

**EMPLOYMENT APPEALS TRIBUNAL**

**APPEAL(S) OF:**

EMPLOYEE – *appellant*

against

**CASE NO.**

RP165/2009

WT64/2009

EMPLOYER – *respondent*

under

**REDUNDANCY PAYMENTS ACTS, 1967 TO 2007  
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. G. Phelan  
Dr. A. Clune

heard this appeal at Ennis on 1st October 2009

**Representation:**

Appellant(s): Ms. Mary Skerritt, Information Officer, Citizens Information Centre, Bank Place, Bindon Lane, Ennis, Co Clare

Respondent(s): In person

The decision of the Tribunal was as follows:-

**Background:**

These proceedings were brought under the Redundancy Payments Acts, 1967 to 2007 and the Organisation of Working Time Act, 1997.

At the commencement of the hearing, the appeal under the Redundancy Payments Acts, 1967 to 2007 was withdrawn as the appellant had already received a redundancy lump sum payment from the Social Insurance Fund.

**Respondent's case:**

The respondent confirmed their leave year as being from January to December. The appellant was put on lay off on 12 January 2009 but his employment was not terminated.

In 2008, the appellant took 3<sup>rd</sup> June and 24<sup>th</sup> and 31<sup>st</sup> December as fixed holiday days when the

business was closed, and 21<sup>st</sup> January, 1<sup>st</sup> August and 18<sup>th</sup> March as floating holiday days. Historically in the business, either the day before or after St. Patrick's Day was given as a paid day off. Although the respondent does not have a policy of paying for sick days, at the appellant's request his sick were paid as holidays; these days being 13<sup>th</sup> February, 14<sup>th</sup> April, 2<sup>nd</sup> and 20<sup>th</sup> May, 15<sup>th</sup> July, 8<sup>th</sup> August and 3<sup>rd</sup> October. The appellant was also off for a period of two paid weeks for a family bereavement, two of these days being paid compassionate leave.

**Appellant's case:**

The appellant stated that he took no holidays in 2008. He missed about four to five days from work but was not paid for those days. He also received seven paid days compassionate leave from 1 September to 8 September. He denied that he had taken a lot of sick days. When he was off on such days, he had not been paid. The appellant also denied that he had asked for any floating days off. As far as the appellant could remember, he had not been off on 18<sup>th</sup> March.

**Determination:**

No claim was made under the Minimum Notice and Terms of Employment Acts, 1973 to 2005. Furthermore, a complaint for the non-payment of wages is properly a claim under the Payment of Wages Acts 2001, which must be made in the first instance to the rights commissioners and only on appeal to the Employment Appeals Tribunal. The Tribunal notes that the appeal under the Redundancy Payments Acts, 1967 to 2007 was withdrawn thus the only claim being adjudicated on by the Tribunal is the appeal under the Organisation of Working Time Act, 1997.

Section 19 (1) (a) of the Organisation of Working Time Act, 1997 provides that an employee shall be entitled to paid annual leave equal to "*4 working weeks in a leave year in which he or she works at least 1,365 hours (unless it is a leave year in which he or she changes employment)*". Section 25 (1) of the Act provides "*An employer shall keep ... such records, in such form, if any, as may be prescribed, as will show whether the provisions of this Act are being complied with in relation to the employee and those records shall be retained by the employer for at least 3 years from the date of their making*". Section 3 of the Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations, 2001 - (S.I. No. 473 of 2001) - provides "*the records required to be kept under section 25(1) shall contain the following particulars and documents*" to include (c) "*any days and hours of leave in each week granted by way of annual leave or in respect of a public holiday to each employee concerned and the payment made to each employee in respect of that leave*".

The Tribunal notes the conflict of evidence between the two parties. The onus rested on the respondent to prove that the relevant provisions of the Act have been complied with. In this case, no records were opened to the Tribunal by the respondent to support its position in relation to leave days taken by the appellant. The Tribunal finds that the respondent failed to convince it, as a matter of probability, that the appellant received his full statutory entitlement to annual leave for 2008.

The appellant's statutory entitlement to annual leave is four working weeks of paid holidays in a year. The Tribunal accepts that the appellant received three days fixed holidays when the business closed for annual leave. It does not accept the appellant's contention that he received seven paid days of compassionate leave but accepts that he got two paid days for this leave period. Thus, the Tribunal finds that the other five paid days in this period were days of paid annual leave. The Tribunal therefore determines that the appellant is entitled to twelve days by way of unpaid annual leave. Accordingly, it finds that the appeal under the Organisation of Working Time Act succeeds

and awards the appellant the sums of €853.20.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)