

## EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

EMPLOYEE - **Appellant**

RP74/2009

against

MN86/2009

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. M. Gilvarry

Members: Mr. D. Morrison  
Mr. M. McGarry

heard this appeal at Castlebar on 17 June 2009

#### **Representation:**

Appellant:

Mr. Neil McCole, Clarke & Flynn Solicitors,  
Bury Street, Ballina, Co. Mayo

Respondent:

In person

The determination of the Tribunal was as follows:

The appellant was employed as a plasterer from February 2003. The respondent's position, not denied by the appellant, was that the appellant, whilst his work was fine, did not have the best attendance record. On 21 December 2007 the employees started a two-week Christmas/New Year holiday. There is a total contradiction in the evidence between the parties as to the events surrounding the resumption of work after this holiday.

The respondent's position is that the managing director (MD) telephoned the appellant on either 2 or 3 January 2008 and told the appellant that he was to start work on 4 January 2008 on the same site as he had been working prior to the holidays. The appellant failed to turn up for work on the appointed day and MD did not attempt to contact the appellant after that time as MD was sick and tired of the appellant not turning up for work.

The appellant's position is that he tried, unsuccessfully, to contact MD before the end of the

holidays and it took another two weeks before he was able to talk to MD who told the appellant that there was no work for him. The appellant rejected the respondent's assertion that he had been working in Sligo at the beginning of 2008.

It is common case that the next contact between the parties was some time in May or June 2008 when the appellant sought, and received, his form P45 from the respondent in addition to the appellant sending redundancy form RP50 to the respondent.

**Determination:**

Whilst there is a total contradiction of evidence between parties about the timing and content of the telephone conversation between the appellant and MD, neither side is claiming that MD told the appellant before 4 January 2008 that there was no further work for the appellant. The respondent's position is that he did not bother to contact the appellant when he failed to turn up for work on 4 January 2008. Whilst the respondent may have had issues with the appellant's attendance record this does not justify there being no attempt to make contact with the appellant after he failed to turn up for work. A termination of employment is not effected by the mere mental exercise of the employer. If the respondent considered that the appellant had resigned by failing to turn up for work on 4 January 2008 he should have written to the appellant in that regard. The Tribunal finds that the appellant was laid off in the telephone call he had with MD in mid to late January 2008 and further finds that by requesting his P45 in early May 2008 the appellant was entitled to claim redundancy having been laid off for in excess of four weeks. The appellant is entitled to a lumpsum under the Redundancy Payments Acts, 1967 to 2007 based on the following criteria

Date of Birth	30 May 1980
Employment commenced	1 February 2003
Employment ended	2 May 2008
Gross weekly pay	€680-00

The period from 4 January 2008 until 2 May 2008 is non-reckonable service by reason of lay-off. 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.

In circumstances where the appellant has claimed redundancy by reason of lay-off a claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 does not arise

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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