EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.
Employee PW12/2008

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

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. D. Winston
Mr. J. Dorney

heard this appeal in Dublin on 15 April 2008

Representation:
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Appellant(s) :
Mr. Kevin D'Arcy BL instructed by
O'Regan Little, Solicitors,
7 Winetavern Street, Dublin 8

Respondent(s) :
Lt. Col.Michael Sheehan B.L., Minister For Defence,
Parkgate, Infirmary Road, Dublin 7

This case came to the Tribunal as an appeal against Rights Commissioner Decision r-053988-pw-07/EH.

The decision of the Tribunal was as follows:-

At the outset it was suggested by the Tribunal that the matter be adjourned pending the appellant's court-martial as he himself had opted to have the issues decided by court-martial. Having heard submissions from both sides the matter proceeded as the appellant was in fact relying on sections of the Payment of Wages Act, 1991, in addition to those sections originally referred to in the documents submitted (in particular S.5 (2)).

On 15 February the appellant went sick. He notified the respondent by phone of this. On 16 February a car arrived at his home to take him to barracks but there was no reply and a note was left

to indicate to him that he was being deemed absent as and from 0600 of that morning and to report to barracks. He rang the barracks and informed them that the sick cert would be left into barracks within seventy-two hours. On the same day, his partner left in the sick cert to a named soldier at the main gate.

The appellant returned to work on 22 February and was notified by his bank that his wages had been stopped. The stoppage was for a seven-day period although he was absent for only six and a subsequent week was deducted. However, that was an error and the one week plus one day was repaid to him. The matter is to be decided by a court-martial. The other monies remain deducted.

Section 101 of the Defence Act, 1954, allows the respondent to withhold payment where any question arises regarding pay etc. and that question shall be determined with all convenient speed and, pending such determination, the pay, allowance etc. may be withheld in whole or in part.

It is also the case that members of the defence forces are deemed employees within the meaning of that term in the Payment of Wages Act, 1991, and clearly come within the Act. The respondent relies specifically on section 5 (1) which states: "An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless (a) the deduction (or payment) is required or authorised by virtue of any statute or any instrument made under statute." The respondent contends that s.5 (1) allows it invoke s.101 of the Defence Act in the manner in which it was invoked in the instant case.

However, s.5 (1) cannot be read in a vacuum. S.5 (2) specifically sets out that "an employer shall not make a deduction from the wages of an employee in respect of (a) any act or omission of the employee… unless

(i) the deduction is required or authorised to be made by virtue of a term (whether express or implied and, if express, whether oral or in writing) of the contract of employment made between the employer and the employee, and
(ii) the deduction is of an amount that is fair and reasonable having regard to all the circumstances (including the amount of the wages of the employee), and
(iii) before the time of the act or omission or the provision of the goods or services, the employee has been furnished with- (I) in case the term referred to in subparagraph (i) is in writing, a copy thereof, (II) in any other case, notice in writing of the existence and effect of the term, and
(iv) in case the deduction is in respect of an act or omission of the employee, the employee has been furnished, at least one week before the making of the deduction, with particulars in writing of the act or omission and the amount of the deduction".

It is clear that defence forces members clearly come within the Act. Thus, while nothing in the Act prohibits the defence forces from invoking s.101, if a deduction or a withdrawal is made because of an act or omission of an employee, then the conditions set out therein have to be complied with i.e. one week's notice to the employee of the deduction and that the deduction be fair and reasonable having regard to all the circumstances etc.. To suggest that s. 5 (1) somehow takes the defence forces outside of the Act in the sense that it can invoke s.101 without any consideration of s.5 (2) is clearly incorrect. It makes no sense to include them only to allow the army to exclude the application of s.5 (2) to it by relying on s.5 (1).

While it is accepted that, if the provision to withhold pay did not exist, a situation could arise whereby military personnel could remain indefinitely on the payroll when they had long since

ceased to render military service by reason of absence, it is also clear in this case that it was never in doubt but that the appellant was on sick leave and he had rung in to that effect and had submitted a doctor's cert to that effect also within the relevant time period of seventy-two hours.

How and why the army invokes s.101 is a matter for the army. However, when it invokes s.101 in circumstances such as these when there is no question of the employee having gone missing but is still in situ so to speak it must do so in the context of s.5 (2) and adhere to the provisions of the section. In the instant case it failed to do that. It was accepted by the lieutenant colonel for the army that the note left in to the appellant's house could not be deemed to constitute notice of a deduction for the purposes of s. 5(2)(iv). It was also accepted that such a notice could not be deemed to put the appellant on notice of the fact that the defence forces wanted him to be seen by a military doctor. This is particularly so in circumstances where this appellant had never before been required to be seen by a military doctor for routine illness such as this. The appellant was not told that this was required of him and had always submitted certs from civilian doctors heretofore.

Any deficiencies in the appellant's behaviour regarding non-adherence to army rules for reporting in sick are not the concern of this Tribunal and how the army deals with those alleged deficiencies by way of court-martial or otherwise is a matter for the army also.

But it is the case that that members of the defence forces come within the Act and military law does not take precedence over civil law. If the army wants to invoke s.101, in circumstances such as these, where a soldier is clearly still in situ and is going out sick and has indicated that a cert will be and then is provided, it invokes it having regard to the relevant sections in the Payment of Wages Act. Thus, as the respondent did not adhere to the provisions of this Act, the Tribunal finds in favour of the appellant and, allowing the appeal against Rights Commissioner Decision r-053988-pw-07/EH under the Payment of Wages Act, 1991, awards him the sum of €526.29 being the amount deducted by the respondent herein.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)