EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	**CASE NO.**
Employer	PW170/2008
– ***employer/appellant***	TE139/2008

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

Employee – ***employee/respondent***

under

PAYMENT OF WAGES ACT, 1991
TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. P. Casey
Ms. P. Doyle

heard this appeal at Cork on 28th May 2009

Representation:

Appellant(s): In person

Respondent(s): Mr. Noel Murphy, Independent Workers Union, 55 North Main Street, Cork

(*This case came before the Employment Appeals Tribunal by way of an appeal by the employer [hereinafter referred to as the appellant] against the decision of the rights commissioner; r-060672-pw-08 JOC dated 12 September 2008 and recommendation of the rights commissioners; r-060676-te-08 JOC dated 12 September 2008*)

(*The evidence of this case was heard through a Tribunal appointed Polish interpreter, provided on prior application by the respondent's representative).*
(During the hearing, a large volume of documentation, including payslips and timesheets, were opened to the Tribunal).

The decision of the Tribunal was as follows:-

Appellant's case:

In sworn evidence, the appellant stated that the respondent had commenced employment on 13 January 2007 as a retail security officers based in Cork. He was provided with payslips and was paid a composite rate of €9.00 per hour. This was outlined to the respondent in a letter to him dated 22 January 2007. Included in this letter were his terms and conditions of employment, an application form, the standard operating procedures and a request for additional paperwork fromhim for his personnel file. The application form was completed and returned together

with theadditional requested documentation. However, the signed terms and conditions of employmentwere not returned.

The respondent's last day of work was on Sunday 22 July 2007. On that day, the respondent alleged that he was assaulted on his way home from work. However, despite requests from the appellant, the respondent failed to provide any reports of this alleged incident, and any resulting insurance claim could not be processed without the provision of such a report. The respondent resigned on 5 November 2007 and all holiday monies that had accrued to him were paid.

On 14 January 2008, the appellant received correspondence from the respondent's union representative detailing four claims under the Unfair Dismissals Acts, 1973 to 2007, the Organisation of Working Time Act, 1973, the Payment of Wages Act, 1991 and the Terms ofEmployment (Information) Act, 1994 and 2001, which had been submitted to the Labour RelationsCommission. Ultimately, the claim under the Unfair Dismissals Acts, 1973 to 2007 was unsuccessful. In relation to the other Acts, the rights commissioner found as follows…

1. Organisation of Working Time Act, 1973 €7,500.00
2. Terms of Employment (Information) Act, 1994 and 2001 €1404.00
3. Payment of Wages Act, 1991
    - Ø Personal attack €4000.00
    - Ø Overtime payments €2500.00
    - Ø Training 4 weeks x 39 hrs x €9 per hour €1404.00

On appeal to the Labour Court, the decision under the Organisation of Working Time Act, 1973 was overturned as the appellant showed that no such breach occurred.

The appellant disputed the award made to the respondent under the Terms of Employment (Information) Act, 1994 and 2001. They contended that all of the required documentation for therespondent's employment was issued to him on 22 January 2007. As requested, the respondent subsequently returned several of the items including the application form, two passport photographs, copies of references, his P45 form from his previous employer, bank details, etc. Theappellant was satisfied that the respondent had received the terms and conditions of employment inthe letter of 22 January 2007 but chose to ignore the request to sign and return it. They contendedthat they had complied with their obligations under the Terms of Employment (Information) Act, 1994 and 2001 to provide an employee with a written statement of terms and conditions of employment within the first two months of the commencement of employment.

In relation to the Payment of Wages Act, 1991 and the issue of training, the appellant contended that the respondent received on the job training/familiarisation from his manager at that time and hewas paid for all work carried out from the commencement of his employment. The appellant'sapplication form states, "Where training is required (minimum 14 hours) this shall take place priorto commencement of Employment. Training is a prerequisite of Employment. No wage is paid fortraining." (*sic*) However, in the case of the respondent, as he was already familiar with therequirements of the client, it was not the case that he had received unpaid training.

The appellant also disputed the award for overtime which was made by the rights commissioner. The respondent's letter of appointment states that the respondent would be paid €9.00 per hour. At that time, the applicable rate as outlined in the Security Industry Joint Labour Committee Employment Regulation Order effective from 1 January 2007 was €8.62 per hour. It was the common practice of the appellant, at that time, to pay a composite rate of pay based on an employee's previous experience within the security industry and their expected hours of work. The composite rate of €9.00 was based on a forty-seven hour week and included average weekly

overtime of eight hours. The rate of €9.00 had been agreed with the respondent and at no time during his employment did he dispute his rate of pay or request that same be broken down.
In relation to the personal attack claim, the appellant highlighted that the respondent had alleged that he was assaulted on Sunday 22 July 2007 and that the assault was work related. However, despite requests, no report of the incident had been provided to the appellant. The Security IndustryJoint Labour Committee Employment Regulation Order provided that a Personal Attack Benefit would apply to employees who are attacked in the course of their duty. The amount payable to anemployee after six months of service will be ten weeks' basic pay, less Social Welfare. The respondent was submitting weekly medical certificates. He submitted a claim for ten weeks pay on23 August 2007, which was less than five weeks after the alleged assault. The respondent confirmed that they carry insurance cover for work related injuries. Claims are based on the submission of a detailed report to the insurance company and the insurance company's assessor decides on the validity of such a claim. It is the exclusive right and authority of the Insurer to validate any claims and no claim can be submitted to the Insurer on behalf of the respondent without a proper detailed report.

In cross-examination, the respondent's representative stated that he had an issue with the application of a composite rate of pay.

Replying to the Tribunal, the respondent stated that they had felt that, within their industry, it was easier to apply a composite rate of pay. At the time, the respondent's basis rate of pay was €8.62 per hour and the composite rate covered this, premium rates and overtime. All elements had been included in the composite rate of pay. They agreed that the rights commissioner had found that €9.00 was the respondent's basic hourly rate of pay and was not a composite rate and that therefore, the respondent would have had a genuine expectation of an overtime rate based on the basic hourly rate of €9.00. However, the respondent maintained that they had told the appellant at the commencement on his employment that €9.00 was a composite rate of pay and while in employment, he never complained about same.

As the respondent had previously worked in security and was therefore familiar with the requirements of the industry, the training he received from his manager at the commencement of his employment was on-site familiarities, and he was paid for all work carried out by him from the commencement of his employment. The appellant also provided the respondent with FETAC training. This was a two-day security course, was completed in March 2007 and was funded through FÁS.

The personal attack on the respondent occurred on Sunday 22 July 2007. Provision is made for such incidents under the Security Industry Joint Labour Committee Employment Regulation Orderand the appellant had insurance to cover such an eventuality. However, despite requests to the respondent, his union and his legal representative, no reports of the alleged incident had been supplied to the appellant. Also, the claim for the ten week personal attack benefit was made lessthan five weeks after the alleged incident occurred. The appellant also highlighted that, when it hadbeen indicated to the rights commissioner at that particular hearing that there was a separate legalcase on-going in relation to this incident, he – *the rights commissioner* – had said that he had nojurisdiction in the matter.

Respondent's case:

It was submitted on behalf of the respondent that the respondent worked for the appellant from 13 January 2007 until 4 January 2008 as a security guard in a store in Cork. He worked in excess of forth-eight hours each week and was paid €9.00 per hour.

The respondent never received written terms of employment from the appellant, which was in breach of the Terms of Employment (Information) Act.
The respondent was not paid in accordance with the terms of the Security Industry Joint Labour Committee Employment Regulation Order. When he was sent for training, he was not paid for same and this was admitted in correspondence that the respondent's union representative received from the appellant.

The respondent was assaulted in the course of his duty and, as a result, was unable to work. Three people whom he had escorted from the store earlier in the day attacked him. The assault was recorded by the Gardaí and the hospital. A note of the medical report from the hospital and medical certificates were supplied to the appellant, and they were informed of the attack on the respondent by letter from the respondent's union representative. However, the personal attack benefit, as provided under the Security Industry Joint Labour Committee Employment Regulation Order was not applied.

The appellant's position had been that the €9.00 per hour had been an agreed composite rate of pay. The respondent's position was that he was unaware of a "composite" rate and that he had been told that his rate of pay was €9.00 per hour. Under the Security Industry Joint Labour Committee Employment Regulation Order, an employee should receive 25% extra in pay for the first six hours of overtime. The Order gives an extra 50% for work done in excess of forty-five hours per week and a Sunday premium of €1.94 per hour subject to a maximum of €7.26.

When asked for their reply on this submission, the appellant stated that the respondent requested his P45 form on 5 November 2007, and accordingly did not have the year's service with the appellant to allow his claim under the Unfair Dismissals Acts be entertained. Furthermore, in relation to the figures submitted by the respondent's representative as an example of underpayment to the respondent under the Organisation of Working Time Act, the respondent only worked for the appellant for twenty-seven weeks, and not thirty-six weeks which had been the basis of this calculation.

The appellant did not dispute that an attack had occurred on the respondent but they had no evidence that the attack was work related. The respondent had said that the three people whom he had earlier removed from the shop attacked him at a bus stop, which was three minutes from the shop. However, the shop's incident report book had no record of three people being removed from the shop by the respondent on that day. The appellant fully accepted that an employee could be attacked while coming to or going from work. The problem was that as there was no written report of this attack, they cannot process the attack through their insurance company until such a report is furnished. Neither the Gardaí nor the hospital would deal directly with the appellant. They were not contesting the assault on the respondent but required a written report of same and the details of what happened for the insurance company. The appellant gave a commitment to the Tribunal that when they receive the written report, they would process the claim. The respondent's union representative confirmed that he was happy with this position.

In relation to the written terms and conditions of employment, the appellant stated that they believed that the only onus on them was to show that same had been issued to the respondent. Their evidence was that terms of employment had been given to the respondent. They confirmed that they had not retained a copy of same.

The appellant accepted that the respondent had been employed under the terms of the Joint Labour Committee Employment Regulation Order. The respondent was trained by his manager at the commencement of his employment but he was paid at that time as though he was actually working. The respondent had made a claim for four weeks unpaid training. Wages were paid a week in

arrears. The respondent commenced employment on 13 January 2007 and his first payslip was dated 26 January 2007. At the time of the respondent's employment, the pay week had run from Saturday to Friday. Hours of work in a particular week were processed on the following Tuesday and payment was made the following week. Accordingly, it was not possible that the respondent had worked unpaid for a period of four weeks.

The respondent confirmed that the mater of the assault was not before the Court. He had been threatened by the individuals and so was scared to proceed further with the mater. He also said that he commenced employment with the respondent on 2 January 2007 and had worked for them for two weeks, illegally and unpaid.

Determination:

The letter of 22 January 2007 from the appellant to the respondent simply states that the "rate ofpay is €9.00 per hr". (*sic*) It does not indicate that this was a composite rate of pay. The Tribunalcan find no evidence to support the appellant's contention that €9.00 per hour was a composite rateof pay or that the appellant had the ability to cover the respondent's basic hourly rate of pay – which at that time was €8.62 – and all premium rates and overtime rates within the rate of €9.00. Dangers and problems can arise when using a composite rate of pay if an employee does not understand what is included in same. Indeed, in the employment of all employees but particularlyin cases where employees are non-nationals, it is imperative that the use of a composite rate of paybe explained clearly and unambiguously.

The Tribunal will first deal with the issues under the Payment of Wages Act, 1991.

The Tribunal notes that the issue of the personal attack benefit as provided for under the terms of the Security Industry Joint Labour Committee Employment Regulation Order was compromised by the parties in that, the appellant gave an undertaking that on the furnishing of a written report of the incident, the matter will be processed by them, and this undertaking was accepted by the respondent. Consequently, the Tribunal feels that it need not involve itself in this matter and accordingly, makes no award in relation to same.

Despite the respondent's allegation that he worked illegally for a period with the appellant, it was agreed in the oral and written submissions of both parties that the respondent's employment with the appellant commenced on 13 January 2007. The Tribunal noted that the respondent had made no such allegation to rights commissioner, nor did same appear in his written submission to the Tribunal. Indeed, throughout the Tribunal hearing, the respondent's union representative accepted that employment began on 13 January 2007. The payslips that were opened to the Tribunal substantiate that the respondent was paid a week in arrears from the commencement of his employment on 13 January 2007. Having carefully considered the oral and written evidence, the Tribunal does not believe that the respondent was either employed illegally for any period of time by the appellant, nor was he unpaid during any period of his initial employment, be it in ether training or work. The Tribunal upsets the decision of the rights commissioner in regard to the award for training.

The respondent was employed in an industry that is legislated by – among other things – the Security Industry Joint Labour Committee Employment Regulation Order, and same was accepted by the appellant. While the appellant said that a composite rate was agreed, the respondent denied this. Reflecting what the Tribunal have already said in relation to the dangers in using composite rates to pay employees, the Tribunal does not believe that a composite rate of €9.00 was sufficient to cover the respondent's basic rate of pay, and overtime and premium payments. Accordingly, the Tribunal upholds the award of the rights commissioner in relation to overtime.

In relation to the appeal under the Terms of Employment (Information) Act, 1994 and 2001, the Tribunal notes the appellant's contention that they were compliant with the section 3(1) of the Act in that they provided written terms and condition of employment to the respondent within two months of the commencement of his employment. Section 3(1) of the Act provides, "*an employershall, not later that 2 months after the commencement of an employee's employment with the employer, give or cause to be given to the employee a statement in writing* ". However, section 3 also provides that such a written statement shall contain certain particulars of the terms of the employee's employment, and include…

- *the full names of the employer and the employee*
- *the place of work or, where there is no fixed or main place of work, a statement specifying that the employee is required or permitted to work at various places*
- *the title of the job or nature of the work for which the employee is employed*
- *the date of commencement of the employee's contract of employment*
- *the rate or method of calculation of the employee's remuneration*
- *the length of the intervals between the times at which remuneration is paid, whether a week, a month or any other interval*
- *any terms or conditions relating to hours of work (including overtime)*
- *the period of notice which the employee is required to give and entitled to receive (whether by or under statute or under the terms of the employee's contract of employment) to determine the employee's contract of employment or, where this cannot be indicated when the information is given, the method for determining such periods of notice*

Section 3(4) of the Act states **"***A statement furnished by an employer under subsection (1) shall be signed and dated by or on behalf of the employer*" and section 3(5) states "*A copy of the said statement shall be retained by the employer during the period of the employee's employment and for a period of 1 year thereafter.*" The Tribunal carefully considered the "Security Officer Service Agreement, Company Code of Conduct & Safety Policy", which was opened to the Tribunal and finds that this document did not meet with the requirements of the Act and was deficient in a number of areas. Nonetheless, the Tribunal recognised the efforts made by the appellant to comply with the Act and varies the recommendation of rights commissioner in this regard.

Accordingly, the decision of the rights commissioner under the Payment of Wages Act, 1991 is varied and the Tribunal awards the respondent the sum of €2,500.00 under the Act. The recommendation of the rights commissioner under the Terms of Employment (Information) Acts, 1994 and 2001 is also varied and the Tribunal awards the respondent the sum of €1,100.00 under this Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)