

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

Employer

CASE NO.

PW73/08

Against the decision 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. D. Cagney BL

Members: Mr. P. Pierce
Ms E. Brezina

heard this claim at Dublin on 10th September 2008.

Representation:

Appellant: Mr. David Cantwell, Foster McAteer, 32 Upper Mount Street, Dublin 2

Respondent: In person.

The decision of the Tribunal was as follows:-

This appeal came before the Tribunal by way of the employer (in voluntary liquidation) c/o the liquidator appealing against the decision of the Rights Commissioner under the Payment of Wages Act, 1991 (ref. R-056736-pw-07/SR).

Background:

The employee (respondent in this appeal) was employed as an electrician and worked for the company from 17th January 2007 to 16th June 2007. On 15th February 2007 he received an advance towards his wages of €500.00 from the company. He believed he was not paid at the correct rate of pay during his tenure. He never received a P45 or a P60. He secured employment through a friend working in the company. He never received a contract of employment.

The liquidator acting for the company said the company went into liquidation on 3rd September 2007. Through conversations with the Directors of the company he ascertained the respondent only engaged sub-contractors. From the company's records he could see no evidence of employees being employed by the company. Sub-contractors invoice the company for

services. Relevant Contracts Tax (RCT) is a system of tax deduction where principal contractors deduct tax at 35% from payments to sub-contractors. Certificates of RCT deducted issue to sub-contractors who receive payments. There was no evidence from the company's records that the appellant had received any payment from the company for services.

Respondent's Case:

The respondent (the employee) was employed as an electrician from 17th January 2007 to 16th June 2007. He worked in several locations throughout Dublin. The owner/director of the company decided as to where he worked and his hours of work. When he completed work in a particular location he telephoned the owner/director as to where he was to work next. His hours of work were 8 am to 4.30 pm Monday to Friday. He worked until 6 pm on one occasion and also worked on two Saturdays. He agreed a rate of pay of €15.20 per hour with the respondent. The company supplied materials. He drove to work each day. After 16th June 2007 he could not contact the company. During his tenure he was paid €4,000.00 in cash and €1,500 in cheques totalling €5,500.00. He believed he should have been paid at a rate of €17.70 per hour and that a balance of €3,700.00 in wages was owed to him. He never received his annual leave entitlement of 10.5 days, which amounted to €1,449.63 nor payment for three public holidays, which amounted to €414.18.

Appellant's Case:

The appellant (liquidator) was appointed to the respondent company on 3rd September 2007. At the date of liquidation it was established with the directors that the company had no employees but rather engaged sub-contractors to carry out work. The respondent was deemed to be an unsecured creditor of the company. One of the owners of the company had told him that the respondent had worked for him for some time. The liquidator believed the respondent to be a sub contractor of the company and therefore an unsecured creditor. The respondent never invoiced the company. No P45 issued because those working for the company were sub-contractors and thus the issuing of P60s did not come into play. If the respondent were deemed to be an employee he would accept that a sum of €5,563.81 was owed to the respondent. Prior to 2007 the company employed staff but as each employee left a sub-contractor was engaged to replace that employee. The respondent came to the liquidator's office and informed him that he was owed a sum of money and sought an RCT Certificate. There was no evidence that the respondent had received payments from the company. It was explained to the respondent that there was no records to suggest that the respondent had invoiced the company.

The appellant told the Tribunal that it was possible that the company could have employed employees but that no payroll or other company records were kept in the company.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. It is clear to the Tribunal there was a significant conflict of evidence between the parties. The respondent believed at all times that he was an employee of the company. He had direct contact with the owner/director on a regular basis who instructed him as to where he was to work. He was paid by his employer on a weekly basis. The Tribunal finds that the respondent (employee) was unaware his employment had been terminated with finality until some time had elapsed since he was last called for work. The liquidator believed it was possible that the respondent could have been an employee of the company. On this basis the Tribunal varies the decision of the Rights Commissioner and

wards the respondent €5,563.81 under the Payment of Wages Act, 1991.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

