

EMPLOYMENT APPEALS TRIBUNAL

Appeal Of:
Employer

Case No.
PW3/2006

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

Employee

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney B.L.

Members: Mr G. Phelan
Mr. T. Kennelly

heard this appeal at Thurles on 28th February 2007

Representation:

Appellant: In person

Respondent: No appearance or representation

This case came before the Tribunal by way of an employer appealing against a Rights Commissioner's Decision ref. R-034415-pw-05.

The decision of the Tribunal was as follows:

The Tribunal being satisfied the respondent was properly notified of the hearing and given the failure of the respondent or a representative on his behalf to appear, the Tribunal proceeded to hear the appeal.

Appellant's Case:

Giving evidence Mr. M told the Tribunal he was approached by the respondent in September 2004. The respondent wanted to work for the company but was returning to Poland in three weeks' time. Mr. M told the respondent there was no point in the respondent becoming an employee of the company for such a short time. He suggested the respondent make contact with him when he returned from holidays. The respondent asked if he could do a trial trip on the lorry before he went on holidays. Mr. M agreed to this on the basis that the respondent would be a contractor rather than an employee. The respondent was therefore responsible for his own tax affairs.

Mr. P from the company accompanied the respondent on the trial trip. The trial trip involved travelling to Dublin port and onto mainland Europe. Mr. P telephoned Mr. M from Dublin port.

Mr. P was upset. He had to locate a docker to put the lorry on the ship, as the respondent was unable to do this. The respondent was not as capable as he had maintained to Mr. M.

Mr. M monitored the lorry for the rest of the trip via a satellite system. He realised the respondent was not taking his necessary breaks. The respondent had flawless English and Mr. M telephoned him to tell him he needed to stop the lorry and take a break. He explained the regulations governing breaks to the respondent.

On the trip the respondent had an accident in Spain. When he returned to Ireland after the trip, Mr. M informed him that he could not be a driving contractor for the appellant. The respondent became very upset. Mr. M reconsidered and told the respondent that the only way he could be a driving contractor for the appellant was if he paid for whatever damage he did himself. The respondent asked for a trial on this basis until December 2004.

The respondent was paid a daily rate of €90.00 per day. The respondent was responsible for his own tax affairs. The appellant's employees are on a rate of €100.00 per day and the appellant handles their tax and PRSI.

Mr. M was approached by Mr. A seeking employment. Mr. A had a lot of experience on the continent. Mr. M thought Mr. A and the respondent could travel together and the respondent could learn from Mr. A's experience. They worked together for three weeks but Mr. A told Mr. M that he could no longer work with the respondent. He left the appellant's employment.

Mr. M told the respondent he was not suitable as a driver as he had caused €3,000.00 worth of damage. The appellant withheld the respondent's last payment. The respondent stopped driving for the appellant in December 2004.

Answering questions from the Tribunal Mr. M confirmed the respondent was paid after he completed a trip. The appellant's employees are paid on a weekly basis. Mr. M stated it did not make sense that the respondent had tried to claim holiday pay when he was a contractor.

Determination:

There was no evidence tendered that the amount alleged by the respondent was properly owing to him as set out in the original claim under the Payment of Wages Act, 1991. No evidence was tendered in relation to holiday pay. Therefore, the appeal under the Payment of Wages Act, 1991 is successful and the Rights Commissioner's Decision is overturned.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

