

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

EMPLOYER

- *appellant*

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

CASE NO.

P1/2012

EMPLOYEE – *respondent*

5 Chestnut Avenue, Esker Hills, Portlaoise, Co. Laois

under

### MATERNITY PROTECTION ACTS 1994 AND 2001

I certify that the Tribunal

(Division of Tribunal)

Chairman: Ms D. Donovan BL

Members: Mr J. Horan

Mr F. Barry

heard this appeal at Portlaoise on 4<sup>th</sup> June 2013

Representation

Appellant:

Respondent:

The determination of the Tribunal is as follows:

This case came before the Tribunal by way of the employer's appeal of the Rights Commissioner Decision reference r-111414-mp-11/TB under the Maternity Protection Acts 1994 and 2004.

#### **Appellant's Case**

The general manager gave evidence. An agreement was made about 1990 following the 1987 Programme for National Recovery which gave all employees a 39 hour working week. Because the appellant's business operated 24 hours a day with employees working 3 shifts implementing the agreement presented problems. The employees and the respondent agreed that employees would continue to work a 40 hour week. Employees were given paid up to a maximum of up to 6.5 paid days a year to compensate for the extra hours worked per week. Four days of the extra paid leave were taken at Easter and the other two days were taken at the discretion of management. The extra paid holidays were in return for time worked and while the respondent was on Maternity Leave she did not work the hours and according to the employer was not, therefore due the time off.

#### **Respondent's Case**

The respondent gave evidence. She started working for the appellant in March 2005. She went on Maternity Leave on 24 September 2010. Her Maternity Leave ended on 26 April 2011. She took 2 weeks extended Maternity Leave and was paid for 1 week and 4 days of the extended leave. She contended that under the terms of the agreement between SIPTU and the appellant she should have been paid for the remaining 3 days of her extended Maternity Leave.

It was the respondent's case that terms of the agreement were binding on the appellant.

## **Determination**

Having considered the evidence adduced at the hearing and the submissions of the parties the Tribunal finds that the crucial issue to be determined in this case is whether the paid time off in lieu of the extra hour worked by the employees of the appellant company each week is remuneration or annual leave. In accordance with section 22 of the *Maternity Protection Act 1994*, as amended by section 14 of the *Maternity Protection (Amendment) Act 2004* if the time off in lieu is remuneration the appellant company succeeds and if it is annual leave the appellant company fails. At the hearing before the Rights Commissioner the evidence was that it was annual leave and which evidence was uncontested because the appellant company did not appear at the hearing.

In the absence of a definition for 'remuneration' in the *Maternity (Protection of Employees) Act 1981* the Employment Appeals Tribunal in its determination in *McGivern v. Irish National Insurance Co. Ltd* P5/1982 was of the opinion that the following statement from *S&U Stores Ltd v. Lee* [1969] 2 All E.R. 417, 419 was "a generally satisfactory definition":

"Remuneration is not mere payment for work done but is what the doer expects to get as the result of the work he does in so far as what he expects to get is quantified in terms of money."

In *S&U Stores Ltd* it was held that the definition of remuneration "might be wider than that" but that it did not arise in that particular case. The Tribunal considers that in the case at hearing whether 'remuneration' might be wider does arise because in this case the benefit is not quantified in terms of money *per se*.

In *McGivern* the definition in section 7(3) of the *Unfair Dismissals Act 1977* was also opened to the Tribunal for consideration.

Section 7(3), the redress section, of the *Unfair Dismissals Act 1977* defines "remuneration" as follows:-

“*remuneration* includes allowances in the nature of pay and benefits in lieu of or in addition to pay”

In *Memorex Media Products v Byrne & Others*, an Employment Appeals Tribunal's determination (Case No. P9/1986), which was opened to the Tribunal it was held that whilst the Tribunal cannot read the Unfair Dismissals Act's definition into the Maternity (Protection

fEmployees) Act 1981, the Tribunal considered it was entitled to use the definition to assist in determining a definition of remuneration for the purpose of the case at hand.

The *Maternity (Protection of Employees) Act 1981* has been replaced by the *Maternity Protection Act 1994* and whereas this Act does not contain a definition of remuneration in section 2, the interpretation section, it does in section 32(4), the redress section, contain an identical definition for remuneration to that contained in section 7(3), the redress section, of the *Unfair Dismissals Act 1977*.

Page 9 of the appellant's Employee Handbook states as follows:

*"All operators work a 40 hour week. .... each week an employee works 40 hours, one hour will be "held" and given as extra paid days off known as lieu days"*.

This arrangement was agreed between the union and the appellant company in order to comply with the 39-hour working week. The union agreement was not opened to the Tribunal so the Tribunal did not have the benefit of perusing this agreement. It was not open to the appellant company to pay the employees for the extra hour worked each week as this would have been in breach of the 39-hour working week. Therefore, the appellant company had to effectively give some other benefit to the employees for the extra hour worked each week.

The Tribunal finds that the *extra paid days off known as lieu days* are what the doer expects to get as the result of the work he/she does rather than accrued annual leave and must be considered a benefit in lieu of pay and therefore remuneration. Accordingly, the Tribunal allows the appeal from the recommendation of the Rights Commissioner by the appellant company. The decision of the Rights Commissioner is upset and the respondent is not entitled to 3 days paid leave.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

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