EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF: CASE NO.

EMPLOYER - **Employer** PW325/2010

against the decision of the Rights Commissioner **R-091644-PW-10**
In the case of

EMPLOYEE -- **Employee**

and

EMPLOYEE -- **Employee**

against the decision of the Rights Commissioner **R-095758-PW-10** PW341/2011
In the case of

EMPLOYER - **Employer**

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Wallace

Members: Mr B. O'Carroll
Ms H. Henry

heard these appeals at Ennis on 14 June 2012

Representation:

Employee:
Mr Glenn Cooper, Dundon Callanan Solicitors,
17 The Crescent, Limerick
Respondent:
Ms Paula O'Hanlon, IBEC Mid-West Regional Office,
Gardner House, Bank Place, Charlotte Quay, Limerick

The determination of the Tribunal was as follows: -

These cases came before the Tribunal as a result of an appeal by the employer against a decision of the Rights Commissioner under the Payment of Wages Act, 1991 **R-091644-PW-10** in the case of the employee (the first decision) and an appeal by the employee against a decision of the Rights

Commissioner under the Payment of Wages Act, 1991 **R-095758-PW-10** in the case of the employer (the second decision).

Preliminary Issue

Both parties to these appeals objected to the others' respective appeals in regard to the requirement under Section 7(2) (b) of the Payment of Wages Act which provides

An appeal under this section shall be initiated by a party by his giving, within 6 weeks of the date on which the decision to which it relates was communicated to him –

a) *A notice in writing to the Tribunal containing such particulars (if any) as may be specified under subsection (3) and stating the intention of the party concerned to appeal against the decision, and*

b) *A copy of the notice to the other party concerned*

The first decision was signed by the Rights Commissioner on 27 September 2010 and received by the employer on 29 September 2010 which is the date on which it was communicated to it. The employer's appeal against that first decision was received by the Tribunal on 19 October 2010 in compliance with Section 7(2) (a). On 22 November 2010 the General Manager of the employer sent an email to the employee's then union representative to confirm that the employer had lodged an appeal with the Tribunal. Leaving aside any argument as to whether this email constituted a copy of the notice lodged under Section 7(2) (a) it the Tribunal was satisfied that the email was not sent within the prescribed period of six weeks from the date it was communicated. Accordingly, the Tribunal found that there was no jurisdiction to hear the employer's appeal arising from the first decision.

The employee was able to furnish documentary evidence to show that she had complied with this requirement in respect of her appeal of the second decision. Accordingly, the Tribunal found that there was jurisdiction to hear that appeal.

Determination

The employer is a charity providing services to both children and the elderly, it also provides addiction services. The employer has some 500 workers with about 400 of these being home helps. It is 90% funded by the HSE with other funding from, among others, the Departments of both Justice and Social Protection. Salaries have traditionally been based on 92% of HSE rates.

Arising from the economic downturn the employer was faced with a cut in funding in 2009. The employer operates under service level agreements (SLA) with its funders, these SLA's set out the services which the employer will provide and the level of funding is dependent on the SLA's being maintained.

The employee's role with the employer was as a clerical administration officer. Her employment commenced in May 2005 and in January 2008 she was promoted from the Grade IV scale to the first point of the Grade V scale. Her contract of employment provided for annual increments through the scale in January each year. In January 2009 the employer implemented a policy of suspending increments in light of the deteriorating financial situation. This was the action of the

employer that prompted the employee to lodge the complaint with the LRC that led to the first decision.

Faced with a further reduction in funding during 2010 the employer sought the agreement of its workforce to the imposition of pay cuts in order to meet the financial constraints without having to resort to any reduction in staff numbers or any reduction in service provision with the inherent threat to funding because of the effect on SLA's. The employee was the only one of the 500 workers who did not accede to the pay reduction. The employer then implemented the pay reduction in April 2010 and, as this was applied to the employee despite her not having agreed to it, she lodged the complaint with the LRC that led to the second decision.

It was submitted on behalf of the employee that issue estoppel applied to that part of the second decision which applied to increments as this issue had already been decided in the first decision which the Tribunal had already found there was no jurisdiction to hear the appeal thereof. The Tribunal believes that the issue of estoppel is misplaced in these proceedings. Essentially this doctrine applies to the Parties themselves and prevents one of the Parties from changing a position or view which it may have held to the detriment of the other. In this particular case the Employer has maintained the same position at all times on the issue of increments as between its workers throughout the various hearings with the employee. The doctrine clearly does not apply to a decision of the Right Commissioner himself as he is not one of the Parties.

There is no doubt but that the employee's contract provides for annual increments. Equally thecontract made reference, albeit a loose reference, to the contract being subject to funding beingobtained. There is no doubt but that the employer took a decision in 2009 to suspend thoseincrements. No evidence was adduced to the Tribunal to suggest that any other workers lodgedcomplaints with the LRC over this issue. It is, however, common case that in April 2010 theemployee was the only person to lodge a complaint over the implementation of the pay cuts.

The Tribunal is satisfied that, as the employee had not given her prior written consent, the pay cut imposed in April 2010 represented an unlawful deduction as provided in Section 5 (1) (c) of the Payment of Wages Act, 1991. Accordingly, the second decision of the Rights Commissioner is set aside as the Tribunal finds the complaints are well founded.

It is not the Tribunal's role to tell an employer how to implement changes brought about by financial constraints. The employer sought to achieve the reduction in payroll cost by a combination of suspension of increments and later a general pay cut. No document was opened to the Tribunal to show where the employer issued amended contracts or terms and conditions to reflect the reductions which have been made. Nevertheless the Tribunal cannot ignore the fact that 99.8% of the workforce accepted the reductions which were imposed. In those circumstances the Tribunal is satisfied that it is reasonable in this case to make no award under the Payment of Wages Act, 1991.

Sealed with the Seal of the

Employment Appeals Tribunal

This ________________________

(Sgd.) ________________________

(CHAIRMAN)