

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
Employee

CASE NO.
UD897/2007

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

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. N. O'Carroll-Kelly B.L.

Members: Mr. F. Cunneen
Mr. N. Broughall

heard this appeal at Dublin on 6th February 2008

Representation:

Appellant: Ms. Mary Fay B.L., instructed by:
Ms. Aileen O'Carroll, Donal Taaffe & Company, Solicitors, 3 Burgh Quay, Dublin 2.

Respondent: Ms. Mona O'Leary, O'Leary Maher, Solicitors, 191 Howth Road, Killester, Dublin 3

Respondent's case:

TW (Community Centre Manager) said that the Appellant rented the Arts & Crafts room in Donnycarney Community Centre from 21/11/06 to 29/6/07. He paid for the materials and also for public liability insurance. The total rent paid was €5505.00. She said the maximum number of students the room could cater for was 10/12. She had no knowledge of exactly when the classes actually started.

PD (Appellant's employer) said that the Appellant started work with his company in October 1997. He chose to work independently, to be self-employed and to make his own tax returns because as an artist, he had a tax exemption. He was an excellent teacher, and for many years there was a good working relationship between them. On 20/9/06 the Appellant asked him for a meeting, he asked "what about", and was told he would find out when they met. The Appellant told him at the meeting that an increase should be provided on an annual basis. PD said under the terms of the written contract that a pay review was not due until September '07. At this the Appellant lost his cool, he said PD was breaking the law, that he had been forced into working on a consultancy basis, and that the union told him that he could be taken to the Labour Court. PD said that he became afraid, that the Appellant was very aggressive and threatening. PD denied the allegations and said that the Appellant had chosen the consultant's role himself. He eventually calmed down and PD said he would review the situation. Although he felt that his behaviour could be construed as gross

misconduct, he decided that he would not sack him, but gave him a warning letter. PD met him at a further meeting and said that he would consider taking him on to the PAYE system if matters normalised. The warning letter was issued to him, and the meeting ended amicably. Another problem arose on 17/10/06 when a student complained that the Appellant had embarrassed her in front of the whole class, and that she would never attend his class again. PD sought to discuss the incident with him, but was ignored. Then the Appellant became very angry again and started to shout at him, and inquired was PD going to issue another F'ing warning to him. PD said if that was his attitude, he had no option but to terminate his contract. He stated that it was not his wish to dismiss him, he knew that he would lose some students because of their wish for the Appellant to be kept on, but he was left with no other choice. He admitted that the Appellant had no written contract until 2005. In December he was given an increase of 4%, and in September 2005 he was given an increase of 14% (as opposed to the other staff who were given increases of 7%) on the basis of his seniority.

It was the Appellant's conduct and his aggressive behaviour on two occasions, within a month, which led to his dismissal. The only other employee that PD had to dismiss over the years was a framer who refused to turn up for work.

KG said she rang the Appellant in January 2007 to inquire about the availability of classes, but was told that two of the four classes were full, and that the charge would be €175.00 for 10 weeks.

Appellant's case:

The Appellant joined the company in 1997. He said he needed to work three days a week, as sometimes he sold artwork, other times not. He agreed that initially it was his idea to work independently, as a consultant. He did not receive a written contract until 2005, employment terms were verbally agreed prior to this. He worked an average of 16.5 hours per week, with pay varying from €434.00 to €510.00 per week. His relationship with PD had been good, but it deteriorated after 2004. He eventually got an increase in 2004 (4%), but he had to push for it. He claimed that he was the senior tutor, and deserved a better rate of pay. In 2005 his pay was increased by 14%, but this was only the second increase in seven years.

Regarding the meeting with PD in September 2006, the Appellant stated that PD mistook vehemence for aggression. He was not aggressive, he had used his normal tone of voice, which may have been mistaken by PD to signify aggression. He did not shout at PD at this meeting. He did say to PD that he may have to take the company to the Labour Court in order to claim his correct entitlements, and he also affiliated himself to a Trade Union, and sought their advice on the matter. At the meeting with PD he was simply seeking his assurance that his pay would be kept up to the level of inflation, but PD would not agree to this. He also asked that he be put on to the PAYE system like the other staff, but PD refused to do this. In regard to the letter of warning of 22 September 2006, the Appellant did not understand what PD meant by "gross misconduct", but he did believe that this was the beginning of the end for him within the company. All of a sudden, after nine years service, he had gone from being a very good tutor to being dismissed within a period of seven weeks. He was not aware of any complaint being made against him. On 18 October 2006 he was five minutes late, due to his car breaking down. PD said he wanted to talk to him and then started to tell him how bad he (the Appellant) was, PD said he was the worst employee he ever had, but the Appellant told him he would talk later, that he had to go to his class. PD insisted on him staying to talk, the Appellant said "so dismiss me", PD said "ok then", and Appellant just went to his class. He received a letter of termination in October 2006, and worked out his notice. Since he left, he conducted classes in Donnycarney Community Centre from December 2006 for about six months, but lost money on this project.

The Appellant was asked had he understood the written contract presented to him in 2005, he said that he had - for the most part, but he did not remember if he had discussed with PD those areas

within the contract which he had not understood. He was further asked why he hadn't asked PD to link his pay to inflation before he signed the contract. His answer to this was that he was not aware how much he was being paid, but he did realise that it was a binding contract. He denied that any of his classes in Donnycarney were ever full. He decided to keep the Donnycarney classes going for six /seven months- even though they were losing him money- because he thought they would eventually make a profit.

The Appellant was then asked why he had not apologised to PD about his behaviour after the first meeting. He said that PD had apologised to him. He denied that he had ever been aggressive to PD. He was further asked why he had not spoken to PD on the day of his dismissal, he said because he had to go to his class, and that he knew "what was coming". He said that PD was confrontational, and sought to "impose his will".

DH (student) said that the Appellant told her that he had been dismissed for being five minutes late.

MH (student) said that all the students were shocked when they learned of his dismissal.

The Appellant said that he was happy with his earnings at present, and was working on a scheme in Santry that had the local Council's involvement, and the costs incurred by him were more favourable than in Donnycarney.

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an appeal by the employee against the recommendation of a Rights Commissioner, ref: r-048952-ud-06/TB dated 11 September 2007

The Tribunal upholds the recommendation of the Rights Commissioner. Therefore, the appeal under the Unfair Dismissals Acts, 1977 to 2001 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)

