

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

CASE NO.

EMPLOYER - *appellant*

PW3/2009

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

EMPLOYEE - *respondent*

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr G. Phelan
Dr. A. Clune

heard this appeal at Ennis on 21st May 2009

Representation:

Appellant(s) : Ms Ger Moriarty, Local Government Management Services
Board, Olaf House, 35-39 Ushers Quay, Dublin 8

Respondent(s) : Mr. Tony Kenny, Branch Organiser, SIPTU, O'Connell Street,
Ennis, Co. Clare

In this appeal before the Tribunal the employer/appellant is appealing the decision of a Rights Commissioner under the Payment of Wages Act 1991 ref:PW46353/06/MR.

The decision of the Tribunal was as follows:-

Appellant's Case:

The appellant Co Council's Chief Fire Officer told the Tribunal that he had been Chief Fire Officer with the respondent since 2004 and prior to that had been its Assistant Chief Fire Officer. As well as being paid for call outs the retained fire fighters are paid a retainer on a quarterly basis. They must reside within a mile and a half of their local fire stations. Fire Station E is staffed by fifteen fire fighters, all of whom except for the station officer are retained fire fighters and these are divided into two crews, a red crew and a blue crew, who are on duty on alternate weeks. The crew that is on duty on a particular week *must* attend all call outs and the crew that is off duty *should* attend call outs. This system

is in place to guarantee that a minimum number of seven fire fighters will be available for any given callout. It is vital that teamwork is in place as it is essential that adequate personnel are available at all times. If an on-duty fire fighter wishes to be removed from on-duty service, he must find a replacement from the alternate crew. In this regard a Change of Duty Form must be completed and signed by both parties as well as the station officer.

A composite agreement covering the pay and conditions of retained fire fighters was agreed between SIPTU and ATGWU on behalf of the retained fire fighters and LGMSB on behalf of the Local Authorities in 1999. Included in this agreement were clauses concerning requirements to participate in drills and to attend fire emergency call outs and penalty provisions for failure to comply therewith. In the case of alert/emergency calls there is an absolute liability on the fire fighters to attend. It is on this basis that a retainer is paid. The respondent's contract of employment contained terms to this effect: *failure to attend or participate in ...50% of fire/emergency call outs ... in any quarter of a year shall have the result that the fire fighter shall forfeit his/her right to payment of the retaining fee for that quarter.*

...

Where the Chief Fire Officer considers that a fire fighter is not fulfilling the above attendance standards which he/she considers reasonable in all of the circumstances, the Chief Fire Officer will have the right to withhold the retainer payment as follows:

50% in the 1st quarter,

100% in the 2nd quarter within any twelve months.

Any further failure to meet the above attendance standard may be dealt with through disciplinary procedures.

The respondent commenced employment with the appellant in January 2002. Originally, the respondent was part of the off-duty crew for the week on which 29 March 2006 fell. However, he had agreed to cover for an on-duty colleague. The Change of Duty form had been signed as required. Thus, the respondent was under a strict liability to attend any call outs on that day.

On the evening of the 29 March 2006 the respondent failed to attend a call out. A letter issued to him from the Assistant Chief Fire Officer on the 25 April 2006 seeking an explanation for his non-attendance at the call out. He was advised in this letter that unless an acceptable explanation was provided 50% of his retainer due for the quarter in question would be withheld. The respondent replied to that letter on 26 April 2006 stating that the fact that he was covering for another fire fighter had slipped his mind and that the error was his in its entirety. He wanted the time off to attend a funeral and recorded this request through the usual procedures but forgot that he had agreed to cover for an on-duty colleague. The appellant did not accept this explanation as there is a strict duty to attend and by way of letter of the 5 July 2006 he notified the respondent that a sum of €1,207.50 would be deducted from his retainer payable on the 31 August 2006. This deduction was in line with the respondent's contract of employment which was signed by him and the terms of the 1999 Composite Agreement. There had been other occasions when the respondent had missed call outs. These occasions were mainly due to a later failure and his explanations were accepted in those instances.

In cross-examination the Chief Fire Officer confirmed that the respondent is a competent fire fighter and has a good disciplinary record. He has a high attendance records at fire drills and call outs. On the evening of the 29 March 2006 the minimum crew level was exceeded as a

total of ten fire fighters attended the call out. The sanction that was imposed on the respondent as a result of his non-attendance at the call out had nothing to do with his competence as a fire fighter. This sanction was related to the respondent's conditions of employment and the basis for this sanction was the 1999 Composite Agreement. While the schedule to the respondent's contracts of employment with its retained fire fighters provides for a lesser deduction (of one month's payment from the quarterly retainer) the deduction of 50% is provided for in the contracts of employment, is copper-fastened by 1999 agreement and is the deduction that the appellant has imposed in all cases on other fire fighters including the respondent since the 1999 Agreement. A question of reasonableness was considered when deciding whether or not the respondent had a valid excuse for not attending the call out on the evening of the 29 March 2006. He was given an opportunity to provide an explanation but this explanation was not accepted. There is a requirement on all fire fighters that are on duty to attend 100% of call outs, and this rule is in operation for all districts in the county.

Respondent's Case

The respondent is a retained fire fighter with the appellant Co. Council. He carries an alerter 24 hours a day. While he was originally to be off duty on the evening of 29 March 2006 he had agreed some days previously to cover for an on-duty colleague. This meant that he was on duty on that particular evening. During the day he heard that a friend had died. There is a system in operation in the fire station, whereby if there is a blank space on the notice board in the station an off-duty fireman can insert his name in the space thus indicating he will not be available for duty on the particular day/night. The respondent went to the fire station to check the notice board and seeing blank spaces he entered his name in one of them thus indicating that he would not be available for duty that evening. He did this because he had forgotten that he had agreed to cover for a colleague. While at the funeral that evening he received a call informing him that he should be on duty. He attended at the fire station within a half hour of receiving the call and apologised to the station officer. He attended another fire emergency later that evening.

It was clear to him from the notice board that on the night in question that minimum crew levels were available and indeed a total of 10 fire fighters attended the call out. During his fifteen years service with the appellant he has attended over 80% of calls between off duty and on duty weeks. The mix up on the night was due to genuine human error. He feels that the sanction imposed on him for this was unreasonable

In cross examination the respondent accepted that the appellant had on other occasions accepted his explanations for non-attendance at call outs; on most of those occasions his failure to attend was due to alerter failure. He accepted that he was under a strict duty to attend the call out on 29 March and that technically he was not in a position to avail of this slot as he was on duty on the evening in question. He accepted that it is the decision of the Chief Fire Officer as to what constitutes a reasonable explanation for non-attendance at a call out.

Determination

This is an appeal under the Payment of Wages Act, 1991. Section 5 of the Act regulates deductions from an employee's wages. Subsection (2)(a)(ii) of that section provides that *an employer shall not make a deduction from the wages of an employee in respect of any act or omission of the employee unless the deduction is of an amount* (emphasis

added) that is fair and reasonable ... having regard to all the circumstances (including the amount of the wages of the employee) ...

The respondent's contract of employment which incorporated the relevant terms of the 1999 Composite Agreement provides:

[F]ailure to attend or participate in ...50% of fire/emergency call outs ... in any quarter of a year shall have the result that the firefighter shall forfeit his/her right to payment of the retaining fee for that quarter. ...

Where the Chief Fire Officer considers that a firefighter is not fulfilling the above attendance standards which he/she considers reasonable in all of the circumstances, the Chief Fire Officer will have the right to withhold the retainer payment as follows:

*50% in the 1st quarter,
100% in the 2nd quarter within any twelve months.*

Any further failure to meet the above attendance standard may be dealt with through the disciplinary procedures.

The effect of this clause is to give the Chief Fire Officer a discretion as to whether to make a deduction from the employee's wages for an act or omission and it provides for the amount of the deduction. Whilst the above contractual term relating to attendance at call outs requires attendance at 50% of call outs it is clear from the evidence that as a particular crew is on duty on alternate weeks that there is a 100% duty to attend all call outs during the on-duty week. Lastly, whilst there was an inconsistency between the contractual term in the main body of the contract of employment and that in Schedule A thereto, as to the amount of the deduction to be made in case of failure to attend, the Tribunal is satisfied that the practice in the employment in all such failures was to apply the contractual term effecting the Composite Agreement and make the 50% deduction rather than the lesser deduction referred to in Schedule A.

Construing the aforementioned contractual terms and statutory provision the Tribunal finds that once the Chief Fire Officer decided to exercise his discretion to make a deduction he had no discretion as to the amount of that deduction as it was set by the terms of the claimant's contract of employment and the Composite Agreement.

Accordingly, the appeal under the Payment of Wages Act, 1991 succeeds and the decision of the Rights Commissioner is set aside.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

