

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYEE - *appellant*

CASE NO.

UD2358/2009

against the recommendation of the Rights Commissioner in the case of:  
EMPLOYER - *respondent*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr M. Carr  
Mr N. Dowling

heard this appeal at Mullingar on 3rd May 2011

Representation:

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Appellant(s) : Noel G. McArdle & Company, Solicitors, Shankill Business  
Centre, Station Road, Dublin 18

Respondent(s) : Mr Sean Deegan BL instructed by Larkin Tynan & Company, Solicitors,  
Blackhall Street, Mullingar, Co. Westmeath

This case came before the Tribunal by way of an appeal by the employee (appellant) against the recommendation of the Rights Commissioner (r-072112-ud-08/JC) under the Unfair Dismissals Acts 1977 to 2007.

#### **Appellant's Case**

The appellant gave direct evidence that he commenced working as a farm labourer for the respondent in late 2004. Employment was largely uneventful until the 30 May 2008 when he had an accident on a motorbike while working for the respondent. He immediately informed the respondent of the accident but did not realize the extent of his injuries at that stage. Later, on the evening of 30 May 2008 he attended hospital and informed the respondent that he would not be able to report for work due to his injuries as he had a broken leg and a broken hand. However he said that he intended to return to work when he had recovered from his injuries. He returned to his native country, Lithuania, in early June 2008 to receive treatment for his injuries as it was less expensive than Ireland. He informed the respondent that he would return in approximately 6 weeks. While he was in Lithuania his cousin, known as Witness (A) (hereinafter referred to as "A") who lived in Ireland communicated with the respondent. The Appellant accepted that he did not send any medical certificates to the respondent during his absence. When he returned to the respondent's

workplace on 23 July 2008 he was told by the respondent that there was no more work for him. He accepted that he did not inform the respondent prior to 23 July 2008 that he would be returning to work on that date. He simply reported for work on that date. When asked by the Tribunal what exactly he did say to the Respondent before he departed for Lithuania in May 2008 the claimant through his interpreter, gave evidence that he communicated with the Respondent through a friend, Witness (B) (hereinafter referred to as “B”) who had much better English. When asked if this friend was present to give evidence he confirmed that she was.

The next witness, (A) gave evidence that he was a cousin and friend of the appellant. He told the Tribunal that he was in regular contact with the respondent during the period of time that the appellant was absent from work in Lithuania as both he and the respondent worked from the same tar plant. The respondent enquired from him on a regular basis as to the appellant’s condition and he told the respondent that the appellant was improving. He also spoke by telephone with the respondent as the respondent contacted him enquiring about the appellant. He confirmed that the appellant did not request him to forward medical certificates to the respondent during his period of absence in Lithuania.

The next witness (B) was, according to the claimant, the friend who explained to the Respondent that he (the claimant) was going to Lithuania for treatment and that he would return to work within six weeks. After this witness had taken the Oath the Appellant’s representative stated that this witness wanted to give evidence through the interpreter. This request was refused by the Tribunal because witness B was supposed to have explained, in English, to the Respondent about the Appellants’ plans to return to work. This Witness refused to answer any question put to her by the Chairman and remained mute.

### **Respondent’s Case**

The Respondent gave direct evidence that he is a dairy farmer and haulage contractor. He drove a haulage truck and employed the appellant on his farm carrying out farm duties. Following the appellant’s accident on 30 July 2008 the appellant returned to his native country to receive medical treatment. He did not know if the Appellant was returning to his job. He attempted to contact the Appellant on a number of occasions by telephone but was unable to do so as the Appellant’s mobile phone was switched off. The Appellant made no contact with Respondent during his absence from work. He enquired from (A) on two or three occasions as to the appellant’s condition but (A) told him that he did not know of his condition. He never received any medical certificates explaining the Appellant’s absence from work. Because the Respondent was a dairy farmer his cows had to be milked twice a day. Doing nothing was not an option. He could not leave the work undone. He had to be certain whether the Appellant was coming back or not. The Respondent discontinued driving his truck and took over the Appellant’s duties on the farm. He did not replace the Appellant with another employee. When the Appellant returned to the farm he was no longer in a position to offer him work and he furnished him with a P45.

### **Determination**

The Appellant worked on the Respondent’s farm from late 2004 until he was injured in an accident on the farm on 30<sup>th</sup> May 2008 as a result of which the Appellant said he sustained a broken leg and a broken hand. He returned to his native country, Lithuania, in early June 2008 to receive treatment for his injuries as it was less expensive than Ireland. The appellant gave evidence that informed the Respondent through “B” that he would return in approximately 6 weeks. While he was in Lithuania his cousin, known as “A” who lived in Ireland gave evidence that he kept the Respondent updated in relation to the Appellant’s condition and his plans to return to work. The appellant accepted that he did not send any medical certificates to the Respondent during his absence. When he returned to

the Respondent's workplace on 23 July 2008 he was told by the Respondent that there was no more work for him. He accepted that he did not inform the Respondent prior to 23 July 2008 that he would be returning to work on that date. He simply reported for work on that date.

The Tribunal was unimpressed with the evidence offered at the hearing by the Appellant, Witness A and Witness B. There is no evidence whatsoever that the Respondent was told (at the end of May 2008) by the Appellant that he was going back to Lithuania but that he intended returning to his job. By his own evidence the Appellant admitted (through his Interpreter) that he didn't tell the Respondent about his intentions because he did not have sufficient command of English to do so. The Appellant said that "B" told the Respondent of this.

When "B" was called to give evidence she requested that she give evidence through the interpreter. This was an extraordinary request as the Appellant clearly stated (through his interpreter) that his friend "B" explained the situation to the Respondent, in English, about the Appellant's intention of returning to work. The Tribunal found it incredible that "B" now needed an interpreter to assist her in telling the Tribunal what she already allegedly told the Respondent in English. If she was not competent enough now at the hearing to explain to the Tribunal what she told the Respondent then she could not have been competent to explain this to the Respondent in February 2009. The Witness refused to answer any question put to her by the Chairman and remained mute. This showed appalling lack of respect, indeed even contempt, for the Tribunal. No blame whatsoever is attributed to the Appellant's representative who fairly told the Tribunal that he had no difficulty communicating, in English, with "B".

Because the Respondent was a dairy farmer his cows had to be milked twice a day. As he stated doing nothing was not an option. He could not leave the work undone. He had to be certain whether the Appellant was coming back or not. The Respondent discontinued driving his truck and took over the Appellant's duties on the farm. He did not replace the Appellant with another employee. The Tribunal accepts that the Respondent attempted to contact the Appellant on a number of occasions by telephone but was unable to do so as the Appellant's mobile phone was switched off. It is clear from the Appellant's own evidence that he made no contact with the Respondent during his absence from work. The Tribunal is not satisfied that satisfactory communication was made through "A". The Respondent never received any medical certificates explaining the Appellant's absence from work.

Accordingly, the Tribunal affirms the decision of the Rights Commissioner in this matter.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

