

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
Employee- Appellant

CASE NO.
RP962/2008
MN1033/2008

against
Employer - Respondent

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: Mr. J. Sheedy

Members: Mr. J. Hennessy
Mr. D. McEvoy

heard this appeal at Waterford on 3rd April 2009

Representation:

Appellant: Mr. Derry O'Carroll, Derry O'Carroll & Co, Solicitors, 4 Ballybricken, Waterford

Respondent: Mr. Neil Breheny, Neil J. Breheny & Co., Solicitors, 4 Canada Street,
Waterford

The decision of the Tribunal was as follows:

Appellant's Case:

The appellant worked as a carpenter and joiner. He commenced his apprenticeship with the respondent in October 2003 and he was due to qualify in October 2007. However, the appellant had to repeat one of his examinations and his apprenticeship finished in February 2008. At the beginning of February 2008 the respondent told the appellant that his employment would end when he had completed his apprenticeship. However, at the end of February 2008 the respondent told the appellant that he had enough work to retain him in his employment for a while. The appellant continued to work full-time for the respondent.

The appellant continued in his employment to the end of May 2008. During May 2008 the respondent informed the appellant that work had slowed down and once the roof they were working on was completed he would not be able to keep the appellant in his employment.

As was the norm the respondent collected the appellant on the 22nd May 2008 and they travelled 24 kilometres to the site. The appellant worked from 8.10am to his break time of 10am. At the time

of his break the appellant asked the respondent if he could go home as he was not feeling well and was quite tired. The respondent told the appellant that he could finish that day and walked away from the appellant. The appellant submitted that the respondent had used the occasion as a smokescreen to avoid making a redundancy payment; as the respondent had told him three weeks before hand that he would be letting him go due to a slowdown in the industry.

During cross-examination the appellant denied that he had previously missed work due to alcohol or that he had been spoken to about being under the influence of alcohol at work.

It was put to the appellant that there were eight houses on site which still required carpentry work. The appellant stated there were six houses remaining requiring work. It was put to the appellant that there was work available on this site until the end of September 2008. The appellant replied, "could be."

It was put to the appellant that he was previously dismissed for behavioural problems regarding alcohol but was re-instated some two days later. The appellant replied that there was a previous occasion where he and the respondent had argued.

Respondent's Case:

The Tribunal heard evidence from the foreman of the site. There were twenty houses in development on the site. The foreman was responsible for scheduling the work of the plasterers and electricians etcetera. At the time of May 2008 he had work for carpenters up to the time of September/October 2008.

The foreman recalled the 22nd May 2008 as he spoke to the respondent about the condition of the appellant. The appellant was not in a fit state to be on site as he was intoxicated and had vomited on site a number of times that morning. The foreman could not tolerate this on site due to safety reasons. The foreman could not allow a sub-contractor to have an intoxicated employee on site. The foreman spoke to the respondent sometime before 10am and asked him to do something about the appellant. Later the foreman noticed that the appellant was no longer on site.

In reply to questions from the Tribunal, the foreman stated that he knew the appellant as the appellant had worked on the site since Christmas 2007. The foreman did not have any problems with the appellant until he saw the condition of the appellant on the morning of the 22nd May 2008.

The Tribunal heard evidence from the respondent. The respondent agreed that he had spoken to the appellant at the end of his apprenticeship in February 2008 and he had agreed to retain the appellant in his employment at the end of his apprenticeship as the work was very busy. The respondent did not recall discussing the appellant's employment with him prior to the 22nd May 2008.

On the 22nd May 2008 when the respondent collected the appellant he could smell alcohol from him. There were a number of occasions throughout the appellant's employment when he would smell of alcohol on a Monday morning or when he would text the respondent to say he would not be attending work. On the 22nd May 2008 the foreman spoke with the respondent about the condition of the claimant. The appellant then approached the respondent, telling him he was sick and asking if he could go home. The respondent told the appellant that he was not fit to be on site. He dismissed the appellant. The work on the site was worth a lot of money to the

respondent so hereached the decision to remove the appellant from the site.

On the 24th May 2008 the appellant came to collect his tools and he enquired about redundancy. The respondent told the appellant he would check but that he did not think the appellant had an entitlement to a redundancy payment. He later told the appellant that he was not entitled to a redundancy payment as he was dismissed for bad behaviour. The respondent did not replace the appellant. Instead the respondent and his other employee worked extra hours. In October 2008 the respondent's work finished on the site.

During cross-examination the respondent stated that he and the other employee worked separately on site to keep ahead of the work after the appellant was dismissed. The appellant had received warnings from the respondent but the events of the 22nd May 2008 were the "last straw." The respondent stated he had did not have any recollection of speaking to the appellant in May 2008 concerning the possibility of letting him go.

In reply to questions from the Tribunal, the respondent stated that he did not take any action regarding the appellant's condition until the foreman brought to his attention how sick the appellant was. The respondent outlined two occasions in the past when he had issues with the appellant.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. The Tribunal accepts the evidence of the respondent that he dismissed the appellant for misconduct due to his condition on site on the 22nd May 2008. The Tribunal finds that there was work available for the appellant after May 2008 and that a redundancy situation did not occur in relation to the termination of the appellant's employment. The appeal under the Redundancy Payments Acts, 1967 to 2007, fails.

The Tribunal finds that given the nature of the dismissal was in relation to the conduct of the appellant, the respondent was entitled to summarily dismiss the appellant. Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)