

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

Employer

UD652/2009

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

Employee -v- Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms S. McNally

Members: Mr D. Hegarty
Mr J. Flavin

heard this appeal at Cork on 9th March 2010

Representation:

Appellant /Employer:

Mr Eoin Clifford B.L., instructed by Mr Seamus Hickey,
Hickey Fitzgerald, Solicitors, O'Brien Street, Mallow, Co. Cork

Respondent /Employee:

Ms Ilona Majdak, 8 Kingsfort Square, Castlepark Village,
Mallow, Co. Cork

Mr. Barry Murphy, Eugene Carey & Co., Solicitors,
Courthouse Chambers, Mallow, Co. Cork

The determination of the Tribunal was as follows:-

This case came before the Tribunal by way of an appeal by the employer against the decision of a Rights Commissioner Ref:r059680-ud-07/DI - 07/DI dated 3rd February 2009

Employer's case:

The employer, J has run a tyre and garage business for in or around fifteen years. Their work includes fitting car tyres and roadside assistance. The employee is Polish and commenced his employment in October 2004. On the week prior to his employment commencing, another Polish worker had been taken on and an enquiry was made as to whether the employer was looking for other workers. The employee met witness with an interpreter also in attendance however it transpired that his English was perfect. The employee was an excellent worker and was always very punctual. In May 2007 he requested a pay raise and witness told him this was not possible but offered him the option of working six days which meant he was getting extra money. In or around that time another Polish man started working for witness and in October 2007 he said he was leaving. He was asked if he would work his notice, which had been given on a Tuesday and he left the following Thursday.

The employee came to witness on 5th October 2007 and told him he had got a better job and was giving two weeks notice. Witness appreciated his honesty. On the Friday when the two weeks notice were up the employee said that the other job had not come through but at that stage the employer had earmarked someone else for the employee's job. The man who had been earmarked for the job was working for a plumber and he came back to witness and told him his boss wanted him to finish a particular job. The employee asked if witness could keep him on and he was told he could work on a day-to-day basis. Two weeks later G, who designates the jobs, told witness that the employee was refusing to do a particular job. Witness told the employee that he could not pick and choose his jobs and he then did the job in question. Witness was not at work on 21st November 2007 and G rang him at around 4.30pm stating that the employee was asked to do a job and he refused. Witness advised G to tell the employee to go home and he would talk to him the next day. The employee's response was that the employer should pay him for the two weeks and he got into his car and drove away. The man that witness had earmarked replaced the employee.

In cross-examination witness stated that in May 2007 the employee did not state that he was thinking of leaving, all he mentioned was that he wanted more money. The jobs were done in rotation, it was the employee's turn and he refused to do the job. On 21st November 2007 the employee was not told that he was fired but to go home and he (witness) would sort it out the next day. The next day he met the employee in the yard and asked him what happened the previous day and his response was that he should pay him two weeks notice. Witness told him he did not let him go.

In re-examination witness stated that the employee was taken on as a mobile tyre fitter. If a job came in and another employee was already in that area then that employee would do the job, otherwise the jobs were done in rotation.

In answer to questions from Tribunal members witness said that when the employee was appointed he was told that when he had experience he would be going on the road to do the mobile fitting. All the employees do mobile fitting as well as after hours work and its done in rotation. Prior to the employee commencing his employment his wages and holidays were written down and it was read out to the employee in the presence of the interpreter. The employee did not have written terms and conditions of employment. If an employee had a problem they would talk it over with witness or his wife

The Tribunal also heard evidence from a director and wife of previous witness and she was in the office with the previous witness when the employee handed in his notice. The employee said that he was not going to do like the other man who did not give notice. He said he had got another job.

Witness was not present on 21st November 2007. Her understanding was that at the end of the two weeks he was leaving as he had got another job.

In cross-examination witness stated that on the next day, 22nd November, the employee sent a text message looking for his P.45 and she sent back a text asking for his address.

The Tribunal also heard evidence from G who had worked with the employer for over five years. He gave notice in September and left in December 2007 as he had got a job in the Civil Service. He was the office manager. At the beginning of October 2007 the employee came to the office and asked witness if he had handed in his notice and was he leaving. The employee said he had handed in his notice. When he asked him when was he leaving, the employee said two weeks and that he expected to start the new job in four weeks. By 19th October the employee was still working for the employer. It was getting more difficult to get the employee to do the jobs. There were two roadside breakdowns which he refused to do and witness told J, the employer what had happened. There were three vans and when the first call-out came in, the first person would be asked to do it. If there were one or two more calls in that area that same person would do those jobs. The employer covered a wide area. The next van would go in the other direction. The jobs were split. The employee gave no excuse for not doing the job and there was no mention of a bad back. On 21st November a call came in for a roadside breakdown. One of the vans had been taken to Cork for taxing purposes and the other two Irish employees had done the same number of jobs that day, with the employee having done one less job. The employee never had a problem with understanding English. The equipment from one of the Irish employees vans was being used in the depot in relation to a job on the dumper truck. Witness asked the employee to do a call out and his response was to ask one of the Irish lads. The employee was told it was his turn. Witness rang J and told him of the employee's refusal and he asked to speak to the employee on the phone but the employee ignored witness. J suggested that the employee be told to go home and witness said to the employee as instructed and that he was of no use if he was not going to do the jobs. He does not have the authority to fire anyone. The employee went home and witness was not in the following day.

In cross-examination witness stated that he ran the business on a day-to-day basis and nobody had been fired during his time working for the employer. All of the staff had been there over a long period. The employee had been doing his fair share of the call outs.

In answer to questions from Tribunal members witness said that after 21st November when the employee left and went home, he assumed he would be in the next day. There was nothing to suggest that he had been dismissed.

Employee's case:

The employee stated that his standard of English was good for the purpose of dealing with customers but not that good in a situation such as the hearing of this case. His writing skills were good. He commenced working for the employer in October 2004 and was given a letter in Polish stating he was a full time employee. In May 2007 he went to J, his employer and told him that his cousin had offered him a new job. The employer offered him one extra day and asked him to stay on, that he needed him and the employee agreed. He had a problem with his back and he told J, his employer. In October 2007, in or around the 5th, he went to J and told him his back was in a bad condition. He had no other job lined up. On 21st November 2009 he and another Polish man plus two Irish men were working on a dumper. G came to the two Irish lads and they refused to do the call out. The two Irish lads normally did the call outs. The employee usually worked in the garage

but if it were busy he would do call outs but did not ask to do them. When witness was asked to do the call out he refused, saying he was busy. G then rang J, the employer and came back to witness telling him to go home that he was fired. He had not received any previous verbal or written warnings and he had never refused to do call outs prior to this.

The employee left immediately and went home. He went to take a shower and when he looked at his phone he noticed a text message from the employer asking for his up to date address so that a P.45 could be sent to him. The next day his back was bad and he told J, the employer about his back the previous day. The next day he went to the garage and he gave in his up-to-date address as requested. He then asked J, the employer for two weeks wages. There was no mention of the previous day and nothing was said about G. The employee thought he was fired. He obtained alternative work three weeks later at a lower rate of pay. He received his P.45 a week to ten days later and he was not asked to attend the garage to discuss the matter.

In cross-examination witness stated that he started having problems with this back in January/February 2007. He did not think of leaving in May because of his bad back. The job with the employer was not good for his back but he agreed to take on the extra day as he needed more money. He told J, the employer about his back in April 2007. His back was not painful every day, it could be bad one day and then okay for a few weeks. He did not tell G about his back. On the morning of 21st November 2009 at about 9/10am J, the employer was in the garage and he told him his back was bad. In October 2007 he told the employer that the job was too hard and he wanted a change. He asked his cousin if he could find him a job. The employer never came to him after the two weeks to say he had found someone else. He told the employer he would like to change the job but he did not say he was leaving. On 21st November he refused to do the call out as he was doing another job at the time and his back was bad.

In answer to questions from Tribunal members witness stated that he went to a doctor in Poland in relation to his back.

Determination:

The Tribunal having heard the evidence in this case is satisfied that the dismissal was procedurally unfair, however there was a significant contribution by the employee to his dismissal. Taking this contribution into account the Tribunal award the employee the sum of €2,500 under the Unfair Dismissals Acts 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

