

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

Employee

CASE NO.

- *appellant* RP883/2008

against

3 Employers

- *respondent*

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. Clancy

Members: Mr. B. O'Carroll
Dr. A. Clune

heard this appeal at Ennis on 19th January 2009
and 30 March 2009

Representation:

Appellant: Mr. Tony Greenway, Hegarty & Horgan, Solicitors, Law Chambers, Kinsale,
Co. Cork

Respondent(s): In person

The decision of the Tribunal was as follows:-

At the commencement of the hearing, the appellant's representative made a verbal application to have this proceedings amended to include the name of the third respondent (*hereinafter referred to as S. Con Limited*). The first respondent (*hereinafter referred to as TG*) did not consent to the application.

Opening statement:

The appellant's representative stated that TG had always paid the appellant. The appellant had worked on a site in Cork. On the completion of that job, he had not received his P45 form so his employment had not ended. On his transfer to a site in Clare, he had not been told that his employment was transferring to a different company. His employment began in May 2006 and ended in June 2008 and there had been no break in his service.

The job in Clare came to a halt and the appellant received notice on 8 May 2008 but was kept on a week-to-week basis. While on the way to the Clare site following the June bank holiday weekend, he received a telephone call from TG requesting that he come instead to the respondent's office in Limerick. There, he was told that the Clare job was finished.

The appellant was not dismissed for misconduct and received no alternative offer of employment. Initially, he had not received a contract of employment from the respondent. He had worked for the respondent for over two years. On 6 August 2008, he sent a request for his redundancy payment to the respondent but same was refused due to lack of money.

In objecting to these proceedings being amended to include the respondent S. Con Limited, TG stated that he had operated as a sole trader. In forming a limited company, he had informed the tax office that on completion of the job in Cork, his operation as a sole trader would also end.

Appellant's case:

In sworn evidence, the appellant explained that he replied to an advertisement in the Cork Examiner in May 2006. He telephoned and spoke to TG and explained his experience. They agreed to meet on the respondent's Cork site on Tuesday 2 May. The respondent had been contracted to build houses and a leisure centre on the site. TG agreed to employ the appellant as a foreman and he commenced work that day.

The job in Cork had gone very well and he had no difficulties. He had been on the site until 9 May 2007 when the work had been completed. This was nine week ahead of schedule. TG had telephoned the appellant with a job offer in Clare where houses, apartments and a nursing home were being built. There were no changes in the terms of employment and no P45 form was issued at that stage. He had simply progressed to another job.

TG had introduced the appellant to the Clare site as the "number 1 foreman from Cork". He arranged to stay in accommodation in Clare for four nights per week and to travel home for weekends. TG agreed to pay for the accommodation. Initially, the work in Clare did not progress well due to difficulties in securing supplies and tradesmen because of unpaid bills. This caused delays to the work and finally, the main contractor closed the site.

The appellant had worked through the summer until June 2008 with no break. While on the way to work in June, he received a telephone call to come to the respondent's office in Limerick. There he met TG and TG's son and was told that there was no money to pay the workmen on site. Throughout his employment, it had been TG who had signed his wage cheques. In August 2008, the appellant wrote to the respondent for his redundancy payment as he had been in their employment for over two years and so was entitled to same.

From June 2008, the appellant has been in receipt of job seekers allowance. Despite his efforts, he had not been successful in securing alternative employment.

Respondent's case:

In his sworn evidence, TG confirmed that he had employed the appellant on the Cork site. They had entered into a verbal agreement. He had no problems with the appellant.

The job in Cork should have been completed by November 2006 but had continued until May 2007. Some of the delay in finishing had been the fault of the appellants. At that time, the appellant approached TG seeking to be kept on with further employment, as he had no work himself. He was told of work on a site in Clare with S. Con Limited, which was a totally separate company from the one that employed the appellant on the Cork site. The appellant had gone to check out this alternative work on his own time and then agreed to take a job there. When this job had ground to a

halt, protective notices had been issued.

From a written submission, TG said that he, as a sole trader, had personally employed the appellant as a foreman on the site in Cork. The claimant had been made fully aware of the finish date for the Cork project. When this project finished, the appellant finished and the first respondent finished at that point in time.

S. Con Limited was formed in April 2006 and TG is one of its directors. This company had ongoing work in 2006, 2007 and 2008. One of the projects was a development in Clare. Because he had no alternative work, the appellant had requested employment in any of the projects of S. Con Limited and TG had informed him that the only active site at that time was in Clare. After checking the site in Clare to ascertain if it would be a viable option for him, the appellant informed TG that he would take the job and work as a foreman with S. Con Limited. The appellant's employment period with S. Con Limited was from 8 May 2007 to 3 June 2008. Accordingly, the appellant was not entitled to redundancy from S. Con Limited.

In cross-examination, TG confirmed that he had met the appellant and informed him about all of the details of the site in Cork including its finish date of November 2006. Work had not finished there until 2007. The appellant's P45 form had been available for him at that time. When TG had said that he would get the P45 form issued when the job finished in Cork, the appellant had said no. The appellant had asked TG to hold on to the P45 form in case it got lost. He – the appellant – was going to England to seek work so the P45 form would be safer with him. He had gone to Clare, checked on the viability of the job there for him and, in taking that job, had not taken his P45 form. However, it was still available for him. TG confirmed that the appellant did not receive his P45 form.

TG did not agree that in not ceasing employment but continuing to work for him, there had been no break in the appellant's service and a transfer of undertaking had occurred. The appellant had worked for the first respondent in Cork and for S. Con Limited in Clare. Though TG was a director of S. Con Limited, the appellant had not continued to work for him. At the conclusion of the job in Cork, the appellant had sought alternative work from TG. TG had not offered the appellant alternative work in Clare at the conclusion of the job in Cork nor had he transferred the appellant to a different company.

TG agreed that either he or his son signed the cheques that paid the wages of the appellant. However, he did not agree that there had been no break in the appellant's employment service so as to allow his entitlement to redundancy.

Replying to Tribunal queries, TG said that because of the increased workload, he had decided to end operations as a sole trader. The consequences as a sole trader were too great. He had informed the tax office that the job in Cork would be his last as a sole trader. In the meantime, S. Con Limited had been formed. There had been no transfer from one to the other. The operation as a sole trader had stopped and it has not operated again since the site in Cork. The employees of the sole trader would have gotten the opportunity to work with S. Con Limited. Only one person, a machine driver, had moved from Cork to Clare. No one employed on the Cork site had received redundancy as none had qualified for same, having not worked for a period of greater than two years. Also, sub-contractors had been employed on the Cork site.

TG confirmed that the address of his operation as sole trader was the same as that of S. Con Limited. However, there were also five other companies registered with this address. TG confirmed that he is the owner of these other companies but they have not traded. The operation as

a sole trader had closed and though he is a director of S. Con Limited, there had been no transfer of the first respondent to S. Con Limited.

At this stage and having considered the matter, the Tribunal granted an application to the appellant's representative to amend these proceedings with the completion of a new T1-A form (*Notice of Appeal*) to include the respondent referred to above as S. Con Limited.

The hearing resumed opening with the respondent stating that the liquidator for S. Con Limited would not be present but would abide by any decision the Tribunal would make in regard to this matter.

Determination

The Tribunal found that there was a transfer of undertakings between XXXX and XXXX. The claim under the Redundancy Payments Acts, 1967 to 2003 is allowed against XXXX who was found to be the employer responsible for the appellant.

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

Date of Birth	4 th May 1950
Date employment commenced	2 nd May 2006
Date employment ended	3 rd June 2008
Gross weekly salary	€1474.00

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

It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)