

**EMPLOYMENT APPEALS TRIBUNAL**

**APPEAL OF:**

**CASE NO.**

TE181/2010  
UD1465/10

EMPLOYER - appellant

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

EMPLOYEE - respondent

**under**

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr. M. Flood  
Mr D. Thomas

heard this appeal at Naas on 29th June 2011.

**Representation:**

Appellant: Mr. Michael O'Neill, Solicitor, Kingscourt, 33 South Main  
Street, Naas, Co. Kildare

Respondent: Mr. Marcin Szulc, Maguire McClafferty, Solicitors, 8  
Ontario Terrace, Portobello Bridge, Dublin 6

The determination of the Tribunal was as follows:-

This case came before the Tribunal where the appellant was appealing the Rights Commissioner Recommendation under the Unfair Dismissals Acts, 1977 to 2007 reference r-083455-ud-09/EH and under the Terms of Employment (Information) Acts, 1994 and 2001 reference r-083457-te-09/EH.

At the outset of the hearing the appellant indicated that they did not wish to pursue the appeal under the Terms of Employment (Information) Acts, 1994 and 2001. The Right Commissioner's recommendation under this Act therefore stands.

## **Appellant's Case:**

The appellant is engaged in building axles and suspensions for machines for mining companies and these are mostly exported. The company is a sub contractor to company T.

The respondent was employed to work on the bogey and suspension floor. His employment began on 11<sup>th</sup> April 2005 and it ended on 18<sup>th</sup> September 2008.

In November 2006 the respondent suffered a soccer injury and no medical certificates were furnished during his absence from work. He returned the week before Christmas. In 2007 the respondent had some personal problems and was absent again from work and he suffered an injury to his left leg.

At approximately 8 am on 18<sup>th</sup> August 2008 the Director and Floor Manager, WD met the respondent on his way into work and noticed that he had a slight limp. The respondent confirmed that he was ok to work. The respondent said he had a knock while playing football. During the course of the day WD noticed that the respondent appeared to be in discomfort and advised him to get medical assistance.

At lunch time on 18<sup>th</sup> August 2008 Director AmcC was called out to the floor where employee K had transported the respondent on a forklift truck. The respondent told him he had injured his knee and he subsequently hopped down off the truck. There did not appear to be any swelling or bruises and AmcC asked him to walk. The respondent appeared to be ok but AmcC advised him to see a doctor and report back with a medical certificate. The respondent went to Naas hospital and furnished a medical certificate, and a second medical certificate from a Polish medical practitioner covered his absence from work until to 31<sup>st</sup> August 2008. After that no further medical certificates were furnished.

WD expected the respondent back at work on 1<sup>st</sup> September 2008 but he never arrived. WD tried to phone him and left messages. On 6<sup>th</sup> September 2008 he drove to the respondent's house and spoke with him. The respondent said he had been in Poland and had problems but was on the mend and would be back at work the following Monday, 8<sup>th</sup> September 2008. Again the respondent did not arrive for work that day and WD rang him and left messages. On 18<sup>th</sup> September 2008 WD made contact with the respondent who told him that he was returning to Poland for good as he had family problems. The respondent said he would not be returning to work.

WD personally delivered the respondent's P45 to his home around 22<sup>nd</sup> September 2008. As the respondent was not there he gave it to his housemate.

On 26<sup>th</sup> September 2008 the respondent came to the company and wanted them to sign a form in order that he could claim disability benefit. The company refused to sign the form for him. Subsequently, WD received several phone calls from an Irish national, who said he was a friend of the respondent, asking that he sign the disability form.

Further to a letter from Department of Social and Family Affairs in which the Department sought information on the respondent's injury, the company responded that the respondent had injured his knee while playing football in late October 2006 and had recurring problems since then. He at no time suffered any injury during the course of his employment with the company.

The respondent spoke to WD in the company on three separate days in May 2009 and said that he

wanted his job back. No vacancies existed at that time.

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

The respondent commenced employment in April 2005. On 18<sup>th</sup> August 2008 he injured his leg at work. A work colleague helped him onto a forklift truck and took him to see AmcC. When AmcC asked him to get off the forklift truck he got off very slowly and gently. When asked by AmcC to walk he demonstrated that he could only walk very slowly but was limping and losing his balance. At lunch time that day he went to the hospital and was furnished with a medical certificate for a week. He visited a Polish doctor the following week and secured a second medical certificate until 31<sup>st</sup> August 2008. The doctor gave him an injection in his knee because of the swelling and told him if it was not better in a week he would need to have an MRI scan done but would have to wait six months. He advised the company accordingly. WD told him to return to work when he was deemed fit and he trusted him and understood he did not have to furnish medical certificates as in 2006 and 2007 while he was absent due to illness WD had told him that there was no requirement to furnish medical certificates.

On 18<sup>th</sup> September 2008 his employer visited him at home and asked him to return to work. He still had a problem with his leg. He told WD that he would probably have to have surgery and WD responded that when he came back after his surgery there would be a job for him. It was cheaper and quicker to have such an MRI scan done in Poland so he returned there some two to three months later. He advised the company accordingly. He had no intention at that time of returning to Poland for good. WD had promised him that he would pay for an MRI scan but he knew that this was only talk and he was never reimbursed for the scan. He never received a P45 from the company.

The respondent returned to work on 15<sup>th</sup> September 2009. He was told that he had no right to be there and told to come back the following Monday at 10 am. He met WD that day and enquired about work and again was told to come back the following day. He was subsequently told that he had been sacked and the respondent then asked for his P45. He did not receive his P45, and he was told the original had been sent to his home some time ago. The company secretary told him to go to Revenue to secure a copy.

The respondent had never been told that he was being dismissed in September 2008 and he never resigned and had never said he was returning to Poland. He never received his minimum notice entitlement or outstanding wages owed to him.

Since his dismissal the respondent worked in another company for approximately two weeks and helped a friend in a workshop. He has secured casual and intermittent work since May 2009. He has been constantly seeking full time employment.

### **Determination:**

The Tribunal carefully considered the evidence adduced during the course of this hearing. WD stated in his evidence that he had called to the respondent's home on 18<sup>th</sup> September 2008 requesting him to return to work and this was accepted by the respondent. During the course of that conversation WD stated that the claimant had told him that he was returning to Poland for good, however the respondent denied that part of the conversation took place. The P45 issued on 22<sup>nd</sup> September 2008 with a cessation date of 18<sup>th</sup> September 2008.

On the balance of probability the Tribunal prefers the appellant's evidence based on the fact that the

P45 issued shortly after the respondent allegedly told WD that he was returning to Poland permanently.

The Tribunal finds that the respondent was not unfairly dismissed from his employment. The Tribunal upsets the Rights Commissioner's recommendation.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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