

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:
Employee

CASE NO.

MN781/2009
RP834/2009
WT331/2009

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs. M. Quinlan

Members: Mr. J. O'Neill
Mr F. Barry

heard this appeal at Dublin on 2nd February and 11th May 2010

Representation:

Appellant: Ms. Christina Ryan BL instructed by O' Riada, Solicitors, Liffey House
Primrose Hill, Celbridge, Co. Kildare
On the second day the appellant did not have a legal representative.

Respondent: Ms. Marian Becker, Denis McSweeney, Solicitors, Grand
Canal House, 1 Upper Grand Canal Street, Dublin 4

The decision of the Tribunal was as follows:-

Preliminary Point

The claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Organisation of Working Time Act 1997 were withdrawn on the day of the hearing.

Appellant's Case

The appellant gave direct sworn evidence that he was a director of the respondent company until his resignation as a director in November 2008. The company was involved in the tool and plant hire business and he had responsibility for sales, delivery, repairs and general administration work. He had a financial investment in the company but never received payment in the form of a director's salary and never received any dividend as a director. He was also an employee of the company. He commenced working for the respondent company in June 2005 but did not receive his first monthly payment until September 2005.

As a director he attended board meetings and all management decisions were made through the board meetings. He did not make decisions on his own but as part of the board of five directors. He was given his P45 on the 16 August 2008 as the business was being folded up at that stage and it was intended that the company should cease trading. He sought a redundancy payment when he finished work but never received any redundancy payment. He accepted that he resigned as a director of the company but denied that he resigned as an employee of the company.

In response to questions from the Tribunal he confirmed that he worked in excess of 50 hours per week. He agreed that he received holidays in 2008. He was absent on holidays on two different occasions in 2008 for periods not longer than two weeks on each occasion.

The appellant was adamant that he had never been the managing director of the business. When shown a copy of his CV retrieved from a computer belonging to the respondent that described his position as depot manager/managing director, the appellant said that it was a small business and he was involved with everything. He keeps his CV updated all the time. The hire manager did not, to his recollection, defer to him. When the hire manager left, the founding director took over. The appellant had no recollection of a meeting with the finance director on 19 June, or of a phone call from the founding director. He never said, 'I have enough. I want out. I am leaving.'

After he received his P.45 on 16 August he took it that his job was gone but he stayed working until Christmas working without pay. His job never changed. The issue of his redundancy was never discussed. The other employees did not get redundancy as they did not have enough service.

Respondent's Case

The founding director gave evidence. In 05 they decided to set up in Ireland because the market was buoyant at that time. The company initially had five directors, each with a 20% share of the business. Their business was plant and tool hire.

In the beginning the appellant was in charge in Dublin. Unfortunately the business did not take off. In 06 he took over as managing director of the business. He commuted from the UK. In June 07 a change in his circumstances made commuting difficult so once more the appellant became the managing director. The finance director supported the appellant. The hire manager dealt with customers day-to-day and reported to the appellant.

In January 08 there was a board meeting in Dublin. Three directors travelled from the UK. The appellant was notified of the meeting by email. A log of the actions to be taken was kept and circulated. The next board meeting was held in the UK. The two Irish directors would travel this time. One resigned his position before the meeting. They reviewed the profit and loss for the previous quarter. Debt collection had become a major issue. Also they knew the lease on the premises would expire. The lease had been extended to 8 August but there was no possibility of a further extension.

The appellant was on holidays from 31 May to 13 June. The finance director took over. He was trying to negotiate payments on debts. The appellant and the finance director met on 19 June. The appellant told the finance director that he had had enough and he was leaving. Then the finance director contacted him. The Founding director, even though he was on holidays, immediately phoned the appellant because he was concerned that nobody might be in charge in Dublin. He asked the appellant if he was leaving immediately or if there would be time for a handover. The appellant told him that there would be time for a handover.

The founding director went to the depot. He was fact-finding. No decision had been made on whether the business would continue. He could not commute as that had not worked before. So someone would have to run it. The lease would expire soon. They had an income, contracts and some plant. In smaller premises and with less staff the hire manager could run the business. The appellant printed out a list of suitable premises in the Ashbourne area. He was looking for solutions.

The deadline was 8 August. Everything had to be removed from the depot. The company might have been viable with 3 employees, the hire manager, a driver and a part-time bookkeeper. The hire manager had found other employment and was not interested. The two remaining staff members had not sufficient service to qualify for redundancy.

There was finance to pay on the plant. The larger equipment was sent to the UK and the remainder was stored in a farmyard. The business no longer has an income but debt payments are still being received.

If the appellant had not resigned the business could have continued. All that was required was a new premises. The founding director did not have time to find a premises and a manager. The appellant continued to support the company. Tasks needed to be done. Contracts were still in place and debts needed to be collected. The arrangement was amicable at first. At present the founding director is working on collecting money owed to the business. He is doing this work, without pay, when he gets home from his other work.

Determination

The Tribunal carefully considered all the evidence adduced. The Tribunal finds the respondent's evidence that the business could have been viable in smaller premises and operating with 3 employees credible. The departure of the appellant combined with the founding director's other commitments resulted in no one being available to continue the business. The Tribunal is of the view that the appellant's employment terminated when he resigned of his own accord. Therefore the claim under the Redundancy Payments Acts, 1967 to 2007 fails.

The claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and the Organisation of Working Time Act, 1997 were withdrawn on the day of the hearing.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)