

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO:
UD2638/2009
RP3145/2009
MN2467/2009

- *claimant*

against

EMPLOYER

- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE OF TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. A. Courell BL

Members: Mr. D. Morrison
Mr. M. McGarry

heard this appeal at Castlebar on 1 June 2011
and 19 January 2012

Representation:

Claimant: Michael Kilcoyne, SIPTU, Forster Court, Galway

Respondent: Dermot Halloran BL instructed by:
O'Brien Solicitors, Deerpark Business Centre, Claregalway Road,
Oranmore, Co. Galway

This order should read in conjunction with K339551 – UD 2630/2009, RP 3129/2009, MN 2402/2009 and WT 1123/2009 as both cases were heard together.

At the outset the claim under the Unfair Dismissals Acts, 1977 to 2007 was withdrawn.

The decision of the Tribunal was as follows:

Claimant's Case:

The claimant's colleague (AZ) gave evidence with the assistance of an interpreter. He commenced employment with the respondent in October 2005. His role entailed construction work, groundwork, driving machinery and general labour. He worked a 40-hour week.

On Friday September 4th 2009 he and his colleague, and the claimant in this case (SK) were working on a housing estate in Westport. The foreman (JM) and the Site / Contracts Manager (KL) were also on site. They were finishing up work on their last day on site at around 3.00p.m.

They were cleaning up the site when KL approached the witness and the claimant, JM was also present. KL asked him for the company tools the claimant always transported in his own van for work to be put in the company van. KL informed them that there was no work for them at the moment but he would be in touch if anything came up.

A few weeks later AZ contacted JM but was informed there was no work. The respondent never contacted him. On September 19th 2009 he wrote to the respondent asking when he would be paid his redundancy and holiday pay owed.

On cross-examination he refuted he and AZ had been working in the yard. He agreed he and AZ had been put on temporary lay off in May 2009. The respondent had given him and AZ a letter and their P45's. When the work-flow improved they were rehired.

He refuted he had rung the Office Administrator (ML) the previous evening, September 3rd 2010 to demanding his P45 and weeks monies owed to him and SK. He refuted he had contacted KL that evening concerning the matter because ML said she could not do it as she was on leave. He again stated the JM and KL were on site on September 4th 2009. KL had been driving the teleporter. KL did not meet them that day with their P45's or monies owed.

When asked he said that he got his P45 some weeks later from JM. The claimant had acquired a new job and needed it. He told the Tribunal that JM had brought it to the house but then said he was not sure.

On re-direction he said that he was not sure if the P45's were posted or handed over.

When asked by the Tribunal he said that the foreman (JM) handed out the wages cheques. When put to him that he had inserted that date of August 28th 2009 for the date of notification of his termination was September 4th 2009 he replied that he did not understand. He explained that when they were laid off for a period of time in May 2009 he had not been asked to hand back the company tools he carried in his personal van.

The claimant (SK) and colleague of other claimant (AD) at this hearing gave evidence with the assistance of an interpreter.

He told the Tribunal that he and AD had been told on September 4th 2009 by KL that there was no work for them. KL asked for the company tools back. He said that he was unsure when he received his P45. He signed for social welfare benefit the following week but did not have it. He acquired a new job 3 weeks later. He was unsure when or how he received his or AD's P45. He stated that he had not left his employment and would be still working there if he had not been let go.

On cross-examination he stated he had signed the T1A form. (An application had been made and objected to to amend the termination date on the form from May 15th 2009 to September 4th 2009). He told the Tribunal that JM had paid their wages by cheque on Thursday

September 3rd 2009. When asked he said that he had looked for a job as he had been left go from the respondent.

Respondent's Case:

The Site / Contracts Manager (KL) gave evidence. On the evening of September 3rd 2009 AD rang him. He had contacted ML looking for his, and the claimant's, P45 and wages owed but she could not organise it until the following week. He was adamant he wanted his and the claimant's P45 and wages owed by the following day. He was very surprised. He contacted ML and asked would she get the necessary documents the following day.

On November 4th 2009 he drove to the Westport site and gave AD and the claimant their wages and P45's. On November 19th 2009 the office received letters from the claimant and AD requesting redundancy payments and holiday pay owed. The letters were handed over to the then solicitors for the respondent who said they would look after it.

On cross-examination he agreed the claimant and ADK had been laid off in May 2009 and given their P45's and letters for the Department of Social Protection but had not been given them again in September 2009 as they had not been let go. There was still work for them. He explained that after the claimant and AD left they took on a new employee in October 2009, rearranged the locations of staff and relocated the full-time staff member in the yard on site as there was so much work.

When asked about the claim taken under the Terms of Employment Acts, 1991 and 2001 to the Rights Commissioners he replied that their then solicitors advised them not to attend and not to do anything about the decision in AD's favour. When asked about the rate of pay paid to the claimant and AK and the Registered Employment Agreement (REA) concerning the claimant's and AD's rate of pay, he replied that he was aware of the REA but did not deal with wages.

When asked by the Tribunal he again stated that he had given the claimant and AD their wages and P45 they had requested. He told the Tribunal that although the job in Westport was finishing up there were a number of other jobs available for the claimant and AD to work on.

The Office Administrator (ML) gave evidence. She explained that she was daughter to the owner of the company and sister to KL.

On the evening of September 3rd 2009, after working hours, she received a call from AD on her personal mobile phone. He asked for his and the claimant's P45 and monies owed for the following day. She asked why and he replied that they were finishing up. She replied that she would not be able to do it but would sort it the following week. She explained to the Tribunal that she had the day booked off as she was attending a wedding. The claimant contacted KL and called her again saying he had spoken to KL. She spoke to KL and agreed to attend work the following morning to sort the matter.

When asked she said the handwritten letters dated November 19th 2009 had been received from the claimant and AD and were given to their solicitor. When asked she said she had not attached covering letter to the P45's. She refuted the Department of Social Protection had been in contact with the respondent looking for the claimant and SK's P45's. When

she received the handwritten letters dated November 19th 2009 it was the first time she had heard about holiday pay being owed.

The Managing Director (PJL) and father to KL and ML gave evidence. He knew both the claimant and AD. They were great workers and there had been no problems with either of them. He was surprised when KL informed them that the claimant and AD were leaving. He told the Tribunal that if any staff member were to be made redundant it would be discussed between KL, ML and himself.

He agreed the claimant and AD had been laid off in May 2009 but had been rehired as soon as they had work for them. They had not been let go, there had been work for them to do.

On cross-examination he stated that he had been aware of the REA and would pay staff in accordance to it. He replied, when asked, that the handwritten letters concerning redundancy and annual leave owed was handed over to the company solicitor who said he would deal with them.

The Site Foreman (JM) gave evidence. He was present on site on September 4th 2009 but not the 3rd. However he had paid the claimant and AD their wages on September 3rd 2009.

On September 4th 2009 KL came on site. He was surprised to hear the claimant and AD requested their P45's and monies owed. KL had told him. They were handed what they had requested but KL did not tell them they had been let go.

When asked he explained that when a site finished up he and KL would discuss and tell the staff where they would relocate the following working day.

Determination:

The Tribunal have carefully considered the evidence and submissions adduced by all parties in this case. The burden of proof was on the claimant to prove a redundancy situation had taken place. The Tribunal finds this has not been proven.

Accordingly the appeal under the Redundancy Payments Acts, 1967 to 2007 fails. The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 also fails.

Sealed with the seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)