EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	CASE NO.
EMLPOYEE	RP1522/2011
	MN1254/2011
	WT473/2011

against

EMPLOYER

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. O Catháin

Members: Mr. P. Casey
Mr. J. Flavin

heard this case in Cork on 7 November 2012 and 28 January 2013

Representation:

Appellant(s):
Mr. Frederick Gosnell, Frederick V Gosnell, Solicitors,
Pembroke House, 2 Pembroke Street, Cork

Respondent(s) :
Mr. Frank O’Connell, C.F. O'Connell & Company, Solicitors,
55 Grand Parade, Cork

The decision of the Tribunal was as follows:-

Claimant’s Case

In May 2011 claims were lodged with the Tribunal on behalf of a former employee of the respondent. It was alleged that the claimant had lost his position as a truck driver with the respondent without proper procedures being implemented, without his having received the minimum notice payment due to him and without his ever having received payment for annual holidays. Compensation was sought. It was alleged that the employment had begun on 14 May 2007 and had ended without notice on 15 March 2010.

Respondent's Case

The respondent's position was that the claimant had commenced employment with the respondent on 14 May 2007 but that he was involved in a serious road traffic accident (due to the fault of a third party) on 14 June 2007 as a result of which he was out of work due to injury for a protracted period and did not seek to return to work for over two years. At the end of 2009 he sought to return to work as a lorry driver with the respondent but no driving position was available at that time. On 15 February 2010 the appellant telephoned the company to state that he had got another job and that he was looking for his P45. This was duly issued to him.

For more than one year following his accident the appellant was paid his wages by the respondent on condition that he was to claim his loss of earnings in his High Court personal injuries case and refund the respondent in due course. The claimant recovered compensation for serious personal injuries and all other losses including loss of earnings. He duly refunded the wages paid to him by the respondent during his sick leave.

The claimant resigned from his employment in order to take up another job. He was not dismissed. Even if he had been dismissed on 15 February 2010 his redundancy appeal would be out of time in that it had been made more than fifty-two weeks after the date of termination of his employment. During the relevant period (i.e. the year following such termination) the claimant had the benefit of legal advice. It was also submitted that the claimant had been fully compensated for all his losses on foot of the settlement of his personal injuries case.

The respondent also disputed the claim under working time legislation because the claimant did not work for the respondent at any time during the relevant period due to the employee's absence from work on sick leave. It was further contended that the claimant had been fully compensated for his loss of earnings, (including holiday pay which he would have received had he been working) under the terms of settlement of the High Court personal injuries action. The claim was also out of time in that a time limit of six months applied unless there were exceptional circumstances.

It was also argued that the claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, could only be valid where the employee had been dismissed by the employer. The respondent denied that there had been a dismissal and, accordingly, denied that there could be a valid minimum notice claim.

At the initial Tribunal hearing the Tribunal ruled in favour of the claimant employee by accepting that a claim lodged with the Rights Commissioner Service was sufficient to comply with time limits provided that a Rights Commissioner had jurisdiction to hear the claim in question. However, having heard sworn testimony from the claimant, the Tribunal was not satisfied that there had been exceptional circumstances preventing the lodging of claims such as might warrant extension of time limits from six months to twelve months. The claimant said that his then advisors had occupied themselves with his personal injuries action (rather than time limits around employment law claims). The claimant himself did not appear to have had any knowledge of relevant time limits.

Consequently, the Tribunal ruled that the claimant could only proceed with claims under redundancy and minimum notice legislation.

At the 28 January 2013 hearing it was submitted on behalf of the employer that it was not open to the Tribunal to make an award to the employee in respect of redundancy or minimum notice.

Regarding redundancy it was contended that the employee had only worked for the company for one month before going on sick leave. It was argued that, even if it were assumed that the employee had been dismissed for redundancy, he was debarred from receiving a lump sum award by virtue of having been absent (due to occupational injury) from his employment for more than fifty-two weeks of the last three years of the said employment.

Regarding minimum notice it was submitted that the employee's position was that he had had to leave but that an entitlement to minimum notice could not arise if an employee were to leave of his own volition.

The employee's representative submitted that the Tribunal was entitled to extend the time for the bringing of a redundancy claim from 52 to 104 weeks if reasonable cause was shown.

After a recess, the Tribunal ruled that it would hear witness testimony.

The employee's representative stated that he wished to establish that the employee had made many attempts to get his job back.

Giving sworn testimony, TB (the employee's father-in-law) stated that he had driven the employee to the company's premises and had sat in a van outside. He had also witnessed the employee on the phone to the employer. TB alleged that the company had claimed to have been slack but had taken on JHN and other drivers rather than take his son-in-law back.

Giving sworn testimony, KF (a director of the respondent company) said that he was not the respondent's transport manager but said that he recalled the employee's accident and that the employee's wages had been paid after it. KF said that the employee had not asked for his job back but had said that he did not know if he could drive a truck again. KF said that the employee had ultimately asked for his P45 saying that he had found work with another employer.

Under cross-examination, KF said that he was only one of four brothers who ran the respondent company and that he did not recall how many drivers the respondent had taken on.

Giving sworn testimony, TM (the respondent's company accountant and office manager) said that he recalled the employee's accident and his calling in to the respondent though not as soon as two months after the accident. TM denied saying to the employee that the respondent could not take him back because of the insurance company. TM said that the employee would call in to the respondent and say how he was getting on but TM did not recall the employee saying that he wanted to sit in a company truck. TM denied that the employee had expressed to him that he wanted his job back. TM did say that the respondent had no work in late 2009 and that the employee would have been told to try the respondent again. TM did not recall when the abovementioned JHN was taken on but said that if the appellant employee were taken on someone else would have had to be laid off. TM said that work had been very quiet and that the

appellant had ultimately left the respondent to take up another job.

Under cross-examination, TM said that he could not recall the appellant calling in to the respondent within two months of the accident. When it was put to him that the appellant had been told that there was no work for him TM replied that the appellant had not been ready to go back and that the appellant had never given a definite date when he could return. TM denied that there had been any problem with the insurance company but said that the respondent had not been taking on drivers when work was quiet.

When it was put to TM that the appellant had been cold-shouldered TM replied that it had been quiet but that he had never said that the appellant would not get his job back. TM could not recall new drivers being taken on saying that “drivers come and go” but did acknowledge that JHN had been taken on and said that the appellant would have had a valid expectation to go back.

It was put to TM that the appellant had called to the respondent repeatedly and had been treated in a peculiar way. TM replied that the appellant had been quite entitled to have the view that his job would be there for him.

TM disclosed that the respondent had a workforce of thirty-five including drivers but said that he did not know who had been taken on in 2009 and that he could not recall laying off the appellant when work was quiet. Rather, he told the Tribunal that he had just said that there was no work at the time.

Closing Statements

The appellant’s representative said that the appellant should have been taken back on or made redundant and the respondent’s representative referred the Tribunal to his initial submissions from the beginning of the 28 January 2013 hearing.

Determination:

As the Tribunal found at the 7 November 2012 hearing that the only claims with which the appellant could proceed were in respect of redundancy and minimum notice, the claim under the Organisation of Working Time Act, 1997, is dismissed.

The Tribunal was not impressed by the respondent’s testimony about its changes in personnel. It was not convinced that it had heard from the respondent’s most informed witnesses. The Tribunal was struck by the vagueness of the testimony of the witnesses who did give evidence. However, the Tribunal feels that it has no alternative but to accept the respondent’s argument that the appellant was not entitled to a redundancy lump sum because he had been out due to occupational injury for more than fifty-two weeks of his last three years. For want of reckonable service in those last three years, the appeal under the Redundancy Payments Acts, 1967 to 2007, fails.

In respect of the minimum notice claim the Tribunal finds that it has no alternative but to accept the respondent’s argument that the appellant had no notice entitlement because, he having left the respondent of his own volition to take up other employment, the respondent was not in breach of minimum notice legislation. The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This ______________________

(Sgd.) ______________________
(CHAIRMAN)