

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:  
EMPLOYEE

CASE NO.  
RP1063/2009, WT414/2009

against

EMPLOYER

Under

**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**  
**ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr C. McHugh  
Mr A. Butler

heard this appeal at Wicklow on 6th April 2010

### **Representation:**

Appellant : Mr Cian Moloney B L instructed by  
Pauline O'Toole & Co, Solicitors, Ma Street, Carnew, County Wicklow

Respondent : In person

The decision of the Tribunal was as follows:

It was the respondent's case that the appellant's termination of employment was caused by other factors other than redundancy.

### **Appellant's Case**

The appellant commenced employment with the respondent in June 2003. His work ranged from operating a mechanical digger to assisting in the construction of various dwellings, performing agricultural duties which included erecting sheds on farm holdings. He told the Tribunal that it did not matter to him that he never received a contract of employment or terms and conditions for this work. The witness who got paid by cash and cheque, only occasionally received payslips from his employer. From 2007 and particularly the early summer of 2008 the witness became aware of a downturn in the fortunes of the respondent. He experienced problems securing his weekly wages as the respondent's cheques were not being honoured by the bank. By May 2008 the respondent's banking facilities had been withdrawn from the bank. The respondent also informed the witness that there was now only "bits and pieces" of work available.

By October 2008 the appellant who continued in the employment of the respondent was owed up to

seven weeks' outstanding wages. Towards the end of that month the witness was advised by the respondent that he should register for social welfare payments as there was probably no further work available. The appellant followed that advice and signed on at his local social welfare office on 28 October. Around the same time the respondent secured work from another contractor to erect farmyard sheds under a State grant aided scheme. That scheme enabled the appellant to continue working for the respondent on an almost daily basis up to the end of the year. The witness commented that during that period the contractor frequently told him to report for work on that ongoing day-to-day basis.

The witness described as a joke the deadline of 31 December 2008 for the ending of the grant scheme as he continued to work up to mid January 2009. His last day of work was 16 January when the respondent told him that there was no more work for him. The contractor also gave him the same message. The respondent was aware that he had been signing on for welfare payments from October 2008.

The appellant's sister acknowledged she was aware that he was working almost every day while drawing down welfare payments from late October 2008. She assisted him in filling in forms related to his employment with the respondent. This witness also received cash payments from the respondent connected with her brother's outstanding wages.

### **Respondent's Case**

The respondent started employment as a farmer and as time passed branched out into digging operations. Those operations entailed him into operating as an employer and as such he employed the appellant in the summer of 2003. He undertook construction work but on several occasions his clients failed to pay him. That situation steadily deteriorated to the extent that he encountered serious cash flow problems. His bank closed its account with him and ceased honouring his cheques. It was in that context when work was almost non-existent that he "perhaps said to the appellant in a joke that he should sign on". However, the respondent told the Tribunal that he never suggested to him to register for social welfare payments.

Due to an arrangement with another contractor the respondent found himself with plenty of work from November 2008. By December the witness learned that the appellant was actually drawing welfare payments while he was continuously working for him. He "did not know where he stood" with that scenario. His attitude was that the fact that the appellant was signing on was a statement that he was no longer working for him. As far as the witness was concerned the appellant stopped working for him prior to the holidays for Christmas. When the appellant returned to work in late December and on into January 2009 he was then working directly for the contractor. However, there was no clear announcement between the parties on that issue.

The witness could understand the reasons why the appellant began signing on for welfare payments. The respondent owed him several weeks' wages at the time and there was no guarantee that or indeed future wages would be fully paid.

The contractor confirmed that the appellant worked for him rather than the respondent in January 2009. He added that the deadline for the completion of the grant aided shed work was firm as work on that project was intense up to the end of December.

*The area manager from the Department of Social Protection for the appellant's region said he was*

*familiar with the appellant's file. That file showed that the Department commenced job seekers' benefit payments to the appellant from 31 October 2008 and such payments continued uninterrupted for a full twelve months. When those payments ceased the appellant was placed on a job seekers' allowance scheme. In early March 2010 the appellant wrote to the Department and accepted he had been working while drawing welfare payments. It is likely the appellant will become the subject of an overpayment procedure from that Department.*

### **Determination**

The Tribunal found this case quite confusing on the basis of both the appellant's and respondent's evidence. The evidence of the last two witnesses helped to clarify this case.

On the basis of those two witnesses' evidence the Tribunal cannot accept the evidence of the appellant that he was dismissed by the respondent in January 2009. The appellant has failed to satisfy the Tribunal that he was dismissed by way of redundancy. The appeal under the Redundancy Payments Acts, 1967 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

