

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER

CASE NO.
PW120/2010
TE133/2010

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

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. P. Casey
Mr. J. Flavin

heard this case in Cork on 15 July 2011 and 11th October 2011

Representation:

Appellant(s):

Ms. Deirdre O'Callaghan BL and Mr. Donnchadh Kiely BL instructed by
McCarthy & Co, Solicitors,
10 Ashe Street,
Clonakilty,
Co. Cork

Respondent(s):

Mr. Jan Jaroslaw Potocki, Polish English Translation,
"Pilawa", Office 19, 21-23 Oliver Plunkett Street, Cork

The decision of the Tribunal was as follows:-

This case came to the Tribunal as an employer appeal against Rights Commissioner Decision r-084681-pw-09/EH under the Payment of Wages Act, 1991, and against Rights Commissioner Decision r-084683-te-09/EH under the Terms of Employment (Information) Acts, 1994 and 2005.

The first hearing of this case by the Tribunal was adjourned to allow the respondent to try to obtain documentary evidence that he was a qualified electrician and to allow the Tribunal to engage the services of an independent interpreter.

The Tribunal received the assistance of an interpreter and heard sworn testimony on the second hearing day.

The appellant's case

The appellant's representative stated that the first issue was that the respondent was claiming to be an electrician entitled to an electrician's rate of pay but that it was clear from the respondent's certification that he was not a qualified electrician. It was submitted that the work done by the respondent had not been the work of a qualified electrician. It was, however, accepted that there had been no contract of employment. The respondent's duties had varied and he did whatever work was requested of him. The appellant had given information about work done by the respondent and the pay given. It was submitted that the onus was on the respondent to show that he was a qualified electrician and that the respondent had not discharged that onus. The Tribunal was referred to national qualification authority documentation to support the contention that the respondent's qualification was to leaving certificate level and that he was not a qualified electrician.

It was submitted that the respondent was not entitled to a notice payment because he had left of his own accord and that he was not entitled to any award in respect of holidays because there was no holiday pay due to him.

While it was accepted on behalf of the appellant that no terms and conditions of employment had been given to the respondent it was contended that no evidence had been adduced of the respondent seeking such terms and conditions.

It was submitted that the appellant had helped the respondent by giving him work, feeding him, giving him the use of a van and assisting him significantly with marriage-related costs and a loan towards the respondent's first home.

It was accepted that a week's pay was due to the respondent for his final week's work for the appellant.

It was stated that there had been a breakdown of communication which had prevented the appellant from attending a Rights Commissioner hearing which he had intended to contest.

The respondent's case

The respondent's representative said that he was not seeking a minimum notice award because the respondent had given verbal notice of his own departure.

However, it was submitted that ninety per cent of the respondent's work for the appellant was that of an electrician and that most of the work was done on construction sites such that the respondent should get a labourer rate. It was contended that the respondent was probably due holidays although it was acknowledged that he had got three weeks' holidays (in connection with his marriage).

It was argued that the respondent had not received his last week's wages and, to protest from the appellant's representative, that he had not got breaks. It was contended that the respondent had got below the minimum rate for the construction industry and that this shortfall was now claimed in respect of a period of twenty-two weeks as well as holidays going back over a period of eighteen months.

Determination:

The Tribunal was not satisfied that it was established that the respondent was a qualified electrician but it is found that the appellant was wrong in not giving the respondent terms and conditions of employment. The documentation produced to the Tribunal did not establish that the respondent was an electrician.

Regarding the contention that the respondent had worked on construction sites such that he was entitled to construction industry rates, the Tribunal notes that, when questioned, the respondent could not recall on what construction sites he had worked. The respondent did not prove that he was entitled to a registered employment agreement rate and no substantial argument was made that would have convinced the Tribunal to apply such a rate.

The Tribunal notes that the appellant is an electrician who employed the respondent to assist him. The appellant stated that he worked on one-off housing and maintenance of holiday homes for a family business. Rather than clarify everything by giving terms and conditions of employment he got good use out of a versatile employee and left himself vulnerable to claims lodged by a resourceful opposition in the form of the respondent and his representative.

The Tribunal was not satisfied that it was established that the respondent was left short of any specific payment for holidays or that there was any notice payment due to him subsequent to his employment with the appellant.

The Tribunal varies Rights Commissioner Decision r-084681-pw-09/EH under the Payment of Wages Act, 1991, and awards the respondent the sum of €440.00 as compensation for the fact that both sides had agreed that the respondent had not yet been paid for the last week of his employment with the appellant.

Also, the Tribunal varies Rights Commissioner Decision r-084683-te-09/EH under the Terms of

Employment (Information) Acts, 1994 and 2005, and awards the respondent the sum of €1,760.00 as compensation for the fact that both sides had agreed that the respondent had not received terms and conditions of employment for his service with the appellant.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

