EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: **CASE NO.**

Employer ***employer/appellant*** TE3/2009

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

Employee – ***employee/respondent***

under

TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. O'Connor

Members: Mr. D. Hegarty
Mr. K. O'Connor

heard this appeal at Tralee on 29th April 2009

Representation:

Appellant(s): In person

Respondent(s): Mr Noel Murphy, Independent Workers Union, 55 North Main Street, Cork

(*This case came before the Employment Appeals Tribunal by way of an appeal by the employer [hereinafter referred to as the appellant] against the recommendation of the rights commissioners; r-063840-te-08/EH dated 29 October 2008*)

The decision of the Tribunal was as follows:-

Preliminary point:

The respondent's representative stated that the Tribunal could not hear this appeal as it had beenmade outside of the prescribed timeframe of six weeks. The latest date that the appeal could havebeen made to the Tribunal was 10 December 2008. The copy of the T1-B (*Notice of Appeal*) thathe had received bore the Tribunal date stamp of 22 December 2008.

The appellant stated that they had made their appeal to the Tribunal by correspondence dated 7 December 2008. The Tribunal Secretariat had acknowledged receipt of the correspondence by letter dated 10 December 2008.

After carefully examining the file and all of the correspondence contained therein, the Tribunal determined that this appeal against the recommendation of the rights commissioners was made to the Tribunal within the required timeframe. Section 8(2)(a) of the Terms of Employment

(Information) Act, 1994 states "a *n appeal under this section shall be initiated by the party concerned giving, within 6 weeks of the date on which the recommendation to which it relates wascommunicated to the party, a notice in writing to the Tribunal…and stating the intention of theparty concerned to appeal against the recommendation.*"

The notice of appeal was received in the Tribunal on 10 December 2008 and date-stamped accordingly. As no T1-B form was received with this appeal documentation, the Tribunal Secretariat replied to the appellant on the same date – 10 December 2008 – acknowledging receipt of the correspondence and enclosing a blank T1-B form for completion. The completed T1-B form – and copies of all of the documentation that had originally been received by the Tribunal on 10 December 2008 – was received by the Tribunal on 22 December 2008 and date stamped accordingly. However, only the documentation bearing the date stamp of 22 December 2008 was copied to the respondent. The Tribunal was satisfied that the information contained in the correspondence, received by the Tribunal on 10 December 2008, complied with the requirements of the Act and meets the criteria for the making of such an appeal and that the appeal was received by the Tribunal within the prescribed time frame.

Substantive issue:

Appellant's case:

In direct evidence, the appellant/employer stated that the respondent received a contract of employment within his starter pack, when he commenced his employment in 2001.

The respondent had alleged that he did not receive a contract of employment yet in his submission to the Tribunal, he admitted to receiving a draft of the contract of employment. In his complaint to the rights commissioner in 2008, the respondent had stated "no contract has been given by the company until now". (*sic*) In the submission to the Tribunal, the respondent had written "I was notissued with a contract at time of employment in 2001 only a copy of a proposed draft which wasnever signed by anyone". (*sic*) (*A draft of the 2001 contract was opened to the Tribunal. Examplesof two contracts which had issues at the same time in 2001 to two other employees and which hadbeen signed by them were also opened to the Tribunal*). The appellant admitted that they did nothave a signature of the respondent on the contract but by his own admission, the respondent didreceive same. Accordingly, it was incorrect to allege that they – *the appellant* – had not compliedwith section 3 of the Act.

After negotiations with the unions in January 2008, revised terms and conditions of employment were issued to employees. Letter dated 8 January 2008 to the respondent highlighted to him that from an audit of H.R. files, it appeared that a signed copy of his contract of employment was not on file. He was asked therein that, if he had a copy of the contract that had been initially supplied to him and if same was available to him, to forward a copy to the appellant. All he did was to instigate a complaint under the Act with the rights commissioner.

Contracts of employment had been issued to all employees in October 2001, when the company commenced. At that time, there were thirty to forty employees.

Other documents, which had been contained in the respondent's starter pack of 2001 had been signed by the respondent and returned to the appellant by him. Though these documents referred to the contract, they were not part of the contract. The appellant confirmed that they had no signed contract for 2001 for the respondent on their file.

The respondent confirmed that SIPTU was the recognised union for negotiation purposes on all issues. Some of the improved terms and conditions of employment were not reflected in the 2001 contracts and the appellant wanted them reflected in the contracts of 2008. With the agreement of SIPTU, the 2008 contracts were distributed to all staff for signature. 85% to 90% of employees accepted the new contracts. As most staff were members of SIPTU, they were bound to accept what had been negotiated.

Respondent's case:

In his opening statement, the respondent's representative stated that the respondent did not deny that a contract of employment was contained in the respondent's starter pack in 2001, but this document was a discussion draft. Discussions never happened. The draft of the new contract of 2008 varied greatly from the custom and practice that existed since 2001.

In his sworn evidence, the respondent confirmed that he worked for the appellant from 2001 and he received a draft of a contract of employment in his starter pack, when he commenced employment. However, between 2001 to 2008, the content of the draft was never discussed with him nor was he ever approached by the appellant to discuss same. There had never been any disciplinary issues or problems with his work

The respondent stated that he was never notified that the appellant wanted to change his conditions of employment. The new contract of 2008 proposed a variety of changes including the respondent's job description and the place where his work stated.

The respondent had been presented with a contract of employment in 2001 and asked to sign same. He did not sign this draft contract, nor did he sign the 2008 contract. From the respondent's recollection, in 2001, the employees were asked to sign two documents from the starter pack. The contract was not to be signed at that time, but was to issue at a later date, for signature. No one approached him for his signature for the contract that had been in his starter pack.

In cross-examination, the respondent confirmed that no one in management approached him to discuss the 2001 draft contract.

The appellant confirmed that he was a member of the Independent Workers Union. He had never been a member of any other union.

At the commencement of his employment, the respondent and colleagues were called to a meeting in Killarney where management at that time went through the contents of the starter packs and they signed some of the documents contained therein. However, they were not asked to sign the contracts. When put to the respondent that the contents of the starter pack (i.e. the contract, Garda clearance request, confidentiality agreement, etc.) were discussed at the meeting, he replied that the contents of the contracts were not discussed to a point which would allow them to be signed. He agreed that though the contents of the contract may have been discussed, he was not asked to sign it

Replying to Tribunal questions, the respondent confirmed that he no longer works for the respondent, having left by way of redundancy. In 2001, he commenced employment as a driver. His only job from day one was to drive, to check the equipment in the vehicle, to ensure that all the equipment was available to the doctor and to keep the vehicle clean.

Determination:

This was a "de novo" hearing by the Employment Appeals Tribunal against the recommendation of the rights commissioner.

Under the Terms of Employment (Information) Act, 1994 and 2001, employers have a statutory obligation to give to their employees written terms and conditions of employment. Pursuant to section 3(1) of the Act, "*an employer shall, not later that 2 months after the commencement of an employee's employment with the employer, give or cause to be given to the employee a statement in writing*".

Section 3 of the Act also provides that such a written statement shall contain the following particulars of the terms of the employee's employment –

"**(*a*)** *the full names of the employer and the employee*
(*b*) *the address of the employer in the State or, where appropriate, the address of the principal place of the relevant business of the employer in the State or the registered office (within the meaning of the Companies Act, 1963)*
(*c*) *the place of work or, where there is no fixed or main place of work, a statement specifying that the employee is required or permitted to work at various places*
(*d*) *the title of the job or nature of the work for which the employee is employed*
(*e*) *the date of commencement of the employee's contract of employment*
(*f*) *in the case of a temporary contract of employment, the expected duration thereof or, if the contract of employment is for a fixed term, the date on which the contract expires*
(*g*) *the rate or method of calculation of the employee's remuneration*
(*h*) *the length of the intervals between the times at which remuneration is paid, whether a week, a month or any other interval*
(*i*) *any terms or conditions relating to hours of work (including overtime)*
(*j*) *any terms or conditions relating to paid leave (other than paid sick leave)*
(i) incapacity for work due to sickness or injury and paid sick leave, and
(ii) pensions and pension schemes
(*l*) *the period of notice which the employee is required to give and entitled to receive (whether by or under statute or under the terms of the employee's contract of employment) to determine the employee's contract of employment or, where this cannot be indicated when the information is given, the method for determining such periods of notice*
(m) *a reference to any collective agreements which directly affect the terms and conditions of the employee's employment including, where the employer is not a party to such agreements, particulars of the bodies or institutions by whom they were made*".

Section 3(4) of the Act states **"***A statement furnished by an employer under subsection (1) shall be signed and dated by or on behalf of the employer*." The Tribunal paid particular attention to the use of the word "shall".

Section 3(5) of the Act states "*A copy of the said statement shall be retained by the employer during the period of the employee's employment and for a period of 1 year thereafter*."

The question to be determined by the Tribunal in this case was whether the document titles "Terms and Conditions of Employment – Driver – Draft for discussion Purposes only", which was furnished by the appellant to the respondent and confirmed as so furnished by the respondent, metthe requirements of section 3 of the Terms of Employment (Information) Act, 1994 and 2001. Having heard the evidence that was presented in this case, the Tribunal finds that

the document thatwas supplied by the appellant did not meet with the requirements of the Act as it was deficient in anumber of areas…

1. it did not provide the respondent with the effective date of the commencement of his employment as required under section 3(1)(e) of the Act.
2. it was not signed and dated by the employer as required under section 3(4) of the Act.
3. a copy of the said contract was not retained by the employer as required under section 3(5) of the Act

In the circumstances of this case and based on the reasons stated above, in dismissing the appellant's appeal, the Tribunal upholds the award of €700.00 under the Terms of Employment(Information) Act, 1994 and 2001, as set out in the rights commissioners recommendation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)