

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.

EMPLOYER

*(appellant)*

UD1418/2010

EMPLOYEE

*(respondent)*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr P. Pierson  
Ms H. Murphy

heard this appeal at Carrick-On-Shannon on 11th April 2011

Representation:

Appellant(s) : Construction Industry Federation, Construction House, Canal  
Road, Dublin 6

Respondent(s) : Mr. Vernon Hegarty, 1 Beechfield, Tonaphubble, Sligo, Co. Sligo

The determination of the Tribunal was as follows:

This case was brought before the Tribunal by way of an appeal by the employer, who is the appellant, against a recommendation (r-086775-ud-09/SR) of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007.

A preliminary point arose where the appellant stated that the respondent did not have the required service under the act. The appellant stated that the employment began on 10<sup>th</sup> November 2008 and the respondent maintains that the employment began on 24th April 2007. The dismissal itself is not in dispute.

### Appellant's case

One of the Directors of the company gave evidence that he runs the operational side of the business i.e crane driving, crane rigging. The respondent worked as a mobile crane operator and helped with rigging. He was employed for two periods amounting to approx 18 months. Explaining why the respondent left the employment, the Director stated that work had slowed down and respondent had a mortgage to pay. The respondent had said that he had a brother in the U.S.A. and there were opportunities out there. The Director told him to “go for it”. The respondent was gone for just over a month and he had said it did not work out for him. The Director informed the respondent that there was very little work, due to the downturn and offered him crane rigging. Most of the work was in the U.K. There were odd jobs in the yard, maybe one day a week.

In December of his second term of employment the respondent asked the Director for a letter he could give to Social Welfare in relation to days he was not working. About one month before he went to the U.S.A. he asked for his P.45. During his second term of employment he asked for time off for AGB driving lessons. The Director said he gave the respondent the opportunity to get experience. This did not work out, as the company needed someone with experience. The Director told the respondent that he would be taking on someone else with experience in this area of work. There were seventeen employees in the company at that time and this number is now down to four. The Director of the company is now doing the rigger work.

One of the reasons the company employed the respondent for a second term was because the Director was ill.

In cross-examination, it was put to the Director that the respondent was away for two weeks from 28<sup>th</sup> October 2008 until 10<sup>th</sup> November 2008. The Director said he could not put dates on the break. He was aware that the respondent was attending a wedding. About one month before he attended the wedding in the U.S.A. the respondent mentioned the possibility of work out in the states. It was put to the Director that the respondent did not ask for his P.45 or if he had then why was it not given to him. The Director stated that it would not have been issued until his final salary.

The Director denied having a conversation with the respondent telling him that he was breaking his service as the company had previously had an unfair dismissal case and did not want another.

The Director stated that the respondent knew that it was unsustainable to keep him working in the yard and that was why he requested his P.45. It was put to the appellant that the respondent was dismissed because of the accident in the yard and not by reason of redundancy. The appellant stated that his son was responsible for the accident in the yard.

Another Director of the company gave evidence stating that she was responsible for the payroll, tax and P.R.S.I. The Director stated that she was aware that the respondent intended going to the U.S.A. He had mentioned over coffee that he would be looking for work in the States and that he would be requesting his P.45. She issued the P.45 on the respondent's instruction.

Under cross-examination the Director confirmed that the respondent had requested his P.45 over coffee. The Director was asked why the relevant paperwork required was not ready the day he finished work. She stated that she does the wages the following week after termination. The Director confirmed to the Tribunal that the respondent started on 10<sup>th</sup> April 2007. He went to the States on 24<sup>th</sup> October 2008 and was paid his last week's wages on 30<sup>th</sup> October 2008. He started again with the company on 10<sup>th</sup> November 2008 and finished on 27<sup>th</sup> July 2009. The Director sought a new tax deduction card for the respondent from Revenue when the respondent was taken

back on.

## **Respondent's case**

The respondent started with the company in 2007. He stated that he did not terminate his employment. He notified his employer well in advance that he was going to a wedding. He had no intention of leaving as he was building a house. He had a return ticket booked to New Jersey. He did not ask his brother in the States about work as he was earning good money in his current employment. No discussion took place about him ending his employment. The Director told him that things were not going too well and that he would be giving him his P.45 to break his service as he had a previous unfair dismissal case against him. When the respondent received the P.45 he asked the Director what he should do with it and he was told to bring it back in. He did not interpret the P.45 as the end of his employment.

In relation to his dismissal, the respondent stated he was working in the new yard getting lorries ready for Donegal. The Director's son was bringing the lorry with a crane and he said to the respondent to bring the mobile crane. The respondent drove out and the tyres burst as a result of protruding steel. The Director's son telephoned his father who told the respondent unless he was paying "that's it". When the respondent said he could not pay, the Director told him to finish up. Prior to going to the U.S.A. the respondent did not cease association with his local G.A.A. club and was involved in various things e.g. the Ploughing Championships. He had no intention of seeking work in the U.S.A. The respondent did not have a copy of his return ticket. He has not been able to get consistent work since his employment terminated, only bits and pieces.

The respondent confirmed to the Tribunal that it was him who drove out of the yard and caused the damage. He said he was given a P.45 to break his service. The respondent confirmed that the other driver taken on to replace him had more experience than he did. When asked if he received a different contract in November 2008, he replied saying he received no contract.

The brother of the respondent gave evidence stating that he had booked return flights to the U.S.A. for the wedding. He booked the tickets in January 2008. His brother did not say he would be looking for work in the States.

## **Determination**

The Tribunal carefully considered the evidence given and submissions made in this appeal. The Tribunal preferred the evidence of the respondent in relation to the circumstances of his trip to America in the autumn of 2008, and finds that he did not resign at that stage and there was no break in service. The Tribunal also preferred the evidence of the respondent in relation to the termination of his employment and finds, on the balance of probabilities, that the appellant's dismissal was clearly unfair. In all the circumstances the Tribunal confirms the recommendation of the Rights Commissioner and hereby dismisses the appellant's appeal.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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