

## EMPLOYMENT APPEALS TRIBUNAL

**APPEAL(S) OF:**

Employee

**CASE NO.**

UD720/2006

PW44/2006

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

under

### **PAYMENT OF WAGES ACT, 1991 UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. M. Flood  
Mr P. McAleer

heard this appeal at Cavan on 5th December 2007  
and 5th March 2008

**Representation:**

Appellant(s) : Mr. John Quigley, P.J.F. McDwyer & Co., Solicitors, Elm House, Cavan

Respondent(s) : Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower Baggot Street,  
Dublin 2

The determination of the Tribunal was as follows:-

**This case came before the Tribunal by way of an appeal by an employee against the recommendation of the Rights Commissioners in the case of (r-035800-ma-05-DI).**

On the first day of the hearing the appeal under the Payment of Wages Acts, 1991 was withdrawn.

**Claimant's Case:**

The claimant gave evidence. He stated that he a qualified electrician and had worked in a number of different organisations in England.

In 2003 he decided to move to Ireland and attended the respondent's head office in Chester after submitting his curriculum vitae. At his interview he was informed by the Personnel Officer in Chester that there was a problem in the Facilities department in the respondent's premises in Carrick-on-Shannon. He explained that he had been told that an employee was absent on long-term sick leave. He was informed that he would be recruited into the Telemarketing department but would be seconded into the Facilities department. When asked, he said that the contract of employment given to him was in relation to Telemarketing. He stated, when asked, that he would be seconded into the

Facilities department as a way of getting him “in the back door”. The claimant stated that he felt it was a “ruse”.

He commenced employment in Carrick-on-Shannon and was met by the Facilities Line Manager and was brought directly to the Facilities department. On March 25<sup>th</sup> 2004 he was sent a letter from the Personnel Manager to confirm his secondment to the Facilities department for an initial period of 3 months with a salary of € 28,160. The claimant told the Tribunal that he had never anything to do with the Telemarketing department.

When asked if he had questioned whether his position was to be regularised he replied that he had on a number of occasions to Facilities Line Manager. He said that the answer was always the same, there were no vacancies. When asked, he said that the Facilities Line Manager had mentioned the claimant returning to the Telemarketing department on a number of occasions but he never questioned it.

He received a letter, dated March 10<sup>th</sup> 2005, from the Personnel Manager informing him that his secondment would cease with effect from March 18<sup>th</sup> 2005 and that he would take up his original contracted role as Telemarketing Customer Specialist. The claimant told the Tribunal that he was “gobsmacked”. He spoke to the Facilities Line Manager and was informed that he, the claimant, was included in the “headcount” of the Telemarketing department and the section was short staffed. The employee he had replaced was still on long-term sick leave at the time. The Facilities Line Manager told him that it was “out of his hands”. He then approached the Personnel Manager who informed him to put his grievance in writing and it would be investigated.

He submitted a letter of grievance to the Personnel Manager on March 15<sup>th</sup> 2005. He received a reply dated March 18<sup>th</sup> 2005 informing him that his grievance was not upheld but informed him that he could raise the issue with the Head of European Telemarketing. The claimant told the Tribunal that he did not see the point in appealing the decision and was very disheartened. He attended his doctor, was diagnosed with severe depression and signed off work.

On March 22<sup>nd</sup> 2005 he wrote to the Personnel Manager in response to his March 18<sup>th</sup> letter. Three of the nine points set out in the letter were read out to the Tribunal. He stated that

1. *“It had been made clear to me from the outset that there was an imminent vacancy in Facilities but that it was at the time blocked by the incumbent taking long term sick leave. That he was thought not likely to return, and that if he did he faced serious disciplinary action.*
2. *That my initial appointment was by way of a back door ruse is not of my doing. I feel that (and have felt for some time) that the fact that I was initially appointed in Chester & that the incumbents had no say in selection has quietly worked against me and has led to the present situation, which I deplore.*
3. *To sum up, I fell humiliated & degraded by the Company & in such a state of mind that I have to seek medical assistance which will probably lead to a short period of certified leave.”*

While on certified sick leave he was informed of a position available in the Facilities department and submitted an application to the People Relations Manager. This position was the job the claimant had been performing before commencing sick leave. An interview was set for May 4<sup>th</sup> 2005. On May 2<sup>nd</sup> 2005 he emailed the People Relations Manager informing him that, on reflection, he was not taking up the interview, was resigning from his position and was reserving the right to seek remedy by way of constructive dismissal. He received a reply on May 5<sup>th</sup> 2005.

The claimant gave evidence of loss.

When asked he said that he had signed his contract of employment in February 2004. This contract stated that he was employed as an Outbound Customer Specialist. The claimant stated that he signed it as he was going along with the “ruse” and what he had been told in Chester in order to facilitate the respondent. When asked, he said that he had received the company handbook. When asked, he said that the Facilities Line Manager had referred him to the Personnel Manager and not the People Relations Manager. The claimant stated that the company had not followed their own company procedures.

On cross-examination he replied, when asked, that it was common knowledge that the employee from the Facilities that was on long-term sick leave was to be dismissed. When asked, he replied that he had not met anyone from the Telemarketing department on his first day of his employment with the respondent. When asked, he stated that he had not asked anyone formally to deal with the situation of his secondment. He thought the post had been allocated to him.

When asked, he said that he only remembered one call and one meeting with the People Relations Manager before he resigned. When asked if he had lodged a formal complaint against anyone he replied no.

On re-direction he stated that he did not appeal the Personnel’s Manager to move him to the Telemarketing department as he felt “abused” by the respondent.

When asked by the Tribunal he stated that the initial interview he had attended was a technical interview, a telecommunications role had not been mentioned.

### **Respondent’s Case:**

On the **second** day of the hearing the Personnel Manager gave evidence. He explained that he was not the direct line Manager to the claimant.

He explained that he had met the claimant in Chester and had wrote to him on February 19<sup>th</sup> 2004 enclosing his contract and informing him that he would contact him later to discuss the temporary position in the Facilities department. He explained that it was unusual to send a covering letter with a contract but he wanted to inform the claimant about the temporary position.

On March 25<sup>th</sup> 2004 he again wrote to the claimant to inform him of the details of his secondment for a 3-month period. The claimant was also informed that he would be given two weeks notice of any change in this arrangement and on completion of the secondment he would return to European Telemarketing department.

On March 10<sup>th</sup> 2005 he wrote to the claimant informing him that his secondment would cease on March 18<sup>th</sup> 2005, he would take up his original role as Telemarketing Customer Specialist and his responsibility allowance of € 8,655 would also cease. The claimant was not happy and told the witness over the telephone. The claimant was asked to put his grievance in writing, which he did on March 15<sup>th</sup> 2005. The witness replied on March 18<sup>th</sup> 2005 stating the claimant’s grievance was not upheld but he was given the opportunity to appeal. The witness told the Tribunal that, in his view, the respondent had been very clear on the claimant’s original employment and temporary position in the Facilities department. When asked, the witness stated that the person the claimant could have appealed the decision to was the head of European Telemarketing department who was the claimant’s Manager.

He stated that the claimant had resigned and he had no involvement in it, the Facilities Line Manager

had informed him. He explained that the claimant had only been seconded in the Facilities department on a temporary basis. The Facilities Line Manager asked the witness to explain it to the claimant.

When asked about the posting of positions, the witness explained that positions in the respondent company were posted internally first then externally. The Facilities Line Manager informed the claimant of the availability of a position he could apply for once he returned to work from certified sick leave. When asked, he stated that there had not been any permanent positions available in the Facilities department in March 2005. He told the Tribunal that he knew the claimant had completed the application form for the position but had subsequently withdrawn it.

On cross-examination he explained that he had been a Human Relations Manager for six years. In relation to the covering letter attached to the contract of employment, the witness explained that he had been asked to include it by head office in Chester. When asked, he stated that he had met the claimant on the first day of his employment and had brought him to the Facilities department. He stated that he had no further contact with the claimant until his secondment had come to an end. The respondent company had decided to terminate all secondments at that time and staff were to return to their original positions.

When asked, he stated that he did not have notes of various conversations he had had with various people in the respondent's headquarters in Chester. When asked, he stated that he had spoken to the Facilities Line Manager about the claimant's grievance and the fact that the claimant had brought up the subject of a permanent position in the Facilities department. When asked, he stated that the People Relations Manager had reported to him but he felt that he, the witness, should deal with the claimant's grievance. When asked, the witness replied that the respondent did have a long-term sick leave policy. When asked about the position that was available in April 2005 in Facilities, he stated that he had not had prior knowledge of its availability as all positions had to be approved.

On re-direction he explained that there had been a freeze on staff except those in customer facing areas.

The Facilities Line Manager gave evidence. He explained that he had been the claimant's line Manager in the Facilities department. He was not involved with the claimant's recruitment.

The witness explained that the premises in Carrick-on-Shannon had a staff of 1,000 with only 2 electricians, 1 out on sick leave. The witness explained that there was a freeze on hiring staff at the time but he had still requested a replacement. He explained that he had received a telephone call from headquarters in Chester informing him that the claimant was to be seconded to his department while an employee was on long-term sick leave. This employee was absent from November 2003 and finally leaving his employment in May 2004.

As the freeze on the hiring of staff was still ongoing in 2005, a directive from Management was issued to return all seconded staff to their original positions. The Personnel Manager asked the witness had he promised the claimant the position he had in the Facilities department but he said that all staff knew that all positions had to be posted.

When asked, the witness stated that the claimant's wages were paid from of the European Telemarketing department. When he had compiled the claimant's appraisal he had stated his location was the European Telemarketing department. When asked, he stated that the claimant had spoken to him about the employee absent on sick leave. The witness said that he told the claimant that if the position was approved it would be posted for application.

The witness explained when the employee on long-term sick leave resigned he completed a form for a replacement to be considered by the Resource Allocation Committee. He explained that if a member of

a department left the Manager would apply for a new employee. The matter would be decided at Management level and posted for application. When asked, he stated that he had notified the claimant that his temporary position was to cease. When asked, he stated that the claimant had been paid a responsibility allowance.

On cross-examination he explained that at the time of the claimant's employment he had 14 staff including 2 electricians. The department ran 24 hours a day. When asked, he said that he had not been privy to the claimant's interview in Chester. When asked, the witness said that he been informed by head office in Chester that the claimant would be on secondment from European Telemarketing department to his department. When asked, he stated that he did not have any record of the telephone conversation. When asked, he said that he never had any problems with the claimant and had no recollection of the claimant complaining of work practices.

When asked, he stated that there could be 2 or 3 call outs per week with a set payment per callout. When put to him that the other electrician was called out more than the claimant, he replied that the security department would get a text concerning the fault and they would put in the call for an electrician. He said that he had not noticed a variance in the number of callouts between the claimant and the other electrician.

When asked, he stated that he had carried out appraisals on the claimant but could not recall specifically what he had written and did not have copies of them to submit to the Tribunal. He stated that the appraisals stated that the claimant was working in the European Telemarketing department. When asked when the claimant approached him about a full-time position he replied that it was in the first 6 months of his employment but was not sure how many times the claimant had asked him about the position. When asked, he said that he might have told the claimant there was a freeze on applications. When asked if he had a problem with the employee on long-term sick leave he replied that Personnel had been dealing with him but he had little expectation that he would have returned to work.

When asked, he stated that he applied for the position to be filled in May 2004. In 2005 he again wrote to the Committee to tell them how critical it was to fill the position. When asked, he stated that it was very clear from the Personnel Manager's letter of March 2004 that the position in Facilities was only a secondment for an initial period of 3 months. When asked what he had done to assist the claimant when he left on sick leave he replied that the Occupational Health department dealt with it.

### **Determination:**

The contract was formed in Chester and the Tribunal entirely accepted the evidence of the claimant as to what occurred in Chester. It is significant that the evidence of the claimant was uncountered by any company witnesses and therefore is uncontested.

We accept that he was an electrician and had always worked as one. We accept that the basis of his move to Carrick-on-Shannon was that he would be employed as an electrician working in Facilities but was described in his contract as a Telesales employee who was seconded to Facilities. We accept therefore that any change of this agreement by the respondent whereby he "reverted" to a Telesales person was not in keeping with the contract of employment.

We however find that that the claimant did not exhaust the grievance procedure made available to him by the respondent and this proves fatal to the claimant's case. There was no reason put forth as to why an appeal to the European Head of Telemarketing would have been unfair or biased and we accept that his failure to avail of this right by resigning on May 2<sup>nd</sup> 2005 is fatal to his claim.

In constructive dismissal cases it is incumbent for a claimant to utilise all internal remedies made available to him unless good cause can be shown that the remedy or appeal process is unfair. Accordingly, the Tribunal uphold the recommendation of the Rights Commissioner and finds that the claimant was not constructively dismissed.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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