

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYER

- **appellant**

UD646/2009

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

EMPLOYER

– **appellant**

EMPLOYEE

- **respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr D. Moore
Mr J. Maher

heard this appeal at Dublin on 13th January 2010
and 12th April 2010

Representation:

Appellant: In Person

Respondent: Ms Claire Bruton B.L. instructed by Murphys, Solicitors, Mount Clarence House,
91 Upper George's Street, Dun Laoghaire, Co. Dublin

The determination of the Tribunal was as follows: -

This case came before the Tribunal by way of an employer appealing against the Recommendation of the Rights Commissioner reference r-070079-ud-08 JOC dated 5th March 2009.

Preliminary Issue

This is an appeal from a Rights Commissioner's recommendation. A preliminary issue, concerning the length of the respondent's service arose to be determined.

The respondent gave evidence that his employment commenced in about October 2006 when the appellant secured the contract to provide door security service to a Dun Laoghaire nightclub. He said that he worked there until that nightclub closed when he was reassigned to other duties. When the nightclub reopened he did not resume work because the owner wanted new door staff.

An incident occurred in July 2008, which resulted in the respondent's dismissal. He was dismissed by letter dated the 4th August 2008. The appellant had indicated in the letter that the respondent should contact the office if he had an issue with the decision. He did not get in touch and the appellant, assumed on the 18th August 2008 that the dismissal stood. The Tribunal was told on the appellant's behalf that it considered that the dismissal took place on 18th August 2008.

The respondent also told the Tribunal that he still considered himself employed in mid September. He said that he worked a shift in mid August 2008 and that he made several enquires in September 2008 as to when he was next rostered. This was denied on the appellant's behalf.

The Tribunal was told on the appellant's behalf that the respondent commenced employment on 27th August 2007. Records produced suggest that that was when the employment did in fact commence. A P60 issued to the respondent in respect of the 2007 tax year show that he had 18 weeks of insurable employment and had been paid a total of €1995 with no tax or PRSI deducted. The respondent's case is that he had been employed for the full year but he does not appear to have queried the P60.

For the Tribunal to have jurisdiction to hear a claim for unfair dismissal the employee must have had 52 weeks continuous service other than where certain exceptions apply. None of those exceptions apply in this case. It is for the respondent to satisfy the Tribunal that he has sufficient service to ground the Tribunal's jurisdiction. The Tribunal is not satisfied on the balance of probability that the appellant employed the respondent for a period in excess of fifty-two weeks. On that basis the Tribunal does not have jurisdiction to hear the claim.

It was advanced by Counsel for the respondent that even on the evidence adduced by the appellant that the respondent had sufficient service. This was on the basis that the P60 shows 18 weeks service in 2007 and that the P45 indicated 33 weeks in 2008 and that, when taken with the one-week statutory notice, the respondent had 52 weeks service. While this approach has attractions, the Tribunal must look at the date of commencement and dismissal rather than the number of rounded up weeks. On the appellant's evidence he was employed on 27th August 2007 and dismissed on 18th August 2008. With his statutory notice entitlement added this brings him to 25th August 2008. This is short of 52 weeks service albeit short by a hair's breadth.

On the basis of the foregoing this appeal succeeds and the recommendation of the Rights Commissioner is varied so that the claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)