

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employer -**Appellant (Employer)**

PW180/2008

against the decision of the Rights Commissioner **R-064448-PW-08/JW**
In the case of

Employee -**Respondent (Employee)**

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. M. Gilvarry

Members: Mr. D. Morrison
Mr. M. McGarry

heard this appeal at Castlebar on 19 June 2009

Representation:

Appellant:
XXXX Managing Director of the Appellant

Respondent:
Ms. Teresa Carney, Citizens Information,
Cavendish House, Link Road, Castlebar, Co. Mayo

The determination of the Tribunal was as follows: -

This case came before the Tribunal as a result of an appeal by an employer (the appellant) against a decision of the Rights Commissioner under the Payment of Wages Act, 1991 **R-064448-PW-08/JW**, in the case of an employee (the respondent).

The employee was recruited as an excavator driver on 4 September 2007. The employment began on 26 September 2007. The employer accepted that he had not paid the correct rates as per the construction industry registered employment agreement but had paid a rate of €12-50 per hour. As an excavator driver the employee was to be paid as a class C operator at €15-97 per hour, rising to €16-37 per hour in 2008. The employer's position was that the employee was an incompetent excavator driver who buried the machine up to its slewing rings in a pile of topsoil and, in attempting to extract the excavator from this predicament, had damaged a newly

built stonewall, some twenty metres of which had to be rebuilt as a result. This had occurred towards the end of November 2007 when the employee was still under probation. As a result of this incident the employee was no longer used to drive an excavator but was employed as a class D operator, a general operative and the rates here were €14-52 rising to €14-88 per hour in 2008. The employer's position was further that whilst the agreement called for a 39 hour week he at all times paid for 45 hours both winter and summer and it was only in summer that his employees worked 45 hours.

The employee's position was that the incident with the topsoil and the stone wall had occurred in late February or early March 2008 and that he had at all times been employed as an excavator driver. He accepted that at times when there was no excavator work he had acted as a general operative. The employee's position was further that he had worked in excess of the normal 39 hour week in the construction industry, had not received payslips and was entitled to overtime payments for Saturday work.

The employment ended on 15 March 2008 and the employer's position was that the claimant was told that he was let go because of redundancy but the real reason was because of the employer's dissatisfaction with the employee.

Determination

The Tribunal is satisfied that the incident whereby the excavator was buried in topsoil and the wall was damaged occurred in November 2007 and that from then on the employee was a general operative. The Tribunal accepts the records produced by the employer which show that the employee was at all times paid for a 45-hour week. The Tribunal varies the decision of the Rights Commissioner under the Payment of Wages Act, 1991 and awards €1,266-00 under that Act

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)