EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.

EMPLOYEE PW349/2011

appellant

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

EMPLOYEE *appellant*
and

EMPLOYER *respondent*
under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr R. Maguire, B.L.

Members: Mr. D. Winston
Mr C. Ryan

heard this appeal at Dublin on 25th January 2013
and 23rd May 2013

Representation:
_____

Appellant(s):

Respondent(s):

The decision of the Tribunal was as follows:-

This appeal came before the Tribunal by way of an employee appealing the determination of a rights commissioner reference r-101231-pw-10

Employees Case

The employee outlined to the Tribunal his career history. He qualified as a pharmacist in 1983 and has worked in hospitals since that time. From 1994 to 1998 he was secretary manager in hospital A but otherwise he was always a pharmacist. The position of secretary manager was similar to that of chief executive. He wanted to be the chief pharmacist of a larger hospital and he went to T Hospital for two years in 1993. He became the head of Pharmacy in 1997 as a result of an internal competition. He received an extension until 29th July 2006.

He received a supplementary allowance of one third of his substantive salary. This was an additional supplement for the additional responsibilities he took on. The contract was renewed

for a further period. €30,521 was the salary for the chief pharmacy salary scale; €11,381 was an allowance for the secretary/manager.

From 1994 until June 1998 he was hospital manager. A year before T hospital opened he was head of pharmacy and it had a small department of three to four people. He spent most of the time in T Hospital planning the site. He spoke to Dr. McC the CEO of the new hospital and told him that he wanted to be head of the pharmacy. Dr. Mc asked him to remain as part of the management team and agreed an allowance of € 10,000 to enable the appellant undertake research and development and he established an affiliate with a university. He focused on the academic side and was also involved in other areas of management.

After the hospital opened Dr. McC asked him to take over the catering department which had 70 employees. The catering department provided one million meals per year and there were a number of problems in this area. He was asked to deal with these issues in addition to his pharmacy duty. He established why the employees in catering were unhappy and absenteeism was a problem.

ML was CEO in 2001. The appellant was also responsible for medical physics, clinical engineering and managed equipment. He worked long hours and in 2003 he met with the CEO who agreed to pay the appellant ten hours overtime per week averaged over the year. He was told to keep track of his hours. He was still the chief pharmacist in receipt of basic pay, overtime and a top up sum. He had contracts for the majority of his career. Overtime was linked to pharmacists pay.

He submitted an overtime claim for December 2009 and January 2010, he realised in March 2010 that he was not paid his overtime and he compiled an agenda for a meeting. He retained his overtime hours in his diary and submitted his claim form to the CEO. Usually he was paid for his overtime a month or two after completion and sometimes two months. He had a meeting with the CEO in March 2010 as he thought there was a problem with processing payments. He was told that he was not going to be paid overtime as management did not think this was appropriate.

In an e mail dated 30th April 2010 to the PA of the CEO designate PC he outlined the situation regarding his overtime claims and he asked that his existing remuneration arrangements be honoured. He was informed that senior managers should not be paid overtime. He pointed out the long standing agreement he had with the former CEO ML who had left. Overtime was going to be done in a different way and he should discuss the matter with HR and he was informed that he would be compensated.

On the 18th May 2010 he received a letter from PC regarding management structures and governance arrangements in which he outlined to him that he would like him to focus on patient drug safety, drug budget and cost management. No reference was made to his request. He was told to engage with HR. He spoke to MC, HR manager at the time and there was no resolution of the matter. In a letter dated 21st May 2010 he informed HR that he had met PC who informed him that the matter could now be dealt with and he agreed it should be resolved within one or two weeks.

His allowance was inadequate and did not increase with national agreements. In 2007 he tried to get the matter resolved and he could not understand what the respondent was trying to do. He was in regular communication with the PC the hospital who told him that the matter would

be resolved and that he would be generous. A lot was going on regarding his portfolio. He had a good relationship with MC in HR and he felt that the matter would be resolved eventually

On the 9th June 2010 in an e mail to MC, HR he outlined that he would be obliged if they could meet to discuss the contractual issues in the respondent prior to his secondment to a full time role in another area. He explained that one element was his overtime payments outstanding since December 2009. He informed MC that he would lodge a claim under the Payment of Wages Act before the end of June 2010 if the matter was not resolved. He requested a contractual arrangement backdated to December 2009 which would provide him with a fully pensionable salary that would no longer be subject to additional overtime payments.

Some projects were taken from him including medication, commission of patient safety 2008 and report agenda. In an e mail dated 13th June 2010 to MC, HR he outlined that he had no substantive improvement to his package for six years. He was on the B scale and he requested that he be placed on the A scale at whichever point HR deemed appropriate. Once this was agreed he would give written notice of his request to be seconded to the HSE so that a date could be agreed for his move. In an e mail dated 15th June 2010 to HR he outlined that he had said to that his secondment would be contingent on a satisfactory conclusion of discussions in relation to his contract.

He had an informal meeting with PC on the corridor regarding his salary. He asked the appellant when he was going on secondment and he responded as soon as the issues with his salary were resolved. PC told him that he was signing off on whatever GL, director of finance agreed and that he was not as bad a guy as people think.

In a letter dated 7th July 2010 from GL, Director of Finance to MC, HR he outlined that he was confirming the arrangement agreed by PC and the appellant. He requested that the matters should have been formalised previously and were now confirmed by PC and that his gross salary would be €169.586,00. In this letter GL stated PC confirmed his approval of the decision to make the appellant's remuneration pensionable and that that he wished to treat theappellant in a fair and generous manner. The appellant would not be in a position to take up thesecondment post until the matter was finalised. The appellant's overtime payments ceased inDecember 2009 and PC agreed that the new arrangement would be backdated to that date. Theappellant was very pleased on receipt on that letter. He was happy and relieved that the issueshad been resolved.

He contacted the HSE and accepted secondment as of 6th August 2010.

By e mail dated 15th July 2010 to MC, HR he informed him that he was pleased that the issue of his pensionable pay had been resolved and the arrangement covered the overtime issue satisfactorily. He enclosed a draft of his job description and he had inserted wording under remuneration that was specific to him. He also added a sentence at the end of the section on pensions relevant to his situation. He hoped that the job description was adequate and that any amendment could be quickly agreed.

On the 20 July 2010 he sent an e mail to PC's personal assistant whereby he outlined that HR would be in touch regarding his secondment to work in the HSE on a full time basis for a period of two years and after that he would return to his post as head of pharmacy. He requested to sign off on the arrangement as previously agreed so that he could take up his new role on

Monday 26th July 2010.

In an e mail dated the 22nd July 2010 PC informed the appellant that there was no agreement entered into by him.. He indicated he would like discussions concluded so that the appellant could take up his position. Any agreement reached with the appellant must be consistent with existing hospital policies on secondment. There must be no breach of the public service moratorium.

He could not believe this was happening and he contacted HR. The appellant felt that PC was reneging on what was agreed. When he met MC, HR he told him that there may be a difficulty with getting the pension agreement resolved. The secondment went ahead and the salary issue was not resolved.

On the 26th July 2010 in an e mail to MC, HR he outlined to MC that he had given him an assurance that he would expedite the conclusion of his written contract. He had planned to finish work with the respondent on the 26th July 2010 and commence on secondment on Wednesday 28th July 2010.By the end of August 2010 he had expected the matter to be formalised. He was overtime and he was on the same salary.

MH told the Tribunal that she was the process improvement manager and reported to the appellant. She recalled an occasion on the 30th June 2010 when the appellant spoke to PC outside the education centre. He asked the appellant when he was leaving and he told him that he had spoken to GL director of finance and that he would sign off on whatever the director of finance would give him and that he would be generous despite what people thought.

In cross examination the appellant stated that he had a file note for GL of the hours he had worked without remuneration. In 2007 the respondent had financial difficulties and needed to increase capacity. GL worked on the financial side. He told GL that he needed to be paid for the hours of overtime he worked. He had no personal time off in the year and submitted claims for overtime as chief pharmacist not as manager. GL told him if he submitted a claim he would be paid at the chief pharmacist rate and chief pharmacists were paid overtime. His overtime hours varied and he would not claim overtime unless he worked it. The overtime averaged out and it was no more than ten hours per week.

From 2007 to 2008 he did a master's degree in organisational behaviour which the respondent paid for. He did the masters two hours a day Friday afternoon and Saturday morning.

In a memo to the management team from the Acting Deputy CEO JOC on the 19th October 2009 regarding overtime pre-authorisation he did not feel that he was covered by the agreement as his agreement with the CEO superseded that. He claimed overtime for October and November and he was informed that PC was taking over and in future that he the appellant would have to agree it with him. He did not recall receiving an e mail dated the 28th November 2009 from ML which was copied to PC outlining that overtime was to be authorised in advance. He was due money in December 2009.

He met with PC in June 2010 and he shouted and used foul language to him. He told him that they would need to renegotiate and he felt that is what was going to happen

He agreed that he was clear in relation to the time line in relation to the Payment of Wages Act. He had obtained legal advice at this time. There was no buyout of overtime and he was trying

to renegotiate his contract. His allowance was non pensionable. The chief pharmacists in other hospitals negotiated a personal allowance as well as salary. He felt that when he met MC on the 9th June 2010 that matters would be resolved and he had many pleasant meetings with MC.

It would not have been illogical to be offered a salary of €169,856.00. He had on-going discussions with PC.. MC told him that any pension would be sorted out by MN (HSE). He was a personal friend of GL and had on-going discussions with him about his salary. GL told him that any deal would have to be done with approval of the Finance. GL is no longer employed with the respondent. MC, GL and the appellant were all colleagues on the management team and he felt that GL and MC were sorting things out. He was very anxious to leave and take up his secondment and he was expecting the offer in writing.

He did not have a good relationship with PC at this time. He thought that he had a deal on the 23rd July 2010. He did not lodge a claim then as he felt he would get a better deal. He had sought a Grade A salary and what was on offer was significantly lower than what he sought. He had a letter from GL Director of Finance on 15th July 2010 and it was his understanding that he had a deal.

PC disagreed with the status of the letter of the 7th July from GL to MC regarding the fact that the appellant's gross salary should be €169.586.00. He had not received anything in writing from GL regarding ten hours of overtime a week. The overtime issue was not resolved on the 23rd July 2010. His Payment of Wages claim was not lodged until February 2011.

In re-examination he stated that he did not remember getting a memo dated 19th October 2009.

In answer to questions from the Tribunal he stated that he did not discuss specifics in May 2010 with PC and MC. PC was aware that he was on a higher salary. When he was asked if GL had an agreement with PC regarding his salary he replied that he had sorted out the salary issue. He was not informed that PC would need to agree to it... His secondment is being extended by another year and he was seconded on the same salary. There were nine on the management team and it fluctuated.

Respondents Case

PC told the Tribunal that he was CEO of the respondent from 14th December 2009 to July 2010 for a period of seven months. In 1998 the structure of the respondent was formed. The governance and management structure was not fit for purpose. There were 26 reports to the CEO which was an operational role. There were a number of clinical issues with backlogs in X rays. He communicated the need for restructuring. The senior management team met on a regular basis, it was a very busy environment. It had a balanced budget in place in July 2010 and it was under severe financial pressure. It had very good industrial relations in place and had an alliance of unions regarding work force alignment.

deal with. In March 2010 a number of events occurred and the respondent had a huge backlog of X rays to deal with.

He was never forwarded claims for overtime from the appellant. He met with the appellant on the 26th March 2010. He felt that he was being honest and fair in his dealings with the appellant and tried to align a vision that would take the hospital in a certain direction. His recollection of the meeting with the appellant was they discussed reorganisation of the pharmacy and he was

not aware of a discussion on figures.

He met the appellant in May 2010 and he mandated issues to NMcN and MC. They identified issues and the proposals were fair and equitable, they had to adhere to guidelines as laid down by the respondent, the HSE and the public service. The custom and practice was you could buyout overtime over a period of time.. He had no recollection of having a conversation with the appellant outside of the centre that GL was going to get the appellant to sign an agreement. He was extremely busy at this time and he had many meetings on the 29th and 30th June 2010.

He was on holidays in early July 2010 and he missed a board meeting. He decided that he was no longer going to be CEO and he reverted back to clinical practice clinic on the 30th June 2010. He became aware around mid-July 2010 of a letter dated 7th July 2010 which was sent from GL Finance Director to MC, HR regarding the appellant's salary. His reaction was thatthere was no basis in fact for that letter. He had a short discussion with MC and he wanted thematter of the appellant's salary resolved. He had to be fair but he was also aware of thesituation in the respondent. The following week he demitted from office. The situation wasthat there was a deficit in the funding that summer and there was a major fire in the canteen inJuly 2010.

In cross examination he stated that he met the appellant on the 26th March 2010. He did notdiscuss the appellant's overtime arrangements, the issue was to reorganise and drive the pharmacy. He could not recall if overtime was discussed at each meeting. He did recallsuggesting that NMcN operations manager HR and MC interim HR manager deal with theappellant. He did know what the contractual issues were and he did not recall making anyagreement regarding contractual issues. That was delegated to HR. He had no recollection ofa meeting with the appellant on the 30th June 2010. He did not recall having any discussionswith GL and he did not have an agreement with GL regarding the appellant's salary. As far ashe was aware no written proposal was agreed He delegated responsibility and he did not speakto the appellant himself regarding contractual relations.

In re-examination he stated that he would have received 150 to 200 e mails and numerous correspondences on a daily basis.

MC told the Tribunal that in April 2010 he joined the respondent as acting HR director initially for a short term. Then he was contracted to assist the HR Director NMcN. The respondent received major funding from the HSE and private income and private patients. Three societies raised funds and funds were raised by the sale of goods by one department. Staff above a certain level could not be appointed. The respondent had scales of 1 to 9 as well as specialised scales. The majority of the respondent's pensions and payments were authorisedfrom MN and pension trustees An employee at grade 8 would receive a grade 7 pension. .

He attended executive meetings with PC. He met with the appellant initially and discussed many different topics He wanted to establish the appellant's current remuneration and salary expectations. He did some research and established a grade for the appellant that MN would not have a problem with and PC would sign off on. The salary was aligned with that of assistant national director in HR in the HSE and a number of directors were on that salary. He felt that the salary would reflect the role and a non pensionable allowance was not calculated. A sum of money would be paid for a range of duties and part of the salary would be pensionable. The overtime was in two formulae - one formula was in place and the second

was coming down the line. He needed to get facts and figures.

The respondent would determine the sum of money regarding the loss it felt the appellant had suffered. Overtime would never be consolidated to payment. He established that the appellant's salary was at director level. In his opinion once a position was at a particular level MN had to be informed and permission obtained. €115,567 was at the top of the scale formulated forcalculation of overtime. MN would not recognise a figure above that and it would not bepermissible. He asked the appellant what his salary expectation was and he had to talk toMN.

The custom and practice was to discuss and negotiate. If he made a written offer he would negotiate on the basis of a written offer. If there was an agreement between the appellant and the respondent it would have been documented in writing. PC and NMcN told him to talk to the appellant about the matter and he told the appellant that the respondent was bound by the HSE and MN. He had three meetings with the appellant and possibly a fourth meeting as well as numerous interactions.

He discussed careers and prescriptive medicines and the appellant was capable of leading an organisation. A board meeting took place in July 2010 and he normally did not attend board meetings. The director of finance attended every board meeting. PC returned from holidays in July 2010 and MC was informed that PC was moving to surgery. The witness was very disappointed as he and PC had shared many views of the way forward for the respondent. Regarding the 7th July 2010 letter from GL to the appellant regarding his salary he could not believe that GL would write this as it was not in line with anything that was reasonable. Consultants were on the salary being offered to the appellant by GL. He did not respond to an e mail from the appellant on the 15th July 2010 regarding his secondment. He felt the financial director had overstepped his brief and he wanted PC to affirm that it had no validity. JOC then took over as deputy CEO.

In cross examination he stated that the grade that the appellant's job was linked to was that of assistant national director of HR and Director of HR and Finance. It was a very senior and demanding role. He did not know the salary the appellant was on, he knew the issue was compensation but he did not know specifics. He could not put a salary together for the appellant that would encompass overtime.

His brief was simple and he attempted to resolve the issue in good fate. If the appellant had agreed to an offer they could have fine-tuned it and he would have made the appellant a formal offer. He was authorised by PC and the respondent to remain within guidelines. GL had no authority to make an offer to anyone.

He made an offer of €115,000 plus an offer to buyout overtime. In an e mail from the appellant on the 13th June 2010 the appellant outlined his current salary. He had many meetings with the appellant on a range of issues and explained to him that MN would have to authorise it. He had made an offer to the appellant. The appellant told him that he was not interested in a buyout of his salary. GL knew that he was not mandated to deal with him. It was not up to him to take GL to task. There was no written offer made to the appellant. He and the appellant had discussions of up to twenty to twenty five hours and met on a regular basis. The witness is no longer employed in the respondent and there has been no offer of salary to the appellant since then. The matter was left up in the air and this was not a negotiation in any real way. The preferred way to do business was to seek agreement and then

confirm. He had no discussions with G L. and he had several meetings with JOC who was appointed CEO.

Determination

It is the respondent's position that the finance manager GL did not have authority to offerchanged terms and conditions of employment to the appellant. The Tribunal accepts that as theappellant was in a senior management position he knew or ought to have known that the letterof the 7th July 2010 could not be a valid variation of his contractual terms. The appellant hadbeen dealing with MC throughout and continued to deal with him after. Indeed even theappellant acknowledged by his e mail dated 15th July 2010 that his contract had not beeneffectively varied as it remained to be resolved what his new role and function would be. Assuch the Tribunal are satisfied that the appellant remains on the same contractual terms as wereeffective before these negotiations commenced.

It has not been proved to our satisfaction that there is any reason to extend the six month time line under the Payment of Wages Act as amended. While there were discussions between the parties, these started well in advance of the 1st February 2011 when the appeal was submitted to the Rights Commissioner. The Tribunal has found that the appellant did not act within reasonable expediency at this stage and his appeal can only be in respect of payment of wages from the 1st August 2010, being 6 months before the date he submitted his claim. At that time he was on secondment and he has continued on secondment to date. He gave evidence of doing ten hours per month overtime in his new role.

The Tribunal awards compensation of €23,671.79 from the 1st August 2010 in respect of his overtime and on the basis of his submission. The appeal under the Payments of Wages Act 1991 succeeds and the Tribunal sets aside the determination of the Rights Commissioner.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)