

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYEE-*Appellant*

CASE NO.  
RP2062/2010  
WT643/2010

Against  
EMPLOYER -*Respondent*

under

**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr N. Russell

Members: Mr J. Browne  
Mr F. Dorgan

heard this appeal at Wexford on 27th April 2012

### **Representation:**

Appellant: Mr Eamonn Carroll, Daniel Spring & Company, Solicitors,  
50 Fitzwilliam Square, Dublin 2

Respondent: Mr. Michael McNamee B.L. instructed by Neville Murphy & Co., Solicitors,  
9 Prince Of Wales Terrace, Bray, Co. Wicklow

### **The decision of the Tribunal was as follows:**

The fact of dismissal was in dispute between the parties.

Both the appellant and the respondent gave evidence with the assistance of an independent interpreter.

### Summary of Evidence:

It was the appellant's evidence that in early February 2010 the respondent informed him that he intended to transfer the business to a new owner (Ms. L)

When Ms. L spoke with the appellant in March 2010 she informed that he would be paid a lesser rate of pay and that tax would not be paid in the first three months of his employment. The appellant also had a conversation with Mr. L in or around this time. Some days later the respondent asked the appellant if he wanted to work for Ms. L and the appellant raised his

concerns regarding the lesser rate of pay and the illegality of not paying tax for a period of time. The respondent told the appellant not to worry that he would pay tax on his behalf through his new business. The appellant did not want to be associated with anything that was illegal and he said this to the respondent and enquired about a redundancy payment from the respondent. The respondent told the appellant that if he refused to work for Ms. L and insisted on a redundancy payment, he would “cut off” the appellant’s stamp for his visa application which was being processed at that time. In or around this time the appellant attended the Migrant Rights Centre seeking advice surrounding these issues. A contemporaneous record of the appellant’s contact with the Migrant Rights Centre was opened to the Tribunal.

Following a second visit to the Migrant Rights Centre the appellant informed the respondent that he believed he was entitled to a redundancy payment. On the 31<sup>st</sup> March 2010 the appellant was approached by Ms. Y on behalf of the respondent. Ms. Y acknowledged that the appellant was entitled to a redundancy payment but asked him why for the sake of it; he would abandon his visa application. It was also the appellant’s case that he was offered a sum of money by Ms Y on this date- but not the full sum of his redundancy. Ms. Y told the appellant that if he went to work for Ms. L; the respondent would pay his tax. The appellant refuted that he told Ms. Y that he would only consider working for Ms. L once he had received a redundancy payment.

The appellant presented a request for a redundancy payment to the respondent. On the 31<sup>st</sup> March 2010 the respondent was angry and repeated to the appellant that if he did go to work with Ms. L, then the respondent would “cut off” his visa application. The last day the appellant was due to work for the respondent was on the 3<sup>rd</sup> April 2010.

On the 3<sup>rd</sup> April 2010 the respondent paid the appellant his wages and said that the following week he would receive a P45 but he mentioned nothing about the appellant’s request for a redundancy payment. The appellant stated that he did not resign from his employment. His visa application was subsequently successful.

During cross-examination the appellant refuted that he had other work arranged and that it had in fact taken him some six weeks to secure other work.

It was the respondent’s evidence that Ms. L agreed to employ the respondent’s staff. The respondent informed the appellant of this fact and that Ms. L would be paying tax on the appellant’s behalf. However, two days prior to the transfer on the 3<sup>rd</sup> April 2010 the respondent became aware of the terms and conditions offered to the appellant by Ms. L and of the fact that the appellant informed Ms. L that he did not want to work for her due to the lower wages.

During cross-examination the respondent refuted that he had made threats to the appellant concerning his visa application. The respondent confirmed that he had spoken to Ms. L and told her that she should retain the appellant on the same wages but Ms. L told him that the appellant would not be working for her, as he was seeking redundancy.

Ms. L confirmed in evidence that she took over the business from the respondent but had no chef employed at the time of March 2010. Prior to the transfer she spoke to the appellant and said that she required a chef and that she really wanted to offer the position to him. As business was quiet she told the appellant that she could not offer him the same wages but that if the business improved she would try and give him an increase. The appellant told her that he

wanted to get redundancy first but he did not raise an issue about the lower wages. Ms. L retained all of the other staff on the same terms and conditions they enjoyed prior to the transfer. During cross-examination Ms. L stated that she did not talk to the appellant about tax affairs, however she was aware that her husband also spoke to the appellant about some details of the employment offered.

In reply to questions from the Tribunal, Ms. L stated that the appellant's rate of pay was the only one affected as the position of chef has the highest wages.

Ms. Y gave evidence on behalf of the respondent as she worked in accounts. Ms. Y spoke with the appellant when he presented her with redundancy papers and said he needed the money. Ms. Y confirmed to the appellant that he was not made redundant. The appellant outlined a personal situation to Ms. M and told her that he would not work for Ms. L as he would not receive redundancy. Subsequently, the appellant informed her that he had secured another job.

During cross-examination she refuted that she had offered a sum of money to the appellant when she spoke with him.

Ms. M gave evidence on behalf of the respondent that she recalled speaking with the appellant. The appellant told her that he was seeking a redundancy payment as he needed the money and that he would be able to secure other work.

**Determination:**

In the current case the Tribunal is faced with a complete conflict of evidence on a number of crucial issues with no truly independent evidence to assist it in its deliberations. On balance, the Tribunal prefers the evidence of the appellant.

The contemporaneous record of the appellant's contact with the Migrant Rights Centre appears to add credence to some of the appellant's contested evidence. The Tribunal is of the view that either the appellant's version of events is true or that he misunderstood the terms of his transfer to the new employer. The onus was on the appellant's employer to ensure that such matters were clearly communicated.

On the basis of the respondent's evidence alone it is clear that the appellant was to transfer on less favourable terms while all other employees were to transfer without any change in their terms. The appellant's principal concern, however, was the manner in which he understood his tax and PRSI liability was to be handled following the transfer. The Tribunal accepts the appellant's evidence as to his belief in this regard and, again, it was a matter for the respondent to clear up any misunderstanding surrounding this issue.

The Tribunal is satisfied that there was a 'ring of truth' around the entirety of the appellant's evidence and that he could not be expected to transfer to the new employer in all of the circumstances.

The Tribunal finds the appellant to be entitled to a redundancy payment from the respondent under the Redundancy Payments Acts, 1967 to 2007, based on the following criteria:

Date of Birth: 23<sup>rd</sup> November 1976

Date of Commencement: 19<sup>th</sup> March 2003

Date of Termination: 3<sup>rd</sup> April 2010  
Gross Weekly Pay: €630.55

It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

The Tribunal dismisses the claim under the Organisation of Working Time Act, 1997 as no evidence was adduced in relation the claim.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_  
(Sgd.) \_\_\_\_\_  
(CHAIRMAN)