

**EMPLOYMENT APPEALS TRIBUNAL**

APPEAL(S) OF:  
Employee

CASE NO.  
RP337/2008 MN364/2008  
WT287/2008

against

Employer

under

**REDUNDANCY PAYMENTS ACTS, 1967 TO 2003  
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. G. Phelan  
Mr. A. Kennelly

heard this appeal in Horse & Jockey, Co. Tipperary on 3 October 2008

Representation:

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Appellant(s) :

Mr. Michael Grange BL, 85 Ardcollum Avenue, Artane, Dublin 5

Respondent(s) :

In person

The decision of the Tribunal was as follows:-

On 28 April 2008 the Tribunal received an appeal form from the appellant claiming that her employment with the respondent had commenced in July 2004 and had ended on 20 December 2007. She sought awards under the Redundancy Payments Acts, 1967 to 2003, and under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, based on a gross weekly pay of €260.00.

On 26 May 2008 the Tribunal received a written defence from the respondent. It stated that on Thursday 20 December 2007 the appellant verbally informed the respondent that the appellant was moving to Dublin to live with her partner and that she was no longer available for work. It added

that the appellant had requested that her P45 be sent to her new address in Dublin and that the appellant had not been made redundant. The defence further stated that the appellant had neither spoken to the respondent nor mentioned redundancy to her at any time since leaving her job with the respondent.

On 11 July 2008 the Tribunal received a new appeal form from the appellant indicating that she also wished to make a claim under the Organisation of Working Time Act, 1997. She wrote that she had been made redundant when the respondent's business closed down, that she had received no pay in lieu of notice and that she had never received holiday pay or payment for public holidays.

On 22 July 2008 the Tribunal received a letter from the respondent pointing out that the second appeal form from the appellant gave a new termination date i.e. 28 February 2008 and that the appellant was now acknowledging for the first time that she had not applied to her employer or to the department of enterprise, trade and employment for a redundancy payment.

The respondent's letter also mentioned that the appellant had not indicated whether or not she would have a representative at the Tribunal hearing. Moreover, the respondent wrote that, to the best of the respondent's knowledge, the appellant had received all of her entitlements.

The respondent concluded her letter by writing that her business had not closed down, that she would consider an application if the appellant wished to resume her position and that she would be grateful if she could be sent a copy of the Organisation of Working Time Act, 1997.

At the Tribunal hearing the appellant's representative informed the Tribunal that the appellant was relying upon the second appeal form and requested that the first one be disregarded. Asked why the two appeal forms had given different dates for the termination of the appellant's employment, he replied that the appellant had thought that the last date on which she had worked (i.e. 20 December 2007) had been the termination date. However, he submitted to the Tribunal that 28 February 2008 had been the end of the employment.

The respondent now told the Tribunal that the appellant's P45 had issued on 20 December 2007.

### **Appellant's Case:**

Giving sworn testimony, the appellant said that she had commenced employment as a care assistant with the respondent's residential and respite service on 26 June 2004. When she was first told that she had the job she worked forty-four hours per week but her hours were cut back in February 2005. She worked twenty-six hours per week from then on. She was paid €10.00 per hour. Her pay "never went up".

The last day that the appellant worked for the respondent was 20 December 2007. They broke for Xmas holidays. Finding that she was pregnant, the appellant rang the respondent and informed her. The appellant felt that she needed to go to hospital and she was told that she could not go back for a few weeks.

On 11 January 2008 the respondent rang the appellant and told her that there was no point in her going back. The appellant had pregnancy issues at the time. The respondent said that the business would close in February. The appellant told the Tribunal:

“It was more or less the last thing on my mind. I started crying. I said it to the nurse who put it on my file.”

At this point in the hearing the Tribunal was referred to a copy of an unsigned hospital record for 11 January 2008 which stated that the appellant had been “upset as she found out that she had lost her job”.

Resuming her testimony, the appellant said: “I was never paid holidays or public holidays. I got paid for hours worked and that was it. I never got written terms and conditions or sick pay.”

The appellant told the Tribunal that she had been invited to a “closing-down do” in Dublin at the end of March 2008, that all present had known about her pregnancy and were congratulating her on it. However, she had miscarried.

In cross-examination it was put to the appellant that in September 2007 she had told the respondent that she would go to Dublin to live with her boyfriend. The appellant replied: “No conversation took place in September that I was leaving.”

When it was put to the appellant that the respondent was saying that the appellant was leaving due to pregnancy the appellant replied: “I only found out in December about my pregnancy.”

Putting it to the appellant that the appellant had told the respondent in September that she would not be available in 2008, the respondent said that she had terminated her service to a Dublin organisation (SMH) because of the respondent’s own health, spiralling costs and the fact that the appellant and another girl had said that they were leaving.

The Tribunal was now referred to a letter dated 23 September 2008 which was signed by a lady (PC) on behalf of the lady (ME) who was the head of the social work department of SMH. The letter stated that the respondent had provided “high quality respite services” to SMH for ten years but that on 18 December 2007 ME and a principal social worker (TMcK) had met with the respondent at the respondent’s Tipperary base to carry out a regular review. The letter stated:

“During the meeting (the respondent) informed us that she was considering terminating the service. She gave a number of reasons. One of these related to the two members of staff whom she employed. It was explained that one staff member, (the appellant) was planning on moving to Dublin and the other had obtained employment which offered payment in excess of what (the respondent) could pay.

Subsequently (the respondent) informed us in early January 2008 that she would not be continuing with the service. The service finished in February 2008. The last group of (SMH) service users availed of the service from 11<sup>th</sup> February to 15<sup>th</sup> February 2008.”

The respondent now put it to the appellant that the appellant had not asked her for money. The appellant replied:

“I was very upset at you. You had no right to tell (SMH) so that they could tell clients about my pregnancy.”

The respondent now stated to the Tribunal that the appellant had applied to SMH for employment and it was put to the appellant that 20 December 2007 was the date on the appellant's P45. The appellant replied that, on 11 January 2008, the respondent had said that she could get the appellant's P45 backdated to 20 December 2007.

When the respondent put it to the appellant that it was impossible to backdate a P45 the appellant replied:

"You said that was the last day I worked. We closed for Christmas holidays. I found out about my pregnancy around 30 December."

The respondent now contended that the appellant had given her notice verbally in September and that the last day the appellant had worked had been 20 December 2007. The respondent alleged that the appellant had said that she intended to get pregnant, that this was "all about money", that the appellant had given notice and that the appellant had left her job. The respondent also stated at the Tribunal hearing that she had terminated an aspect of her business but that she was still operating and could have offered the appellant a job. The appellant replied:

"There was no September conversation. I was in hospital for ten days. She rang me. She said she was closing down. I did not tell her in September or December that I was leaving and that I would not go back to my job."

Asked by the respondent why she had put on her second appeal form to the Tribunal that her employment had ended on 28 February 2008, the appellant said:

"The twentieth of December 2007 was the last day I worked. I went to a citizens' information centre. We realised we had put down the wrong date. The twenty-eighth of February 2008 was the date you closed."

When the respondent put it to the appellant that the respondent's business had not closed down the appellant replied: "You told me that."

Questioned by the Tribunal, the appellant said:

"I never got any holiday pay. I just got paid for the days I worked. I took holidays when her business closed down. Forty-four hours was two shifts of twenty-two hours. Then she told me she'd have to cut back my hours. I worked from 9.00 p.m. to the next morning. I did not work every week. 'Twas three weeks on and one week off. The week off was not holidays. Sometimes we'd close down for three weeks. I never got any holiday pay. We were not open for public holidays. We never worked a bank holiday Monday. We've never worked a bank holiday. I was paid by a (bank) cheque that (the respondent) gave me every week. I never got a payslip ever. We finished on the twentieth of December 2007 for Christmas. I got paid for hours done and a bonus of a hundred euro.

When I was pregnant I got illness benefit from the state. I put down that I was still working for (the respondent). The citizens' information centre told me to put in a holiday claim. Work ceased on the twentieth of December 2007. That was the last day I worked."

## Respondent's Case

Giving sworn testimony, the respondent spoke of the appellant as follows:

“In September 2007 she told me that was in a new relationship. When she started she was in rented accommodation in Tipperary. She used my home as her address. She worked for me two nights per week. This was about twenty-six hours per week. I provided a bed for her to use. She was never called during the night for work. A couple of weeks after I let her use my address, she said that she could use my address for some form of benefit. She wanted to use my address for the sending of her social welfare benefit. I was fond of her; so I let her do it. This went on for a couple of months. She could not do more than twenty-six hours. She wanted time in Dublin with her partner. In September when she said she wanted to move to Dublin I told her if she was leaving my employment I would not be happy that she keep using my address. She said she told Social Welfare she was paying me rent. That was untrue. I said I was not happy with her using my address. Our personal relationship became strained. She told me she'd live in Dublin and would not return. I invited her to the retirement party that (SMH) were giving me.

She gave in her notice. She was paid all her entitlements. I wished her the best in her future life. Everything was paid up to the twentieth of December 2007. She was paid all her entitlements. That's it.”

Under cross-examination the respondent was asked about her statement that the appellant had been claiming for rent from Social Welfare. The respondent replied that she knew that the appellant had told Social Welfare that she was paying the respondent eighty or a hundred euro for rent.

It was put to the respondent that there appeared to be no date of issue for the appellant's P45 or mention of when it was written. The respondent replied that she did not see a space for a date on it and continued as follows:

“'Twas a verbal contract of employment. She spent three quarters of her time asleep. I told her I'd call her if she was needed. I was the main carer. For my own peace of mind I wanted somebody else of sound mind. She was paid all her holidays to the best of my knowledge. I try to do everything right about P.R.S.I. and holidays. My accountant is not here today. I did not issue payslips. I run a small business with two employees.”

When it was put to the respondent that payslips were required by law she replied that she now realised this and that it was “the same with terms and conditions”. She added that it was “difficult to state terms and conditions because most of the time was spent asleep”. Speaking of the appellant, the respondent also said: “She got holiday pay and was not made redundant. She worked on both contracts that I had. I still do one of them. (The appellant) was replaced by my friend (MP) who's here.”

It was put to the respondent that she had had three employees. She replied that this had been the case in the past and added that she had not terminated the appellant's employment because the appellant had been hoping to get pregnant. The respondent went on to say that the appellant had “cut back her hours because she was with her boyfriend” but that she did not recall the alleged phone conversation in January 2008 and that she found “this whole Tribunal strange”. She said that she had no medical certificates (from the appellant) for the time of the alleged phone conversation i.e 11 January 2008.

Replying to a question from the Tribunal, the respondent said that, from her own home, she ran a respite hospice for clients with special needs and/or minor disability. She took clients on behalf of a charitable Limerick religious order (BCL) and from the abovementioned SMH in Dublin. She needed staff for the SMH work. They came from Monday to Friday. She had two ladies living with her permanently from BCL. She had the responsibility of looking after them “24/7”. The respondent terminated her SMH contract in February 2008.

Speaking of the abovementioned 23 September 2008 letter, The respondent told the Tribunal that she had told its author (NE) “that this Tribunal was coming up” and had asked NE if NE had a recollection of the appellant telling the respondent that she (the appellant) would leave.

The respondent stated to the Tribunal that she had been thinking of terminating her service to SMH. She had two staff members. The appellant had moved to Dublin. The other found work in Limerick for more than the respondent could pay. The respondent terminated the SMH-related work for the three reasons of her own health, spiralling costs and the fact that two staff were leaving. The respondent had only provided a service twelve days per month i.e. four days per week for three weeks. The appellant did two days and another employee worked the other two. They worked six days per month each.

Regarding the two ladies that the respondent now had on the abovementioned “24/7” basis, the respondent told the Tribunal that she could manage these two ladies herself.

In March 2008 the appellant came to the abovementioned SMH party. The respondent “had no idea of any problem” at that time. Her accountant calculated the holidays. He told the respondent “what was to be stopped”. The respondent furnished the Tribunal with a wages document which contained the stamp of an accountancy firm. The respondent told the Tribunal that holiday pay had been paid by cheque by herself.

Asked if the appellant had taken holidays, the respondent replied that holiday entitlements could “have been included in weekly pay”, that “it varied” and that “sometimes it would be a week off”.

### **Determination:**

Having heard all the evidence in relation to the claimant’s Redundancy Payments claim, the Tribunal determines, on the balance of probabilities, that a redundancy situation arose on 20 December 2007.

The Tribunal finds that the appellant is entitled to a lump sum payment under the Redundancy Payments Acts, 1967 to 2003, based on the following criteria:

Date of Birth	01 April 1980
Employment commenced	15 July 2004
Employment ended	20 December 2007
Gross weekly pay	€260.00

This redundancy award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period. (Social insurance fund payments are limited to a

maximum of €600.00 per week.)

The Tribunal determines that the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001, fails.

The Tribunal determines that the claimant is entitled to redress under the Organisation of Working Time Act, 1997, for public holidays and annual leave. The Tribunal awards the claimant the sum of €1,656.00 as compensation under the said Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)