

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE

CASE NO.
PW181/2008

-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: Mr M. Gilvarry
Members: Mr. D. Morrison
 Mr M. Mc Garry

heard this appeal at Castlebar on 27th March 2009

Representation:

Appellant: Mr. Brian Gill, Callan Tansey, Solicitors,
 Law Chambers, 3 Wine Street, Sligo

Respondent: Ms. Kerry Molyneaux, Ir/Hr Executive, Ibec,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

This case is before the Tribunal by way of an employee appealing the Decision of a Rights Commissioner, under the Payment Of Wages Act, 1991, ref: (r-056737-pw-07/JT), (PW181/2008).

The employee is referred to as the appellant and the employer the respondent.

Background:

The appellant contends that she is due arrears of pay for hours worked/overtime. The respondent contends that she was paid a salary i.e. her job was of a higher pay and she was not due overtime pay.

Appellant's case:

The Tribunal heard evidence from the appellant. The appellant is a qualified accountant her qualifications are recognised in Austria Germany and Switzerland. Her qualification is similar to a chartered accountant. At her interview they did not discuss her hours of work, she did not ask about her hours and it was not the situation as in Germany. There was no mention of overtime. Her contract was sent to her by e-mail and she received a company handbook after the contract. She did not have a conversation about the terms in the handbook.

Clause 1 of her contract was opened to the Tribunal:

“Your average working week will be 37.5 hours. Working as part of a Pan-European team you will be required to be flexible in working schedule and actual days of the week worked. You will be notified of your schedule in advance and this may be subject to change anytime based on the requirements of the service. According to operational requirements the Company can require you to work additional hours as part of the regular shift pattern; work on Irish bank holidays that are not applicable in another European Country; work on Saturday / Sunday.”

The appellant travelled to Germany and Austria “five times in a half year” and could stay for four weeks when she travelled. The appellant told the Tribunal that in the clause above that was opened to the Tribunal it did not state that she would not be paid for additional hours. In her previous company she was on the same salary and was compensated for extra hours worked. Also she was glad to see that according to the handbook that she was entitled to the payment. The handbook was the same as the contract with the addition of “compensation” [the final line in the paragraph].

“Your average working week will be 37.5 hours. Working as part of a Pan-European team you will be required to be flexible in working schedule and actual days of the week worked.

You will be notified of your schedule in advance and this may be subject to change anytime based on the requirements of the service. According to operational requirements the Company can require you to work additional hours as part of the regular shift pattern; work on Irish bank holidays that are not applicable in another European Country; work on Saturday / Sunday. You will receive compensation for these flexible arrangements”

The appellant took one day off in March. She wanted this to be as a day in lieu, but she later learned that it was put down as an annual leave. She then spoke to other accountants and she learned that they did not get overtime. Later on she spoke to the HR manager [also known as JD] and reminded him that she had worked a certain amount of overtime. She also reminded her manager that she wanted time off.

An e-mail dated 28th August 2006, was opened to the Tribunal:

“Sorry bothering you on this but [named person] and me didn’t sort this out yet, I’m afraid. I know that L will talk to both of us (AM and me) but I would love this to get solved in a written note.

I had a closer to my contract and thereafter the company can require additional working hours if needed so. That’s absolutely fine. But know, that as per end of August my overtime totals 191.75 hours which is much more as the talk in the contract can be about.

You may imagine, that this steady pressure resolves in tiredness etc. Unfortunately, I am not Hercules and I am not keen to compensate stress symptoms at weekends nor in the annual leave as I outlined already below.

Frankly, the thinking only, that this invested time shall being not recognised, is frightening me. I hardly can follow for what reason statutory accountants shall have a particular status and no chance to be honoured for their time invest, while all other departments and even so [named person](Supervisor of the VAT group and on the same level I suppose / heard like we stat’s are) shall rely on their time in lieu. Is this stated anywhere? I really feel kind of set back.

I would appreciate if you would advice these hours eventually paid out in September. This suggestion is only, as I don’t think being able to take “weeks” off in the next time, as I think I have kind of trouble to go on holiday either from a time prospective.

Your immediate statement really is appreciated. I am really sorry for my request, but I am sure you understand from an employees perspective.” (sic).

More e-mail correspondence dated 04th August 2006 was opened to the Tribunal:

“Sorry to bother you but I am a little concerned in own matter. At the moment I have approx 155 hours overtime and I will enjoy a week holiday next week. I have understood (named in June that Stat’s are not supposed to release its overtime. Can you confirm that Stat’s in generally have no chance to release them nor getting paid for? I wouldn’t be happy with such a process. Will say, I am not keen to go on holiday and waste time in recovering a couple of days in a first place before I get open minded to the spare time left. That’s what I thinking now. Also, I would fancy getting a day off once in a while during a week or have a chance for extended weekends, when workload would allow so.” (sic).

Opened to the Tribunal an e-mail dated 28th August 2006 from HR manager:

“I will get back to you on this asap. I accept that we need to come up with a solution on this as this level of overtime is not sustainable. I will need to speak to some people about this and I will let you know how I get on.”

The appellant understood that she would be entitled to have time off in lieu, that it was not sustainable and work would have to be reduced.

The appellant explained that she talked to the other accountants and all were complaining and none of them got overtime. They were aware that they were on a higher salary but they maintained that it was because of their qualifications and that they were multilingual. Two other employees who did similar work to them were paid overtime.

The audit was due in September so the appellant anticipated that they would be busy. She approached CJ and asked that she be compensated to the amount of €8,000.00 (overtime) and to be treated like all else.

The appellant told the Tribunal that HR never reverted back to her in time. The appellant tendered her resignation and left on 30th September 2007.

Opened to the Tribunal an e-mail dated 10thSeptember2007 from HR manager:

“Thank you for your e-mails dated 6 & 7 September 2007 in relation to your overtime. As the company has discussed with you previously, you are not entitled to payment for overtime. Your contract of employment with the Company stated that you would be required to work flexible hours, and the Company handbook stated that you would receive compensation for flexible working. The Company have explained to you on numerous occasions that your compensation for any flexible hours worked was included in your salary, which was greater than the salary received by employees who may have been entitled to overtime payments.

The Company informed you of this arrangement on numerous occasions and we are disappointed that you feel that you have been treated unfairly.

If you have any further questions or if you would like to take part in the exit interview proposed for next Thursday 13th September 2007 please let me know. Please let me know if you are available for this meeting.”

The appellant was asked if she ever got time in lieu and she replied that she did not but did on one occasion, which was a travel issue.

Cross-examination:

The appellant accepted that she signed the contract and indicated her acceptance of it. She also explained that it did not indicate that there was an exclusion from overtime. It was put to her that the bonus for her as a higher wage earner was 10% as opposed to 8% for other employees; the appellant replied that her bonus was 8%.

The appellant was asked what the Company said to her regarding overtime. She replied: “that I was on a higher pay level.”

It was put to the appellant that she phoned HR in Germany after contacting HR in Ireland. The appellant agreed that she contacted the HR manageress in Germany. That the HR manageress told her that she was not entitled to the overtime. However the claimant felt that it was not up to the HR manageress in Germany to decide on the matter.

Respondent’s case:

The Tribunal heard evidence from the HR manager. He told the Tribunal that in 2006 the bonus was 8% for all employees. In early 2007 the bonus rate for the management level was changed to 10%. This was indicated to employees and was the same all across Europe, Italy, the Netherlands and the USA. There are two categories of employees and one of these were in a higher pay scale, and higher bonus, and these had a greater flexibility of hours, and did not qualify for overtime payments. It was made clear to all the employees because when the company changed from a manual paying system to another system they met the employees and produced the handbook. He made this clear to the appellant in his e-mails to her.

Determination:

The Tribunal, having carefully considered the evidence adduced and the submissions of the parties, upholds the Rights Commissioner’s Decision under the Payment Of Wages Act, 1991, ref:(r-056737-pw-07/JT), (PW181/2008).

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)