

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYER

*(appellant)*

CASE NO.  
UD619/2011

against

the recommendation of the Rights Commissioner in the case of:

EMPLOYEE

*(respondent)*

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr J Flanagan BL  
Members: Mr D Moore  
Ms M Mulcahy

heard this appeal at Dublin on 27<sup>th</sup> July 2011

Representation:

Appellant:  
director of the appellant

Respondent:  
In person

The determination of the Tribunal was as follows:

#### **Determination**

This case comes before the Tribunal by way of an appeal by the employer against a recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007, reference r-076869-ud-09JOC.

An application for the implementation of the recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007 (r-076869-ud-09JOC) has also been dealt with by this division on this date and an earlier date in the case bearing the reference number UD737/2010.

The respondent stated that she had commenced her employment with the respondent on 7<sup>th</sup> January 2008 and that she was obliged to terminate her employment by way of a constructive dismissal on 27<sup>th</sup> February 2009 because she had not been paid since December 2008. The respondent was receiving an annual salary of €25,000 in her new employment. The appellant accepted that the respondent had not been paid. No payslips were issued to the respondent when the payments became irregular. The respondent confirmed that all arrears owing have now been paid. The

respondent stated that she had been unemployed for eight months since the date of termination of her employment with the appellant. The respondent is currently employed at a rate of remuneration of €24,500 per annum.

It was accepted by both parties that the respondent had not been paid for a prolonged period time prior to the date of termination of her employment. The Tribunal notes that the arrears were only fully discharged at the Rights Commissioner hearing a further seven months after her employment had been terminated.

The Tribunal finds that the relationship of employer and employee is founded upon contract and it was an essential term of this contractual relationship that the employee be paid her remuneration fully and when due. The Tribunal finds that the substantial and prolonged non-payment of remuneration with little certainty as to when regular payment would recommence amounted to a fundamental breach of contract. The ordinary law of contract has application and this fundamental breach places the employee upon her election and she may either choose to continue in her employment and seek to enforce the terms of the contract or she may choose to regard the contractual relationship at an end. The fact that the employee has alternative remedies such as a claim under the Payment of Wages Act 1991 or for judgement as a simple contractual debt does not in any way deprive the employee of her right of election where there is a fundamental breach. The Tribunal finds that the respondent has properly exercised that right and therefore the respondent was constructively dismissed.

The Tribunal finds that the claim under the Unfair Dismissals Acts 1977 to 2007 succeeds and varies the recommendation of the Rights Commissioner and awards the sum of €1000.

The appellant gave evidence that the company was in financial difficulties and could not pay the respondent her wages every week. The Tribunal fully accepts the evidence of the appellant as to the almost complete lack of income to the company and that the principal in the firm was himself working without remuneration. In reducing the award of the Rights Commissioner the Tribunal has had regard to the fact the employer sought to maintain the employee in her employment despite the fact that there was little for her to do and despite the fact that this course exposed the employer to a liability to pay her wages which he ultimately discharged and all in circumstances in which he could simply have either laid off or made redundant the employee thereby avoiding all such liabilities both under the Payment of Wages Acts and under the Unfair Dismissals Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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