EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	CASE NO.
EMPLOYEE - appellant	RP1598/2010
	MN1133/2010

against

EMPLOYER - respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr D Moore
Mr P Trehy

heard this appeal in Dublin on 21st March 2011

Representation:

Appellant: In person

Respondent: No legal representation

The decision of the Tribunal was as follows: -

Appellant's Case

The appellant claimed to have been employed continuously as an information officer by the respondent from 15th January 1995 until 9th April 2010 when he was made redundant. The appellant stated that his gross weekly pay had been €392.00 until July 2009 and thereafter he was paid €262.50 gross per week. The appellant alleged that the respondent had refused to pay redundancy calculated on the basis of the full period of his employment with them from 15th January 1995 to 9th April 2010. The respondent merely paid to the appellant redundancy for the period from 26th June 2002 to 9th April 2010 as that was the time they put him on a contract. The respondent also paid redundancy calculated on the basis of his part-time rate even though he worked mainly at the

full-time rate until July 2009. The respondent had given to the appellant redundancy calculated on the basis of seven years and forty-three weeks service instead of fifteen years and thirteen weeks service. The appellant also claimed that he should have received eight weeks notice instead of the four weeks notice that the respondent had given to him.

The appellant sought to receive a redundancy award for fifteen years and thirteen weeks service calculated at the full-time rate of €392.00 instead of the seven years and forty-three weeks service calculated at the part-time rate of €262.50 that he had actually received. The appellant also sought an additional four weeks notice.

Respondent's Case

The respondent was described as a registered charity and voluntary organisation founded in 1994 to provide free information and education services to the unemployed and to low-income families. The respondent employed the appellant under the FÁS community employment programme from 15th January 1995 to 4th December 1998. Then another company (hereafter referred to as VX) employed the appellant under the full-time job initiative programme from 7th December 1998 to 21st June 2002. It was the respondent's case that although the appellant was placed in the respondent's organisation the appellant was an employee of VX, the appellant had a contract of employment with VX and the appellant had his wages paid by VX. Therefore the respondent argued that the appellant was not in the employment of the respondent for this period.

When the appellant's contract of employment with VX terminated the appellant was granted a further year on community employment with the respondent. The appellant received a top-up payment from the respondent during this employment. The respondent had calculated the appellant's redundancy period of service from the start of this latter period of employment.

The respondent believed that it was correct in calculating the appellant's redundancy payment on the basis of service from 2002 given the break in employment when the appellant was employed by VX for a period of three-and-a-half years. The respondent argued that the appellant was therefore only entitled to four weeks notice. However, the respondent had noted an error in its calculations resulting in an underpayment to the appellant. The redundancy payment had been calculated using a gross weekly wage of €262.50 when the respondent should have calculated the amount due at a weekly rate of €344.68 based on figures extracted from the appellant's P60 for 2009. This left the amount of €1,199.93 owing to the appellant.

The Hearing

At the Tribunal hearing the appellant was asked about the break between his first employment with the respondent and his employment with VX. The appellant replied that there had been no break in that he had started on the Monday after the preceding Friday. When the Tribunal asked if the work had been the same there was no contention that it had been different. The appellant's number of weekly hours had changed. It was put to TL (a manager with the respondent) that an employee's rights could continue in a situation where he was doing the same work in the same location. TL stated that there was no redundancy available for community employment people and that VX had been a different legal entity from the respondent.

The appellant stated that he had stayed with VX for three-and-a-half years and that he would have

sought redundancy if he had not gone to the respondent. TL acknowledged that the nature of the work had been the same and that, while the appellant was with VX, he had been on secondment to the respondent.

The appellant stated that he had paid full tax and PRSI for fifteen years. The appellant acknowledged that he had received the sum of €5032.43 (i.e. €3,832.50 plus the top-up of €1,199.93 mentioned in the respondent's defence above).

The appellant stated to the Tribunal that he had worked the four weeks' notice given to him by the respondent but he claimed that he had been entitled to eight weeks' notice based on his total service and therefore there was still a notice payment due to him equivalent to four weeks' gross pay.

It was put to the respondent that it seemed that there had been a transfer of undertaking in the sense that there had been continuity of the appellant's employment. TL reiterated that community employment employees were not entitled to redundancy and stated that the respondent was not in a position to pay.

Determination:

The Tribunal finds that the appellant had continuous employment with the respondent throughout the period 15th January 1995 until 9th April 2010. The Tribunal finds that the respondent was the sole employer of the appellant for the periods 15th January 1995 until 4th December 1998 and from 26th June 2002 to 9th April 2010 and during the intervening period the respondent had been the secondary employer of the appellant. It is possible for an employee to have more than one employer at a time and where an employee is on secondment from the primary to the secondary employer then both the primary and secondary employers are simultaneously employers of the employee. Therefore the Tribunal holds that where the alleged discontinuity in service occurs by way of the appellant being seconded back immediately to the respondent then employment is continuous. The Tribunal finds that the appellant was initially employed solely by the respondent and thereafter employed by the respondent as secondary employer and finally employed by the respondent as the sole employer.

For the appellant it was submitted that the employment was continuous as there had been a transfer of undertaking and that the work for which the appellant had initially been employed together with the appellant was an undertaking, which had transferred from the respondent to VX and ultimately back to the respondent. The Tribunal rejects this analysis on the basis that the work that was being carried out remained part of the undertaking of the respondent throughout and that the appellant remained integrated into the operations of the respondent. There was no evidence that VX managed the appellant or directed the work carried out by the appellant but rather the respondent remained in control at all times. It appears to the Tribunal that VX was merely involved in the employment relationship as a means of maintaining funding to the position after the FÁS community employment programme had expired and was little more than a funding agency. The Tribunal finds that the appellant was employed by VX for the purposes of carrying out the work of the respondent and that work remained part of the undertaking of the respondent. It appears to the Tribunal that VX was co-operating with the respondent to ensure that the appellant could continue to work for the respondent.

The Tribunal was provided with insufficient evidence to conclude that VX was a sub-contractor to the respondent and that the appellant was merely an employee of VX as a sub-contractor. It did not

appear that the work of the respondent or any part thereof had been given over to VX to carry out other than the payment of wages the appellant.

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:	8th September 1948
Date of commencement:	15th January 1995
Date of termination:	10th March 2010
Gross weekly pay:	€392.00

The Tribunal notes that a payment of €5,032.43 has already been made to the appellant by the respondent in part satisfaction of the redundancy.

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

The Tribunal allows the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, and the Tribunal awards to the appellant the sum of €1568.00 (this amount being equivalent to four weeks' gross pay at €392.00 per week) being the difference between the eight weeks notice to which the appellant was entitled and the four weeks notice which the appellant had worked.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)