EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.
EMPLOYEE *-Appellant*

UD489/2010
PW239/2010

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

EMPLOYER *-Respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Hennessy
Mr F. Dorgan

heard this appeal at Waterford on 31st May 2011

Representation:

Appellant: In Person

Respondent: Mr. Mark Walsh, Kenny Stephenson Chapman, Solicitors,
Park House, Park Road, Waterford

The determination of the Tribunal was as follows:

These cases came before the Tribunal by way of two appeals by an employee (the Appellant) against recommendations of a Rights Commissioner under the Payment of Wages Act, 1991 reference: r-086875-pw-09/JOC and the Unfair Dismissals Acts, 1977 to 2007, reference: r-074482-ud/09/MMG.

The appellant sought to extend the time limit for the claims she brought under the Payment of Wages Act. The appellant's employment terminated on 7th December 2008. She stated that shehad only become aware of deductions made from her pay when the parties met in May 2009. Theappellant confirmed that she did receive payslips throughout her employment but stated that it wasdifficult to establish for what hours she had been paid for. After the parties had met in May 2009,the appellant submitted her claim under the Act to the Rights Commissioner service on 5th November 2009.
It was the respondent's case that the appellant should have known from her payslips what periods she had been paid for and that the Tribunal had no jurisdiction to hear the appeal as the claim was

received outside the stipulated time limit as set out under section 6(4) of the Payment of Wages Act.

In relation to the appeal under the Unfair Dismissals Acts, the respondent gave evidence that the business was a nursing agency, which had operated from 1999 to 2009. The appellant was employed with the agency from the time of March 2007. The employment relationship was generally good between the parties and the appellant was proficient in her role.

The appellant was provided with a contract of employment when her employment commenced in March 2007. Clause 10 of the contract addressed the respondent's disciplinary procedure. This contract was supplemented by a terms and conditions document, which included the various disciplinary stages leading to dismissal. The appellant signed the document in April 2007.

On the 1st October 2007 the respondent issued a typical staff notice advising staff that work cards must be submitted in the week following their placements and no later than 14 days after a placement.

It was the appellant's evidence that when she was ill she asked another carer from the HSE if she would work for her. The appellant admitted that she did not check with her employer on this matter before asking the HSE carer to cover for her. The HSE carer had lengthy experience in caring for the particular client. Prior to this occasion they had often covered for each other in the community. The public health nurse telephoned the respondent about this matter when she discovered they were covering for each other. The appellant had also informed the office manager of the fact that she had been unwell and that a carer from the HSE had covered for her. The office manager told the appellant it was not to happen again. The appellant confirmed that the respondent met with her in relation to this matter. The respondent drew up an agreement document for the appellant to sign and also informed her that a warning would be placed on her file for twelve months.

The respondent stated that letter dated 5th March 2008 issued the appellant with a final written warning. The warning was issued to the appellant when the office manager became aware that the appellant had sent someone else to carry out work on her behalf in a client's home. This was a serious breach of procedure as the person had not been vetted and was in an unsupervised environment.

The respondent stated that if she had rigidly followed the disciplinary procedures then the appellant would have been dismissed but instead she gave the appellant a final written warning. When she met with the appellant on the matter she explained to her why the matter was so serious.

It was the respondent's case that a further letter dated 21st April 2008 was written to the appellant, as she was not submitting work cards on time. It was the appellant's case that she did not receive this letter and that in any event work cards could be submitted late.

On the 6th November 2008 a final warning for continued breach in procedures was issued to the appellant after it was brought to the respondent's attention that the appellant had not followed procedure for the submission of time cards. In addition there were some irregularities with the work cards. In the course of her evidence the appellant stated that she did not receive a letter dated 6th November 2008 but she confirmed that she had met with the respondent on that date.

The respondent had generated a spreadsheet from information that had been inputted into

the respondent's computer system from the appellant's work cards. The spreadsheets and a number ofwork cards were opened to the Tribunal. The respondent stated that the spreadsheet showed that the appellant had submitted work cards for various dates showing the appellant with differentclients at the same time on the dates in question. For example the spreadsheet and work cardsshowed that the appellant had submitted work cards for two clients on the same time period on 10th August 2007. During the course of the appellant's evidence she stated that she might have been with one client in the morning and another in the evening, but the work cards indicated otherwise.

Minutes of a meeting held between the parties on 17th November 2008 were opened to the Tribunal. The respondent gave evidence that she met with the appellant in the presence of another employee to give the appellant an opportunity to meet the procedures outlined regarding the submission of time cards. However, the appellant continued to submit her work cards late. The respondent gave an example of receiving time cards relating to March 2008 during August 2008.

It was the appellant's evidence that work cards had to be signed by the patients if possible. The appellant raised with the respondent that at times there was no one to sign her sheets and it for thisreason the appellant did submit them at times. The respondent said she told the appellant to bring them unsigned. The appellant believed this to be the reason why she was dismissed and felt if thecards were late you just got paid late and not dismissed.

The respondent stated that an audit of time cards was carried out and it was discovered that the appellant had received the sum of €5,000 due to duplication on her work cards. The respondent stated that she met with the appellant on the 19th November 2008 and provided the appellant withcopies of the work cards and told her to take them home and take some time to examine them. Shealso informed the appellant that the matter was very serious and that unless the appellant couldexplain the duplication, the matter could result in dismissal.

It was the appellant's evidence that she was informed that an audit had been carried out and that it was thought she had defrauded the company by €5,000. She told the respondent that the only explanation she could give was that she had completed the times on the cards incorrectly and that itcould have been an error or her part. It was the appellant's case that she asked to see the workcards but that the respondent refused this request.

There was an obligation on the respondent to inform the HSE about the duplication on the work cards as the HSE had been charged in error. The HSE wanted the appellant to continue in her role as there was no question over the level of care which she provided. The respondent stated that she found herself in a difficult position but she gave the benefit of the doubt to the appellant and decided not to dismiss her.

The parties again met on 20th November 2008 on which date the respondent informed the appellant that she had been obligated to inform the HSE. Although the appellant was not dismissed on that occasion it was the respondent's evidence that she warned the appellant that failure to adhere to procedures could result in instant dismissal. This was set out to the appellant in letter dated 19th November 2008, which she confirmed receiving. The respondent needed some reassurances fromthe appellant and she typed a document setting out that the continuation of the appellant's employment was subject to certain conditions.

The parties met again on 3rd December 2008 but the appellant refuted in her evidence that this was a formal meeting. Minutes of the meeting were opened to the Tribunal. The respondent gave

evidence that she called the appellant to this meeting as the appellant had again submitted work cards late and for weeks that she had already been paid for. After the meeting the respondent wrote letter of dismissal dated 3rd December 2008 to the appellant. The respondent confirmed that the dismissal occurred within a year of the final written warning being provided to the appellant.

Determination:

In relation to the appeal under the Payment of Wages Act, 1991 the Tribunal finds that the information was available to the appellant on the payslips that were provided to her. The appellant makes the case that she first became aware of the deductions in May 2009 but section 6(4) of the Payment of Wages Act states,

" A rights commissioner shall not entertain a complaint under this section unless it is presented to him within the period of 6 months beginning on the date of the contravention to which the complaint relates or (in a case where the rights commissioner is satisfied that exceptional circumstances prevented the presentation of the complaint within the period aforesaid) such further period not exceeding 6 months as the rights commissioner considers reasonable."

The appellant did not put forward any exceptional reason that would allow the Tribunal to extend the time period for her claim under this Act. Accordingly, the appeal fails. The Recommendation of the Rights Commissioner under the Payment of Wages Act, 1991 is upheld (reference: r-086875-pw-09/JOC.)

In relation to the appeal under the Unfair Dismissals Acts, 1977 to 2007, having carefully considered the evidence adduces at the hearing, the Tribunal finds that the respondent dismissed the appellant for breaches of work procedures and which said breaches the respondent considered serious breaches. Taking into account the nature of the respondent's business and its obligations it was reasonable for the respondent to rate these breaches as serious. Fair procedures were followed by the respondent regarding the dismissal of the appellant. The Tribunal finds that the dismissal was not unfair. Accordingly, the appeal fails. The Recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007 (reference: r-074482-ud-09/MMG) is upheld.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)