

## EMPLOYMENT APPEALS TRIBUNAL

### APPEALS OF:

### CASE NO.

Appellants:

Employee	PW121/08
Employee	PW122/08
Employee	PW123/08
Employee	PW124/08
Employee	PW125/08
Employee	PW126/08
Employee	PW127/08
Employee	PW128/08
Employee	PW129/08
Employee	PW130/08
Employee	PW131/08
Employee	PW132/08
Employee	PW133/08
Employee	PW134/08
Employee	PW135/08
Employee	PW136/08
Employee	PW137/08
Employee	PW138/08
Employee	PW139/08
Employee	PW140/08
Employee	PW141/08

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

Respondent:

Employer

**Under**

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S C

Members: Mr J. Horan  
Mr G. Lamon

heard these appeals at Naas on 5th January 2009.

**Representation:**

**Appellants:** Ms Amanda Kane, Divisional Organiser/North Eastern  
Division, Mandate Trade Union, O'Lehane House, 9 Cavendish Row, Dublin 1

**Respondent:** Mr. Marcus Dowling B.L., instructed by BCM Hanby Wallace, Solicitors, 88  
Harcourt Street, Dublin 2

The decision of the Tribunal was as follows:-

This case came before the Tribunal by way of appeals by the appellants against the decision of the Rights Commissioner, ref r-059915-pw-07/JW.

**Determination:**

The respondent operates a large chain of stores throughout Ireland and employs these appellants in one of these stores in a large town within commuting distance of Dublin. In mid 2005 twenty-four hour trading began at this store. For several years before 2005 the respondent conducted 24 hour trading in the period leading up to Christmas. The appellants normally worked in the evening shifts and were paid time and a half for work after 10 pm. Their claim is that they were entitled to double time for work after midnight.

It was established practice for several years that during the pre-Christmas 24 hour trading Sales Assistants would be paid double time for work between midnight and 6 am. This was re-enforced by a decision of a Rights Commissioner r-032865-pw-05/JH made on 4<sup>th</sup> October 2005. We understand this position still applies for Christmas trading.

The appellants' case before the Tribunal was based on two arguments:

- (1) a document headed "New Staff Pay Package – Limerick" which provided "24 Hour Trading Sales Assistants working between 12.00 midnight and 6.00 am . Double Time"
- (2) certain other sales assistants, who normally worked on the day shift, apparently received a double time payment on three occasions working after midnight alongside one of the evening sales assistants.

Counsel for the respondent cross-examined one of the appellants at length about the "Limerick document". The appellants did not work in Limerick and issues were raised as to its relevance as well as its status. The document was brought into being when the only 24-hour trading was in the Christmas period. Another document in the booklet submitted by the appellants trade union (Appendix 10 thereof) is headed "Staff Rostering Arrangements for Xmas" and also includes "Rates of Pay for Christmas Trading" and provides "double time for sales staff between 12 midnight and 6 am".

The Tribunal is not persuaded about the status and relevance of the Limerick document. We agree with the Rights Commissioner findings that the Limerick document only applied for the Christmas period and we also agree with his comment "that the document could have been the source of confusion and ambiguity". We also agree that the earlier Rights Commissioner finding ref. R-032865-pw-05/JH does not have particular relevance to this appeal as it applies to Christmas

only.

Turning to the second ground, the Tribunal is satisfied that different terms and conditions applied to these appellants who worked different and shorter hours compared to the day staff. Several appellants in evidence had the same “flexi contract” but the reality is that these appellants normally worked shorter hours than the standard 37.5 hour week usually worked by day staff. The overtime consideration for these appellants could be quite different from day staff who had already worked a standard working day.

The fact that other employees may have been paid at a higher premium rate for working after midnight on three occasions cannot form the basis for a contractual liability for the respondent to pay the same premium to these appellants.

The Tribunal agrees with the Rights Commissioner that these appellants had different terms and conditions relating to pay from those of the day staff. Therefore, the Tribunal upholds 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)