

**EMPLOYMENT APPEALS TRIBUNAL**

**APPEAL(S) OF:  
EMPLOYER**

**CASE NO.  
TE136/2008  
UD1135/2008**

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

under

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

I certify that the Tribunal  
(Division of Tribunal)

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

Members: Mr J. Browne  
Mr. J. Dorney

heard this appeal at Wexford on 2nd March 2009

**Representation:**

Appellant(s) : Ms. Kiwana Ennis BL instructed by:  
Sherwin O'Riordan, Solicitors, 74 Pembroke Road, Dublin 4

Respondent(s) : Ms Geraldine Malone, SIPTU, Assistant Organiser, Connolly Hall, Summerhill,  
Waterford

The determination of the Tribunal was as follows:-

The case was heard in connection with hearing number K33716 – U1134/2008, TE 135/2008 and PW 169/2008.

This case is before the Tribunal by way of an employer appealing a Rights Commissioner's recommendations: r-052702-ud-07/MMG and r-052703-te-07/MMG.

The employee did not have one year's continuous service. His case is that he was dismissed because he joined a trade union. Thus, the onus of proof as to the reason for his dismissal rests on the employee.

**Background**

DA and DB were the directors of Co. Y, the employer herein, 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. DA and DB were also the directors of Co. X, which owns a refugee/emigrant accommodation centre.

## **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/the employer as a caretaker/maintenance worker in the apartment block development. The manager in the refugee centre had told the employee about the job. The employee also instituted separate claims against Co. X. Some of the employee's hours with Co. X were paid by Co. Y. In January 2007 the employee on average worked 34.5 hours with Co. X and 27.75 hours with Co Y/the employer.

On 30 January 2007 a trade union official (TU) wrote to Co. X 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 Co. X replied by fax informing TU that Co. X 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/the employer 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 were also reduced to two nights per fortnight and a staff member was hired to cover the day shift.

Subsequent to his dismissal his employment with Co. X continued. 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. On 26 February the employer's financial director (FC) sent a fax to TU informing her that Co. X'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. The employee resigned from Co. X on 5 March 2007 because of the reduction in his hours of work. He felt he had been constructively dismissed because of his union membership.

According to the 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 AC 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. Y/Employer's Case:**

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 he was doing in the apartments was completed. 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. DA had notasked 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 companies.

**Determination:**

The Tribunal is satisfied that the men the employee saw working in the apartments, shortly after his employment had been terminated by Co. Y/the employer, were not directly working for Co. Y. The Tribunal is satisfied that the reason for the employee's dismissal was that the casual work in the apartments had come to a natural end at that time. 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)

