EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.
Employee RP4/2007

against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly BL

Members: Mr. D. Morrison
Mr. P. Clarke

heard this appeal in Sligo on 2 April 2008

Representation:
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Appellant(s) :
Mr. John McCarrick, Sectoral Organiser, SIPTU, Hanson's Retail Park,
Cleveragh, Sligo

Respondent(s) :
Mr. John V. O'Dwyer, Arthur Cox, Solicitors,
Earlsfort Centre, Earlsfort Terrace, Dublin 2

The decision of the Tribunal was as follows:-

In his appeal to the Tribunal the appellant stated that he had commenced employment with the respondent in July 1982. He received a letter dated 16 March 2006 from the respondent's director of human resources. The letter confirmed the decision of the respondent's board of directors to cease production of sugar and to issue protective notice to all employees. The letter continued as follows:

"We expect that a number of jobs will be maintained…to service future customer requirements and … for the purpose of the manufacture of animal feed. The Company has commenced the information and consultation process and we shall be entering into consultations with union representatives concerning collective redundancies arising from the changed EU sugar regime and the resulting decision to cease production. We shall be consulting the unions regarding the possibility of reducing the number of employees affected (or mitigating their circumstances) and

the basis on which it will be decided which particular employees will be made redundant in the event that some of the jobs can be saved.

You are hereby notified that, unless you are advised in writing by the Company to the contrary by 12th May, 2006, your employment with the Company will terminate on such date as is specified in a statutory redundancy notice (Form RP50) that the company may issue to you to terminate your employment on or after that date.

We confirm that this is a protective notice (which will require to be confirmed by the service of the statutory redundancy notice Form RP50) and that:

(i) it will remain operative and in effect unless you are notified by the Company in writing to the contrary; and
(ii) it is issued to you for the purpose of complying with the Company's contractual and statutory obligations to give you notice of termination of employment, including notice in accordance with the Minimum Notice and Terms of Employment Act 1974(sic)-2001.

If and when it is decided to proceed to terminate your employment by reason of redundancy, the statutory notice of redundancy (Form RP50) will be issued to you, and this will be sent to you at least 2 weeks before date of termination of your employment."

The Tribunal was furnished with a copy of a handwritten letter dated 24 October 2006 from the appellant to a named respondent executive (NS) stating that the appellant had not heard from NS regarding the appellant's "entitlement" under the respondent's "Redundancy Terms" and requesting a reply at NS's earliest convenience.

In his appeal to the Tribunal (lodged at end of 2006) the appellant stated that he had not received a reply to his letter of 24 October 2006 but that the respondent's CEO had subsequently told him verbally that he would not be receiving redundancy.

In reply to a query from the Tribunal secretariat as to the absence of an "employment ended" date on the appeal form the appellant, in a letter dated 4 January 2007, wrote:

"The reason I was unable to fill in Box part 5 – "date employment ended" is – Due to ill health I went on to the Company Group Permanent Health Insurance in October 97.

I am still in receipt of this payment which is paid to me monthly by cheque from …(the respondent)…, PRSI & PAYE is deducted in the normal way."

By letter dated 18 January 2007 the respondent's CEO wrote to the appellant as follows:

"I refer to our telephone conversation some time ago in relation to your request for redundancy. I now write to clarify the Company's position in this matter.

While protective notice was issued to all employees, the Company has not and, indeed, could not issue a Notice of Redundancy (RP50) in your case. This is because you are in receipt of permanent health insurance benefit and, consequently, you must be retained as an employee of the Company,

so that you will continue to be eligible for the benefit that is due to you in accordance with the scheme up to normal retirement age. You cannot therefore be made redundant as this would end your employment and render you ineligible for the benefits payable under the scheme.

There is no proposal whatsoever to make you redundant and we will not be doing so for the reason explained above. A standard letter was sent out to all employees, but in your case it was not confirmed or acted upon and importantly the Company did not issue an RP50 to you (nor does it intend to do so). Consequently, the protective notice is not operative and stands withdrawn in your case.

In case you misunderstood what I was saying during our telephone conversation, I should clarify that while the Company had retained employees and has ongoing employment in the business, the question of your returning to work does not in fact arise in circumstances where you have for a very long period of time (sic) and continue to be in receipt of permanent health insurance benefit. However, if you were medically certified fit for work, without any restrictions, there is no reason why you could not return to work until you reach your normal retirement age. In the absence of such certification I saw no point in putting anything in writing but I am now happy to clarify the Company's position.

In summary, you are not eligible for redundancy or for the "Sugar Distributor Redundancy Terms" in circumstances where you are and continue to be in receipt of PHI benefit and I regret that I cannot accept your request for a redundancy payment."

The appellant replied to the respondent's CEO by letter dated 5 February 2007 saying:

"I wish to point out that I did not seek redundancy from Sugar distributors (sic) until after the date on the protection (sic) notice had expired i.e. 12th May 2006.

It was only then that I made contact with the company by telephone. It should be noted that it took numerous telephone calls before I gained any response from the company. When I eventually contacted…(the abovementioned NS).. he was unable to answer my queries regarding my redundancy.
I find it strange that it was only when I referred my case to the Employment Appeals Tribunal then did I receive communication from the company.

It should be noted, however, that in the notice issued to me, the company were obliged to notify me of its withdrawal or implementation by the due date…i.e. May 12th 06.

I am still seeking the agreed redundancy package that all other members of staff were paid.

I await hearing from you at your earliest."

The respondent's CEO replied to the appellant by letter dated 8 February 2007 saying:

"I acknowledge receipt of your letter of the 5th February.

I have already explained the Company's position in this matter and I do not believe that any useful purpose would be served by further correspondence. I am satisfied that you are not entitled to a

redundancy payment for the reasons already explained and we will be resisting the claim you have made to the Employment Appeals Tribunal."

In oral submissions at the Tribunal hearing the respondent's representative said that the respondent had been in sugar production for a long time but that EU changes had caused the cessation of sugar production in Ireland. Protective notice went to all of the respondent's employees including anyone who might be on income continuance. A vast number of jobs were lost but some were saved as the respondent did have the opportunity to distribute sugar.

It was submitted that the 16 March 2006 letter had not been a notice of termination but rather that it needed further action by the respondent to be operative. Those employees for whom it would become operative would receive a redundancy (RP50) form but no such form had issued in respect of the appellant who had been suffering a long-term disability firstly in the respondent's sick pay scheme and then in the income continuance plan.

It was argued that the reason why there had been no date of employment termination on the redundancy appeal form lodged with the Tribunal at end December 2006 was that there had not been any date of termination and that the appellant had continued to receive income continuance benefit until he reached retirement age in July 2007 whereupon he subsequently received his P45 and a retirement benefit option statement from the respondent's HR manager with an undertaking that he would receive a final statement once all AVC (additional voluntary contribution) details in respect of the appellant were received from an insurance company.

The respondent's representative submitted that the appellant had never been made redundant and, therefore, was not entitled to redundancy.

In oral submissions to the Tribunal on the day of hearing the appellant's representative said that the respondent was saying that the 16 March 2006 received by the appellant was a general letter but that it had in fact been a letter to the appellant by name which could be contrasted with the respondent's CEO's "Dear Colleague" letter dated 18 March 2006 which was also received by the appellant and which stated that the respondent had decided to cease sugar production with immediate effect.

The appellant's representative, stating that the appellant had not received any communication between the March 2006 letters and the stipulated date of 12 May 2006 by which he was to be told if he was being retained, went through the financial details to show that the appellant would not lose out financially if the respondent were to pay redundancy and said that the appellant would have no issue with repaying income continuance money. 29 September 2006 was submitted to be the date of termination for redundancy purposes.

The respondent's representative, addressing the Tribunal, accepted that the respondent "could have explained a bit earlier" but submitted that the appellant "was not in any way disadvantaged" in that the appellant "still got income continuance as he had done for years". He pointed out to the Tribunal that the appellant had not offered to go into work after the respondent's CEO had set out the position in the letter of 18 January 2007 and submitted that the appellant's representative was

"putting a totally artificial interpretation" on the following sentence from the letter dated 16 March 2006 from the respondent's director of human resources to the appellant:

"You are hereby notified that, unless you are advised in writing by the Company to the contrary by 12th May, 2006, your employment with the Company will terminate on such date as is specified in a statutory redundancy notice (Form RP50) that the Company may issue to you to terminate your employment on or after that date."

The respondent's representative submitted that the appellant's representative "conveniently ignores the second part" of the sentence and added that no RP50 had ever issued.

The appellant's representative now submitted to the Tribunal that the appellant had been told that unless he was contacted by 12 May 2006 he would be made redundant and that the CEO's letter of 18 January 2007 had been written after the appellant had lodged a complaint with the Tribunal.

Questioned by the Tribunal, the respondent's representative said that he could not say if there had been any contact by the respondent with the appellant around 12 May 2006 but reiterated that the appellant had not received a RP50.

Asked if there had been a job for the appellant if the appellant had been fit for work, the respondent's representative referred the Tribunal to the following sentences in the CEO's 18 January 2007 letter to the appellant:

"However, if you were medically fit for work, without any restrictions, there is no reason why you could not return to work until you reach your normal retirement age. In the absence of such certification I saw no point in putting anything in writing but I am now happy to clarify the Company's position."

The respondent's representative now stated that the main effect of closure had been in production and that quite a number of people "on other activities" had been accommodated. Adding that the appellant's representative had complained that nobody had spoken to the appellant, the respondent's representative submitted that the respondent's obligation was to deal with the trade union rather than with individual employees.
The appellant's representative told the Tribunal that the appellant had not been a member of the trade union at the time but was now a member.

The respondent's representative told the Tribunal that the respondent had tried to keep jobs as long as it could and that sugar distribution (as distinct from production) had been "maintained with a new company". The Tribunal was told that the respondent now had less than fifty employees whereas there had been about one thousand employees prior to May 2006.

The appellant's representative stated that the respondent had closed on 29 September 2006 and that by then the appellant had not been contacted.

The respondent's representative replied that the position had been confirmed in January 2007, that the appellant had been a long-term income continuance recipient and that "a miraculous recovery" had not been expected.

The appellant's representative, confirming to a member of the Tribunal that the appellant had been a general manager, submitted that the appellant "was not called in because of his high age at the time".

The respondent's representative, having been asked if it was "realistic to say (to the appellant) in a letter ten years on that your job is still there", replied that it had been said that the appellant could go back to work, if certified fit, to the same job or to suitable similar work and that the appellant "would not have been put sweeping the floor".

Having asked if all general managers had been kept on, the abovementined Tribunal member was told that their number had been "phased down" and that "some managers were kept".

Asked if the general manager (West) was still there, the respondent's company secretary said that he did not know but that there was an area manager who had left. The respondent's representative here added that "every employee" of the respondent "could have been redeployed"

When the same Tribunal member asked about if a post on offer had not been acceptable, the respondent's representative replied: "We did not have the appellant coming back seeking work." The respondent's representative added: "Clearly the appellant had raised the point with the respondent's CEO on the phone. I can't confirm or deny that there was communication. 18 January 2007 is clearly some time after. The income continuance plan was administered by an insurance company who did not pay pensions. The cost to the respondent was ongoing pension contributions."

It was now contended to the Tribunal that the post was not made redundant and that work was still being done in that the respondent was still selling sugar although production work had ceased.

Addressing the question of whether or not the respondent should have taken the appellant into account when the appellant's job was reviewed, the respondent's representative replied that the appellant had been on income continuance, that there had been no indication from the appellant that he sought to go back to work and that the appellant had got the 16 March 2006 letter because he had been still on the respondent's books. He added that, if the respondent's factory had never closed and the appellant had gone back, the appellant "could have got his job back".

The respondent's representative was asked if the appellant, though sick, had not still been an employee and therefore entitled to be taken into the reckoning. He replied that this should have been raised and that the respondent had no obligation to consult individually with employees as opposed to employee representatives. He added that the appellant had never indicated that he was fit to return but had continued to receive the benefit of the income continuance scheme.

Furthermore, the respondent's representative argued that the appellant had not replied to the CEO's 18 January 2007 letter in the specific sense as to going back to work, that the job was not redundant, that no redundancy (RP50) form had gone out, that the appellant had been paid to normal retirement age and then retired.

At the end of the hearing neither side sought leave to subsequently send further correspondence to the Tribunal and the Tribunal undertook to issue a written determination based on the evidence adduced at the hearing.

Determination:

The Tribunal interprets that there was more than one limb to comply with in the respondent's 16 March 2006 letter and finds that the appellant's job was still there in that there was nothing to counter that. Therefore, there was no redundancy and the appeal under the Redundancy Payments Acts, 1967 to 2003, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)