

## EMPLOYMENT APPEALS TRIBUNAL

**APPEAL OF:**

**CASE NO.**

EMPLOYEE

PW65/10

*- appellant*

against the decision 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: Ms D. Donovan BL

Members: Mr D. Moore  
Mr J. Flannery

heard this appeal at Dublin on 23rd May 2011 and 13th October 2011.

#### **Representation:**

Appellant: Prison Officers Association, 18 Merrion  
Square, Dublin 2

Respondent: Ms Cathy Smith BL instructed by the Chief State Solicitor's Office, Osmond House,  
Little Ship Street, Dublin 8

This case came before the Tribunal by way of an employee (the appellant) appealing against the decision of a Rights Commissioner under the Payment of Wages Act, 1991 r-077622-pw-09/JT

#### **Appellant's Case:**

The appellant applied for the position of Chief Officer II towards the end of 2007. He was successful and was ranked number 1 on the panel. The appellant was offered the first vacancy which arose.

His letter of promotion and form of acceptance dated 20 December 2007 stipulated that if he did not respond by 28 December 2007 it would be presumed that he no longer was interested in the promotion at that time and would be placed at the bottom of the panel. He signed the Form of Acceptance on 20 December 2007, which was witnessed by the Governor. At that time he assumed a duty allowance applied to his new position. His hours of work were 8am to 5 pm Monday to Friday.

A copy of letter dated 28 January 2008 and received by the Assistant Governor was given to the appellant on 29 January 2008. This letter confirmed his promotion effective from 20 December 2007, his salary scale and that he would receive a Chief officer II duty allowance effective from his date of promotion. The appellant enjoyed working in his new position as it was the career area he was interested in.

In early July 2008 the appellant received a phone call from BF in the respondent's pay section. BF told him that he should not have been in receipt of the duty allowance and that he had been overpaid by €2860.39. A letter dated 3 July 2008 confirmed that he had been overpaid and that the overpayment would be recouped commencing 17 July 2008 at a basic pay of €100 per payday. There was no discussion with the appellant on the deduction of €100 from his pay. No other vacancy was offered to him.

The appellant accepted that there was no mention of a duty allowance in circular 10/2007, which was the circular for the competition for promotion to Chief Officer II. The proposal for organisational change and in particular transition arrangements for senior grades pointed to a duty allowance of €4682.00 for those officers serving in three institutions, none of which the appellant worked in but the appellant assumed this duty allowance applied to his role. A vacancy arose in the Training Unit in HQ which carried the duty allowance. The appellant did not apply for that position as it carried different conditions and rosters. The claimant applied for a transfer approximately twelve months ago to a position with the duty allowance but then withdrew it.

### **Respondent's Case:**

(PR) for the respondent gave evidence that the letter of 28 January 2008 confirming the claimant's promotion to the grade of Chief Officer II should not have stated that he was to receive a Chief Officer II duty allowance as the duty allowance for Chief Officer II posts was only paid to Chief Officer II posts at three locations which did not include the location at which the claimant worked. This letter was drafted by a relatively new employee who assumed that the duty allowance applied to all locations, not just the three locations as outlined in the booklet on Proposal for Organisational Change in the respondent organisation. This was an error on the part the person who drafted that letter. The respondent had previously sought sanction from the Department of Finance to pay the duty allowance to employees in the grade of Chief Officer II at the location where the claimant was employed. This sanction was refused and no officer in the grade of Chief Officer II at the location where the claimant is employed is paid the duty allowance.

The claimant continued to receive the duty allowance from December 2007 until July 2008 when the respondent noticed the error. The claimant was notified of the error in July 2008 and informed that the overpayment would be recouped by €100 per payday commencing on 17 July 2008.

### **Determination**

Having carefully considered the evidence adduced at the hearing and the submissions of the parties, the Tribunal finds that the payment of the duty allowance to the claimant was not a payment for the purposes of the Payment of Wages Act, 1991 as it was not a payment properly made because the respondent did not have power to make the payment. The payment of the duty allowance to the claimant was thus an overpayment and deductions made from payment of wages to the claimant in respect of the overpayment are not deductions for the purposes of the Payment of Wages Act, 1991. Accordingly the Tribunal upholds the decision of the Rights Commissioner but for a different

reason.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)