

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER

-Appellant

CASE NO.
PW193/2009
TE193/2009

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

EMPLOYEE

-Respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. D. Winston
Mr. C. Ryan

heard this appeal at Dublin on 12th November 2010

Representation:

Appellant: Mr. Richard Hendrick, RBH Project Management Ltd, 17 Charnwood Park,
Clonsilla, Dublin 15

Respondent: Mr. Niall Nelligan B.L. instructed by P C Moore & Company, Solicitors,
17 South Great Georges Street, Dublin 2

The decision of the Tribunal was as follows:

These appeals came before the Tribunal by way of an employer (the appellant) appealing the decisions of a Rights Commissioner (references: r-075431-te-09/JT & r-075434-pw-09/JT).

The employee gave evidence with the assistance of a Tribunal appointed translator. He commenced employment with the company on 3 July 2007 but did not receive a contract of employment detailing his terms and conditions until March 2008. The company accepted that the employee had not been given a contract of employment within the stipulated time.

The company stated that a week's wages owed to the employee was paid to him and this was detailed in his last payslip dated 20 August 2008. The employee accepted this to be the case and consequently withdrew his claim for this sum.

The outstanding issue between the parties was in relation to overtime payments. It was the employee's case that he had received payment for overtime on only two occasions. In the last six months of his employment the employee alleged that he had worked 195 overtime hours but had

received payment for just 13 hours. The two payments he received in relation to overtime occurred on 5 March 2008 and 26 March 2008.

The employee stated that he commenced work at 7am each day when he attended at the yard and reported to the Transport Manager who was on duty at that time. He was instructed to drive a lorry to the port and collect a trailer. He then returned to the yard, drove a lorry load to Ballyhaunis and returned late that evening with another load that he had collected. He worked 12-16 hours per day.

The employer had furnished the employee's representative with copies of tachographs and activity reports. From these documents the employee had calculated the outstanding sum owed to him in relation to overtime. The documents were opened to the Tribunal. The employee stated that some of the reports showed rest periods when his lorry was in a queue to be loaded or when he was waiting for necessary paperwork. He recalled an excessive break of over three hours on one occasion when he had taken a break to have a meal. During the time he was having the meal the Gardaí closed the road and it was not re-opened for some time. The employee outlined that the term "excessive idle" shows on an activity reports after 15-20 minutes of the lorry being idle. This can occur in heavy traffic.

It was the employer's case that there was a substantial amount of non-working time associated with the employee's role. The General Manager gave evidence that she has overall responsibility for operations. The majority of "runs" done by the employee were single drop runs. The employee usually arrived at the yard each day at 10am. He was not required to start work until that time but it was his own decision if he decided to start work earlier. The load was booked in for 4pm in Ballyhaunis but if the employee wanted to travel earlier than was necessary then that was his decision.

The General Manager had also carried out an analysis of the tachographs submitted and she stated that where it was justified, overtime payments had been made to the employee. However, there were occasions where the employee's breaks had exceeded statutory rest periods and there were also lengthy periods of non-working time. Examples were outlined to the Tribunal including a rest period of 4 hours and 54 minutes on 1 February 2008.

The employee was not challenged during his employment about taking lengthy breaks or rest. The General Manager stated that it was taken into consideration that there were other occasions when the employee was required to work longer hours. When the employee queried about overtime payments during his employment he was informed that he was not due payment when he had made the decision himself to start work at 7am instead of 10am and that he was not entitled to payment when he had excessive rest periods and non-working time.

Determination:

The appealing company accepted that it had not provided a contract of employment to the employee within the stipulated time period as set out by the Act. The Tribunal upholds Rights Commissioner's Decision reference: r-075431-te-09/JT under the Terms of Employment (Information) Act, 1994 and 2001 and awards the employee (the respondent) the sum of €727.69.

The employee (the respondent) withdrew his application for a week's wages under the Payment of Wages Act, 1991 having accepted that this sum was paid to him in his final payslip on 20 August 2008.

With respect to the issue of overtime: the Tribunal accepts the employee's calculation for his hours of work. The Tribunal upholds the decision of the Rights Commissioner and awards the employee the sum of €1,949.40. The Tribunal therefore varies the Rights Commissioner's Decision reference: r-075434-pw-09/JT under the Payment of Wages Act, 1991.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)