

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employee

PW171/2008

- *appellant*

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

Employer

- *respondent*

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms N. O'Carroll-Kelly BL

Members: Mr D. Moore
Mr A. Butler

heard this appeal at Dublin on 6th February 2009 and 27th May 2009

Representation:

Appellant: Ms. Cathy Smith BL, Ms. Cliona Kimber BL, instructed by:
Mr. Brian Gallagher, Gallagher Shatter, Solicitors, 4 Upper Ely Place, Dublin 2

Respondent: Ms. Cathy Maguire BL, instructed by: Ms. Lorraine Williams,
Chief State Solicitors Office, State and European Litigation Section, Ormond House,
Little Ship St., Dublin 2

This case came before the Tribunal by way of an appeal by the employee against the decision of a Rights Commissioner, ref: r-054038-pw-07/GC dated 18 August 2008

The decision of the Tribunal was as follows:

Appellant's case:

Section 2.7.1 of the Proposal for Organisational change in the XXXX is crucial to this claim, and if his absences were certified then the regulations do not apply.

In 2005 the appellant was accompanying a prisoner when a third man held a shotgun to his head and threatened to shoot if he did not release the prisoner. Later on the same prisoner came back to prison and this triggered the appellant's illness, and he was out sick for a year and a half. His absence was ultimately certified in June 2007 as due to this incident.

He was placed on half pay and allowances from 23 July 2006 until 26 December 2006. He was therefore taken off half pay earlier than he should have, and on the recommendation of the Chief Medical Officer, he was placed on the pension rate. Under the Proposal for Organisational change he was entitled to full pay where he was absent due to an injury at work. Therefore there was an unlawful deduction of wages within the meaning of section 5 of the Payment of Wages Act, 1991.

He then lodged a claim with a Rights Commissioner. He received a letter on 27 June 2007 stating that his illness was due to the incident in 2005, and also saying that he would be paid what he was owed, but they did not do this. He is suffering from stress and is on medication. The correct time for lodging the claim should be 6 months plus 2 weeks because the appellant was paid 2 weeks in arrears.

The Tribunal asked the parties to try to invoke 12.3 of the proposal, and to seek clarification from the LRC, as the Tribunal was being asked to interpret a document which was not statutory.

On the second day of hearing the appellant (BN) gave evidence that he was going into a dark place talking about his case. After the incident in 2005 he suffered from severe post traumatic stress disorder and went out sick in January 2006, and was put on half pay in July 2006. He received a letter from the respondent in December 2006 that he was to come off the payroll a few weeks early. He wrote back to the Governor, but never got a reply. He was told he would not even be getting the pension rate, and that he would be on no pay. This knocked him back, and he started attending counselling sessions.

He returned to work at the end of May 2007. On 19 July 2007 he received a letter from the respondent stating that his arrears of pay were conceded and he would be paid. He was overjoyed at this, and thought that his financial worries were over, but it transpired that the letter did not mean what it said.

Respondent's case:

The Rights Commissioner found that the complaint was statute barred. There were no exceptional circumstances, and the claim was made out of time.

The respondent said that the issues were as follows:

- 1) was the claim made in time
- 2) was there money owed to the appellant, or were all monies paid.

The case might be better served by legal submission, rather than oral hearing. The respondent did not accept that there were monies outstanding. The respondent said that the Green Book was designed to cut down on overtime within the service.

The Director of HR (MF) gave evidence that the level of overtime was unsustainable and the Green Book, which was agreed upon by unions and management in July 2005, was used to eliminate the traditional levels of overtime. It was not, however, a replacement for the Civil Service regulations, i.e. the circular 25/78 still applied. Section 2.7.1 of the Proposal for Organisational change merely re-iterated the existing arrangements. The implications of section 2.7.1 overriding circular 25/78 would be far-reaching and unsustainable.

When the appellant was paid his full annualised hours, this was done in error. The premium was paid for his entire absence, which seemingly was a mistake and not in keeping with the regulations. It was nowhere written down that the general Civil Service regulations regarding sick pay had been changed. Section 2.7.1 simply added a particular part of an employee's pay to the general regulations.

Respondent's closing remarks:

The burden of proof is on the appellant to show the correct interpretation of the Green book. The Green book is not a statute or a statutory instrument, but simply a proposal agreed to by both sides. However, circular 25/78 has the force of legislation. If the appellant succeeded in his claim then an industrial relations agreement would overrule a statutory measure. It would mean that public servants could be entitled to be paid sick leave indefinitely.

Clause 2.7.1 defines categories of pay, it does not repeal civil service regulations on sick pay. It cannot override circular 25/78 or a ministerial decision. The case could have been brought up in other industrial relations fora.

They stated that, while they had sympathy for the appellant, they did not agree that there were any exceptional circumstances which prevented him from putting in the claim in time. The relevant date is 9 June 2006 when he was told he would be on sick pay. He did not make any claim to the Rights Commissioner within 12 months of this date. He is fundamentally out of time, but even if he was in time, under no interpretation of the Green book can it be read that sick pay could be paid ad infinitum.

Appellant's closing remarks:

It is common case that circular 25/78 did change the situation in relation to annualised hours at least. They said that the change went further, that in future officers would receive full pay when out sick, and annualised hours. The respondent was saying that it was a mistake to pay the appellant's annualised hours. The appellant is entitled to rely on clause 2.7.1 until it is changed. They asked the Tribunal to pay compensation in addition to the payment of wages.

Section 6 (4) of the Payment of Wages Act, 1991, can extend the time for a claim to be lodged. They said that the claim is not out of time. The appellant gave evidence of exceptional circumstances, and could not have commenced his claim until there was a contravention.

Determination:

Firstly, regarding the preliminary point in relation to time, the Tribunal is in agreement with the decision of the Rights Commissioner dated 18 August 2008.

The claimant has failed to prove that clause 2.7.1 of the Proposal for Organisational change has altered the provisions of Appendix A to Circular 25/78 relating to sick leave allowable to established staff, which states:

- 1. Full pay during properly certified sick absence, provided there is no evidence of permanent disability for service, may be allowed up to a maximum of six months in one year and half pay thereafter, subject to a maximum of twelve months' sick leave in any period of four years or less.*

Accordingly, 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)

