EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:		**CASE NO.**
Employee	*-appellant*	RP499/2007
against		
Employer	*- respondent*	

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. Mc Aveety

Members: Mr. D. Morrison
Mr G. Hunter

heard this appeal at Donegal on 1st August 2008
and 8th December 2008

Representation:

Appellant(s): XXXX

Respondent(s): Mr. Ian Mc Kenna, O'Donnell McKenna, Solicitors, Waterloo Place, Donegal Town, Co. Donegal

The decision of the Tribunal was as follows:-

Respondent's Case

The Respondent operates in the seafood and fish processing industry and mainly employs seasonal workers. The Production Manager was first to give evidence on behalf of the company and has been employed with the company for the last twelve years and is the Production Manager for three years. The company's staff complement varies from 160 maximum employees to 30 – 49 depending on the season and fish supplies available. The norm is that if there is no fish available, employees are laid off.

The Production Manager explained that the appellant last worked for the company in February 2007. The crab season which started in April 2007 was exceptionally busy. It was normal company practice to telephone all their temporary employees to organise them to work during the busy periods. On commencement of the crab season, the Production Manager telephoned the appellant and left a message for him that cleaning work was available in the respondents. She was surprised that the appellant did not return her call. The following day her assistant told her that she had heard the appellant was doing a computer course that was being funded by FAS. As the

appellant was not available for work she gave his job to another employee for the season.

Under cross-examination she could not recall the exact date on which she had left a phone message for the appellant, but it was most likely in May. When the appellant did not contact her after she had left the message, she did not try and contact him again. It is normal when a call is not returned, she does not follow up. She explained that because of the area where the company is based, local people normally hear when the production lines are starting up, and if an employee does not receive a phone call to recommence work, they would usually contact the company themselves. There is a loose arrangement in place between the locals and the company. She had been made aware that a RP9 had been received from the appellant, but she was not aware of its significance.

In response to a question from the Tribunal the Production Manager outlined when she had rang the appellant. She attended a management meeting at three o'clock where it was decided to run a production line the next day. After this meeting she phoned the appellant to let him know she would need him to start work the following night. The next day as she had not heard back from the appellant she assigned another employee to do the cleaning for the crab season.

The Production Manager could not recall what type of greeting was on the appellant's telephone. If the appellant had telephoned her at any stage she would have given him a job. She would expect the appellant to return to work the crab season which would start in a couple of weeks, that she would be contacting him when the company starts production.

Next to give evidence was an employee who worked for the company for a year and she terminated her employment in June 2007. During this period she replaced the Production Manager for six months who was on maternity leave.

She explained the procedure used to notify employees when a season started. During her time in employment she would have left messages for the appellant on his answering machine and the appellant had contacted her. She did not contact the appellant in 2007 as she was not the Production Manager when the crab season commenced in 2007.

The Managing Director gave evidence on behalf of the Respondent. He explained that the company is the main employer in the area, that the nature of the business requires a level of flexibility from all employees. There is a loose arrangement with employees, and when contacted to start work you cannot pressurise them in to doing so. There is give and take between company and employees to accommodate the needs of both parties. However they have no formal redundancies or lay off procedures.

He believed and was happy that the appellant had been called regarding work available.

The appellant's RP 9 form was the first one he had ever received and at the time he was not aware of the clause to counter notice the employees notice of intention to claim redundancy. There was no redundancy situation and he had passed the form on to another employee and asked him to deal with it appropriately. He did not follow up on the form with this employee and the RP9 was not dealt with. He had issued no instruction to remove the appellant from the employees list and that the appellant's status had not changed with the company.

Appellant's Case

On the second day of hearing, the appellant gave sworn testimony. He commenced employment for the respondent in 1993. His duties included cleaning the plant and working on a fish-processing line. The appellant worked on a seasonal basis. It would usually start at end July/start August and would usually end by March/April depending on the amount of staff involved. He was told by phone if the season was to begin.

Asked if he had ever had to phone the respondent to ask when work would start, the appellant said no. Asked if the respondent had rung him in July 2007, the appellant replied: "No. I'm absolutely certain." He said that the respondent would usually call him or leave a message but that he had got no message and that he had not called the respondent. He added: "It would not work if you had a hundred and fifty people calling them."

Asked if he had been worried, the appellant replied that he had been "a bit concerned" and he confirmed that he had been available for work from mid-July to mid-September 2007. He acknowledged that he had submitted a RP9 form on 18 September but maintained that the respondent had not called him then or sooner. The respondent had not called him at the start of 2008 and had not called him back ever since. Asked why not, he replied that he did not know.

Under cross-examination, the appellant confirmed that he had worked for the respondent from 1993 i.e. for fourteen years or, in fact, fourteen seasons. He acknowledged that the month in which the season would commence might vary from year to year.

Asked what he had done after 18 February 2007 when he had last worked for the respondent, the appellant replied that he had taken on a computer course, which had started in mid-March and had ended around July or early August. He named two female respondent employees who had done the course and said that these ladies had not finished the course because the respondent had called them back. Asked if he actually knew this, he replied: "I presumed it." Asked why he had not rung the respondent then, he said that the normal procedure was that, if the respondent had work for him, they would call him.

Invited to confirm that he had been "a bit concerned", the appellant replied: "Of course." It was put to him that he might have tried to get to the bottom of it. He replied that he had not known what was happening, that the respondent "could have been reorganising here or there" and that the respondent would normally call him. When it was put to him that it had been "relatively informal" and a "flexible situation", he did not disagree.

It was put to the appellant that he had not thought of "picking up the phone". He replied: "I didn't know what was happening. I waited and waited for a call. I submitted the RP9 and still did not get a response."

When the appellant confirmed that he had a wife and children it was put to him that a man with a family should have called the respondent and he was asked why he had not done so. He replied: "I'd feel humiliated. They'd always phoned over a period of fourteen years."

It was put to the appellant that he had seen others going to work and had known that forty non-nationals were going. He replied: "I'd feel rather humiliated trying to phone the respondent." When he was asked why he had not rung the respondent rather than bringing them to the Tribunal, he replied: "I sent the RP9."

Invited to agree that he had been doing a computer course and had had no intention of going back to the respondent, the appellant said that he would have discontinued the computer course and returned back to work with the respondent if he had been called. He said that he had been doing an E.C.D.L. course but had had to give it up after a few months because he had been getting headaches. Asked if he had learnt to send e-mail, he replied: "No. I'd not got to that." Regarding the abovementioned two female respondent employees who had not finished the course because the respondent had called them back, he said that they had done "something else" and that his job had been "cleaning the plant".

When it was put to the appellant that redundancy is when an employer has no work for someone, he replied: "I was waiting for a call." Asked if he expected the Tribunal to believe that he had not made any effort, he replied: "I did not know what was happening in the plant. My job was cleaning plant. I was not certain my plant was being used." He did state that, during his thirteen years with the respondent, the respondent had been an excellent employer and had treated him very well.

The appellant acknowledged that the respondent had flexible working arrangements and that people did other things while released but said that he had been available all year round. When it was put to him that he had sat at home idle rather than going back to work, he replied: "I assumed they had no work for me. I submitted the RP9 in September." When it was put to him that there had been no basis for submitting a RP9 form, he replied: "Had they called me I'd be back in an hour." When it was put to him that he had known that the respondent's plant had been extremely busy, the appellant replied: "I did not know what was happening in the factory. Normally I'd be called back at the start of August. There could be no further work."

The appellant denied that the respondent's production manager had called him and said that he had got no message. Asked if he had assumed that there was no work, he replied: "I did not know." It was put to him that he had said on his claim form to the Tribunal that he assumed there was no work. He replied: "There obviously was no work. Otherwise they'd have called me." Asked if anyone had told him to contact the respondent, the appellant replied: "I heard offhand people were working there. I assumed there was no work for me. They have called me for thirteen years."

He asked the appellant if he would accept that when the respondent had never been so busy, it was not appropriate to serve a RP9 form on the respondent. The appellant replied that, when not called back, he had got in touch with the representative who was now acting for him before the Tribunal.

In questioning by the Tribunal it was put to the appellant that the respondent's production manager had said that she had left a message on his phone. The appellant replied: "I did not receive any message. I've an answering machine and caller i.d. Nobody but my wife has access to my phone. There is no way a message can be mislaid. I would have been there constantly checking. At least twice a day, I'd check that."

Determination:

Having considered the evidence adduced, the Tribunal notes that the appellant served an RP9 form on the respondent and that the respondent failed to give any counter notice. Under the Redundancy Payments Acts, 1967 to 2007, the Tribunal finds that the appellant is entitled to a redundancy lump sum based on the following details:

Date of birth 1st January 1946

Commencement date 1993
Termination date 4th October 2007
Gross weekly pay €429.00

There was a total of 83 weeks of non-reckonable service, by reason of lay-off, from 4th October 2004 until the end of the employment.

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)