

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

EMPLOYER – *appellant*

UD1654/2012

PW750/2012

TE267/2012

against the recommendation of the Rights Commissioner in the case of

EMPLOYEE - *respondent*

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
PAYMENT OF WAGES ACT 1991
TERMS OF EMPLOYMENT (INFORMATION) ACTS 1994 & 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. O’Leary BL

Members: Mr M. Noone
Mr A. Butler

heard this appeal at Dublin on 24th June 2013

Representation:

Appellant:

Respondent: In person

This case came before the Tribunal by way of an appeal by the employer (appellant) against the recommendation of the Rights Commissioner (r-122209-ud-12/JT) under the Unfair Dismissals Acts 1977-2001, (r-122205-te-12/JT) under the Terms of Employment (Information) Acts 1994 & 2001 and (r-122217-pw-12/JT) under the Payment of Wages Act 1991.

The appeals under the Payment of Wages Act 1991 and Terms of Employment (Information) Acts 1994 and 2001 were withdrawn.

Respondent’s Case

The respondent told the Tribunal that on 7 February 2012 when he started his shift at the pub at 6.00pm his colleague was about to leave at the end of her shift. She had her coat on and had her bag with her. He was counting the money in the till when she came to him with a €10 note and asked for change for the bus. He gave her a €5 note and €5 in coins. As a joke she asked for more money. The respondent touched her cheek with his finger and replied to her 'that's your money'. She left in good spirits.

On 10 February the manager phoned the respondent and requested a meeting the following day at 10.30am but he did not say anything about the purpose of the proposed meeting. The respondent was due to work on the evening of 11 February and so he asked the manager to have the meeting when he arrived at work. In reply the manager sent the respondent a text message to say that he was suspended and that he did not need to attend for work the next evening. There was no mention of suspension with pay.

The manager told the respondent that he had seen CCTV of the incident with his colleague on 7 February. The respondent's colleague had not complained but the manager did not like what he had seen. The respondent phoned his colleague but she did not pick up his call.

The respondent wrote, on three occasions, to his employers asking for a resolution of the matter. He did not receive a reply.

The director phoned the respondent on 13 April demanding to know why he was being taken to the Rights Commissioner. The director did not mention the incident. He told the respondent he was not an EU citizen and that the matter would be raised with the respondent's former employer.

The respondent felt that he had been constructively dismissed without any supporting documentation or proper disciplinary process. He had no contact with the director except for the phone call.

The respondent is in the jurisdiction on a stamp 2 student visa that allows him to work 20 hours a week during term and 40 hours during holiday time. He has done courses in English and IT.

Appellant's Case

The manager gave evidence. He is no longer employed by the appellant. He became of the incident the day after when the supervisor told him that the respondent's colleague was upset. The manager phoned the respondent's colleague to find her flustered and upset and he looked at the CCTV.

The manager said that the respondent cancelled both meetings that he set up. Later the respondent sent him text messages but he did not respond. He just passed the matter on.

The respondent's colleague was in fear, crying and shaking and she did not know how to handle the incident. Customers who had been in the pub at the time, told the manager about the incident.

The manager had asked the respondent to produce his student visa but he did not comply. The respondent's colleague is no longer in the country.

The director gave evidence. He took over the business on a transfer of undertaking on 21 December 2011. It is not true that he did not meet the respondent because he met all the staff on the day he took over and again a week after Christmas. He asked the three non-national members of staff for proof of entitlement to work. The respondent did not comply.

The manager informed him of the incident. He phoned the supervisor and was concerned about the girl's welfare because she was traumatised. The director was annoyed.

The director took it upon himself to phone the respondent and advised him of the procedure he wanted to follow. He wanted the respondent to come to the pub and hear what his colleague had to say. There was a lack of answers from the respondent. He would not come in and explain. The director reported the incident to the Gardaí but the respondent's colleague was too afraid to make a statement.

The director has cut the respondent's hours after he took over. He did not realise that the respondent could work 40 hours during college holidays; that was his mistake.

Determination

The Tribunal having carefully considered the evidence adduced finds that there was an incident involving the respondent and one of his colleagues. There was a conflict of evidence about what had happened in that incident but on balance the Tribunal prefers the evidence of the respondent. The Tribunal notes that the appellant produced neither CCTV pictures but referred to them in evidence nor the colleague involved in the incident that led to the termination of the respondent's employment to it at the hearing. This, despite the fact that the appellant was able to bring a witness who had no first hand evidence, to the Tribunal on the matter. The appellant also produced to the Tribunal statements purporting to be from the colleague involved in the incident which were not signed by that person. The Tribunal also noted the difference between the evidence given of the date when the manager states that he became aware of the incident and the date when the director became of it. It was also noted that procedures were entirely lacking in the appellant's response to the incident.

The business was taken over and the Transfer of Undertaking Directive applied and shortly thereafter the respondent's hours of work were reduced significantly. Article 5 (3) of S.I. 131/2003 European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 reads:

If a contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee concerned, the employer concerned shall be regarded as having been responsible for the termination of the contract of employment.

The Tribunal find that the termination of the respondent's employment falls within this definition therefore the respondent was unfairly dismissed. The appeal under the Unfair Dismissals Acts 1977 to 2007 fails and the recommendation of the Rights Commissioner is

upheld.

The Tribunal took into consideration the visa situation of the respondent in coming to this decision.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)