EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.
Employee RP531/2007

against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. Ó Catháin

Members: Ms. M. Sweeney
Ms. P. Doyle

heard this appeal in Waterford on 27 August 2008

Representation:

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Appellant(s):
Mr. Gerard McCullagh, Gerard McCullagh & Co, Solicitors,
1/2 Cois Mara, Dungarvan, Co. Waterford

Respondent(s):
Mr. Derry O'Carroll, Derry O'Carroll & Co., Solicitors,
4 Ballybricken, Waterford

The decision of the Tribunal was as follows:-

Appellant's Case

Giving sworn testimony, the appellant said that, after a three-week trial, he had started a carpentry apprenticeship in September 2001. The apprenticeship lasted five years but, after doing modules in Tralee, Letterkenny and on-site, he completed it. The respondent kept him on after the apprenticeship. He enjoyed his time with the respondent.

The appellant told the Tribunal that on 23 February 2007 he received a call from the respondent's principal (hereafter referred to as JK). JK said that he had lost contracts and that, having lost a particular contract that he had hoped to get, he had to let the appellant go. The appellant told the Tribunal: "That was it. I was finished. He said, if things picked up, he'd ring me."

Over the appellant's five years with the respondent he had very little contact with JK who had "a few" foremen, "twenty or thirty employees on site" and another "thirty or so" in a factory. The appellant thought that "three other lads" were let go at the same time or that there had been only a day or two between them. JK did not apologise but just said that there was nothing he could do. It had been a short conversation.

At this point in the Tribunal hearing the appellant was referred to a copy of a RP9 (lay-off and short time procedures) form which indicated that the appellant had been the subject of a temporary lay-off as and from 9 March 2007. The reason given for this lay-off was "not enough work available". The form was dated 23 February 2007 and signed by the respondent's financial controller (hereafter referred to as DD).

Commenting on this form, the appellant said that: he had never seen it before the day of this hearing; that it had not been handed to him or sent to him by post; and that he had never met DD whom he thought had "worked in the office".

The appellant was now referred to a copy of a letter dated 2 April 2007 from DD to him. The letter contained the following:

"I am pleased to confirm that we will need you to return to work next Tuesday, 10th of April at 8am.

If this is not possible can you please let… (JK)… or myself know as soon as possible before then.

Look forward to seeing you back."

The appellant told the Tribunal that he had never seen this letter before.

The appellant was next referred to a copy of a typed note dated 6 April 2007 saying that the appellant had been contacted and offered "a minimum of 13 weeks work". The note stated that there had been "no reply back from" the appellant. This was initialled in handwriting by DD. The note also contained, in handwriting, a mobile telephone number.

Regarding this note, the appellant said that he had got no call or message from the respondent.

Asked if he had contacted the respondent, the appellant said that he had rung the respondent "a few weeks later" about redundancy but that JK had not been sure and had said that he (JK) would "make arrangements". The appellant told the Tribunal: "That's all I heard."

The appellant stated that he had done a "slinger" (crane-related) course and had got his P45 which he had given to his new employer. He had got a job a few days after going on holidays subsequent to his employment with the respondent.

The Tribunal was now referred to a copy of a letter dated 1 August 2007 from an inspector of taxes to the appellant giving details of the appellant's P45 from JK and stating that the appellant's date of leaving had been 9 March 2007. The appellant's representative submitted that this letter confirmed the appellant's date of termination as being 9 March 2007. The appellant told the Tribunal that he had consulted his solicitor "a while after".

At this point, the Tribunal was referred to a copy of a letter dated 21 August 2007 from DD to the

appellant's solicitor. It contained the following:

"I am in receipt of your letter dated 16th August 2007 regarding our former employee…(the appellant)….

Due to a temporary downturn in our business, …(the appellant)… was laid off on 9th March 2007. On the 6th April 2007 I contacted …(the appellant)… and offered him a minimum of a further 13 weeks work.

I can confirm that…(the appellant)…did not take up this offer of work and as such it is our opinion that he is not entitled to any redundancy payment. It is my understanding that he had already taken up alternative employment at that time.

I hope this clarifies the matter but please feel free to contact me if I can be of any further assistance."

Under cross-examination, the appellant said that, when he had rung "the office", a lady had got JK to ring him whereupon JK had told him that he (JK) had lost a couple of jobs but that, if things picked up, JK would ring him. The appellant ultimately went to his solicitor.

The Tribunal was referred to a letter dated 16 August 2007 from the appellant's representative to the respondent. It contained the following:

"We are writing on behalf of our client, who has not received any Notification of redundancy nor any lump sum payment, which he is entitled to under the Redundancy Payments Act-1967-2003.

Please note that under Section 3 of the Redundancy Payment Act 2003 a 'contract of employment' includes a contract of service or apprenticeship.

Please find enclosed completed form RP77, by…(the appellant)… claiming both a redundancy Form RP50 and a lump sum payment.

Take Notice that unless we receive the completed form RP50 and lump sum payment within the next **ten** days from the date of this letter our instructions are to immediately apply to the Employment Appeals Tribunal to determine the matter."

The appellant stated that he had seen his solicitor "shortly before that".

The respondent's representative, calculating that there had been six months between February 2007 and the appellant's going to his solicitor, asked the appellant how he could recall 23 February so accurately. The appellant replied that it was because he had had a holiday in Lanzarote.

Asked if he had got the date of 23 February from the RP9 form, the appellant said that he had not got that letter or the 2 April letter in the post. Asked who was living at that address, he said that his parents were living there.

Asked if he had been laid off for a few weeks as in the RP9, the appellant said that JK had said on the phone that he had to let the appellant go.

On being asked if JK might not have spoken of a lay-off, the appellant replied: "I was let go. It was redundancy." Pressed on whether it had not been a lay-off, he replied: "Things were going bad. I was let go.

Referred to the abovementioned 6 April 2007 letter, the appellant said that he had never spoken to DD.

Asked if he would not have got back to the respondent, the appellant replied that he "had other work straight away" and that nobody from the respondent had got back to him. He added that he had not thought that the respondent had work for him.

It was now put to the appellant that a named other employee had finished at the same time as the appellant and had gone back to the respondent. The appellant replied that he had not spoken to the said other employee.

The respondent's representative asked the appellant to agree that he had been just one of three or four employees who had been laid off but who had been contacted by letter and phone i.e. that the respondent had tried to get the appellant back. The appellant replied:

"I was gone to another job. (JK) said the lad in the office would get back to me. He did not get back. I would have gone back. The lad in the office did not contact me; so I presumed there was no work for me."

Invited to agree that JK had laid off four employees because the respondent was waiting for a big job in "Carraig an Phiarsaigh" which had not in fact come until July, the appellant acknowledged that JK had lost a contract.

Asked to agree that he had got the notices (sent to him and to other employees) but that he had not wanted to go back, the appellant agreed only to the extent that he thought that the other employees had all been let go at the same time but said that all he knew was that he had not got the correspondence in the post.

When it was put to the appellant that he had known from JK's phonecall that he was being laid off and that the respondent would contact him in a few weeks the appellant did not take issue with this.

Re-examined by his own representative, the appellant said that JK had told him he was being let go, to finish that week and to take his holidays the following week but that JK had said nothing about taking him back. The appellant told the Tribunal that he had thought that he had to get another job and that JK had used the words: "I have to let you go."

Questioned by the Tribunal, the appellant said that he had got no message from the respondent, that he still lived at home and that he had got his P45 after he had started with his new boss. He added that he had also got his "slinger" (crane-related) certificate in the post and that he he had only failed to get his RP9 form and the letter asking him back. He had "got on to" JK "three or four weeks after getting back from holidays". JK said he would "get on to the lad in the office" and that there was "more than likely work there" but the appellant heard no more and presumed that there was no work there.

The appellant told the Tribunal that, with his new employer, he had "only just got up to" the pay he had been on with the respondent and that "the new job is harder with less people".

Asked if it had been usual for the respondent to write to him during his five years of employment, the appellant replied: "The only contact was when I had to go to another site."

Respondent's Case

Giving sworn testimony, DD (the abovementioned financial controller with the respondent) said that he had a diploma in management accounting and now worked "alone". He had started as financial controller for the respondent in October 2006 but his duties had also covered HR. From time to time he and JK had spoken. In 2007 the respondent had had over a hundred employees including nearly forty on site. The respondent had been waiting for a large job (which would need several crews) on a corporation site in "Carraig an Phiarais". Difficulties arose as a result of delays and "things went quiet".

The respondent decided to lay off three or four employees temporarily "till Carraig an Phiarais kicked off". DD checked with the Department of Enterprise, Trade and Employment's website regarding procedures and felt that "it was reasonably straightforward" to use a RP form and to tell an employee that he would finish temporarily on a particular date.

An initial three employees and then one more were laid off. DD told the Tribunal that it had been JK who had told the appellant about this and that JK had told DD that he (JK) had discussed this. DD printed off blank forms and filled them in for the appellant and two others. DD posted out the forms. He told the Tribunal: "I had no real direct contact with the guys on site. Rarely would somebody from a site go to the factory. I sent them by ordinary post."

Asked at the Tribunal hearing if the situation had changed, DD said that the respondent had got a certain amount of extra work and so "got to take the lads back". He drew up a standard letter.

DD told the Tribunal that he had sent RP9 forms and the 2 April 2007 recall letters by post to the relevant employees (including the appellant). He said that, once JK said that the respondent was taking them back, he (DD) "did the standard letter".

Having posted the letter to the appellant and having got nothing back, he made a follow-up phonecall to check if any of the employees were coming back. He tried ringing the appellant a few times, did not send a text message but ended up leaving a message on voicemail asking the appellant to contact him about coming back. He got to speak to two of the employees one of whom said that he had got another job and the second of whom did actually go back to work for the respondent. He (DD) got no reply from the appellant or from another employee.

Asked what the respondent had done in this situation, DD said that three others had been coming out of apprenticeship and the respondent had kept them on full-time. Otherwise they might not have been kept on.

Asked what had happened after he had made the phonecalls, DD said that the respondent had heard that the appellant was working somewhere else but that the respondent had issued a P45 before that

(i.e. when the appellant was laid off) because there was a section on the website saying that a P45 can be for a temporary lay-off.

DD stated to the Tribunal that he "was a bit shocked and surprised" when he received the 16 August 2007 letter from the appellant's solicitors but that he wrote to the appellant's representative on 21 August 2007 stating that the appellant had been laid off, had been offered work again and had not taken up the offer such that he was not entitled to a redundancy payment.

DD concluded his direct evidence by saying that there had been no redundancy situation but rather that there had just been a temporary lay-off and that the respondent had "applied the same principle to others".

Under cross-examination, DD confirmed that he had joined the respondent in October 2006 and that he had been responsible for HR administration. He accepted that JK had made "the initial contact" with the appellant but that JK was "not in court".

Asked if he would not call an employee to the office to lay him off, DD replied that he would indeed do so if the employee in question were working in the factory but that the other employees (i.e. those who were out on site) would be in contact with foremen or with JK. DD said:

"I just did up forms and posted them out. I got the information on the Department of Enterprise, Trade and Employment's website."

Asked if he would send a cover letter, DD said: "I'd just send a compliment slip." It was now put to DD that the appellant was losing his job. DD disagreed (i.e. maintaining that the appellant was just laid off on a temporary basis).

When the appellant's representative said that it had been the appellant's understanding that he was losing his job DD replied that he had not been present at JK's conversation with the appellant. DD told the Tribunal that he and JK "had been discussing it for a period" and that he (DD) "saw no need to use registered post or prepaid post". He added : "'Twas the first time with this company that I'd laid off people." He also told the Tribunal that he had "never met" the appellant and "never had reason to meet him".

It was now put to DD that the 2 April 2007 letter (asking the appellant to return to work at 8.00 a.m. on Tuesday 10 April) did not tell the appellant where he was to go. DD then named a man (who may have been a foreman) and stated that the said man "would tell people where to go".

Asked if a contract had been lost around this time, DD replied that he did not recall discussing the loss of a contract with JK.

On the subject of his note that he had contacted the appellant on 6 April 2007 and "offered him a minimum of 13 weeks' work", DD confirmed to the Tribunal that he had not spoken to the appellant but rather that he had left a voicemail for him.

It was now put to DD that his letter dated 21 August 2007 to the appellant's representative (which letter did state that DD had contacted the appellant on 6 April 2007 and had offered him at least thirteen weeks' work) did not make any mention of a 2 April 2007 letter or of a RP9 form. DD did not dispute this but said that, in hindsight, it might have been the best practice. He conceded that

"possibly" JK "could have gone face to face with" the appellant.

DD denied that documents now before the Tribunal had been produced (i.e. created) subsequently.

In re-examination, DD said that there had been no question of anyone being let go permanently.

Giving sworn testimony, JK's daughter told the Tribunal that she did "the wages", that she had prepared a P45 for the appellant and that she had posted it with the appellant's final payslip but without a cover letter. She said that "Carraig an Phiarsaigh" was a big corporation site and that three apprentices, who "were coming out of their time", had "replaced those who did not come back from lay-off".

Determination:

There was insufficient evidence to show whether or not the RP9 form was served. The Tribunal, however, accepts the evidence of the appellant that the respondent indicated some weeks after the lay-off that the respondent would revert to the appellant. This was uncontested. Under these circumstances, the Tribunal is of the view that the appellant was entitled to assume that the lay-off was not of a temporary nature. Accordingly, the Tribunal makes a finding, under the Redundancy Payments Acts, 1967 to 2003, that the appellant is entitled to a redundancy lump sum based on his commencement date which was 10 September 2001, termination date which was 9 March 2007, gross weekly pay which was €597.80 and date of birth which was 19 May 1983.

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

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)