

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employer

PW14/2008

against the recommendation of the Rights Commissioner in the case of:
Employee-v-
Employer

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr E. Murray

Members: Mr D. Hegarty
Ms. P. Doyle

heard this appeal at Cork on 27th May 2008

Representation:

Appellant :

Mr Finbarr O'Leary B.L., instructed by Michael Powell, Solicitors,
No 5 Lapps Quay, Cork

Respondent :

Ms Elizabeth Scally B.L., instructed by Tracie M. Nolan, Anne L. Horgan & Co,
2/3 Convent Road, Blackrock, Cork

The decision of the Tribunal was as follows:-

This case was heard in conjunction with case number UD603/2007.

This case came before the Tribunal by way of an appeal by the employer against the decision of the Rights Commissioner (Ref: r-054280-pw-07 JOC dated 14th January 2008).

The employer is hereinafter referred to as the appellant and the employee as the respondent.

The decision of the Rights Commissioner arose out of a claim by the respondent that the appellant failed to pay her commission that she was due by virtue of a commission scheme that operated within the appellant company and which was outlined to her by the Office Manager of the appellant company at the time she commenced employment. It was her understanding that the basis of her

remuneration would be in accordance with the following formula:

Basic salary + (sales for period) – (salary for period), divided by three. In this particular case the respondent claimed that for the period of November 2006 until March 2007 her sales amounted to €55,000.00. Her salary for this period was €15,000.00 leaving a balance of €40,000.00, one third of which amounts to €13,333.00, which would be payable in addition to her salary of €15,000.00.

Witnesses on behalf of the appellant gave evidence that the scheme operating in respect of all the employees of the firm was that employees would receive remuneration amounting to one third of their fee income. They would receive part of this by way of regular salary so that they would have regular disposable income and the balance by way of 'bonus'.

Compelling evidence has been produced to the Tribunal that this is the scheme that operates within the firm and that is applicable to all the employees of the firm.

The office manager gave evidence that she uses the same example to all employees when they commence, that is to say that if fees generated by the employee were €99,000.00 your total income would be €33,000.00 and your bonus would be that portion of the €33,000.00 that wasn't already paid to you in salary. She said that she had explained this to the respondent and believed that she understood the position.

The respondent appears to have been under the impression that a different bonus scheme applied, and indeed in response to questioning indicated that she regarded the bonus scheme, as she understood it, to be an extremely generous one. It is noted however that the first complaint made in respect of the non-payment of commission was by letter from the respondent's Solicitor dated the 10th of April 2007, some four weeks after the respondent's employment had ended.

There is no evidence that the appellant sought to mislead the respondent in relation to the system of remuneration and in the circumstances the Tribunal finds that the respondent was mistaken in her understanding of what the scheme was. This misunderstanding may well have been contributed to by the terms of her letter of appointment, but the Tribunal accepts that the scheme in operation, and in respect of which the respondent had an entitlement, was the scheme as outlined by the appellant.

Counsel for the respondent has urged us that it is unreasonable to suggest that having made €58,850.00 in fees for the appellant that she would not be entitled to some commission. The Tribunal however cannot make a decision on this basis, nor can it pluck a formula from the air to remunerate the respondent. It also notes that the respondent received the sum of €25,692.00 in remuneration for the period of approximately 9 months of her employment.

All the Tribunal can do in this case is apply the de facto remuneration package that existed within the business, and on the basis of €58,850.00 of generated income during the course of her employment, the respondent would have been entitled to a sum in the region of €19,500.00, being one third of that figure. She in fact received significantly more than this.

In all the circumstances the Tribunal is obliged to allow the Appeal consequently disallowing the award and therefore setting aside the decision of the Rights Commissioner under the Payment of

Wages Act, 1991.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

