

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

Employee

CASE NO.

PW71/2008

UD496/2008

against the decisions 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 P. McGrath B.L.

Members: Mr D. Moore
Mr C. Ryan

heard these appeals at Dublin on 17th November 2008.

Representation:

Appellant: In person.

Respondent: In person.

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of appeals by the appellant against the decisions of the Rights Commissioner, ref. R-054518-pw-06/D1 and ref. R-058246-ud-07/D1.

The Tribunal unanimously determines that, as the appellant has not complied with the mandatory statutory requirements for a valid appeal, pursuant to the provisions of section 7(2) of the Payment of Wages Act, 1991, a valid appeal was not before it.

In such circumstances, the Tribunal determines that it has no jurisdiction to hear and determine any such appeal from the said decision of the Rights Commissioner. The Tribunal affirms the Rights Commissioner decision, ref. R-054518-pw-06/D1 and finds that the appeal under the Payment of Wages Act, 1991 fails.

The appeal under the Unfair Dismissals Acts 1977 to 2001 proceeded.

Respondent's Case:

A supervisor gave evidence. Between 8.00 pm and 8.30 pm on 30th July 2007 he arrived on the site where the appellant worked to swap over vans with another supervisor. He had a brief conversation with the appellant and enquired if everything was ok. Shortly afterwards the appellant's friend delivered some fruit to him. The second supervisor asked the appellant's friend to leave the site and asked the appellant to lock up. The appellant responded, "don't tell me what to do". He became upset and said he was being picked on. A row ensued which lasted 10 – 15 mins. The appellant threw his high visibility jacket on the floor and collected his own jacket and walked off the site. A short time later he returned and said he wanted his fruit. The supervisor asked him if he was coming back to work. The supervisor locked up the site around 9 pm.

The Operations Manager gave evidence. The appellant wrote to the company on 28th June 2007 outlining several grievances he had with the company. In the Operations Manager's reply dated 5th July 2007 he attempted to resolve matters and made every effort to meet the appellant. He set up three meetings but the appellant failed to attend any of these. However, the appellant met the Managing Director about his payslips.

On the morning of 31st July 2007 the Operations Manager received a telephone call from the appellant. The appellant told him he had been bullied. He did not inform him that he had been locked out of the site the previous day and could not re-enter. The Operations Manager said he would commence the grievance procedures and informed him that the Managing Director was on holidays at that time. Later that day the appellant telephoned and asked to speak to the CEO. The CEO was not available. The Operations Manager was paged with a request from the appellant for his P45.

During a telephone conversation he had with the appellant on 1st August 2007, the appellant asked for his P45. He told him that firstly he would have to resign. Fifteen minutes later the Operations Manager received a call from the Security Officer in Blanchardstown. The appellant had handed in his uniform and requested his P45.

The Operations Manager told the Tribunal that the terms of employment and grievance procedures were given to the appellant after he commenced employment with the respondent.

Appellant's Case:

The appellant gave evidence. He commenced work with the respondent as a Security Officer in 2005. He was happy at work. Lately his hours were reduced. When he phoned the company about the reduction in hours he was told he was a nuisance and to stop calling and that he would get his hours.

He felt aggrieved as he was regularly working extra hours and was not being paid. On 28th June 2007 he wrote to the respondent indicating that he had problems with his wages but was constantly fobbed off.

On the evening of 30th July 2007 he commenced his shift at 7 pm. Two Patrol Drivers/Supervisors arrived between 7.20 pm and 7.30 pm and parked their cars on the site. They chatted for a while. They entered the security hut. He left the hut and did his walk around. He arrived back at 8.00 pm

and the two drivers did not talk to him. He felt uncomfortable. They were watching him.

As he had forgotten his food that day, he asked a friend to deliver it to him. One of the supervisors asked his friend what he was doing there and called him a black bastard and to get off the site. The appellant told his friend to leave immediately and guided him to the gate.

When the appellant arrived at the gate the two supervisors forcibly removed him from the site. They said “you’re sacked little bastard”. The appellant felt bullied. When he tried to re-enter the site he was told to go home. One of the supervisors passed his food to him through the gate. That night he did not wear his high visibility jacket. He wore his uniform to work and did not bring his own jacket with him. Subsequently, the supervisors threatened to call the Gardai. He did not want to cause trouble and then left. He had worked for the respondent for nearly two years and there had been no difficulties with his work.

The following day, 31st July 2007 he telephoned the Operations Manager and told him that he been bullied and subjected to racist remarks and that he been forcibly removed from the site. The Operations Manager did not respond to these allegations. The Operations Manager understood from the supervisor that the appellant walked off the site. The appellant’s P45 was sent to an incorrect address but was re-directed later to his current address.

The appellant told the Tribunal that he was aware of the company’s grievance procedures. Every time he telephoned the company he felt they did not want to talk to him. He had difficulty trying to talk to the Managing Director.

Determination:

The Tribunal has considered the evidence adduced by the parties herein. Clearly there was an altercation between the appellant and two of his line managers on the evening of 30th July 2007. The Tribunal is not impressed with the version of events offered by either party. However, it is common case that the appellant wound up locked outside the premises within two to three hours of starting his shift at 7 pm. It is almost impossible for the Tribunal to determine whether the appellant walked out of the premises of his own volition or whether he was escorted out by the supervisors. There is no corroborative evidence and at least one of the people that was present on the night did not give evidence.

There can be no doubt that there was a history between the appellant and management with respect to non-payment of wages. The appellant raised some very real and far-reaching grievances including working back to back shifts and not getting overtime or public holiday pay. All the appellant’s grievances were committed to paper on the 28th June 2007 with a reply from the Operations Manager having been received by the 5th July 2007. The Tribunal accepts that the management’s response is complete but notes that no follow-up meeting was arranged with the fault for that lying equally between the parties.

It is understandable to the Tribunal that whatever unfolded on the night of 30th July 2007 the appellant did feel vulnerable. He had raised issues with management after a protracted period of being “fobbed off” and was only latterly getting some response from management.

The company makes the point that the two supervisors on site had no authority to fire or sack an employee in the manner described or at all.

The appellant phoned the Operations Manager on 31st July 2007 and complained that he had been bullied and subjected to racist comments and removed forcibly from the premises. The Operations Manager had already heard the supervisor's version of events and put it to the appellant that he had walked off the site.

The appellant and the Operations Manager seemed to agree that the Managing Director's name was raised in the course of the conversation and that the matter might be referred to him. However, the appellant further understood that he had been "sacked" by the Operations Manager and that his uniform should be returned and his P45 would then be made available.

Ultimately, the Tribunal has to be critical of the Operations Manager's handling of the appellant's issues the day after the incident. By the end of the first phone call it appears that the discussion had turned to the intricacies of receiving a P45 in return for a uniform whereas in fact the Operations Manager having received a very serious allegation of racism and bullying should have invited the appellant to make a statement. In addition, it was not clearly made known to the appellant that the two supervisors did not have the authority to sack him in the manner described.

The Tribunal therefore finds the appellant was unfairly dismissed pursuant to the Unfair Dismissals Acts, 1977 to 2001. That said, the Tribunal finds the appellant was not without an understanding of his rights and could have taken up the offer of addressing this particular incident to the Director. The appellant hastened the termination of his employment without ever allowing the employer to mend its hand by overriding the behaviour of the two supervisors on the night of the 30th July 2007.

The Tribunal upsets the decision of the Rights Commissioner and awards the appellant the sum of €2,500.00 as compensation for loss of earnings under the Unfair Dismissals Acts, 1977 to 2001.

The Tribunal strikes out the appeal under the Payment of Wages Act, 1991 in circumstances where notice was not served on the respondent within the six-week period required under that Act.

The Tribunal understands that the respondent will implement that part of the Rights Commissioner's decision which remains outstanding.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)