EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.
EMPLOYEE - appellant RP1474/2010
MN1030/2010

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. S. McNally

Members: Mr. D. Hegarty
Mr. J. Flavin

heard this case in Cork on 29 October 2010

Representation:

Appellant(s):
Mr. Barry Murphy, Eugene Carey & Co, Solicitors, Courthouse
Chambers, Mallow, Co Cork

Respondent(s):
Mr. Cormac O'Regan, Matthew J. Nagle & Co, Solicitors,
Broadview House, West End, Mallow, Co. Cork

The decision of the Tribunal was as follows:-

The allegation

It was alleged in writing that the appellant, a labourer, had not received his redundancy entitlement or a minimum notice payment after working for the respondent from 11 December 2006 to 13 May 2009. The appeal form was stamped at the Tribunal on 13 May 2010.

The defence

The written defence was that the appellant had no right to a redundancy payment in that he had not been dismissed by reason of redundancy or otherwise. He had not been laid off or kept on short time such as to entitle him to a redundancy payment. He had not given notice to the respondent in relation to his claim for redundancy and he had not brought his appeal for redundancy within the statutory time limit.

Regarding the minimum notice claim, it was contended that there was no entitlement to minimum notice in the case because the respondent had not terminated the employee's contract of employment.

The hearing

At the hearing the appellant's representative submitted that the employment had ended in June 2009 i.e. some three weeks after 13 May 2009.

Giving sworn testimony, the appellant, a foreign national with good enough English not to need an interpreter, said that his employment as a labourer with the respondent had began in the last two weeks of 2006. He dealt with PX who was the owner. He started on €500.00 but his pay rose to €650.00. He got no written terms and conditions but there were no problems.

The respondent was a subcontractor for another company (MXCO). The appellant worked as a labourer/driver. There was also PX himself (and MT who worked for the respondent most of the time). On Friday 17 April 2009 the respondent left the site it had been working on. The appellant then worked for a-week-and-a-half on PX's farm but did not work for PX after Wednesday 29 April 2009. Subsequently, the appellant would phone PX every two or three days and would get promises of work but PX would keep putting back the date for this.

This went on for about six to eight weeks. The appellant got an evening job cleaning with a company (MCK). PX got angry saying that he would have to phone his accountant, that the appellant should not take a second job and that he would have to let the appellant go. This was about mid-June 2009. The appellant got a P45 about two weeks later and got a cheque for €330.00 for his last three days.

A photocopy of the cheque was shown to the Tribunal. It was dated 24 June 2009. The appellant stated that he had never presented the cheque for payment and that he had never got his week in hand or holiday pay.

The appellant kept doing his evening job with MCK but after being let go by the respondent he looked for full-time employment from end June 2009. About mid-August 2009 he started work with a construction recruitment company (HY) as a construction labourer. This was only about six weeks after he had got his P45. He worked at Shannon Airport for HY for about two months. That contract ended. He went back to the respondent in September. PX offered him a job in Limerick till about 13 January 2010. The appellant took it. He was working four days. He kept a cheque for €360.00. He should have got €440.00. He also had expenses for hiring a machine et cetera. He would hand receipts to PX every Friday whereupon PX would give him cash or add the amount to the appellant's cheque. He gave the originals of the abovementioned cheques to PX because they were out of date. He was told that PX did not have his chequebook at that moment. In

January 2010the appellant got a job with HY again.

Asked if he had claimed social welfare after finishing with the respondent at the end of April 2009, the appellant replied that he had not done so, that he had thought that he would start back with the respondent again and that he had thought that he was in full-time employment. It was put to him that his appeal form to the Tribunal had given 13 May 2009 as his date of notice and termination He did not recall the date that he had received his P45. Asked if he had given his P45 to HY in summer 2009, he replied that he was not sure and that he had stayed on HY's books. Neither was he sure that he had given his P45 to the respondent when he had gone back to the respondent (after working for HY). He had not got a payslip.

The respondent's representative now submitted that the appellant had not been dismissed but that there had been a break in employment and that the respondent was objecting to the addition of the appellant's work for the respondent to January 2010 to the appellant's service with the respondent for any calculation for possible redundancy purposes.

Under cross-examination, the appellant confirmed that employment with PX had ended on 29 April 2009 but that 13 May 2009 had been the date on the P45 he had received subsequently.

When it was put to the appellant that he had told PX that he had another job the appellant replied that he had told PX of evening work.

Px was now told that PX would say that the appellant had been on short time for two weeks, that the appellant had asked for a week off to paint his house and that PX had rung him after that to ask him back. The appellant denied that he had been asked back full-time.

It was suggested to the appellant that he had had work in a university in May 2009 as well as the evening work for MCK. The appellant admitted only that he had worked two hours for MCK in the evenings and repeated this answer, saying that he had been earning €152.00 per week, when he was reminded that he had not claimed to have sought social welfare at this time. When it was put to him that he would have got two hundred euro on social welfare he replied that he had wanted to work and that he got no social welfare supplement.

Giving sworn testimony, PX (the abovementioned principal of the respondent) said he had had a good relationship with the appellant who had always turned up for his work as a g.o. (general operative). Asked about the June 2009 cheque to the appellant for €330.00, he said that it was forwork done before 13 May 2009. PX added that it was very seldom that the appellant would haveincurred any expenses while work ing for the respondent but that, if the appellant paid forsomething, he would be paid for it.

PX said that work had gone quiet after they got to April 2009 and that the appellant had been put on a three-day week. The appellant asked for a week off to paint his house before the birth of a baby. On the night of Sunday 10 May 2009 PX rang the appellant saying that he had work for him but the appellant said that he was working elsewhere at the time. PX took this refusal as a resignation and

felt obliged to issue a P45 for the appellant. As the appellant did not want to come back PX had to hire MT (a contractor whom the respondent sometimes paid for work) because he needed a labourer. He rang MT on the Monday or Tuesday after he had spoken to the appellant. MT had to be brought in at short notice because the respondent was pouring concrete. MT had lost his own job and working for the respondent part-time because the appellant was not available. PX had been "left high and dry" and could not do the work on his own. MT started about 14 or 15 May.

However, PX hired the appellant back in late October 2009 because he had time for him.

In cross-examination it was suggested to PX that it was strange to offer work to the appellant again if the appellant had refused a previous offer of work. PX replied that the appellant had been working elsewhere at the time of the declined offer. He acknowledged that he had not written to the appellant after the refusal and that he had taken it that the appellant was resigning from the respondent. PX's accountant posted a P45 to the appellant. It was not claimed that there had been any letter attached to it.

Asked why a cheque to the appellant had been dated 24 June 2009, PX replied: "That's when I paid him." He added that he had put that cheque in the appellant's hand in the appellant's house but disagreed when he was told that the appellant was saying that he had got his P45 with the cheque. Asked if he had any records about the P45, PX said that it been sent on 13 May but denied that he had had conversations with the appellant about promises of work.

PX stated that he had proof of payment of invoices to MT.

Asked by the Tribunal about the appellant's return to the respondent in October 2009, PX said that he had made the October offer to the appellant because the appellant was then unemployed but that he had had no further work for the appellant after January 2010.

Asked if he thought it unusual that the appellant would turn down work worth €650.00 per week for work worth €150.00 per week, PX replied that the appellant had not explained but had mentioned work at a university. PX added that the appellant had not given him his P45 when the appellant had returned to him in October 2009.

In re-examination, PX described MT as an engineer but said that MT was a tradesman who had done labouring for PX. PX added that he did not think that MT had "letters after his name".

Giving sworn testimony, the respondent's accountant corroborated that work had gone quiet for the respondent after mid-April 2009, that the appellant had been on three days per week for two weeks but that the respondent had then got full-time work for two people for May (from the second week on) and June whereupon PX had hired MT as a sub-contractor.

Under cross-examination, the witness said that he could not make a comparison between the appellant's skills and those of MT. He said that the work that came to the respondent in May, June

and July of 2009 had a value of about forty thousand euro but that he did not have back-up documentation about that at the hearing. He had taken over from the respondent's previous accountant by whom all relevant documents fell to be furnished. According to such records the appellant had got a P45 without a cover letter.

Asked by the Tribunal about the appellant's date of commencement not appearing on his P45, the witness said that such a date would only appear on a P45 if the employment had commenced in that year.

In a closing statement, the appellant's representative submitted that it made no sense that the appellant would turn down an offer of work, that MT was a qualified engineer who could do work that the appellant could not do and that the appellant had been let go. 10 May 2009 had been a date used by the respondent but 13 May 2009 was on the P45 which the appellant had only received in June 2009.

The respondent's representative submitted that there had been no dismissal in that the appellant had resigned by turning down a 10 May 2009 offer of work on the grounds that he had work elsewhere. PX had then had to hire MT (an unqualified jack-of-all-trades) to do the labouring that had been offered to the appellant. It was not the case that a more qualified person had been brought in. The appellant and PX had parted on good terms to the extent that the respondent re-employed the appellant later that year. However, the appellant's service was not continuous to January 2010 because he had voluntarily left the respondent's employment in early summer 2009.

It was submitted that the appellant had not been entitled to minimum notice because he had resigned with no notice to the respondent and that, in any event, he had mitigated his loss by working elsewhere. The appellant had been on a short week. He had got something with more money. He had given no evidence of seeking social welfare.

Determination:

The Tribunal, having carefully considered the evidence adduced and submissions made, finds that it was not established that there was a redundancy situation at the material time in summer 2009. The appeal under the Redundancy Payments Acts, 1967 to 2007, fails.

The claim lodged under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails because the Tribunal did not find the respondent to have been in breach of the said legislation.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________
(CHAIRMAN)