EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF: CASE NO.

Employee -**Appellant** TE79/2006
PW99/2006

against the decisions of the Rights Commissioner R-042252-TE-06-DI and R-042253-PW-06-DI

in the case of Employer -**Respondent**

under

TERMS OF EMPLOYMENT INFORMATION ACTS, 1994 TO 2001
PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Flanagan B.L.

Members Mr. F. Cunneen
Ms. M. Finnerty

heard these appeals at Dublin on 30th April 2007

Representation:

Appellant:
Mr Richard Grogan, Richard Grogan & Assoc,
16 & 17 College Green, Dublin 2.
Respondent:
XXXX of the respondent

This case came before the Tribunal as a result of appeals by an employee (the appellant) against a decision of the Rights Commissioner under the Terms of Employment Information Acts, 1994 to 2001, R-042252-TE-06-DI and the Payment of Wages Act, 1991, R-042253-PW-06-DI, in the case of an employer (the respondent).

Determination

After having heard from both parties and after having received extensive documentation on the hearing date the Tribunal afforded to both parties the opportunity to furnish written submissions within a period of a further two months. The employer and the appellant then furnished submissions in writing dated 4th May 2007 and 18th June 2007 respectively.

The appellant was retained by the respondent ostensibly as an independent sub-contractor under a contract for services. The appellant had been engaged as in a role described as that of a *"labour only sub-contractor"*. Subsequent to the termination of his employment the appellant

made anumber of complaints to a variety of bodies arising out of his employment. In its submission to theTribunal the respondent has enumerated eight complaints made against it by the appellant.According to the respondent the appellant has made complaints to the Labour Court under theIndustrial Relations Acts in respect of a claim the be paid in accordance with the RegisteredEmployment Agreement for the Construction Industry; under the Organisation of Working TimeAct 1997; under the Terms of Employment (Information) Act 1994; under the Payment of WagesAct 1991; to the Department of Social, Community and Family Affairs; to the Department ofEnterprise, Trade and Employment; to the Revenue Commissioners and finally to the EqualityAuthority on the grounds of race. Only some of those complaints are to be dealt with before thisTribunal.

The appellant had contended before the Rights Commissioner that his correct status was that of an employee retained under a contract of service and not that of a sub-contractor engaged under a contract for services. The Rights Commissioner has found that the appellant was an employee. The Tribunal also notes the decision of the Deciding Officer under section 300 of the Social Welfare (Consolidation) Act 2005 that the appellant was employed under a contract of service and that PRSI Class A is applicable to him. On appeal to the Tribunal both parties were content to accept these decisions. For the appellant extensive submissions were made in support of the contention that the claimant was an employee. Having carefully considered these submissions the Tribunal has satisfied itself independently that the appellant was indeed an employee at all material times.

The main argument before the Tribunal is a somewhat novel claim relating to the deduction of tax. Throughout the entirety of his employment the respondent had deducted 35% of all amounts paid to the appellant and had remitted the amounts deducted to the Revenue Commissioners as being deductions of Relevant Contract Tax. The respondent had deducted this sum, and apparently completed the relevant paperwork, as is required under the various income tax acts and regulations in respect of an independent sub-contractor. The Tribunal has carefully considered the extensive extracts of the income tax acts and regulations provided to it by the appellant.

The appellant claims that since he was not in fact a sub-contractor it then follows that the deduction of Relevant Contract Tax was not a deduction authorised by law and therefore the deduction of 35% of his remuneration was an unlawful deduction for the purposes of the Payments of Wages Act and the appellant seeks a determination of this Tribunal ordering the respondent to pay back to the appellant the entire sum deducted.

For the respondent it was submitted that as the correct status of the appellant was that of an employee the respondent was authorised, and indeed obliged, to deduct tax under the PAYE scheme. As the appellant ought to have been subjected to emergency tax then the appropriate level of deduction was in excess of that which had in fact been deducted such that the claimant had not suffered any loss and that the amount deducted had been authorised by law. The employer also pointed out that as all amounts deducted had been remitted to the Revenue Commissioners then the appellant could deal with any overpayment of taxes by way of an application to the Revenue Commissioners for reimbursement.

The Tribunal has enquired of the representative for the appellant if he accepts that the respondent was obliged in any event to retain a deduction from the remuneration of the appellant in respect of the employer’s obligations under the PAYE scheme and the Tribunal wished to be advised on how that matter ought to be reflected in the determination of the Tribunal. The representative for the appellant was unambiguous in articulating the position of the appellant. The appellant was seeking a determination of the Tribunal for the entire sum deducted without retention of tax under the PAYE scheme. It was the appellant's position that as the deduction of Relevant Contracts Tax was unauthorised by law the appellant was entitled to a determination of the Tribunal for the full amount

and that any obligation or entitlement which the respondent has to deduct monies from the appellant was one which the respondent could take up with the appellant and the Revenue Commissioners but was not a matter in respect of which the Tribunal had any role or jurisdiction under the Payment of Wages Acts or at all.

The Tribunal notes that the appellant is a foreign national and the Tribunal understands that the appellant was ordinarily resident in Poland.

The Payment of Wages Act 1991 [25/1991] provides at subsection 5(1) that *"An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless (a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute."*

The Payment of Wages Act 1991 [25/1991] provides at subsection 5(5) that *"Nothing in this section applies to (a) a deduction made by an employer from the wages of an employee, or any payment received from an employee by an employer, where (i) the purpose of the deduction or payment is the reimbursement of the employer in respect of (I) any overpayment of wages, or (II) any overpayment in respect of expenses incurred by the employee in carrying out his employment, made (for any reason) by the employer to the employee, and (ii) the amount of the deduction or payment does not exceed the amount of the overpayment."* It appeared to be common case that the amount that oughtto have been deducted at the PAYE emergency rate exceeded the amount that had in fact deducted.

The Tribunal finds that the appellant was an employee and that the respondent had made deductions from the wages of that employee and that at least the amount of those deductions was authorised by statute as a requirement of the PAYE scheme such that the deductions are lawful deductions for the purposes of the Payment of Wages Acts as per subsection 5(1) of the Payment of Wages Act 1991 [25/1991].

The Tribunal finds that to make an award under the Payment of Wages Act for the entire amount incorrectly categorised as being deducted under the Relevant Contracts Tax without permitting the employer to retain the amount which ought to have been categorised as being deducted under the PAYE system would constitute an order of the Tribunal for the payment of wages without deduction of tax as required by the income tax acts and that any such order would therefore be *ultra vires* the powers of this Tribunal because it would be an order to an employer to act unlawfully in relation to the operation of the PAYE scheme.

The Tribunal finds that insofar as the respondent failed to make deductions categorised as being in accordance with the PAYE scheme in the first instance from the wages of the appellant then the appellant may be regarded as have received an overpayment in wages in respect of PAYE such that the deductions actually made by the respondent may be regarded as a deduction for the purposes of obtaining a reimbursement and therefore a permissible deduction under subsection 5(5) of the Payment of Wages Act 1991 [25/1991].

The Tribunal is satisfied that there was no unlawful deduction but merely the incorrect categorisation of a lawful deduction such that the Payment of Wages Act has no application in the instant case. The Tribunal was not provided with a credible reason for the failure of the appellant to deal with this matter through an application to the Revenue Commissioners. The Tribunal suspects that the true rationale for making this claim under the Payment of Wages Act and seeking an award for the return of the entire sum without retention of PAYE is for the purposes of non-payment of these taxes by the appellant, who is a non-Irish national and resident abroad and therefore less amenable to the embrace of the Collector General.

It is not the role of the Employment Appeals Tribunal to assess taxes or to deal with the overpayment of taxes and it is appropriate for the Employment Appeals Tribunal to decline to involve itself in matters within the exclusive jurisdiction of the Revenue Commissioners.

The appellant claims that the Rights Commissioner underestimated the loss of wages. The Tribunal upholds the decision of the Rights Commissioner in respect of his finding that the appellant was entitled to be paid at 88% of the combined craft rate. The Tribunal also upholds the uncontroverted finding of the Rights Commissioner that the appellant had been entitled to 115.5 hours annual leave and that he had been paid 137 hours holiday pay.

The appellant claims that the Rights Commissioner failed to deal adequately or at all with the claim under the Terms of Employment (Information) Acts, 1994 to 2001. The Tribunal notes no specific reference to these Acts in the decision of the Rights Commissioner and the Tribunal is therefore satisfied that there is some merit in the claim that the Rights Commissioner erred by omitting to state a conclusion in relation to this head of claim. The Tribunal has considered the argument as to whether it is more appropriate for the Tribunal to decline to hear the appeal in this matter on the basis that no decision was made by the Rights Commissioner in the first instance in respect of the claim under the Terms of Employment Acts and therefore there is no decision of a Rights Commissioner from which an appeal can be made to this Tribunal such that it might be more appropriate to remit the matter back to the Rights Commissioner for a decision in the first instance. The Tribunal is of the view that it has no power to remit and further that the recommendation and decision of the Rights Commissioner was entitled, and therefore intended to be, a recommendation under the Terms of Employment (Information) Act, 1994 by the Rights Commissioner, notwithstanding the lack of any reference to the Act specifically in the body of the decision such that this Tribunal may deal with the matter by way of an appeal.

The Tribunal has noted that the claim under the Terms of Employment (Information) Act was not raised before this Tribunal orally by either party and was only mentioned in documents. It was common case between the parties that the claimant had been categorised incorrectly as a sub-contractor. In the circumstances the Tribunal can only presume that the employer had failed to issue a statement of terms and conditions of employment as required by law. The Tribunal notes that a remedy under the Terms of Employment (Information) Act is to compel the furnishing of a statement of the terms of employment and that the award of compensation under these acts is another remedy. It appears that the key term of his conditions of employment of interest to the appellant was his rate of remuneration, which the Tribunal finds the be in accordance with the Registered Employment Agreement at 88% of the combined craft rate as per the finding of the Rights Commissioner. In respect of the other terms and conditions of the employment of the appellant the Tribunal considers it inappropriate to attempt to furnish a full statement when no request for same was made by the representative of the appellant at the hearing and where the basis for furnishing same was not either agreed between the parties or adduced in evidence. It appears to the Tribunal that the appellant ought to be able to rely upon the finding of the Rights Commissioner, and affirmed by this Tribunal, that the appellant's employment was covered by the Registered Employment Agreement (Construction Industry Wages and Conditions of Employment) Variation Order (Number 2), 2005 as a statement of at least some of the appellant's terms and conditions of his employment.

The Terms of Employment (Information) Act, 1994 at section 7(2)(*d*) provides that the Tribunal or the Rights Commissioner may order the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding 4 weeks remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Unfair Dismissals Act, 1977. The Tribunal is satisfied that the

use of the word compensation in the subsection indicates the clear intention of the legislature that the subsection is not to be operated as a fine or penalty and that circumstances justifying the award of compensation for loss must be shown, whether those circumstances might be categorised as constituting claims for special and/or general damages.

The Tribunal notes that the appellant gave no evidence of a compensatable loss arising out of the failure of the employer to furnish a statement of terms and conditions of employment and in the absence of such evidence the Tribunal declines to award compensation.

Insofar as the Rights Commissioner has made findings as to the rate of pay and the applicability of the terms and conditions to be found in the REA and made no award of compensation under the Terms of Employment (Information) Acts then it may be reasonably implied that the Rights Commissioner did indeed make a recommendation under the Terms of Employment (Information) Acts, albeit without mentioning the Acts themselves. And the Tribunal finds that the Rights Commissioner has dealt with the relevant matters under these Acts and the Tribunal affirms the recommendation of the Rights Commissioner made under the Terms of Employment (Information) Acts.

The Tribunal affirms the award of the sum of €955.13 by the Rights Commissioner in respect of the Payment of Wages Acts.

The Tribunal directs that a copy of this determination be forwarded to the Revenue Commissioners by the Secretariat to the Tribunal.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)