EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: **CASE NO.**
EMPLOYEE, **(*appellant*)** PW404/2011
TE257/2011

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. K. T. O'Mahony B.L.

Members: Mr D. Hegarty
Mr D. McEvoy

heard this appeal at Cork on 10th April 2013

Representation:

Appellant(s):

Respondent(s):

*This case came before the Tribunal by way of an employee's appeal of the Rights Commissioner Decision – **r-100876-pw-10/DI** – under the Payment of Wages Act, 1991 and the RightsCommissioner Recommendation – **r-100866-te-10/DI** – under the Terms of Employment(Information) Act, 1994 and 2001.*

A preliminary issue was raised before the Tribunal in respect of the appeal under the Payment of Wages Act, 1991.

The decision of the Tribunal on the preliminary issue was as follows:

Preliminary Issue

The respondent contended that since the appellant failed to furnish it with a copy notice of the appeal as required by section 7(2) of the Payment of Wages Act, 1991, the Tribunal did not have jurisdiction to hear the appeal. The appellant contended that since the respondent had not raised this point in its T2B form (Notice of Appearance) it was now estopped from raising it. The rights commissioner's decision was received by the appellant's solicitor on 1 September 2011. The appellant lodged an appeal with the Tribunal on 23 September 2011. The respondent first became aware of the appeal when it received a copy notice of appeal sent by the Tribunal on 20 October 2011 to the respondent and received by it a day or two later. The

espondent argued that having received the copy notice of appeal later than six weeks after the rights commissioner's decision was communicated to the parties, was outside the time allowed under the statute for serving the copy notice of appeal on the respondent and in such circumstances the Tribunal did not have jurisdiction under the Payment of Wages Act 1991 to hear the appeal.

Determination on Preliminary Issue

Section 7(2) of the Payment of Wages Act, 1991, 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 in regulations 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."

A crucial issue to be determined by the Tribunal is whether the word 'shall' in the subsection is mandatory or merely directory. The words 'shall be initiated' appears in several other statutory provisions, providing for the initiation of employment rights claims or appeals, under various Acts. The word 'shall' in section 8 (2) the Unfair Dismissals Act 1977 (dealing with initiating a claim under that Act), was considered by the courts in a number of cases.

Hamilton J in the High Court in *The state (IBM Ireland Ltd) v Employment Appeals Tribunal and O' Briain [1984] ILRM 31* dealing with a similar statutory provision under the Unfair Dismissals Act 1977, stated:

> *The rights conferred by the Unfair Dismissals Act are statutory rights; the powers conferred on the Tribunal are statutory powers and in connection with their exercise the statutory requirements of the Act must be complied with.*

Hamilton J referred to the Circuit Court decision in *IBM Ireland Ltd v Feeney* [1983] ILRM 50 where of Ryan J considered section 8 (2) of the Unfair Dismissals Act 1977, which provides:

> *A claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under section 17 of this Act made for the purposes of subsection (8) of this section) to a rights commissioner or the Tribunal, as the case may be, within 6 months of the date of the relevant dismissal and a copy of the notice shall be given to the employer concerned within the same period.*

Ryan J found that the requirement to serve the copy notice on the employer within the stated time limit of 6 months in that subsection was a mandatory requirement. Hamilton J in the later High Court *O' Briain* case stated that Ryan J "was undoubtedly correct" in his decision on the issue of serving a copy notice on the respondent within the stated time limit of 6 months, although Hamilton J found otherwise on the issue of who may serve the copy notice on the respondent given the wording of that particular section.

Having considered the judgments on the issue the Tribunal is satisfied that the word 'shall' in section 7(2) of the Payment of Wages Act 1991 is a mandatory requirement. Examining the wording of the subsection it is clear that the party initiating an appeal must do two things *'within 6 weeks (emphasis added) of the date on which the decision to which it relates was communicated to him':*

> *(a) give a notice in writing to the Tribunal ... stating the intention of the party concerned to appeal against the decision, and*
>
> *(b) a copy of the notice to the other party concerned."*

As the appellant failed to give a copy notice of the appeal to the respondent within the 6 weeks of the decision of the rights commissioner having been communicated to her, it being a mandatory requirement, the Tribunal finds that it has no jurisdiction to hear and determine the appeal under the Act.

The appellant sought to rely on The Payment of Wages (Appeals) Regulations - S.I. No. 351/1991, which at paragraph 5 (2) provides:

> *A notice of appearance under this Regulation shall be in a form specified by the Minister and shall contain a brief outline of the grounds on which the appeal concerned will be contested by the person entering the appearance.*

The appellant contended that since the respondent's notice of appearance was defective in that it failed to mention its defence based on the preliminary issue, it should be estopped from relying on it before the Tribunal. The Tribunal does not accept this argument. A regulation made under an Act cannot override a mandatory provision of the Act itself. Furthermore, the decision in *Transportstyrelsen v Ryanair* [2012] IEHC 226, which dealt with issues of international law, is not relevant to jurisdictional issues before a statutory body dealing with statutory rights and procedures.

Note: Since the judgments in the abovementioned cases on section 8 (2) of the Unfair Dismissals Act 1977 were delivered, section 8 (2) of the Act has been amended to provide for an extension of the time for initiating a claim where exceptional circumstance prevented the giving of notice in the aforementioned period. However, absent exceptional circumstance, the terms of the subsection as discussed in the aforementioned cases remain unaltered.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)