EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

Employer PW77/2007

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

Employee

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. P. Casey
Mr. D. McEvoy

heard these appeals in Cork on 8 April 2008
and 18 June 2008

Representation:

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Appellant :
Mr. Marcus Dowling BL instructed by
Meagher, Solicitors, 8 Exchange Place, IFSC, Dublin 1

Respondent :
Mr. Dermot Conway, Conway, Solicitors, 35 South Terrace, Cork

The decision of the Tribunal was as follows:-

This case came before the Tribunal by way of appeals by the employer against the decisions of a Rights Commissioner R-042993-WT-06 and r-042994-pw-06/MMG dated 18 July 2007.

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

Respondent's Case

The respondent claims that she is due payment in respect of two bonus schemes, A and B. The contract of employment was furnished to the Tribunal.

At the outset evidence was given in relation to Bonus A. Following meetings and interview with

the appellant the respondent commenced her employment in September 2003 as human resources manager-trading division. Her salary was agreed at €55K plus 20% bonus. This bonus was to bepaid on the attainment of key objectives agreed with the respondent and was effective from 1 January 2004. Terms of the contract were highlighted to the Tribunal. A business plan was preparedand objectives agreed. The respondent's tasks were listed together with dates of completion.

In her first year there were a lot of redundancies and they had outsourced a lot of their work. The respondent had to put in place new pay structures and she also designed the bonus system. In October 2004 after she had completed the interviews she had an accident at work resulting in her being out of work until September 2005. During this time she had been doing work at home and was in constant communication with the appellant. When she returned to work she was asked to train in new members of management and she completed that module. She met with the director SH who outlined what he wanted and she completed these tasks by the end of year as he had requested. Following her return to work she noticed that she was removed from the Agri side of the business and she was told that she would no longer be involved in this area. This was not by agreement. She was not given the information necessary to enable her to complete her tasks. She emailed the director on 8 November 2005 expressing her concerns and also the fact that training was being organised with the direct report management team but she had not been included. She met with the director the following day, 9 November and was told she was to be made redundant on 31 December 2005. She was told to think about the redundancy and to come back and discuss terms. He said he would discuss the option of a contract "for service". She was asked to draft a human resource re-organisation strategy which would take effect after she had left the organisation. On 12 November she emailed the director showing redundancy calculations which were to be discussed. She and her colleagues were part of a process (known as the Hay process) which dealt with salary reviews. These calculations were based on reviews due in September 2004 and 2005 and she sought retrospective salary and bonus payments in this regard. Her claim is based on a 20% bonus on an annual salary of €80K which she stated was agreed with the director. A detailed outline of the Hay process was presented to the Tribunal.

The respondent was not made redundant at the end of December 2005. She was called to a meeting with the director on 20 January 2006 and was told that from a cost perspective her post was redundant and there were no alternative positions open to her. A termination date of 31 March 2006 was then suggested and a consultancy option was discussed including bonus payments for savings made on redundancies achieved in other stores. She stated that the redundancy package of statutory plus 4.6 weeks per year of service was unacceptable. At the conclusion of this meeting she was told that all terms were open for discussion. Further meetings took place and at a meeting on 9 March details of savings were outlined in relation to voluntary and compulsory exit programmes in a number of stores. She completed the redundancies and at the end of this process there were no compulsory redundancies. She discovered she was pregnant and told her employer at the end of February 2006. She had a miscarriage on 30 March 2006.

At a meeting on 12 May 2006 a settlement package was discussed however this meeting became aggressive and she ended up dialling "999" for assistance and was very upset. She was accompanied to her car and her employer subsequently rang her husband to make sure she got home okay. Her doctor then certified her unfit to work due to work-related stress. In July 2006 she received a telephone call from the gentleman who had taken over from the previous director, inviting her to return to work. In mid July she had a meeting with this gentleman where she was advised to attend the company doctor. This doctor did not think she was ready to return to work at that time. In September/October 2006 she found out that she was pregnant again and had a baby girl in May 2007. She returned to work on 3 December 2007.

In relation to bonus B she was told she had a project to do and if she achieved the savings she would receive the bonus which was 20% of the figure achieved. In relation to bonus A the (now former) director conceded that a salary of €80K was the basis for future calculation of this bonus at

20%. Other terms were also discussed apart from the bonus schemes.

At the beginning of the 18 June 2008 hearing the appellant's representative told the Tribunal that there was no appeal of the Rights Commissioner's decision regarding holiday pay and that the appellant had paid it. The respondent's representative accepted this.

Respondent's Case (Resumed)

Giving sworn testimony, the respondent said that Bonus A was based on her contract bonus of 20% for 2005. She said that Bonus B was related to bonus payment for achieving savings regarding exit arrangements for employees of the appellant. In September/October 2005 there was an expenditure expectation for a redundancy situation. The original budget was for over a million euro based on statutory redundancy plus 4.6 weeks' pay per year of service. The respondent was to achieve a lower expenditure of statutory redundancy plus two weeks' pay per year of service.

However, the respondent achieved an expenditure of statutory redundancy only. After she had met the union she had expected them to come back to her but, in fact, they did not look for statutory plus 4.6 weeks' pay per year of service or for statutory plus two weeks' pay per year of service. She was astonished when they accepted unenhanced statutory redundancy. The appellant was also surprised at what the respondent had achieved.

The respondent told the Tribunal that she should have received a figure of over €230,000.00 but that she had "never got it or anything like that".

Questioned by the Tribunal, the respondent said: "Twenty per cent is in my contract of employment. No other figure was identified as a bonus payment."

Under cross-examination, the respondent said that the appellant had agreed to pay her a bonus on her targets. When it was put to her that she had put in the figure of twenty per cent regarding the difference between budgeted cost and actual cost she replied that this was based on her contract of employment and that it had been agreed that she would be given a percentage of costs saved.

It was put to the respondent that she had taken holidays between 20 January 2006 and 9 March 2006. She replied that she had taken holidays in early January. It was said that there were just thirty-four days in the period in question. The respondent stated:

"We did not know who would apply. The saving could not be calculated till later. The cost would depend on who applied. The company had a wishlist of people that it wanted to leave. Initially it was based on a grocery department in Midleton closing. One of the targets was to look at the high-end earners. The first budget was about grocery sales in Midleton."

The respondent told the Tribunal that senior management had a meeting, that she met the unions and that she applied the measure across all the stores. The appellant applied statutory redundancy to those who applied for it. The statutory budget had involved all people to be made redundant. People who had less than two years' service were let go.

It was now put to the respondent that she had "created a post facto story for this claim" and that SH would say that he never agreed this but that he had said that the respondent could get a percentage

after she left but that she had never left. The respondent rejected this.

It was put to the respondent that there was no legal reason why she should seek the amount she sought because the logic of her argument suggested that she should seek a higher amount and it was put to her that she would be getting nearly seven thousand euro per day for the period from 20 January 2006 to 9 March 2006. The respondent replied: "I was told I'd be made redundant. I acted in good faith." The respondent acknowledged that she had never become a consultant but said that she was to have become one.

It was now put to the respondent that this "six-thousand-plus-per-day" work was what the respondent would normally do and she accepted this. She was then asked was it not extraordinary that the appellant would agree to pay her so much. She replied: "They offered me a contract based on twenty per cent."

It was put to the respondent that it would have been extraordinary for SH to agree but that she was saying that he had done so. The respondent replied that she was indeed saying that he had done so. When it was put to her that she had never left and that no agreement had ever been reached she did not refute this.

It was now put to her that SH had been trying to agree a package and that, when the package was not agreed, the terms were not agreed. She replied: "I could not wait for an agreement. I had to act on what I believed would be offered." When it was put to her that she had done her normal job at an incredible rate of pay she replied: "I was told this would be part of the exit arrangement."

The respondent did not dispute it when it was put to her that she had still been trying to agree terms with SC (a senior director) in May. Consequently it was put to her that, therefore, there had been no agreement before that and that no-one in the appellant had ever agreed to pay her twenty per cent of savings. She replied: "I was to get a percentage of the savings. I was prepared to accept an offer of seventy-five thousand euro from the company and other things and if my annual leave was sorted out."

The respondent acknowledged at the Tribunal hearing that she had had a row with SC.

It was put to the respondent that she had got Bonus A because she had been out. She disagreed with this saying that she had worked while she had been out. She acknowledged that she had attended her workplace for just under four months of 2005. Asked what percentage of the other eight months she had worked, she replied that she had worked on the appellant's handbook, had prepared submissions for the appellant and had taken calls from colleagues. When it was put to her that this would not have taken more than a month or two she replied that research took an amount of time.

The respondent was now asked how long she was saying that she had worked at home if it had not been just one or two months. She replied that if she had been "clever" she would have recorded it. When it was put to her that she had not worked before August she replied that work on the company handbook could be considered work towards targets. She acknowledged that she had not been given targets until October or November 2005. When it was put to her that she had said that she had been cut out of the loop after November 2005 she replied that at that time she was not being asked to do things.

Referred to a document described as "1st Draft of terms for discussion for acceptable agreement", the respondent said her salary could be taken as being €70,000.00 and that her bonus would be 30

% but that, if not, she was relying on her contract which said 20 %. She did not accept that her bonus broke into three components (individual, departmental and divisional) although she acceptedthat there was a range of figures on the document.

Asked if anyone had got a departmental or divisional bonus in 2005, the respondent replied: "In HR yes." Asked if anyone in 4Home had got one, she said that she did not know. When it was put to her that no-one had got it she was asked if she could rebut this. She replied that she could not. When it was put to her that the appellant had paid her 20% pro rata she did not dispute it.

When it was put to the respondent that the appellant had tried to be generous though it could have excluded the departmental and divisional components she replied that her colleagues in HR had been paid a bonus in 2005 although she did, however, acknowledge that they had not worked in 4Home. She added that, when she had met division heads, the bonus was to have been 30% and that she had asked for a pay review.

When the respondent was asked at the Tribunal hearing if she understood how the bonus worked she said that she did and that if the appellant had met her she "would have been on 30% and this broken-down process would apply".

The respondent told the Tribunal that she had a case before the High Court for wrongful termination and before the Equality Tribunal for equal pay with her comparators. She acknowledged that her equality claim related to six of the nine grounds. When it was put to her that she had a claim about holiday pay the following week she replied:

"Do I? I've not had notice of that."

Appellant's Case

Giving sworn testimony, SH said that he had heard the respondent's evidence. When it was put to him that the respondent had said that she had had a discussion with him he replied that his recollection was "at best, fair to reasonable" and that he no longer worked for the appellant.

SH told the Tribunal that there had been a need for cost-saving and that the respondent's department had been looked at. He had approached her but he did not recall specific dates. There were to be redundancies across the group. He asked the respondent for suggestions as to how her department could be run in her absence. She was to get a percentage of the savings. The discussions went really well. He remembered going to the chief financial officer saying that he thought that the respondent would go for this package based on a rate per day et cetera.

Asked at the Tribunal hearing if he had thought that he had the basis of a deal, SH replied that he did not know what had happened. Asked if he had ever agreed to pay the respondent a bonus of 20% if she stayed, he replied that there had been no question of a bonus being paid if the respondent did not leave. She would stay as part of the team. If they had come to an agreement a percentage of savings would have been agreed. Numbers were probably mentioned but nothing was agreed.

Under cross-examination, SH said that he had worked with the respondent for about two years. When it was put to him that, some time in November 2005, he had told the respondent that shewould be leaving the appellant he replied that he had said that the appellant wanted

to get the negotiations wrapped up by a particular date and "did not want it dragging on". The appellant had been concerned with finding a mechanism for the exit. The respondent "took it like anyone else would". SH had said that she "had a level of experience that we did not need" in 4Home. He acknowledged that the respondent had come to him with a document (i.e. the abovementioned "1st Draft of terms for discussion for acceptable agreement") which he discussed with her but he told the Tribunal that this had been a discussion document and added: "I'd have had to sell this internally."

SH acknowledged that the respondent would have had a lot of input into redundancy packages in the appellant and he said that the appellant "wanted to roll out a redundancy programme".

When it was put to SH that the respondent had been well placed to say what was likely to happen next he replied that he could not say but stated that the respondent had been well exposed to the appellant's workings regarding redundancy. Asked if he had known of a basis for the respondent to be paid a bonus on her contract, he said that she had done eighty-five per cent of her duties in one division and fifteen per cent in another but that this percentage had "changed over time".

SH was now referred to a letter dated 16 May 2003 by which the respondent had been offered the position of human resources manager with the appellant. The said letter contained the following paragraph:

"You will be eligible for a bonus of 20% of your basic salary, on the attainment of key objectives under Performance Management, these objectives will be agreed with you. The bonus scheme will be effective January 1st 2004."

SH stated that "the majority of people did go on to the bonus system".

Asked if the respondent had been doing work for the appellant while she had been out, SH replied:

"Specifically I can't say but there was light work done."

Asked if the respondent had done work on the company handbook or on labour relations submissions, SH said that he did not know but that it was possible and that he knew that the respondent's colleagues had been in touch with her during that time.

At this point in the hearing the appellant's representative interjected to say that the respondent had said that she had done "bits and pieces" but that neither he nor his witness could challenge what the respondent had said. The respondent's representative replied by saying that the appellant's representative could not "leave that up in the air". The appellant's representative then said that he had not challenged it but that the Tribunal could decide on it.

Asked if it was normal for people on sick leave to carry on with their duties, SH said: "It depends."

It was now put to SH that the appellant's representative had put it to the respondent that she had been looking for over six thousand euro per day in respect of a certain period but that no-one could have read that into it at the time. SH replied that there would have been a best-case scenario and a worst-case scenario regarding probable costs depending on whether the appellant: just paid statutory redundancy; or statutory plus two weeks' pay per year of service; or statutory plus 4.6 weeks' pay per year of service.

When the respondent's representative put it to SH that the respondent had got "an excellent result" regarding redundancy at Midleton the appellant's representative said that he was objecting to SH being asked about this whereupon the respondent's representative said that the appellant had not produced figures to controvert the figures to which the respondent's representative had referred. The appellant's representative replied that the appellant had not had to produce figures, that no-one had ever agreed to pay the respondent "this stuff", that "all of this is an invention" by the respondent and that the appellant did not need to call evidence.

When it was again put to SH that there had been "a good result" for the respondent he replied: "I can't recollect and I don't know." He did accept that the respondent had done the Midleton strategy. Asked if it had been sent to SC, he replied:

"I don't recollect a specific document. I'm here under subpoena. There was a Midleton strategy. I don't recall if (the respondent) drafted that but I imagine she did. Certainly the changes were made. We hadn't agreed what Bonus B was to be. It was taken out of my hands. I was only connected with 4Home."

Asked if a bonus to the respondent had been discussed, SH said: "I can't recollect. It's a possibility." Adding that "there may have been a meeting" between him, the respondent and another named officer of the appellant, SH said that SC would have been aware of the abovementioned "1st Draft of terms for discussion and for acceptable agreement" and that this was"a discussion document".

Asked if he had agreed to eighty thousand euro rather than seventy thousand, SH replied:

"I'd accept (the respondent) had a grievance. If it was aired with me it does not mean I agreed. Nothing was agreed till all would be agreed. I was told none of this was my business and to hand it over to (SC). We were still discussing in October. It was a fluid-type scenario. I was trying to be fair to (the respondent)."

SH told the Tribunal that he had attempted "to get this resolved" but that "when I went to get agreement I was taken from the case".

At this point in the Tribunal hearing the appellant's representative interjected to ask rhetorically how the respondent's representative could say that the respondent thought she had an agreement even though she had admitted that she had had a row with SC about it.

When it was put to SH that the respondent had gone on sick leave because of the loss of a child SH replied that he did not know "the exact time" but that he knew that the respondent had met SC. Asked if SC had been told of his earlier conversation with the respondent, SH replied that SC had been told and that he (SH) had been asked to hand over to SC and told to let SC handle it. SH added: "I think I was deemed incompetent probably."

Asked if he had known of other HR posts available around that time, SH replied that he could not say. He accepted the proposition that people try to get what they can but said that he did not think that he had been incompetent in dealing with the respondent. He said that there had been no agreement and that the matter had been taken out of his hands.

Determination:

Regarding the appeal lodged against Rights Commissioner Decision R-042993-WT-06 under the Organisation of Working Time Act, 1997, the Tribunal notes that at the beginning of the Tribunal hearing on 18 June 2008 the appellant's representative told the Tribunal that the appellant was not appealing this element of the Rights Commissioner's award. As the respondent's representative accepted this, the Tribunal deems the appeal against Rights Commissioner Decision R-042993-WT-06 under the Organisation of Working Time Act, 1997, (by which the respondent was awarded the sum of €4,230.00) to have been formally withdrawn.

Regarding the appeal lodged against Rights Commissioner Decision r-042994-pw-06/MMG under the Payment of Wages Act, 1991, (by which the Rights Commissioner awarded the sum of €11,000.00 as Bonus A and €11,000.00 as Bonus B based on an annual salary of €55,000.00) the Tribunal agrees with the Rights Commissioner in his finding that the respondent was entitled to a payment as Bonus A and a payment as Bonus B but the Tribunal exercises its right to vary the said award as set out in the following paragraphs.

In the case of Bonus A the Tribunal deems it just and equitable to award the respondent the sum of €9,234.23 (this amount being equivalent to seventy-five per cent of twenty per cent of an agreed updated annual salary of €61561.50.) It was admitted to the Tribunal that the respondent had only been in her place of employment for three months and three weeks in the relevant bonus period. However, evidence was also adduced that the respondent had worked from home during part of the said year.

In the case of Bonus B the Tribunal deems it just and equitable to award the respondent the sum of €12,312.30 (this amount being equivalent to twenty per cent of the updated annual salary of €61561.50.) The Tribunal accepts that enormous savings had accrued to the appellant as a result of the respondent's work in minimising the cost to the appellant of a redundancy scheme. The Tribunal does not doubt the opinion formed by the Rights Commissioner that there was an understanding between the respondent and her employer that a bonus would be attributable to such a project in view of the time and effort that would have to be expended in achieving what was achieved over and above any other targets and duties that related to the respondent's role.

Therefore, the Tribunal varies Rights Commissioner Decision r-042994-pw-06/MMG under the Payment of Wages Act, 1991, to award the respondent the sum of €21,546.53 under the said legislation. Any payments that may have already been made to the respondent towards payment of either the said Bonus A or towards the said Bonus B can be set off against the said award.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)