payment.

Appellant's Case:

The appellant gave evidence of commencing employment in 1971 as a Glass Inspector. In 1983 she applied for a position in another area in the company and was offered the job. Then her supervisor informed her that it was being withdrawn and they offered the job to another person because of weight restriction attached to the position.

The appellant continued working until 1985 but felt very stressed and began suffering with severe migraine headaches. She spoke to the then HR Manager about her illness and he suggested she take some time off. In the first two to three years of her absence she submitted six medical certificates to the company. The company never queried these certificates. No P45 was issued to her. She never resigned from the company. In the 15-year period 1985 – 2000 she was absent on sick leave she was in receipt of illness benefit from the Department of Social Welfare. She attended several medical assessments requested by the Department of Social Welfare.

In 2000 her two sisters informed her of a new position becoming available in the plant. The job was in a cleaner environment. She applied for this job having consulted her doctor beforehand as her headaches had eased greatly. She was offered the job and was medically examined. She made the doctor aware of her migraine headaches and how they had eased up.

The new position was similar to the one she held previously. She received new terms and conditions of employment. She was never asked to produce a P45 as stated in the contract. When she received notification of her forthcoming redundancy in the company she spoke to the General Manager. She sought recognition for the fifteen-year period she was absent on sick leave. He said he would speak to the HR Manager. As she had not heard from the General Manager after six weeks she contacted him and sought another meeting. This meeting lasted two minutes and she was told there was nothing that could be done for her.

The appellant reiterated that she never resigned and never said she left the company to rear her young children. She believed others were treated differently to her when the redundancy lump sums were being calculated. The period 1971 –2000 was not taken into consideration when calculations were being done.

The appellant under cross examination said she chose not to consult her union when she was informed that her previous years' service with the company would not be considered for the calculation of her redundancy lump sum payment. In the period 1985 to 2000 she did not think it unusual that there was no contact from the company. She was unsure if a sick pay scheme existed in the company at that time. She discontinued forwarding medical certificates to the company after approximately three years, as she received no feedback from management. She was in receipt of

illness benefit from the Department of Social Welfare. She did not incur expenses from her G.P.for her medical certificates. She had always hoped she could return to work.

The appellant spoke to her doctor before applying for a job with the company in 2000. She was happy to go to a new cleaner environment. She signed the contract of employment, as there were new terms and conditions. She was aware she had to re-train for the new job and that she would start at the lower end of the pay scale. Within three months she moved to a higher rate. She did not raise issues with her new start date of 13th November 2000 in the new position, as she knew the company had her records on file. In 2005 she placed no value on the five-year award she received from the company. In 2000 she joined the VHI scheme. Her husband had previously had cover for both of them as he had also worked in the company. The appellant said she was unaware of anycolleagues on the income continuous scheme. She decided to investigate why she was not beingafforded recognition for the years 1985 – 2000 and wrote to the HR Manager.

The appellant told the Tribunal that she always believed she was an employee of the company since her commencement date in 1971. During her illness her sister helped look after her two children. The reference she received from the company outlined a start date with the company as 1971.

An employee from the Department of Social and Family Affairs gave evidence that the appellant was in receipt of illness benefit from 13th August 1984 to 11th November 2000. This was paid to her based on medical evidence produced. The appellant was assessed and deemed unfit for work.

The witness said that when an employee has been absent from work on sick leave for one year, the Department of Social Welfare accepted monthly medical certificates from the employee. A flat rate is paid to those in receipt of illness benefit.

A former colleague (Mr. M.) of the appellant gave evidence. He commenced employment with the company in 1972 and was absent on sick leave from the company from 1990 until he was made redundant. The company paid him for the first year he was absent on sick leave and then he was in receipt of the income continuance payment from Irish Life. He received a substantial redundancy lump sum from the company. He had been a member of the union.

Under cross-examination Mr. M. said he was happy with his redundancy lump sum. He was in receipt of €400 per month under the income continuous scheme operated by the company for employees absent from work on long term illness, which was operated by Irish Life PLC.

The appellant's husband said he was employed in the company from 1968 – 1993. He believed an excess amount was put into the Redundancy Fund and that this should have gone to the Pension Fund. All employees participated in the productivity bonus.

The former Human Resources Manager gave evidence. He commenced working with the company in January 2006 and set about restructuring the company. At that stage 190 employees were offered voluntary redundancies. Their business was under review and costs had to be reduced. In December 2006 there were compulsory redundancies. Agreement was reached with SIPTU. Any anomalies were discussed in detail with the union. The appellant was notified in April 2007 of her redundancy due to the imminent closure of the company. The company could not locate any documents relating to the appellant for the period 1985 – 2000.

Under cross-examination the Human Resources Manager said that clause 11 in the appellant's contract of employment of 2000 was standard. He could not say if the company had issued a P45 to

the appellant. There were no records to suggest a P45 had issued to the appellant. The company categorically rejected they wanted cost savings. He said the company was open and fair to all employees. There was no evidence to suggest that the appellant was employed in the period 1985 – 2000. A comparison could not be made with Mr. M. An unauthorised person in the company wrote the reference given to the appellant.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this hearing. The appellant had worked with Magna Donnelly Electronics Naas Ltd. (respondent) for a fourteen-year period from 1971 to 1985. In 1985 the appellant went out on sick leave which was certified. The appellant's period of absence from work was fifteen years. The question which the Tribunal must answer is whether during that period of absence the appellant continued to be an employee of the respondent or whether she had effectively terminated her employment. For the purpose of including that fifteen-year period in an assessment for redundancy the appellant would have to demonstrate that she never intended that she had terminated her employment. The Tribunal can find no evidence which demonstrates that it was intended by either party that the contract of employment was intended to subsist during the fifteen-year period. The parties did not stay in touch and it is not feasible that the appellant believed she was an employee of the respondent company for the duration of that period.

The appellant in making her case, compared her situation to that of a co-colleague who had been out on long-term sick leave and was allowed to include this period of time for the purpose of calculating redundancy. The Tribunal finds that this third party comparator was not in a similar position to that of the appellant insofar as he was a recipient of the Income Continuance Scheme operated by the respondent and bound to be considered an employee of the respondent company for that purpose.

The Tribunal therefore finds that the appellant has failed in her application to have the fifteen-year period included as reckonable service. Accordingly, the appeal under the Redundancy Payments Acts, 1967 to 2003 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)