EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:	CASE NO.
EMPLOYEE – Claimant	RP1051/2008
	MN1133/2008

against

EMPLOYER – Respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL
Members: Mr R Murphy
Mr P Trehy

heard this appeal at Cork on 23rd June 2009

Representation:

Appellant: Mr Pat Guilfoyle, Regional Secretary, TEEU,
Old Fire House, 23 Sullivans Quay, Cork

Respondent: Mr David Gaffney, Coakley Moloney, Solicitors,
49 South Mall, Cork

The decision of the Tribunal was as follows: -

Respondent's case:

The appellant had not been furnished with a statement of the terms of his employment nor had he received payslips. Ultimately it was agreed between the parties that his remuneration had been €479.65 per week.

The respondent had taken on the appellant as an apprentice electrician in or around September 2005. The appellant had attended FAS Phase 2 off-the-job training from 23rd October 2006 to 16th March 2007 as part of his apprenticeship. The appellant failed a section of the examinations and again on two subsequent attempts.

The appellant received a letter dated 22nd May 2008 from FAS stating that "*every contract of apprenticeship shall be deemed to be automatically terminated, on an apprentice failing to reach, after three (3) attempts the minimum qualifying standard, as specified by FAS in any of the modular assessments during off-the-job training - Labour Services Act 1987 – Apprenticeship Rules*

997Section 8". The appellant was given the option to appeal the termination of the contract ofapprenticeship within three months. The respondent urged the appellant to appeal this decision andthe respondent provided the appellant with money to take grinds in mathematics and lodge theappeal so that the appellant could repeat the exam.

On 11th June 2008 a sub-contractor, E, offered the respondent some work locally. On 13th June 2008 he told the appellant there was work for him from 16th June but that the respondent would still pay the appellant. The appellant has previously worked for other sub-contractor(s) and continued to be paid by the respondent. The respondent's brother is also a sub-contractor. The appellant was to contact the sub-contractor E over the weekend to get details of the job. On Tuesday the sub-contractor E told the respondent that the appellant had not turned up for work and that the appellant had sent him a text message on the Sunday stating he was going working for the appellant's brother. Six weeks later a family member rang stating that the appellant was entitled toredundancy. The appellant was planning on going to Australia.

The appellant sent the respondent Form RP9 on 25th August 2008 and in it stated that 20th June 2008 was the first day of lay-off. The respondent by letter stated that the offer of work by the sub-contractor E on 11th June 2008 was extending his employment before entering into a temporary lay-off situation. The appellant responded by letter dated 3rd September 2008.

In cross-examination the respondent stated that he has continued to work on this particular site up to and including the date of this hearing. On the 6th June 2008 the respondent told the appellant he might have to put him on temporary lay-off. Having told the appellant on 13th June 2008 that there was work for him from the following Monday, the appellant asked the respondent's brother for the telephone number for the sub-contractor E.

In answer to questions from Tribunal members the respondent stated that he did not terminate the appellant's employment. On the 13th 1June 2008 he paid the claimant his wages and two weeks holidays plus €100 to re-sit his exam. This was in response to the letter from FAS dated 22nd May stating that his apprenticeship had been terminated.

The Tribunal also heard evidence from the sub-contractor E who is a self-employed electrical contractor. The sub-contractor E had asked the respondent if he could assist him and it was arranged that the appellant would come and work for him the following Monday. On Sunday at teatime the respondent received a text message from the appellant telling him he was going to work for his brother. On Tuesday the respondent sent his brother and son to help the sub-contractor E instead. The sub-contractor E had worked with the appellant on a number of occasions. There would be plenty of work for the appellant and on Monday 16th June 2008 he needed bodies on the site as certain work had to be done.

In cross-examination the sub-contractor E said that he did not agree that the appellant had contacted him three weeks later. The appellant had left him in the lurch on 16th June 2008.

Appellant's case:

On 6th June 2008 the appellant was on site when the respondent came to him and told him that he would have to let him go due to the downturn in work. On 13th June 2008 the appellant was handed a cheque and there was no conversation about work with the sub-contractor E. Three weeks later the appellant rang the respondent and the respondent told the appellant to ring the sub-contractor E

which he did, however the sub-contractor E did not get back to him. The appellant had worked for the sub-contractor E, through the respondent prior to this and the respondent would have paid him. The respondent's brother was foreman on site but he was not aware that he was also a sub-contractor. The appellant subsequently took up work with his brother. The appellant needed his P.45 to sign on for Social Welfare purposes and he rang the accountant to get him to send it on to him. He also mentioned to the accountant regarding his redundancy payment and he sent him Form RP9 for his signature. There was no further communication after that. There was no conversation with the respondent on Friday 13th June regarding other work. In relation to the letter from FAS dated 22nd May 2008, as far as he was concerned he had three months to appeal. He had a good relationship with the respondent.

In cross-examination the appellant stated that on 13th June 2008 he was handed the cheque and was told this included his holiday pay and the respondent encouraged him to go back and re-sit the exam. When he got the letter from FAS he did not read into the detail of it but saw that he had three months to appeal. His parents wanted him to go back to repeat the exam. He had tried three times and was not successful. He got a few days work here and there with his brother during the three weeks but was unsure of the exact dates after he finished working with the respondent. He sent the RP9 to the respondent as he thought he was being let go and he crossed out the word "Short Time" on the form.

Determination:

In many respects the facts as alleged by the parties were not in dispute. It appears that much of the conflict between the parties concerns the significance of what was said. Having carefully considered all the evidence the Tribunal prefers the evidence of the respondent.

The Tribunal notes that the last day actually worked by the appellant for the respondent was 13th June 2008. The Form RP 9 as submitted by the appellant had only part B filled in, this is the part in which the employee notice of intention to claim redundancy dated 25th August 2008 and claiming lay off commencing 20th June 2008. These dates are inconsistent with those submitted by the appellant on Form T1A which gives the date of termination of employment as 13th June 2008.

The Tribunal finds that the appellant was placed on lay-off and that during the period of lay-off the respondent offered to the appellant work with the sub-contractor E. The respondent gave evidence that the appellant had worked with this sub-contractor before and that the respondent had charged the sub-contractor E by way of invoices for the appellant's work and that the appellant had continued to be paid by the respondent for work done for the sub-contractor. The Tribunal is satisfied that the work with the sub-contractor E was work for which the appellant was to continue in his role as an employee of the respondent and therefore the respondent had brought the period of lay-off to an end when the respondent offered this work to the appellant.

The Tribunal has considered Article 8 of S.I. No. 168/1997 Labour Services Act 1987 - Apprenticeship Rules 1997 which provides that: *"Every contract of apprenticeship shall be deemed to be automatically terminated on an apprentice failing to reach after three (3) attempts the minimum qualifying standard as specified by An Fóras in any of the modular assessments duringoff-the-job training. Second and subsequent attempts must be taken in accordance with the procedures for such attempts in each trade, as specified by An Fóras."* The Tribunal notes that hadthe respondent wished to terminate the employment of the appellant without liability for aredundancy payment the respondent could have taken the opportunity to deem the employment asbeing terminated by operation of the Article 8 and otherwise than by way of

redundancy. Insteadthe respondent sought to retain the appellant in his employ after receiving notice of the third failure.

It was submitted on behalf of the respondent that if the appellant's employment was terminated on 13th June 2008, as alleged by the appellant in the Form T1A then section 4 of the Unfair Dismissals Act, 1977 applies and it provides that: "*This Act shall not apply in relation to the dismissal of a person who is or was employed under a statutory apprenticeship if the dismissal takes place within 6 months after the commencement of the apprenticeship or within 1 month after the completion of the apprenticeship*." It was submitted that in this case the apprenticeship was terminated in accordance with the letter from FAS dated 22nd May 2008. The Tribunal does not find it necessary to decide this point as the Tribunal finds that the respondent did not terminate the employment of the appellant during this one month period or at all.

The Tribunal accepts the evidence of the respondent that he encouraged the appellant to appeal to FAS and that the appellant failed to make an adequate response to his employer - he just did not say he was going to appeal. The Tribunal also accepts the evidence of the respondent that when the respondent offered work to the appellant in Sarsfield Court the appellant simply shrugged his shoulders and that it was for this reason that the respondent paid the cheques at that time to the appellant. The Tribunal finds that the payment of the cheques at that time was a way of dealing with the uncertainty caused by the appellant as to whether the appellant wished to continue working for the respondent and was not an act of termination of employment by the respondent.

The case of Paul Kenny v Tegral Building Products Limited, UD837/2004 was opened to the Tribunal. In that case it was argued that there had been a break in employment within one month of the ending of the apprenticeship of the appellant and that the subsequent period of re-employment was a period of service insufficient for an award of redundancy. This division of the Employment Appeals Tribunal finds that the facts of this case involve no such discontinuity as the respondent did not terminate the employment of the appellant with the ending of the apprenticeship and therefore the Tegral case can be distinguished from this case.

The respondent had work for the appellant on assignment with sub-contractor E but the appellant did not take up the offer of employment. Instead the appellant took up work of his own choosing with someone else and thereby the appellant terminated his own employment.

The appeal under the Redundancy Payments Acts 1967 to 2007 is dismissed. No award is being made under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)