

EMPLOYMENT APPEALS TRIBUNAL

| APPEAL(S) OF: | | CASE NO. |
|---------------|-----------------------|------------|
| EMPLOYEE | | PW106/2009 |
| | <i>- appellant 1</i> | |
| EMPLOYEE | | PW107/2009 |
| | <i>- appellant 2</i> | |
| EMPLOYEE | | PW108/2009 |
| | <i>- appellant 3</i> | |
| EMPLOYEE | | PW109/2009 |
| | <i>- appellant 4</i> | |
| EMPLOYEE, | | PW110/2009 |
| | <i>- appellant 5</i> | |
| EMPLOYEE, | | PW111/2009 |
| | <i>- appellant 6</i> | |
| EMPLOYEE | | PW112/2009 |
| | <i>- appellant 7</i> | |
| EMPLOYEE | | PW113/2009 |
| | <i>- appellant 8</i> | |
| EMPLOYEE | | PW114/2009 |
| | <i>- appellant 9</i> | |
| EMPLOYEE | | PW115/2009 |
| | <i>- appellant 10</i> | |
| EMPLOYEE | | PW116/2009 |
| | <i>- appellant 11</i> | |
| EMPLOYEE | | PW117/2009 |
| | <i>- appellant 12</i> | |
| EMPLOYEE | | PW118/2009 |
| | <i>- appellant 13</i> | |
| EMPLOYEE | | PW119/2009 |
| | <i>- appellant 14</i> | |
| EMPLOYEE | | PW144/2009 |
| | <i>- appellant 15</i> | |

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. D. Mac Carthy S C

Members: Mr. J. Reid
Mr. J. Dorney

heard this appeal at Dublin on 26th February 2010

Representation:

Appellant(s) : Mr. Willie Hamilton, Mandate, O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent(s) : XXXXXXXXXXXX

The decision of the Tribunal was as follows:-

Background

A submission was presented to the Rights Commissioner regarding loss of earnings under the Payment of Wages Act, 1991 on February 2nd 2009 on behalf of the fifteen named appellants. The basis of the claim was that the appellants were rostered to work in accordance with the roster that was posted up at the start of week 51.

It was not disputed that this roster was changed on Wednesday December 19th 2008, which resulted in a loss of earnings to the appellants. Under two collective agreements with the respondent and the retailJLC, the respondent was obliged to notify staff of their roster one week in advance. There is a letter from the Night Crew Manager admitting to the breaches of the respondent's policy in regard to this matter.

The number of hours of hours lost and the appellants concerned are agreed by the respondent and the union.

The respondent raised a preliminary issue in relation to the complaint under the Payment of Wages Act, 1991. The Rights Commissioner ruled against the union and the appellants in respect of the preliminary issue and found that the loss of earnings suffered by the appellants by the non-compliance of the respondent in relation to rosters is not a deduction as defined in the Act.

It is the union and the appellants' view that they are entitled to appeal this decision by virtue of the provision of Section 5 (6) of the Payment of Wages Act, 1991.

Section 5 (6) clearly states that where a total amount of any wages paid on any occasion is less than the total amount that is "properly payable" then the amount of the deficiency shall be treated as a deduction. The union stated that one of the rights conferred by the Act is the right of every employee to protection against unlawful deductions from their wages or salary. The union stated that this right was encapsulated in Section 5 (1) of the Act, which provides that an employer shall not make a deduction from the wages of the employee unless the employee has given his or her prior consent in writing to the deduction.

The respondent's representative stated that it was the respondent's policy to post up rosters two weeks in advance.

He stated that under Section 17 of the Organisation of Working Time Act, 1997 clearly outlines the notice required of employers in respect to changes in hours of work of employees. Section 17 (4) states:

“A notification to an employee, in accordance with this section, of the matters referred to subsection (1) or (2) as the case may be, shall not prejudice the right of the employer concerned, subject to the provisions of this Act, to require the employee to start or finish work, as the case may be, to work the additional hours referred to in subsection (2) at times other than those specified in the notification, if circumstances, which could not reasonably have been foreseen, arise that justify the employer in requiring the employee to start or finish work, or as the case may be, to work the said additional hours at those times”.

He stated that this section allows employers in reasonably unforeseen circumstances to change the start/finish times of employees. In this instance the expected levels of business activity did not materialise giving management no option but to reduce the hours available on the rosters. Consequently management changed the start/finish times for the appellants to align with the levels of customer activity in the store.

Determination:

The Tribunal gave lengthy consideration to the respondent’s argument under Section 17 (4) of the Organisation of Working Time Act, 1997 which has been quoted above.

There might be some debate as to whether these circumstances in the present case “could not reasonably have been foreseen”, but the Tribunal does not have to address this point as subsection 4 does not arise unless Section 17 (1) of the Organisation of Working Time Act, 1997 applies.

Section 17 (1) provides:

“If neither the contract of employment of the employee concerned nor any employment regulation order, registered agreement or collective agreement that has effect in relation to the employee specifies the normal or regular starting and finishing times of work of an employee, the employee’s employer shall notify the employee, subject to subsection (3), at least 24 hours before the first day or, as the case may be, the day, in each week that he or she proposes to require the employee to work, of the times at which the employee will normally be required to start and finish work on each day, or, as the case may be, the day or days concerned, of that week.”

In the present appeal both the individual contracts and the registered employment agreement govern hours of work.

The individual agreement includes:

3. Hours of Work

You will be expected to work between 18 and 39 hours over a combination of days Monday to Sunday from 8 p.m. to 6 a.m. The actual hours and nights will be discussed with you on commencement with the Company.”

The registered agreement includes:

“Section 1 Normal Working Hours

The normal number of hours to be worked by workers in relation to whom the Committee operates shall be 39 hours per week. In relation to workers under the

age of 18, the provisions of the Protection of Young Persons (employment) Act, 1996 shall apply.

Any change in normal rostered hours will be notified one week in advance.”

It is clear to the Tribunal that both the individual contracts and the registered employment agreement make provision for information in relation to working hours. Therefore the Tribunal holds that the respondent has failed to satisfy us that Section 17 (1) of the Organisation of Working Time, Act 1997 applies.

All parties accept that the respondent did not comply with the terms of the registered employment agreement by its failure to give at least one week’s notice of a change in the roster.

The Tribunal finds that the total amount of wages “properly payable” would relate to the original rostered hours, and that any lesser payment must be “treated as a deduction” under Section 5 (6) of the Payment of Wages Act, 1991.

The Tribunal allows the appeal and payments to be made to the appellants as per the attached schedule:

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

Schedule

| No of Named Appellant | Referral Number | Difference in Hours | Actual Hours Lost | Actual Difference in money |
|------------------------------|------------------------|----------------------------|--------------------------|-----------------------------------|
| 1 | R-06388-PW-08 | 8 | 6 | € 149.76 |
| 2 | R-063892-PW-08 | 6 | 6 | € 172.08 |
| 3 | R-063872-PW-08 | 6 | 3 | € 80.10 |
| 4 | R-063873-PW-08 | 6 | 4.75 | € 113.24 |
| 5 | R-063900-PW-08 | 9 | 4 | € 53.40 |
| 6 | R-063944-PW-08 | 5 | 5 | € 116.27 |
| 7 | R-063887-PW-08 | 7 | 7 | € 174.72 |
| 8 | R-063871-PW-08 | 9 | 5.75 | € 93.38 |
| 9 | R-063943-PW-08 | 8 | 7 | € 174.72 |
| 10 | R-063944-PW-08 | 6 | 6 | € 199.32 |
| 11 | R-063893-08-08 | 0 | 0 | € 0 |
| 12 | R-063895-PW-08 | 9 | 7 | € 120.15 |
| 13 | R-063899-PW-08 | 8 | 6.75 | € 180.22 |
| 14 | R-063898-PW-08 | 7 | 7 | € 232.34 |
| 15 | R-063870-PW-08 | 9 | 9 | € 240.30 |