EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: **CASE NO.**

Employee RP537/2007

Against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr S Ó Riordain BL

Members: Mr G. Mc Auliffe
Mr F. Barry

heard this appeal at Dublin on 13th February 2008 and 19th May 2008.

Representation:

Appellant : Mr. John Horgan, 3 Carnelly Wood, Clarecastle, Co. Clare

Respondent : Mr Breffni O'Neill, CIF, Construction House, Canal Road, Dublin 6

The decision of the Tribunal was as follows:-

Respondent's Case:

The Contracts Director of the respondent company gave evidence. He stated that the appellant and the respondent parted company by mutual agreement at a meeting on 22nd June 2007. The appellant was not made redundant as he had been replaced on the job. Also the appellant was not entitled to claim redundancy as he had less than two years service, from 9th August 2005 until 22nd June 2007.

The appellant began his employment as an engineer on 9th August 2005 at the company's Finglas site. As that job was winding down around March or April 2007 the appellant was moved to the Ashbourne site. The Contracts Director asked the appellant if he would like to become trainee sitemanager at the Lourdes site to which he agreed. The appellant was working at the Lourdes site forroughly six weeks when his employment was terminated by agreement. The Contracts Director haddiscussions with the Board of Directors about the appellant's performance prior to the meeting withthe appellant. The Board felt that the appellant was not performing satisfactorily in his site management responsibilities and they left the Contract Director to deal with it.

The Contracts Director went to meet the appellant for a review on 22nd June 2007. At the meeting they mutually agreed that the appellant was not up to the job as trainee site manager and, as there was no other job as site engineer available, that the employment should be ended. The appellant received two weeks pay as a gesture of goodwill and he would be paid in respect of outstanding holidays. The notice period required by the standard contract of employment was four weeks but the appellant had never signed the contract of employment and two weeks pay was agreed. This was an ex gratia payment. They parted on good terms.

In an e-mail sent by the appellant to the Contracts Director after the meeting on 22nd June 2007, the appellant indicated that, as agreed with him, he had been given notice that day and that he would be receiving two week's pay, holiday pay and any outstanding yearly bonus. The contracts director said that there had been no agreement between them to pay any bonus and that, in a subsequent exchange of correspondence, he wrote to the appellant to the effect that "as he was aware bonus payments are at the discretion of our Managing Director and assessed twice per year on merit" and that the company did not feel payment of a bonus was merited. He invited him to outline grounds for payment of bonus. There was a subsequent discussion with the appellant's representative about this but the company did not believe a bonus was due. The respondent also requested on 22 June,2007 that his P45 be sent to his home address and this was done. The P.45 is a revenue document and can not be regarded as notice of termination of employment. There had been no need to send any notice of termination of employment as it had been was ended by agreement on 22 June, 2007.

No bonus was due and he was not entitled to redundancy. The company was a good employer and had never previously been before the Tribunal. There was no question of deliberately terminating the appellant's employment before he became entitled to redundancy.

Appellant's Case:

The appellant outlined his professional qualifications and his work with the company since he joined in August 2005 leading to his appointment as a Junior Site Manager.

The appellant said that he had been seeking a meeting with the Contracts Director for some time in the context of a salary review but the meeting turned out to be of a different nature. There was a discussion about difficulties with his performance as a Junior Site Manager and he had agreed that he may have taken the position prematurely in view of his lack of experience.

At the meeting he reached a mutual agreement with the Contracts Director. He understood he would receive a bonus of €4,500 based on previous payment of bonuses, and he was happy with the arrangement. He was to receive two week's pay. He was not aware, until later that he was entitled to one month's notice, although it was stated in his contract of employment. It was also agreed that he would receive outstanding holiday pay.

The appellant did not receive notice of termination of his employment in writing and he did not receive the bonus as agreed. The bonus was an essential element of his agreeing to leave work and, in the circumstances, there was no agreement between the parties on his leaving. He believed that what had happened was a deliberate move by the respondent company to get him out of employment before he was entitled to redundancy. He only agreed to leave on the understanding that the bonus, which was in the order of what he would receive in redundancy, would be paid. He had not agreed to waive two weeks of his contractual notice.

The earliest date, therefore, on which notice could have been served, was 1 July, 2007, the date he received his P45. He was then contractually entitled to one month's notice and he was also entitled to take his outstanding holidays which would bring the date of termination of employment beyond 9 August, 2007and he would, therefore, be entitled to redundancy in a situation in which the company were making engineers redundant. His substantive grade was still engineer and he was paid at that rate rather than as Junior Site Manager.

Determination:

The respective position of the parties is set out in the evidence. For the appellant to succeed in his claim for payment under the Redundancy Payments Acts, 1967 to 2003 it is necessary that two elements be unambiguously clear. Firstly, that the appellant had 104 weeks' continuous service with the employer and, secondly, that a situation of redundancy existed. Failure under either heading is fatal to the appeal.

The Tribunal is satisfied on the basis of the evidence that the critical date for the purpose of this case is 22nd June, 2006 the date of the meeting and mutual agreement between the Contracts Director of the respondent company and the appellant. The practical reality is that the appellant's employment ended at this meeting and this was understood to be the position by the respondent and by the appellant, who performed his side of the agreement, cleaned out his desk, and requested that his P45 be sent on and never subsequently returned to work with the company.

The Tribunal is also satisfied that this conclusion stands irrespective of whether the termination of employment was by virtue of mutual agreement as claimed by the respondent or by reason of redundancy (in which case there would have been a statutory entitlement to one month's notice from 22 June, 2006) as claimed by the appellant in this forum, by reason of unfair dismissal being claimed by the appellant before a Right's Commissioner, or whether a right of action exists in relation to payment of an unspecified bonus or whether a further two week's pay in lieu of notice is outstanding.

The inescapable logic, therefore, is that, even if the Tribunal were to accept the appellant's submission that a situation of redundancy existed and that one month's notice plus one week's entitlement to outstanding holidays (for which payment has already been made to the appellant) were included in the calculation of continuous service, the appellant would not have 104 weeks' continuous service with the respondent company as required under the Redundancy Payments Acts, 1967 to 2003. The Tribunal is also conscious in any event that no case has been made or sustained, nor is it aware of any basis in law, which would entitle the appellant to extend the date of termination of employment by adding untaken annual leave to statutory entitlement to notice of dismissal for redundancy.

The appeal under the Redundancy Payment Acts, 1967 to 2003, therefore fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)