

**EMPLOYMENT APPEALS TRIBUNAL**

APPEAL(S) OF:  
EMPLOYER – appellant

CASE NO.  
UD751/2009  
TE71/2009

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

EMPLOYEE – respondent

EMPLOYER  
under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms M Levey BL

Members: Mr G Mc Auliffe  
Ms N Greene

heard this appeal at Dublin on 18th February 2010 and 26th April 2010

Representation:  
\_\_\_\_\_

Appellant(s): Mr John Kilroy  
John Kilroy Solicitors, Ocean House, Aaron Court, Aaron Quay, Dublin 7

Respondent(s): Ms Aoife Farrelly BL, instructed by:  
Ms Jennifer Burke,  
J Burke & Co, Solicitors, Main Street, Rathcoole, Co. Dublin

This case came before the Tribunal by way of an employer appealing the recommendations of a Rights Commissioner, refs: (r-066239-ud-08/JT) & (r-066242-te-08/JT).

The determination of the Tribunal was as follows:

**Appellant's Case:**

The appellant appealed the Rights Commissioner recommendations, as the company understood that an agreement had been reached with the appellant prior to the Rights Commissioner hearing. The appellant did not attend the Rights Commissioner hearing.

A director of the company gave evidence that the company fits suspended ceilings and metal stud partitions. The respondent (employee) commenced with the company as a sub-contractor in 2005. He became an employee in January 2007. The employee was often absent from work. He was suspended in April 2007 for a number of weeks due to his absenteeism. The employee's attendance continued to be poor on his return. He was dismissed on April 14<sup>th</sup> 2008 because of his poor attendance. There was no other issue with the employee's performance. The contracts manager dealt directly with the employee.

After receiving a letter from the Rights Commissioner in July the director arranged to meet the employee. He met the employee in his jeep in a car park. The employee told him that his issue was with the contracts manager and that he was owed two days pay. The director gave him a cheque for €1,000 as a goodwill gesture. He prepared a document for the employee to sign. He then forwarded the document to the Rights Commissioner. The director notified the company accountant that he would be abroad on the day of the Rights Commissioner hearing.

During cross-examination the director stated that the employee was not given a copy of his terms and conditions when he became an employee. There was no employee handbook. Some of the days the employee took off were taken as annual leave but he did not know which.

The contracts director (CD) gave evidence that the employee was a friend of his. He used to collect him for work and drop him home. CD's brother was employed as an apprentice and worked with the employee. CD's brother began collecting him to bring him to work. On occasion the employee did not come out of his house in the morning. When the employee did not show up for work his brother could not work as he was not sufficiently skilled. CD's role was to oversee the various sites. When the employee did not come to work he occasionally had to step in and do his job for him.

CD, his brother, the employee and two others became employees in January 2007. The employee's absenteeism became a problem and on 10<sup>th</sup> April 2007 he suspended the claimant. He let the employee return a few weeks later on the condition that he got his own transport. For the rest of the year there was a cycle of CD telling the employee to improve his attendance, it improving for a while, but then it would start to slip again. This continued into 2008. The employee did not explain his absences, but CD socialised with him on Thursday nights and therefore knew why he often did not appear on Fridays. He was normally absent on days before or after the weekend.

The employee normally took the week of the Cheltenham races, but he was not due to take that week off in 2008. On the Sunday night before the races CD got a text from the employee stating that he would not be in for the week. He then took the week of Easter off. CD had to finish the employee's job for him.

The employee did not appear for work on Monday 14<sup>th</sup> April 2008 and did not contact CD. He phoned the employee several times but there was no answer. He later sent a text message to the employee stating that there was no point coming in the following day. The employee phoned later but CD was too busy to talk to him. He had no further communication with him.

During cross-examination CD stated that he had not asked the employee for doctor's certificates when he was on sick leave. Sick leave was unpaid and he was unaware of the need for certificates. He did not explain to the employee how changing from a sub contractor to an employee would affect him. He did not specify to the employee what the consequence would be if he did not improve his attendance.

### **Respondent's Case:**

The respondent disputed that there had been an agreement prior to the Rights Commissioner hearing.

The employee gave evidence that he became an employee in January 2007 having commenced as a sub-contractor in 2005. He did not receive a written contract of employment, an employee handbook or payslips. He worked the same job for the same hours and if he did not attend he did not get paid. He always took the week of Cheltenham off and two weeks in July.

In April 2007 he missed a day and CD told him that he had missed too many days and that he was dismissed. He did not question it as he had missed the time. He rang a few weeks later and got his job back on the condition that he got his own transport. Again he was just told to watch his days.

On 14<sup>th</sup> April 2008 he did not attend work and he had a number of missed calls. He tried to call back but was unable to speak to CD. He received a text message that night stating that he should not come in the next day. He did not receive any written warnings.

He met the director at a later date after submitting a form to the Rights Commissioner. He felt pressurised into signing the document that the director gave him in the car park.

During cross-examination the employee stated that he could not verify the number of absences he had taken during his employment, but he agreed that CD had carefully kept his diary. He contended that he only left CD's brother waiting outside his house once or twice. He normally text messaged in the morning or the night before to say he wasn't coming in.

He acknowledged that he was suspended in April 2007 because of the number of absences he had. He did not consider it as a warning as it was standard practice in the construction industry to take days off here and there. He called it the 'Monday club'. He did not contact CD on Monday 14<sup>th</sup> April 2008 to explain his absence as there was no point phoning at 10am or 11am and the day was nearly over. The day's work finished at 3.30pm.

He believed the director gave him a cheque for €1,000 as an apology for how he was dismissed.

### **Determination:**

The Tribunal finds that the employee was not unfairly dismissed. Although the warnings he received were somewhat informal in nature, he was actually suspended in April 2007 and at the very least should have been aware after that that the warnings he was given should be heeded. The Tribunal therefore overturns the recommendation of the Rights Commissioner (ref: r-066239-ud-08/JT) under the Unfair Dismissals Acts 1997-2007.

The Tribunal varies the recommendation of the Rights Commissioner ref: (r-066242-te-08/JT) made under the Terms of Employment (Information) Act 1994 and awards the employee €700.00 (seven hundred euro).

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)