

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

Employee

UD693/2009
RP613/2009

Including against the recommendation of a Rights Commissioner
R-070677-UD-07 (sic) under the Unfair Dismissals Acts in the case of

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. Clancy

Members: Mr. J. Redmond
Ms. H. Henry

heard this appeal at Loughrea on 14 July 2009

Representation:

Appellant:

Ms. Agnes O'Connor, Citizens Information Centre,
Augustine Street, Galway

Respondent:

Mr. Tom Smyth, Tom Smyth & Associates,
41 Halldene Drive, Bishopstown, Cork

The determination of the Tribunal was as follows:

This appeal arose as a result of an employee (the appellant) appealing against a recommendation of a Rights Commissioner R-070677-UD-07 (sic) in the case of an employer (the respondent) under the Unfair Dismissals Acts and a related appeal by the employee for a lump sum payment under the Redundancy Payments Acts

The respondent who is a plastering contractor employed the appellant, initially as an apprentice and then as a plasterer from January 1997. The employment was uneventful other than for an ongoing issue with absenteeism on Mondays which clearly annoyed the respondent but about which no formal disciplinary measures were taken.

It is common case that some time in October 2007 the respondent became aware that the appellant intended going to Australia although how the respondent became aware of this is in dispute between the parties. Both agree that the matter was raised immediately after a

colleague of the appellant raised a grievance with the respondent. The appellant's position is that it was done face to face, the respondent's position that it occurred during a telephone conversation made by the colleague to the respondent using the appellant's mobile telephone. The respondent asserts that during this conversation the appellant told him, "*I don't give a damn, I'm going to Australia after Christmas*" and that this was heard on speakerphone by the respondent's wife.

The appellant's position is that the respondent had told him there would be a job for him when he got back, the respondent's position is that he made no such statement, but rather as two of the appellant's brothers had left his employment and gone to Australia on a permanent basis without advising the respondent of their intention to not return, the respondent formed the opinion that the appellant was going to do likewise.

The appellant's trip to Australia was next discussed shortly before Christmas 2007 when the appellant's position is that he told the respondent that he was leaving Ireland on 7 February 2008 and returning on 7 April 2008. The respondent's position is that the appellant merely confirmed that he was going to Australia in February 2008 and the appellant walked away before any further discussion could ensue on the matter.

The appellant and the respondent both attended a wedding towards the end of January 2008 and the appellant's position is that at this wedding he discussed with the respondent an accident which had recently befallen the appellant's brother in Australia with the thought that he might need to extend his stay in Australia. The respondent's position is that he did not discuss the appellant's trip to Australia with the appellant but that colleagues of the appellant, who were also at the wedding, had told the respondent that the appellant was going to Australia for a year.

The appellant's last day at work for the respondent was on Friday 1 February 2008. He left for Australia on 7 February 2008 and returned on 7 April 2008. During the appellant's time in Australia the respondent employed a new plasterer. The respondent's position is that he issued a P45 to the appellant's home address on 15 February 2008 showing a date of leaving of 3 February 2008. The appellant's position is that no P45 was received at his home. The appellant contacted the respondent soon after his return from Australia and was told that there was no work currently available.

The appellant contacted the respondent on two more occasions the last time being 22 July 2008 when the respondent told the appellant that he should go on Social Welfare and that the appellant should call to the respondent's house in order to collect his P45. The form T1A was lodged with the Tribunal on 26 August 2008. Whilst there have been periods of lay-off for the respondent's employees since this time no employees have been declared redundant.

Determination:

The appellant was replaced in February 2008 shortly after his departure for Australia. No positions have been declared redundant since that time. The Tribunal is satisfied that this is not a redundancy situation and accordingly the appeal under the Redundancy Payments Acts, 1967 to 2007 must fail.

When considering the appeal under the Unfair Dismissals Acts the first issue to be established is the date of dismissal.

The Tribunal is not satisfied that the appellant was issued with a P45 in February 2008

as contended by the respondent. The Tribunal is comforted in this view by the fact that, on the appellant's return in April 2008, the respondent did not mention the issuing of a P45. Both parties accept that the P45 was first discussed on 22 July 2008 and the Tribunal is satisfied that this was the first time that the appellant became aware that he had been dismissed. A dismissal cannot be effected by the mere mental exercise of an employer. For this reason the Tribunal is satisfied that the appellant was dismissed on 22 July 2008 when the respondent suggested he collect the P45 from his house.

Accordingly the Tribunal is satisfied that the claim under the Unfair Dismissals Acts was lodged in the six-month period allowed and that there is jurisdiction to hear the appeal.

Whilst the Tribunal accepts that brothers of the appellant may have left the respondent's employment abruptly to live in Australia this does not justify the respondent making the assumption that the appellant was going to do the same thing and not return.

The respondent made no meaningful attempt to ascertain what the appellant's intentions were; rather he merely replaced the appellant and moved on. No attempt was made to warn the appellant of the consequences of his actions. This dismissal was without any, or fair procedure. For all these reasons that Tribunal is satisfied that the appellant was unfairly dismissed.

Having noted the fact that the respondent's employees have suffered significant lay-off in the period since the appellant was dismissed, the appellant's failure to satisfy the Tribunal about his attempts to mitigate his loss and the appellant's contribution to the situation that arose by not properly communicating his intentions to the respondent, the Tribunal measures the award under the Unfair Dismissals Acts, 1977 to 2007 at €5,000-00

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)