

EMPLOYMENT APPEALS TRIBUNAL

**APPEALS OF:
Appellant (Employer)**

CASE NO.
PW169/2008
UD1134/2008

TE135/2008

against the decision of the Rights Commissioner **r-052708-pw-07/MMG**
and the recommendations of the Rights Commissioner :
r-052705-ud-07/MMG, r-052706-te-07/MMG

In the case of:

Respondent (Employee)

Under

**PAYMENT OF WAGES ACT, 1991
UNFAIR DISMISSALS ACTS, 1977 TO 2007
TERMS OF EMPLOYMENT (INFORMATION) ACTS, 1994 AND 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr J. Browne
Mr. J. Dorney

heard these appeals at Wexford on 2 March 2009

Representation:

Appellant:

Ms. Kiwana Ennis B.L. instructed by
Sherwin O'Riordan, Solicitors,
74 Pembroke Road, Dublin 4

Respondent:

Ms Geraldine Malone, SIPTU Assistant Organiser,
Connolly Hall, Summerhill, Waterford

The determination of the Tribunal was as follows: -

This case came before the Tribunal by way of the employer (the appellant) appealing a Rights Commissioner's recommendations r-052705-ud-07/MMG and r-052706-te-07/MMG as well as decision r-052708-pw-07/MMG in the case of the employee (the respondent).

At the outset of the hearing herein the appeal under the Payment of Wages Act, 1991 was withdrawn.

The employee did not have one year's continuous service. His case is that his hours of employment were reduced by the employer when he joined a trade union, thus forcing him to resign from his employment. Accordingly, the onus of proof under the Unfair Dismissals Acts is on the employee.

Background

DA and DB were the directors of Co. X, the employer herein, which owns and runs a refugee/emigrant accommodation centre. They were also directors of Co. Y, which had been involved in a section 23 apartment development with a December 2006 deadline. However Co. Y had to hire contractor(s) to do some remedial work on the apartments thereafter. The last apartment was sold in 2006.

Employee's Case:

The employee commenced employment on as a casual relief night porter for the full-time porter in the Co. X's refugee/emigrant accommodation centre in June 2006. He was initially working twelve-hour night shifts four times per fortnight. This was generally weekend work. Some time later the employee was given day shift(s) in addition to the night work. As time passed the employee became dissatisfied because he was only receiving basic pay for the weekend work. He believed he should be receiving a twenty per cent premium for his weekend night work. In late November he and some of his fellow workers joined a trade union.

On 2 December 2006 the employee commenced employment with Co. Y as a caretaker/maintenance worker in the apartment block development. The manager in the employer's centre told the employee about the job with Co. Y. The employee also instituted separate claims against Co. Y. The latter paid some of the employee's hours with the Co. X/the employer. In January 2007 the employee on average worked 34.5 hours with Co. X/the employer and 27.75 hours with Co Y.

On 30 January 2007 a trade union official (TU) wrote to Co. X/the employer on behalf of its members requesting a meeting to discuss collective bargaining and terms and conditions of employment including rates of pay. TU proposed to have the meeting on 9 February. On 5 February the employer replied by fax informing TU that DA was not available on that date and suggesting they meet on 27 February. By return fax TU informed the employer that her side was not available to meet on 27 February.

The employee's colleagues resigned from the union but he remained a member. On or around 7 February 2007 his work with Co. Y was terminated. He could not understand why his hours with Co. Y had ended as maintenance was still ongoing in the apartments and he had not been told it would cease in December. When he went to collect his tools he saw that two of the residents from the centre were working there doing his job. His hours with the Co. X/the employer were also reduced to two nights per fortnight and a staff member was hired to cover the day shift.

On 22 February TU wrote to DA indicating that she wished to include the employee's reduced hours on the agenda for their meeting on 27 February. DA was out of the country at the time. On 26 February the employer's financial director (FC) sent a fax to TU informing her that the employer's manager (also referred to herein as FM) had been hospitalised, was very ill at the time and that the

meeting would have to be indefinitely postponed. A meeting between Co. X and the union was never convened.

The employee contacted DA and told him that he could not afford the drop in hours and would have to resign. He submitted a letter of resignation on 5 March 2007. He felt he had been constructively dismissed because of his union membership.

According to Co. X's former manager (FM) DA instructed him to hire the employee to clear up after private contractors had done remedial work on the apartments. When DA discovered that the employee had joined a trade union he instructed FM to end the employee's hours in Co. Y and to reduce his hours with the employer to force him to resign. However, the work in the apartments was still ongoing when the employee's employment there was terminated. According to FM, DA had also instructed him to tell the kitchen assistant that if she resigned she would be re-employed by Co. X/the employer and to give other employees a pay incentive if they left the union. FM was instructed not to meet the union. FM had instituted a claim against the Co. X/the employer but it had been settled.

Co. X/Employer's Case:

Co. X/the employer hired the employee as a relief porter in its refugee centre. In early December all the apartments had been built. However, the employee was employed by Co. Y to complete some casual work, mostly cleaning up, after a private contractor had done some remedial work in the apartments. This contractor was to be finished within 28 days but work in the apartments dragged on. The employee wanted as many hours as he could get and extra work was given to him when it became available. When he offered to do some painting they allowed him to do it. His work with Co. Y came to an end because the work there dried up. After the employee left Co. Y it had to retain a roofing contractor to do some work on the roof. The two men seen by the employee working in the apartments had not been working for the Co. X or Co. Y and must have been employed by the roofing contractor.

The kitchen assistant told him before she told anyone else that she was resigning from the employer because she lived close to the employee and did not want to get mixed up in the issues. Having resigned, she telephoned a few weeks later to ask for her job back. None of the employees who resigned from the union got an increase in pay except the head chef who was promoted to the position of manager.

DA had been a member of a union for sixteen years. He would have no problem dealing with the union but it had not been possible to arrange a meeting in late February. He refuted the employee's allegation that the kitchen assistant had been told to resign from the union and that she would then be re-hired. The employee had never told him he had any problems at work, if he had he would have dealt with them. He agreed the employee had no written contract of employment but all staff were in receipt of contracts of employment now. While the employee did not have a disciplinary or grievance procedures in place employees were to approach FM about any issues they might have.

The head chef in the refugee centre told the Tribunal that when she had approached FM about some work issues he advised her to go to the trade union. She joined the union in November 2006. Over time her issues were resolved. She resigned from the union on 12 February 2007 because she had not a good feeling about what was happening and she had not told her boss about her issues at work. When the trade union asked her why she resigned from the union she told them it was for personal reasons. DA had not asked her to leave the union.

It was the kitchen assistant's evidence that when she approached FM about work issues he advised her to go to the union. She joined the union in November 2006. At a union meeting held in December 2006 the employee raised the issue of wages and weekend work. She felt that there might be some aggravation coming down the line and as she had known both the employee and DA for years she did not want to "get caught up" in it so she resigned from the union and from work in February 2007. Following a conversation with DA she resumed work three weeks later. She had not been told to withdraw from the union or that her wages would increase if she so did.

The employer produced pay slips showing the hours worked by the employee for both DA's companies. The employee was due to work on 3 & 4 March but did not turn up for work. The employer first realised that the employee had issues when he received his letter of resignation in early March 2007.

Determination:

The Tribunal is satisfied that the casual work for which the employee was employed by Co. Y came to an end in February 2007 resulting in his job with Co. Y being lawfully terminated. Having examined the documentary evidence adduced by the employer showing the weekly hours worked by the employee during his employment with Co. X/the employer, the Tribunal notes that his hours of work fluctuated from week to week over the entire period of his employment. Having examined the pattern of fluctuation the Tribunal is satisfied that there was no discernable reduction in his hours of work from the time he joined the trade union.

The Tribunal notes that there was some difficulty on both the employer and the trade union side in arranging a meeting to discuss the employee's working hours. Whilst the trade union did later indicate that it would meet the employer on 27 February the Tribunal accepts the difficulty ultimately presented to the employer as regards that date. Further time should have been allowed to facilitate the convening of a meeting between the employer and the trade union. In the circumstances the employee acted hastily in resigning from Co. X/the employer.

In the circumstances the employee failed to establish the aforementioned onus of proof, under the Acts, to the satisfaction of the Tribunal. Accordingly, the employer's appeal under the Unfair Dismissals Acts, 1977 to 2007 succeeds and the Rights Commissioner's recommendation is set aside.

The evidence having shown that the employee did not receive a contract of employment, the appeal under the Terms of Employment (Information) Acts, 1994 and 2001 is dismissed and the recommendation of the Rights Commissioner is upheld.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)