

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

EMPLOYEE - *appellant*

RP789/2009
UD721/2009
MN744/2009
WT314/2009

against

EMPLOYER - *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Quinn BL

Members: Mr T. Gill
Dr. A. Clune

heard this claim at Loughrea on 7th October 2009

Representation:

Claimant(s) : Mr. Blazej Nowak, Polish Consultancy Enterprise, 19 Talbot
Street, Dublin 1

Respondent(s) : Mr. James St. John Dundon, Dundon Callanan Solicitors,
17 The Crescent, Limerick

The determination of the Tribunal was as follows:-

At the commencement of the hearing, the claim under the Unfair Dismissals Acts 1977-2007 was withdrawn.

The Appellant who was born on the 27th December 1974 is a Polish national and was employed as a plumber by the Respondent. His employment commenced on the 1st June 2005. His gross weekly wage at all material times was in the amount of €630.

It is the Appellant's case that in the month of April 2008 he was laid off by the Respondent and provided with a P45 on the 4th April in order to facilitate him to obtain jobseeker's allowance. In June 2008, he resumed employment with the Respondent and worked on a continuous basis until he went on leave in the month of December 2008. On his return in January 2009, he alleges that he was informed by the Respondent that there was no more work for him.

In addition to a claim under the Redundancy Payments Acts, the Appellant maintains that he was entitled to two weeks notice under the Minimum Notice and Terms Of Employment Acts which he was not afforded and in relation to the Organization of Working Time Act, the Appellant maintains that he was not afforded his dues in respect of the 25th and 26th December 2008 and January 1st, 2009 and he gave sworn testimony to that effect, whereas on the Respondent's case, as the Appellant's employment had ceased as at the 16th December 2008, a claim in these respects was not sustainable.

The Appellant testified that in April 2008, he was advised by Mr. M, the Managing Director of the Respondent, that no work would be available for him with the Respondent for two months and that he was being laid-off. It is common case that the Appellant was provided with a P.45 by the Respondent at that time.

The Appellant testified that he resumed employment with the Respondent in June 2008 and worked continuously until the 16th December 2008 when he took his holidays to return to Poland. The Appellant testified that when he returned to resume his employment with the Respondent on the 6th January 2009, he first learned from Mr. M, that the Respondent did not have any further work for him and would be providing him with a P45, which stipulated the date of cessation as the 16th December 2008.

In cross-examination by Mr. Dundon, it was denied by the Appellant that he had requested his P45 in April 2008 and again in December 2008.

It was suggested to the Appellant that as regards April 2008, he had requested his P.45 of the Respondent to be permitted to return to Poland for a family occasion at or about that time. That was rejected by the Appellant who testified that, a friend of his who was also employed by the Respondent was similarly provided with a P.45 at that time and subsequently resumed employment with the Respondent at the same time as the Appellant, two months afterwards also. In re-examination the Appellant testified that he did not return to Poland throughout the period of his lay-off, as he was in receipt of job-seekers benefit at the time and was obliged to be in attendance each week to receive same.

It was also suggested to the Appellant that he had telephoned Mr. M on the 28th November 2008 and requested his P.45 on that occasion also as he was returning to Poland and that in fact the Appellant was provided with his P.45 before he returned to Poland in December 2008. Whereas it is common case that the P.45 stipulated the 16th December 2008 as the date of cessation, the Appellant was adamant that he was provided with it in January 2009. Furthermore, it was suggested to the Appellant that he provided notice of his termination of employment to the Respondent on the 28th November 2008 and having worked out two weeks notice thereafter until the time that he left for Poland on the 16th December, the provisions of the Minimum Notice and Terms of

Employment Acts, could not avail him.

It was also suggested to the Appellant that there was plenty of work available to the Respondent and that a redundancy situation didn't arise for the Appellant, to which the Appellant responded that there was no work and that he was informed that there was no work for him. In this context, in the course of cross-examination, a number of contracts which the Respondent alleged were ongoing for it for the period from late November 2008 to mid December 2008 and into January 2009, were mentioned to the Appellant, who testified that as he was working on a particular project, was not privy to such matters and regardless, was told in any event by the Respondent that there was no work for him.

The Appellant testified that he attended at Mr. M's residence on the 22nd January 2009 for the purpose of obtaining monies that he alleged were owed to him by the Respondent in respect of overtime earned by him. It was admitted by the Respondent that such monies were due and owing to the Appellant at that time. On the occasion in question, it appears that the Appellant unilaterally removed materials, the property of the Respondent from its vehicle. The Appellant's explanation for this was, so as to exercise some form of a lien over the property, as security for and pending payment, to him of the monies owed by the Respondent, which the Appellant alleges, he had requested on the 6th January 2009 and had not been forthcoming. In consequence of the foregoing, it appears that the Appellant was paid the monies due and owing to him and the Respondent had its property returned.

The Appellant's brother, Mr. P.S. also testified before the Tribunal. He attended with and drove his brother to Mr. M's residence on the 6th January and 7th January 2009 as the Appellant did not own a motor vehicle. He testified that he observed Mr. M provide the Appellant with documentation at that time, but that he wasn't aware of the nature of same. Mr. M's evidence to the Tribunal was that he had no recollection of meeting the Appellant at his residence in early January 2009.

The testimony of Mr. P.S concerning his attendances at the residence of Mr. M were quite specific and in particular, he recounted how that one of the occasions, he encountered Mr. M's wife, who advised them that her husband was out riding a horse and they awaited his return. For her part, Mr. M's wife admitted that she encountered the Appellant and his brother at her residence in January 2009 prior to the incident involving the unauthorised removal of the Respondent's property by the Appellant.

Mr. M subsequently testified that, he had a recollection of his wife telephoning him in January 2009 when he was out exercising a horse and informing him that the Appellant and others were at their residence behaving rather aggressively and that he subsequently received a further telephone call advising him to check the Respondent's vehicle as tools were missing, but that he had no recollection of the Applicant being in contact with him.

At the conclusion of the Appellant's case, Mr. Dundon on behalf of the Respondent, made an application for a dismiss of the Appellant's claim under the Redundancy Payments Acts. That application was refused by unanimous decision of the Tribunal and the Respondent went into evidence.

One of the primary issues for determination in this case was the nature and characterization of the Appellant's absence from employment with the Respondent in the period from April to June 2008.

In the event that the Tribunal determined that the Appellant voluntarily resigned in April 2008, his

service as at December 2008/January 2009 would not have been continuous since the 1st June 2005 and therefore he would not have met the requirements in that regard, as would have prima facie entitled him to a redundancy payment, had a redundancy situation latterly prevailed.

On the other hand, in the event that the Tribunal determined that the Appellant was laid off by the Respondent in April 2008, continuous and reckonable service would not be broken thereby and the Appellant would have in these respects, as at December 2008/January 2009, met the statutory requirements, as would have prima facie entitled him to a redundancy payment, had a redundancy situation latterly prevailed.

Mr. M testified on behalf of the Respondent. He was and is the Managing Director of the Respondent, a plumbing and electrical contractor.

He testified that in the month of April 2008 there was a fall off in work and at this time, the Appellant requested his P.45 from the Respondent. He testified that the Appellant had expressed a desire to return to Poland to attend a family event and he required the document in case he would not be returning. The Respondent testified that he informed the Appellant that in the event of work becoming available to it in the future, that he would be the first person contacted.

He said that in June 2008 he went to where the Appellant had been residing to ascertain his whereabouts and having done so, contacted him and offered him employment, which commenced on the 2nd June 2008 and continued apace thereafter.

Mr. M alleged that on the 28th November 2008, the Appellant telephoned him and requested a P.45 as he was going back to Poland in December and that as a result of learning of this development, Mr. M telephoned his accountant's secretary and immediately arranged for same to be processed. Mr. M was in a position to provide the Tribunal with a particularly vivid recollection and account of this disputed episode.

Mr. M maintained that the Appellant left the jurisdiction on the 15th or 16th December 2008, having ceased his employment with the Respondent, the previous Friday or Saturday, the 12th or 13th December 2008 and that he had been provided with his P.45 before his departure.

Mr. M maintained that the Respondent was reasonably busy at this time and had two other persons in its employment, a full time electrician and a part-time labourer who was waiting to attend college and that it had sufficient work for the Appellant available towards the end of December 2008 and into early 2009.

In the course of cross-examination by Mr. Nowak, Mr. M. agreed that the Appellant and another employee were laid off in April 2008 as he had no work for them, that they were laid off for a short period with the intention that they would be returning when work became available and which was anticipated. As he termed it, he put them on "temporary lay-off" and admitted to the Tribunal that he did not wholly understand the procedure entailed thereby.

Having considered all of the evidence adduced, the Tribunal generally preferred that of the Appellant and his witness, over that of the Respondent. The version of events as attested to by the Appellant and his brother had a greater degree of credibility for the Tribunal than that of the Respondent.

On the issues therefore, the Tribunal unanimously determines that

(i) the Appellant did not resign his employment with the Respondent in April 2008. Rather he was laid-off and resumed his employment again in June 2008 following that period of lay-off.

(ii) the Appellant did not request his P.45 from the Respondent on the 28th November 2008 and work out his notice over the two weeks thereafter. Rather the Appellant was informed by the Respondent for the first time on the 6th January 2009 that there was no further work available for him and he was provided with his P.45 by the Respondent in January 2009

By reason of the foregoing, the Tribunal is satisfied that a redundancy situation existed for the Appellant and accordingly, his claim under the Redundancy Payments Acts succeeds and the Tribunal awards the Appellant his statutory entitlement to redundancy thereunder, based on the following criteria:

Date of Birth:	27 December 1974
Date of commencement of employment:	1 June 2005
Date of termination of employment:	6 January 2009
Gross Weekly Pay:	€630.00

This award is made subject to the Appellant having been in insurable employment under the Social Welfare Acts during the relevant period. However it is to be noted that there is a gross weekly ceiling of €600 on all awards made from the Social Insurance Fund.

It also follows from the foregoing that the Appellant's claim under the Minimum Notice and Terms of Employment Acts succeeds and the Tribunal also awards the Appellant the sum of €1,260.00 in that regard being the equivalent of two weeks pay.

Furthermore the Tribunal awards the Appellant the sum of €315.00 which it calculates as being the equivalent of three days public holiday pay due and owing to the Appellant pursuant to the Organisation of Working Time Act 1997, based on a 6 day working week of which the Appellant had testified.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)