EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

Employee RP680/2006

against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. Gilvarry

Members: Mr. D. Morrison
Mr. G. Hunter

heard this appeal at Donegal on 12 July and 4,5 & 6 September 2007

Representation:

Appellant:
Mr. Vernon Hegarty, Largymore, Kilcar, Co. Donegal

Respondent:
Mr. James O'Donnell B.L. instructed by Ms. Cathleen Dolan,
Cathleen Dolan Solicitors, Main Street, Donegal Town

The determination of the Tribunal was as follows:

The appellant was employed from July 1976 until some time in 1987 on a full-time basis. There was no contract of employment. In 1987 the work became seasonal. At that time the season consisted of some ten months of the year. Over the years the length of the season varied but reduced to the point that from 2002 the season was from August or September until March or April. During the period from 2002 the work was not only seasonal but also part-time in nature with the claimant working for the respondent for a maximum of twenty-four days per month down to one day per month. The appellant, on occasion, worked for other employers when he was not working for the respondent. The following table sets out the appellant's working pattern for the respondent:-

	Days worked per month				
	2002	**2003**	**2004**	**2005**	**2006**
January	11	18	12	20	24
February	19	22	11	6	6
March	19	10	8	5	0
April	11	9	10	0	0
May	2	3	0	0	0
June	1	2	0	0	0
July	0	2	0	0	0
August	1	2	0	0	0
September	1	0	0	0	0
October	13	7	10	4	4
November	8	15	13	10	14
December	9	7	1	0	9

On 24 October 2006 the managing director of the respondent received a form RP9 from the appellant in which the appellant claimed a redundancy lump sum payment by reason of lay-off, citing that he had been laid off from 18 September 2006 until 23 October 2006. On 26 October a director of the respondent replied to the appellant's claim by stating that the respondent did not accept that the appellant, as a casual seasonal worker, was entitled to claim such lump sum. The respondent did not give counter-notice to the appellant. The appellant's first day of work for the respondent at this time was 23 October 2006. No data was available to the Tribunal as to what days the appellant worked after 25 January 2007, he worked one day in January up to that date, but it is common case that his last day in work was 14 March 2007.

The appellant's position is that the 2006/2007 season started on or around 18 September 2006 but that he was not called back to work for the respondent until 23 October 2006. While the appellant accepted that he was engaged in other work until 20 October 2006, his position is that he was at all times ready to commence work for the respondent once they indicated that they had work for him.

The respondent's position is that the 2006/2007 season did not commence until 23 October 2006 and that the appellant, as a casual seasonal worker, could not have been on a period of lay-off until the start of that season.

During the course of the case the respondent's representative applied that the Chairman disqualify himself. The Chairman declined and the tribunal rose to consider the matter briefly. On resumption of the hearing the Chairman pointed out that the tribunal intended to deal with the case in a fair and equitable manner to both parties, and the tribunal unanimously refused the application of the respondent's representative for the Chairman to disqualify himself.

Determination:

The tribunal unanimously makes the following findings of fact.

1. The appellant was employed with the respondent since 15 July 1976.
2. His employment was originally as a full time worker but became a part time worker in 1987.
3. He was employed on the basis that such hours and days as were available for work with the employer were offered to him and he was entitled to decline any such work if he so wished. Work was only made available to him during the fishing season which is variable from year to year.
4. The fishing season was once much longer than it is at present but has shortened over the last ten years and now extends from approximately October to March on average.
4. The fishing season is subject to change and will vary from year to year.
5. The appellant was left free to pursue other jobs during the off season i.e. outside of the fishing season and in fact worked for another employer up to 21 October 2006.
6. The appellant was called back to work on 23 October 2006.
7. The appellant served a Form RP9 on the respondent on 24 October 2006 referring to a lay off period from 18 September 2006 to 23 October 2006.
8. The respondent replied to this notice by letter dated 26 October 2006 denying that the appellant was redundant and indicating that work was available to him.
9. The appellant was not subsequently employed for a period of 13 consecutive weeks without being on lay off short term.
10. The appellant's period of lay off coincided with the fishing season and the tribunal is satisfied that the respondent called him back to work as soon as the season recommenced in 2006.

After careful consideration of the conflicting evidence the Tribunal has come to a majority decision in this case with Mr. Morrison dissenting. In discussing the question of lay-off as applicable to seasonal workers it was necessary to consider Section 8 of the Redundancy Payments Acts, 1967 to 2003 which provides at subsection (1) that……. *where an employee who has been dismissed by reason of redundancy orlaid off has, during the period of the four years immediately preceding the date of thedismissal, or the lay-off, been laid off for an average annual period of more thantwelve weeks, the following provisions shall have effect:*

(a) that employee shall not become entitled to redundancy payment by reason of dismissal or lay-off until a period equal to the average annual period of lay-off over the said four-year period in relation to that employee has elapsed after the date of dismissal or lay-off;
(b) if, before the termination of the period required to elapse under paragraph (a), that employee resumes work with the same employer, that employee shall not be entitled to redundancy payment in relation to that dismissal or lay-off;
(c) if, before the termination of the period required to elapse under paragraph

(a), the employer offers to re-employ that employee and that employee unreasonably refuses the offer, he shall not be entitled to redundancy payment

Subsection (2) provides that …*In a case where this section applies, the period of four weeks referred to in section 12(1)(a) or the period of thirteen weeks referred to in that section shall not commence until the expiration of the period (referred to in subsection (1)(a)) equal to the appropriate average annual period of lay-off.*

Having considered the dates on which the appellant worked for the respondent in the four years prior to submitting his claim for a redundancy payment on 23 October 2006, the majority is satisfied that by that date he had exceeded the average annual period of lay-off. The majority is further satisfied that the average period of lay-off had been reached by 18 September 2006 when the appellant contended that his four-week period of lay-off had commenced. The majority is not persuaded that the appellant had unreasonably refused any offer of re-employment by the respondent during that period of lay-off.

It was then necessary to consider section 13 (1), (2) & (3) of the of the Redundancy Payments Acts, 1967 to 2003 which provides that

- (1) *Subject to subsection (2), an employee shall not be entitled to redundancy payment in pursuance of a notice of intention to claim if, on the date of service of that notice, it was reasonably to be expected that the employee (if he continued to be employed by the same employer) would, not later than four weeks after that date, enter upon a period of employment of not less than thirteen weeks during which he would not be laid off or kept on short-time for any week.*
- *(2) Subsection (1) shall not apply unless, within seven days after the service of the notice of intention to claim, the employer gives to the employee notice (in this Part referred to as a counter-notice) in writing that he will contest any liability to pay him a redundancy payment in pursuance of the notice of intention to claim.*
- *(3) If, in a case where an employee gives notice of intention to claim and the employer gives a counter-notice, the employee continues or has continued, during the next four weeks after the date of service of the notice of intention to claim, to be employed by the same employer, and he is or has been laid off or kept on short-time for each of those weeks it shall be conclusively presumed that the condition in subsection (1) was not fulfilled.*

The letter of 26 October 2006 sent from the respondent to the appellant in response to his notice of intention to claim, whilst making it clear that the respondent does not accept that a redundancy situation existed, does not satisfy the condition set out in subsection (1) in that it does not offer thirteen weeks employment when the appellant would not be laid off. The majority is therefore satisfied that, as confirmed by the records of the appellant's employment, it was not to be reasonably expected that the appellant was entering upon a period of thirteen weeks when he would not be laid off for any week.

Mr. Morrison, in his dissenting opinion, whilst agreeing with the findings of fact

disagrees with the conclusion reached by the majority. The appellant served Form RP9 on the respondent who responded by way of letter dated 26 October 2006 disputing that any redundancy situation existed. The appellant in fact continued in work after that date on the same basis as in previous years and worked out the 2006/2007 season to a conclusion. Mr. Morrison found that it would be entirely unfair to the respondent to make an award in favour of the appellant in those circumstances. Sections 13.(1).(2) and (3) of the Redundancy Act 1967 to 2003 have been referred to in the case. However it is common case that the appellant worked only when called in to the factory and in fact had more days in October/November/December 2006 than in the previous October/November/December 2005. It would be entirely unrealistic to expect the respondent to provide 13 consecutive full working weeks to the appellant when he had rarely if ever had 13 consecutive full working weeks with the respondent in any of the years since he went from a full time to a part time employee. In those circumstances Mr. Morrison finds that the appellant was not made redundant and was not entitled to claim a lump sum under the Acts.

For all these reasons the Tribunal, by the aforementioned majority, finds that the appellant is entitled to a lump sum payment under the Redundancy Payments Acts, 1967 to 2003 based on the following criteria where the gross weekly pay has been calculated as provided in paragraphs 15 and 16 (iii) of the schedule to the Acts by taking into account the remuneration paid to the appellant in the 26 weeks which ended 13 weeks before the date on which he was declared redundant

Date of Birth	Employment Commenced	Employment Ended	Gross Weekly Pay
23 February 1955	15 July 1976	23 October 2006	€382-08

The following periods are to be taken as non-reckonable service by reason of lay-off: -

20 December 2003 to 5 January 2004, 18 February 2004 to 29 February 2004, 17 March 2004 to 29 March 2004, 3 April 2004 to 18 April 2004, 1 May 2004 to 4 October 2004, 20 October 2004 to 2 November 2004, 4 December 2004 to 3 January 2005, 2 February 2005 to 13 February 2005, 13 March 2005 to 10 October 2005, 20 October 2005 to 1 November 2005, 13 November 2005 to 21 November 2005, 27 November 2005 to 3 January 2006, 4 February 2006 to 12 February 2006, 16 February 2006 to 23 October 2006.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)