

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYEE (*appellant*)

CASE NO.  
PW342/2011

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

EMPLOYER (*respondent*)

under

### **PAYMENT OF WAGES ACT, 1991**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. D. Winston  
Ms. N. Greene

heard this appeal at Dublin on 31st August 2012

Representation:

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Appellant(s) : Mr. Joe Donnelly, Divisional Organiser, Mandate Trade  
Union, O'Lehane House, 9 Cavendish Row, Dublin 1

Respondent(s) : Byrne Wallace, Solicitors, 2 Grand Canal Square, Dublin 2

The decision of the Tribunal was as follows:

This case came before the Tribunal by way of an employee appeal of a Rights Commissioner recommendation under the Payment of Wages Act 1991, reference r-099719-pw-10/TB. The hearing was held in conjunction with PW108/2011.

#### **Claimant's case**

The claimant was employed as a sales assistant with the respondent company since 1982. She was rostered to work 40 hours per week, which included 2.5 hours overtime every Thursday night, which was paid at double time.

In December 2009 while the branch where the claimant worked, Branch S, was being revamped, she was transferred to Branch C where she continued to work the late night as previously. The

additional 2.5 hours overtime paid at double time was also paid when the claimant was on annual leave, even though she physically did not work it. She was rostered for this overtime for 30 years with the respondent. When Branch S reopened, the claimant was no longer required to work the late night. The claimant was not given a contract or any paperwork relating to her employment with the respondent.

In cross-examination the claimant stated that it did not suit her to transfer to another location within the company.

### **Respondent's case**

Giving evidence, the HR Manager stated that the claimant was given the opportunity to stay in Branch C with the late night included but she chose to return to Branch S. The claimant was informed that she would be returning to a 37.5 hour week in Branch S.

In cross-examination, the HR Manager informed the Tribunal that the other employee, who was in the same position as the claimant, was paid redundancy based on 40 hours per week.

### **Determination**

It is clear that the late night working was regularly and consistently rostered and formed part of the claimant's weekly wages for a long number of years.

The claimant did not have a Contract of Employment but the Tribunal is satisfied that the 2.5 hours formed part of her employment relationship with the respondent by custom and practice. She was paid for the 2.5 hours, even though she didn't work them. The Tribunal finds it significant that the claimant was compensated for the 2.5 hours even when she was on annual leave. The respondent deducted the amount attributable to the 2.5 hours from the claimant's remuneration.

An employer cannot make a deduction from an employee's wages unless it complies with Section 5 (1) of the Payment of Wages Act 1991.

Section 5 (1) An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless -

(a) the deduction or payment is required or authorised to be made by virtue of any statute or instrument made under statute,

(b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or,

(c) in the case of a deduction, the employee has given his consent in writing to it.

The Tribunal determines that the reduction in the claimant's wages by the respondent is in breach of Section 5 (1) of the Payment of Wages Act, 1991 and awards the claimant €1,758.90 compensation for unlawful deduction from the claimant's remuneration over a 26 week period.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

Sgd \_\_\_\_\_  
Chairman