

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

– *appellant*

MN1420/2008

against

Employer

under

CASE NO.

RP1322/2008

WT604/2008

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 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. J. O'Connor

Members: Mr. P. Casey
Mr. K. O'Connor

heard this claim at Tralee on 28th April 2009

Representation:

Appellant(s): Mr. Paddy Whelehan, Philip O'Sullivan & Company, Solicitors,
21 Denny Street, Tralee, Co Kerry

Respondent(s): Mr. John O'Donoghue, O'Donoghue O'Dwyer, Solicitors, Langford Street,
Killorglin, Co. Kerry

(The evidence of this case was heard through an interpreter who was provided by the appellant. Upon enquiry by the Tribunal, the respondent's representative raised no objection to this.). (Copies of P45 forms for 2007 and 2008 and P60 forms for 2006 and 2007 were opened to the Tribunal).

The decision of the Tribunal was as follows:-

Background:

The appellant's employment details with the respondent were agreed at the commencement of the hearing. It was agreed by the representatives that the appellant's employment finally ended on 12 July 2008. The respondent's representative also accepted that the appellant was due €690.00 in respect of holidays. The appellant's representative stated that the appellant was owed more than this amount for his holiday entitlements.

Opening statements:

The appellant's representative stated that the appellant was a Polish national who had been employed by the respondent as a labourer. His claims before the Tribunal were for redundancy, notice and holiday pay. He was also seeking compensation due to the non-receipt of terms and conditions of employment and the non receipt of payslips from the respondent, and punitive damages.

The respondent's representative stated that the appellant did not have the required service to qualify for an entitlement to redundancy. The appellant had a break in service between June and July 2007 when he resigned from the respondent's employment. He had been issued with his P45 form in June 2007. He returned to the respondent's employment in July 2007 and employment finally ended in July 2008.

Appellant's case:

In his sworn evidence, the appellant confirmed that he commenced employment with the respondent on 15 December 2005 as a labourer. He worked for about thirty months with the respondent until his employment terminated on 12 July 2008. He never received a P45 form in 2007 nor did he resign from the respondent's employment in 2007. The only reason he was absent from work during the period of his employment was to go on holidays.

The appellant's employment was terminated while he was in Poland. While in Poland, he received a telephone call from his daughter. She told him that the respondent had telephoned her and said that there was no more work. On his return to Ireland, the appellant tried to telephone the respondent several times but his calls were not returned. The appellant confirmed that he never told the respondent that he wanted to resign and he never requested his P45 form from the respondent. He agreed that at that time, the respondent had very little work.

The appellant had wanted to return to work with the respondent after his return to Ireland but there was no work. He tried to telephone the respondent for a month after his return to Ireland to sort things out. He was not given notice of the termination of his employment, nor was he told that work was ending and that his P45 form would be issued. He was not given redundancy forms for completion nor did he receive a redundancy payment. He did not receive written terms and conditions of employment from the respondent nor did he ever receive payslips.

Before going on holidays to Poland, the appellant presented a cheque to the bank, which he had received from the respondent but they refused to cash same saying that there was insufficient funds to cover the amount on the cheque. The amount on the cheque was for the equivalent of one week's wages. At that time, the most holidays the appellant would have taken were three weeks.

The appellant denied that he had returned to Poland to work for another employer. The respondent was his only employer and he never had another employer in Poland. He had only ever returned to Poland for a holiday, and the duration of such a holiday was two to three weeks, depending on the cost of the airfare.

When the appellant went on holidays, he never received his full entitlement to holiday pay and two to three days was always deducted from same. This deduction was never explained to the appellant. Though the figure of €690.00 was admitted as being owed by the respondent to

the appellant, the appellant maintained that he only received three quarters of what he was entitled to in respect of holiday pay. The holiday money he received was always less than his entitlement.

The appellant confirmed that he was seeking redundancy because he had been working for the respondent for a period of greater than two years. Also, he had not received notice from the respondent of the termination of his employment and he was not paid for two Sundays on which he worked. The appellant concluded his direct evidence by confirming that he did not resign in 2007 and receive his P45 form from the respondent.

In cross-examination, the appellant denied that he had left the respondent's employment in 2007. It was put to the appellant that on 10 June 2007, he received a cheque in the amount of €1238.00 from the respondent. Though he could not remember the amount on the cheque, the appellant confirmed that usually if going on holidays, he received holiday money and overtime payments, which were due, and he only took two weeks holidays.

It was further put to the appellant that from 10 June 2007, he did not return to work for the respondent for a period of six weeks, that he was unpaid during this six week period by the respondent and that from 10 June 2007 to 22 July 2007, he was out of the country. In reply, the appellant said that he was unsure of the date of 10 June 2007 but at that time, he did receive a payment from the respondent and went to Poland for his daughters wedding. He denied that he was out of work with the respondent until July 2007 and stated that the period June to July was too long and that he had returned to the respondent's employment before the stated July date. He did not accept that he had wanted his P45 form from the respondent to ensure that his tax affairs were in order nor that he had returned to Poland because his wife was sick and that he intended to get work there. He had returned to Poland, not because his wife was sick but because his daughter was getting married and he was only there for a period of three weeks. He denied that he was out of the country and not in the respondent's employment during the period 10 June 2007 to 22 July 2007. If he had received his P45 form then, he would have claimed tax back.

Replying to the Tribunal, the appellant denied that he had seen or received a P45 form in 2007. He had not been out of employment with the respondent for a period of six weeks in 2007 and had only been in Poland for two weeks for his daughters wedding. Though his wife had been ill for some time, she had not been unwell at that time. The absolute length of time that he had been out of work between June and July 2007 was three and a half weeks.

While in Poland on holidays in 2008, the appellant was contacted by his daughter about a telephone call she had received from the respondent saying that there was no more work for her father. When he returned to Ireland, he lived with friends and was financially supported by them and his daughter. He was in receipt of social welfare payments from November 2008. Due to his limited English, he had been unaware of his entitlement to social welfare prior to this time. He had not tried to claim social welfare but meet the director to try and have matters resolved.

In his sworn evidence, AS explained that he had been employed by the respondent as a labourer, in circumstances similar to the appellant. He had been employed for around the same period as the appellant but had commenced employment four months before the appellant. His employment had ceased in March 2008, a few months prior to the cessation of the appellant's employment, when he was told that work had ended so his job had ended.

AS and the appellant had worked on the same projects for the respondent. He had been on holidays during July 2007, for two and a half to three weeks. He did not notice that the period the appellant

was off work was as long as six weeks, or of the appellant getting his P45 form.

When his employment ended, AS received a small amount of money which he thought was for his holidays. He also received the wages that were due. He did not receive the full amount of his holiday entitlement. He received two weeks notice of the end of his employment. He had worked for the respondent on Sundays in Kenmare but had not been paid for this Sunday work. He did not get his P45 form in the middle of a year nor did he receive redundancy from the respondent. He did not know about terms and conditions of employment and had signed nothing in relation to same.

In cross-examination, AS confirmed that he knew the appellant well and they were good friends.

AS confirmed that he received his wages and holiday pay when he went on holidays in July 2007. At that time, he went on holidays for two weeks from 4 July until 22 July. Both AS and the appellant returned to work on the same date – 22 July 2007. However, AS was unsure as to the date that the appellant went on holidays to Poland, except that everyone went for three weeks.

AS confirmed that he left the respondent's employment due to his high blood pressure and he told the respondent of same.

Respondent's case:

In his sworn evidence, the respondent's director confirmed that the appellant commenced employment prior to Christmas 2005 and worked through the year of 2006 until June 2007. In June 2007, the appellant told the director that his wife was sick in Poland, that he had to return there and that he would get another job either there or in Germany. As far as the director was concerned, the appellant was leaving. The appellant made no mention of his daughter's wedding. In July 2007, the appellant returned. He just showed up. The director maintained that such Polish guys just keep coming and going without giving notice and that a person could never know with them. At that time, the appellant had specifically asked for his P45 form.

It transpired that the appellant was also returning to Poland in July 2008. He gave no reason for his departure. The appellant's daughter then telephoned the director and asked that the appellant be sorted out. This was why the appellant's P45 form was issued to him.

The director maintained that the appellant had a break in his employment in July 2007. He handed the P45 form to the appellant at that time, before the appellant left his employment and went on holidays. The break had not been a holiday and no one else had received a P45 form in the middle of the year. The director gave the appellant his P45 form because the appellant told him that he was sick of Ireland and he was going away. The appellant had asked for his P45 form. He had entitlements and could claim social welfare. He went off to Poland and then, four weeks later, he returned. At the time, the respondent had sixty-five employees.

It was put to the director that the appellant had said that the break was for three weeks but, in his evidence, he – the director – had referred to a holiday of four weeks and also, he had not explained his use of the word "holiday". When asked about the termination of the appellant's employment in July 2008, the director explained that the appellant had said that he was leaving and that Polish guys simply come up and announce that they are going home. In July 2007, the appellant's wife had been sick and in July 2008, the appellant's friend had requested the appellant's P45 form. The director confirmed that there was a slow-down in business in 2008 and it would have been natural that employees would have been let go.

The director agreed that employees are entitled to their statutory entitlements. However, no other employee was issued with a P45 form in July 2007 except the appellant. He was not a young person and was not happy in Ireland. The director confirmed that work had been available for the appellant had he remained with the respondent. People left the respondent so there were no redundancy situations.

The director admitted that there had been a downturn in business. He had employed direct employees and sub-contractors. He confirmed that the appellant had not been dishonest. He had been a good employee and the director had no problems with him. However, he had been the one who decided to return to Poland. The director stated that the appellant had never worked for the respondent on Sundays in Kenmare. The appellant might have worked for a sub-contractor in Kenmare. The respondent never had projects in Kenmare, despite it being a busy town. What employees did in their own time was their own business and it was none of the director's business if they decided to work for sub-contractors.

The director did not accept that the appellant was due holiday pay, as he had claimed in his evidence. He had not received notice from the respondent, as he was the one who had terminated his employment. The appellant had come and gone as he liked and had gone in the middle of 2007. In June 2007, the appellant had told the director that he was leaving for good because his wife was sick and he was returning home to mind her.

The director agreed that the appellant had let him down by leaving in 2007. It was put to the director that he had re-employed the appellant despite being letdown. The director replied that the appellant had been a good worker and that the respondent was busy and under pressure of work. He was surprised with the return of the appellant and would not have known that the appellant had not claimed tax back. The appellant was re-employed on the same conditions of employment as previously but was not given written conditions of employment. In 2007, when the project that they had been working on finished, things were quiet after that.

It was put to the director that the appellant had maintained that he had not terminated his own employment. In reply, the director stated that he had been contacted by the appellant's friend for the appellant's P45 form. The bounced cheque that the director had been approached about was as a result of a cash flow problem. The director had said that he would sort it out if the appellant waited a week.

Replying to the Tribunal, the director confirmed that he thought that the appellant had been issued with his P45 form in 2007 prior to leaving Ireland. When it was highlighted that this P45 form was dated 9 August 2007 and so must have been produced subsequent to the appellant's return from Poland, the director stated that he did not know the mechanics of a P45 form. He confirmed that his accountant prepared the P45 forms and P60 forms. His accountant issues the P60 forms every year.

Verbal submissions made during evidence:

The appellant's representative confirmed that the appellant received his P60 forms but he did not get his P45 form in 2007 nor did he resign in 2008 or get notice of the termination of his employment.

Referring to the appellant's P60 form for the year 2007, the respondent's representative highlighted that same showed that the appellant had twenty-one weeks employment with the respondent for that year. The P60 form – a revenue document – covers a financial year. The year 2007 was broken by

the issue of the appellant's P45 form in June 2007.

Determination:

In this case, the only claims before the Tribunal were appeals under the Redundancy Payments Acts, 1967 to 2007, the Minimum Notice and Terms of Employment Acts, 1973 to 2001 and the Organisation of Working Time Act, 1997. The issues of the non-furnishing of payslips and the non-furnishing of terms of conditions of employment are not matters for the Tribunal in this case. In respect of the non-furnishing of payslips, such a complaint may be made to the National Employment Rights Authority. Complaints for the non-receipt of terms and conditions of employment may be referred to the Rights Commissioners Service under the Terms of Employment (Information) Acts, 1994 to 2001 in the first instance, and only on appeal can the matter be heard by the Tribunal. Furthermore, claims for redundancy, notice and holiday pay are statutory entitlements and the question of awarding punitive damages is not within the remit of the Tribunal.

In respect of the claim for redundancy, the Tribunal carefully considered all of the verbal and documented evidence, and in particular the P60 forms. From the evidence adduced, it would appear that the appellant does not have the required service in the relevant period to entertain such a claim. The documentary evidence indicated that the appellant did not have two years continuous service and accordingly, the appeal under the Redundancy Payments Acts, 1967 to 2007 is dismissed.

The Tribunal finds that the appellant had an entitlement to notice from the respondent. Accordingly, the appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 succeeds and the Tribunal awards the appellant the sum of €577.45 in lieu of notice, this being the equivalent of one week's pay.

In respect of the claim to holiday pay entitlement, the respondent accepted that the sum of €690.00 was owed to the appellant. However, no supporting evidence was adduced to the Tribunal to support the appellant's contention to a claim of extra unpaid holidays. Accordingly, the appeal under the Organisation of Working Time Act, 1997 succeeds and the Tribunal awards the appellant the sum of €690.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)