

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE – *appellant*
Against

CASE NO.
RP3136/2009

EMPLOYER – *respondent*

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Fahy BL

Members: Mr W O'Carroll
Ms H Henry

heard this appeal at Galway on 11th February 2011

Representation:

Appellant(s): Ms Gerardine Costello
Gerardine Costello & Associates
Solicitors
4a Oranmore Business Park, Oranmore, Co Galway

Respondent(s): Ms Deirdre Brown BL, instructed by:
Ms Mary Jennings
Fair & Murtagh, Solicitors, Society Street, Ballinasloe, Co. Galway

The decision of the Tribunal was as follows:

As dismissal was in dispute the appellant gave evidence first.

Appellant's Case:

The appellant worked as an excavator operator for the respondent. He commenced his employment with the respondent in 1973. He disputed that he was a seasonal worker. He understood that he was laid off when there was no work. He earned a weekly gross pay of €618.00, but he contended that he should have been paid €16.69 per hour. There were insufficient stamps paid for him by his employer in the early part of his employment. There was no written contract of employment.

In December 2008 the appellant received a phone call from the respondent. He contended that the respondent instructed the appellant to come to his house to sign a form. He said that the motorway

contractor that the appellant was working for had found out that the appellant's pension contribution was not up to date. But the appellant was given a blank page to sign. The respondent said that the contractor was talking about letting a machine go and that if the appellant didn't sign there would not be any more work. The appellant signed the piece of paper. Two weeks later the respondent told him that there was no more work and issued his P45.

In March or April of 2009 he received a call from the respondent who offered him two days' work. He said that two days were no good to him as he would have to sign off social welfare and it would take six weeks to get it back. He went to the respondent four or five times to seek work. In June 2009 he asked the respondent to renew his plant certificate but he wasn't interested. He told the respondent that if he wasn't going to renew his certificate or offer him work he was going to look for redundancy.

During cross-examination the appellant denied that he also worked as a farmer. The farm belonged to his mother and his son worked it. He received a P45 or a letter for social welfare when he was laid off. He disputed the respondent's contention that the issue regarding the contractor and his pension contribution was actually in May & June 2008. He denied that he was not happy to join the pension or that the respondent had given him the letter to take home and look over.

He denied that the respondent rang him on February 27th 2009 and asked him to come back to work. He denied that he said he was too busy farming. He didn't know why the respondent rang him twice on February 27th 2009. They often spoke on the phone. He was not aware of the contract secured with Ballinasloe town council. He denied that the respondent phoned him in June to see if he could work. He contended that he couldn't work on the ESB job as he was not a member of the trade union and had been sent home in 2007 as he wasn't a member. He disputed that that issue had been resolved.

It was agreed that in 2005 the appellant worked 35 weeks, in 2007 39 weeks and in 2008 43 weeks. There was a dispute regarding 2006. The appellant contended that he worked for 36 weeks and the respondent contended that it was 33 weeks.

An accountant gave evidence on behalf of the appellant. He stated that all work carried out on the farm was done in the appellant's mother's name. The appellant did not receive payslips, but he calculated his gross pay to have been €618 per week. He calculated that the appellant was missing 270 weeks' of PRSI contributions. The appellant would have signed on to social welfare for weeks he wasn't employed. He did not have records of when the appellant worked.

Respondent's Case:

An accountant for the respondent gave evidence that he calculated the weeks the appellant worked from the P35 submitted by the respondent. Over the last four years of the appellant's employment he was on lay off an average of 14.5 weeks per annum. Taking the appellant's contention of 36 weeks worked in 2006 the average became 13.75 weeks on lay off. The appellant was issued a P45 in 2004 and 2008. Not all records were available but as far as he was aware only two P45s issued to the appellant. There was an issue in that the social welfare office had three different numbers associated with the respondent.

The respondent gave evidence that he runs a plant hire business with his son. His clients include farmers, private and state forestry and the ESB. They had a contract for a year with a contractor working on the new motorway near Athlone. He hired the appellant when he had work and put him

on lay off when he didn't. The appellant was laid off in December 2008. The issue regarding the pension contributions was in June 2008. One employee joined the pension scheme, but the appellant didn't want to. The appellant asked him to write to the company and say that it didn't suit him. The respondent drafted a letter and gave it to the appellant to take away and look at.

As in other years the work came to an end in December 2008. His son secured a contract from Ballinasloe town council in February 2009. He produced his mobile records to show that he had phoned the appellant twice on February 27th 2009. He rang the appellant to ask him to return to work. He did not say it was for two days. It was not worth his while offering two days work. The appellant said that it didn't suit him as he was busy farming. The respondent said that he was stuck and would he think about it. He phoned him later the same day but that appellant still said it didn't suit him. He did not recall phoning the appellant in March or April 2009.

The respondent had continuous work for the appellant from the end of February on. He had to organise other workers to do the work for the town council and he hired a contractor to finish the job. He turned down work from the motorway contractor, as he could not provide a driver. The ESB job started in July, later than normal, as he could not provide a driver for that job. His son carried out that contract. He had organised union cards for drivers when it was required.

The appellant did not come to the yard until July 2009, when he came to enquire after a stolen trailer. He asked the appellant if he was available for work. The appellant said it would only suit him if he got permanent work nearby. The appellant never asked him to sign a form for renewing his plant certificate. If the appellant had given him the form for his plant cert then he would have signed it and taken him back. The appellant never asked for a redundancy payment. He may have asked him to sign a form in August, but by then it was too late in the year to take him back on.

During cross-examination he agreed that he had not written to the appellant to offer work. They always operated over the phone. They were neighbours. The other employee was no longer working due to illness. The respondent's son had replaced him. There was no downturn in work in 2009. He did not advertise for a driver. He did not want to answer hundreds of replies and the ESB job was tricky and required a good driver. He did not have time to train in a new driver as he was ill at the time.

The respondent's son gave evidence that he heard both phone calls made to the appellant on February 27th 2009. The calls were made on loudspeaker. He tendered for contracts and had his own business of selling second hand diggers. The Ballinasloe job continued until the middle to end of March 2009. There were further contracts after that. He did the ESB job starting in July. It could have started earlier if a driver had been available. The appellant had done the job of bankraising every year for the ESB.

During cross-examination he stated that he began working with his father in 2006. He was a plant fitter by trade. He carried out maintenance as well as driving. The level of work had not reduced, but the rates paid had. The appellant was offered the whole site clearance job in Ballinasloe, the length of time was not specified. He was present in July when his father offered the appellant work. He denied that his business was not doing well and that he wanted the appellant's work. He contended that there was work for the appellant and his certificate would have been renewed if he had returned. He sold approximately 12 diggers every year.

Determination:

The Tribunal, having heard the evidence from both parties, finds that there is a conflict between the evidence adduced relating to the offer of work on February 27th 2009, which the respondent says was made by phone call. The appellant denies that there was any offer of work on this day. In the absence of any written offer of employment the Tribunal prefers the evidence of the appellant and accordingly determines that he is entitled to a redundancy lump sum payment under the Redundancy Payments Acts, 1967 to 2007, based on the following information:

| | |
|-----------------------|-------------------------------|
| Date of Birth: | 8 th June 1950 |
| Date of Commencement: | 14 th May 1973 |
| Date of Termination: | 5 th December 2008 |
| Weekly Gross Pay: | €618.00 |

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period. It should be noted that a statutory weekly ceiling of €600.00 applies to payments from the Social Insurance Fund.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)