EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	**CASE NO.**
EMPLOYEE ***-appellant A***	PW88/2011
EMPLOYEE ***-appellant B***	PW89/2011

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: Ms N. O'Carroll-Kelly B.L.

Members: Ms A. Gaule
Ms M Maher

heard this appeal at Dublin on 27th June 2012 and 31st August 2012

Representation:

Appellant: Mr. Saul Woolfson B.L. instructed by Sinnott & Company, Solicitors, 15 Belgrave Road, Rathmines, Dublin 6

Respondent: Ms. Mary Paula Guinness B.L. instructed by Mr. Tom McEvoy, Harrison O'Dowd, Solicitors, 98 Henry Street, Limerick

The decision of the Tribunal was as follows:

This case came before the Tribunal by way of an appeal by two employees (the appellants) against the decisions of a Rights Commissioner under the Payment of Wages Act, 1991 references: PW93280/10/MR and PW91842/10/MR.

Background:

It was the appellants' case that they started work for the respondent working 37.5 hours per week. At that time they did not work nights, late shifts or weekends. Appellant B commenced on a "gold shift" in 2005 and Appellant A subsequently started on this shift in 2007. On this shift they worked 32 hours per week with a shift allowance of 25%, however they maintained the basic rate of pay that they had earned when working 37.5 hours week.

On this shift theappellants worked night shifts and weekends.

In July 2009 the company announced its intention to standardise the shifts. The company's proposal was that those employees on 24/7 shifts were now expected to work 36.75 hours perweek but for the same rate of pay.

In any event the deadline date for the standardisation was January 2010. The appellants made it clear they were not consenting and since January 2010 have lodged claims under the Payment of Wages Act, 1991 on a six-monthly basis. It was the appellants' case that the change to a gold shift, working 32 hours instead of 37.5 hours, was an agreed term in the course of dealings between the appellants and the company. The Tribunal heard evidence from the appellants.

It was the respondent's case that the appellants' contracts were based on a 37.5 hour week and that their salaries were calculated on that basis. Their contracts contain a clause regarding flexibility in hours of work which states, "*Our business requires flexibility in meeting the expectations of our customers located in different countries. As a result you will be required to work to varying patterns which may include shifts at any time during a 24 hour period…"*

The Tribunal also heard evidence on this issue from the respondent's witness, a technical support director who leads the services section. It was the respondent's case that the shiftpattern and rota policy were in place and employees on the 24/7 shifts were made aware ofthese policies by managers and that the shift pattern and rota policy states, *"the current shiftrosters are determined by the call arrival patterns and as such changes in shift rosters may berequired to support service level,"*

In addition under the contract of employment heading it further states,

"The terms and conditions set out in this letter govern employees working on shift pattern only. All other terms and conditions of employment will remain in force as per the contract of employment except to the extent that they are varied by the terms and conditions in this letter."

Determination:

The following is the dissenting opinion of Ms. Mary Maher.

Unlike other forms of contract, the contract of employment can be subject to variability. Custom and practice is a common example, but contracts can also be varied by verbal understandings and agreed changes. In this case it seems clear that the written contract of 2005 was varied in 2007 by a new agreement between employer and employees.

The 2005 written contract stated: *"Your normal hours are 37.5 hours per week Monday to Friday (inclusive) each week with a one hour lunch break each day. Our business requires flexibility in meeting the expectations of our customers located in different countries. As a result, you will be required to work varying patterns which may include shifts at any time during a 24 hour period."*

The fact that flexibility was required does not negate the fact that the normal working hours were as stated in the contract.

In 2007 a new shift was advertised. Had the company regarded this shift as one which they could impose as stated in the contract –required for flexibility, i.e., work of a "varying pattern" -- there would have been no need for an advertisement. Clearly the company needed to attract candidates who would work unsocial hours regularly, the incentive being a drop to a 32 hour week over four day/night shifts.

It is not clear whether many candidates applied. Appellant A said in evidence that he had applied and initially failed, but was approached several months later by management and given the job.

The agreement was that the appellants would be given the same salary as they had on their original 2005 contract, plus a shift allowance obviously added as compensation for unsocial hours.

The new agreement of 2007 was in effect an oral contract. In 2010 the respondent company imposed an additional 4.5 hours to their work week at the same rate of pay (salary plus shift allowance) without the agreement of the appellants, who have worked the extra hours since under protest. To work longer hours for the same monthly pay is a loss of pay whether the contract refers to wages per hour or salary per month. The respondent is in breach of the agreed oral contract and in breach of the Payment of Wages Act, 1991. The appeal should succeed.

<u>The following is the majority decision of the Tribunal with Ms. Mary Maher dissenting.</u>

The Tribunal has considered all of the evidence in this case together with the documentation submitted and legal submissions.

The appellants' contract of employment dated the 4th March 2005 states at clause 5, *"your normal working hours are 37.5 hours per week Monday – Friday (inclusive) each week, with a one hour lunch break each day. Our business requires flexibility..... 24 hours period"*

The respondent had various different shift patterns which varied from week day only shifts to a combination of week days and weekends, day shifts, evening shifts and night shifts ranging from 28 hours – 37.5 hours. The common thread within all of the various shift patterns was thatall the employees, including the appellants, were paid for 37.5 hours regardless of the hoursworked. Their holiday pay was calculated on a 37.5 hour week. Bench marking was calculatedon a 37.5 hour week. An allowance of 25 % was also paid to employees who worked any of theshift cycles.

When the appellants worked a 32 hour week they were paid, as per their contract, an amount equivalent to 37.5 hours despite the fact that they did not work those hours.

The appellants argued that they were paid overtime after 32 hours however the respondent contested this evidence stating that as a general rule overtime was not paid until the expiration of 37.5 hours. Occasionally and as an exception to the general rule overtime was paid before the expiration of 37.5 hours. That was done on a "fairness" basis e.g. if an employee was called in at the last minute to do a night shift.

In evidence one of the appellants conceded that there was no deduction to his overall salary. This salary in 2006 was €36,094.28. In 2007 it was €39,361.66. In 2008 it was €41,912.46. In

2009 it was € 42,150.00. In 2010 it was € 42,571.51 and in 2011 it was € 42,996.20. There was no deduction from those figures and they increased annually in line with benchmarking. That was accepted by the appellant.

The appellants were free to apply for different shifts if they so desired. Evidence was given and was not contested that many employees for different personal reasons applied to change shift cycle and the respondent, where possible, would facilitate the employee. Regardless of what shift cycle was worked the employees were paid for 37.5 hours.

The appellants previously worked a 32 hour shift. They were paid the equivalent of 37.5 hours together with a 25% allowance. The appellants took no issue with that. They were then moved to a different shift where they were obliged to work 36.5 hours. They were still paid their contractual 37.5 hours together with a 25% shift allowance.

The appellants argue that being paid the same amount for working a 32 hours shift as a 36.5 hours shift amounts to a deduction in their wages i.e. having to work 4.5 hours more for the same money reduces the hourly rate paid. The Tribunal by majority, with Ms. Mary Maher dissenting, do not accept the appellants' argument. The appellants signed their contract ofemployment and took no issue with that. On the new shift they were paid their contractual 37.5hours despite only working 36.5 hours, together with the allowance during the subject time. Nodeduction was made from the appellants' wages nor were they required to work outside of thiscontractual obligation. The appellants stated that they were required to work an additional 4.5hours for the same remuneration. They attempted to reduce their salary to an hourly rate. Theythen calculated that rate over 32 hours and 36.5 hours. When one calculates the salary in thatway, there is a reduced hour rate being paid for the 36.5 hour shift. However, the appellants' salary, as per their contract, was not paid hourly. It was a flat rate equivalent to 37.5 hoursregardless of the hours worked. There was no deduction from their contractual rate of pay. Theappeals under the Payment of Wages Act, 1991 fail and the decisions of the RightsCommissioner (references: PW93280/10/MR and PW91842/10/MR) is upheld.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)