

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER – appellant

CASE NO.
UD757/2009
PW89/2009

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

EMPLOYEE – respondent
v
EMPLOYER

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
PAYMENT OF WAGES ACT, 1991**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N O'Carroll-Kelly BL

Members: Mr F Cunneen
Mr. J Dorney

heard this appeal at Dublin on 2nd March 2010

Representation:

Appellant(s): In person

Respondent(s): Mr Raymond O'Reilly
Independent Workers Union
SUI House, 61 North Strand Road, Dublin 3

This case came before the Tribunal by way of an employer appealing a recommendation and a decision of a Rights Commissioner refs: (r-068853-ud-08/RG & r-068852-pw-08/RG).

The determination of the Tribunal was as follows:

Appellant's Case:

The general manager (GM) of the appellant company contended that the respondent (henceforth referred to as the employee) was not dismissed, but rather he was laid off and offered a job two weeks later, which he refused. The GM agreed that the claimant did not have a written contract of employment.

The employee came to see the GM on July 16th 2008 regarding pay for overtime and Sunday premium. She told him that she was preparing written contracts for all staff, which she would provide on her return from her holidays, which she was due to take from July 17th 2008 until August 5th 2008.

The employee had commenced his employment in November 2006. He worked on the 'starter' section of the restaurant, which the management decided to combine with the bar position. A director of the appellant company wrote to the employee on August 6th 2008 notifying the employee that he was being laid-off effective from August 15th 2008, and that 'should a suitable position arise in the near future in any of our catering outlets we would be glad to re-employ you'.

GM wrote to the employee on August 21st 2008 and stated that: 'We are now happy to inform you that just recently a chef has left his position in a new outlet opened in July... We are now seeking applications from persons suitable for the position. Should you wish to apply please make contact ...'

The employee responded by letter dated 27th August 2008 seeking:

- A written job description.
- A written contract stating hours of work, detailing pay for overtime, Sunday premium and holiday arrangements.
- A basic hourly wage of €18.00 per hour.
- Compensation for the increased distance to the new workplace.
- Bullying prevention strategy, 'to avoid the repetition of unpleasant situations'.
- Health and Safety statement and sick pay arrangements.

The GM sent the employee a sample contract of employment on August 2008. She then sent an email on September 1st 2008 in response to the employee's email. In relation to the employee's request for €18.00 per hour the GM stated that:

'We are not averse to considering you for this position by your demands. However, to justify this payment and to consider you for the position you must provide us with an up to date Curriculum Vitae of all your "work experience and skills", including reference from previous employments from detailing positions held.'

The GM stated that the closing date for applications was September 9th 2008. There was no further contact from the appellant.

During cross-examination the GM confirmed that there had been no contact with the employee between the time he spoke to her on July 16th 2008 and the issuing of the letter putting him on lay-off. The letter did not indicate that the lay-off was to be temporary.

A further witness for the appellant company stated that the company had been inspected by the Labour Inspectorate, in 2006, and some breaches of the legislation were found. He contended that the Inspector told him that only employees who were paid the minimum wage had to be paid overtime and Sunday premium, and those who were paid over the minimum wage did not. The employee was paid a rate higher than the minimum wage, €9.50 per hour, and was therefore not paid overtime or Sunday premium.

The first witness did not tell the employee this when he came to see her in July, as she did not know. She was drafting the contracts of employment for the restaurant staff based on the contracts issued to the company's construction employees. She did not dispute the hours the employee contended that he worked. She contended that the staff wanted sign in the window was for a position handling hot food, though the sign did not specify this.

Respondent's Case:

The employee commenced his employment with the appellant in November 2006 as a commis-chef. He was the paid minimum wage when he commenced and his pay was increased to €9.50 per hour after six or seven months. In July 2008 he asked his manager why he wasn't paid overtime or Sunday premium. His manager was annoyed and told him that he would give him his P45 in two weeks, and to look for another job. He held a surprise meeting with the staff and said to the employee that he was the only one there with a problem.

The employee spoke to the GM on July 16th 2008. She said she was aware of the rules and that after her holidays she would provide a contract and fix the problem. He then received the letter putting him on lay-off from August 15th 2008. On August 11th he saw a 'staff wanted' advertisement in the window of the restaurant.

He did not apply for the job in the other restaurant, as he did not trust them. He asked GM for information in order to avoid the situation with the previous manager. They replied by asking for his CV when he had worked for them for twenty months. He asked for €18.00 per hour, as he believed he had the skills to warrant it. He did not wish to return under the same conditions.

The employee gave evidence of his loss.

Determination:

The employee admitted in evidence that he was not available for work at any time since being dismissed and that he did not make any job applications. Accordingly, the Tribunal varies the recommendation of the Rights Commissioner and awards the claimant €1,600.00 (one thousand six hundred euro) under the Unfair Dismissals Acts, 1977 to 2007.

There was no evidence advanced as to why the Employment Regulation Order (Catering) did not apply and therefore the Tribunal upholds the decision of the Rights Commissioner under the Payment of Wages Act, 1991, and awards the employee €796.71 (seven hundred and ninety-six euro, seventy-one cent).

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)