

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employee

UD960/2008

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

Employee -v-
Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Sheedy

Members: Mr J. Killian
Ms. P. Doyle

heard this appeal at Cork on 4th February 2009

Representation:

Appellant :

Mr Daniel Snihur, National Secretary, Independent Workers
Union, 55 North Main Street, Cork

Respondent :

XXXX Managing Director

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an appeal by the employee against the recommendation of a Rights Commissioner Ref: r-059517-ud-07/EH dated 25th June 2008.

Neither the employee/appellant or employer/respondent were present at the Rights Commissioners hearing

Respondent's case:

The managing director in his evidence told the Tribunal that the respondent is a sub-contractor. He employed a site foreman/supervisor but he was unable to attend this hearing. Witness was told that bottles of beer were found in different work areas and he was then told that the appellant was found

intoxicated. He was sent home as he was a danger to himself and others. On another occasion the company (hereinafter referred to as P), to whom they were sub-contracted, told him that the appellant came in to work intoxicated. Witness was not on site at the time. Witness visited the site every week or two. The hiring and firing was all done by the site manager. In relation to health and safety all employees including the appellant were officially induced through P's code of practice. P had their own management looking over the management from the respondent. There was a lot of heavy machinery on site and the appellant was intoxicated on two occasions despite having been warned, however no witnesses were present at the hearing to give evidence in this regard. In October 2007 the respondent's business ceased to trade and all the employees were let go.

In cross-examination witness stated that when he issued the appellant with the letter of dismissal dated 18th July 2007 he was unaware that the appellant was on holiday in Poland at that time from 16th July to 4th August 2007. Witness was not involved in the day-to-day running of the site and he was not in a position to verify if any allegations of intoxication referred to this period. The letter of dismissal stated that the downturn in the construction industry was the reason for dismissal, however it did not mention intoxication as an employee would not want to have that mentioned on his work record.

Appellant's case:

The appellant in his evidence told the Tribunal that he was on holiday in Poland from 16th July to 4th August 2007. He worked for the respondent for in or around eighteen months and there was never an occasion when he was drinking or drunk on site. He was required to present a safe pass, which covers all the safety regulations on site, at the start of his employment. The man who did the safe pass course from P explained all the safety regulations to him and the other employees and he had to pass the course. He never received terms and conditions of employment or a contract of employment. When he returned from holidays in August 2007 and reported for work he was told he was let go the previous week. The letter headed "termination of employment" dated 18th July 2007 stated that his employment would cease with effect from 27th July 2007 due to the downturn in the construction industry. There were seven employees when he started with the respondent and this number increased to thirty-three. When he was dismissed others with less service were still working for the respondent.

In cross-examination witness stated that he only took holidays once per year. He was never sent home from work as a result of being intoxicated or for any other reason. While he stated that other employees with less service were kept on he did not have any names or evidence in this regard. He then told the Tribunal of his efforts to obtain alternative employment.

A colleague of the appellant gave evidence that they worked together for nine months and he never saw the appellant intoxicated on site. He has never received terms and conditions of employment from the respondent.

Determination:

The respondent did not have any disciplinary procedures in place and neither was the appellant issued with a contract of employment. No evidence was produced to the Tribunal by the respondent to verify the appellant's intoxication and neither could the appellant provide evidence that he was let go while others with less service were kept on after his dismissal. The Tribunal allows the appeal and taking the aforementioned factors into account and the appellant's failure to

mitigate his loss awards him the sum of €3,000 under the Unfair Dismissals Acts, 1977 to 2007 and therefore overturns the recommendation of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

