

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER

-Appellant

CASE NO.
RP1547/2009

against
EMPLOYER

-Respondent

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. D. Donovan B.L.

Members: Mr. J. Hennessy
Ms. S. Kelly

heard this appeal at Kilkenny on 4th May 2010

Representation:

Appellant: Mr. Michael Wall, SIPTU, Wexford Branch, North Main Street,
Wexford

Respondent: Mr. M of the liquidator's office

The decision of the Tribunal was as follows:

Respondent's Case:

It was the respondent's case that a redundancy situation existed but that the appellant was not entitled to a redundancy payment as he was engaged on a contract for service. The appellant was engaged as a contractor a number of years. In 2004, the Revenue Commissioners issued a directive to the respondent that the appellant must be regarded as an employee. From that time the appellant was placed on a zero hours contract and there was no onus on the respondent to provide work to the appellant. The appellant did not receive a set number of hours from the respondent and he was paid only for the hours given to him by the respondent. The appellant could accept or reject the hours offered to him by the respondent. The appellant was free to carry out business on his own account. There was no onus on the respondent to guarantee work to the appellant.

In 2006, the respondent lost its main client and coupled with the economic downturn between 2007/2008 the company entered into liquidation. The liquidator was appointed in November 2009.

Appellant's Case:

The appellant started working for the respondent in the area of driver training in October 2002. The appellant was paid fortnightly and was listed as a contractor until the Revenue Commissioners directive issued in 2004. The appellant was processed through the PAYE system from January 2004. The appellant's holiday pay was paid but he did not receive two weeks' holidays during the time he worked for the respondent. The Tribunal noted that the appellant's contract of employment provided for entitlement to annual leave and public holidays in accordance with the terms of the Organisation of Working Time Act, 1997. He submitted payslips showing the respondent as his employer and deductions for PAYE/PRSI.

The appellant outlined how his earnings from the respondent were €26,192.23 in 2003 but had decreased to €1,532.65 in 2008. During 2007/2008 the appellant met with management and was reassured that work would increase. However, this did not happen and the appellant spoke to the Training Manager on numerous occasions about the prospect of increased levels of work. The Training Manager informed the appellant that senior management had assured him that there were some large contracts in the pipeline. The contracts did not materialise.

The appellant wrote letter dated 2nd September 2009 to the Training Manager stating that as he was receiving only three or four hours of work per month, he felt that he should now apply for redundancy. Letter dated 5th September 2009 informed the appellant that the matter had been referred to the General Manager.

The appellant received a letter dated 24th September 2009 from the General Manager, which stated that the respondent was successful in securing a number of tenders, and that existing clients were hoping to increase their levels of business with the respondent. The General Manager expected that these factors would have a positive impact on future volumes of work to the appellant, as there were not many other trainers in his locality.

A meeting between the appellant and the General Manager took place on the 17th November 2008 and the appellant was assured at this meeting that new work would become available in January 2009. The respondent wrote to the claimant on 12th December 2008 stating that "we can't make your position redundant as we still have work to offer to you" and "companies are trying to avoid making their employees redundant". No evidence was adduced that the respondent informed the claimant at that time that redundancy would not be appropriate as the claimant was not an employee.

The appellant wrote on the 19th January 2009 and again on the 5th February 2009 stating that he was submitting his resignation with one week's notice and formally seeking his redundancy. The appellant submitted an RP9 form to the respondent but did not receive a response. The appellant completed the RP9 on the 11th February 2009.

It was the appellant's case that the driving instructors were named as employees at a creditors meeting.

Determination:

The Tribunal having carefully considered the evidence adduced at the hearing finds that the appellant was an employee of the respondent from his commencement date of 1st September 2002 and that there was a redundancy by reason of short time. The claim under the Redundancy

Payments Acts, 1967 to 2007 succeeds and the appellant is entitled to a lump sum payment under the Redundancy Payments Acts, 1967 to 2007, based on the following criteria:

Date of Birth: 5th December 1967
Date of Commencement: 1st September 2002
Date of Termination: 11th February 2009
Gross Weekly Pay: €85.98

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)