

EMPLOYMENT APPEALS TRIBUNAL

Appeal of:
Employee

Case No.
UD604/2006

PW38/2006
TE56/2006

against the recommendation of the Rights Commissioner in the case of:

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001
PAYMENT OF WAGES ACT, 1991
TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mac Carthy S C

Members: Mr. J. Browne
Mr. P. Trehy

heard this appeal at Wexford on 27th August 2007

Representation:

Appellant: Mr. Anthony H. Ensor, Ensor O'Connor, Solicitors, 4 Court Street,
Enniscorthy, Co. Wexford

Respondent: Ms. Angela Grimshaw B.L., Peninsula Services, Unit 3, Ground Floor, Block
S, East Point Business Park, Dublin 3
Mr. Eric Furlong, Coughlan Kelly, Solicitors, Trinity Chambers, South
Street, New Ross, Co. Wexford

This case came before the Tribunal by way of an employee appealing against the Rights
Commissioner Recommendation & Decision R-035697-MA-05/TB

The appeal TE56/2006 was withdrawn.

The determination of the Tribunal was as follows:

Background:

The appellant was a long distance truck driver who was arrested in France when customs officials discovered a large quantity of contraband cigarettes concealed in his truck. He was imprisoned for more than four months before being released on bail, which was raised by his employer. One of the

bail conditions was that he was not to communicate with his employer, pending trial. At the conclusion of his trial he was convicted on four charges. The Tribunal was not given precise details of the charges but in general terms they related to smuggling, tax evasion, public health and transportation. He was given a suspended sentence and fined €1.2million. This fine equated to the value of the contraband cigarettes, which, at 4.8 tonnes, was the largest ever such seizure in France.

After he was released on bail the appellant returned to Ireland but as he was forbidden from contacting his employer he could not resume working for them. The appellant had difficulty finding other employment and being a South African national, a new work permit would have to be obtained by any new employer. The appellant also had difficulty obtaining his P-45 from the respondent. Matters were further complicated by the terms of his bail, which forbade communication with the respondent, and he was obliged to deal with them indirectly through his tax office. The respondent had not dismissed the appellant and informed the Revenue officials that they would not issue a P-45 unless the appellant resigned. The appellant wrote his resignation and received his P-45, which he passed to a new employer who obtained a new work permit for him.

The appellant claims that his resignation amounted to a constructive dismissal. He said he was unaware that the cigarettes were in his truck until they were discovered by the French customs officials and that his employers were responsible for his predicament as it was they who directed him to Barcelona where the cigarettes were loaded.

The appellant also claimed under the Payment of Wages Act, 1991, originally for payments, which he said, should have been made to his family while he was in prison but at the Tribunal hearing, this claim was changed to a claim for wages from the time he returned to Ireland until he started in his new job.

Determination:

A Rights Commissioner found against the appellant in his claims under the Unfair Dismissal Acts, 1977 to 2001 and the Payment of Wages Act, 1991 but found in his favour under two other Acts covering accrued holiday pay and the absence of written terms of employment. The appellant appealed under the Unfair Dismissal Acts, 1977 to 2001 and during the appeal hearing, changed his position under the Payment of Wages Act, 1991. The appellant's trial had not concluded when the Rights Commissioner heard his claims.

Section 1 of the Unfair Dismissal Act, 1977 defines dismissal to include-

(b) the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer.

The appeal fails for several reasons. The respondent did not dismiss the appellant at any stage in the direct sense, and the termination of his employment was at his own request so that he could start new employment. The appellant's argument that his termination was a constructive dismissal cannot stand, as it does not derive from the conduct of the employer.

In another sense the appellant's employment might be regarded as having been ended by the condition of his bail- that he should not communicate with his employer. That was not the conduct of the employer.

The appellant gave his account of the experience from the time his truck was loaded in Barcelona. He insisted that he was an innocent party and was unaware that the contraband was hidden in his truck. However, it is not for this Tribunal, in effect, to retry the case that has already been decided by the French courts. The appeals under the Unfair Dismissal Acts, and the Payment of Wages Act, fail. In any event the appellant suffered no loss under the Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

