

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER – appellant

CASE NO.
UD759/2009
TE81/2009

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

EMPLOYEE - respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Hurley

Members: Mr J Redmond
Ms H Henry

heard this appeal at Loughrea on 14th October 2009

Representation:

Appellant(s): Mr Francis Comerford BL, instructed by:
Mr. Adrian Harris
Padhraic Harris & Co., Solicitors,
Merchants Gate, Merchants Road, Galway

Respondent(s): Mr John Flannery,
John F Flannery & Associates
4 Fr Griffin Road, Galway

The determination of the Tribunal was as follows:

This case came before the Tribunal by way of an employer appealing the decision of a Rights Commissioner (refs: r-067559-ud-08 & r-067560-te-08)

Respondent's Case:

The respondent (henceforth referred to as the employee) commenced his employment with the respondent company in May 2005. The employee started out working in the yard and by the end of the year had begun working on a bin lorry lifting and emptying bags into the lorry. Working on the

bin lorry meant receiving Saturday work and receiving a meal allowance. The employee's day started when he was collected from his house by the bin lorry driver at five or six in the morning and finished between two and three in the afternoon.

The employment was uneventful until January 2008 when the employee began to have difficulties with his knees and had periods of sick leave. On his return from sick leave on the 4th February 2008 he was assigned yard work and after a period put back on the bin lorry. But his knees again became a problem and he went on sick leave again until March 10th 2008. The employee disputed that his employment ceased on February 25th 2008.

The employee contended that he contacted the transport manager on Sunday 9th March 2008 to enquire what he would be doing the following day on his return. The transport manager told him to come in at 2pm to work in the yard. The employee reported for work and was assigned to work in the recycling plant.

After two hours the employee went to the transport manager's office as he wasn't happy with the work in the recycling plant and wanted to know what time he would be finishing at. The employee asked about a van driving job that had been discussed previously, but was told that someone else was doing that and someone else was trained on his old job. The employee went back to the recycling plant, but then left the premises, as he wasn't happy with the hours.

The transport manager rang around 4pm and asked if he was coming back to work that day. The employee asked if there were other jobs available. The employee then rang the citizens' information centre and was told that he was entitled to his job back on the truck. The employee then communicated this to the transport manager. The manager told him 'not to hold a gun to his head' and asked if the employee was returning to work. The employee told him that he had no interest in the job (in the recycling plant) and wanted his old job back. The employee had no further contact with the company except for collecting his P45 and wages on March 14th 2008. The employee stated that he had no difficulty with the company until the last day he worked there. He did not raise the issue with anyone other than the transport manager.

During cross-examination the claimant contended that it had only been on two occasions, rather than four, when he had not been there in the morning when the driver came to collect him. The claimant contended that there were also occasions when he had to phone the driver to wake him up.

The employee agreed that the transport manager had purchased new boots for him, but disputed that he had been offered a van driving job. The claimant contended that the van driving job had only been a suggestion. He agreed that he had been requested to bring in his driver's licence.

The claimant contended that when he rang in sick with a headache on the 7th February 2008 he was on yard duty and not on the lorry as the employer contended. The claimant agreed that he worked on the bin lorry from the 18th to 21st February 2008. He believed he spent the previous week working in the yard. The claimant disputed that the lorry driver could not contact the claimant on the morning of Friday 21st February 2008. The claimant contended that he spoke to the driver and told him that he had a problem with his knees and that the driver should get another helper. The claimant contended that he later contacted the driver and told him that he would be out for a couple of weeks.

Appellant's Case:

The appellant company contended that the employee commenced his employment with the company in May 2005 and that he resigned his position with the company on 26th February 2008 via phone call. The employee's performance was good and there were no difficulties with him. The transport manager gave evidence that he had put the employee on yard work on his return from sick leave to see how he got on with his knees and his attendance. He hadn't intended for it to be long-term and this had been the case on previous occasions.

The manager contended that the claimant phoned him on Sunday 24th February 2008 and that he told the claimant to come in at 8am, which the claimant did. The manager disputed that there was a two-week gap. The claimant asked the manager about returning to the bin lorry and the manager told him not for a while. The claimant then asked if he could take the van driving job, but the manager told him that another member of staff was trained to do it and that with the claimant's attendance and time off he couldn't do it. The manager told him to come in at 2pm the following day.

When the manager rang the claimant on Tuesday 26th February to find out where he was the claimant said that he wasn't happy working from 2pm to 11pm and that his hours couldn't be changed without 24 hours notice. The manager then told the claimant to come in at 8am the following day. The claimant asked if he would be on the truck and the manager told him it wouldn't. The claimant said if he wasn't being put on the truck then he wasn't coming back. The manager did not contact the claimant again.

The transport manager disputed that he was trying to get rid of the claimant and pointed out that he had purchased special boots for the employee in 2008 to see if they helped his knees. He had also offered the claimant a job driving a van, which the claimant turned down. The transport manager had never issued the claimant with any official warnings. He had occasional chats with him about the job, but these were to encourage rather than reprimand. The manager agreed that the claimant had not been issued with a written contract of employment.

The bin lorry driver gave evidence that he saw the claimant in the yard when he returned with the lorry on Tuesday February 26th 2008. The lorry driver agreed that there had been occasions when either he or the claimant had had to phone each other to wake each other up. They had a good working relationship.

The company financial controller gave evidence that the claimant was shoddy at handing in his work sheets and that he had not handed in a work sheet for the 25th and 26th February 2008. The delay in paying the claimant could have been due to the difficulty the accountant had in ascertaining the claimant's hours and calculating his holiday pay. The Financial controller contacted the claimant's house by phone and spoke to his partner to ascertain what his final payment should be and to get agreement on it. The claimant was last paid for the week ending 14th March 2008.

Determination:

The Tribunal have heard nothing to justify the variation or discharge of the award made by the Rights Commissioner under the Terms of Employment (Information) Act, 1994 and 2001 (ref: r-067560-te-08) and upholds the award under this Act.

The Tribunal upsets the decision (ref: r-067559-ud-08) of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007, as the employee failed to meet the onus under section 1(b) of the Unfair Dismissals Act, 1977.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)