

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

Employee

(Appellant)

CASE NO.

RP327/2009

against

Employer

(Respondent)

under

### REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. S. Ó Riordáin B.L.

Members: Mr. J. Hennessy  
Mr. J. Dorney

heard this appeal at Kilkenny on 8th October 2009

#### **Representation:**

Appellant: Ms. Mary Molloy, Solicitor, 2 Rose Inn Street, Kilkenny

Respondent: Ms. Catherine Day, Smithwicks, Solicitors, 43 Parliament Street, Kilkenny

#### **The decision of the Tribunal was as follows:**

The Tribunal heard that dismissal as a fact was in dispute in this case.

#### Respondent's Case:

The respondent is a plant hire business, which supplies machines and accompanying drivers to clients' sites. The appellant commenced employment with the respondent in October 2004 and he was an experienced employee. Ms. N, a director of the company gave evidence that they had a good working relationship with the appellant for the majority of his employment.

During his employment the appellant moved from site to site as that is the nature of the plant hire business. Giving evidence, Mr. F, a director of the company stated that on the 27<sup>th</sup> March 2008 the appellant was provided with a letter as a first official warning. The appellant was provided with the warning because he refused to transfer to another site on a temporary basis.

On the 30<sup>th</sup> October 2008 the appellant refused to drive a tractor and tank on a site in Knocktopher even though he had done this work on other occasions. The appellant was offered this work as he had been removed from another site. The appellant made it clear to Mr. F that he was leaving his employment.

When the appellant refused to take up the work driving the tractor and tank on the site, Mr. F contacted the union and as a result he handed letter dated the 10<sup>th</sup> November 2008 to the appellant who returned it unsigned. The appellant told Mr. F that he would not sign it, as he would not get a redundancy payment if he did. Mr. F told the appellant there was no redundancy situation as work was available for him. The letter stated that the respondent received the appellant's verbal notice to rescind his employment on the 30<sup>th</sup> October 2008. The letter further stated that a position was available to the appellant and this was a position he had previously occupied. The letter stated that as the appellant had terminated his employment he had no claim against the respondent for redundancy.

Subsequently, letter dated the 18<sup>th</sup> November 2008 was sent to the appellant outlining the respondent's position. The letter outlined that the appellant had provided the respondent with verbal notice on the 30<sup>th</sup> October 2008, that the position of tractor and tank driver was offered to the appellant numerous times since the 30<sup>th</sup> October 2008 and that the appellant had continued to refuse this work without explanation. No employees were placed on lay-off at the time of October 2008.

No reply was received from the appellant to the letter of the 18<sup>th</sup> November 2008. The appellant subsequently sent an RP9 form to the respondent but this was returned to him unsigned with letter dated the 2<sup>nd</sup> December 2008 enclosed. This letter again outlined that as per the respondent's letter of the 18<sup>th</sup> November 2008 the respondent confirmed receiving the appellant's verbal decision to rescind his employment and his subsequent refusal to accept work offered.

An employee who was part-time at the time of the events now holds the appellant's position. The respondent has never had to utilise the lay off or short time clause in the contract of employment. The respondent continues to hold both contracts with Client A. Drivers change jobs on a daily basis and Client A does not have a problem with that as the foreman of a site does not dictate which driver arrives on the site with the machine. Mr. F stated that regardless of whether any machines on Client A's site were off hire there was still work available for the appellant on the Knocktopher site. Twelve months later the respondent still has a machine operating on that site.

Ms. N, also a director, gave evidence that she spoke to the appellant on one occasion after the 30<sup>th</sup> October 2008 when he enquired about being paid minimum notice. Ms. N informed the appellant his job was still there. The appellant did not raise the issue of a redundancy payment during this conversation. No employees were made redundant or placed on lay-off in the eight months after the 30<sup>th</sup> October 2008.

#### Appellant's Case:

Giving evidence the appellant stated that he did not receive the first official warning letter of the 27<sup>th</sup> March 2008.

On the 24<sup>th</sup> October 2008 the respondent's mini-digger was on a compound and the appellant was working on another machine on site. The foreman told the appellant that the mini-digger should have been left elsewhere by Mr. F. The foreman told the appellant that he wanted both the appellant's machine and the mini-digger taken off hire. The appellant tried to contact Mr. F for three days to make him aware of this situation. On the 27<sup>th</sup> October 2008 the appellant brought both machines back to the respondent's premises. When the appellant arrived

at the premises a number of employees were present. Mr. F arrived to the premises and said he had lost the contract with Client A and as work had decreased, someone would have to be laid off.

Between the 24<sup>th</sup> and 30<sup>th</sup> October 2008 the appellant had worked on his own initiative completing repairs to machinery. On the 30<sup>th</sup> October 2008 the appellant brought the timesheets to the office. Mr. F said to the appellant that there was work available on a tractor and tank in Knocktopher and he would like to give the work to the appellant but he could not take the chance of changing the driver on the machine, as the client had to have the same driver on site throughout. As a result Mr. F told the appellant there was no further work for him and he would only be provided with a P45 if he signed a letter to say he was not made redundant. The appellant later became aware that the work on the Knocktopher site finished a few weeks later. The appellant was not offered work on this site and he did not refuse any such offer. The appellant confirmed that he had previously worked on that site driving a tractor and tank. He did not receive letter dated 10<sup>th</sup> November 2008. It was the appellant's understanding that the respondent laid off two other employees.

The Tribunal asked the appellant why he had not accepted the offer of work contained in the respondent's letter of the 18<sup>th</sup> November 2008. The appellant replied that the letter differed from what had been said to him. The union were also dealing with the matter on his behalf at that time. The appellant did not reply to letter dated 2<sup>nd</sup> December 2008 as again at that time the union were trying to get his job back for him.

#### **Determination:**

There was a fundamental conflict of evidence between the parties. Irrespective of the conflict between the parties regarding the 30<sup>th</sup> October 2008, the respondent's subsequent correspondence clarified for the appellant that he was not made redundant and that work was available for him. The letter of the 18<sup>th</sup> November 2008 outlined to the appellant that the position of tractor and tank driver was offered to him numerous times within the previous weeks.

The appellant subsequently submitted an RP9 form to the respondent, which was returned unsigned with letter dated the 2<sup>nd</sup> December 2008 which reiterated the respondent's position; that the appellant was not made redundant and that he had refused work offered. The appellant did not reply to either of the letters the respondent wrote. In all the circumstances the Tribunal finds that a redundancy situation did not occur in relation to the end of the appellant's employment with the respondent. Accordingly, the Tribunal dismisses the appeal under the Redundancy Payments Acts, 1967 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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