

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE
- *appellant*

CASE NO.

RP2395/2009

MN1976/2009

against
EMPLOYER
- *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr N. Russell
Members: Mr J. Hennessy
Ms S. Kelly

heard this appeal at Waterford on 9th July 2010

Representation:

Appellant(s) : Mr. James J. Hally, Solicitor, "Eldon", Main Street,
Tramore, Co. Waterford

Respondent(s) : Nolan Farrell & Goff, Solicitors, Newtown, Waterford

The decision of the Tribunal was as follows:-

Appellant's Case

The appellant gave direct evidence that he was employed as a general operative on a full-time basis by the respondent since May 1998. On 6 April 2009 he reported for work and was told by his employer that there was no work for him. He sought a letter from his employer in order for him to sign on at his local Social Welfare office. His employer provided him with the letter which stated that he started work in May 1998 and finished on 3 April 2009 due to shortness of work at present. His employer did not say anything about returning to work if more work became available.

The appellant signed on at his Social Welfare office on 7 April 2009. He worked about 4 half days for the respondent after 7 April 2009 and signed off for those days. No regular work was made

available to him and he then sought a redundancy payment from the respondent. Initially his employer told him that he even though he was not entitled to a redundancy payment he would pay it to him from the goodness of his heart. However he never received any payment. He did not resign from his job.

Under cross examination he confirmed that he was unable to erect scaffolding after April 2009 as a result of an eye injury suffered in the respondent's workplace in 2002. He supplied his employer with a letter dated 17 July 2009 from his doctor stating that he was fit to return to work. This letter stated that while he was fit to return to work there were certain limitations due to the eye injury he sustained on a building site and he was unable to work on sites. He told the Tribunal that he did not resign because of ill health. He was let go.

Respondent's Case

The respondent gave direct evidence that he is a building contractor involved mostly in insurance work after storms and flood damage. He employed the appellant as a general worker. On 6 April 2009 he provided the appellant with a letter stating that he (the appellant) had finished work on 3 April 2009 due to a shortness of work at present. He provided the appellant with this letter in order for him to sign on at the Social Welfare office. He told the Tribunal that the appellant returned to work on 7 and 8 April 2009. Documentary evidence in the form of a response to a letter from the appellant's legal representative was also produced to the Tribunal. This response stated that the appellant continued working for the respondent intermittently during the months of April, May, June and July 2009. This documentary evidence also listed a number of days that the appellant failed to report for work. The appellant then contacted him in July 2009 and told him that he was resigning as the dust was affecting his eyes. The appellant requested a redundancy payment but the witness informed him that he was not entitled to a redundancy payment as work was available for him.

Under cross examination he confirmed that he telephoned the appellant on the night of 6 April 2009 informing him that work was available the following day. He could not confirm the exact location of the work on 7 and 8 April 2009. He denied that he let the appellant go on 6 April 2009. He confirmed that the plasterer (PO) whom the appellant attended was also put on short time. He did not confirm in writing to his employees that they were being put on short time. He confirmed that (PO) returned to work on a full time basis in August 2009 and continues working with him to date.

Determination

Conflicting evidence was given by the appellant and the respondent on a number of issues pertaining to their dispute, however, there was agreement on a number of key issues to include the following:-

- The appellant and the respondent had a meeting on the 3 April 2009 as a result of which the appellant requested a letter from the respondent for the Social Welfare.
- The letter dated the 6 April was given to the appellant and he was interviewed by the Social Welfare on the 7 April 2009.
- On a number of days subsequently, the appellant worked for the respondent and signed-off on each of those days.

- The appellant raised the issue of redundancy with the respondent in early May 2009.
- In or about the 17 July the appellant advised the respondent that he could not do the work anymore due to deterioration in the condition of his eye and produced a letter to that effect to the respondent.

The appellant asserted that he was told on the 3 April that he was finished up and should sign on. His evidence was that there was no mention of any other work being available. He drew the Tribunal's attention to the handwritten letter of the 6 April from the respondent which stated that he "finished up" on the 3 April.

In response the respondent indicated that he put the appellant on "short time" on the 3 April and made it clear to him that he would contact him as and when jobs became available. He further gave evidence that seasonal short-time situations were not unusual and, indeed, that another employee put on short-time at the same time as the appellant is currently working full time with him. He accepted that the wording in his letter of the 6 April was somewhat misleading but felt that it had been clearly qualified by the words "shortness of work at present".

Faced with this evidential conflict the Tribunal was influenced by the fact that the appellant was back working with (and signing off) the respondent shortly after the 3 April in an arrangement that continued until July 2009. While the number of days worked was not agreed, there was an agreement that the appellant continued to work on an irregular basis until July 2009.

Accordingly the Tribunal finds that the appellant was on short-time from, the 3 April 2009 and that the respondent complied with his obligations in this regard under Section 10 of the Redundancy Payments Act 1979. While written notice from an Employer implementing a short-time arrangement is preferable, the statute does not require the notice to be in writing and, on this occasion, the verbal discussion and notice given by the respondent on the 3 April was sufficient.

In early May 2009, the appellant raised the issue of redundancy with his Employer. The appellant's evidence was that he was promised a redundancy payment as soon as the respondent cashed in a pension policy or secured a VAT refund. The respondent's evidence was to the effect that he advised the appellant that he had work for him and that there was not a redundancy situation. The respondent gave evidence that there was another Employee (JR) who had been made redundant and that he had promised the latter full payment of redundancy on the encashment of a Pension but that no such representation was made to the appellant. He believed that the appellant had learned of the proposal he had made to JR from the latter.

Section 12 of the Redundancy Payments Act 1967 as amended by Section 11 of the Redundancy Payments Act 1971 provides that an employee shall not be entitled to redundancy payment by reason of having been laid off or kept on short-time unless he gives his employer a notice of intention in writing to claim redundancy. No such notice was given on this occasion nor does the Tribunal find that any representations or actions on the part of the employer amounted to a waiver of this notice requirement.

The Tribunal accepts that the respondent contacted the appellant in early July to ascertain why he had not turned up for work only to be advised by the appellant that he could no longer carry out his duties for health reasons, a contention supported by the letter from the appellant's doctor dated 17 July 2009.

The Tribunal finds that the appellant resigned voluntarily from his position with his employer and is not entitled to a Redundancy Payment. Accordingly, the claims under the Redundancy Payments Acts 1967 to 2007 and the Minimum Notice and Terms of Employment Acts 1973 to 2005 fail.

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Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

