EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:		CASE NO.
EMPLOYER	*(appellant*)	PW10-PW13/2010

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

EMPLOYEE *(respondent 1)*

EMPLOYEE *(respondent 2*)

EMPLOYEE (*respondent 3)*

EMPLOYEE *(respondent 4)*

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. J. Reid
Mr. S. O'Donnell

heard this appeal at Dublin on 8th April 2011

Representation:

Appellant :

Mr Michael McGrath, Ibec, Confederation House, 84/86 Lower Baggot Street, Dublin 2

Respondent :
Siptu, Liberty Hall, Dublin 1

This case came before the Tribunal by way of an employer appeal of a Rights Commissioner recommendation under the Payment of Wages Act, 1991, references r-076853-pw-09/JC, r-076852-pw-09/JC and r-076851-pw-09/JC.

The Tribunal did not have to consider the appeal involving respondent 2, as any dispute had been withdrawn.

The decision of the Tribunal was as follows:

At the outset the respondent company submitted that the Rights Commissioner did not have jurisdiction to hear the original claims as they were not lodged within the six months' time limit stipulated in the Payment of Wages Act 1991. Similarly the Rights Commissioner did not have jurisdiction to hear complaints in relation to the non-payment of 'bonus' as the bonus case rate did not come within the meaning of wages as defined in the Payment of Wages Act 1991.

Appellant's case

Giving evidence, the Director of the company stated that he is 26 years with the company dealing in chilled and frozen foods. Employees of the company could achieve different bonus rates depending on what they were working on, based on a case rate system. In this particular contract, the bonus rate was paid on cases picked above the base rate of 80 cases per hour at the rate of 10.5 cent per case. Explaining what the term contract meant, the Director stated that the company had a number of major Supermarket contracts. Employees are not tied to one line of production.

The Director stated that the company have, over the years, moved case rates up and down. In reply to a question from the Tribunal, the Director stated that employees are not exclusively left on one particular contract. Explaining the revised case rates, the Director pointed out that in 2004 the company revised a supermarket contract (S) from 80 cases to 130 cases per hour. This change was agreed with employees. Another contract (D) was originally profiled at 150 cases per hour and that dropped to 90 cases per hour and then went up to 130 cases per hour. It was customer practice to adjust rates without written agreement. The issue before the Tribunal relates to the change of a major contract (SV) case rate from 80 cases per hour to 120 cases per hour. The Director explained that initially the SV line was originally picked in Belgard Road and then the company moved to a new premises with 190,000 sq feet which meant less congestion. SV were looking for a reduction in costs.

The company contracted IPC Consulting to carry out a complete review of the picking target values for SV. A case per hour rate of 119 was recommended for the SV contract. This case rate was discussed with employees as the company was hoping for co-operation on this. A start date of 22nd February was proposed in relation to the new rates. Three employees objected. The company suggested another line which was not in dispute for these employees, but they wanted to stay on the SV line. From 22nd February 20009 the changes were implemented on a phased basis with an increase of 10 cases from 80 per hour to 90 per hour to increase to 120 per hour.

In reply to the Tribunal asking how an employee's pay is determined, the Director stated that the TMS system calculates how many cases each employee has completed under the SV code, along with hours worked. There are approx 320 employees within the company with 100 General Operatives in Dublin. The employees did not refuse to do the work and were paid the new rate of bonus.

Under cross-examination, the Director stated that they gave employees the opportunity to work on other lines. The TMS system recorded hours and another system recorded cases. The Director

was not sure of the time span of the consultancy process. He said that the increase from 80 to 120 cases per hour was justified with the move to the new warehouse.

In reply to the Tribunal, the Director confirmed that there were approx 28 employees working on the SV line. The old rate was not restored after the Rights Commissioner hearing.

Claimant's case

The first claimant (Mr.B) stated he started with the company in February 1986. He started on the SV contract in 1998 and continued until 2009, working 7-8 hours per day on this contract. His average bonus earnings was €1,000 per month. It was not an easy target to achieve, as he would have to come out from the freezer every hour. He was entitled to a 12 minutes break after every hour and this was built in to the case rate of 80 per hour. Mr. B has been working on the D contract since the Rights Commissioner decision of 2009 and has not earned any bonus since starting this. He had earned a bonus for a period 23 years with the company.

Under cross-examination, Mr. B confirmed he was picking 141 cases per hour. The reason he does not complete 120 cases now is because the D contract is not as easy as the SV contract. He had worked on the SV contract more than 90% of his hours worked and maybe an hour or two on the S contract. Mr. B accepted that the S line rate was raised a number of years ago but he was not at a large financial loss as he was not on it any length of time. He accepted he worked a line in the past that was changed regarding the rate.

The second claimant (Mr. F) stated he is no longer working with the company. He did not agree to the change in the case rate. He incurred loses of 25% of potential earnings. He finished with the company on 21st May 2010. He said he had tried to achieve the new targets but his rate per hour reduced dramatically.

Under cross-examination, Mr. F confirmed that when he commenced his employment with the company he worked on a Friday on the S contract and Sunday on the SV contract. He earned between €80 to €90 bonus on the SV contract. He confirmed that the S line had changed and he had struggled to hit the base rate.

Claimant number three did not give evidence.

In the closing statement the appellant stated that the claimants had been paid as per contract of employment. It has been essential to the company to vary rates – one company had threatened to withdraw 65% of business if reductions in costs were not made. The period in question is 22nd February until 24th March 2009.

In closing, the respondent stated that the bonus is part of the claimant's wages and the company had set the bar too high.

Determination

The claims before the Tribunal in each of the above cases are based on similar facts.

The Tribunal determines that the Rights Commissioner had jurisdiction to hear the original claims which were lodged within the six months time limit stipulated at Section 6 (4) of the Payment of Wages Act 1991. Similarily the Rights Commissioner has jurisdiction to hear complaints in relation to the non payment of 'bonus' as the bonus case rate comes within the meaning of wages as defined in Section 1 (a) of the Payment of Wages Act 1991.

The respondent company stores chilled and frozen foods at its depot, and through its employees, "picks" (selects) orders for different companies mainly medium to large supermarket chains. Employees of the company are paid a basic rate and have the potential to earn a Bonus Rate which is defined in the contract of employment as:
"Task related bonus rates subject to productivity targets will be paid to staff, who have successfully completed their training period".

Employees of the company could achieve different bonus rates, depending on what they were working on, based on a case rate system. The bonus rate was paid on cases picked above the base rate of 80 cases per hour at the rate of 10.5 cent per case.

Evidence was given that over the years case rates moved up and down. As a result of pressure from its customers for better terms the company was forced to revise rates. It had to revise rates for one company (S) from 80 cases to 130 cases per hour. This change was agreed with employees. Another company (D) was originally profiled at 150 cases per hour, then dropped to 90 cases per hour but then went up to 130 cases per hour. It was customer practice to adjust rates without written agreement. The issue before the Tribunal relates to the change of case rates of a customer (SV) from 80 cases per hour to 120 cases per hour.

The company contracted IPC Consulting to carry out a complete review of the picking target values for SV. A case per hour rate of 119 was recommended for this customer. This case rate was discussed with employees as the company was hoping for co-operation on this. A start date of 22nd February was proposed in relation to the new rates. Three employees out of 100 objected. The company suggested another line which was not in dispute for the employees who objected, but they wanted to stay on the SV line. From 22nd February 2009 the changes were implemented on a phased basis with an increase of 10 cases from 80 per hour to 90 per hour to increase to 120 per hour.

The Tribunal noted that an employee's pay was according to how many cases each employee has completed along with hours worked. There are approx 320 employees within the company with 100 General Operatives in Dublin. The employees did not refuse to do the work and were paid the new rate of bonus.

Changes were forced on the respondent company by its customers seeking better terms. Indeed evidence was given that (SV) would withdraw 65% of its business unless the cost per "pick" was reduced i.e. that the employees picked more cases per hour than they were previously doing.

The Tribunal determines that the respondent company was not in breach of the Payment of Wages Act 1991 and was entitled to adjust the pay bonus rate on a case rate system /task related

bonus rate subject to productivity targets. This is not in breach of each individual claimants' contracts. The Tribunal notes that the case rates applicable to productivity bonus rates had for varying reasons been altered upwards and downwards in the past. Accordingly the Tribunal sets aside the recommendation of the Rights Commissioner in each of the above claims and allows the appeal of the respondent employer in each case.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN