

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
Employee

TE 62/2007

CASE NO.
UD1068/2007

against the recommendation of a Rights' Commissioner in the case of

Employer

Under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Quinn BL

Members: Mr. G. Phelan
Dr. A. Clune

heard this claim at Limerick on the 19th May and 21st July 2008

Representation:

Claimant: In person

Respondent: Mr Brian McEnery, Horwath, Bastow Charlton, Horwath House,
The Red Church, Henry Street, Limerick

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an appeal against the decisions and recommendations of a Rights Commissioner reference numbers UD46255/06/MR and TE 46253/06/MR.

There was no appearance entered before the Tribunal by or on behalf of the Respondent to the appeals.

The Tribunal was satisfied that the Respondent was aware of the appeal and had been properly notified of the hearing dates.

There was no appearance at the hearing by, or on behalf of the Respondent.

The only evidence adduced before this Tribunal, was the uncontroverted sworn testimony of the Appellant, which was adduced on the 21st July 2008, through the medium of a translator appointed by the Employment Appeals Tribunal, in the aftermath of the sitting of the 19th May 2008, at which it had become apparent to the Tribunal, that such a service was both desirable and appropriate in this instance.

The Appellant is a Russian national. He is 54 years of age and commenced employment with the Respondent in or about the month of May 2004. In addition to driving a forklift, he exercised a supervisory function with the Respondent, which extended to overseeing from between 10 to 20 employees. Whilst he worked different hours each week, on average he was employed for sixty-six hours over a six-day week. The Appellant commenced being paid at an hourly rate of €7.50 per hour, which rose to a rate of €8.50 per hour, in the course of the second year of his employment with the Respondent.

The Appellant recounted how on the afternoon of the 3rd July 2006, he received a telephone call to meet a representative of the Respondent at O'Connell Street, Limerick. The Appellant attended at this meeting at approximately 5 o'clock that evening, as he was scheduled to commence work at 6pm on that date. At that meeting, a number of allegations concerning, in the first instance, a failure on his part to perform the tasks for which he was employed and in the second instance, repeated unwarranted absenteeism from his place of employment, were put to the Appellant, who was advised by the Respondent to return home and remain away from his place of employment, until after the Respondent had analysed closed circuit television records and reverted to him.

Thereafter, in the absence of hearing from the Respondent, the Appellant visited the premises on a number of occasions to ascertain the position and ultimately on or about the 17th July 2006, when he met with the Respondent's managing director, the Appellant was made none the wiser, but the Respondent demanded and obtained from him, the electronic key to the premises which had remained in his possession. As a result of this exchange, the Appellant considered that he had been dismissed from his employment with the Respondent.

On the basis of the evidence adduced by the Appellant, the Tribunal is satisfied on the balance of probabilities, that all of the circumstances of the interaction between the parties in the month of July 2006, following the confrontation and verbal exchange on the 3rd, are such that, it is more likely than not, that a dismissal of the Appellant was intended and effected by the Respondent, or that such may reasonably be inferred as having been so intended and effected by the Respondent, which in fact and in law occurred. The Tribunal is satisfied in all of the circumstances that a reasonable employee would have understood the Respondent's intention and actions are terminating his employment and it was reasonable for the Appellant to so conclude and believe that he had been dismissed by the Respondent.

Having so determined the fact of the Appellant's dismissal, in the absence of evidence from the Respondent to discharge the burden of justifying the dismissal of the Appellant, as required by the provisions of the Unfair Dismissals legislation, the Tribunal determines that the dismissal of the Appellant was unfair.

In the course of his evidence, the Appellant testified ON OATH as to a number of matters, concerning conditions of his employment with the Respondent and practices that were allegedly adhered to by the Respondent in purported compliance, or otherwise, with its statutory obligations pursuant to the provisions of Income Tax and Social Welfare legislation.

In particular, a mere flavour of some of the grave allegations made by the Appellant against the Respondent, concerned employees working under assumed names to the knowledge and connivance of the Respondent, failure by the Respondent to truthfully and accurately record and return, the correct number of hours worked by employees and wages paid to them, including the

Appellant, the operation in the Respondent's enterprise of a system of double accounting to conceal the factual position concerning such matters and deductions for tax purposes and a failure to provide the Appellant with his P60 and P45 documents.

If such allegations are indeed true and the Tribunal has no reason to doubt the veracity of same, in the absence of the controverting sworn testimony from the Respondent, the Tribunal is satisfied that the terms and conditions of the Appellant's employment as provided by the Respondent, would have contravened the legislation aforesaid and accordingly, as mandatorily required by the provisions of s.8(12) of the Unfair Dismissals Act 1977 as amended, the Tribunal hereby directs notification of the matter, to the Revenue Commissioners, or the Minister for Social and Family Affairs, as may be appropriate, for further investigation.

Determination

The redress sought by the Appellant was compensation and in the absence of any evidence from the Respondent, the Tribunal determines that compensation is the appropriate remedy in all of the circumstances of this case and that neither re-instatement nor re-engagement of the Appellant by the Respondent would be appropriate in this instance.

The Appellant testified that prior to coming to Ireland in 2001, he had obtained third level academic qualifications in both economics and construction studies from Russian educational institutions. It appears that once in Ireland, prior to the commencement of his employment with the Respondent, he had obtained employment first as a toolmaker and thereafter with a contract cleaning company. Notwithstanding the foregoing, from what was demonstrated to the Tribunal by the Appellant, his command of the English language would appear to be minimal.

The Appellant testified that he has not obtained employment since his dismissal by the Respondent in July 2006. The Appellant is not in possession of an employment permit. He alleges that he was never provided with a work permit by the Respondent whilst in its employment. The Appellant testified how he has engaged the assistance of a named Solicitor in Limerick City with a view to progressing matters concerning his official status here. The Appellant testified that in the interim he is studying English online and endeavouring to have his Russian educational qualifications recognised and accredited here.

The Appellant also testified that he had no income at present and was subsisting on borrowings.

In determining the amount of compensation payable to the Appellant, the Tribunal *inter alia* is obliged to have regard to the extent (if any) to which the financial loss referred to by the Appellant is attributable to an act, omission, or conduct, by or on behalf of both the employer and the employee and the measures, if any adopted by the employee, or as the case may be his failure to adopt appropriate measures to mitigate the financial loss aforesaid.

Although the Appellant has a PPS Number and ostensibly had sums of money deducted from his wages by way of PAYE and PRSI, having regard to the apparent failure of the Appellant to engage with his local social welfare and revenue offices to date, for the purposes of obtaining assistance in endeavouring to procure his P.45 and P.60 documentation from the Respondent and furthermore, the introduction of the new scheme as of the 1st February 2007 pertaining to employment permits, pursuant to the provisions of Employment Permits Act 2006, in order to facilitate the employment of foreign workers in this State, the Tribunal is not satisfied that the Appellant's alleged financial loss in this instance, is wholly attributable to the actions, omissions, or conduct of the Respondent,

unlawful as such may have been.

In all of the circumstances, the Tribunal has, in varying the recommendation of the Rights Commissioner, determined that the sum of €13,500 is just and equitable compensation for the Appellant under the provisions of the Unfair Dismissals legislation.

In so far as the claim of the Appellant under the Terms of Employment (Information) Acts, 1994 and 2001 is concerned, the Tribunal is satisfied, on the balance of probabilities, from the testimony of the Appellant, that the Respondent had not provided him with a written statement of his terms of employment as required by Section 3 of the Principal Act and in such circumstances, had thereby contravened the legislation. The Tribunal having calculated the Appellants gross weekly wage in the sum of €561, varies the recommendation of the Rights Commissioner in respect of Mr. Romanichev's complaint, thus ordering the Respondent to also pay to the Appellant, further compensation under this heading, in the amount of €2,244, as is just and equitable, having regard to all the circumstances.

Sealed with the Seal of the

Employment Appeals Tribunal

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(Sgd.)

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(CHAIRMAN)