EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	CASE NO.
EMPLOYEE	RP350/2011, MN291/2011

against

EMPLOYER

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: Ms. K. T O' Mahony B.L.

Members: Mr D. Hegarty
Mr J. Flavin

heard this appeal at Tralee on 24th February and 25th May 2012

Representation:

Appellant : REP

Respondent : Mr David Lane, KPMG, 90 South Mall, Cork

The decision of the Tribunal was as follows:

The appellant was claiming entitlement to a redundancy lump sum based on a period of unbroken service from 8 January 1999 to 27 April 2010 when the company ceased trading. The RP1form signed by the former owner of the company sets out those dates as the period of employment. A liquidator was appointed to the company on 4 June 2010. An EIP 1 prepared by the company's accountant also sets out those dates.

The liquidator, through a colleague on his behalf, was challenging the appellant's entitlement to a redundancy lump sum payment on the grounds that the appellant resigned from the employment on 9 January 2010 and while he resumed employment with his former employer some weeks later, on 15 February 2010, he had by his resignation broken his continuity of service and the earlier period of service could not be taken into account for the purposes of redundancy entitlements.

Summary of Evidence.

The appellant commenced employment as a truck driver with the respondent who had a haulage business on 8 January 1999. In the latter part of his employment his duties consisted of collecting milk and delivering fertiliser and feed stuffs. His wages were paid weekly by cheque and later by electronic transfer. However, in or around September 2008 this changed and his wages were not paid when due. This problem became worse and by mid/late December 2009 his wages were several weeks in arrears. The appellant spoke to the managing director (MD) about this problem a number of times. By 31 December 2009 MD had paid the appellant all the arrears of wages due to him, in two separate instalments. Before Christmas 2009 the employees were told that the respondent had lost a major contract (the fertiliser and feed stuffs contract) to another haulage company.

On 9 January 2010 the appellant, feeling he had to make a stand, approached MD and asked to be paid on a weekly basis. It was unacceptable to the appellant that. MD could not give such a guarantee and he took up a job with another haulage company. The appellant's position was that he had neither resigned from nor wanted to leave the respondent. Two weeks after leaving the respondent, the appellant texted MD seeking his P45 and MD pleaded with him to come back. The appellant did not know his status with the other company during the few weeks he worked there and he did not want to remain there. MD considered the appellant's departure on 9 January 2010 as a termination of employment but he had not issued him his P45 at that time.

The respondent's position was that the appellant's leaving "was probably a harder blow" than the earlier loss of the contract in December 2009. Some weeks after his leaving MD approached the appellant and asked him to return to the company. Following two meetings between the parties and payments, made by the respondent to the appellant, the appellant resumed employment with the respondent on 15 February 2010. The payments made at this time, included a sum equivalent to three weeks wages, which according to MD was like an advance on future wages so that the appellant's wages would not fall into arrears again; the other payment covered monies owing to theappellant. MD made these payments as he wanted the appellant to return to the company. Theappellant returned to work with respondent on 15 February 2010. The company ceased trading on27 April 2010. A liquidator was appointed to the company on 4 June 2010.

Determination

Having considered the detailed evidence from the appellant and his former employer/former owner of the company now in liquidation the Tribunal finds, on the balance of probability, that the appellant resigned from the company on 9 January 2010. The Redundancy Payments Act, 1967 to 2007, in Schedule 3, Paragraph 4 provides that "*employment shall be taken to be continuous unless terminated by dismissal or by the employee's voluntarily leaving the employment*". As the claimant voluntarily left his employment on 9 January 2010 his service with the company was broken at that time and any prior service prior cannot be taken into account when calculating service for the purpose of redundancy entitlements. The appellant's subsequent re-engagement with the respondent some weeks later was followed by his dismissal, by reason of the company's ceasing trading, on 27 April 2010. Only his service from 15 February 2010 can be taken into account when determining service for the purpose of entitlement to a redundancy payment. Similarly, voluntarily leaving the employment breaks the continuity of service for the purposes of calculating entitlement to payment in lieu of notice under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. Accordingly, the appellant does not have the requisite service to entitle him to a payment under

either the Redundancy Payments Acts, 1967 to 2007 or the Minimum Notice and Terms of Employment Acts, 1973 to 2005. The appeals fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)