

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

EMPLOYEE

CASE NO.

RP857/2009

MN803/2009

against
EMPLOYER

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. T. Taaffe

Members: Mr. J. Browne
Mr. A. Butler

heard this appeal at Wexford on 17th February 2010

Representation:

Appellant: Cllr. D. Hynes, XXXX

Respondent: In Person

The decision of the Tribunal was as follows:

Preliminary Issue:

The appellant's T1A form stated his employment terminated on the 2nd January 2008. The Tribunal subsequently received the appellant's form on the 6th April 2009.

The appellant applied to the Tribunal to have the time limit for the appeal extended from 52 weeks to 104 weeks, as he had first submitted his appeal to the redundancy section of the Department of Enterprise, Trade & Employment.

Determination on Preliminary Issue:

The Tribunal extended the time limit as set out under S.12 of the Redundancy Payments Act, 1971 and proceeded to hear the appeal.

Substantive Issue:

The appellant commenced employment with the respondent in March 2002 working as a roofer. The respondent gave evidence that the appellant approached him on the 14th September 2006 and informed him that he was setting up business for himself unless the respondent could increase his wages. The appellant subsequently left the respondent's employment. His last day of work was Friday, 15th September 2006 and he was paid wages up to and including this date.

On or around the 18th October 2006 the respondent received a telephone call from the appellant who sought to return to a position with the respondent. The respondent agreed to this on the basis that the appellant worked as a sub-contractor. The appellant accepted this and commenced working as a sub-contractor on a project for the respondent. When the work on the project completed on the 25th October 2006 the respondent calculated the monies owed to the appellant and deducted 35% tax, as he was obliged to do for a sub-contractor. The respondent had a C35 document and he provided the appellant with the relevant section of the document for revenue purposes. The appellant told the respondent that he needed a regular wage and it was agreed between them that the appellant would return to the respondent's employment as a direct employee.

The appellant commenced working with the respondent as a direct employee from the 25th October 2006. During December 2007 the respondent's employees were working on a house in Wexford and the work was due to continue in January 2008. However, work on the house could not proceed in January 2008 as an electricity pole had not been moved and work came to a halt on the site. The respondent informed the appellant and the other employees that as soon as the electricity pole was moved, work would resume on the site. It was the appellant's evidence that the respondent informed the employees that they should sign onto social welfare. The appellant understood this to mean that he was unemployed, as the respondent had no other work available at that time.

It was the respondent's evidence that approximately one week later the appellant attended at the respondent's house seeking a redundancy payment. The respondent re-iterated that work would more than likely work resume on the site. The appellant informed the respondent that he had other plans and did not intend to return to work with the respondent. The appellant informed the respondent that he had applied to the Department of Enterprise, Trade & Employment for a redundancy payment.

The respondent stated in evidence that work later resumed on the site in March or April of that year. He did not contact the appellant with an offer of work as the appellant had made it clear to him that under no circumstances would he be returning to work. The appellant disputed in his evidence that he had made other plans.

There was a dispute between the parties concerning the length of the appellant's break in service. The appellant's representative submitted the break in service was for a period of only two weeks but the respondent submitted the break in service was for a longer period based on the dates he had outlined to the Tribunal. He stated that the appellant had also worked for other contractors during this time but the appellant disputed this in his evidence.

Determination:

The Tribunal carefully considered all of the evidence presented to the hearing. It accepts the evidence of the respondent, which was not disputed by the appellant, that unlike his previous

employment with the respondent, for a number of weeks in the months of September/October 2007, the appellant of his own volition ceased to be an employee of the respondent and that for this period he worked as an independent contractor. It is accepted that the appellant was subsequently re-employed with the respondent following this period and that this employment terminated on the 2nd January 2008. The appellant was not therefore in the employment of the respondent for a continuous period of two years and his appeal for a redundancy payment under the Acts, therefore fails.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, is found proven and the Tribunal awards the appellant the sum of €600.00 (being the equivalent of one weeks gross pay) in respect of this claim.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)