

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE

CASE NO.
RP2007/2010

against

EMPLOYER
under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony BL

Members: Mr. D. Hegarty
Ms H. Kelleher

heard this appeal in Cork on 25 February 2011

Representation:

Appellant(s):

Ms. Anne-Marie Sheridan, James A Sheridan & Co, Solicitors,
The Mall, Riverside Way, Midleton, Co. Cork

Respondent(s):

No legal representation

The decision of the Tribunal was as follows:-

Appellant's Case

The appellant originally commenced employment with the respondent in September 2003.

The appellant's position was that when work began to slow down, towards the end of 2007, he asked the respondent if he could take unpaid leave and if job would be held open for him. On getting the respondent's assurance that his job would be held for him, he took unpaid leave from 17 January 2008 and went to Australia. There was no agreement between them on a return date but they agreed to stay in contact and he would return if the respondent became busier. The appellant denied the respondent's assertion that he resigned and had intended going to Australia for a year; he had a long term girlfriend at home in Ireland. The appellant and respondent texted one another every few weeks. The respondent had told him by text that he "would hold a seat" for him until the end of March beginning of April. In his Form T1A the appellant stated that the respondent had agreed that he could take "extended holidays during January and February".

According to the appellant the respondent's response when he first approached him about taking leave was that he was on the verge of laying some workers off but not himself because he was so flexible. The respondent later told him that he was glad that he was going because it meant one less to pay.

The appellant heard that the respondent was becoming busier and he decided to return home. On his return he resumed working with the respondent on or about 10 April 2008 on his old job. He denied that his role had changed to that of relief driver. Work began to slow again and on 26 March 2010 the respondent told him that he was not being called back because things were not picking up but he was neither given his redundancy papers nor P45. In cross-examination the appellant's position was that the respondent told him he would not be working the following week and asked him to wait for a call. The appellant approached the respondent with an RP50. He had been previously left off for two weeks in February 2009 with only one day's notice.

The drinks party was arranged because his work colleague, who was going to Australia with him, was not returning. The appellant was not aware that he had been issued with a P45 at that time.

The appellant's father told the Tribunal that he understood that his son/the appellant was going to Australia for a few months and that his job was being kept for him. Both the appellant and his brother returned home together. The respondent had phoned the appellant's father prior to the appellant's return asking for his return date because he had work coming up.

Respondent's Case

In January 2008 the appellant informed the respondent that he and a friend had decided to go to Australia for a year. The appellant left the employment a few days later, on 17 January 2008 and the respondent issued him with a P45, which was posted to the appellant's home address and also filed with the Revenue Commissioners and he discontinued paying the appellant's construction industry pension.

The respondent understood the appellant was going for a year. A farewell party was organised in the local pub for them. The respondent denied that there had been any mention of a career break or of holding the appellant's job open. It would not be feasible to hold a job open for a year. The respondent thought the appellant's relationship with his girlfriend was over when he was going to Australia.

In a conversation, the appellant's father mentioned to the respondent that the appellant was thinking of coming home and the respondent told him there was a job there for him if he wanted to return. On the appellant's return home he rehired him and he worked mainly as a relief driver. Things began to slow down again in early 2010. Work was not regular and the claimant was not happy. On or around 26 March 2010 when the claimant asked him about work for the following week, he told him to come in on Monday "and we'll see". The

claimant had worked 45.5 hours in the week ending 26/27 March 2010. The claimant never came in on the following Monday. Work became much quieter around then. The respondent's position was that the appellant was a flexible, versatile and obliging worker who got first refusal on jobs; he would be the last worker he would let go.

When the respondent tried to contact the appellant about a job in April 2010 he discovered that he was working elsewhere. The only communication that he had from the appellant after 26 March 2010 was when he received an RP9 from him on 21 May 2010 seeking a redundancy payment by reason of lay-off. By response the respondent sent the appellant an RP50 because he was entitled to redundancy from the time of his return in April 2008.

Determination:

Having considered the various versions of the conversation that took place between the appellant and the respondent on 26 March 2010 the Tribunal accepts the respondent's position that the appellant was put on lay-off on that date. Indeed this is consistent with the claimant's subsequent action of serving Form RP9 on the respondent on 21 May 2010 claiming a redundancy lump sum by reason of lay-off.

The Tribunal had to determine the issue as to whether the break in the appellant's employment between mid-January 2008 and mid-April 2008 was an "authorised break" such that the claimant had continuity of employment from the commencement of his employment with the respondent in September 2003 or whether, as the respondent contended, the break in early 2008 was a resignation from the employment thus breaking the appellant's continuity of employment and only entitling him to a redundancy payment in respect of his employment from April 2008 on. Having carefully considered the conflicting evidence on the issue, the Tribunal finds, on the balance of probabilities, that the break in the employment in early 2008 had not been an "authorised" or agreed break, but rather a resignation by the appellant. Thus, the appellant does not have continuity of employment from September 2003 and his entitlement to a redundancy payment is in respect of his latter period of employment beginning in April 2008 as set out below.

Accordingly, the appeal under the Redundancy Payments Acts, 1967 to 2007 is allowed and the appellant is awarded a statutory lump sum payment under those Acts based on the following:

Date of Birth:	4 August 1984
Date of Commencement:	10 April 2008
Date of Termination:	25 May 2010
Non-Reckonable Service:	2 February 2009 to 13 February 2009 and 26 March 2010 to 25 May 2010
Gross Weekly Wage:	€600.00

This award is made subject to the claimant having been in insurable employment, during the relevant period, in accordance with the Social Welfare Acts.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)