

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE

CASE NO.

TE54/2009

PW59/2009

PW60/2009

TE56/2009

PW61/2009

PW62/2009

TE57/2009

PW63/2009

EMPLOYEE
EMPLOYEE

EMPLOYEE

EMPLOYEE

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

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. J. Horan
Mr. S. O'Donnell

heard this appeal at Dublin on 26th November 2009
and 21st January 2010

Representation:

Appellant(s): Ms. Barbara Mebtouche, Triana, Independent Advice & Information Bureau,
13 Store Street, Dublin 1

Respondent(s): Ms. Anne Lyne, Hayes, Solicitors, Lavery House, Earlsfort Terrace, Dublin 2

This case came before the Tribunal by way of five employees appealing against the Recommendations/Decisions of the Rights Commissioner Ref:

r-066353-pw-08/RG, r-066354-te-08/RG,

r-066352-pw-08/RG, r-066351-te-08/RG,

r-066344-pw-08/RG, r-066343-te-08/RG,

r-066345-pw-08/RG, r-066347-te-08/RG,

r-066350-pw-08/RG, r-066348-te-08/RG,

The second-named and fifth-named appellants withdrew their appeals under the Terms of Employment Acts, 1994 and 2001, prior to the hearing.

The decision of the Tribunal was as follows:-

At the outset the appeals PW59/2009 and TE 54/2009 were dismissed as the first-named appellant was not present to defend his case.

Background:

The case was made by the respondent company in this case that they had not been properly notified within six weeks of the appellants intention to appeal the Rights Commissioner's decision. The claims took place before the Rights Commissioner on December 4th 2008. The recommendation was dated February 12th 2009 and the appeal was lodged to the Employment Appeals Tribunal on March 11th 2009. The Rights Commissioner found all claims under the Payment of Wages Acts, 1997 were not "well founded". In respect of the second and last named appellants he recommended an award of € 1,000.00 to each of the two appellants.

The time limit to appeal the recommendation to the Employment Appeals Tribunal was March 26th 2009. The respondent submitted payment of € 1,000.00 to the two appellants on March 27th 2009, when they were unaware an appeal had been lodged. On March 30th 2009 the respondent became aware of the appeals lodged and the cheques were cancelled. The appellants' representative stated she assumed the respondent had received a copy of the appeals by post.

Having considered the matter the Tribunal stated they would hear all the appeals and there seemed some confusion with regard to the service of notification of the appeals.

Appellant's Case:

The second-named appellant gave evidence. She commenced employment in June 2006. She never received a contract of employment until she left and never received a copy of the office procedures. She worked a 40 to 46 hour week with few breaks and stated her rate of pay was € 8.65 per hour. She stated that she was not paid for all these hours she recorded in her diary but she was only paid her commission on the sale of the scratch cards she sold. When asked if she received any annual leave pay she replied that she was deducted €27 each weekend just got these payments returned. She had never heard of a Christmas fund.

She did not receive regular payslips. Weekly sales targets were set at € 1,200. If they did not reach these targets they were told to work on Mondays. The problem began when the commission on sales was reduced from 25% to 20% reducing it from € 300 to € 200 per week. She complained but was told it was to be like that.

On cross-examination she stated she had liked working for the respondent, the difficulty was with the Manager. She confirmed she had written the letter dated April 2008 thanking the respondent for their support and friendship and informed them she was leaving on May 2nd 2008. She explained that she was rostered to work Tuesday to Wednesday 07.30 to 16.30, Thursday to Saturday 07.00 to 19.00. They spent 3 days out of Dublin working and would arrive back after the office had shut so they would get their things with their supervisor.

The respondent's representative explained that the employees were paid either € 8.65 per hour or the commission on the sale of tickets. In total the second-named appellant states she was owed € 1,279.00. When asked she stated she left the company's employment as she was so stressed out over the situation. The supervisors constantly controlled all the staff and a lot of staff resigned at the same time.

The third-named appellant gave evidence. He commenced employment as a ticket seller in November 2006. He never received his written terms and conditions of employment but received his contract

after he left in May 2008. He worked a 43 to 46 hour day with very few breaks and received a lower salary than the previous witness.

On cross-examination he stated his friend wrote the letter of thanks to his employer when he left. He agreed he had not mentioned any financial issues in this letter. The staff were told they were working on a commission basis. He never received any office procedures.

The fourth-named appellant (hereafter referred to as AP4), testifying with the aid of an interpreter, gave both April 2005 and April 2006 as when he started with the respondent. He admitted that he could not recall very well. Asked about his statement of terms and condition, he said that he had signed in 2008 but that he had not received it hitherto.

Regarding pay, AP4 said that the respondent's system had changed in February 2008. He stated that he had just received commission and that he had never been paid by the hour. He believed that the respondent had introduced a system of paying per hour because it had lost a case at the Labour Relations Commission and that this was why the respondent had written that employees had been paid by the hour after the employment of those employees had ended.

However, AP4 told the Tribunal that employees had not been paid by the hour had not been paid for holidays and had not been given contracts before the Labour Relations Commission case.

In cross-examination AP4 did not dispute that his employment with the respondent began in 2006. He could not recall the month in which he had commenced.

In legal argument at the hearing on 21 January 2010 the respondent's representative said that the appellants were saying that they got different amounts and were denying that they had got €8.65 per hour. The respondent's representative said that the appellants had got what was in the payslips.

The appellants' representative countered that all that the third-named appellant (hereafter referred to as AP4) had got was commission but that there had been agreement that she would get €8.65 per hour and commission.

The respondent's representative stated that the appellants had been happy at the time and that there had been no news that they had only realised at the end. Regarding targets, the appellants would get lower pay in respect of takings of less than €1,000.00. Commission was around 27% from €1,000.00 to €1,202.00 (which was considered to be an average week's takings). If they took in more than €1,202.00 commission was 30% of the whole amount. (They would take in from €1,500.00 up to €2,000.00 per week at Xmas but only at Xmas.) The appellants were met every week and had the arrangements explained.

The respondent's case was that the appellants always got the greater of commission or minimum wage but did not get both. The appellant's representative submitted that they should have got €8.65 per hour plus 30% commission and that targets were being changed all the time. The respondent's representative queried why the appellants would have accepted all the arrangements until after leaving. It was alleged that the fifth-named appellant (hereafter referred to as AP5) had only realised at the end that he had not been paid €8.65 per hour. The respondent's representative then questioned why AP5 had not contested this at the time.

When questioned were asked about the respondent's pay records the Tribunal was told that the respondent's accountant was on holidays at the end of the year, that records were done in advance and that the respondent could not predict what commission there would be. The Tribunal was told that a letter could be got from the accountant if the Tribunal required greater clarity.

Giving sworn testimony through an interpreter, the fourth-named appellant (hereafter referred to as AP4) said that his employment with the respondent had begun some years earlier but that he did not recall signing a contract before 2008. Asked if he had received any written statement of terms and conditions before then, he said that he had not and that he would have signed it but had not got it.

AP4 said that he received his pay in an envelope and that the respondent's system had changed. When a question was asked at the hearing as to why there appeared to be two payslips in respect of a particular period AP4 said that he had not queried this. His representative then submitted that this was proof of inconsistency in the respondent's records. Commenting on this and on the suggestion that dates did not tally in the respondent's records, the respondent's representative said that the respondent had paid AP4 the higher amount, that he had signed for it and that he was not out any money. It was conceded that he had been given both payslips and that the respondent could not say more about this without consulting its accountant.

It was not disputed that the appellants had received their commission but AP4 said that he had only got commission and had never been paid by the hour. However, it was alleged that the respondent's system of hourly payment had been introduced because the respondent had lost a case with another employee at the Labour Relations Commission and that this was why the respondent wrote, when employment ended, that employees were paid by the hour. However, it was alleged that a contract had not been provided and that employees were not paid by the hour or paid for holidays.

The appellants' representative submitted that there had been no contract-type documentation before the Labour Relations Commission case. It was alleged that the respondent had altered the way in which employees were paid and had provided documents at the end to indicate how they had been paid.

Giving sworn testimony, the fifth-named appellant (hereafter referred to as AP5) said that he had worked for the respondent from 2007 to late April 2008 when his employment ended but that he had never got, seen or signed a contract. He did not know why this was the case. He never got a P45. He called the respondent who said that he would get it if he signed something.

Leaving the subject of terms of employment, AP5 went on to the subject of payment of wages and holidays. He said that he had not got his due holiday entitlements and that he had worked between forty-four and fifty hours per week for the respondent after having been told, before starting, that the job was good, that he could earn a lot of money and that nobody earned less than three hundred euro per week with the respondent.

However, asked how many times he had earned over three hundred euro per week with the respondent, AP5 replied that he had only achieved this three times. Asked why he had left the job, he replied that there had not been enough money to survive. Asked if the respondent had given him enough hours, he replied that he had worked over forty hours but that he had never been paid by the hour. He added that if this had been the case he would probably still be working for the respondent but that he had never been happy in the job. After one week he got one hundred euro. He had to pay rent and send money to his wife. It was not enough. Asked if he had worked Sundays, he said that he had only done so once but that there had been no Sunday premium. He had just been paid on commission.

Giving sworn testimony, a witness for the appellants (hereafter referred to as APW) said that he had worked for the respondent from June 2005 to June 2006, that the job had been okay and that it had, in fact, been a good job. AP4, who had been already working for the respondent in the summer of 2005,

told APW about the job. In June 2006 APW started another job.

Asked about pay with the respondent, APW stated that he had been paid different rates of commission depending on how much money he collected for the respondent. Asked about written terms and conditions of employment, he said that neither got terms of employment, nor payslips nor a P45. The respondent had been his first job in Ireland. His English was poor at first. For the respondent he worked about five or six days per week. He started at about 8.00 a.m. and worked till 5.00 p.m. or 6.00 p.m. Somebody picked him up or he took a bus. He got no payslip or P60.

Respondent's Case

Giving sworn testimony, a witness for the respondent (hereafter referred to as RW) said that he had worked for the respondent from May 2007 until 2009. He subsequently went back to his studies. He had been a ticket seller like the appellants.

RW told the Tribunal that, after a few weeks with the respondent, he got terms and conditions of employment but he was not asked to sign. He thought he had signed but he was not sure. He had his copy but was not sure if he had given a copy to the respondent. In 2008 he got a new contract and signed it. He kept one copy and gave a copy to the respondent.

At this point in the Tribunal hearing, the respondent's managing director (hereafter referred to as MD) said that the respondent had a copy of RW's contract but did not have it present at the hearing.

Resuming his testimony, RW said that the respondent's employees had got a sheet of rules to follow in their job and that he had been told what he would be paid. The respondent's head supervisor (hereafter referred to as HS) said that he would be paid €8.65 per hour and that the respondent had targets. These changed in February 2008. First, €1,250.00 had been a target. Then it was about €1,202.50. If he collected less than €1,000.00 he got paid by hours. Between €1,000.00 and €1,250.00 he got whichever was greater between hours or commission. Commission was about 28%. Over €1,250.00 it was his hours or commission at 30 %. Every Saturday when they got wages they could discuss it. People asked questions. Everyone wanted to know. He saw no reason to be afraid to ask a question. He had a question about emergency tax. The respondent paid it for him as it had done for AP5. For RW it was better to get more money every month (by virtue of the respondent paying his emergency tax) rather than if he himself had to pay it.

RW told the Tribunal that with the respondent he could choose his hours and that he had got paid all the money that had been due to him.

Asked if he had been told the hourly rate was €8.65, RW confirmed this. It was then put to him that this had not been the national minimum wage when he had started. He replied that maybe he had been wrong, that this had been about three years earlier and that maybe it had been €8.35.

Asked what hours he had worked for the respondent, RW said that he had started around 7.00 a.m. or 7.30 a.m. and had stopped at about 4.00 p.m. or 5.00 p.m.. When it was put to him that there would sometimes be a collection outside a football match that might start at 8.00 p.m. he replied that this could happen on Wednesdays but not at weekends.

It was put to RW that APW had started with him for the respondent in 2005 or 2006. RW replied that he knew APW, that they had been at parties together and that he (RW) had first come to Ireland on holidays in summer 2006 but had only stayed five or six weeks. His friend was with the respondent in 2006. He (RW) was "a lot of times in the office". He tried to get a job but was not working for the

respondent in 2006. He maintained to the Tribunal that he had started work in 2007.

The appellants' representative submitted to the Tribunal that RW's evidence did not make sense and that APW had worked with him for the respondent in 2006.

Giving sworn testimony, the respondent's head supervisor (heretofore and hereafter referred to as HS) stated that he had been in this position since June 2006 when the respondent had only just begun as an incorporated entity but that he had previously been doing this job since 2005. He was supervisor to the appellants. Contracts were furnished by him within two months. He was instructed to do this by the respondent's managing director (hereafter referred to as MD). Either MD or HS signed them.

HS told the Tribunal that, at first, he had not asked employees to sign and that there had been no place on the documentation for them to sign but that contracts had subsequently been given to them and that it had probably been he who had given them to the employees. They could not work without contracts.

Regarding sales targets, HS said that in 2006 there was a target of up to a thousand euro. Between €1,000.00 and €1,250.00 pay was based on commission of about twenty-eight per cent if that would give an employee more than a wage. If an employee sold enough to go into the 30% commission band the employee remuneration based on commission would always be higher than the employee's wage.

HS specifically recalled signing documentation for one of the appellants (AP4) but did not recall a response by him. HS gave documentation to each employee. They received contracts.

Asked if contracts had been given to employees to be signed, HS said that they had not been given so that they be signed, but, rather, that he had just given the contracts and that he had asked them all, when they were leaving, to sign in case they had not signed before. He did not recall the exact date that the respondent had met its documentation obligations but told the Tribunal that it had definitely occurred before the passing of two months.

It was put to HS that AP4 had said that he would take his documentation home. HS replied that AP4 was entitled to do this, that sometimes people forgot and that HS thought that AP4 was given his documentation "in February (2008) like the others". They were given two copies so that they could keep one and return one to the respondent. HS did not always check to see if documentation was signed. He would just put it in each employee's file.

HS told the Tribunal that, when he started doing interviews, it had never come from his mouth that remuneration was to be only commission. Employees were reaching sales targets. It was in their favour (that they be paid the commission-based figure that was higher than their wage). The respondent tried to reduce the weekly target and spread it over a month. There could be five days of rain. Three good weeks could compensate for one bad one.

Asked if there had been a change in February 2008, HS said that there was a meeting and that, around the end of January, MD was introducing a new system. HS translated for those people who could not understand. They asked if the position was still the same. He did not know if an employee was afraid of him and that he was treating all of them as friends. People could come and ask him questions. The respondent gave payslips every week. There was no recession in Ireland then and there were lots of other jobs (that people could go to if they were not happy with the respondent).

Asked if he had mentioned the minimum wage when talking to employees each week, HS replied that he would tell employees what they earned and that he would tell them if they were not performing as they should. Sometimes he wanted to motivate them.

Asked if anybody had ever said that they were owed money, HS said no but that he had made a mistake regarding an employee's wages although not with any of the appellants.

Giving sworn testimony, the respondent's managing director (heretofore and hereafter referred to as MD) said that the respondent had an agreement for fundraising with an asthma body which was based on lottery-ticket selling. MD had been a sole trader but there had been a change in 2006 and the respondent was now an incorporated company. MD acknowledged that the respondent had two months to present contractual terms to employees. She believed that the respondent just presented terms of employment and that it was up to the employees if they wished to sign. It was just MD and the had supervisor (HS) who presented the terms. Other supervisors did not do this.

MD stated that she had never told employees that they were just earning commission. There had never been a complaint nor a query about hours. The employees would always know if there was an issue. She (MD) would have given contracts to people but she could not recall to whom she had given them. She would just tell them that these were their terms and conditions. The respondent gave new statements when the minimum wage changed.

In February 2008 the respondent changed sales targets. Some people were doing well based on a five-day week. Some reached the targets. The respondent reduced targets so that employees could earn 30% commission if their sales were over €1,202.00 rather than €1,250.00. This was for the motivation of weaker employees. This was after the start of January 2008. She recalled the second-named appellant (AP2) asking if they would still get all their entitlements. MD said yes. Employees asked if their holiday pay would carry forward. Now the payslips would reflect the hours worked. Previously, employees got the benefit of extra (notional) hours for holiday entitlements. People who just worked two days per week would get less hours (on their payslips or for holiday rights).

The respondent spoke to everybody at the end of the week. They knew the target was reduced. If hours were irregular it was based on an average over thirteen weeks. A thirteen-week period would be applied to the averaging of commission. The respondent's accountant would calculate what holiday days were due and say what was the pay due.

Asked if she had got any contracts back, MD said that she had got most of them back but that that she knew that AP5 had not returned one.

When it was put to MD that AP2 had said that she had been afraid (to talk to HS) MD said that she could not understand this and that, if AP2 did not talk to HS, she (AP2) could talk to MD's partner or to MD.

It was put to MD that the appellants were saying that they were owed €8.65 per hour. MD rejected this saying that they had been paid already and that the respondent had timesheets that it kept and which pointed out deductions. She added that AP5 had said that he wanted to be paid his gross pay so that he could avoid having to pay emergency tax before he had his PPS number and that she had also done this for another employee (i.e. RW who had given evidence for the respondent).

MD acknowledged that many of the respondent's employees were non-nationals who were new to Ireland. When it was put to her that forty-six hours per week might be worked she replied that the respondent's supervisors worked forty hours per week and that she did not know how employees could work more.

Asked about the respondent's Xmas club, MD said that employees had problems opening bank accounts and came to her saying what they wanted to keep. A €27.00 deduction was kept in a

safe. The respondent could have up to twenty-five people doing this. The respondent finally ended this because it was too much complication for MD to run it.

It was put to MD that it was alleged that there had been no holiday pay for 2007. She replied that the employees had got holiday pay and had carried forward some holidays to 2008. Since 2006 she had had between 120 and 180 employees. Just the appellants and one other employee brought a complaint against the respondent. That one other employee claimed for holiday pay, non-payment of wages and lack of a contract. MD did not recall if the said complaint had been about not getting the then minimum wage of €8.30 per hour. About six weeks after the result of that complaint the appellants left. MD tried to advise them that they might not get social welfare if leaving voluntarily.

Submissions

In her closing statement, the respondent's representative said that all of the appellants had got terms of employment within two months. When there was a change they were given written details. A contract was later done and employees were asked to sign. The representative submitted that there was no reason why the respondent should prepare so much documentation if it were not going to give it to employees. The representative reminded the Tribunal that one employee (RW) had got the documentation and had given evidence to support the respondent.

Regarding payment of wages, the respondent's representative submitted that the respondent's employees had been happy with the respondent and referred the Tribunal to letters that had been written by employees to the respondent. It was submitted that there had been no unlawful deduction by way of non-payment. All employees knew that remuneration was paid by commission. They all got it. Only after they left did they argue that they should have got €8.65 per hour basic pay. The variations regarding commission favoured employees. The respondent went to best efforts to ensure that employees knew how much money they got. The respondent helped employees with regard to emergency tax. It was submitted that the appellants had not shown that they were still owed a sum equivalent to €8.65 per hour for sixteen forty-hour weeks or any other less clear figure that might have been claimed and revised by AP2 in particular or by AP5 who had reduced the amount of his claim without the respondent receiving an explanatory rationale. It was submitted that differing figures made it hard for the respondent to defend the case.

The appellants' representative, in her closing statement, said that the respondent's system was so bizarre, that the appellants were not so educated and that it would have been easier for an accountant. €8.65 per hour was the Irish national minimum wage and the appellants had worked an average of forty hours per week but payslips showed fourteen or fifteen hours. Asked about the respondent's Xmas club, the appellants' representative said that deductions had been made unlawfully and that deductions made in respect of the Xmas club by the respondent had been called holidays by the respondent. Clarifying how sixteen weeks' pay could be claimed, the representative said that this related to the period from 18 or 27 December 2007 to 18 or 25 April 2008 or 2 May 2008 depending on the appellant concerned.

The respondent was asked to provide details of payments made to the appellants.

Determination:

The appeals by the first-named appellant against Rights Commissioner Recommendation r-066353-pw-08/RG under the Payment of Wages Act, 1991, and against Rights Commissioner Recommendation r-066354-te-08/RG under the Terms of Employment (Information) Acts, 1994 and 2001, fail for want of prosecution in that they are dismissed because he was not present to prosecute his appeals.

Having heard the evidence of the parties concerned, the Tribunal concludes that the second-to-fifth-named appellants were aware of the terms on which they were being paid. The documentary evidence supports this. The Tribunal upholds the Rights Commissioner's findings in all of these cases with regard to payment of wages. The appeals against Rights Commissioner Recommendation r-066352-pw-08/RG, Rights Commissioner Recommendation r-066344-pw-08/RG, Rights Commissioner Recommendation r-066345-pw-08/RG and Rights Commissioner Recommendation r-066350-pw-08/RG under the Payment of Wages Act, 1991, fail.

The appeal by the third-named appellant under the Terms of Employment (Information) Acts, 1994 to 2001, against Rights Commissioner Recommendation r-066343-te-08/RG fails because the Tribunal has not been satisfied that the respondent breached the said legislation in respect of this appellant.

The appeal by the fourth-named appellant under the Terms of Employment (Information) Acts, 1994 to 2001, against Rights Commissioner Recommendation r-066347-te-08/RG fails because the Tribunal has not been satisfied that the respondent breached the said legislation in respect of this appellant.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)