

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

Employee
(*appellant*)

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

CASE NO.
UD1339/2008

Employer
(*respondent*)

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Mahon BL

Members: Mr. M. Flood
Mr. J. Dorney

heard this appeal at Dublin on 31st March 2009

Representation:

Appellant: Ciara O'Duffy BL instructed by O'Donnell Solon & Co., Solicitors, 167 Lower
Kimmage Road, Dublin 6W

Respondent: In person

This case came before the Tribunal by way of an employee appealing against the Recommendation of the Rights Commissioner ref:(r-057433-ud-07JT)

The determination of the Tribunal was as follows:-

Appellant's Case

The appellant commenced employment with the respondent in January 2001 where he worked on a book binding machine. He explained that he started to suffer from depression in 2005 but this never affected his work until 2007. He had no difficulties with his employer during the course of his employment. His doctor certified him unfit to work for two months from the 27th June 2007 due to depression. He submitted this certificate to the respondent.

The boss rang him and told him that the certificate was not enough evidence, so he returned to his doctors and asked for copies of his social welfare certificates. However the doctor had already sent

the certificate for the first month. He did receive copies in respect of the second month which he sent on to the respondent.

On his return to work on the 27th August 2007 he discovered another man operating his machine. This gentleman informed him that he was on a contract for eight months with the respondent. He then met a director on the premises who told him that he would have to get a final certificate in order to return to work and he asked him to wait in the office. He waited for about an hour and then left. On the 29th August 2007 he asked for his P45. On the 3rd September 2007 he collected his P45.

He had been happy in his employment. The director or his manager had never told him that his job would be available for him on his return. He gave evidence of loss to the Tribunal.

Under cross examination he recalled he had spoken with his employer at the end of July 2007 but could not remember the employer leaving any messages for him during the period of his absence. He agreed that the respondent told him that his last social welfare certificate was dated up to the 29th August 2009 and informed him that he could not work while claiming social welfare. He also agreed that on his return to work the respondent told him to go back to his doctor to get a final certificate. In response to a question as to why he was not allowed work on the 27th, he said he did not know and that he saw someone in his place. He stated that the two months ended on the 27th August 2007.

He reiterated that the gentleman in his place told him he was on contract for eight months and he queried with the respondent as to why he would leave his permanent job. When he had requested his P45 he did not tell the respondent he had a new job but that he was in training. He said he asked for his P45 as he had nothing to do there. He did not accept that the respondent had no input in to his leaving his employment. In response to a question from the Tribunal he said he had not made any contact with the respondent when he left, as he did not want to go back as he had lost his trust in them.

Respondent's Case

The appellant's line manager gave evidence on behalf of the respondent. He had met the appellant on the shop floor on the 27th August and the appellant was looking bemused. He informed him he had returned too early and asked him to wait in his office so he could speak with him. When he went to the office the appellant was not there. He found out later that a director had informed the appellant of the situation. The appellant was never told his job was gone and he was not dismissed. The appellant had asked for his P45 on the 28th August 2007.

He received no communication from the appellant on the first or second day of his sick leave. During the course of the appellant's absence he tried to contact him and around the end of July the appellant got in touch with him. At this stage he told the appellant he would need to get a final certificate to return to work and also that he may have to see the company doctor on his return. They needed somebody to run the appellant's machine during his absence so they hired an employee from another printing firm on a temporary basis. This replacement was not under an illusion that he was in a permanent position with the respondent.

Under cross-examination he reiterated that he had been unable to contact the appellant during his absence and that they required weekly certificates in relation to his sick leave. When he returned to his office on the 27th August and the appellant was not there, he did not phone him as the director

informed him that he had already spoken to the appellant. A director of the company dealt with the printing firm that had supplied the temporary replacement. This replacement was not on the company payroll at that time and they received weekly invoices in respect of his services. The appellant's replacement was offered a permanent position with them in October 2007 and is currently still employed by them. He confirmed that they had given the appellant an additional two weeks pay when he left, as he had been a valued member of their staff.

A director of the respondent gave evidence that he had negotiated with the other printing firm to engage the temporary services of one of their employees. This replacement was not offered a permanent position when the appellant was out sick. It suited the other printing firm at the time to loan their employee to them. He explained that the cost for this replacement was higher than the appellant's wages as this man was on a higher wage than the appellant and they also had to pay the employers PRSI. He did not contact the appellant after he resigned.

Determination

The members of the Tribunal very carefully considered all of the evidence adduced, statements made and documents submitted during the hearing. The Tribunal heard that during the appellant's absence on sick leave the vacancy was temporarily filled by a hired temporary replacement. The position remained available until a permanent replacement was employed on the 16th November 2007 as per contract signed on the 15th November 2007.

It is the finding of the Tribunal that the appellant requested his P 45, which he collected on the 3rd September 2007 in order to take up an alternative position in another employment and that he did not use or exhaust the opportunities and possibilities available to him with a view to resuming his position with the respondent. The appellant did not present sufficient and adequate evidence that the respondent dismissed him even in a constructive fashion. Accordingly the Tribunal finds that his dismissal did not occur. Therefore having regard to all of the circumstances it is the unanimous determination of the Tribunal that the appeal under the Unfair Dismissals Acts, 1977 to 2007 fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)