

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE

PW310/2010

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

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K.T. O'Mahony B.L.

Members: Ms. M. Sweeney
Mr. J. Flavin

heard this appeal at Cork on 7th March 2011, 17th May 2011, 6th October 2011 and 7th October 2011

Representation:

Appellant:

Mr. Pat Guilfoyle, TEEU, Old Fire House, 23 Sullivans Quay, Cork

Respondent:

Lillian O Sullivan & Co, Solicitors, 48 Maylor Street, Cork

This case came to the Tribunal by way of an appeal, by the employee, against the decision of the Rights Commissioner Ref: PW90563/10/MR.

Summary of Evidence

This appeal was heard in conjunction with the appellant's claim under the Unfair Dismissals Acts, 1977 to 2007, Ref: UD1362.10.

The appellant, who had commenced employment with the respondent on 3rd March 2008, resigned from the employment on or around 1st August 2009 and claimed that she had been constructively dismissed.

The appellant was not given a written contract of employment. Her position was that the respondent had guaranteed her 20 hour's work per week, at €18.00 per hour. She set out the 20hours she would be available for, two to three weeks in advance, in a diary kept at the receptiondesk. Appointments were made within that time-frame. It was her position that she was in attendance in the clinic for those 20 hours each week except when she had been on authorisedleave and in the last few weeks of her employment when she was sent home.

The appellant maintained that she would not have left a well-paid job for one where she would not have 20 hours' work per week. In cross-examination the appellant accepted that her assertion that the position had been advertised for 20 hours per week was incorrect. A copy of the advertisement was produced in evidence.

The respondent, a sole trader, denied having guaranteed the appellant 20 hours' work per week; sport injuries therapy was a new element to the business and she could not guarantee hours. Her position was that at the interview the claimant requested 20 hours' work per week but it was made clear to her that the respondent could not guarantee her anything, that sports injury therapy was a new venture for the respondent and that the claimant would have a role in its development. The appellant accepted in cross-examination that as part of the interview process candidates had to outline in writing how they would develop and market the business. If work became available the respondent would be happy to give the claimant 20 hours' work. The practice was that the therapists, including the appellant, would log in the diary the hours they were available for work, appointments were entered and the receptionist would phone the therapists the day before to confirm the appointments or inform them of any appointments that had been made after the therapist had gone home. However if there were no bookings the appellant was not requested to attend. Therefore the appellant would only be paid for the hours which she had worked. One exception to this was in circumstances where she was booked for two appointments with a short interval between them she was paid for the interval. As well as that exception, during the early months of her employment, at a time when the appellant had little therapy work, she was paid for around 20 hours per week, because at that time she was actively involved in developing the sport injuries element of the business: canvassing for clients, assisting in the creation of a brochure and other documentation for the business and doing leaflet drops. The evidence of two receptionists, who worked for the respondent at the relevant time, was that the appellant did not come to the workplace when she did not have appointments.

During the period of the appellant's employment with the respondent two cheques paid to her, for work done, bounced. This matter was resolved within two weeks when the appellant was paid in cash. However, the appellant wanted to see the documentary evidence that such payments were made to her. Documentation in respect of these payments was produced in evidence.

Determination

A core issue in this appeal is whether the appellant had been guaranteed 20 hours' work per week. Having considered the evidence of both parties, the contents of the advertisement placed in the local newspaper, whether it had been raised at the interview that the position was to include a role in the development and marketing of the business, the fact that sports injuries therapy was a new venture in the respondent's business, the respondent's explanation as to why the appellant was paid for 20 hours' work in the early weeks of her employment and despite the appellant's assertion that she would not have left a well-paid job to come to one where she would not have 20 hours' work, the Tribunal unanimously accepts the respondent's evidence that no such guarantee had been given to the appellant. The Tribunal further accepts the evidence that the appellant was not requested to attend at the workplace except when she had appointments and was duly paid for those hours, as well as for any short interval between two appointments. Accordingly that element of the appeal fails. Having examined in detail at the hearing, and afterwards in its deliberations, the documentation produced in evidence on payments to the claimant, the Tribunal is satisfied

that the claimant received all payments due to her for work done, including payment in respect of the cheques that had bounced.

As the appellant resigned from her employment there is no entitlement to a payment in respect of notice under the Payment of Wages Act, 1991. There was no evidence adduced to show that the claimant was due any payment in respect of holidays or public holidays.

Accordingly, all elements of the appeal under the Payment of Wages Act, 1991 fails and the decision of the Rights Commissioner Ref: PW/90563/10/MR is affirmed.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)