

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.  
RP1185/2009

EMPLOYEE -*Appellant*

against

EMPLOYER -*Respondent*

under

### REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr R. Murphy  
Mr F. Dorgan

heard this appeal at Wexford on 10th March and 8th June 2010

#### **Representation:**

Appellant : Ms. Barbara Mebtouche, Triana, Independent Advice & Information Bureau,  
13 Store Street, Dublin 1

Respondent : Mr. Stephen Sands, Construction Industry Federation,  
Construction House, Canal Road, Dublin 6

#### **The decision of the Tribunal was as follows:**

Since the respondent contended that the appellant resigned from his employment dismissal in this case was in dispute.

#### Appellant's Case:

The appellant who is a citizen of Poland who had a limited command of the English language commenced work with the respondent in October 2004. He never received a contract of employment nor terms and conditions of employment and his main job was that of yard helper and general operative. His main place of employment was located at a yard a short distance from his residence in Enniscorthy, county Wexford. Prior to March 2009 when his employment ceased he was aware there were trading and commercial problems at work. This witness received a letter dated 6 March 2009 from a director of the respondent informing him that it no longer had work for him at the yard. That letter also stated that there was work for him as a labourer "on our sites" and to contact the administrator as to where exactly he would be placed.

At that time the respondent had two sites in county Wexford, one in the county town and the other

in the hometown of the appellant. However, on 13 March 2009 he was told to report to work the following week at a site in west Dublin, some 130 kilometres from his residence. The witness protested at the nature of that work saying his age and condition were not conducive to labouring work. In addition the company was not providing transport for him to and from that new location and since he did not possess a driver's licence he was unable to get to that site on his own accord. There was no room for him in a van that was due to travel that route.

The appellant tried to make his objections directly known to that director but was unable to contact him personally to do this. However, he made those objections known to other staff members at the time. Despite agreeing to try that labouring job on a three-day week trial basis the appellant neither made an effort to travel nor reported to that site as scheduled on 18 March. He had no transport to make that journey. An employee advised him to write to the director outlining his situation. He handed in such a letter on 23 March to the respondent and in reply the director wrote and told him that his final payslip and outstanding monies were enclosed with this letter.

The witness said that he was presented with a form relating to redundancy and/or social welfare during a meeting he attended on 13 March notwithstanding that he neither sought his P45 nor a redundancy payment at that time. That situation followed the receipt of the director's letter and on 27 April he wrote to the director inviting him to comment on his redundancy situation. In turn that director replied to the appellant stating that the company was not making him redundant and reminding him that he had failed to turn up for work at the site in Dublin.

The daughter of the appellant said she was present at a meeting with her father and a director on 13 March in the capacity of translator. At that meeting the director stated there was no more work available at the local Enniscorthy yard but that there might be a labouring job available to him elsewhere. A form relating to redundancy and/or social welfare was referred to at that meeting. The witness also spoke to another employee who advised that her father write a letter about his situation to the respondent.

In referring to his own situation with the respondent a former employee who worked there from 2001 to August 2008 spoke of the transport situation for the workers to and from the company's sites. An undated memorandum to all employees issued prior to the appellant's termination. That memorandum stated that due to a proposed reduction in operating costs that employees would now have to make their own way to sites.

#### Respondent's Case:

A director of the company outlined that the respondent company supplies labour and equipment to sites throughout Leinster. The director confirmed writing letter dated 6 March 2009 to the appellant informing him that there was no further work available to him in the yard from Friday, 13 March 2009. However, there was work available to the appellant as a labourer on the respondent's sites. The director asked the appellant to contact the Contracts Administrator for information of where he would be working on Monday, 16 March 2009.

On the 13 March 2009 the appellant approached the director without prior notice to discuss the situation. The appellant's daughter translated and the director discussed the changes with the appellant. The appellant raised the issue of redundancy on that occasion and requested a redundancy payment. The director refuted that the appellant was provided with an RP9 form on this or any other occasion. He informed the appellant that he was not entitled to

a redundancy payment, as work was available and he requested that the appellant report for work on Monday, 16 March 2009. However, the appellant did not attend for work on the 16 March. No contact was received from the appellant until he submitted an undated letter informing the director that he was not accepting the work offered. The director confirmed subsequently writing letter dated 23 March 2009, acknowledging the appellant's refusal of the work offered.

When he received a further letter from the appellant (dated 27 April 2009) enquiring about a redundancy payment, he responded with letter dated 5 May 2009 outlining to the appellant that he was not being made redundant but was being offered work in his present capacity but on a site.

The only time redundancy had been discussed with the appellant was on 13 March 2009, when the appellant had raised the issue. It was clear to the director that the appellant was not entitled to a redundancy payment, as there was alternative work available to him on site. The materials the appellant would be carrying on site were no different to the materials he carried in the yard.

The appellant was replaced in his employment on the 23 March 2009, when a general operative was employed to work at the site in Wexford town. A number of positions opened up locally after the appellant terminated his employment.

During cross-examination it was put to the director that an offer of transport to the site in west Dublin was not offered to the appellant who did not have a car or a license. The director replied that the respondent operates under the REA and pays either travel or subsistence to sites. The director confirmed that the memorandum to staff regarding the possibility of removing the van fleet from use so that employees would have to make their own way to site had not been implemented to date.

It was put to the director that the appellant was told to "turn up" at the site in west Dublin but without an offer of transport. The director stated that the appellant was given advance notice of where he would be working and the Contracts Administrator organises the transport to each site.

In reply to questions from the Tribunal, the director confirmed that company vehicles had transported employees to the site in west Dublin. The company provides the relevant transportation for the number of employees travelling to any site and it is the Contracts Administrator who makes these arrangements. The director did not know when the appellant had observed a two-person van leaving the yard but he said the appellant would also have observed that the respondent company provided the relevant vehicle depending on the number of employees travelling to a particular site.

### **Determination:**

The Tribunal carefully considered the conflicting evidence in this case. The Tribunal finds that the alternative offered to the appellant was unreasonable. The respondent did not produce a contract to show that the company had the right to request the appellant to move from his position in the yard to a position on site. In addition, the Tribunal noted that the appellant's working hours would have significantly changed had he accepted the offer of alternative work in west Dublin.

The Tribunal is satisfied that the appellant is entitled to a lump sum payment under the Redundancy Payments Acts, 1967 to 2007, as the appellant's position as a yard labourer had reached an end. The Tribunal finds the redundancy payment should be based on the following criteria:

Date of Birth: 2<sup>nd</sup> January 1955  
Date of Commencement: 26<sup>th</sup> October 2004  
Date of Termination: 13<sup>th</sup> March 2009  
Gross Weekly Pay: €622.08

It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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