

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE –**Appellant**

RP1879/2009

against

EMPLOYER –**Respondent**

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Lucey

Members: Mr. J. Browne
Mr. D. McEvoy

heard this appeal at Cork on 30 September 2010

Representation:

Appellant:

Ms. Jane Anne Rothwell B.L. instructed by Mr. Seamus Hickey,
Hickey Fitzgerald Solicitors, O'Brien Street, Mallow, Co. Cork

Respondent:

Mr. Tim O'Connell, IBEC Confederation House,
84-86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

The appellant was employed from 1989 as a security guard and was highly regarded within the respondent at all times. It is common case that the claimant's 40 hours a week contract was not site specific and it was a condition of his employment that he could be moved to different assignments as and when required by the respondent which has some 50 guarding contracts in the Cork and Munster region. In the event the claimant worked at one site for some fifteen years and then in 2004 he was assigned to a site in Mallow (the site) where his duties included the operation of the weighbridge on a 24/7 basis on twelve-hour shifts.

The appellant was born in 1939 and in 2005 he accepted a change to his terms and conditions whereby he was no longer covered under the respondent's sick pay and death in service schemes. In May 2008, following discussions with the regional manager (RM), it was agreed that the claimant could reduce his hours to 24 per week whereby he would work two shifts per week.

In November 2008 the respondent became aware that the site was to close and that their involvement was to end as of 31 December 2008. On 28 November 2008 the regional human resource co-ordinator (HR) wrote to the claimant to advise him of the termination of the assignment at the site. He was told that it was hoped to reassign personnel to other assignments and that he would be kept fully informed.

On 1 December 2008 the claimant telephoned RM to discuss the situation. It is common case that, during this conversation, the claimant asked RM if there was any possibility of him being declared redundant and that RM told the claimant there was no such possibility as the respondent wanted to keep good reliable honest staff and allocate them to alternative assignments. The claimant accepts that he mentioned that his knees were not good and that he might retire during this conversation.

On 2 December 2008 the claimant sent a handwritten letter to RM in the following terms "*I wish to rescind any verbal communication regarding my resignation, my job is being made redundant, I would like to discuss this with you*". The claimant received no response from RM in relation to this letter. It is common case that the claimant then raised the question of a possible redundancy situation arising with his trade union representative (TU) and that TU approached RM about this and RM told TU that redundancy was not an option for the guards at the site.

At some stage in December 2008 the termination of the assignment at the site was put back to 5 January 2009. The claimant's position is that he was never informed of this extension. Of the three other guards employed at the site two were reassigned to another site in Mallow and the third guard was moved to a site in Mitchelstown. The claimant worked his last rostered dayshift on 24 December 2008. On 26 December the duty service manager telephoned the claimant to ask him to work that night at very short notice. The claimant was unable to oblige due to a social commitment. It is common case that this was the first and only time during the employment that the claimant was unable to assist the respondent following such a request. The respondent's position is that, during this conversation, the claimant said his knees were not up to it and he was retiring. The claimant accepts making reference to his knees but denies any mention of retirement. It is common case that re-assignment from the site was not discussed during this conversation.

The respondent's position is that all guards at the site were made aware of their re-assignment during the dissemination of detail of their rosters in telephone calls from the two service managers. The claimant's position is that he was never informed of any re-assignment. The assignment at the site terminated on 5 January 2009 and on 9 January 2009 HR wrote to the claimant acknowledging his retirement.

The claimant's position is that he would have accepted re-assignment to the other Mallow site if it had been offered to him. He accepted that he had made no representations to the respondent about his dissatisfaction with the situation for some months until his solicitor wrote to the respondent seeking a redundancy payment on behalf of the claimant.

Determination:

It is obvious to the Tribunal that the claimant was a well-regarded employee and it was clear during the hearing that good relationships still exist between the parties. Unfortunately there appears to have been a serious breakdown in communication within the respondent following the conversation between the claimant and RM on 1 December 2008. Whilst HR did not give evidence the Tribunal is satisfied that she never became aware of the letter from the claimant to RM on 2 December 2008 in which he made it clear that he was not resigning. The Tribunal is further satisfied that, following representations by TU on his behalf, the claimant was told that redundancy was not an option and re-assignment would be offered. The Tribunal accepts the evidence of RM that there was work available for the claimant in Mallow following the termination of the assignment at the site on 5 January 2009. In any case at no stage did the respondent give the claimant notice that his employment was coming to an end. In both the letter of 28 November 2008 from HR and in the conversation with RM on 1 December 2008 the respondent was telling the claimant that he would be re-assigned. This was in keeping with his contract, which is not site specific. As reflected in the letter from HR to the claimant on 9 January 2009 it is clear that the respondent believed the claimant had put into effect a decision to retire. The claimant told the Tribunal that he would have accepted work in Mallow if it had been offered to him. This is inconsistent with his lack of reaction to that letter. For all these reasons the Tribunal is satisfied that this was not a redundancy situation and the question of a lump sum payment under the Redundancy Payments Acts, 1967 to 2007 does not arise.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)