EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	CASE NO.
Employee	RP415/2007

against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly BL

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

heard this appeal in Letterkenny on 30 April 2008
and 11-12 December 2008

Representation:

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Appellant(s) :
Cllr. Thomas Pringle, Connolly House, Bridge Street,
Killybegs, Donegal Po, Co. Donegal

Respondent(s) :
Mr. Kieran O'Gorman, O'Gorman Cunningham & Co, Solicitors,
16 Upper Main Street, Letterkenny, Co. Donegal

The decision of the Tribunal was as follows:-

Opening Statement for the Respondent

In an opening statement the respondent's representative said that, if the appellant's appeal were to succeed, the respondent would only be liable for about fifteen hundred euro but that at issue there was a customary practice going back "hundreds of years" by which an employed fisherman could be replaced by another for a period of time without the vacancy-filler acquiring rights under redundancy legislation after two years. It was submitted that a change in this "custom and tradition" would mean that "the whole custom of the temporary filling of a berth" would have to cease for the industry.

The respondent's representative submitted that the position involving the appellant was that the

appellant was saying that, if he had to leave his berth with the respondent, he would go to work for a Moroccan entity which was a completely different entity from the respondent. The respondent's representative said that the respondent would state that the appellant had not been obliged to go to Morocco, that the appellant had not fished there and that the appellant had gone to mend nets. Questioned by the Tribunal, the representative said that the appellant had gone to Morocco for two weeks but that the appellant would say that he had gone for a month.

The Tribunal was told that the respondent would call a witness (JC) who was the fisherman whose berth the appellant had taken and that, at end 2006, the appellant had been told that JC was coming back and would need his berth. In November 2006 a notice was sent to the appellant who was paid until end December 2006. JC was not coming back until January 2007.

Asked if the respondent's custom and practice had been spelt out clearly to the appellant, the respondent's representative replied that there had been nothing in writing and that it had been contingent on the return of JC.

The respondent's representative went on to say that the respondent, hoping to sell a boat in Morocco, established a fishing venture there which would make it possible to test a boat. The representative said that the appellant was claiming that the respondent had intended to establish a fishing business in Morocco but the representative stated that this had not been the respondent's intention.

According to the respondent's representative, "the whole tradition and way of working may change after this case". All employees of the respondent now had contracts. KD (son of the respondent's principal) would give evidence that the appellant had not been obliged to go to Morocco. It had been a choice. Most of what the appellant was claiming would be disputed. The respondent would give work if it could.

Opening Statement for the Appellant

The appellant's representative said that it was accepted that there was "custom and practice" of somebody coming in for someone who was ill or on a course but that the situation before the Tribunal was different. The appellant would say that he had a contract of indefinite duration. He thought that he would go out to Morocco if he was not working in Killybegs. In November 2006 the Morocco work ended. The appellant was claiming redundancy.

Case for the Appellant

Giving sworn testimony, the appellant said that he had begun employment with the respondent in early 2004 having worked in a net factory for some sixteen years before that. The appellant heard through his factory that the respondent wanted a few men to work as crew on a Killybegs boat. He rang KD who said that the appellant would get a berth but would have to go to Morocco if a man being replaced came back.

The Morocco venture started around that time. One of the men was to come back. The appellant

supposed that the respondent hoped to be fishing out of Morocco for a period of time. When KD took the appellant on he told the appellant that it could take time to "get things up and going" and that, if someone came back, the appellant would be sent to Morocco. He was never told that his job would cease if someone came back from Morocco. It was stated that he would have to go to Morocco if JC (the man the appellant was replacing) came back. Three men (FD, CW and the appellant) were taken on at that time. The appellant told the Tribunal that FD "was taken on a little earlier" than the appellant and was still fishing with the respondent. FD was a relative of JD (the respondent's principal). The appellant and CW were let go at the same time. The appellant said that he was still in contact with CW.

The appellant stated to the Tribunal that he "would not leave a full-time job for a temporary job". He added: "We had to get jabs to be ready to go to Morocco. We got that done for February in case we had to go at the drop of a hat."

Continuing his testimony, the appellant said that on 24 November 2004 he got a call from KD who said that JC had to come home and that the appellant would have to go to Morocco. JD told the appellant to get his stuff ready. The appellant got his wet gear out of the boats and got ready to go.

On the morning of the following Monday the appellant got a call from KD saying that JC would stay in Morocco. The appellant returned to his Killybegs boat then. He thought that his skipper got a call to tell him that the appellant would be going and that JC would return. The appellant kept fishing from Killybegs.

In July 2005 the appellant did go to Morocco. JD rang to say they had torn some nets and wanted a hand to get them repaired. From 14 July 2005 to 3 August 2005 the appellant worked in Morocco mending nets. He was brought in for that purpose. If a net was torn all of the crew would help out but the appellant had more knowledge of mending nets than did the men on the boats.

Around November, the appellant heard that the men were returning from Morocco and that the company had ceased in Morocco. The appellant had received nothing in writing. He rang JD to ask if this was true and JD confirmed it. The appellant asked for a letter from JD.

The Tribunal was now referred to a letter from the respondent dated 21 November 2006 stating that the appellant was due to finish his employment in December 2006. By letter dated 21 February 2007 the appellant wrote to the respondent claiming that he was entitled to a redundancy lump sum. Having got no response, the appellant sent a further letter dated 20 March 2007 saying that he was enclosing a completed RP9 form in relation to his redundancy claim. In August 2007 the appellant appealed to the Tribunal.

Under cross-examination, the appellant said that CW had contacted him and that CW was waiting to see what happened about the appellant's case.

The appellant said that he knew he had been "filling in" and that he had taken it that he was filling in for JC who, like the appellant, was a "netman". The appellant said that he had known that JC was going to Morocco to "get set up" and that "it was not said" that the appellant was taking JC's job but that the appellant "knew".

Asked in the cross-examination if he knew what "taking a berth" entailed, the appellant nodded and added: "I knew that, if I didn't go (to Morocco), I'd be unemployed." The appellant told the

Tribunal that he had not been told that, when JC came back, he (the appellant) would be "out of a job".

When it was put to the appellant that there had been no guarantee that Morocco would work out, he replied that there was no guarantee in any job.

When it was put to the appellant that JC was never going to stay in Morocco, he replied that JC had stayed three years and that he (the appellant) had not known about boat-selling in Morocco.

Asked what a berth was, the appellant replied: "A job." Asked if if it had been JC's berth, the appellant replied: "That had not been said." The appellant added that the respondent "was not going to be able to keep us all on".

It was put to the appellant that he had rung JD and said that JC was coming back and that there was no job for the appellant. The appellant replied that he had not said that and that he had been told the respondent would have to let him go.

It was put to the appellant that FD had also been let go at that time but it was acknowledged that FD happened to be re-employed later on. The appellant replied that he believed that CW had also gone to Morocco but that he was not sure when CW had done so. The appellant added: "I was told I'd have to go to Morocco. That was the agreement. When the boys came back I'd be going to Morocco. There would be no reason for three or four extra men in Killybegs.

At this point in the Tribunal hearing, the respondent's representative said that the "situation in Morocco" was to see if the boats were suitable for sale but that the boats had been impounded and no fishing had gone on for eleven months. The appellant now commented that he had understood that the respondent had hoped that the Morocco venture would be a success.

Asked by the Tribunal if the Morocco venture had always been limited by purpose, the respondent's representative agreed, added that the intention had been to sell boats and that "one boat was brought down to sell after fishing it for a while". Asked by the Tribunal why this had never been said to the appellant, the respondent's representative replied: "It never arose. Morocco was never (going) to be long-term." The Tribunal's proposition that the appellant had not been "made aware of the purpose of Morocco" was not disputed.

In resumed cross-examination, the appellant gave the name of a boat that "was going down to fish out of Morocco" and that the respondent had "hoped to get the company set up and going and (to) fish out of Morocco." The appellant added that he had been told that the respondent would set up a company and that he had never asked how long it had been expected to last.

It was put to the appellant that he had been taken on to fill in for JC while JC was away. The appellant replied that he had thought that he would be going to Morocco when JC came back. He added that KD was taking three or four men there and that fishing would be done there.

The appellant told the Tribunal that, while he himself had been in Morocco, JD had paid him by JD cheque. It was put to the appellant that he had said that it had been a possibility that he would maybe work out of Morocco and that he had said that he had known the terms on which he had been taken on. The appellant replied that he had not known "when it would cease". It was then put to him that he had known that his employment would cease. The appellant replied that, when KD had employed him in 2004, KD had not said that it would end in 2007.

The appellant stated to the Tribunal that KD had said that the appellant would go to Morocco when JC came back, that the appellant had been in full-time work for sixteen years and that JC could have come back in a week. When it was put to the appellant that he had not worked for the net company for sixteen years, the appellant replied: "Okay. I was fishing for five years. I was full-time for eleven years, five (years) fishing and then four back with the net company." Asked why he had gone back to the net company, the appellant replied: "I wanted to do it." It was then put to the appellant that he had wanted to go fishing when the chance came. The appellant agreed with this but said that he had not been prepared to leave a full-time job for a month's work or just until JC came back.

The appellant was now asked if he was saying that the respondent had said that it would try to keep the appellant on. He replied that he had been told that he would be going to Morocco if those who had gone there came back and added that KD had not told him that the purpose had been to sell a boat.

It was put to the appellant that he had said that there had been a possibility of going to Morocco if the chance arose but that there had been nothing to force him to go there and he was asked if he had asked JD if it would be all right if he (the appellant) got work between November and January. The appellant said yes and added that, on his last day on the boat, he had asked about the possibility of being kept on until the end of the summer.

When it was put to the appellant that, after he had made a case for redundancy, JD had rung him, the appellant replied that he might well have rung JD and asked him about redundancy.

The appellant was asked if he had not asked JD to pay redundancy minus the rebate. The appellant replied that JD had declined saying that it was not a redundancy situation.

In re-examination, the appellant said that he had heard that the respondent had had problems in Morocco. The fishing venture had been going badly. On that basis, the appellant assumed that his job was gone. He knew that he would be out of work. It was printed in a marine journal that the joint venture in Morocco was going badly. The appellant knew that he had no opportunity to go to Morocco.

The appellant was asked if he had asked JD about working on something else between November and January. The appellant replied that there would have been no hard feelings if it had been all right to do something else in the said period.

Questioned by the Tribunal, the appellant said that he had never felt that he could refuse to go to Morocco. He added that he now thought that the boat that had not been sold in morocco was now tied up in Denmark or Holland. Regarding the work he did in the fishing industry, he said that, if there were no nets to be done, he did the same as everybody else.

The appellant said that, when he rang JD, JD said that the Morocco venture was not working out and that the men who had gone there would be coming back. Asked when these men had come back, the appellant said that they had come back in January. Asked if all fishing had ceased in Morocco, the appellant replied that, as far as he knew, "they were impounded". Asked how many men had been on the boat, he replied that there were five men from Killybegs and some Moroccan

crew.

The appellant said that there was a boat in Killybegs and another boat in Morocco. He added that all four or five Irishmen had come back from Morocco to Killybegs. Only three men (the appellant, CW and FD) had been brought in to Killybegs by the respondent and had taken a berth. No-one was taken on after that in Killybegs. The appellant asked about being kept on until the end of the summer but was told that he could not. There were crew back from Morocco who took the jobs of the appellant, CW and FD.

Further questioned by the Tribunal, the appellant said that from the net factory he had heard that the respondent was going to set up business in Morocco. They made up new gear for the relevant boat which had fished out of Killybegs for years. KD said that they were hoping to provide fish in Morocco. This was to be for a fish factory that was to be set up six or eight months later.The appellant thought that the respondent had an interest in the factory. He did not know if the respondent had put money into it.

The appellant told the Tribunal that he had never heard that a boat was going to Morocco to be sold. This had been the first he had heard of boats working in a situation like this. It was only at the Tribunal hearing that the appellant had heard of boatselling. Neither JD nor KD had said to him that men were going to Morocco so that a boat could be sold. There was a fish factory in Morocco. JD -and some Moroccans were in that together.

At this point in the Tribunal hearing, the respondent's representative said that there would be a denial as to the fish factory and that there had been a sale agreement in place for a boat before the appellant went to Morocco at all.

The appellant, asked by the Tribunal to confirm that he had served a RP9 form on the respondent, said that he had posted it.

The respondent's representative said that, after the 21 February 2007 letter was sent, there had been a conversation between the appellant and JD. The appellant told the Tribunal that he could not recall this conversation.

Case for the Respondent

After taking the oath at the Tribunal hearing, KD was asked if the appellant had approached him looking for a job. KD replied: that he could clearly recollect speaking to the appellant on the pier at Killybegs; that KD had been looking for people to fill in in Killybegs; and that the appellant, who had been working in the abovementioned net factory, had asked if there was a job in Killybegs. A boat was going to Morocco on a trial period. Neither KD nor the appellant knew how long the trial period would be.

KD said to the appellant that men would be coming back and that the appellant was already in a job (with an employer other than the respondent). The appellant said that he knew that he would have to go to Morocco if the men came back from there. KD said that there was nothing certain in this.

KD told the Tribunal that he had not been dealing with the sale but that he had had to get crew for the boat and that he had got a brief from JD to source some people for while fishermen were in Morocco.

KD stated that men had been asked to go to Morocco but that he had not been in a position to tell them to do so. None of the men had been obliged to go there and they had known that they could go back at any time. KD told the Tribunal that JD had rung the appellant "to go down to mend nets for a different company" and that, if the appellant had not gone, the respondent would, through the net company, have got "somebody to go down". KD added that the appellant "could get extra money to go to Morocco to mend nets" but that "if he did not go, we would get somebody else".

In further testimony, KD said of the appellant: "I told him that the opportunity to go to Morocco could be taken if a fisherman came back. It was totally up to him. You can't tell how something will go until you see how it goes."

Replying to a question from the Tribunal regarding berthing an Morocco, KD said: "There is a fish factory but we've nothing to do with it. We've no part in it. It's a very short season. Even in a month you can make quite a lot of money. The opportunity could have been for three months or six months. (JC) is a net-mender like (the appellant). I was looking to replace the people who went to Morocco. I was approached. That was the basis (the appellant) was taken on. It was common knowledge that fishermen would go back to their original berths if they came back. It would be talked about if they did not get the berths."

Under cross-examination, KD said that he had told the appellant that it would be about three months to start with. He added that it was possible the appellant could get a berth in Morocco if JC came back and that the respondent had "hoped there were fish there".

KD acknowledged that, towards the end of 2006, the fishing venture in Morocco had got into difficulty and so there had been no opportunity for the appellant to go there. Asked if JC was a more experienced fisherman than the appellant, KD said that he could not say because the appellant had never fished under KD.

Questioned by the Tribunal, KD said that there had been a Moroccan company "with three or four Irish", that the respondent had had no links with the fish factory and that he did not even "know if any of the Moroccans were involved in the fish factory".

KD stated that men had gone to work for KP (an entity with which the respondent had had a contract) but that the said men "went with full knowledge that their jobs were still there" with the respondent.

When it was put to KD that KP had been a separate company, KD replied that the men "had full knowledge that they could go back" to the respondent, that KP had paid JC when JC was in Morocco and that he (KD) presumed that KP had paid the appellant while he (the appellant) was in Morocco. KD added that, to KD's knowledge, the respondent had paid the appellant while the appellant had been in Killybegs.

Asked if fishermen had had the right to go back to the respondent, KD replied: "It was their job.

Why would they go down (to Morocco) if there was no guarantee of their job when they go back?"

KD added that the appellant had known that he would have the opportunity to go to Morocco if JC came back. KD said that he, the appellant and everyone had known that it was "the done thing that people are taken on temporary".

KD was asked what would happen if the appellant had refused the offer to go to Morocco after JC came back. He replied: that the appellant's position had only been temporary; that, if JC came back after six weeks or three months, JC would go back into his job; and that, if the appellant did not want to go to Morocco, he (the appellant) would have no berth at Killybegs.

Asked about the five men who had gone to work for KP, KD replied that "two went their own way" and that others (including JC) had come back. Asked if service had been continuous, KD replied: "They broke when working for (KP). They were not told what would happen about their service if they went to work for (KP)." KD now said that, in his view, their service would be honoured.

At this juncture, the respondent's representative observed: "That would be tradition. Once the berth is held it would be continuous."

Further questioned by the Tribunal, KD said: "My uncle was off for family issues and a man was taken on for 1.5 years. My uncle came back and the substitute did not complain. He was glad to get his 1.5 years' work."

Asked if a berth situation could happen because of an injury, KD replied that it would sometimes happen for other reasons such as the serious illness of a family member whereupon the employee concerned would be "given time". KD said that one employee had been off for about two years and that there had been no preventing him getting his job back. Also, people had been off after they "lost bits of their hands" and, according to KD, subsequently "the berth-fillers just leave".

Asked about when somebody comes in fresh, KD replied: "Nobody comes on to a boat who would not know. You would not take on somebody who would not know the situation. Anybody taken on would be well aware. It would not arise."

When it was put to KD that it would not arise if it was written out he replied: "I don't understand. It was never done. It was never needed. Maybe from now on that's the way we'll have to do it."

It was put to KD that there would be no harm in putting something on paper so that there would be no exposure for the respondent. KD replied: "This is the first I've heard of it."

In questioning by the Tribunal it was put to KD that, in terms of law, it was necessary to offer suitable alternative employment. He replied: "It was clear in my mind the situation. It's clear from his (the appellant's) own evidence that it was clear in his mind."

Further questioned, KD continued: "I went back on a boat in Killybegs. I was in a second skipper post like before I went. I worked with him (the appellant) in Morocco and Killybegs. I and (JC) worked on the same boat in Morocco. In 2007 the work was done by (JC) who had the berth."

When it was put to KD that the appellant had done the work from 2004 to 2006 KD replied that JC "did it before and after". When it was put to KD that the work did not cease he replied that the appellant "did the work while he was there".

Giving sworn testimony, JD confirmed that the appellant had written to the respondent seeking a redundancy lump sum. JD said that there had been a sale agreement before the boat went to Morocco and that it was to be sold if suitable for fishing. There was a six-month trial period. JD only dealt with the one boat but there was another boat owned by another person. JD said that business had been flat in Europe but that the Moroccans, who had not had that kind of fishing, had agreed to buy the respondent's boat.

Asked if the Morocco venture had been a disaster, JD replied that this would be an understatement saying that hi-jacking had been attempted and that crew members had had occasion to fear for their lives.

JD agreed that there had been no question of men having to stay in Morocco. He confirmed that he had left crewing to KD but said that he (JD) had initially been the skipper and that he would be aware of what his son was doing.

JD stated that he had had no contact with the appellant until they were finishing up. He added: "We knew the project was not going ahead. They all knew they'd revert and the people in the berths knew they'd be let go. They didn't have to wait for a letter. Nothing was ever put in writing. I'm forty years fishing. I've had a lot of experiences when somebody was put in place and somebody had to go off. You knew they'd come back. It would not affect their term of employment. It was continuous."

JD told the Tribunal that the temporary men had known that they would be let go and that on 21 November 2006 the respondent's secretary sent a letter (to the appellant) saying that the employment would cease. JD said to the Tribunal that it ceased because JC was coming back to take his job. JD agreed that the appellant had received that notice in writing and that the appellant had known that it (his employment with the respondent) had been for a fixed term (by implied contingency).

Under cross-examination, JD said that he had been a minority shareholder and a director of a company in Morocco but that "the majority were Moroccan". He said that in the first six months hardly any fishing was done, that the period was extended and that they ended up in Western Sahara where there was "no law and order" such that they had to contact the Irish ambassador. They had to get a complete year of fishing to test the boat. They were cornered and could not get out. The crew in Killybegs were not fully and formally told that their jobs would end when "the boys" came back. The respondent could not give a date for that. It was the Moroccans who decided the date by their actions when they started to arrest people.

It was put to JD that, when the appellant had rung him, he had told the appellant that "the boys" would take the berths. JD replied: "I think he rang to confirm what he already knew." JD added that the apppellant had been very friendly but had requested a letter. JD acknowledged that the letter sent to the appellant had not given a reason for the appellant's employment to end. JD confirmed to the Tribunal that the appellant had subsequently written seeking redundancy.

JD was asked if he had had a conversation with CW (another man who had worked in Killybegs) and not with the appellant. JD replied: "With both."

Asked why the respondent had not replied to the appellant's February 2007 letter, JD replied that on the phone he had told the appellant that he would not get any redundancy.

In questioning by the Tribunal, JD was asked if he was aware of the responsibility of an employer to give terms and conditions of employment. He said that he was.

Asked what had been the position regarding Morocco in April 2004 when the appellant had started and asked when the agreement about the sale of a boat had been signed, JD replied: "In February 2004. I have a copy but not here (with me today). The crew did not go down until April. He (the appellant) would not start working until September. I was not involved in when he started. He was self-employed at first. He was self-employed until September but I was paying him. At that time all our employees were self-employed. They were never told that they were all employees."

Asked if the appellant's conversation with KD had been in April, JD agreed and said: "In April the boats were going down to Morocco. I'm still hoping to sell mine. It was initially six months' fishing that would be done. It was the only offer we had. The purchasers wanted to find out about the boat. The boat fished for about two years. You know where Western Sahara is and who's disputing it. It was a Moroccan company was dealing with it."

Asked if there had been a hope of fishing there, JD replied: "It's so far away. It's not a country you'd want to live in and work in."

In re-examination, JD agreed that somebody could fill in for somebody else's berth and that the job did not cease until the boat stopped fishing. JD added that one of his crew, who had been with him for the best part of thirty years, had been "off for different reasons" but JD agreed when it was put to him that the job was continuous.

Again questioned by the Tribunal, JD confirmed that he had said that the appellant had started in September (2004). JD was then referred to the respondent's letter dated 21 November 2006 which stated that the appellant had started on 2 April 2004. JD replied: "That could be an oversight. The period of employment does not make any difference. Even after he finished he did not dispute it. We're not bothered with that."

Asked about protecting the respondent's interests and those of an employee, JD replied: "After this case a lot of things will be written down. It was just the practice why it was not written down. I'm baffled by this situation." He added: "It's a lesson. This is our third day here."

The respondent's representative now submitted that the appellant had been "merely filling in", that the Tribunal's decision would affect the fishing industry and that "the tradition" was "to fill a berth for a period, for example, if somebody's wife was ill". He submitted that the fishing industry could be faced with a situation in which nobody could be taken on unless everything was addressed in writing.

When the Tribunal asked if the appellant could have been given the Morocco option if it had been viable, KD said that he would have given it if it had arisen. The respondent's representative said

that the mission had been to sell the boat and, when it was put to him that the appellant had not been privy to this, he contended: "He (the appellant) could not have been given that option because nobody knew." The respondent's representative, admitting that the respondent had not addressed the option in writing, challenged whether the appellant was in a position to think that he was going to get a job in Morocco if JC came back (to Killybegs).

Giving sworn testimony, JC said that he had been with the respondent since 1999 and added: "That's my berth on the boat. (KD) came to me in February or March of 2004 and said that a boat was going to Morocco on a six-month trial period. I knew I was coming back to the boat. I presume he (the appellant) knew I was getting my berth back."

JC agreed that his function had never ceased, that he had taken it back and that "just the person switched". Asked if there had been any obligation on him to go to Morocco or stay, JC replied: "No. I was to stay six months but I changed my mind. I understood my job was always there. The fact is (that) the job changed. That's the way as far (and) as long as I can remember."

Under cross-examination, JC said that he had been fishing since 1980 i.e. a lot longer than the appellant. Asked if the Morocco trip could have been longer, he replied: "It was six months to start." Asked if the duration of six months had been cast in stone, he replied: "No. I could go back any time." Asked if he had known who had replaced him in Morocco, he replied: "I knew (the appellant) was taken on. I just wanted to go home. It was not my concern who replaced me."

Questioned by the Tribunal, JC said that a Moroccan company had paid him while he was in Morocco, that JD had paid him when he was in Killybegs and that he would not have known about the relationship between the Moroccan entity (the abovementioned KP) and the respondent.

In re-examination JD stated that there had been "six on the boat at the start" and that the appellant had come to Morocco to fix nets but had never fished. JC was led to believe that the appellant "was down for a month".

Determination:

S. 9 (1) of the Redundancy Payments Act, 1967, provides that an employee shall be taken to be dismissed by his employer if but only if-

(a) the contract under which he is employed by the employer is terminated by the employer, whether by or without notice, or
(b) where under the contract under which he is employed by the employer he is employed for a fixed term, that term expires without being renewed under the same or a similar contract, or
(c) the employee terminates the contract under which he is employed by the employer without notice in circumstances such that he is entitled so to terminate it by reason of the employer's

conduct.

S.6 of the Redundancy Payments Act, 2003, amended s. 9 (1) of the 1967 Act by substituting the following for paragraph (b) above:

"Where, under the contract under which the employee is employed by the employer, the employee is employed for a fixed term or for a specified purpose (being a purpose of such a kind that the duration of the contract was limited but was, at the time of its making, incapable of precise ascertainment), that term expires or that purpose ceases without being renewed under the same or similar contract"

The Tribunal finds that the appellant was employed for a specific purpose i.e. to fill in in the role of netmender until JC returned. This ended when JC came back. That covers all berthing situations. Then the Tribunal turns to the alleged redundancy situation.

S. 7 (1) of the Redundancy Payments Act, 1967, provides:

"An employee, if he is dismissed by his employer by reason of redundancy or is laid off or kept on short-time for the minimum period, shall, subject to this Act, be entitled to the payment of moneys which shall be known (and are in this Act referred to) as redundancy payment provided-

(a) he has been employed for the requisite period and
(b) he was an employed contributor in employment which was insurable for all benefits under the Social Welfare Acts, 1952 to 1966, immediately before the date of the termination of his employment, or had ceased to be ordinarily employed in employment which was so insurable in the period of two years ending on that date."

S. 7 (2) provides:

"For the purposes of subsection (1), an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to-

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish."

S.4 of the Redundancy Payments Act, 1971, amended S. 7 (2) of the 1967 Act by substituting the following at paragraph (b):

"(b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish, or

(c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise"

Interpreting the above legislation in the context of the redundancy appeal to be determined, the Tribunal looked at the requirements of the business in which the appellant had been employed. The Tribunal considers that the appellant was definitely an employee. The fact that there was more than one entity (the respondent company and KP which was the Moroccan venture) is not fatal to the appellant's redundancy appeal because the legislation refers to "the requirements of that business". A business is an undertaking which can involve more than one company. A business is what is done rather than who or what does it.

Regarding the legislation's reference to "work of a particular kind", the Tribunal notes that the appellant and JC were the two people qualified to carry out netmending. As for the legislation's reference to "the place" where an individual is employed, the Tribunal observes that the need for the appellant in Killybegs ceased when JC came back from Morocco. The specific purpose of the appellant had been to take the place of JC.

In addition to the legislative aspects of this case, it also weighed with the Tribunal that the matter was made more difficult to decipher by the absence of a written contract which the respondent could easily have provided to the appellant.

Having carefully considered all of the evidence adduced in this case and the relevant redundancy legislation, the Tribunal makes a finding under the Redundancy Payments Acts, 1967 to 2007, that the appellant is entitled to a redundancy lump sum from the respondent based on the following:

Date of birth	10 July 1972
Date of commencement	24 March 2004
Date of termination	31 December 2006
Gross weekly pay	€1,100.00

It should be noted that this award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period and that social insurance fund payments are subject to a statutory ceiling of €600.00 per week

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)