

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE, - appellant

CASE NO.
RP2453/2009
MN2020/2009

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: Ms. K.T. O'Mahony BL

Members: Ms. M. Sweeney
Mr J. Flavin

heard this appeal in Cork on 9 February 2010

Representation:

Appellant:

Ms. Siuin Hurley, O'Donovan Murphy & Partners, Solicitors,
The Quay, Bantry, Co. Cork

Respondent:

No legal representation

The decision of the Tribunal was as follows:-

Summary of the Evidence

The appellant commenced employment with a plant hire business on 20 August 1996, driving excavators and dumpers and doing ground work. He did not receive a written contract of employment. The appellant also had a dairy farm. On 1 May 2003 the business and its employees were transferred to the respondent. Since May 2003 at least half of the respondent's work was in Cork city.

At the time of the transfer of the business in 2003 the claimant was working on the ESB contract,

which continued until mid 2007. During this contract the appellant had worked at various locations throughout mid Cork, west Cork and east Kerry. Following the ending of the ESB contract the claimant was working on a contract with the County Council which ended on or around 15 August 2008. When that contract was approaching its end the respondent had no work around the Bantry area and offered the appellant work in Cork city.

The appellant declined this offer on the basis that the location was not suitable for him: he would have to leave home at 6.30am to be on the site for the 8.00am start, he had a young baby and his father was becoming older and unable to give the help he had hitherto given with the cattle. The respondent's position was that the work in Ballincollig was only 50 minutes to 1 hour away and only 10-15 minutes extra drive each way as compared to distances the appellant had travelled to other locations over the course of his employment. While the appellant accepted that he had been offered work in Cork city he maintained that the sites at Ballincollig or Blackrock had not been mentioned.

It was the appellant's case that at all times he had worked within half an hour's drive from his home. In cross-examination he agreed that he had worked for the respondent in Adrigole, which, was 35-40 minutes drive from his home. The appellant could not move to sites involving travel on a long-term basis. The appellant agreed that he had worked as far away as Carrigtwohill about two years previously but that had been for a short period because the respondent had been in difficulty.

It was the appellant's position that the respondent had previously taken his farm into account and had sent other men to places that were further from Bantry. It was the respondent's position that at least half of the respondent's work was in Cork city. Employees had to be prepared to travel for work. Most employees were based in Bantry and travelled on a daily basis. He had accommodated the appellant when he could. When working outside the Bantry area transport is provided for the employees and they are paid for their travel time from when they leave the yard in the mornings.

During late August and September the appellant worked for the respondent covering holidays and doing short-term work around the Bantry area. This ended on 30 September 2008. From 14 October 2008 to mid November 2008 the appellant worked for the respondent in Tivoli. He did so because he was milking fewer cows at the time and was hoping that something else would come up.

The appellant was not willing to travel and wanted a letter for Social Welfare. MD gave him a letter saying that he had offered the appellant two other jobs but that the appellant could not travel because of commitments to his farm. The appellant asked him to truncate the letter. This was duly done to take out the reference to the appellant's inability to travel. MD acknowledged to the Tribunal that the appellant had been an excellent excavator driver and a reliable worker. However, other men had had similar issues and had been prepared to travel far from Bantry.

Determination:

Having carefully considered the evidence adduced, the Tribunal by majority, (Ms O'Mahony BL dissenting) finds that it was not unreasonable for the appellant to refuse the offer of alternative employment in or around Cork city as there was a long practice during the appellant's employment of allocating him work within closer travelling distance from his home. Accordingly, by majority the Tribunal finds that the appellant is entitled to a redundancy lump sum payment under the Redundancy Payments Acts, 1967 to 2007, based on the following details but subject to two weeks lay-off at the beginning of October 2008:

Date of birth: 18 February 1975
Date of commencement: 20 August 1996
Date of termination: 14 November 2008
Gross weekly pay: €388.00

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

The Tribunal is satisfied that the appellant was given notice in excess of his statutory entitlement that the respondent had no further work for him in the local area. Accordingly, the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)