

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYEE            *-Appellant*

CASE NO.  
PW323/2010  
TE268/2010

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

EMPLOYER            *-Respondent*

under

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

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Browne  
              Mr F. Dorgan

heard this appeal at Wexford on 22nd June 2012

#### **Representation:**

Appellant: Mr. Blazej Nowak, Polish Consultancy Enterprise,  
              107 Amiens Street, Dublin 1

Respondent: Mr. Jim Healy, IBEC, Confederation House, Waterford Business Park,  
              Cork Road, Waterford

#### **The decision of the Tribunal was as follows:**

These cases came before the Tribunal by way of an employee (the appellant) appealing against the decisions of a Rights Commissioner under the Payment of Wages Act, 1991 and Terms of Employment (Information) Act, 1994 and 2001. (references: r-091960-pw-10/EH and r-091961-te-10/EH)

#### **Payment of Wages claim:**

The appellant was employed with the respondent from 15<sup>th</sup> February 2009 to 27<sup>th</sup> January 2010. The appellant lodged a claim under this Act on the 1<sup>st</sup> April 2010. The relevant six month period pertaining to the claim therefore was found to be from the 30<sup>th</sup> September 2009 to the 27<sup>th</sup> January 2010. It was the appellant's case that he was owed 106.2 hours pay from this period.

The appellant gave evidence with the assistance of an independent interpreter provided by the Tribunal. The appellant stated that in or around the time that he was leaving his employment with the respondent, he went to the office to discuss outstanding pay but was informed there was no sum outstanding. The appellant thought he mentioned the issue to his supervisor in September 2009. The appellant recalled the supervisor telling him that he needed to raise it with the office staff. However, the appellant failed to raise it until he was departing his employment.

The appellant's claim was for 106.2 hours that he worked but for which he had not been paid. The appellant stated that these hours were over and above what was listed on the respondent's rotas as he often worked between two to six hours extra per week. For these months the appellant was working in an offsite canteen premises operated by the respondent on a large building site. In support of his claim the appellant sought to rely on security gate records showing when he entered and departed the building site within which the canteen was located.

It was the respondent's case that the records which the appellant sought to rely on were not the property of the respondent company and were possibly the records of the security company who managed the security on site.

A Human Resources officer (hereinafter referred to as HR) with the respondent gave evidence that during an exit interview she held with the appellant he raised the issue of unpaid wages. HR undertook to investigate this matter for the appellant and spoke to the head chef, the general manager and the payroll department regarding the issue. However, there was no evidence that the appellant had worked the extra hours that he claimed; indeed the head chef assured her that the rotas were correct and the payroll paid the wages according to the rotas.

In an effort to resolve the appellant's issues HR and the company accountant met with the appellant and offered him a sum in settlement as a goodwill gesture despite the fact that there were no records to support his claim. This was offered as the appellant was well thought of and a good employee.

#### Terms of Employment (Information) Acts claim:

The appellant received an amended contract when he was relocated to the offsite canteen. The claim under these Acts refers to the fact that the company name is incorrect in that it does not reflect that the respondent is a limited company. In addition the amended contract was not signed by the employer and it did not reference S.23 of the National Minimum Wage Act. While it was accepted that the appellant was not prejudiced by this, it was the appellant's case that the respondent had not complied with the Act. Finally, not all breaks were detailed within the employee handbook as specified by S.11, S.12 and S.13 of the Organisation of Working Time Act, 1997 and the relevant S.I.

HR stated that the appellant received the amended contract to reflect the change in his employment when he was relocated offsite. HR accepted that the omission to reference S.23 of the National Minimum Wage Act may have been a mistake on her part but the appellant was paid above the minimum wage. The respondent provides over and above in terms of break entitlements as employees receive an extra 15 minutes for lunch and are paid for their breaks.

## Determination

Having considered the evidence adduced at the hearing of the appeal of the decision of the Rights Commissioner the Tribunal finds that the appeal under the *Payment of Wages Act 1991* fails due to lack of clear and convincing evidence that the appellant was underpaid in respect of 106.2 hours over a period commencing 30<sup>th</sup> September 2009 to 27<sup>th</sup> January 2010. The Tribunal notes that the respondent offered the appellant an *ex gratia* payment of €1,300 when the appellant raised the issue of underpayment of wages although the respondent's records did not support any such underpayment of wages. The Tribunal upholds the decision of the Rights Commissioner (reference r-091960-pw-10/EH).

Regarding the appeal under the *Terms of Employment (Information) Act 1994* as amended the Tribunal finds that the impugned contract of employment was in fact an ancillary contract to reflect a location change in the appellant's contract of employment. The Tribunal finds that if there was any defect in this ancillary contract such defect was not in the main contract of employment or was covered in the employee handbook. The Tribunal further finds that if there were any such defects the appellant was not prejudiced by same. In the circumstances the appeal regarding the level of compensation fails and the Tribunal finds no reason to disturb the Rights Commissioner's decision (reference: r-091961-te-10/EH).

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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