

## EMPLOYMENT APPEALS TRIBUNAL

**APPEAL(S) OF:**

Employer

*- appellant*

**CASE NO.**

UD1434/2008

UD1435/2008

UD1436/2008

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

3 Employees

*- respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr M. O'Connell B.L.

Members: Mr E. Handley  
Mr. S. O'Donnell

heard this appeal at Dublin on 17th April 2009

**Representation:**

Appellant(s) : Mr Barry Kenny, Connolly Sullivan, Solicitors, Market Court, Town Hall, Bray,  
Co. Wicklow

Respondent(s) : Raymond O'Reilly, Independent Workers Union, SUI House,  
61 North Strand Road, Dublin 3

*(This case came before the Employment Appeals Tribunal by way of appeal for implementation of the rights commissioner recommendation; r-54947-ud-07/DI, r-054946-ud-DI, r-054927-ud-07/DI).*

The determination of the Tribunal was as follows:-

**Respondent's Case:**

The 2<sup>nd</sup> named respondent gave evidence. He commenced employment with the appellant as a cleaning Supervisor of new house builds on a site in August 2003 working approximately 37 hours a week. He and the other two named respondents did not have contracts of employment but had received payslips.

As time passed business got quieter and he was informed that there were no more houses to work on as the economy had slowed down. He explained to the Tribunal that he was paid on a per house basis.

In April 2007 he was paid half on an hourly rate of € 9.50 and half on a job basis. Hours decreased and therefore wages decreased. He and his colleagues felt this was unfair and tried to negotiate a better price. The rate had decreased from € 120 per day to € 40 per day. Their Manager (known as E) informed them that if they thought it was not fair they could go home. He asked if they were fired and was told, "Yes, go home and leave your stuff". He contacted E and asked for a redundancy payment. She did not agree and said that he and the other named respondents in this case had left the company. He later received a text message telling him he and the other named respondents could come back to work. He went to seek advice. His representative contacted the appellant company to set up a meeting but it never took place.

On cross-examination he agreed that he had left the employment for a month in August 2006 as he did not get on with E but had returned to work. He agreed he had received a P45. He attended a meeting on May 22<sup>nd</sup> 2007, on behalf of himself and the other respondents, with E and the owner of the appellant company. He told them that he and the other respondents would have been happy to stay if they were paid an hourly rate but was told no. He said they should be paid the 3 weeks as they had not worked and should be paid redundancy but were told no. He was asked if they would return on the new rate and he replied no. He felt there was no point having another meeting. An advertisement was placed for prospective employees by the appellant on the old rate of pay.

The 3<sup>rd</sup> named respondent gave evidence. He commenced employment in April 2005 as a cleaner. His Supervisor informed him that no one had a contract of employment and would be paid an hourly rate. Business declined and he was informed they would be paid a unit rate, € 50 per apartment and € 100 per house. He explained that it could half a day to clean a house. Their rate had decreased by up to € 250 per day. He felt the appellant company wanted to change the rules no matter what the employees wanted.

When asked he said that he had asked for a contract of employment but received no answer. He disagreed that he was employed on a casual basis. On April 27<sup>th</sup> 2007 E came to speak to them and informed them they would be paid on a unit basis. He was asked if he wanted to work and if not they could put their stuff down. He disagreed that another member of the appellant company had arrived that day to tell them she would discuss the cement left on the windows by the builders. He could not remember if he and the other respondents in this case asked if they were fired. He did not work after April 22<sup>nd</sup> 2007. He did not attend the meeting of May 22<sup>nd</sup> 2007 but his supervisor did. He gave evidence of loss.

### **Appellant's Case:**

The owner of the appellant company gave evidence. She explained that her company offered a service of an "initial" cleaning on new builds. She said the respondents were good employees. The 3<sup>rd</sup> named respondent was employed on a casual basis and was employed if work was available.

In 2007 there was a slowdown in business. On April 27<sup>th</sup> 2007 she received a call from E. She drove to the site in Tyrellstown and spoke to the builders about the cement on the windows. The respondents said they would not clean the overly dirty windows but were told to just move on with their work and they would get the builders to sort it out. On that day the respondents asked on a number of occasions if they were fired and were told no. They told her they were leaving. When they left she put an advertisement for new employees as the respondents had walked out. This advertisement did not guarantee a 37-hour week and was at a lower rate per hour.

She said that the respondents had been offered work inside the houses but they declined. At the

meeting in May 2007 she was offered two options, to pay 3 weeks wages and guarantee a 37 hour week or fire them and pay redundancy. She said that she wanted them to stay but could not guarantee them the hours. She thought they took 2 staff on and a previous employee returned. She never dismissed anyone.

On cross-examination she said that she had received a complaint from the building foreman on site saying the respondent had been sitting around talking. He wanted the price to change from hourly to a unit basis.

**Determination:**

As the appeal from the Rights Commissioners received amounts to a de novo hearing the 1<sup>st</sup> named respondents is obliged to attend. As there is no appearance the appellants' appeal in this case is allowed.

It is common case that the 2<sup>nd</sup> named respondent broke his service with the appellant for a period of 4 weeks. The circumstances surrounding the break in service, while subject of some dispute, did not allow the 2<sup>nd</sup> named respondent to avail of the statutory exceptions to the requirement of unbroken service of 12 months. Accordingly the Tribunal declines jurisdiction. The Tribunal notes this issue was not raised at the Rights Commissioners hearing but the Tribunal's lack of jurisdiction requires it to set aside the recommendation.

The Tribunal took a poor view of the quality of the industrial relations procedures in the appellant company. It also notes that the appellant did not provide the respondents with a written contract of employment. However, it notes that the appellant has taken steps to rectify this deficiency. The Tribunal is not persuaded that the 3<sup>rd</sup> named respondent was dismissed as he alleged. The Tribunal then consider whether it was reasonable for him to leave his employment in circumstances where there was a proposed change in the method of payment to him. The Tribunal does not believe it was reasonable for him to leave in these circumstances.

Accordingly the Rights Commissioners recommendation is set aside and the appellant's appeal succeeds.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)