EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: **CASE NO.**
EMPLOYEE - ***appellant*** UD565/2008

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: Ms. P. Clancy

Members: Mr. G. Phelan
Dr. A. Clune

heard this appeal at Ennis on 3rd December 2008
and 17th February 2009

Representation:

Appellant(s): Mr. Ronan Murphy, Ronan Murphy, Solicitors, Level 1, Liosbaun Industrial Estate, Tuam Road, Galway

Respondent(s): Mr. Glenn Cooper, Dundon Callanan, Solicitors, 17 The Crescent, Limerick

(*This case came before the Employment Appeals Tribunal by way of an appeal by the employee [hereinafter referred to as the appellant] against the recommendation of the rights commissioners; r-054766-ud-07/JOC dated 30 May 2008*)

The determination of the Tribunal was as follows:-

Appellant's case:

The appellant gave evidence that in January 2001, he attended an interview chaired by PeC in Moscow to work for the respondent. He received a work permit and visa and commenced employment with the respondent on the 19 July 2001. Copies of all of the appellant's work permits during the course of his employment were opened to the Tribunal and all were issued in the respondent's name.

Initially after commencing employment, the appellant received no payslips. The appellant open his P60 forms for each year of his employment. On same, the name of his employer was stated and referred hereafter to as AM Agency, an employment agency. Each year that the appellant travelled home to Russia, the respondent provided him with a letter for the Garda National Immigration Bureau (G.N.I.B.), a sample of which was opened to the Tribunal.
The appellant was quite sure that when he had come to Ireland, the respondent was going to be his

direct employer. The respondent's operation manager would ring him with his hours of work; he received their safety statement, training and equipment. He received his pay cheque once a month from AM Agency.

In November 2001, the appellant was going to bring his family to Ireland so he asked the production manager about his prospects within the company. The production manager gave him encouragement as he had been with the respondent for over six months and the probation period was normally from six to eight months. In February 2002, he was quite sure that his probation was complete so in April, he brought his family to Ireland. The first time the appellant realised that he was employed on a contract basis was when he applied for a mortgage.

In 2005, the appellant had to take time off work because of repetitive strain injury to his neck and back. He gave details of the treatment he received in relation to this injury. It took him from the 13 November 2005 to 29 June 2006 to get fit to return to work. He contacted the respondent and was told there was no work available at that time. The appellant continued to contact the respondent on a weekly basis. Six weeks later in August MaF told him that the respondent did not want him back to work at all. He received no written statement from the respondent saying he was dismissed.

The appellant submitted a complaints form to the right commissioner's. There were on going discussions between the respondent, the appellant and the appellant's union representative to resolve the issue. The appellant produced a copy of a letter dated 19 December 2006 to the Tribunal, which was signed by the H.R. manager and which confirmed that the respondent would be applying to renew the appellant's work permit. This work permit issued in April 2007. It had been negotiated that the appellant would return to work for the respondent. He had been certified fit to return to work by the company doctor.

A letter from the respondent to the appellant dated 5 June 2007 was opened into evidence. This letter referred to the appellant not presenting himself for work or nominating a suitable commencement date. The appellant maintained that he was in contact with the company at this time. However, the contract of employment appeared to be a new contract and hence the appellant would lose his years of service. The appellant thought that this would affect his residential status. A copy of this new contract of employment was opened to the Tribunal.

In cross-examination, the appellant once again denied that a meeting had taken place in March where he said he could not work. He had one accident in work in 2004. No accidents had occurred in 2005. The repetitive strain injury had occurred in late April 2005. It was put to the appellant that MaF would say in evidence that he – MaF – had received no telephone call from him after he had left work in November and no contact had been made with the respondent until the meeting in March 2006. The appellant refuted this and repeated that no meeting had occurred in March and that he had contacted MaF by telephone. In June 2006, he had also contacted MaF by telephone.

The appellant had not called to the respondent's premises to meet MaF. It was put to him that he had called to the premises in June 2006 and had gone to MaF's office, where he told MaF that he wanted to say goodbye and take his things. The appellant said that this had happened in January 2006, that as he was going to Russia, he wanted to take things out of his locker to clean.
It was put to the appellant that after speaking to MaF in June, he never telephoned the respondent again and the next thing the respondent received was a letter from his union representative in August 2006.

The appellant received his last salary in November 2005. He brought the letter of 2 December 2005, which he had received from the Sports Injury & Acupuncture Clinic to AM Agency and they

told him to give it to the respondent. He gave the respondent the letter on the 3/4 of December 2005. He travelled to Moscow in February 2006 but did not inform the respondent of this. However, there were sick certificates every two weeks from his doctor which covered his absences. These sick certificates were given to AM Agency until the end of June 2006.

The appellant recalled the negotiations that took place between the respondents and his union representative where a compromised agreement was reached in December 2006. It was put to the appellant that he was aware that this agreement resulted in a new contract for him with establishing him as a direct employee with the respondent. The appellant cancelled his hearing with the rights commissioners as a result of this agreement, and because the respondent was applying for a new work permit for him. The respondent's representative outlined that the appellant had met with H.R. to discuss his return to work. The appellant had informed H.R. that he had wanted to return to Russia to see a doctor. He said that this meeting took place in May 2007. He was told then that there was not much work available so he thought he would travel home to Russia. The appellant refuted that he had refused to give a start date but had confirmed that he could start any day.

The respondent wrote to the appellant on the 5 June 2007 seeking a back to work date and the appellant's representative replied to this on behalf of the appellant. The respondent's representative outlined the content of this letter of reply for the Tribunal. From the outset, the appellant was seeking re-instatement. The offer from the respondent had been a new contract of employment. The appellant's union representative thought that this was unacceptable. The appellant replied thatthe respondent had denied that he was an employee of theirs for nine months and discussions should have started earlier. The respondent had told him and his union representative that they hadnot received the union letter of the 8 June 2007 so he had sent his own letter to the respondent. Theappellant refuted that he had abandoned his job on the 12 November 2005.

The appellant is legally in Ireland but cannot work as his work permit is for the respondent. He cannot find alternative work because of this. He felt that he would have a better chance of residency if he was working.

Replying to questions from the Tribunal, the appellant confirmed that his work pattern was irregular. Some days he was offered work and other times not. Often, there would be no work during the summer months as airlines were busy. When he left work on 12 November 2005, he told the manager he was sick. He also telephoned MaF the following day. The appellant refuted that a meeting had taken place in March 2006 involving himself, MaF and MMc.

The appellant did not sign the contract of the 3 August 2007 as it was not valid. There was a mistake in it in relation to a date and also it was a new contract of employment and not re-instatement which he had sought. He had wanted to meet with the respondent to point this out and to have his employment with them since 2001 recognised. The appellant thought if he signed this new contract of employment, he would lose his service. He had given his medical certificates to AM Agency because when he went to the respondent, he was instructed by MaF to submit it to AM Agency. MaF had told him to give these medical certificates to AM Agency as they were his employer. The appellant confirmed that he had not made a claim for personal injury against the respondent.

In re-cross examination, the appellant confirmed that he had received medical certificates from his doctor in 2005, which allowed him to claim disability benefit. However, since 2005, he never made claims for any social welfare benefit. He had no income during the years of 2006, 2007, 2008 and 2009. He had completed social welfare claim forms but did not submit them because he did not

think that this grievance with the respondent would have continued for this length of time and also, he thought that he would have been unable to apply for long term residence if claiming disability benefit. He had survived on the financial support of family and friends and on the once-a-month child support benefit. His wife did not work. When asked how he lived and paid for rent and food without an income, the appellant replied that he did not live and this was not life. The respondent had promised him his job back and now he was waiting for the outcome of the Employment Appeals Tribunal hearing. He had sought alternative employment around the country, though recently this was less and less because employers did not want to go through the routine of applying for a work permit for him. The appellant confirmed that he had not applied for permanent residency or citizenship.

As the appellant was unrepresented on the first day of this hearing, the respondent's representative confirmed that he had no objection to a brief re-direct examination of the appellant's evidence.

When asked to outline the series of events that lead to the hearing before the Employment Appeals Tribunal, the appellant explained that he had come to Ireland on the basis of a work permit. On same was specified the names of the employee and employer, and that employer had been the respondent. He had worked under seven work permits and believed that the respondent was his employer. They had controlled his working hours and his rest breaks. AM Agency had paid him monthly by cheque which he had considered strange. The respondent had told him that this was going to be the situation. In August 2006, he was told that his employment had been terminated.

The appellant explained that the reason he removed things from his locker was to prepare and clean the items for his return to work. He had been out of work for three months at that stage.

In his affirmed evidence, AS explained that following the termination of the appellant's employment, he assisted the appellant in looking for another job. In February 2008, he took the appellant to one such job interview. However, the appellant was unsuccessful at same because he did not have the necessary paperwork. He was told that he could only work for the respondent.

In his affirmed evidence, DP explained that he was a friend of the appellant and had tried to find a job for him in a hotel in the region. DP went with the appellant so as to speak to the hotel manager and seek a simple job for him such as kitchen porter. The appellant showed his papers about his status in Ireland to the hotel manager but when the hotel manager saw same said he could not employ the appellant.

DP also sought a job for the appellant on a mushroom farm in the midlands. This was around June 2008. The appellant took his paperwork – his PPS number, work permit and passport - to this job interview but the mushroom farm owner said that he could not help because the work permit was only for work with the respondent. After this, PD was in no doubt that he could not help the appellant. The problem was with the work permit which precluded the appellant from getting an alternative job.
In cross-examination, DP confirmed that he understood that when a non-national lives in Ireland for a period of five years, such a person could make an application for residence.

Respondent's case:

In his sworn evidence, the operations manager (*hereinafter referred to as PeC*) explained that the respondent is involved in the repair, refurbishment and maintenance of aircraft.

The respondent required a level of expertise from its employees. The respondent had two aircraft

hangars and in one hangar, the external parts of an aircraft were dealt with while in the second hangar the internal. The appellant was involved in external aircraft work. Aircraft maintenance is a highly regulated industry and this work is at the forefront of the industry. Work on an aircraft is finished to the required standard both internally and externally and the respondent and customer's quality control people monitor the full process. The nature of the business is seasonal in that there is plenty of work in the winter but in summer while aircraft are flying, things are quieter.

Employment Agencies were used by the respondent to supply qualified workers to augment their own staff and were paid an hourly fee for same. Traditionally staff came from the U.K. but because of demand in 2001, the respondent had been unable to get enough staff. AM Agency approached the respondent about a recruitment fair in Moscow. PeC and another went to Moscow to conduct interviews. Resulting from the interviews, suitable candidates were short listed, based on their experience and understanding of English. PeC presented his list of suitable candidate to AM Agency and then had nothing more to do with the matter. The suitable candidates were drawn from heavy industry or were car painters.

Before going to the recruitment fair in Moscow, the respondent arranged with AM Agency that recruited candidates would be paid on the basis of work sheets. AM Agency would invoice the respondent and the respondent would pay them at an hourly rate of pay.

Despite being paid by AM Agency and receiving his P60 forms from them, the appellant worked for and was trained by the respondent. The initial training was on safety, chemical handling and working from heights. The appellant received a progressive on-going training, which is called continuation training and has to be documented. It was part of the regulations of the aircraft maintenance industry that such continuation training is done and documented. The appellant had come from the car painting industry.

PeC was aware that the appellant had requested to work on night shifts. However, while on nights, the appellant fell asleep during his breaks and it was felt that his work was slipping so it was decided to return the appellant to day work and to supervise him. Though not involved, PeC was aware of a meeting which happened in February/March 2006 between MaF, AMa and the appellant.

Subsequent to the appellant's complaint under the Unfair Dismissals Acts to the rights commissioner, a meeting took place in December 2006. The meeting was conducted in a local hotel and present were AMa and PeC from the respondent, the appellant and his union representative. The meeting was an attempt to resolve the unfair dismissals claim. It was agreed that the respondent would apply for a new work permit for the appellant and a new contract of employment would issue upon receipt of the new work permit and the appellant passing a medical. The appellant requested a letter for social welfare to show that a work permit was being sought for him. The appellant also told of his debts so it was agreed that he would be paid €300.00 per week by AM Agency. By way of telephone call in April/May from the appellant's union representative, PeC was made aware that the €300.00 had not been paid to the appellant. PeC was told that the appellant was destitute but when he asked if the €300.00 per week was being claimed, he was told that it was not, because of cultural differences. When PeC asked why the €300.00 was not being claimed if the appellant was so destitute, the union representative had said that he would check with the appellant and revert back.

A work permit and successful medical report was received for the appellant but the respondent could not get a return-to-work date from him. The new work permit had been given to the appellan t. AMa had prepared a new contract of employment and was trying to get a return-to-work date from the appellant but none was supplied. At that stage, the respondent had got frustrated

with theappellant because they had wanted him back to work. After receiving the telephone call from theappellant's union representative, it was decided to allow the matter go forward to the rights commissioners. N o further contact was received and then the proceedings with the rightscommissioners commenced again.

At the December 2006 meeting, the appellant had given the impression that he had wanted to return to work. However, when he was asked to sign the new contract and the waiver to the proceedings before the rights commissioners, the appellant went back into negotiations mode and sought backpay for the period he had been out of work. As he would not supply a return-to-work date, therespondent formed the view that he did not want to return. The respondent's representative referredto letter dated 29 May 2007 from the appellant's union representative to him – PeC – and to thepoints therein that they were "seeking (*the appellant's*) reinstatement to his position" there was "aclear onus of responsibility on (*the respondent*) to reimburse (*the appellant*) for his loss of wagessince June 2006, which would be consistent with the legal definition of reinstatement". (*sic*) PeCdenied that there was any agreement from the meeting in December 2006 to pay back pay to theappellant.

In relation to his letter dated 05/06/07 to the appellant, PeC had written in part therein that "despite your assurances…you have not presented yourself as available for work or nominated a suitable commencement date. This also applies in light of the telephone contacts with you to determine thesame."(*sic*) PeC explained that AMa would have made the telephones calls to the appellant.

In letter dated 8 June 2007 from the appellant's union representative to PeC, reference was again made to the reinstatement of the appellant, and to a request for a further meeting to discuss "the contract terms in relation to terms and conditions of employment to include pay, sick pay, insurancecover, and an acceptance that his period of employment had been of a continuous nature." Theappellant also wrote to PeC on 14 June 2007 and PeC confirmed that he received this letter. PeCagreed that in this letter, the appellant had written that he was "really afraid to continue work in [*therespondent*] without…proper understanding of specifics of my employment." There was a furthermeeting between AMa and the appellant but PeC was not involved in it and all further correspondence were between AMa and the appellant's union representative.

PeC explained that the current position is that there was no trust between the respondent's managers and the appellant. The appellant had taken his complaint of unfair dismissals to the rights commissioners and then, on appeal to the Employment Appeals Tribunal.

The respondent currently employees twenty-eight people including administration staff and they had no plans to engage more full-time employees. The agreement that had been negotiated with the appellant was no longer available because of the current market situation. In 2006 and 2007, the respondent had long term work forecasts with large airlines. However, these airlines are now struggling. The respondent's work is seasonal and in January 2009, a loss was sustained. Now there is only six weeks forecasted work. Employees who would now choose to leave the respondent would not be replaced.

In cross-examination, PeC agreed that as operations manager, he was involved in AM Agency and had gone to Moscow at their request. It had been the intention that the short list of suitable candidates that he had given to AM Agency would be the people who would come to Ireland. He had given the list of suitable candidates to AM Agency.

The appellant received site-specific training. He was under the control of the respondent's team leader and then the respondent's production manager. Difficulties arose when it was noted with concern that the appellant was not taking his rest breaks while working on days. The appellant wanted to work night shifts, and while working on nights, he would fall asleep in the canteen during his break. This sleeping on break was not a disciplinary issue. Contract employees would not have received disciplinary procedures from the respondent, nor would the appellant have received notice of termination of employment from the respondent. The respondent paid nothing extra to AM Agency for employees to work on nights. PeC was not in a position to know what procedures the appellant had received from AM Agency.

When put to PeC that confusion had arisen over whether the appellant was being re-engaged or re-instated, PeC replied that from the respondent's point of view, the agreement had been for a new contract of employment, a new work permit and an allowance of €300.00 per week until the new work permit was received. Things began to change when the appellant sought back pay. However, everyone had left the meeting in December with the same understanding.

AM Agency had not been at the December meeting but an arrangement was put in place with them that all the appellant had to do was to telephone them to claim the €300.00. PeC did not know the mechanics of AM Agency which would simply have allowed a cheque for €300.00 be issued to the appellant.

The appellant had not signed the new contract of employment. When his successful medical was completed, AMa had approached the appellant for a re-start date. However, the appellant would not provide a date because he felt that he was not medically fit to return to work and that he required medical treatment in Russia.

Replying to Tribunal questions, PeC confirmed that the respondent worked with AM Agency on the basis that they were a manpower supply agency. A number of people who had been recruited in Moscow had been offered contracts of employment by the respondent and the respondent had made a financial settlement with AM Agency for same.

It was put to PeC that despite his claim that a clear understanding of what was on offer to the appellant had been established at the December meeting but subsequent to that meeting, the appellant's union representative had written about the appellant's re-instatement, no reply had beenmade by the respondent to rebuke the re-instatement claim. PeC replied that, from the initial meeting, the respondent had felt that the appellant was not their direct employee and this was thepoint that they had made at the hearing before the rights commissioner. PeC did not understand theu-turn of the appellant's union representative in relation to the agreement and he assumed that ithad something to do with the status of the appellant. They had not replied to the appellant's unionrepresentative because it had become very frustrating, and instead decided to allow the matter gobefore the rights commissioner. PeC stated that he – and all who were present at it – was very clearwhat was decided at the December meeting; that the appellant would receive a new contract ofemployment, a new work permit and an allowance of €300.00 per week.

The appellant was out of work since 12/13 November 2005 to date. PeC was aware of a meeting in mid 2006 between MaF and the appellant. At a meeting with PeC, the appellant had said that MaF was aware that he – *the appellant* – was out of work on sick leave. PeC maintained that this was not the case and that the appellant had simply not shown up for work, which was not unusual with agency staff.

In sworn evidence, MMc confirmed that she was a director and general office manager of AM

Agency and had contact with the appellant and respondent.

MMc had not been involved in the initial recruitment of the appellant in Moscow. At that stage, AM Agency had a recruitment licence. The respondent had been their client and they had been the facilitators in getting staff for them. However, in 2001, it had been difficult to get qualified personnel for the respondent. The respondent's work was seasonal. AM Agency had a list of candidates which the respondent would screen for suitable recruits. The appellant had been issued with his P60 forms by AM Agency and he had been on their payroll. AM Agency received an hourly fee for the candidates they supplied to the respondent.

In November/December 2005, issues arose with the appellant. MMc received weekly time sheets from the respondent with the hours worked that week by an employee. However, around this time, she noticed that no hours of work appeared for the appellant. MMc thought that it was in December when she telephoned MaF to find out if the appellant was on holidays, and was told that the appellant had not shown up for work. She then tried to make contact with the appellant. Contact was made in 2006 when she arranged a meeting for the appellant, the respondent and themselves. MMc thought that this meeting occurred around March 2006. It took place in the respondent's office and in attendance were the appellant, MaF and herself. She accompanied the appellant to the meeting. MMc could not recall exactly what happened at this meeting. The appellant had said that he was out of work on sick leave due to a work related accident in November 2005. However, no record of such an accident could be found in the respondent's accident book. An argument also happened between the appellant and MaF.

MMc confirmed that she received medical certificates from the appellant during 2006 though she could not recall exactly when she had received them. The appellant had not submitted these certificates to AM Agency on a regular basis. She had requested them from the appellant. (*Copies of the medical certificates were opened to the Tribunal*). MMc also confirmed that she had received letter dated 18 May 2006 from the appellant's doctor and in same was stated in part "[*The appellant*] had received treatment…and is making progress. He is still receiving injections from…and this is expected to go on for another month or so. I expect that he will be fit to resume work in about a month." (*sic*) MMc received this certificate in October 2006. However, it did not state that the appellant was fit to return to work. MMc could not recall when she received letter dated 3 June and 2 December 2005 respectively, and which were from the appellant's Sports Injury& Acupuncture Clinic, nor could she remember when the appellant had given her the receipts for the medical treatment which he had received. However, AM Agency had offered the appellant medical assistance around mid 2006 and MMc felt that the medical receipts were not received by them any sooner than this time.

In a letter dated 17 October 2006 from the appellant's union representative to MMc, reference was made to a meeting that occurred in 5 October 2006. MMc agreed that in this letter, the union representative enquired as to the current employment status of the appellant, the measures being taken to allow the appellant return to work, the right of the appellant to be back paid his wages since June 2006 and that no request had been made of the appellant by either the respondent or AM Agency that he submit medical certificates. MMc had replied by letter dated 27 October 2006 and requested in same that the appellant supply a medical certificate certifying his fitness to return to work. She had also expressed surprise in the letter that the appellant had not made some contact. MMc confirmed that she had tried to telephone the appellant on a number of occasions but he had not returned her calls.

A fellow director of MMc wrote to the appellant on 13 November 2006 and in same highlighted to him that he had been informed repeatedly since early October about an offer of employment with

the respondent and requested that he contact the respondent directly about this offer. In letter dated 14 November 2006, the appellant's union representative had replied and raised a number of queries, including the appellant's future employment status with the respondent and stating, for the recordthat "between June 2006 and October 2006 neither [*AM Agency*] or [*the respondent*] requested [*theappellant*] to provide a fitness to return to work certificate." (*sic*) MMc's reply of 15 October 2006stated in part that…

1. it was the obligation of the respondent to renew the appellant's work permit
2. the appellant was still on the books of AM Agency but had not been paid by then since November 2005 due to his absence on sick leave
3. a copy of the appellant's doctor's letter of 18 May 2006 was received by AM Agency during the meeting on 5 October 2006 and in same was stated that the appellant was expected to be fit to return to work one month from that date (i.e. 18 May 2006)
4. a fitness to return to work certificate for the appellant was requested by AM Agency at the meeting on 5 October 2006 so as they could advise the respondent of same. The fitness to return to work certificate remained outstanding
5. while awaiting the fitness to return to work certificate, AM Agency had contacted the respondent who had advised that they had work available and asked that the appellant be advised of same, and this had been done
6. the appellant would no longer be paid by AM Agency but would be on contract to the respondent
7. MMc had tried, unsuccessfully, to arrange a meeting with the appellant to advise his of the situation to see if he was agreeable to same
8. "for the record, I [*MMc*] must reiterate that I asked [*the appellant*] several times before and after June 2006 that he provide us with a cert of fitness so that I could contact [*the respondent*] with regard to a return to work date."

The reply of 29 October 2006 which MMc received from the appellant's union representative stated that any work permit application signed by the appellant and made by the respondent on his behalf could only be processed in the context of re-instatement and not on the basis of a new job offer. MMc confirmed that this was the last communication which she received form the appellant's union representative. In one subsequent telephone call from the appellant's union representative, MMc was informed that the appellant was in financial difficulty and in arrears of rent to his landlord, and MMc offered to pay the appellant's landlord so as to help resolve the issue.

In cross-examination, MMc confirmed that her only involvement was in paying the appellant and made his tax deductions from the fees received by AM Agency from the respondent. The last day that the appellant had worked was in November 2005. He had then been out sick. When he called to the office of AM Agency, MMc had told him that he could claim social welfare benefit. In 2006, he had requested his P45 form and MMc had told him that same could be supplied when the form was requested in writing. However, the appellant was still on the books of AM Agency at that time and there had been work available for him. MMc confirmed that the appellant was still an employee of AM Agency though he had not worked in two and a half years.

The appellant had not produced medical certificates when requested to do so but MMc was not sure when she had made such a request for medical certificates. When put to MMc that the appellant had gone on sick leave in November 2005 and had supplied a medical certificate of the Sports Injury & Acupuncture Clinic in December 2005, MMc agreed that she had received it.
Replying to Tribunal queries, MMc said that the appellant's hours of work were provided by the respondent. The appellant was recruited in Moscow but MMc did not know if he was given a

contract of employment and his hours of work. She agreed that AM Agency had facilitated with payment of the appellant. However, AM Agency did not supply a H.R. facility to the respondent and were not technically the appellant's employer. It had been the respondent who had applied for the appellant's work permit. A work permit had to be made out to the place where a person worked.

No certificates had been provided to certify that the appellant was fit to return to work. By November, AM Agency had been taken out of the loop and negotiations were then between the appellant and the respondent. It had not been MMc but another director of AM Agency who had dealt with the respondent's arrangement to have an allowance of €300.000 per week paid to the appellant. MMc did not have a record of this arrangement for the Tribunal hearing. However, she highlighted that AM Agency had offered assistance to the appellant with his medical and rental expenses.

When put to MMc that there is a legal obligation to an employer to give an employee written terms and conditions of employment, MMc replied that technically, AM Agency was not the appellant's employer. They were only providing his payroll and this was noted by Revenue. As MMc was not involved in the interview in Moscow or in the initial discussions, she was unable to say if the appellant had been told that he would only be on-call with the respondent.

In his sworn evidence, MaF confirmed that he was the respondent's production manager and initially, he had been the appellant's team leader.

As MaF saw it, the relevant period was from November 2005 onwards. After 13 November, the appellant did not show up for work. In January, MaF was contacted by MMc and informed that the appellant was missing from a payment run. In a telephone call in March from MMc, MaF was informed that the appellant wanted a meeting. MaF believed that at this meeting, the appellant would request to return to work. The meeting took place in the boardroom where the appellant became bullish. MaF asked the appellant where he had been since November. He had replied thatthe respondent knew that he – the appellant – had hurt his leg in the docking area in November. However, after checking the accident book, MaF told the appellant that the only record was his hurtleg in the docking area from 2004. To this, the appellant had replied to MaF that "you are a liar". MaF would not be called a liar, told the appellant that he would not accept this and left the meeting. (*A copy of the incident book and the record therein of the appellant accident dated 3/11/04, and acopy of the medical certificate in relation to this accident were opened to the Tribunal).*

The appellant, AMaG and MaF attended the meeting in March 2006. Nothing more was heard from the appellant until mid June when MaF was called to the respondent's reception area. There he met the appellant who wanted to clean out his locker. In line with the respondent's procedures, MaF accompanied the appellant to the lockers. There the appellant cleaned out his locker and MaF took any items that were the respondent's property. Following this, the appellant requested to go into the plant to say goodbye to the lads but MaF refused to allow this because the appellant had no protective gear on. The appellant said "okay" to this, shook hands with MaF and left.

MaF denied that the appellant contacted him several times after this. It never happened that he told the appellant subsequent to this that the respondent had no further work for him. In the second half of 2006, MaF never spoke to the appellant at all.

In cross-examination, MaF confirmed that he was responsible for health and safety. The respondent's health and safety documents had been given to the appellant at his induction. He also

got a facemask, suits, gloves, filters and steel toe-capped boots. MaF took back the full-face mask and the boots when the appellant left.

MaF confirmed that the appellant did not show up for work in November 2005. In January 2006, MMc contacted him when the appellant's name did not show up for payment on the payroll of AM Agency. The appellant was not contacted directly because his record was poor and the respondent had enough people available to do the work.

The appellant had come to MaF to submit a sick certificate of the Sports Injury & Acupuncture Clinic but was told to submit it to H.R. When the appellant was not available for work, he would be taken out of the roster.

Replying to the Tribunal's question that the appellant's coming in June to remove his stuff had not been put in the correspondence to the appellant's union representative, MaF replied that this had been raised at the rights commissioners hearing. MaF agreed that the appellant's evidence had been that there had been no work for him and that he – MaF – had dismissed him but MaF denied that this was the case. MaF always classed workers such as the appellant as contractors. Some such workers requested permanency and received it.

Contractors would be on-call while an effort would be make to keep their own full-time staff working, cleaning the hangars. In February 2005, the respondent had no aircrafts and therefore had no work.

Explaining what was meant to the reference that the appellant's "record was poor", MaF explained that he had been told by the appellant's supervisor that the claimant was sleeping on nights and that his work had gone poor. Accordingly, the appellant had been put back on to day shifts.

The 11 November was the last day that the appellant had worked. MaF did not know what day of the week this was or if the appellant had been scheduled to work on the following day. When someone is out sick, the respondent does not contact them. MaF was not surprised that the appellant did not show for work because during the previous months, his work had become poor. However, no written warning had been issued to the appellant.

MaF denied that the appellant had been told in June 2006 that there was no work available. No work had been available in March. In June 2006, the appellant arrived and cleaned out his locker.

MaF believed that the purpose of the meeting in March 2006 was for the appellant to explain his absence from work. This meeting lasted three minutes. The appellant had said that MaF had known of his accident. The accident book was checked and the occurrence of an accident was denied. The appellant had called MaF a liar. MaF denied that he had dismissed the appellant. Initially, he had been against the idea of offering the appellant a full-time position but was told that it was for the best.

In her sworn evidence, AMa recalled that she attended the meeting in December 2006. The appellant, the appellant's union representative and PeC had also been present at the meeting and it had been held in a local hotel. The meeting was because the appellant was unhappy and wanted a job with the respondent. The appellant had wanted a job, a work permit and a letter for the Immigration Department stating that the respondent was applying for a work permit for him. AMa stated that there was agreement on what was said at this meeting and she was clear about same.
The next day, the respondent applied for a work permit for the appellant. The appellant was with AMa in her office when she applied for the work permit. She also spoke to him about the €300.00

allowance he was to receive from AM Agency. He had said that he had not applied for this allowance and she had told him that he should.

After Christmas, the appellant contacted AMa for an update. She telephoned the Department and was told that the issue of the work permit would take from fourteen to sixteen weeks. The appellant continued to telephone AMa every other week. When the permit was received in April 2007, she contacted the appellant and told him to come and collect it, and retained a copy of the permit for their file. The appellant was told that a medical needed to be arranged for him and he had said okay. The medical was set up for a week later with the respondent's medical people but at short notice, the appellant telephoned to say that he could not attend it. The medical was re-arranged for a week later. The appellant attended this medical appointment and received confirmation that he was fit to return to work. This occurred sometime towards the end of April.

With the medical and work permit in place, AMa called the appellant to a meeting on 2 May. At this meeting, payment, travel, concessions, pension and the respondent's handbook were discussed and AMa told the appellant that they were looking forward to his return. It was an amicable meeting and the appellant was asked for a start date. The appellant had hesitated and replied that he may need to return to Russia for medical treatment. AMa was perplexed at this and asked the appellant to telephone her on Monday with a return to work date. On the Wednesday/Thursday, the appellant had telephoned and said that he did not have a start date. He said that he did not want to mess the respondent around and wanted to resolve the medical issues. AMa had said okay but that he had to come back with a start date, as work was available. The appellant had asked for back pay for the period June to December 2006. However, AMa reminded him that at the December meeting, it had been explained that the respondent was not liable for such a payment. There was no further contact from the appellant from this date on 2 May until the letter of 5 June 2007 from PeC to the appellant.

On 14 June 2007, the appellant wrote to PeC. The next letter referred to was dated 3 August 2007 from AMa to the appellant. AMa was unsure if there had been any correspondence during July as she had been on maternity leave during this time. In her letter of 3 August 2007 to the appellant, AMa had referred to the adjourned rights commissioners hearing, and the meetings of the 15 December 2006 and 27 April 2007. The meeting of the 27 April had been in AMa's office wherethe appellant's employment details were discussed. The letter of 3 August outlined what had beenagreed and arranged at the different meetings, and enclosed in same was a contract of employment. The letter of 3 August also stated in part; "The specifics of your employment were fully explainedto you by me on 27th April. Agreement was reached in December 2006. I have now prepared yourwritten contract of employment and a waiver for you to sign, as enclosed. This is all in accordancewith the agreement we reached in December 2006. You must sign these documents and returnthem to me by next Wednesday, 15th August at the latest. Your start date will be 17th August 2007. If you fail to sign these documents or fail to attend for work on 17th August, then [*the respondent*]will have performed all its obligations under the December 2006 settlement agreement and it willsimply be a matter that you have decided not to take up the offer of employment that has been madeto you under the terms of that agreement."

A hand-written letter dated 22 August 2007 was received from the appellant's union representative in response to AMa's letter of 3 August 2007. In part was stated, "Given that the company hadgiven no indication of its intention to accept [*the appellant's*] re-instatement we see no other optionbut to proceed with the Rights Commissioner hearing. We have given every opportunity to thecompany to resolve the matter. [*The appellant*] again on May 2nd indicated to you his preferredchoice of resolving this issue directly with [*the respondent*]. However the company haveconsistently attempted to avoid dealing with its responsibilities to make good the

losses suffered by[*the appellant*]". AMa's understanding was that at this stage, an impasse had been reached betweenthe parties. The appellant had been offered a contract, a new work permit had been gotten for himand his return to Russia had been facilitated. AMa was coming under pressure from the respondent's director as to what was happening with this situation and she was unable to provide ananswer.

The meeting in December 2006 had been an attempt to resolve issues. AMa stated that there could have been no misunderstanding from this meeting. She had come away from the meeting with a list of to-do things such as applying for a work permit for the appellant, organise a medical for him and put a contract in place which would bring him into permanent employment with the respondent. All of this had been confirmed to the appellant and his union representative.

AMa confirmed that the content of the letter of 27 August 2007 from the respondent's legal representative to the appellant's union representative was an accurate reflection to the situation. Insame was stated "[*The respondent's*] understanding of the arrangements that were made inDecember 2006 is that in resolution of all the disputes between the parties, [*the appellant*] would beoffered and would accept a new contract of employment". The appellant had frustrated this agreement. As H.R. manager, AMa had offered a good faith agreement to the appellant. He hadwanted to work for the respondent so AMa did not know why he had not joined the respondent andsupplied a start date.

In cross-examination, AMa confirmed that subsequent to December 2006, the appellant had been anxious to get back to work and his medical had been done. It was put to AMa that from the content of the correspondence from the appellant's representative, the appellant's "re-instatement" appeared to be the issue. However, AMa stated that she did not think there was confusion over this, as the appellant had wanted a contract, a work permit and a letter for the Immigration Department. When put to AMa if the appellant had wanted a new contract or a continuation of his contract, she replied that he had wanted a contract with the respondent and this is what he had received.

In relation to the €300.00 allowance that had been arranged for the appellant, he had been told to contact AM Agency and they would pay the allowance to him. When AMa reminded him of the allowance during their meeting, the appellant had been evasive.

When put to AMa by the Tribunal that in evidence, the appellant had said that he had been dismissed but MaF had said that he was not dismissed but had left, why then had the respondent offered the appellant a new contract, AMa replied that the appellant had worked for the respondent and there was a position for him. They had decided to offer the appellant a position so as to satisfy him.

AMa confirmed that she was the respondent's H.R manager. She had taken her own diary notes at the meetings of what she had to do arising from same, the work permit and the letter for the Immigration Department. There had been two meetings, the first related to the agreement about what had to be done and the second one to confirm what things were happening.

The letter of 29 May 2007 from the appellant's union representative to PeC indicated that the appellant was seeking re-instatement and not re-engagement. In letter dated 5 June 2007 to the appellant, PeC sought confirmation from the appellant that within ten days of the letter, he was available to commence work on or prior to 15 June 2007, otherwise they – the respondent – reserved the right to withdraw the offer of work. In letter dated 8 June 2007 from the appellant's union representative to PeC, reference was again made to the appellant's re-instatement and not re-engagement under an entirely new contract of employment. The next correspondence was the

appellant's hand-written letter of 14 June 2007 to PeC. The respondent's reply was by letter dated 3 August 2007 to the appellant, and enclosed was a contract of employment. When questioned as to why a reply had not been made to the correspondence from the appellant's union representative, AMa replied that, to be honest, there was frustration by that stage. By that stage, an agreement had been reached at the December meeting. In hindsight, the letters from the appellant's union representative could have been replied to so as to set out what had been agreed and to clear up any uncertainty.

AMa agreed that a waiver had also been enclosed in her letter of 3 August 2007 to the appellant. She confirmed that this was not normally done but because of the previous issues with the appellant, the respondent wanted a clean slate going forward. At the December meeting, it had been categorically said that back pay from June to December 2006 was not going to be paid to the appellant but that he would get an allowance through AM Agency until such time as his work permit was issued. The waiver was to cover the December agreement going forward and also the issue of the non-payment of back pay.

It had been a mystery why the appellant was not returning to the job when it had been offered to him. All the dots had been joined, the work permit received and the contract of employment issued. The issue of the loss of some statutory entitlement on the signing of a new contact of employment had not been raised at the December meeting.

AMa agreed that another meeting could have been called because of the hesitation of the appellant to return to work. The appellant had explained that he had medical issues which he wanted resolved in Russia. AMa thought that this was why the respondent was not getting a return to work date from the appellant. By this stage, the respondent had had an expensive medical check-up done on the appellant.

Closing statements:

In his closing submission, the respondent's representative made the following points…

1. the rights commissioners received the claimant's claim in October 2006 and the rights commissioner's recommendation was appealed to the Employment Appeals Tribunal. What the claimant alleged was unfair dismissal. The rights commissioners initially adjourned their proceeding to allow the parties' time to resolve the matter and the respondent made every effort to do so. However, for some reason, a resolution did not happen either because of misunderstanding from the meeting in December 2006, or the claimant did not actually want to return to work, or the respondent was at fault. It was not the case that the negotiations resulted in a binding agreement, which was reneged upon. The respondent's representative maintained that it was not appropriate for the Tribunal to investigate the negotiations, as they have no bearing on this case. The only matter that should concern the Tribunal was the issues that occurred between October 2005 and August 2006.

2. if the Tribunal finds that the claimant has incorrectly named the above respondent as a party to these proceedings, then the claim for unfair dismissals fails. However, if the respondent was the employer of the claimant, then the question for the Tribunal is whether there was a dismissal and if so, was it fair.

3. by his conduct, the claimant abandoned his work and ultimately, he resigned from

his employment by his long absence.

4. there were substantial discrepancies in the evidence and that this was a matter for the Tribunal but the respondent's evidence had been that the claimant had not shown up for work for long periods of time. The claimant said in evidence that he attended a meeting in December 2005 when he produced sick certificates but the respondent's evidence had been that the sick certificates could not have been received until April 2006.

5. the respondent's evidence was consistent in referring to a meeting in March 2006 but which the claimant maintained happened in December 2005. There was also the meeting in June 2006 when the claimant came and cleaned out his locker, though the claimant denied that this happened. In 2006, the claimant asked for his P45 form from MMc. All of this is consistent with the claimant leaving his job in June 2006.

6. in his evidence, the claimant said that he telephoned the respondent in the weeks subsequent to June 2006 and was told that there was no work available. The respondent's evidence had been that he never spoke to the claimant subsequent to him cleaning out his locker.

7. if the evidence of the respondent was correct, the claimant stopped coming to work, did not submit sick certificates until April 2006, cleaned out his locker in June 2006 and had his union representative write to the respondent in August 2006 seeking confirmation of his employment status. In such circumstances, there was an abandonment of work by the claimant and in this context, there was no active dismissal. The claimant had maintained that he had been advised that there was no work available for him in August but the respondent had denied that this had happened. The claimant had already left his employment by this time.

8. if the Tribunal decided that the claimant was an employee of the respondent's, it should be noted that the remedy sought by the claimant is re-instatement. However, this is not an appropriate remedy because trust no longer exists between the parties. The claimant's employment history shows that he did not put his best foot forward. Also, at this time, the respondent has a full workforce complement.

9. if the Tribunal finds for the claimant and decided on a monetary award, then it should be noted that the claimant made a substantial contribution to his dismissal by not showing up for work and by not providing medical certificates. At the meeting in March 2006, he alleged an injury and called MaF a liar, while in June 2006, he cleared out his locker. If this is not sufficient to show that the claimant resigned, then it is sufficient for a finding that the dismissal was fair.

In his closing submission, the claimant's representative made the following points…

1. all issues that happened subsequent to the rights commissioners hearing are a matter for this Employment Appeals Tribunal.

2. for all practical purposes, the respondent was the claimant's employer and AM Agency was only a payroll system

3. this was a case of constructive dismissal. Medical certificates were submitted to MMc at AM Agency. When the claimant sought to return to work, there was no work available for him. Attempts were then made to resolve the issue. However, it would seem that when the claimant went out sick in 2005, his job ended at that time.

4. the claimant was seeking re-instatement. He had a work permit which allows him work for the respondent and accordingly, he cannot work for anyone else. A monetary award will only be a band-aid and will not be sufficient because of the claimant's huge debts.

Determination:

The Tribunal finds that having regard to the facts of the case, an employee/employer relationship existed between the appellant and the respondent by virtue of section 13 of the Unfair Dismissals Amendment Act, 1993.

Despite the substantial conflict of evidence between the parties, the Tribunal agrees that the appellant was dismissed by the respondent. The Tribunal noted that the correspondence from the appellant's union representative to the respondent alleged the dismissal of the appellant but the respondent made no actual reply to same. On the consistency of the evidence submitted, the Tribunal preferred the evidence of the appellant on the balance of probability, and the respondent failed to satisfy the Tribunal that the dismissal was fair.

Having carefully considered the conflicting evidence between the parties, the Tribunal considered that the remedy of re-instatement sought by the appellant was not appropriate and is therefore denied. The Tribunal accepts that an irrevocable breakdown of trust exists between the parties such that there is no reasonable prospect of the appellant working for the respondent again. In all the circumstances therefore, the Tribunal finds that compensation is the most appropriate remedy and having taken into account the appellant's duty to mitigate his loss varies the recommendation of the rights commissioners and awards the appellant €25,500.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)