EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

TE 61/2008

EMPLOYEE

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

EMPLOYER

under

TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J Flanagan BL

Members: Mr J Reid
Mr F Barry

heard this appeal at Dublin on 31st July 2008

Representation:

Appellant: Mr Richard Grogan of PC Moore & Co.
17 South Great George's Street, Dublin 2.

Respondents: Ms Kerry Molyneaux of IBEC,
Confederation House, 84/86 Lower Baggot Street, Dublin 7.

The decision of the Tribunal was as follows: -

This case comes before the Tribunal by way of an appeal against the decision of the Rights Commissioner of a claim under the Terms of Employment Act r-057298-te-07/EH.

Preliminary matters

The appellant did not appear in person before the Tribunal but his representative was present. The representative for the appellant advised the Tribunal that the appellant had been unable to find Davitt House where the hearing was due to be held. The appellant did have his representative's mobile telephone number but the representative's telephone had been turned off and by the time it was turned back on the appellant had returned to Cavan. The Tribunal stated that it was not inclined to grant a postponement in light of the fact that claimant had been on notice of the hearing and had left for home prior to the commencement of the hearing and without adequate excuse.

The respondent applied to the Tribunal for the appeal to be struck out on the grounds that there had been no appearance by the appellant in person and also for want of prosecution. The Tribunal refused this application and held that there was no obligation upon an appellant to appear in person and that where an appellant was represented before the Tribunal there was an appearance on behalf of the appellant. The Tribunal held that it was appropriate to hear legal submissions by the representative for the appellant in pursuit of his appeal but that where no person was available to give evidence on behalf of the appellant the Tribunal could not entertain any factual claims other than those admitted by the respondent. The Tribunal was satisfied that an appeal against the decision of a Rights Commissioner could in appropriate circumstances be pursued by way of legal submissions exclusively such that there being no witnesses for the appellant did not of itself necessitate a finding that there had been a want of prosecution.

The Facts

It was agreed between the parties that the appellant had been employed by the respondent at the material times and that the appellant had been given a statement of terms and conditions of his employment and that statement was admitted into evidence before the Tribunal. It was stated by the respondent in Form T2 that this statement had been furnished to the appellant within the statutory period of two months and the representative for the appellant raised no issue with this claim. It was further agreed between the parties that the appellant had worked 35 hours per week as a boner in the respondent's plant and that the appellant had been offered and had accepted additional work which involved cleaning up the boning area at the end of his shift for pay at the standard rate.

Appellant's Submission

In his main submission to the Tribunal the appellant's representative argued that there had been a breach of sub-subsection 3(1)(i) of the Terms of Employment (Information) Act, 1994 because the appellant was performing an additional job as a cleaner and that because the appellant was working three extra hours per day there had been a material change in the terms and conditions of the appellant's employment such that the appellant ought to have been provided with a new contract of employment that reflected the additional job and change in working hours.

The representative for the appellant sought to allege that there had been a breach of the Organisation of Working Time Act 1997 as a result of the appellant being required to work excessively long periods.

The appellant's representative claimed that the Terms of Employment (Information) Acts, 1994 to 2001 did not comply with the terms of the European Union directive. The directive in question was not clearly cited to the Tribunal and the appellant's representative did not have a copy of the directive to hand. The Tribunal understands this to be a reference to Directive 96/71/EC of theEuropean Parliament and of the Council of 16th December 1996 concerning the posting of workersin the framework of the provision of services. The Tribunal understands this to be a submission thatthe Terms of Employment (Information) Acts, 1994 to 2001 failed to properly transcribe into Irishlaw the requirements of a European Union directive.

Respondent's Case

The respondent submitted that the appellant had been given a contract of employment within two months of the commencement of his employment and that this contract described the title of the job

for which he had been employed in terms of that covered the extra tasks performed by the appellant and referred specifically to overtime work such that there was no breach of the Terms of Employment (Information) Acts, 1994 to 2001.

Determination:

In response to an inquiry by the Tribunal the representative for the appellant accepted that it had suited the appellant to do the additional cleaning work and that the appellant had been free to refuse to work overtime if he had so wished. The Tribunal therefore finds that there is no factual basis for any suggestion that the respondent in any sense forced to the appellant to work overtime.

The Tribunal notes that an employee is not entitled to contract out of the relevant limitations under the Organisation of Working Time Act 1997 Number 20/1997 and that an employer may be in breach of the Act even where the employee freely chooses to work excessive hours. However there was no evidence adduced before the Tribunal to support any allegation that the appellant in this case had worked for periods of time greater than those allowed under the Organisation of Working Time Act. The Tribunal notes the contention of the respondent that the periods of overtime worked by the appellant varied.

The Tribunal has declined to entertain any allegation made by the representative for the appellant that the appellant may have worked for periods in excess of those allowed by the Organisation of Working Time Act because there was no evidence whatsoever placed before the Tribunal to support that allegation and independently because there was no claim properly brought before this division of the Tribunal under that particular Act.

The appellant's representative had also attempted to argue that the Terms of Employment(Information) Acts, 1994 to 2001 did not comply with the terms of the European Union directive.The Tribunal has also refused to entertain this argument. Irrespective of the merits of any suchargument or any demerits in the Terms of Employment (Information) Acts the Tribunal holds thatas a statutory body without any inherent jurisdiction and whose sole authority to hear and decidejusticiable controversies in relation to the provision of employment information is derived from theimpugned Acts the Tribunal has no jurisdiction to come to a decision as to whether the Actsthemselves are contrary to the laws of the European Union or are in any other way defective. Thereare other legal fora where such arguments can be made.

The more relevant parts of section 3 of the Terms of Employment (Information) Act, 1994 Number 5/1994 have been excerpted below:

3.*—(1) An employer shall, not later than 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 containing the following particulars of the terms of the employee's employment, that is to say—*

(d) the title of the job or nature of the work for which the employee is employed,

(i) any terms or conditions relating to hours of work (including overtime),

The Tribunal asked the representative for the appellant if he was alleging that there had been any failure to comply with the requirements of sub-subsection 3(1)(d) but the representative declined this invitation and stated that the breach complained of related to sub-subsection 3(1)(i) only.

The written statement of terms and conditions of employment provided to the appellant contains two clauses of particular relevance and both are set forth below in full:

2. Nature of Post
The Company will employ you as a General Operative in the Boning department. The company may move you to another department if necessary"

8. Normal Working Hours:
Your normal working week is 39 hours. Start time will be agreed with your supervisor and your start time will usually range from 6.00a.m. to 9.00a.m. Employees shall on request work a reasonable amount of overtime. The company shall where possible give reasonable notice of when overtime is needed. Lunch break of 30 minutes is taken at the discretion of your supervisor.

Employees will not be allowed to leave their work stations during working hours except with management/supervisor permission. The company utilizes a clock card system for recording individual attendance and timekeeping. All employees are required to clock in and out at the start and end of each working day. All employees are required to clock in and out at each break taken. This procedure should also be followed if permission has been given to leave the plant at any other time during working hours.

The central argument put forward on behalf of the appellant was that the cleaning role was an additional job and the hours of this work ought to have been specified in a statement of terms and conditions of employment. The Tribunal regards this argument as comprising two elements; that the cleaning role was an additional job and therefore should have its hours specified as if it were a separate employment; and/or the additional hours worked were regular additional hours and therefore the statement had ceased to accurately reflect the normal working hours of the appellant.

The Tribunal notes that there was no dispute between the parties but that the description of the nature of the post was correct insofar as it related to the main task carried out by the appellant. The statement described this role as that of general operative in the boning department. The Tribunal specifically upholds the finding of the Rights Commissioner that the additional duties, which were cleaning duties in the boning area, were within the scope of the description in the statement of terms and conditions of employment and the Tribunal therefore rejects the contention that cleaning constituted an additional and distinct employment for the purposes of the Act. The Tribunal finds that the cleaning of the boning area was an additional task within the scope of the employment as described. The Tribunal holds that there is no requirement under the Terms of Employment (Information) Act, 1994 to 2001 that an employer specify each or indeed any specific task once those tasks are already captured in the title of the job or description of the nature of the work as found in the statement.

In response to a question from the Tribunal the representative for the appellant specifically claimed that the hours of overtime which were to be worked by the appellant ought to have been specified in the statement of terms and conditions. The Tribunal holds that sub-subsection 3(1)(i) Terms of Employment (Information) Act, 1994 does not impose a requirement upon an employer to specify in the statement of terms and conditions of employment the hours of overtime which an employee is expected to work because it is the essential nature of overtime to be hours of work done in addition to those hours required as a term of the contract of employment. The Tribunal holds that the term "overtime" as used in the sub-subsection has its ordinary meaning as used in employment generally and not any special legal meaning in the context of the Act. It is very frequently the case

that overtime is not foreseen well in advance as to its duration and date of occurrence such that a requirement that the duration of each period of overtime be specified in a statement of terms and conditions of employment would be an onerous requirement upon an employer which would impair the flexibility which overtime normally provides and therefore the Tribunal rejects the argument of the appellant on this point because it implies a meaning inconsistent with the ordinary meaning of overtime.

The Tribunal also notes that there was no dispute about the rate of pay for the overtime worked, such rate being specified in a separate schedule to the statement of terms and conditions provided to the appellant. There was no evidence to support the contention of the representative for the appellant that the hours of overtime worked were regular such that they might be considered to be in reality part of the normal hours of work and not properly to be categorised as overtime.

Having carefully considered the submissions of both parties the Tribunal finds that there was no breach of the Terms of Employment (Information) Act, 1994 to 2001 and accordingly the appeal fails and the decision of the Rights Commissioner is upheld.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)