

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE - first appellant

CASE NO.
RP528/2009
MN522/2009

EMPLOYEE - second appellant

RP529/2009
MN523/2009

against

EMPLOYER - respondent

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. J. O'Connor

Members: Mr. D. Hegarty
Mr. D. McEvoy

heard this appeal in Killarney on 27 April 2010

Representation:

Appellant(s):

Ms. Katie O'Connell BL instructed by
Mr. Patrick Daly, Solicitor, 23 Rock Street,
Tralee, Co. Kerry

Respondent(s):

Ms. Clodagh Brick BL instructed by
Ms. Bridget Reidy, Kelliher Coghlan, Solicitors,
Castleisland, Co. Kerry

The decision of the Tribunal was as follows:-

The claims

The first-named appellant (hereafter referred to as A1) sought redundancy and minimum notice awards. On his claim form it was stated that he had only received one day's verbal notice and that

he had been entitled to one week's notice.

It was also submitted that on 22 January 2007, after working for the respondent for thirty-seven weeks, he had asked for a day's leave on a particular day because he really needed it but that the respondent had told him not to bother coming back if he took that day off. A1 took the day off and after eight weeks asked for his job back. The respondent took him back and A1 worked for him for eighty-two weeks until 3 October 2008. On 2 October the respondent told A1 that he had no work from 3 October. A1 then presented a claim for redundancy but the respondent contended that A1 was not entitled to redundancy because he did not have 104 weeks' continuous service.

The second-named appellant (hereafter referred to as A2) also sought redundancy and minimum notice awards. On his claim form also it was stated that he had only received one day's verbal notice and that he had been entitled to one week's notice.

A2 claimed that he had worked for the respondent for twenty-five weeks up to December 2006 when he went home to Poland for his Xmas holidays intending to return to work in January 2007. He rang the respondent on 3 or 4 January to confirm his arrival but was told that there was no work for him. He rang five or six weeks later to get a reference and was told that his job was available again. He then worked for seventy-nine weeks but on 2 October 2008 he got one day's notice of the termination of his employment on 3 October. He applied for redundancy but was refused it.

The defence

Regarding A1's minimum notice claim, the respondent offered the following defence:

At the beginning of September (2008) I notified (A1) that we only had approximately three weeks of work left. If I was unsuccessful in securing further jobs I would have to leave him go. From the start of September I kept (A1) fully informed that I would be terminating his employment if I was not successful in securing another job. I did not secure another contract for work.

On the 19th day of September 2008 I notified (A1) that I only had two weeks of work left and, as I had not secured another job, I would have to let him go at the end of the two weeks which would be the 3rd of October 2008 giving him two weeks' notice that I was terminating his employment.

On the 26th of September 2008 I still had no new work lined up and I again advised A1 that he would be left go at the end of the following week which again was the 3rd of October 2008.

Although (A1) was only entitled to one week's notice (A1) was fully advised of the unavailability of work and was given approximately one month's notice of termination of his employment. He was paid all wages and holiday pay in full.

Regarding A1's redundancy claim, the respondent offered the following defence:

(A1) commenced employment with me on the 21st of April 2006. When he wished to take time off or finish an hour or so earlier I always consented if we were not under pressure to meet a deadline. He was always paid for a full day irrespective of whether he worked the full day or not.

The week of the 2nd day of February 2007, I was under pressure to meet a deadline and I required all my staff to work. (A1) came to me in my workshop one morning and asked could he take the same day off. I replied no as we had a deadline to meet and I needed everybody working otherwise we would not finish on time. He then ignored my decision and left the workshop where we were working which was an act of gross misconduct. His term of employment with me ended then.

I did not hear from him for approximately eight weeks when he approached me and asked me for another job. After some consideration I hired him on the 26th of March 2007 until the employment was terminated on the 3rd of October 2008 due to lack of work. There was a clear break in service where his employment was terminated and (A1) does not now have 104 weeks of continuous service. Therefore, he is not entitled to redundancy payment.

Regarding A2's minimum notice claim, the respondent offered the following defence:

At the beginning of September (2008) I notified (A2) that we only had approximately three weeks of work left. If I was unsuccessful in securing further jobs I would have to leave him go. From the start of September I kept (A2) fully informed that I would be terminating his employment if I was not successful in securing another job. I did not secure another contract for work.

On the 19th day of September 2008 I notified (A2) that I only had two weeks of work left and, as I had not secured another job, I would have to let him go at the end of the two weeks which would be the 3rd of October 2008 giving him two weeks' notice that I was terminating his employment.

On the 26th of September 2008 I still had no new work lined up and I again advised (A2) that he would be left go at the end of the following week which again was the 3rd of October 2008.

Although (A2) was only entitled to one week's notice he was fully advised of the unavailability of work and was given approximately one month's notice of termination of his employment. He was paid all wages and holiday pay in full.

Regarding A2's redundancy claim, the respondent offered the following defence:

A2 commenced employment with me on the 7th of July 2006. In December 2006 he mentioned that he was returning to Poland for his Christmas holidays. However, he failed to return for work in January 2007. I did not hear from him until the middle of February. There was a clear break in service and termination of his employment. I did not hear from A2 again until he contacted me a few days prior to the 16th of February 2007 to see if he could have his job back. I then hired him on the 16th of February 2007. This was a clear break in service of his employment and therefore his employment is deemed to start on the 16th of February 2007 until it was terminated on the 3rd of October 2008. He does not have 104 weeks' continuous service and is not entitled to redundancy payment.

Determination:

The Tribunal heard testimony from the appellants, from the respondent and from a witness for the respondent. Regarding the minimum notice claims, the Tribunal preferred the evidence given by the appellants. Neither of them claimed that they had received no notice at all. However, they both convinced the Tribunal that they were told on 2 October 2008 that their employment would end on 3 October 2008. The Tribunal can believe that the respondent might have conveyed an impression of uncertainty and even pessimism in preceding weeks as to whether there would be enough work in October. However, the Tribunal is not satisfied that the respondent formally informed the appellants that their employments would end (on 3 October 2008) any sooner than 2 October 2008. They were both entitled to one week's unequivocal notice without any hint of vagueness or uncertainty rather than the one day's notice which they both acknowledged that they did receive.

There was some debate as to the amount of each appellant's gross weekly pay. It is now assessed at €500.00 per week for the first-named appellant and €390.00 per week for the second-named appellant. Therefore, in allowing the claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, the Tribunal awards the first-named appellant the sum of €400.00 (this amount being equivalent to 0.8 weeks' gross pay at €500.00 per week) and awards the second-named appellant the sum of €312.00 (this amount being equivalent to 0.8 weeks' gross pay at €390.00 per week) under the said legislation.

Regarding the appeals under the Redundancy Payments Acts, 1967 to 2007, the Tribunal finds that the appeals must fail because the Tribunal was not satisfied that the appellants had the two years' continuous service required under the legislation. Neither appellant satisfied the Tribunal that his employment with the respondent was not in fact one employment followed, after a definite period out of the respondent's employment, by a second employment.

The second-named appellant was unfortunate in that his period between the two employments was not unrelated to the withholding of some of his pay by a compatriot for reasons relating to their living expenses. However, the Tribunal does not find the respondent to have been responsible for this.

There was a genuine break in service in both cases. The appeals under the Redundancy Payments Acts, 1967 to 2007, fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)