EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:		**CASE NO.**
Employee	- ***appellant***	RP947/2008
against		
Employer	– ***respondent***	

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. S. McNally

Members: Ms. M. Sweeney
Ms. H. Kelleher

heard this appeal at Cork on 29th May 2009

Representation:

Appellant(s): Mr. Daniel Snihur, National Secretary, Independent Workers Union, 55 North Main Street, Cork

Respondent(s): Mr. Conor O'Connell, Construction Industry Federation, Construction House, 4 Eastgate Avenue, Little Island, Cork

(The *hearing of this case was conducted with the assistance of a Tribunal appointed Polish interpreter, who had been provided on formal application by the appellant's representative.*)

The decision of the Tribunal was as follows:-

Appellant's case:

In his sworn evidence, the appellant confirmed that his employment with the respondent commenced in August 2005 and ended on 15 April 2008.

On the afternoon of Tuesday 15 April 2008, the appellant and two work colleagues (*hereinafter referred to as Jar and Pav*) were told by JOD that there was no more work for them and not to come to work the next day.

After a month, the appellant and Jar contacted the respondent to enquire if work was available. JOD told them to come to the office the next day to collect their P45 forms and sign other forms indicating that they did not want redundancy. The next day, he and Jar went to the respondent's office. They were told to sign the document indicating that they did not want a redundancy

payment and if they refused to sign the document, they would not get their P45 forms. The appellant told the respondent that he did not want to sign the document. Jar agreed to sign the document and was told to return the next day to collect his P45 form, and the holiday money and wages that were owed to him. The appellant did not sign the document. He received the wages and holiday money owed to him a month after going on lay-off, and two months after going on lay-off, he received his P45 form.

The appellant stated that he never received a letter from the respondent stating that more work was available, nor had anyone from the respondent contacted him about further work. He denied that he had received a telephone call from the respondent on 12 May with an offer of work.

Following his lay-off from the respondent, the appellant claimed social welfare benefit. While claiming this benefit, he was not allowed to leave the country. He had asked about this directly and had been informed that he could not leave the country. He had to sign on monthly to claim his benefit payment and so had to be present in Ireland. He had claimed benefit for a period of ten months. He could not leave Ireland during this time, as his social welfare payment would have been stopped. The appellant collected his first month of social welfare payments at the post office. After this, the benefit was paid directly in to the appellant's bank account.

The letter, which he received from JOD, was enough to allow him apply for social welfare. This letter advised the appellant that there was no more work for him and that he should apply for social welfare. He confirmed that the letter had stated that he was being laid off.

The third work colleague – Pav – had also been put on lay-off on the same day as the appellant. Pav had two relatives working for the respondent. The appellant believed that Pav had been contacted and had returned to work for the respondent. Pav's service with the respondent was shorter that the appellants.

In cross-examination, the appellant confirmed that the 15 April 2008 was the last day that he worked for the respondent. He denied that prior to this, he had been advised that work was slowing down due to contractual difficulties and that there may be a need to put him on temporary lay-off.

The appellant agreed that on the 15 April 2008, JOD gave him a letter stating that there was no more work and that he should apply for social welfare. It was put to the appellant that he had also been given an RP9 form on that date. In reply, the appellant stated that he received a sealed envelope which he opened when he got home. The envelope contained only one document, the letter stating that temporarily, there was no work, but in the future, he might get a call to return. It was put again to the appellant that the envelope that JOD had given him had contained two documents, the letter about the temporary lay-off and an RP9 form.

The appellant confirmed that in applying for social welfare, he had given the Social Welfare office the temporary lay-off letter, his P60 form and the completed application form claiming social welfare.

The appellant stated that at the end of May, his colleague – Jar – telephoned the respondent to enquire if there was work available for both of them. Jar telephoned on behalf of the appellant because Jar's English was better. It was put to the appellant that he himself made no contact with the respondent, either physically or by telephone, subsequent to 15 April. In reply, the appellant stated that he was invited to come to the respondent's office the day after Jar had telephoned the respondent. Both he and Jar went there together the next day. Jar had signed the document but he had not.

The letter that he had initially received from JOD about being put on temporary lay-off had been given to the Social Welfare office. He did not retain of copy of it, nor did he have a copy of the form on which he had been asked to sign away his entitlement to redundancy. He maintained that he had only been asked to sign the document and if he refused, he would not get his P45 form.

The appellant received his P45 form two months after going on lay-off. Jar had agreed to sign the document and had received his P45 form the day after. When asked why he had not received his P45 form like Jar if both had called to the office together, the appellant replied that as he would not sign the document, unlike Jar, he did not receive his P45, but Jar did. The appellant did not know why it was that the respondent had posted his P45 form to him if it was true that he refused to sign the document.

It was put to the appellant that subsequent to the respondent's attempts to make contact with them, Jar had called to the respondent's office for his P45 form because he was returning to Poland, and he – *the appellant* – had asked Jar to also ask for his – *the appellant's* – P45 form, that Jar had told JOD that both he and the appellant were returning to Poland and that the appellant wanted his P45 form to claim tax back. In denying this, the appellant stated that Jar had agreed to sign the document because he was returning to Poland but he – *the appellant* – had refused to sign becausehe was staying in Ireland.

The appellant confirmed that the union helped him complete the T1-A form (*Notice of Appeal*) for his claim for redundancy, and other forms in relation to alleged breaches of his employment rights. The T1-A form was completed on 13 May 2008.

On 4 March 2009, the appellant signed for his last social welfare payment and returned to Poland three days later. He did not appear at a rights commissioner hearing on 13 March 2009 in relation to the other claims that he had taken against the respondent because no one had told him about the hearing. However, that hearing had proceeded in his absence.

The appellant maintained that he did contact the respondent subsequent to going on temporary lay-off on 15 April 2008. He was available for work during all of that time but was not called back by the respondent.

It was highlighted to the appellant that the 12 May 2008 would have been one month subsequent to lay-off. He had gone to the union on 13 May 2008, where various forms were completed, including a form to claim redundancy. The appellant confirmed that, at that stage, he knew he was entitled to redundancy and the union representative had confirmed same to him. When asked why he or his union had not written to the respondent at that stage to claim redundancy, the appellant replied that the union representative had told him that they would sent the appropriate documentation and that he should just wait.

Replying to Tribunal questions, the appellant confirmed that he went to the union a month after being laid off by the respondent. He told the union representative that he had been laid off, that he had not received redundancy and that he had worked for the respondent for three years. The union representative told him that he would write an official letter to the respondent and tell them to pay the redundancy.

During the period, April 2008 until 2009, the appellant confirmed that he did not leave Ireland for any reason, nor did he get work while he was in Ireland.

When asked about the redundancy document/form he had been asked to sign waiving his right to

redundancy and to describe same, the claimant stated that he had not seen this document/form. It had been at the end of May when the appellant and Jar had called to the respondent's office. On that day, he had refused to sign this document/form but he did not actually see it. The document/form was produced by the office secretary to Jar on the following day when Jar went to collect his P45 form. Jar had described the document/form to the appellant. Colleagues had previously told the appellant that he would be given such a document to sign and that he should not sign it, as if he did, he would not get his redundancy payment.

On 15 April, JOD had told him that there was no more work. His friend has interpreted this for him. His friend had also interpreted the letter they received from JOD. The appellant opened the envelope within which his letter was contained and gave it to his friend to read to him. It had been a one page letter and his friend had received the same letter.

Jar had been with the appellant the day the appellant physically called to the respondent's office and he had translated what was said. Jar told him that if he signed the document/form, he would get his P45 form. The document/form was not there that day but it would be prepared for the following day, for signing. The appellant refused to sign the document/form. Jar had agreed to sign it and so went alone to the office the next day. The appellant only went to the office once. He confirmed that his P45 form had been posted to his address in Cork.

The appellant confirmed that he remembered signing documents for the union representative. He confirmed that it was his signature on the T1-A form.

The appellant's union representative gave sworn evidence in relation to the presence in Ireland of the appellant and the preparation of the application form claiming redundancy.

The union representative explained that it was not possible for a union representative to represent people they do not personally meet. On 13 May, the appellant attended the union office and the date of his signature on his T1-A form attested to that fact, same being signed in front of the representative on that date. This was normal procedure in the case of people who attend the office and have no English. The appellant provided information in relation to his employment and the circumstances behind his claims. After compiling this information, the forms relevant to the claims were procured. In relation to the appellant's claim for redundancy, it was the T1-A form that was procured. The union representative confirmed that he advised the appellant that the T1-A form was the standard form for the claiming of redundancy.

The appellant had knowledge of his entitlements. He had come into the office and said that four weeks had passed, he was on temporary lay-off and that he thought that he was entitled to redundancy. The union representative confirmed this information to the appellant. The appellant had wanted the union to represent him.

The union representative was unsure if the appellant had attended the union office on more than one occasion. However, he had updated the appellant on the situation through contact on the appellant's mobile telephone.

The union representative had explained to the appellant that they would be writing to the respondent and the State bodies involved in his claims. This was what the appellant had wanted. It has also been explained to the appellant that due to the backlog of work that the union were dealing with, there would be a delay on their part in having the matter processed.

The union representative confirmed that he wrote to the respondent on 12 September 2008. (*A copy*

of this letter was opened to the Tribunal). In this letter addressed to the respondent was outlined a number of entitlements which the appellant was claiming, and included correct pay, overtime premium, notice and "a redundancy payment after he was laid off for a period of over 4 weeks." (*sic*) Also stated therein was a calculation by the union representative that the appellant was "owed€8,845.20 in total." Upon this letter being opened to the Tribunal, the respondent's representative stated that its contents only indicated claims that were lodged against the respondent and did not constitute a request for redundancy payment.

The union representative stated that he did not get an RP9 form from the appellant. The appellant had said that he never received such a form from the respondent. The union representative also never saw the letter that the appellant had received from the respondent as same had been given to the Social Welfare office. The union representative concluded by confirming that the appellant had been aware that he was on temporary lay-off.

In cross-examination, the union representative confirmed that the appellant had first made contact with the union on 13 May 2008. At that time, the appellant knew that he was entitled to redundancy and the union representative confirmed same to him. After gathering the details on the appellant's employment, the next thing that had been done was the completion of the T1-A form. He never advised the appellant to contact the respondent, and the union's delay in writing to the respondent had been due to their backlog of work. When asked why a claim for redundancy had not been made through the respondent, the union representative replied that he had done it through the T1-A form.

Respondent's case:

In his sworn evidence, JOD confirmed that he was a Director of the respondent company. In April 2008, there had been an interruption in their work due to problems on a particular site where they had been working. Because of the problem, they had to go off site for two months. Accordingly, three employees – the appellant, Pav and Jar – were put on temporary lay-off that April. He had spoken to these employees two weeks earlier and had told them about the uncertainty of the continuation of work. He had subsequently told them that because of the site problems, they would have to be let go on temporary lay-off. Two weeks later, JOD gave them an envelope containing an RP9 form and a letter stating that they were on temporary lay-off.

Only Pav returned to work for the respondent after JOD had telephoned him in May. JOD had also tried to contact Jar and the appellant at that time but without success.

On 14 May, Jar came in to the respondent's office. The appellant had not been with him. JOD had been in the office at the time and both of them had spoken for a while. Jar had said that he had been on holidays in Poland. He had come to request his P45 form, as he wanted to claim his tax back. When JOD had enquired about the appellant, Jar told him that he – *the appellant* – was in Poland and to issue him with his P45 form as well as he also wanted to claim tax back. Jar returned the following day to collect his P45 form.

JOD stated that he genuinely wanted to re-employ the guys because he was under pressure of work at that time. Both had been good workers and JOD had no issues with them.

Since April 2008, the respondent had received no contact from the appellant. The appellant's P45 form had been posted to him. His position with the respondent had not been made redundant and another person had since replaced the appellant.
Twenty employees had been made redundant so far this year by the respondent and they had been

paid redundancy. There had been no issue with these redundancy payments.

In cross-examination, JOD confirmed that he had not tried to make direct contact with the appellant due to the appellant's poor English. Contact had been tried through the appellant's colleague. The same contact telephone number that had been given for both Jar and the appellant. Jar had also been asked to have the appellant contact the respondent. The respondent had not written to the appellant because Pav had told them that he – *the appellant* – had returned to Poland. JOD agreedthat, in hindsight, when considering that a claim for redundancy might arise, it might have been important to have contacted the appellant in writing with an offer of work. However, he had neverthought that they would be at the Employment Appeals Tribunal, as he had gotten on well with thelads.

JOD met the employees on site on 15 April, where they had been working all day. He did not recall the appellant telephoning through a friend a month later, seeking work. Only Jar had subsequently come to the office, where he said that he had come back from Poland.

JOD agreed that the appellant and Jar had been good workers. When on site in April, they had said that they wanted to continue working with the respondent so it was hard to believe that they did not subsequently want to return.

Pav returned to work in May. He had told JOD prior to that time that the appellant had returned to Poland. Jar had also told JOD that the appellant was in Poland. As JOD was busy, he never thought to write to the appellant. He was getting on with the work and trying to replace the lads who had left.

In his sworn evidence, DOB explained that he was a joint Managing Director of the respondent company, which had been founded twelve years ago. It had employed three hundred employees and 2008 had been a good year for the respondent. When the respondent was founded, a decision was made to do things properly in relation to an employee's entitlements. Over the years, they had not changed their name or tried to hide behind the vale of liquidation. A National Employment Rights Authority (NERA) inspection had given them a clean bill of health.

The appellant had been in employment with the respondent for three years. The appellant knew the respondent's set-up so not re-hiring him after the end of the lay-off period made no sense. DOB could not understand why, after only a month, the appellant had sought redundancy. It made no financial sense for the respondent to contest the claim. The fist time the respondent heard about this claim was in September and through the appellant's union. All claims that the appellant had made had been through the union.

Over the past five or six months, employees have been made redundant and all redundancy entitlements have been paid. The respondent had no difficulty in paying an employee who had an entitlement to redundancy.

In cross-examination, DOB confirmed that the appellant's representative's union were the only union who took claims against the respondent in relation to union disputes. Employees are members of two other unions and union deductions are made accordingly from an employee's wages. In line with procedure, if an employee has a problem, he contacts his union and the union contacts the respondent to set up a meeting. The only source of complaints was from this union.

Closing statements:

The respondent's representative stated that both the appellant and the respondent had admitted in evidence that a temporary lay-off situation had existed and letters confirming same had been issued by the respondent to the appellant. The respondent did not terminate that employment contract of the appellant and, in many ways, he was still considered to be an employee.

The appellant made no effort to contact the respondent by way of an RP9 form to claim redundancy because he was not available to return to work. It would not have suited him to be told – by way of counter-claim on part B of the RP9 form – that work was available for him.

In a temporary lay-off situation, the onus is on an employee to claim redundancy. However, this was not a redundancy situation as defined under the Redundancy Payments Act, 1967 as the appellant's position had not been made redundant.

The appellant's representative stated that the appellant had been in Ireland claiming social welfare and so was available for work with the respondent. The respondent's allegations had been that the appellant had left Ireland or another employee had said that the appellant had left Ireland. They never tried to contact the appellant, as they should have by way of registered post.

It was the respondent who decided to issue the appellant with his P45 form after two months. The appellant never asked another employee to have his P45 form issued to him. He had been available for work with the respondent and so was now entitled to redundancy.

Determination:

Section 12(1) of the Redundancy Payments Acts, 1967 provides that "*An employee shall not be entitled to redundancy payment by reason of having been laid of or kept on short-time unless he gives to his employer notice (in this Part referred to as a notice of intention to claim) in writing of his intention to claim redundancy payment in respect of lay-off or short-time.*"

It was accepted by both sides that there was a temporary lay-off and this was communicated to the appellant on 15 April 2008. However, the required procedure to make a claim for redundancy on foot of a lay-off situation was not adhered to by the appellant. Accordingly, the appeal under the Redundancy Payments Acts, 1967 to 2007 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)