

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

Employer
– *appellant*

CASE NO.

UD912/2009

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

Employer – *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. Mahon B.L.

Members: Mr. M. Noone
Ms. A. Moore

heard this appeal at Dublin on 29th July 2009

Representation:

Appellant(s): Ms. Karan Talbot B.L. instructed by Mr. Raymond Noone, Kelly Noone & Co., Solicitors, Taney Hall, Eglinton Terrace, Dundrum, Dublin 14

Respondent(s): Ms. Deirdre O’Kane B.L. instructed by Ms. Yvonne Brogan, Muldowney Counihan & Co., Solicitors, Office 3, Clon Court, Main Street, Clonee, Dublin 15

The determination of the Tribunal was as follows:-

(This case came before the Employment Appeals Tribunal by way of the employer [*hereinafter referred to as the appellant*] appealing against the recommendation of the rights commissioner under the Unfair Dismissals Acts, 1977 to 2007, reference r-049802-ud-07/JT, dated 19 November 2007).

Preliminary Issue:

At the outset of the hearing, Counsel for the respondent raised a preliminary issue as to the Tribunal’s jurisdiction in this matter. It was contended that this appeal against the recommendation of the rights commissioner had been lodged with the Tribunal outside the period of six weeks as provided for under the Unfair Dismissals Acts, 1977 to 2007. The Tribunal heard oral submissions from Counsel for both parties in relation to this issue.

Respondent's submission:

Counsel for the respondent submitted that this appeal had been lodged to the Tribunal outside of the time limit as prescribed under the Acts. Section 9 (1) of the Unfair Dismissals Act, 1977 provides that “*A party concerned may appeal to the Tribunal from a recommendation of a rights commissioner in relation to a claim for redress under this Act and the Tribunal shall hear the parties and any evidence relevant to the appeal tendered by them and shall make a determination in relation to the appeal.*”

Section 9 (2) of the 1977 Act, as amended by section 8 of the Unfair Dismissals (Amendment) Act 1993 provides that “*An appeal under this section shall be initiated by a party by giving, within 6 weeks of the date on which the recommendation to which it relates was given to the parties concerned, a notice in writing (containing such particulars (if any) as may be specified in regulations under section 17 of this Act for the purposes of section 8 (8) thereof) to the Tribunal and stating the intention of the party concerned to appeal against the recommendation and a copy of the notice shall be given to the other party concerned by the Tribunal as soon as may be after the receipt by it of the notice.*”

Counsel for the respondent submitted that the rights commissioners hearing of the case had occurred on 5 September 2007 and the recommendation had issued to the parties concerned on 19 November 2007. By her calculations, the appeal against the recommendation should have been lodged to the Tribunal by 31 December 2007, without allowing for postal delays.

The issue of the lodgement of the appeal outside the time frame as prescribed under the Acts was a preliminary issue that had to be dealt with and the Tribunal could not be estopped from dealing with same.

The rights commissioners recommendation was dated as signed on 19 November 2007 and date-stamped as having been received by the Tribunal on 9 January 2008. Also, the appeal itself was not properly before the Tribunal as the actual rights commissioners recommendation had not accompanied the Notice of Appeal (*the T1-B form*). The Tribunal received the Notice of Appeal on 9 January 2008 (date-stamped accordingly) but the Tribunal did not receive the actual recommendation of the rights commissioner until 3 April 2009 (date-stamped accordingly). While there may have been an intention to appeal against the rights commissioners recommendation, the technicality of doing so did not occur until 3 April 2009.

Counsel for the respondent highlighted that the recommendation of the rights commissioner had been received from the rights commissioners by the respondent's legal representative on 20 November 2007 and date-stamped accordingly by that office. (*The original of same was opened to the Tribunal*). No cover letter had accompanied the recommendation when it was received from the rights commissioners and there was no such letter. The only correspondence that had been received from the rights commissioners in this regard was the actual recommendation.

Accordingly, Counsel for the respondent submitted that, based on the reasons stated above, this appeal was out of time when lodged to the Tribunal.

Appellant's submission:

Counsel for the appellant submitted that as they had not been on notice of this preliminary issue, the respondent could be estopped from raising it. However, she confirmed that as the issue had been raised, she would deal with it.

Counsel referred to letter dated 8 May 2009 from the appellant’s legal representative to the Tribunal Secretariat wherein was stated in part that “the Decision of the Rights Commissioner which apparently was made on 19th November 2007 was communicated to our Office by letter dated 10th December 2007 and therefore could not reasonably have been received here until 12th December 2007 or 11th December 2007 at the earliest. Our Appeal was filed as of 9th January 2008 which is well within the six week period”. (*sic*) When asked by the Tribunal for a copy of the letter of the 10th December 2007, which had been referred to in the appellant’s legal representatives letter of 8 May 2009, Counsel explained that the letter did not appear to be on their file. An opportunity was given to Counsel, through a short recess by the Tribunal, to have the letter faxed to the Tribunal from the office of the appellant’s legal representative. Following the resumption of the hearing, Counsel explained that there had been no luck in locating said letter.

Counsel for the appellant referred to a number of letters that had passed back and forth between the appellant’s legal representative and the Tribunal. The Tribunal’s letter of 27 March 2009 had stated that a decision of the rights commissioner must be appealed to the Tribunal within six weeks of its receipt and as the Tribunal had not received the recommendation, it could therefore not proceed with the appeal. In the Tribunal’s letter of 3 April 2009, it had been stated that the appeal appeared to be statute barred. The reply from the appellant’s legal representative of 8 May 2009 had referred to their receipt of the letter/recommendation of the rights commissioner on 12 December 2008. It had been felt then by the appellant’s legal representative that the matter had been dealt with as the appeal was processed by the Tribunal. They had been told that the appeal would not be processed unless the time limit issue was dealt with. When the appeal was then processed, it was felt that there was no further issue about the time limit. There had been no notification that the issue of the time limit would be raised as a preliminary issue.

The intention to appeal against the rights commissioner’s recommendation was formed immediately by the appellant once the outcome/content of the recommendation was communicated to them. This had been over the Christmas period of 2007. The setting in motion of the appeal had been complicated by a bereavement of a family member of one who had represented the appellant. However, it was the intention of the appellant at all times to appeal against the recommendation of the rights commissioner and this intention to appeal had been formed at the earliest opportunity.

Accordingly, Counsel for the appellant contended that based on the reasons as set out above, this appeal to the Tribunal was not out of time.

Determination:

The issue of the lodgement of an appeal against a recommendation of a rights commissioner within the prescribed time frame as provided under the Unfair Dismissals Acts, 1977 to 2007 is central to any application of this nature and is an issue the Tribunal would have addressed as a preliminary issue had the matter not been raised by the respondent’s representative in the first instance.

The Tribunal noted that a number of letters passed back and forth between the appellant’s legal representative and the Tribunal Secretariat. Some of same can be summarised as follows...

09 January 2008 date-stamp for...	fax of form T1-B under cover letter dated 9 January 2008 from the appellant’s legal representative to Tribunal Secretariat
10 January 2008 date-stamp for...	original T1-B form under cover letter dated 9 January 2008 from the appellant’s legal representative to the Tribunal Secretariat
Letter dated 10 January 2008	from Tribunal Secretariat to appellant’s legal representative acknowledging receipt of the original T1-B form and requesting that a

	signed copy of the recommendation of the rights commissioners be forwarded in order to process the claim. Also stated therein “a decision of the Rights Commissioner must be appealed to the Tribunal within six weeks of receipt of the Rights Commissioners recommendation”.
Letter dated 05 March 2009	from Tribunal Secretariat to appellant’s legal representative enclosing a copy of letter dated 25 February 2009 for their information, which the Tribunal had received from the respondent’s legal representative. In the letter from the Tribunal Secretariat was stated in part “please inform the Tribunal on your intentions in this matter.”
Letter dated 24 March 2009	from appellant’s legal representative to the Tribunal Secretariat which stated in part “refer to the Notice of Appeal which we filed with the Employment Appeals Tribunal under cover of our letter of 9 th January 2008...As far as we are concerned no Appeal date had yet been fixed and we are awaiting hearing from you with an Appeal date and it is our Client’s intention to fully defend this matter”
Letter dated 27 March 2009	from Tribunal Secretariat to appellant’s legal representative enclosing a copy of the Tribunal Secretariat’s letter of 10 January 2008 wherein a signed copy of the rights commissioners decision had been requested. In this letter of 27 March 2009 was stated in part “a decision of the Rights Commissioner must be appealed to the Tribunal within six weeks of receipt of the Rights Commissioners recommendation.” Also stated therein was “To date we had not received this (<i>the signed recommendation of the rights commissioner</i>), and therefore cannot proceed with the claim.”
Letter dated 31 March 2009	from appellant’s legal representative to the Tribunal Secretariat enclosing the signed copy of the recommendation of the rights commissioners.
Letter dated 03 April 2009	from Tribunal Secretariat to appellant’s legal representative, which stated in part “In order to appeal the Rights Commissioner’s recommendation, notification must be made to the Tribunal within six weeks of the date that the decision was communicated to you. From the information supplied in your correspondence it would appear that you are outside the time limit for making the appeal and the appeal would therefore appear to be statute barred. The Tribunal will await your instruction before processing this appeal.”
Letter dated 08 May 2009	from appellant’s legal representative to the Tribunal Secretariat which stated in part “the Decision of the Rights Commissioner which apparently was made on 19 th November 2007 was communicated to our Office by letter dated 10 th December 2007 and therefore could not reasonably have been received here until 12 th December 2007 or 11 th December 2007 at the earliest. Our Appeal was filed as of 9 th January 2008 which is well within the six week period”.
19 May 2009	The appeal was processed by the Tribunal Secretariat

In relation to the contention that, by their reply of 8 May 2009 and with the processing of the appeal by the Tribunal on 19 May 2009, the appellant’s legal representative thought that the matter of the time limit had been dealt with and was no longer a issue to be answered, it should be noted that the Tribunal Secretariat is an administrative body only and had no decision making functions. All decisions are ultimately a matter for a Division of the Employment Appeals Tribunal on the day of a hearing.

The Employment Appeals Tribunal is a statutory body bound inter-alia by the Unfair Dismissals

Acts, 1977 to 2007. It acts under the provisions of statute and has no discretion to act outside of those provisions. Section 9 (2) of the Unfair Dismissals Act 1977, as amended by section 8 of the Unfair Dismissals (Amendment) Act 1993 clearly states that “*An appeal under this section shall be initiated by a party by giving, **within 6 weeks** of the date on which the recommendation to which it relates was given to the parties concerned, a notice in writing... to the Tribunal*”.

The Tribunal finds that there is a strict statutory limit on the time for an appeal against a rights commissioner's recommendation to the Employment Appeals Tribunal. This recommendation was dated as signed on 19 November 2007. The T1-B form (*Notice of Appeal*) was received by the Tribunal by fax on 9 January 2008. Counsel from the respondent produced the original rights commissioner's recommendation which had been received by them on behalf of their client and which had date-stamped 20 November 2007 - the date of its receipt by them. She contended that no cover letter had accompanied the recommendation. Counsel for the appellant contended that they had received a cover letter and the accompanying recommendation from the rights commissioner on 11/12 December 2007.

Having carefully considered the submissions of the representatives for the appellant and respondent, and based on the evidence available to it, the Tribunal is not satisfied that the appeal against the recommendation of the rights commissioner in this case was made within the six weeks from the date on which the recommendation was communicated to the parties concerned, as prescribed under the Acts. The Tribunal does not have discretion to extend the time limit. Consequently the appeal under the Unfair Dismissals Acts 1977 to 2007 must fail and accordingly, the recommendation of the rights commissioner is upheld.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)