

**EMPLOYMENT APPEALS TRIBUNAL**

**APPEAL OF:**

**CASE NO.**

Employer

UD519/2008

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

Employee

-v-

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. Mc Grath BL

Members: Mr G. Mc Auliffe  
Mr. P. Woods

heard this appeal at Dublin on 2nd September 2008  
and 5th November 2008

Representation:

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Appellant :

Dockery, Solicitors, Mespil House, Sussex Road, Dublin 4

Respondent :

Mr Tommy Mc Kearney, Independent Workers Union, 61 North  
Strand Road, Dublin 3

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an appeal by the employer against the recommendation of a Rights Commissioner Ref: r-053713-ud-07/JT dated 15<sup>th</sup> April 2008. The employer is hereinafter referred to as the appellant and the employee as the respondent.

**Appellant's case:**

The Tribunal heard evidence from the then proprietor who stated that the employee worked for the company as a waiter from November 2005 to March 2007 when the employee said he was going to

China for a few months. He was told per company policy that the position could not be held open for him but should a position be available when he returned then they would re-employ him. They work on a ten-day back week basis and when he returned from China he collected his P.45 dated 13<sup>th</sup> March 2007 and balance of his wages. Having enquired from the then manager as to the availability of a job he was re-employed on 13<sup>th</sup> May 2007. At the end May 2007 the employee came to witness in relation to an issue with a payslip and he was told to come back and he would sort it out later. The employee went away and he was rostered to work the following two days Saturday and Sunday but did not turn up either day. He knew his roster a week in advance. On the Monday the manager tried contacting him but he did not answer his phone and messages were left asking if he was coming back to work. At around 5pm on the Monday he asked a friend of the employee's if would be seeing him and he gave him letter dated 3<sup>rd</sup> June 2007, terminating the employee's employment as he did not turn up for work for a few days and he could not communicate with him. This letter had been written on the Sunday night. He did not collect his wages the following Friday and there was no communication from him until he took this case to Rights Commissioner. There is a six week probation period for all employees therefore when he re-commenced his employment on 13<sup>th</sup> May 2007 he started this period of probation.

On the second day of the hearing the Tribunal sought clarification of a number of issues. The representative for the appellant accepted that the respondent had travelled abroad for five weeks in 2006 and his employment had continued over this period. However in 2007 the appellant changed their policy so when the respondent travelled abroad for eight weeks, they could not hold his position open and a P45 was issued so therefore the respondent did not have one years service in June 2007 to allow him to claim unfair dismissals. He conceded that the respondent had not been paid from the 9<sup>th</sup> May to 13<sup>th</sup> May and that this was due to a rostering error.

The Manager of the business at that time who commenced with the appellant in late 2006 gave evidence. He explained that the owner had made it clear to all employees that if they took extended leave that they would have to reapply for their job on their return. As far as he was aware the respondent had been informed of this. On the respondents return from abroad he had approached the owner and secured a position for the respondent.

The respondent recommenced with the appellant, he had a row with the owner on the Friday and he never showed up for work on the Sunday. When he had not reported for work he had tried to contact him over a number of days but had received no response. It was then decided by the owner to issue the respondent with the termination notice.

The proprietor gave additional evidence that in the respondent's previous employment with the company he had received a warning, but when he recommenced for the four weeks he had received no warnings. They had tried to contact the respondent by phone to see if he wished to continue his employment but had got no response. He did not try to contact the respondent by letter. He was aware that the respondent had another job in a comedy club.

On Friday 1<sup>st</sup> June 2007 the respondent had come in looking for his wages and the altercation had happened then. The respondent had not showed up for work as rostered on the Sunday.

The respondent's first P45 was issued on the 13<sup>th</sup> March 2007 and the respondent collected this on his return from abroad.

### **Respondent's case:**

The employee's evidence was that he asked for holidays and went to China on 7<sup>th</sup> March 2007. He returned to Ireland on 7<sup>th</sup> May 2007 and went back to work on 9<sup>th</sup> May. On 18<sup>th</sup> May he received his P.45. He received six hours pay before he left for China and was paid six hours on Friday 11<sup>th</sup> May to cover for a period prior to going to China. He was not paid for the period 9<sup>th</sup> to 13<sup>th</sup> May. On 25<sup>th</sup> May 2007 he asked the then manager about the money outstanding from the first week and he promised to check the matter for him. On Friday 28<sup>th</sup> May the proprietor slapped on the table telling the employee to go away and he felt afraid. When he returned to work after his trip to China he was not told that he was on probation.

According to the employer records he re-commenced working on 13<sup>th</sup> May however the employee disagreed. The employee stated that he was at work from the 9<sup>th</sup> to 13<sup>th</sup> May.

In answer to questions from Tribunal members witness stated that when he received time off to visit China he said he was taking holidays. He understood from a friend that he could get four weeks holidays. The employer stated that employees usually take two weeks holidays at a time. At the time he was going to China he was owed five days holidays and the employer said he was paid in full. The annual holidays are twenty days. Employees get paid into their bank account except for the last weeks pay. The employee said he had been with the employer for two and half years at that stage and he believed that he would get four weeks annual leave rolled into that holiday. Around May/June 2006 he went to China for five weeks and he got four weeks holiday pay. He returned to work immediately after that holiday. When he requested the leave to go to China in 2007 there was no mention that his job could not be kept open for him. The employee stated that he commenced his employment in October 2004 whereas the employer records show his start date as November 2005. According to the employee he was not rostered to work the Saturday or Monday in question.

The respondent was recalled to give more evidence. He confirmed that he had received no payment for the period 9<sup>th</sup> to 13<sup>th</sup> May 2007. He was also seeking two weeks minimum notice. He was not employed for two months after his dismissal. He denied he was working immediately afterwards in a comedy club. He had made no effort to contact his employer before he was dismissed as he was afraid of him.

Under cross-examination he denied he was told that his employment would not be kept opened to him before he travelled abroad in 2007. He did not realise the significance of the P45 dated 13<sup>th</sup> March 2007. He had not asked for his job back on his return he had just reported back to work. He had arrived back on the 8<sup>th</sup> May and started work on the 9<sup>th</sup> May 2007.

### **Determination:**

The Tribunal carefully considered the evidence adduced during the course of this two-day hearing. Essentially this is an Unfair Dismissals claim arising out of a termination of employment, which occurred, by written notice on the 3<sup>rd</sup> June 2007. In addition to this claim the respondent employee is also making a claim under Payment of Wages legislation specifically for a five day period from the 9<sup>th</sup> to the 13<sup>th</sup> May 2007 and for holiday pay which may be due and owing.

Regarding Holiday pay, the appellant makes the case that there is no such entitlement as the respondent's two or three years of employment were terminated in March of 2007 just before the respondent was taking an eight week break to China. The appellant is making the case that the termination which occurred on the 3<sup>rd</sup> of June was in relation to a new service period which had started in mid May 2007 and after the respondent's employment had been terminated in March 2007 and after the respondent had left the country and returned to Ireland on an extended break.

The appellant states that the respondent was told in February/March 2007 that his job could not be held open for him should he choose to leave the country for an extended eight-week period. This was a new policy implemented since the respondents extended holiday in 2006 when the respondent's job had been guaranteed on his return. The appellants therefore made the case that the respondent was only allowed to return to his workplace in May of 2007, as there was an opening available for him.

If the Tribunal accepts the appellants version of events then the Tribunal has no jurisdiction to determine whether the termination of the 3<sup>rd</sup> of June 2007 was fair or otherwise as the requisite fifty two week service had not been worked up.

Neither party gave a convincing account of what passed between them in advance of the respondent's departure to China in March of 2007. The single corroborate piece of evidence was the P45 which issued simultaneously to the respondent's departure. He only received the P45 on the 18<sup>th</sup> May some nine days after taking up employment on return from China.

On balance the Tribunal accepts that the implications of issuing a P45 were intended and understood by the parties and therefore the employment was legitimately terminated in March 2007. In the circumstances the Tribunal is satisfied that the respondent did not have the requisite service to qualify for unfair dismissal under the Unfair Dismissals Acts, 1977, therefore the Tribunal upsets the recommendation of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sad.) \_\_\_\_\_  
(CHAIRMAN)

