

EMPLOYMENT APPEALS TRIBUNAL

Appeal Of:
Employee
MN872/2007

Case No.
RP644/2007

against
Employer

under

**REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Quinn B.L.

Members: Mr. M. Forde
Dr. A. Clune

heard this appeal at Limerick on 3rd September 2008

Representation:

Appellant: In person

Respondent: XXXX

The decision of the Tribunal was as follows:

The Appellant is and was a painter. The Respondent is and was a painting contractor.

It was common case that the Appellant's employment with the Respondent commenced in the month of September 2004 and that it ended on the 9th March 2007, by which time the Appellant was in receipt of a gross weekly wage of €691, in respect of a thirty-nine hour week.

The primary issue for determination by the Tribunal was whether the Appellant was made redundant as he alleged, or merely laid off, as alleged by the Respondent.

In addition, the Appellant alleged that he only received two days notice of the termination of his employment, whereas the Respondent contended that he had been afforded notice of termination, one week prior to the date on which the Appellant claimed that he had received it.

The evidence of the Appellant

The Appellant's evidence was that on the 7th March 2007, whilst employed by the Respondent, on a painting contract in Cork city, he was advised by the Respondent, that there was no more work for himself and a fellow employee, following conclusion of the contract on the 9th March 2007 and that on the 9th March 2007, he was provided with his P.45 by the Respondent.

The Appellant denied that on the 7th March 2007, any notice was given to him by the Respondent, to the effect that the cessation of his employment with the Respondent would not be permanent.

The Appellant admitted that in the course of his employment with the Respondent, he had previously been laid off on a couple of occasions, but at most for three weeks at a time and always following notice from the Respondent that such was not intended to be permanent and that on conclusion of such periods, he had always resumed his employment with the Respondent and that during such periods of lay-off, the Respondent would maintain regular communication with him, as regards when he could reasonably expect to resume his employment with it.

The Appellant testified that following the termination of his employment with the Respondent, on the 9th March 2007, he next secured employment (with a different employer) commencing in or about the first week of April 2007, a development of which he learned, approximately one week prior to the commencement of this new employment, being in or about the end of March 2007.

The Appellant testified that in or about early May 2007 he obtained from the Department of Enterprise, Trade and Employment, the appropriate statutory forms for the purposes of claiming a statutory redundancy payment, which he furnished by way of ordinary post, to the Respondent for completion by the 15th May 2007.

Having received no response from the Respondent, the Appellant was contemplating repeating the exercise, when in or about the 7th or 8th August 2007, he received a telephone call from the Respondent with an offer of immediate work, which the Claimant was unable to accept, as he had by then, been guaranteed employment with his current employer until Christmas 2007. When questioned by the Appellant in the course of this telephone conversation, about his failure to return the completed redundancy payment form, the Respondent denied ever having received same.

The Appellant testified that the first communication he received from the Respondent after the 9th March 2007, was the telephone call aforesaid in early August 2007.

Subsequent to the telephone conversation aforesaid, in August 2007 and later that month, the Appellant again submitted to the Respondent, the appropriate statutory form for the purposes of claiming a redundancy payment, with service upon the Respondent being effected by registered prepaid post on this occasion. Thereafter the Appellant received notification from the Department of Enterprise, Trade and Employment that the Respondent was disputing his alleged entitlement to a redundancy payment.

The evidence of the Respondent

The Respondent testified that one week previous to the 7th March 2007, he had notified the Appellant of the fact, that his employment with the Respondent would cease on completion of the contract upon which he was then engaged, as he had no further work for the immediate future, but that he could reasonably hope to be back in a few weeks hence.

The Respondent testified that what pertained on this occasion was identical to the episodes of lay-off, which had occurred theretofore.

Mr. R, on behalf of the Respondent, further testified that on or about the 16th March 2007, he met with the Appellant on O'Connell Street in Limerick and offered him employment under the Respondent's contract for the Railway Hotel in Limerick, which was to commence on or about the 19th March 2007, which the Appellant refused, as he was "o.k".

The Appellant denied that he ever had such an encounter with the Respondent, or that he was ever offered employment by the Respondent to paint the Railway Hotel in Limerick, as was alleged by the Respondent.

Although the Respondent denied ever receiving the initial form which was sent to it by the Appellant in May 2007, Mr. R, who testified on behalf of the Respondent, when questioned by the Tribunal, could not remember, nor could he explain, what prompted him to unilaterally telephone the Appellant in early August 2007 with an offer of immediate work.

Determination

As appears from the foregoing, on the central issues which were in dispute between the parties, the sworn testimony of each of them, was in direct contradiction of each other.

Having had the opportunity of observing the demeanour of the parties in the course of giving evidence and the manner by which both parties adduced their evidence, the Tribunal unanimously prefers the evidence of the Appellant, over that of the Respondent.

The Appellant's evidence had a greater appearance of credibility than that of the Respondent and was communicated to the Tribunal in a direct, forthright, specific and confident manner, whereas the Respondent's evidence was somewhat hesitant, more generalised and vague in nature.

In addition, the Tribunal believes that, had the alleged meeting of the 16th March 2007 taken place, as contended for by the Respondent, the Appellant would have accepted the offer of employment in the Railway Hotel, allegedly made to him by the Respondent on that occasion, to commence on the 19th March 2007, as the first contract on which the Appellant was in fact employed by a subsequent employer, after the 9th March 2007, did not begin until the first week of April 2007, a fact of which the Appellant was unaware as at the 16th March 2007, as such contract of employment was not in fact offered to him until the end of March 2007.

By reason of the foregoing, the Tribunal unanimously determines that the Appellant's employment with the Respondent, ended by reason of redundancy on the 9th March 2007, the Respondent having decided to carry on its business with fewer employees, by requiring the work for which the Appellant had been employed, to be done by other employees.

In such circumstances, the Appellant's claim under the Redundancy Payments Acts 1967 to 2003 succeeds however the award of this Tribunal determining the Appellant's entitlement to redundancy, is subject to his having been in insurable employment under the Social Welfare Acts during the relevant period.

For the purposes of calculation of the Appellant's redundancy payment, in the absence of

any conclusive documentary evidence from either party, the Tribunal regards the 9th September 2004, as being the day on which the Appellant's employment with the Respondent commenced and notes the statutory weekly ceiling of €600 which pertains to all payments from the Social Insurance Fund.

The appellant's date of birth as provided on his T1A form is the 24th July 1967.

In so far as the Appellant's claim under the Minimum Notice And Terms Of Employment Acts 1973 to 2001 is concerned, the Tribunal further awards the Appellant the sum of €1,105.60, representing the period of eight working days, thus constituting his statutory notice entitlement of two weeks.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)