EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:		**CASE NO.**
Employee	– ***appellant***	RP243/2008 MN281/2008

against

Employer	– ***respondent***

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney B.L.

Members: Mr. J. Redmond
Dr. A. Clune

heard this appeal at Galway on 18th February 2009

Representation:

Appellant(s): Ms. Lily O'Brien, V P Shields, Solicitors, Block 6, Liosbaun Business Park, Tuam Road, Galway

Respondent(s): Mr. Breffini O'Neill, Construction Industry Federation, Construction House, Canal Road, Dublin 6

The decision of the Tribunal was as follows:-

Claimant's case:

In sworn evidence, the appellant confirmed that at a meeting with the respondent on 11 October 2007, he was informed that he was being laid-off. He had understood that this lay-off was permanent. On 1 November 2007, the day that he finished work, the appellant received a letter from the respondent for the purposes of social welfare. The next contact the appellant received from the respondent was by way of telephone call on 17 December 2007. The appellant confirmed that he did not work between the dates of 1 November 2007 and 5 January 2008. In January, the appellant also received his P45 form from the respondent.

In the telephone call of 17 December 2007 from the respondent, the appellant was asked to return to work for the following day – 18 December 2007. The respondent did not indicate the duration of this resumed employment or the type of work involved. The appellant had not returned because he was in Dublin helping his parents with the renovation of their house. He told this to the respondent during the telephone call. The respondent had replied by asking the claimant for his address so as

outstanding wages and holiday pay could be forwarded to him. The appellant confirmed that nothing more was said in that telephone conversation. He had not said to the respondent that though he was in Dublin and could not return to work for the 18 December, he could be back within a subsequent few days. This period was just prior to Christmas and the site would have been closed. The telephone call from the respondent had been received at 10.00am.

The appellant's representative highlighted that they had written to the respondent on behalf of their client on 17 October 2007 and 26 October 2007 requesting details of the redundancy package that was being put in place for the appellant.

On 5 January 2008, the appellant received a letter dated 22 December 2007 from the respondent within which was stated "This letter is to confirm that we required you back to work on the 18th December last. You were unavailable as you had started work for a new firm in Dublin. The position which we were holding for you is now closed". (*Sic*) The appellant confirmed that he had not told the respondent that he had gotten new employment. However, he had not contacted the respondent to inform him that this was incorrect. His legal representative had written to the respondent on 25 January 2008 – some three weeks later – and stated in part therein "Our Client wishes it to be known that contrary to the contents of this letter [*of 22 December 2007*] he had not taken up employment with another firm and that he was in Dublin on private business". (*Sic*) The appellant had also received his P45 form by this stage.

In cross-examination, the appellant confirmed that he had been working for the respondent on a site in Knock in October/November 2007. When put to the appellant that the houses on the site were unfinished, that he was ahead in his work and that the plumbers and electricians had to be given an opportunity to catch up with their work thus the temporary lay-off, the appellant replied that everyone on the site had been laid-off and he had been the last one to go. The appellant did not accept that the plumbers and electricians were behind with their work.

The appellant denied that subsequent to 11 October 2007, the respondent had told him that the lay-off was temporary. He contended that if the lay-off had been temporary then why was he seeking alternative employment. The appellant said that he did not read the letter of 1 November 2007 in relation to social welfare as he received it in its envelope. This letter stated in part "This is to confirm that [*the appellant*] will be temporarilly laid off on Friday the 2nd of November due to a shortage of work. It is intended that he will resume work as soon we obtain suitable additional work". (*Sic*) It was put to the appellant that he was aware that his lay off was temporary from the contents of this letter.

The appellant said that he thought it was on Sunday 16 December when he missed a call from the respondent and it was on 17 December when the respondent spoke to him. The appellant denied that in that telephone conversation, he told the respondent that he had work in Dublin and that he asked for his P45 form and redundancy.

Despite working for the respondent for six years, the appellant explained that he had not contacted the respondent by telephone because the respondent was a hard person to talk to and their relationship had not been good. The reply to the respondent's letter of 22 December 2007 had been sent some three weeks later from the appellant's legal representative. He had probably contacted his legal representative about the letter of 22 December a few days after receiving it. He had not been professionally working but had being working on his parent's house. The appellant denied that he had wanted redundancy from the respondent and had not wanted to return to work for him.

It was put to the appellant that he had been offered work by way of letter of 24 February 2008. This was not the action of an unreasonable employer. As work had been available, it was not a redundancy situation but at that stage, all he had wanted was redundancy. The appellant contended that this letter, which stated in part "when we again attain suitable full time work we will give you the opportunity to return", was not an offer of work. By this stage after four months, he did not return to the respondent as he felt he could no longer work under him and as their relationship had been so bad over the years.

Replying to the Tribunal, the appellant confirmed that he had not said to the respondent during their telephone conversation on 17 December 2007 that the offer to return to work on the following day was a few days before Christmas and to be expected to return to work so close to Christmas was unreasonable. He had not asked the respondent why he was wanted back at this stage or for the duration of the work he was returning to. He had simply told the respondent that he was in Dublin and the respondent had asked for his new address so as outstanding wages and holiday pay could be forwarded to him.

Respondent's case:

In sworn evidence, the respondent's managing director (*hereinafter referred to as F*) told the Tribunal that the appellant had been employed as a carpenter and supervisor and they had a good relationship.

There had been a logjam of work as some of the trades such as the plumbers and electricians were not up-to-speed with their work. Because of this, there was a difficulty in supplying a full week's work to employees. On 11 October, F had told the appellant that he would be put on temporary lay-off but he not put a date on it. This lay-off was as to allow the other trades to catch up with their work and once caught-up, there was still six or seven weeks work for carpenters. At a guess, six months work had remained on the Knock site.

The temporary lay-off was not a redundancy situation. In July, the appellant had been sent on a teleporter training course, which provided him with a four year licence to drive such a machine. The respondent paid for this training course. The appellant would not have been sent for further training if it had been the respondent's intention to make him redundant.

From previous experience, F had known that he had to supply a letter for social welfare purposes. The appellant had not asked for such a letter but F had supplied it and he had read it to the appellant before giving it to him.

F had telephoned the appellant at least ten times and had finally spoken to him on 17 December and asked him to return to work on the next day. The appellant had said that he was working with a company in Dublin and had requested his P45 form. F had sought the appellant's new address, which he supplied and then had wished the appellant the best. The P45 form had been sent to the appellant on 3 January 2008. By his refusal to return to work and in requesting his P45 form, the appellant had terminated his own employment. It was the appellant who requested his P45 form. The tax office had told F that he could issue the P45 form and that same could be reversed, if required.

Three weeks later, the respondent received a reply to their letter of 22 December 2007 by way of letter dated 25 January 2008 from the appellant's legal representative. F had been surprised with the content of same, particularly the denial that the appellant had been working with another firm.

Despite being patchy on site, things were getting up-to-speed so F had offered work back to the appellant. However, the appellant had belittled the offer. Overall, the appellant had been offered work on 18 December and on two further occasions.

In cross-examination, F confirmed that on the 11 October 2007, he had discussed the logjam of work and temporary lay-offs with the appellant. However, he had not explained how long the temporary lay-off might be for, except that it might be for a while, possibly a month but not three months. The respondent had experienced previous lay-offs in 2003. At that time, F thought the two people had been laid-off. These people had not subsequently been made redundant.

F had not mentioned redundancy to the appellant. There was still work which had to be finished. F had known to supply a letter to the appellant in relation to social services and this letter had been given to the appellant the day before he had finished on site.

F had telephoned the appellant over ten days but had not left a message because this facility was not on the appellant's telephone. F would not have used text to the appellant. It was on the 17 December that F and the appellant had spoken on the telephone. F had told the appellant that he had been looking for him on the previous day. The appellant had said that he was now working for someone else in Dublin and that he had not had his telephone with him during the previous week. F confirmed that the work that had been available to the appellant had been sub-contracted to others.

The respondent's letter of 22 December 2007 had told the appellant that the position that had been held for him was closed from 18 December. F had offered the appellant work only to be told by the appellant that he had work. F had not given notice to the appellant that his employment had ended because he did not have to.

It was put to F that the appellant had not been aware that there was work that still needed to be completed on site, thus the letters from the appellant's legal representative in relation to the appellant's redundancy entitlements. F replied that in the respondent's letters of reply, it had been stated that it was not a redundancy situation but was temporary lay-off. Months of work still had to be completed but it was a judgement call as to when employees would be back to work depending on when the other trades would have caught up with the logjam of work.

F confirmed that he had replied to the appellant's letter of 13 March 2008. An RP77 form had been enclosed with this letter. F said that he had not known what the RP77 form was but would not have completed it because the appellant was not entitled to redundancy.

The appellant had been offered work three times and he would have known that the duration of this work would have been for months. Work had been sub-contracted and this was not the best way to price a job. The appellant would have been taken back had he returned to work. All he had to do was say that he wanted to return. Because the sub-contractors could not be laid off to make way for the re-employment of the appellant, suitable future work would have been offered to him at the site in Knock. Work had not finished there until June and even then, snagging had continued for a few weeks with a crew of three or four people.

Replying to the Tribunal, F explained that the letters of 17 October 2007 and 26 October 2007 from the appellant's legal representative had referred to redundancy. He had spoken to the appellant on two occasions on the Knock site and told him that it was not a redundancy situation. He thought that this had finished the matter. He had not replied to the appellant's legal representatives but had

let the appellant talk to them himself. He did not believe that he had to reply to the legal representative. Talk could not be done through solicitor's letters and he had spoken directly with the appellant.

Despite the appellant's denial that he was working for a firm in Dublin, F said that they both – the appellant and himself – knew that his denial was untrue. While accepting that lies are told, F agreed that the appellant would have been taken back.

The tone of the respondent's letter of 24 February 2008 was matter-of-fact to sort out the issue. The appellant had been offered the opportunity to return to work. While accepting that the tone of the letter was not friendly, neither was the tone on the letter of 25 January 2008 from the legal representative, which had threatened to "take legal action without further notice". The job that had been offered in the letter of 24 February 2008 was genuine and had existed and the appellant had been wanted back.

The job had also existed in December 2007 and work would have continued until the following summer. However, because the appellant had not answered his telephone during the previous weeks, F had felt that he was being fobbed off. When they had finally spoken, the appellant had requested his P45 form.

Closing statements:

The respondent's representative stated that this was not a redundancy situation. Furthermore, if the appellant was alleging that he was dismissed, this was properly a claim for unfair dismissal.

The appellant's representative stated that their position was that the appellant was made redundant and that one day's notice to return to work was not sufficient.

Determination:

Having carefully considered the evidence adduced, the Tribunal is satisfied that no genuine redundancy situation existed. The appellant failed to prove that no work was available for him from the respondent. Accordingly, the appeals under the Redundancy Payments Acts, 1967 to 2003 and Minimum Notice and Terms of Employment Acts, 1973 to 2001 are dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)