

APPEAL(S) OF:

CASE NO.

Employee

PW70/2007

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

Employee

and

Employer

under

### **PAYMENT OF WAGES ACT, 1991**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr D. Hayes BL

Members: Mr F. Moloney  
Mr G. Lamon

heard this appeal at Dublin on 21st January 2008  
and 7th April 2008

Representation:

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Appellant(s): Mr Noel Ward, I.N.T.O., Parnell Square, Dublin 1

Respondent(s) Mr. Marcus Dowling BL instructed by Mr. Paul McDonald, Arthur O'Hagan,  
Solicitors, Charlemont Exchange, Charlemont Street, Dublin 2  
Mr. Conor J Glendon & Co, Solicitors, Ard Na Gréine,  
Clonroadmore, Ennis, Co Clare

The decision of the Tribunal was as follows:-

#### **Determination**

The Appellant and Respondent are both National School teachers. The Respondent is a permanent teacher in St Anne's National School in Dublin. The Respondent sought leave during the academic year of 2005-2006 for the purpose of obtaining a further qualification. Such leave is governed by Rule 116 of the Rules for National Schools.

Rule 116 provides, inter alia, that a teacher may be permitted to absent himself from his school for the purpose of attending certain university courses provided that he employs at his own expense a

suitable substitute. It also provides that such permission may be withdrawn if the teacher's work in the school is not being conducted in a satisfactory manner in his absence.

Rule 116 leave for the period in question was regulated by the Department of Education and Science's Circular 12/05. Circular 12/05 sets out the terms upon which Rule 116 leave is granted. It provides, *inter alia*, that the employment and payment of a fully qualified substitute, for the duration of the course, remains the responsibility of the applicant for leave. It also provides that, when employing a qualified substitute, teachers granted leave must strictly adhere to the relevant conditions of payment and apply fully the rates of remuneration payable to qualified substitute teachers employed by Boards of Management.

The application form for Rule 116 leave contains an undertaking one of whose terms is as follows:

"I fully understand that a trained teacher must be employed by me as a substitute and that I must strictly adhere to the relevant conditions of payment and apply fully the rates of remuneration payable to qualified substitute teachers by Boards of Management."

The Appellant had worked as a substitute teacher in St Anne's National School during the academic year 2004-2005, during which period he was employed by the Board of Management. The Respondent sought Rule 116 leave for the year 2005-2006, for which permission was given. As outlined above, she was required to employ a suitably qualified substitute. The school principal suggested to the Respondent that she might use the Appellant as a substitute. The Appellant was agreeable to this. He was to work as the Respondent's substitute from mid-October 2005 until mid-May 2006. It was agreed that the Appellant be paid at the rate of €117 *per diem*. This was not, in fact, the rate to be paid to a qualified teacher, which was €180 *per diem*. The Appellant had been paid the lower unqualified rate during the previous year. He told the Tribunal that the Department regarded him as a qualified teacher but was paying him at the unqualified rate until such time as they had received all relevant documentation from him. This process was completed in April 2006 at which time the Department notified him of his correct point on the pay scale. He was reimbursed by the Department in respect of the shortfall for the year 2004-2005. He then approached the Respondent and told her that she had been paying him at the incorrect rate and sought to be paid the full rate on a retrospective basis from the previous October. The Respondent declined to pay this rate. The Appellant had at no stage informed the Respondent that the amount that he was entitled to be paid was likely to significantly increase or that when it did he would seek arrears from her.

During the course of his acting as a substitute for the Respondent, the Respondent continued to be paid her salary by the Department of Education. She in turn paid the Appellant at the agreed rate for the days that he worked, having deducted the necessary amounts in respect of tax and social insurance. She furnished him with pay slips. There was, however, no written contract of employment.

It was submitted on the Respondent's behalf that any scheme requiring a teacher to employ his own substitute is unlawful and *ultra vires* given that s.24 of the Education Act, 1998 gives the responsibility for the employment of teachers to boards of management. S.24(1) of the Act provides as follows:

"Subject to this section, a board may appoint such and so many persons as teachers and other staff of a school as the board from time to time thinks necessary for the performance of its powers and functions under this Act."

This section permits a board of management to appoint teachers to a school. The Respondent was appointed as a teacher in the school. The Rule 116 leave allowed her to absent herself from the school while retaining her appointment. That she remained the appointed teacher is clear from requirements such that she was required to return to the school during her course of leave should the substitute's teaching not be satisfactory and that she was required to return to teach in the school at the expiry of her leave. The Appellant was not appointed to the school. He was engaged to act as a substitute during the absence of an appointed teacher. The Tribunal is satisfied that this is distinct to the function of the board pursuant to s.24.

It should be noted that Rule 116 leave operates to the advantage of the appointed teacher in that he retains his appointment and preserves his pension entitlements.

The Payment of Wages Act, 1991 defines an employee as a person who has entered into or works under a contract of employment. The Act defines a contract of employment as follows:

- “(a) a contract of service or of apprenticeship, and
- (b) Any other contract whereby an individual agrees with another person to do or perform personally any work or service for a third person whether or not the third person is a party to the contract) whose status by virtue of the contract is not that of a client or a customer of any profession or business undertaking carried on by the individual, and the person who is liable to pay the wages of the individual in respect of the work or service shall be deemed for the purposes of this Act to be his employer, whether the contract is express or implied and if express, whether it is oral or in writing.”

It is clear that the Appellant agreed with the Respondent to personally perform work for the national school; that the national school was not a client or customer of the Appellant, or indeed of the Respondent; and that the Respondent was liable to pay the Appellant's wages.

The Respondent agreed with the Department, as a condition to being granted leave, that she would employ a substitute. The Department continued to pay the Respondent and she in turn paid the Appellant. The Tribunal is satisfied that the Respondent was the Appellant's employer for the purposes of the Payment of Wages Act, 1991.

The Tribunal is satisfied that the Appellant and Respondent agreed that he should be paid, by her, the rate of €117 per diem. He freely entered into a contract to be paid at this rate. He made no mention of any potential increase in this rate or that he might seek for it to be increased once his qualification status was regularised with the Department. He was paid this rate. The question for the Tribunal is whether the higher rate should be implied into the contract.

The Respondent told the Tribunal that the higher rate was not in her contemplation when she agreed with the Appellant for him to substitute for her. Indeed, she said that she could not have afforded the higher rate and would not have taken the leave had she been required to pay it. However, she did agree with the department, as a condition for her obtaining leave, that she would employ a qualified substitute and pay him the rates payable to qualified substitutes by boards of management. This, however, was an agreement between the Respondent and the Department of Education. The Appellant was not a party to this agreement. Consequently, he has no standing to enforce it against the Respondent.

The Tribunal is satisfied that the Appellant and Respondent agreed that he be paid at a rate of €117

*per diem*. The Payment of Wages Act, 1991 is to enforce the payment of wages payable under a contract of employment. The Tribunal is satisfied that the Respondent paid the correct wage as had been agreed between the parties.

The Appellant was not, however, paid in respect of bank holidays. The Respondent accepted that she had not paid him in this respect. In respect of bank holidays, the Tribunal awards to the Appellant damages in the amount of €819.00 and thus varies the recommendation of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

