

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE

CASE NO.
RP2182/2010

against

EMPLOYER
under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. Ó Catháin

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

heard this appeal in Cork on 11 April 2011

Representation:

Appellant(s):

Mr. Jack Purcell, Michael Purcell & Son, Solicitors,
33 Main Street, Macroom, Co. Cork

Respondent(s):

Ms. Niamh McNamara, Barry C. Galvin & Son, Solicitors,
91 South Mall, Cork

The decision of the Tribunal was as follows:-

The claim

After employment of twelve years (commencing in March 1998) the appellant, a storeman, was put on a “casual working” basis ranging from one to three days per week. This occurred from the start of January 2010.

On 23 February 2010 the appellant had a meeting with a respondent director (hereafter referred to as KL). During this meeting he requested to go back to full-time employment as he was in severe financial difficulty due to a “non-working” wife, two children and a mortgage. However, KL said that there was no possibility of full-time work “going forward”. The appellant then asked for his statutory redundancy as he had to look for full-time work.

Over the course of the next two weeks the appellant had numerous other meetings with the “main” director (hereafter referred to as MD) during which he again asked for statutory redundancy as no

full-time work was offered.

On Tuesday 9 March the appellant again met with MD. During this meeting MD agreed that the appellant would get everything to which he was entitled and that the situation would be resolved amicably. On Wednesday 10 March the appellant was asked to attend work and to meet with the directors and company secretary and accountant (BR) to settle all matters. No meeting took place that day as they were unable to meet him. He was told to come back the next day and all matters would be settled then.

On Thursday 11 March the appellant attended work and at 2.15 p.m. he was called into a meeting with KL who took a hostile stance, criticised the appellant's work for the first time in twelve years and said that the appellant was costing the respondent a thousand euro per week. KL was very aggressive, "inticed"(sic) an argument and left the appellant "with a lot of bad feelings". At this stage, KL offered full-time employment and said that his doing so meant that the appellant was not entitled to redundancy. KL's aggressiveness and attitude made it "abundantly clear" that working for the respondent would be impossible.

After this meeting the appellant was preparing to go home when he was called into another meeting with MD and KL. MD revoked his earlier offer of 9 March to resolve matters amicably and said that the appellant would receive no redundancy. MD also said to KL that it was not in their interest to resolve matters amicably as they did not expect to see the appellant again.

During this meeting the appellant's outstanding wages were brought up. KL stated to MD that the appellant was entitled to just over seven thousand euro in wages and sales commission. MD asked KL if these figures were confirmed and if there was any possibility that they could dispute any of it. KL confirmed that the figure was correct. They then asked the appellant to accept a company car in lieu of this payment. The value of this car was agreed at €4,500.00.

Needing a car and not liking confrontation, the appellant accepted this which the respondent stated would be the equivalent of the appellant's wages after tax. The meeting finished with the appellant claiming that he would pursue his statutory redundancy as had been agreed on 9 March.

The defence

The respondent contested the appellant's entitlement to redundancy on the basis that suitable alternative employment which had been offered was unreasonably refused.

The Tribunal was referred to copy documentation. There was an undated letter from KL to the appellant which stated that, during a 23 February 2010 meeting, the appellant had requested that he be made redundant but that the respondent had offered to "reinstate" him in full-time employment for a period of no less than thirteen weeks in accordance with the Redundancy Payments Act, 1967. The letter also stated that during a 11 March 2010 meeting the appellant was offered full-time work but that the appellant again refused and decided to leave the employment.

There was also a document dated 11 March 2010 in which the appellant accepted a particular car "in settlement of all commissions and wages due whilst leaving employment of (the respondent) on today 11th March 2010". This document, on the respondent's headed paper, was signed by KL and the appellant.

The respondent set out a detailed defence as follows:

On Monday 4 January 2010 KL had a meeting with the appellant regarding his role as storeperson/machinery-salesman due to the appellant's own admission that there was virtually no spare parts business. They had already had this conversation pre-Christmas and asked the appellant to concentrate more on machinery sales than just sitting in the office hoping that the phone would ring.

The appellant had sold many machines to people that entered the yard and had vetted many trade-ins by visiting customers' sites etc....over the years and so during 2005 he agreed to change roles and become a full-time sales representative. When the respondent found and employed a suitable candidate to replace him in the stores he commenced his new role. The respondent purchased a company car for him and supplied a phone, expenses etc....

After a relatively short period of time the appellant decided that he was not comfortable in his new role and wished to return to the stores and to combine his store work with the sale of machines. It was not ideal as the respondent had gone to great expense but, as the appellant was a valued employee, the respondent agreed to his wish. The appellant was allowed to keep the company car, phone etc.... as he had travelled to many parts of the country over the years inspecting trade-ins, meeting customers and closing deals.

To the respondent's amazement, on 4 January the appellant said: "Fire me, put me on a one-day week, whatever, I'm not selling machines any more! I know the spare parts are dead but I will not sell machines any more." The appellant was then asked what days suited him to work in the stores (taking that the level of business was minimal) and it was agreed that he would work Tuesdays and Thursdays but that, as soon as the business picked up, they would get back to a full week. The offer was left open to him to combine the stores with sales and to work a full week.

On 23 February KL asked the appellant to attend an informal meeting in KL's office and, once again, asked him to come back to work on a full-time basis. However, the appellant said: that he had plenty of work on the family farm; that, in his opinion, he had been replaced in the stores department; and that he would not pass any invoices as it was not his job. KL asked why he would take such a stance. The appellant said that he had a job offer and was deciding what to do.

On 9 March 2010 the appellant gave a week's notice to MD saying that he was leaving in seven days as he had secured another job. MD asked why he would leave when there was full-time work with a company car etc.... and said that over the next few days they would all have a chat but the appellant was adamant that he was leaving.

There were several occasions over the term of the appellant's employment with the respondent that he handed in his notice but later changed his mind revoking that action so that the respondent was confused once again.

On 11 March 2010 KL had a meeting with the appellant (who had just sold a machine to a customer) and asked him to reconsider as he was a respected member of staff. KL was shocked and disappointed that the appellant would accuse him of being hostile, critical, very aggressive and argumentative. At that juncture of KL's life he was in severe pain and undergoing tests that would prove that he had cancer. Therefore, to raise his voice in any manner would have been impossible and the said allegation was totally denied. KL virtually begged the appellant to reconsider as it

made no sense that the appellant would leave if he did not have alternative employment lined up. It was true that the appellant had asked for redundancy during that meeting. KL had said that the appellant had handed in his notice terminating his employment two days earlier, had refused several times to return to normal working hours and now wanted redundancy payment. The appellant had said that he would prefer to be made redundant as he needed money. KL had explained once more that the appellant had handed in a seven-day notice that he was leaving his employment with the respondent even though there was, at all times, a full working week with the prospect of earning sales commission of new (and used) machinery and, also, on the sale of spare parts.

KL asked the appellant if he had another position lined up. The appellant replied that he had not and said that he would consider what was being said and would get back to KL. Shortly after the meeting, KL made a call to EL (a supplier of goods to the respondent) and asked if EL had agreed to employ the appellant. EL confirmed that this was true. KL asked when the appellant was to commence employment. EL said that he had agreed with the appellant that the appellant could commence with him when he was no longer employed by the respondent because he (EL) was wary of stealing an employee of the respondent (a customer of EL).

KL's co-director (MD) returned to the office shortly later and, upon his arrival, the appellant was removing his personal possessions from his desk and from his company car. The appellant was putting his possessions into a car driven by another person (whom the respondent assumed to be one of the appellant's brothers). MD asked the appellant what he was doing. The appellant replied that he was leaving and that the respondent could post out his holiday pay and wages. The appellant was asked to come to a brief meeting because no employee had ever left under such circumstances.

MD asked the appellant if he knew how much he was owed. The appellant replied that it totalled just over four thousand euro between holiday pay, wages and sales commission. MD asked him if he had a job lined up. The appellant replied that he had not. When KL said that he had spoken to EL (who had confirmed agreeing to employ the appellant) the appellant became quite annoyed and said that he was not sure that he had a job with EL. An agreement was reached which included the purchase of the appellant's company car by the appellant in lieu of a balance which he claimed to have been due to him.

They all shook hands and parted on good terms. To the best of KL's knowledge, the appellant had taken up employment with the abovementioned EL.

Determination:

At the Tribunal hearing sworn testimony was given by the appellant and by the respondent's MD who conceded that the respondent had not ensured to provide all employees with written terms and conditions of employment. However, the appellant did not serve a redundancy RP9 form on the respondent (as a notice of intention to claim redundancy). This would have put the onus on the respondent to serve a formal counter-notice on the appellant offering him sufficient employment so that he not be entitled to redundancy. Instead, the appellant showed his dissatisfaction by finding a new employer rather than properly completing the procedures required to obtain from the respondent either a permissible level of employment or a redundancy lump sum.

The appellant was never dismissed by the respondent. It would be unfair if he were awarded a redundancy lump sum by the Tribunal even if he might have had grounds for serving a redundancy RP9 form. The appellant had gone on the road to do sales work but had not liked it. The respondent re-offered him the alternative work he had turned down. The appellant did not make a proper redundancy claim. He had a job before he left the respondent or, if he did not have a new job, he had a very good indication or signal.

For the above reasons the appeal under the Redundancy Payments Acts, 1967 to 2007, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)