EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	CASE NO.
EMPLOYEE - appellant	RP2902/2009

against

EMPLOYER - respondent

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. Ó Catháin

Members: Mr. D. Hegarty
Mr. F. Dorgan

heard this appeal in Cork on 24 August 2010

Representation:

_____

Appellant(s):
XXXXX

Respondent(s):
Mr. Arthur Comyn, O'Connor Dudley & Comyn, Solicitors,
West End, Mallow, Co. Cork

The decision of the Tribunal was as follows:-

A redundancy award was sought for the appellant after an employment from 9 January 2006 to 4 April 2009. It was contended that the respondent had never told the appellant that he was entitled to redundancy when the respondent had let him go. There was a letter to prove that the respondent had terminated the appellant's employment. A redundancy form had been sent to the respondent but the respondent had not responded to it.

In its defence the respondent contended that no redundancy situation had existed when the

appellant's employment terminated and that the appellant had been dismissed on the grounds of lack of competence. It was contended that there had then been (and that there continued to be) work available.

Giving sworn testimony with the aid of an interpreter, the appellant said that he did not know why he had not received a P45 from the respondent. He had just received one letter from the respondent (dated 17 April 2009) confirming that the appellant was no longer employed with the respondentand that his employment had "terminated from 4th April 2009".

Asked what he had done for the respondent (a construction company), the appellant said that he had done different work at different times but that he had worked nine or ten hours per day and that the respondent had never really complained about his work. However, his number of hours was cut down and he was not replaced after his termination when he was told, on his last day, that the respondent had no work for him.

Under cross-examination, the appellant acknowledged that the abovementioned 17 April 2009 letter had been sought by his son. Asked if his son had said to the respondent that he felt that he was made redundant, the appellant replied that, after his son had spoken to the respondent, he (the appellant) had understood that the respondent had no employment for him any more.

It was put to the appellant that the first time that redundancy was mentioned was when redundancy forms were completed on 25 August 2009. He replied that this was possible.

Asked if he was aware of anybody after him who had been let go by the respondent, the appellant replied that he had not heard of anyone.

The appellant denied that a P45 had been issued in late 2009. Asked if he could claim jobseeker's benefit without a P45, he replied that he could do so on the grounds of the letter that he had got in May(sic) 2009, that he had not sought unemployment benefit before that letter and that his son had known that he needed something saying that he had been working. The appellant stated that he had been let go on 4 April 2009 and not on 17 April 2009.

In re-examination the appellant confirmed that he still thought that he had been made redundant and that he was entitled to a redundancy lump sum. He had been working very hard, had not resigned and had been let go.

In questioning by the Tribunal the appellant was asked how his relationship with the respondent had ended. He replied that the respondent had approached him and had told him that he did not understand English enough. This had not troubled the respondent for three years. He worked until the end of that day and got a cheque for that week. Asked who had approached him from the respondent he named his boss (CES).

In further cross-examination by the respondent's representative, the appellant acknowledged that the respondent had asked him to learn some basic words of English. Asked if he had done so, he replied that he had made some progress and had learned some English.

It was put to the appellant that he had left manholes and gullies uncovered (after he had been told to cover them), that this had occurred about two weeks before his termination and that this had caused a risk to health and safety. The appellant replied that he had not previously heard about this. He did acknowledge that CES had sent out his own son to come and explain to the appellant.

Giving sworn testimony, the abovementioned CES said that he was the managing director of the respondent and that two of his own sons worked with him. He also employed some twenty people. The appellant worked for the respondent for three years but, having no English, was only able to work when he had a son of CES with him. The appellant had to be shown what to do and how to do it.

CES confirmed that the abovementioned incident regarding health and safety had occurred and that he had let the appellant go after that. CES also confirmed that the abovementioned 17 April 2009 letter had been given to the appellant but stated that there had been no mention of a redundancy claim until his wife had got one in the post.

CES stated that the number of people employed by him varied but that he had not made the appellant redundant.

Under cross-examination, CES did not deny that the appellant had worked for the respondent for three years but said that the appellant was good only with CES's son and that it had come "to a head over health and safety". CES said that "with a small bit of English" the appellant could have been sent on jobs but that it had become "impossible and frustrating" that the respondent "could not get basic English" from him. The respondent had been very happy with the appellant's work but could not supervise him all the time.

CES told the Tribunal that if the appellant had had "a small bit of English he would still be with us". Asked why that had not been put in the letter, CES replied that the appellant's son had asked for a letter to get unemployment benefit and that the appellant had been a good worker.

In re-examination CES said that there had not been a redundancy situation, that the respondent still had work despite the construction industry downturn and that "on and off" the respondent had about twenty employees.

Giving sworn testimony, CEJ (an employee of the respondent and a son of CES) corroborated CES's statement that the respondent still employed about twenty people. CEJ stated that the respondent still had work and was engaged in a project in a business park in North County Cork since the end of May 2010 and that this project would last until about the end of October 2010.

Questioned by the Tribunal, CEJ said that it had been CES who had spoken to the appellant on 4 April 2010 but that the appellant's son had been present because the appellant would not have understood without his so there.

CEJ told the Tribunal that he had picked the appellant up in the mornings to go to work and that he had worked with the appellant a lot.

Determination:

The Tribunal heard it argued, on behalf of the appellant, that the appellant was made redundant and, on behalf of the respondent, that the appellant's employment was terminated on grounds of competence rather than redundancy. Having considered the evidence adduced, the Tribunal was not satisfied that there was a redundancy in the circumstances of this case. The appeal under the Redundancy Payments Acts, 1967 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)