EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.

EMPLOYEE RP148/2009

Against

EMPLOYER

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. L. Tobin
Mr C. Ryan

heard this appeal at Dublin on 29th July 2009

Representation:

Appellant(s) Mr Michael Whelan, Siptu, Dublin Construction & Allied Trades Branch, Liberty Hall, Dublin 1

Respondent(s): Ms Sinead Mullins, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The decision of the Tribunal was as follows:-

Respondent's Case

SK told the Tribunal that she was a trade and labour consultant with the respondent. A large number of people with skill sets were registered with the respondent. The respondent matched people on request with required skill sets. It assigned temporary workers, registered them and where it could it matched skill sets. Requests changed on a regular basis and it depended on client requirements. The process on registering was to document details such as name, address, skill sets and sign a temporary worker form. Some individuals could be registered with other agencies and they were not obliged to take assignments from the respondent. When an individual registered, time was spent with them and they were informed that it was not a work offer. If people were actively seeking employment they kept in regular contact with the respondent. The respondent had two separate offices until September 2008. She and her colleague worked together and they had a record of who contacted them. She had no record that the appellant telephoned and was seeking employment. The work that people undertook depended on skill sets and it varied according to the client needs.
In cross-examination she stated that the appellant registered and started work with the respondent in

2004. The appellant signed a term of assignment form on 12 July 2007. He commenced work with the respondent in 2004 and she did not know if he signed a term of assignment form in 2004. The respondent paid the appellant the registered employment agreement rates weekly on a time sheet basis For every one hundred hours he worked he was given eight hours holiday and he could apply for holidays at any time. She was not aware if the respondent paid for a safe pass test for the appellant.

She was not aware of the legalities of redundancy. An individual who registered with the respondent was under no obligation to accept work. If she obtained an assignment from a specific company she would look at her records to establish who worked with that company previously. At no stage during the appellant's three to four breaks in service did the respondent receive an RP9 form from the appellant.

In answer to questions from the Tribunal she stated that she did not know if a job was available for the appellant in August 2008. She had never dealt with the appellant and she and her colleague moved to the same office in September 2008. The appellant was never drawn to her attention and her colleague would have told her who was available to work with the respondent. A P45 issued to the appellant in December 2008. When the respondent placed an individual with a client it checked to ensure the client was happy. The respondent paid the appellant's wages. The client paid the respondent an hourly rate for work it provided.

Appellant's Case

The appellant told the Tribunal that he registered with the respondent on 12 May 2004 as a general operative. He was not given a contract of employment. He had regular work and he contacted a member of staff in the office prior to August 2008. He was not aware of company procedures. He paid tax and PRSI. If work was available he received a telephone call. He did not come and go as he pleased. He did not have public liability insurance. He requested a letter from the respondent in July 2008, as he wanted to receive social welfare. If he did not undertake work he was paid social welfare. He was not aware of lay off procedures. He never refused work, he requested his P45, as he needed money for Christmas. He was told that he was entitled to redundancy and he sent a letter to the respondent requesting his redundancy. He did not receive a reply and the respondent did not contact him. The respondent did not have work for him and he believed that he should have received his redundancy. He was not aware if the law covered an agency worker.

In cross-examination he stated that when he returned from holidays in 2008 he made numerous calls to the respondent but he could not recall who he spoke to. He was made aware in 2007 when he signed the form that it was for temporary work. He did not have paperwork with him at the hearing. He sent the letter requesting redundancy to the payroll division. From August to September 2008 he knew that there was nothing happening and he thought that things had folded in the respondent.

In re-examination he stated that he was not aware of any procedures he had to adhere to to obtain work from the respondent. He was not aware that he could work with another agency. The respondent did not give him any information. He visited the office in September and he thought that it was closed.

In answer to questions from the Tribunal he stated that he did not read the terms of assignment, he

signed it "blind". He could not recall if he signed a term of assignment when he commenced employment with the respondent

Determination

The appellant gave evidence that he commenced with the Agency in May 2004 and that he finished on 5 December 2008. The appellant was not offered work by the agency for some time. The appellant gave evidence that he wrote to the Agency indicating his intention to claim redundancy. The respondent maintain they did not receive such notification but acknowledge that there was a change in personnel in the office and the person the appellant normally reported to was no longer there.

The appellant had not been notified that he was on lay off and thus the respondent's argument that he should have responded within a four week period pursuant to Section 12 of the Redundancy Payments Act 1967 as amended by Section 11 of the Redundancy Payments Act 1971 does not arise.

Furthermore had the agency served notice of lay off it would indicate that the agency considered the appellant to be its employee, which would bring him within the Act and the respondent does not accept that he comes within the Acts. In 2003 the amending redundancy payment legislation introduced a change to the definitions of "contract of employment" and "employee". In that regard the 2003 legislation defines a contract of employment as meaning a contract of service and "any other contract whereby an individual agrees with another person who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971 and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract)…" The legislation goes on to define an "employee" as a person working under a contract of employment (as defined in the legislation) and an employer as the person who has somebody working under a contract of employment (as defined in the legislation). The effect of the definition of a contract of employment as contained in the 2003 Act is that the issue of whether or not the agency worker is an "employee" is largely irrelevant, it is enough if the agency worker has agreed with the recruitment agency to perform any work or service on behalf of a third party and the agency is liable to pay the wages of the person concerned. (Redundancy Payments Act, 2003 Section 3).

Once the respondent terminates the relationship which it effectively did as it had no work for the appellant and the person meets the qualifying criteria set out in the legislation, which this appellant does, then the appellant is entitled to a redundancy payment.

The fact that the appellant in the instant case, wrote of his intention to claim redundancy first has no bearing on anything as he was prompted to do so by the absence of work for quite a period of time. If it were to have any bearing on anything it would mean that the Agency would be able to circumvent the provisions of the Act.

While there were interruptions in the appellant's period of service the Tribunal is of the view that it does not constitute a break in his continuity of service that would take him outside the provisions of

the Act.

Schedule 3(5A) Redundancy Payments Act, 1971 states as follows:-

> "If an employee is dismissed by reason of redundancy before attaining the period of 104 weeks referred to in section 7(5) (as amended) of the Principal Act and resumes employment with the same employer within 26 weeks, his employment shall be taken to be continuous."

Further at the commencement of each break in his employment there was a mutual expectation that he would recommence employment with the same employer once suitable work became available. The record over the four years of his employment confirmed that he would be re-employed after each such break in his employment. Thus the appellant is entitled to his redundancy under the Redundancy Payments Acts, 1967 to 2007 based on the following criteria:-

Date of birth	13 June 1967
Date employment began	12 May 2004
Date employment ended	05 December 2008
Gross weekly pay	€750.00

The award is being made subject to the appellant being in insurable employment under the Social Welfare Acts during the relevant period.

There is a weekly ceiling of €600 on all awards made from the Social Insurance Fund.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)