

## EMPLOYMENT APPEALS TRIBUNAL

### APPEAL OF:

Employee

*appellant*

### CASE NO.

RP1510/2009

Against

Employer

*respondent*

under

## REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms F. Crawford B.L.

Members: Mr T. O'Grady  
Mr G. Whyte

heard this appeal at Dublin on 30th April 2010

### Representation:

Appellant: Mr. Tom Lillis, B.L., instructed by Anthony F O'Gorman & Co, Solicitors, St Michael's Road, Gorey, Co Wexford

Respondent: Ms. Ciara O'Duffy, B.L., instructed by Catriona Sharkey Sol., Hennessy & Perrozzi, Solicitors, Burgundy House, Forster Way, Swords, Co Dublin

The decision of the Tribunal was as follows:-

### Preliminary Point

At the outset of the hearing the claimant's representative sought to amend the T1A form to include a claim under the Unfair Dismissals Acts 1977 to 2007, and Minimum Notice and Terms of Employment Acts, 1973 to 2005. The grounds of the application were that the claimant did not have the benefit of legal advice at the time of completing the form.

The respondent's representative did not agree to the application for the amendment on the grounds that the claimant was a lay litigant and also pointed out that the claimant had a solicitor on file for some time prior to the hearing.

### Decision

On the preliminary issue, the Tribunal is of the view that the Application was made well outside the time period as provided for under Section 8 of the Unfair Dismissals Act 1977 (as amended) and there was no sufficient reason proffered for the granting of an extension. The Tribunal feels that there has been sufficient time since the claimant contacted his solicitor to apply for an amendment to the T1A form. Also, the foundations of the Tribunal are for lay people to avail of its services. Accordingly, having considered the submissions made by both parties the Tribunal refuses the application to amend the T1A form.

The hearing of the claim under the Redundancy Payments Acts 1967 to 2007 proceeds.

### **Appellant's Case**

During direct evidence the appellant told the Tribunal that he worked for the respondent since 1<sup>st</sup> October 2004. He was employed as a carpenter / joiner. At the start of his employment there were a few employees and when the level of work started to pick up the respondent would bring in more employees for a few months. The appellant last recalled working with the extra employees in the summer of 2008. From then until the date of his dismissal there was only himself and one other employee (JN).

JN was employed as a labourer and the appellant told the Tribunal that sometimes JN would carry out the same work as him. The appellant would build stud walls and items from sets of plans and that type of work is different to a labourer's work because a labourer would only be required to set up or prepare an area for work. Sometimes JN was given sets of plans and the appellant said that coming up to Christmas 2008 this was happening more often.

While working on a job in Clontarf JN was given a set of plans and asked to help the respondent. The appellant was sent to the garden to cut up bits of plaster. The appellant told the Tribunal that there is a difference between a labourer and a skilled worker. JN was also given power tools to use, which the appellant said is not normal practice for a labourer. The appellant told the Tribunal that he felt that work was being taken away from him and he was being pushed out.

In December 2008 the appellant sought an increase in his wages. The appellant told the Tribunal that there was a "*bit of a tiff*" about it but they eventually went up.

From the beginning of 2009, the work began to slow down and the appellant might only be working a three-day week. The appellant told the Tribunal that on 14<sup>th</sup> January 2009 he was injured on site. On the 29<sup>th</sup> January 2009 the appellant went to the respondent with a medical certificate and the respondent told him that work was slowing but the appellant saw that the labourer was still working away.

In relation to the injury received at work the appellant told the Tribunal that he hurt his neck, back and shoulder while dismantling a scaffold on site. After the injury the appellant said there was no contact from the respondent until 29<sup>th</sup> January 2009 when he got his certificate signed. There was no further contact from the respondent until 22<sup>nd</sup> April when the appellant received his P45 dated 11<sup>th</sup> March 2009.

The appellant told the Tribunal that six days after receiving his P45 he got a phone call from the respondent asking him to work on a job in Skerries for cash.

The appellant told the Tribunal that he did not leave his employment. His situation at the time was that he had bought a house and it would have been madness to leave his employment.

### *Cross Examination*

Under cross examination the appellant told the Tribunal that he bought a house in Co. Wexford on 6<sup>th</sup> July 2008. The appellant has been working in Dublin and Wicklow for the past month and a half. Prior to that he was on sick leave.

The appellant told the Tribunal that he is still an apprentice carpenter. When asked if he wanted to leave his employment to move to Wexford the claimant replied in the negative.

### **Respondent's Case**

The Tribunal heard evidence from a company director, CC. CC told the Tribunal that at the time in question there was plenty of work available and the job being carried out was going well. Around mid March another job started in Skerries.

CC told the Tribunal that in January 2009 the appellant was in receipt of less money because he had been working less hours as a result of taking time off to work on his house. CC said that there had not been an accident at work on the 14<sup>th</sup> January 2009. CC told the Tribunal that he did not remember receiving any sick notes from the appellant. CC told the Tribunal that when the job in Terenure was completed, there was a new job starting in Skerries but this only required the labourer for the first two to three weeks to set up and prepare the site. For this reason, the appellant was asked to go to a job in Skerries for a few weeks. The appellant told CC that he did not want to go to Skerries.

CC did not agree with the dates of work that the appellant had recorded in his personal diary. CC told the Tribunal that the appellant's last day of work was Thursday 5<sup>th</sup> February. He worked on Wednesday 4<sup>th</sup> February, he was off on Tuesday 3<sup>rd</sup> February and he also worked on Monday 2<sup>nd</sup> February. CC said the appellant also worked a full week from Monday 26<sup>th</sup> January to Friday 30<sup>th</sup> January. CC told the Tribunal that the reason the appellant was off work between 15<sup>th</sup> and 26<sup>th</sup> January was because he was working on his own house. The appellant did not carry out any work for the respondent after the 5<sup>th</sup> February 2009.

From the 9<sup>th</sup> February the appellant wanted time off to work on his house and did not want to go to Skerries. CC told the Tribunal that there is still work available for the appellant.

### *Cross Examination*

Under cross examination CC agreed that sometimes his brother and a friend would help out with work and they had helped out between March 2008 and January 2009. CC said that JN, had been employed as a labourer with the company for approximately two and a half years. CC did not agree that JN had been asked to carry out more skilled work as his time with the company progressed and he also disagreed with the appellant's opinion of being pushed out. CC said that JN, was employed as a labourer to help.

CC stated that the appellant's position had not been filled since his employment with the company ceased and that there is still work available for him.

The Tribunal heard evidence from JC, a company director, who said the appellant was not offered work after 5<sup>th</sup> February 2009 because he had a few projects of his own that he wanted to do. Namely, work on a garage for his dad and also work on his house in Wexford. JC, told the Tribunal that as employer's they were flexible. If the appellant requested time off, he was given time off.

JC told the Tribunal that he contacted the appellant about a job in Skerries because he was under pressure to get it finished. The appellant told him that it would take him two hours to get there and

he was not willing to travel. JC told the appellant that he did not have to be at work at 8am. JC told the Tribunal that the main contractor was understanding and allowed him to finish the job himself but he could not do the flooring and as a result he lost the contract. JC felt that the appellant did not go to the job in Skerries because it was too far to commute.

JC said that the company used the services of sub contractors where necessary to cover the work that the appellant should have been doing. JC told the Tribunal that the appellant was a required employee and still is. There was no attempt to push the appellant out. The company did not experience a downturn and it has always been practice to move the man from one job to another as necessary.

JC told the Tribunal that he thought the appellant requested his P45 from the company. In relation to other workers being employed JC said this was only done to push a job along, similar to using the services of sub contractors.

#### *Cross Examination*

Under cross examination JC said he could not recall when the appellant requested his P45. JC reiterated that the appellant has not been replaced and the resulting extra work is carried out on Saturdays and as overtime. JC agreed that the wages received by JN are considerably less than those of the appellant. He did not accept that JN's duties had changed as a result of the appellant's cessation of employment.

#### **Determination:**

After hearing all of the oral evidence and considering all of the evidence submitted, the Tribunal decides that a dismissal by reason of redundancy took place.

The Tribunal, on the balance of probabilities finds that the appellant's claim under the Redundancy Payments Acts 1967 to 2007 succeeds and the appellant is entitled to a redundancy payment based on:

Date of Birth	21 <sup>st</sup> September 1986
Date of Commencement	01 <sup>st</sup> October 2004
Date of Termination	11 <sup>th</sup> March 2009
Normal Weekly Remuneration	€600

This award is subject to the appellant having been in employment, which is insurable for all purposes under the Social Welfare Consolidation Act 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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