

## FULL RECOMMENDATION

PW/22/176ADJ-00034972 CA-00046131-001

DETERMINATION NO. PWD2250

SECTION 7(1), PAYMENT OF WAGES ACT, 1991

## PARTIES:

PRIMARK LTD T/A PENNEYS (REPRESENTED BY IRISH BUSINESS AND EMPLOYERS' CONFEDERATION) - AND -  
ROMANA VANCEKOVA

## DIVISION :

Chairman: Ms Connolly

Employer Member: Mr Marie

Worker Member: Mr Bell

## SUBJECT:

1.Appeal of Adjudication Officer Decision No ADJ-00034972 CA-00046131-001.**BACKGROUND:**2.The Respondent appealed the Adjudication Officer's Decision to the Labour Court in accordance with Section 7(1) of the Payment of Wages Act, 1991 on 24 May 2022. A Labour Court hearing in a virtual setting took place on 14 September 2022. The following is the Determination of the Court:**DETERMINATION:**This is an appeal by Ms Romana Vanekova against a Decision of an Adjudication Officer (ADJ-00034972) dated 24 May 2022 made under the Payment of Wages Act 1991 ("the Act"). The Adjudication Officer found that the complaint made by Ms Vanekova that her employer, Primark Ltd trading as Penney's made an unlawful deduction from her wages was not well founded.In this Determination the parties are referred to as they were at first instance. Hence, Ms Romana Vanekova is referred to as "*the Complainant*" and Primark Ltd trading as Penney's as the "*the Respondent*".

## Position of the Complainant

The Complainant works as a Part Time Retail Assistant and submits that during the third national lockdown, in the period from 25 March 2021 to 13 May 2021, she was subject to a 40% pay cut in her pay without her consent. Shortly after the announcement of the third national lockdown she received an email from her employer stating that they were closing its doors and that she would be paid 80% of her contractual hours. All normal statutory deductions would apply (PAYE, PRSI, Pension).

Prior to the pandemic the Complainant earned an average weekly income of €244.55. She believes that this is the amount that was properly payable to her during the lockdown. This figure is based on the Complainant's contractual hours as a member of weekend staff, working 13 hours over Saturday and Sundays and receiving a double payment for Sunday working.

During the third lockdown she received a weekly payment of €172.43. Her payslips did not specify the amount of any deduction from her contractual entitlement and gave no details relating to a "support payment". She submits that the unilateral decision of the employer to cut her contractual wages is a breach of the Payment of Wages Act.

The Complainant accepts that the Covid 19 pandemic was an extraordinary and challenging situation for everybody. The Respondent made a unilateral company decision to keep all staff in employment. The Complainant contends that there were other options available to employers during this period. An Employment Wage Subsidy Scheme was available to companies that met Revenue criteria. Companies that did not meet the eligibility criteria for the scheme had the option to temporarily lay off employees who could apply for the Pandemic Unemployment Payment.

The Complainant submits that during lockdown she was not absent from work on unpaid leave, sick leave, on strike, or

laid off. She was at home on standby waiting and ready to come to work at any time her employer required. There was no other option available to her. The company decision to keep her in employment prevented her from accessing social protection payments. The monies that were properly payable to her during this period was her average weekly salary. The Complainant further submits that the Respondent's decision to pay 80% of basic hours to all staff negatively impacted weekend staff, who received premium payments for working on a Sunday and on Public Holidays. Weekend staff suffered an approximate 40% reduction in pay, compared to other workers who received a 20% cut in pay. This issue did not arise during the first national lockdown when Sunday public holiday payments were included in payments made to staff.

The Complainant does not accept, as asserted by the Respondent, that the Mandate trade union agreed on behalf of all retail staff a payment based on a formula of 80% of contractual hours during the store closures. There is no written collective agreement. The Complainant was not informed about a collective agreement by the union or by her employer. She was never informed that a decision was made in agreement with the union. There is no proof of a collective agreement.

The Complainant asserts that correspondence entered into between the Head of HR and the trade union in November 2020, which was opened to the Court, is proof that the pay reduction was a unilateral decision by the Respondent and not negotiated with the trade union in advance. During the third lockdown, which lasted nearly 5 months, there was no communication between Mandate and Penney's employees. The Complainant tried to contact the trade union office for an explanation. She was told she had been paid correctly and if she was not happy to lodge a grievance. When the Complainant raised a formal grievance in relation to the matter, she was advised that the payment made to her was "*a company decision*" and there was no reference to trade union involvement in the making of that decision.

The Complainant submits that it was a company decision to keep her in employment even though there was no job available for her. The company made a unilateral decision to make unlawful deductions from her contractual wages. Correspondence between the Respondent and the trade union indicates that there was no collective agreement in place. The company did not avail of the government funded Employment Wage Subsidy Scheme as it did not meet the criteria. During the pandemic the company announced multi-million investments. It did not need to make a pay cut to survive the consequences of the pandemic.

There is no exception under the payment of wages act for *exceptional circumstances*. It is clear from the Act that it is unlawful for an employer to implement a pay deduction in the absence of a statutory or contractual entitlement to do so, or without the employee's consent. In all communications to employees the Respondent emphasised *their decision-making* regarding pay. They failed to inform employees about the trade union's involvement regarding pay.

#### **Position of the Respondent**

The Respondent rejects the claim that an unlawful deduction was made from the Complainant's wages. The Complainant was paid a support payment of 80% of her contracted hours during a period of state enforced store closures, in a manner agreed with the union. No wages were properly payable to her during this period, and as such no unlawful deduction was made.

As a result of the Covid 19 pandemic, the company was forced to close its retail stores on three separate occasions. On each occasion, the Respondent in agreement with the Mandate trade union, with whom they have a collective bargaining relationship, agreed to provide a support payment to all retail staff. The company recognises Mandate for the purposes of negotiating terms and conditions of employment. It is a term of the Complainant's contract that she is a member of Mandate.

The agreed formula for calculating the support payment during the third lockdown was that employees on *banded hours* contracts were paid 80% of the higher end of their band. All affected retail employees were paid 80% of their basic hours. The support payment did not include premium payments in addition to contractual hours, as premium payments are applied to hours physically worked.

In providing support payments the Respondent agreed to maintain the connection of employees to the employer during the closures, which otherwise would have resulted in a very significant social cost been carried by the State.

Approximately 5000 retail staff received a payment based upon the agreed formula. No other employee submitted a complaint about incorrect wages.

The Respondent accepts that the collective agreement entered into with the trade union was not captured in a written document. It relies on the oral evidence of Ms Michelle Whelan, Head of People and Culture, to demonstrate the existence of a collective agreement in place at that time, which it submits was incorporated into the Complainant's contract of employment through custom and practice. There is a contractual requirement to join a trade union, which reflects the existence of collective bargaining, and terms and conditions of employment are negotiated on behalf of employees. This custom and practice is notorious and well established.

The Respondent understands that the Complainant, as evidenced in her claim form and submission, was informed by her Mandate representative that she had been provided with the correct level of support payment, in accordance with an agreement which was negotiated on her behalf with the company. The Respondent rejects the assertion that correspondence entered into between the Head of HR and the union is evidence of a unilateral decision by the Respondent. Furthermore, that correspondence related to the second national lockdown period and not the period encompassed by the within claim.

It is the Respondent's position that no wages were properly payable to the Complainant during the relevant period, therefore, no deduction under the Act was made.

Section 6 of the Act states: *(6) Where—*

- *(a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act)...then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion.*

The Respondent submits that the store closures were imposed on the company during a public health emergency, and there were no *occasions* on which the Complainant could work. It follows, therefore, that no payments were *properly payable* on that *occasion*, as per section 6(a) of the Act, and that no *deduction* could have been made. The Complainant did not work any hours while the stores were shut and so was not entitled to be paid for those hours. The Complainant is paid for hours that she works. If the Complainant does not work any hours, then no payment is *properly payable* to her.

Without prejudice to the above position, should the Court consider that a deduction was made, the Respondent submits that any such deduction was authorised by virtue of a term of the Complainant's contract of employment in force at the time of the deduction, as is provided for under section 5(1)(b) of the Act.

It is a condition of the Complainant's employment to be a member of the union mandate. The Complainant's contract of employment states as follows:-

- *"Union Membership*

*It is a condition of employment that sales staff employed by the company shall upon taking up employment be*

*members of Mandate... Union contributions will be deducted on a weekly basis from your wages”.*

The Respondent submits that it is the practice in the company to negotiate terms and conditions of employment with recognised unions. The Respondent consulted and agreed with the union the method of payment to apply to all retail staff, despite no hours being worked during the period in question. The Mandate trade union agreed on behalf of all retail staff to accept a payment during store closures based on a formula of 80% of contracted hours. Therefore, it is a contractual condition of the Complainant's employment that any provisions which are agreed with her union, on her behalf, are taken to be agreed by the claimant. The Complainant has during the course of her employment benefited from agreements with the union, which were applied to and altered her contractual entitlements.

The Respondent further submits, should the Court consider that a deduction may have been made, any deduction was authorised by statute, as provided for under section 5(1)(a) of the Act. It asserts that the factual position in this case meets the conditions at section 11 of the Redundancy Payments Acts which define Lay Off as follows:-

- *11. (1) Where... an employee's employment ceases by reason of his employer's being unable to provide the work for which the employee was employed to do, and*
  - (a) it is reasonable in the circumstances that employer to believe that the cessation of employment will not be permanent, and*
  - (b) the employer gives notice to that effect to the employee prior to the cessation, that cessation of employment shall be regarded for the purposes of this act is layoff.*

The Respondents submits that in this case retail employees were informed that there was a temporary cessation of work. The Respondent referred the Court to the case of *McDonough v Shortline Tavern Ltd PW674/2012* where the Employment Appeals Tribunal ruled that where the employer satisfied section 11(1)(a) and (b) of the Redundancy Payments Acts, then the contract was temporarily suspended, and there was no right to payment during that period. Furthermore, the tribunal found that “*there was a notorious custom and practice in this jurisdiction that employees will not be paid during a period of layoff. Layoff itself as an instrument of statute*”.

The Respondent submits that on three separate occasions it was obliged to close its retail stores by order of the government. On each of these three occasions the Respondent provided support payments to its retail staff. A different formula applied during each of the three lockdowns. During the first lockdown, payment was based on average earnings. During the second lockdown, payment was based on 80% of the bottom of the band. During the third lockdown, payment was based on 80% of the top of the band. It is the company position by the third lockdown, a custom and practice was established that in circumstances where stores were required to close, based on a government direction, that it was the established practice not to pay staff the amount they would have been paid, had the stores been open and the staff physically working.

Finally, the Respondent submits that, should the Court deem that a deduction was made, that no compensation is reasonable in the circumstances. The wording of the section makes clear for the Court to make such a decision on the facts support this.

#### **Evidence of Ms Michelle Whelan, Head of People and Culture – Retail ROI**

Ms Whelan gave evidence that the Respondent has operated a closed shop since the 1970's. There are good relations with the union and the Respondent is viewed as one of the better employers. In the exceptional circumstances arising in this case, the company had to react fast. It was a challenging time for all and decisions in relation to pay were made and communicated to staff one month at a time.

During the first lockdown in March 2020, the company availed of the government funded subsidy scheme based on

average earnings. During the second lockdown layoff as an option was discussed with the union, however, a decision was made to keep employees on the books, and to pay retail employees 80% of the bottom of the band.

In response to questions about the correspondence between the company and the trade union which the Complainant submits provides evidence that no agreement was in place, Miss Whelan replied that the letter came about as a result of pressure from some employees around the formula for calculating payments (during the second national lockdown) when employees were paid their rostered hours. There were regular conversations with the union during this period.

During the third lockdown, which lasted 18 weeks in total, a different formula for paying 80% of contractual hours was arrived at, with payments made at the top of the band. For example, an employee working on a banded hours contract for 20 - 24 hours was paid for 24 hours.

Under cross examination, Ms Whelan said that the normal practice was to sit down and negotiate with the union negotiating committee, however, that was not possible when everyone was at home. The company acted in good faith when stores were closed. There were no sales, as the company does not have an online presence. The company had no income for 36 weeks. Ms Whelan told the Court that she had full autonomy to discuss and agree measures. Very few companies continued to pay employees and income in those circumstances. There was no pay cut.

Ms Whelan said that other options were discussed with the union. The matter was looked at on a collective basis. The company was aware that layoff would work better for some and not for others. The unions were not pushing for layoffs. When asked why there was no mention of a collective agreement in the communication to employees, Ms Whelan said that it was not a secret. She normally communicated the company position to the management team for cascade. The trade union normally communicated with its members.

When asked why the company communication stated that it was a company decision, Miss Whelan replied that the matter was discussed with the union.

Ms Whelan said that in normal circumstances agreements are reached with a national negotiating team and, in general, bigger issues are put to ballot. However, in the circumstances arising there were specific time constraints, as stores were closed. Employees are paid every two weeks, so there was two-week period in which to make a decision on pay.

The rate of pay is collectively bargained with the union. Ballots are a matter for the union. In this case there was no requirement to await the outcome of the ballot to communicate to employees. There was a verbal acceptance of the agreement.

**The Contract of Employment** The relevant clauses from the Complainant's contract of employment are as follows:

#### Contract Terms

*Your employment is subject to these standard terms and conditions and to the rules contained in the Staff handbook, which forms an integral part of your contract. Any changes or specific over-riding terms relating to your employment will be notified to you in advance.*

#### Remuneration

*You will be paid weekly in arrears into your bank account. Your rate of pay will commence at €9.07 per hours.*

#### Union Membership

*It is a condition of employment that sales staff employed by the Company shall, upon taking up employment, be member of MANDATE - The Union of Retail, Bar and Administrative Workers. Union contributions will be deducted on a weekly basis from your wages.*

#### Other Documents

*Further Terms and Conditions relating to your employment with Penneys' can be found on the staff notice board and in*

the Staff Handbook. These Terms and Conditions may be amended from time to time. You should pay particular attention to the following matters in the Staff Handbook/Staff Noticeboard:...

### The Applicable Law

Section 5 of the Payment of Wages Act 1991 provides in part as follows: *(1) An employer shall not make a deduction from the wages of an employee (or receive any payment from an employee) unless—*

- *(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute, (b) the deduction (or payment) is required or authorised to be made by virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or (c) in the case of a deduction, the employee has given his prior consent in writing to it.*

*(6) Where—*

- *(a) the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee on that occasion (after making any deductions therefrom that fall to be made and are in accordance with this Act), or (b) none of the wages that are properly payable to an employee by an employer on any occasion (after making any such deductions as aforesaid) are paid to the employee, then, except in so far as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment shall be treated as a deduction made by the employer from the wages of the employee on the occasion.*

The complaint was submitted to the Workplace Relations Commission on 12 September 2021. Therefore, the cognisable period for consideration by the Court is the period from 13 March 2021 to 12 September 2021. The Complainant seeks payment of her normal weekly wages of €244.55 from the period commencing 25 March 2021 to 13 May 2021. To ground a claim under the Payment of Wages Act 1991 the Court needs in the first instance to ascertain what wages are properly payable. Having established that the Court then needs to ascertain whether there was a shortfall in the proper payment and, if that was the case, whether the shortfall arose for one of the reasons set out in section 5(1) above.

### What Amount is Properly Payable?

The Complainant submits that the monies that were properly payable to her during the relevant period for consideration by the Court was her average weekly salary of €244.55. She submits that during lockdown she was not absent from work on unpaid leave, sick leave, on strike, or laid off. She was at home on standby waiting and ready to come to work at any time her employer required. There was no other option available to her.

The Respondent submits that no wages were properly payable during the relevant period, as store closures were imposed on the company during a public health emergency, and there were no *occasions*, as per section 6(a) of the Act, during which the Complainant could possibly work. The Complainant did not work any hours while the stores were shut and so was not entitled to payment. As a result, no payments were *properly payable*, and no *deduction* was made.

In *Balans v Tesco Ireland Limited [2020] 31 E.L.R. 125* MacGrath J. held that the first matter for the Labour Court to determine in assessing if a contravention of the Act occurred is to establish what wages are properly payable under the contract. Accordingly, the starting point for assessing what is properly payable is the Complainant's contract of employment.

The Court was provided with a contract of employment setting out standard terms and conditions of employment for part-time staff from 2008. It was accepted by both parties that the document submitted to the Court set out the terms and conditions of employment applicable to the Complainant at that time. The relevant clause on hours of work specified her minimum weekly hours of work of 15 hours. The relevant clause on remuneration specified a starting rate of pay of

€9.08 per hour. It was accepted that the Complainant's contractual hours and remuneration changed over time and that by 2015 the Complainant's regular working hours were 7.5 hours on a Saturday and 5.5 hours on a Sunday. The Complainant worked three out of every four Sundays. The parties were in agreement that the Complainant normally worked 13 hours per week and that she was entitled to payment of €244.55 per week when she worked these hours. The Respondent asserts that no wages were *properly payable* during the relevant period as store closures were imposed by the Government and there were no *occasions* on which the Complainant could possibly work. The Court cannot agree with that assertion. Notwithstanding the unprecedented and exceptional nature of the challenges faced by society with the onset of the pandemic, and the restrictive measures implemented in the public interest to minimise the spread of that disease, the fact remains that the employment relationship between the Respondent and Complainant remained in place during that time. The Court, therefore, concludes that the contract of employment in place during the period encompassed by the complaint establishes the wages that were properly payable to the Complainant at that time. The parties are in agreement that the Complainant would have been entitled to her normal weekly wages of €244.55 per week had she physically worked during the relevant period encompassed by the claim. Accordingly, the Court finds that the amount *properly payable* to her during this relevant period was her normal weekly earnings of €244.55.

#### **Was there a shortfall in the amount payable?**

The Complainant seeks payment of her normal weekly wages of €244.55 from the period commencing 25 March 2021 to 13 May 2021. It is not disputed that in the third lockdown period, the Complainant received a weekly payment of €172.43. The Complainant submits that there was a shortfall or deduction of in her weekly wages for this 7-week period amounting to the difference between her normal weekly earnings and the support payment made to her. This shortfall was €72.12 per week.

#### **Were the deductions required or authorised within the meaning of section 5(1) of the Payment of Wages Act 1991?**

The Act at Section 5(1) prohibits an employer from making a deduction from wages that are properly payable to an employee unless the deduction (a) is required or authorised to be made by virtue of any statute, (b) is required or authorised to be made by virtue of a term of the employee's contract of employment or (c) the employee has given his prior consent in writing to it. Without prejudice to its position that no wages were properly payable during the relevant period, the Respondent submits that should the Court determine a deduction occurred that any deduction was required or authorised by statute, as provided for under section 5(1)(a) of the Act and required or authorised by virtue of a term of the employee's contract of employment, as provided for under section 5(1)(b) of the Act.

The Respondent set out a number of arguments in support of the position that any deduction was lawfully made. Firstly, it submits that any deduction was authorised by a contractual provision in the Complainants' contract of employment. Secondly, it submits that during the cognisable period the Complainant was on lay-off within the meaning of the Redundancy Payments Act 1967 which had the effect of suspending the contract of employment which meant that the Complainant's contractual entitlement was nil. Thirdly, the Respondent submits a payment formula of 80% of contracted hours was a rate collectively agreed between the union and the Respondent, which had the effect of varying the Complainant's contract of employment. Finally, it submits that by the third lockdown, a custom and practice was established not to pay staff the amount they would have been paid, had the stores been open and the staff physically working.

#### **1. Was a deduction authorised by a contractual provision in the contract of employment?**

Without prejudice to its position that no wages were properly payable during the relevant period, the Respondent submits that any deduction or shortfall was authorised by the Complainant's contract of employment.

It relies on the contract clause that specifies that it is a condition of employment that the Complainant be a member of the union, Mandate, and submits that, as a result of this clause, it is a contractual condition of the Complainant's employment that any provisions which are agreed with her union, on her behalf, are taken to be agreed by her also. Accordingly, any deduction was authorised by section 5(1)(b) of the Act.

In evidence, Ms Whelan told the Court that the Respondent has operated a 'closed shop' since the 1970's, and that it is a well-established practice in the company to negotiate terms and conditions of employment on a collective basis with recognised unions. She asserts that Complainant has directly benefited from company/agreements which were applied to and altered her contractual entitlements. In this case the employer points to the clause titled "*Union Membership*" of the Complainant's contract which specifies that it is a condition of employment that the Complainant be a member of the union, Mandate, and submits that, as a result of this clause, it is a contractual condition of the Complainant's employment that any provisions which are agreed with her union, on her behalf, are taken to be agreed by her also. The Court has reviewed the contract of employment that was opened to it in evidence. Under the clause titled "*Union Membership*" the contract specifies that it is a condition of the Complainant's employment that on taking up employment as a member of the sales staff that she be a member of the Mandate Union. That document makes no reference to collective agreements, or how provisions of agreements entered into between the union and the Respondent are incorporated into the Complainant's contract of employment. In those circumstances, in the absence of any express reference to collective agreements negotiated on behalf of the Complainant by a recognised trade union, the Court finds that the Respondent cannot rely on any express term cited in the Complainant's contract of employment to assert that any deduction or shortfall was authorised by the Complainant's contract of employment, such as to allow the Respondent to rely on Section 5(1)(b) of the Act.

▪ **2. Was the Complainant on lay-off within the meaning of the Redundancy Payments Act 1967?**

Without prejudice to its position that no wages were properly payable during the relevant period, the Respondent submits that should the Court determine a deduction occurred that any deduction was authorised by statute, as provided for under section 5(1)(a) of the Act.

In this regard, it asserts that the factual position in this case meets the conditions set out at section 11(1) of the Redundancy Payments Acts which defines lay off as follows: *Where an employee's employment ceases by reason of his employer's being unable to provide the work for which the employee was employed to do, and—*

- *(a) it is reasonable in the circumstances for that employer to believe that the cessation of employment will not be permanent, and (b) the employer gives notice to that effect to the employee prior to the cessation, that cessation of employment shall be regarded for the purposes of this Act as lay-off.*

It submits that the Complainant has no contractual entitlement to be paid when laid off from work and in such circumstances no unlawful deduction was made from the Complainant's wages.

While it is accepted that there is no clause in the Complainant's contract of employment providing for a period of lay-off, the Respondent says that such a contractual clause is not necessary and that all retail employees were informed that there was a temporary cessation of work, in accordance with the Act. Notwithstanding this argument the Court encountered a number of difficulties with the Respondent's assertion. Of the various documents opened to the Court, no evidence was submitted to demonstrate that the Complainant was given prior written notice of the cessation of the employment, that the cessation of work was temporary and, for the purposes of the Redundancy Payments Acts, should be regarded as lay-off. Furthermore, in evidence, Ms Whelan told the Court that a number of options were considered by the company, in consultation with the union, including the option of lay-off. The company was aware that layoff could

work out better for some employees and not for others. Ultimately, a decision was made not to lay employees off and instead to keep employees on the books.

In such circumstances, the Court finds that the Respondent cannot rely on section 5(1)(a) of the Act to say that the deduction made from the Complainant's wages were required or authorised by statute, by reference to section 11 of the Redundancy Payments Acts.

- 3. Did a collective agreement between the Respondent and the union have the effect of varying the contract of employment?

The Respondent contends that the Complainant was paid a support payment of 80% of her contracted hours during a period of state enforced store closures, in a manner that was agreed with her union. It submits that the collective agreement agreed with the union, was incorporated into the Complainant's contract of employment through custom and practice.

The question the Court must determine is, first, was there a collective agreement entered into between the Respondent and its recognised union covering payments to retail staff during the third national lockdown and, secondly, if there was an agreement whether such a collective agreement was incorporated into the Complainant's contract of employment through custom and practice, or otherwise, so that it can be relied upon to authorise a deduction in the Complainant's wages.

As already outlined, Ms Whelan told the Court in evidence that the Respondent has operated a 'closed shop' since the 1970's, and that it is a well-established practice in the company to negotiate terms and conditions of employment on a collective basis with recognised unions. She asserts that the Complainant has directly benefited from company/agreements which were applied to and altered her contractual entitlements.

Ms Whelan gave evidence that company/union negotiations did not follow the normal format of engagement during national lockdowns and that the agreement she reached with the union was not committed to writing. The Court has no reason to question the bona fides of Ms Whelan who came across as an honest witness. Ms Whelan highlighted the exceptional circumstances that the company found itself in at the time, as well as the challenging time constraints at the time given that employees are paid fortnightly which allowed a two-week period in which to make a decision on pay.

The Complainant's position is that she was not informed about the existence of a collective agreement by the union or by her employer. She was not informed that a decision affecting her pay was made in agreement with the union. The communications issued by her employer only referred to a decision made by the employer, not a collective agreement.

There is no proof of a collective agreement

The only correspondence put before the Court were communications issued by the Respondent to retail staff. They comprise four undated letters addressed to "colleagues", which was jointly signed by Olivia Kelly, Sales Director ROI, and Michell Whelan, Head of People & Culture – Retail ROI.

The first of those letters state, inter alia, that:-

*"When closing out stores, we committed to paying hourly colleagues for their rostered hours for an initial two-week period and a further two-weeks at 80% contracted hours. In the absence of any revenue in our Irish Stores, this was a significant investment on behalf of the company... As we are approaching the Christmas period, our priority is to support our colleagues and provide piece of mind. As a result, today we are pleased to confirm that Penneys are now in a position to pay colleagues 100% of their contracted hour for the period that our stores are closed, up until 1<sup>st</sup> December 2020. We are currently exploring all options to us including the opportunity to qualify for government subsidy... If our stores remain closed... the situation will have to be reviewed again."*

The second undated letter states, inter alia, that:-

*"As it currently stands, all Penneys stores will remain closed until 1<sup>st</sup> February. When closing our stores, we committed to paying all colleagues for your rostered hours for a two-week period. We have now taken the decision to pay colleagues 80% of your contracted hours until 31<sup>st</sup> January after which time the situation will be reviewed should the current lockdown be extended further".*

The third undated letter states, inter alia, that:-

*"Following the Government announcement yesterday, 26<sup>th</sup> January we will now remain closed until 5<sup>th</sup> March 2021. We have now taken the decision to continue to pay colleagues 80% of your contracted hours until 5<sup>th</sup> March after which time the situation will be reviewed should the current lockdown be extended further".*

The fourth undated letter states, inter alia, that:-

*"Based on the extended lockdown and our continued closure, we have taken the decision to continue to pay colleagues 80% of your contracted hours until 4<sup>th</sup> May, after which time the situation will be reviewed should the current lockdown be extended further".*

The Court was also provided with two FAQ documents. The first document titled "FAQ Document – Retail Assistants February 2021" set out that -

*"Following the company's announcement on 26<sup>th</sup> February 2020...you will continue to be paid 80% of your contracted hours from 6<sup>th</sup> March 2021. Payment previously in place for those on banded hours contracts will remain in place...The new pay decision runs from 6<sup>th</sup> March until 5<sup>th</sup> April 2021. After which this will be reviewed in line with government guidelines. ...You will be paid 80% of your contracted hours and therefore all your normal statutory deductions will apply (i.e. PAYE, PRSI, Pension)".* The document goes on to state that all annual leave requested and approved will go ahead as normal, and all statutory leave will continue as normal unless requested otherwise.

A second document titled "FAQ Document – Retail Assistants March 2021" repeats the text set out in the February FAQ document, except in relation to the dates specified where it states that :-

*"The new pay decision runs from 6<sup>th</sup> April 2021 until 4<sup>th</sup> May. After which this will be reviewed in line with government guidelines".*

While the Respondent did not seek to rely on the communication documents submitted to the Court to assert that those documents amended the Complainant's contract of employment in any way, it asserts that the communications reflected the Respondent's commitment to pay 80% of contracted hours during the relevant period, as agreed with the union. It is well settled that a collective agreement while it might be binding on the parties to the agreement, i.e. the Respondent and the union, it is not necessarily binding on an individual employee, i.e. the Complainant, such as to vary her employment contract. Any analysis as to whether the contract is individually applicable or not is dependent on the facts particular to each case. A union may accept into its membership only those who will agree to the binding authority of their negotiations on behalf of members which in turn may impact an individual's employment contract. A clause in the employment contract itself can make a collective agreement binding on the employee. For example, an individual employment contract may contain an express provision that it may be altered under the terms of a stated negotiating procedure or through collective agreement with the union representing the employee. The Court notes that the documents opened to it make no reference to a collective agreement negotiated with the union, or any agreement that alters the Complainant's contract of employment. In such circumstances, the Respondent cannot rely on these documents to support its assertion that a collective agreement was incorporated into the Complainant's contract of employment by custom and practice or otherwise. The Court is of the view that on the balance of probabilities there was some

understanding entered into between the Respondent company and the union in relation to the payments made to retail staff during each of the three lockdowns. However, the Court is of the view that it was not provided with sufficient information to establish that a collective agreement was entered into between the Respondent and the union that had the effect of varying the Complainant's contract of employment. Based on the evidence submitted, the Respondent has not established to the satisfaction of the Court that a collective agreement was entered into that amended the Complainant's contract of employment, such as to allow the Respondent to rely on Section 5(1)(b) of the Act.

▪ **4. Was the contract of employment amended by an implied term by way of custom and practice?**

Finally, the Respondent submits that by the third lockdown, a custom and practice was established that in circumstances where stores were required to close as a result of a government direction, there was an established practice not to pay staff the amount they would have been paid, had the stores been open and the staff physically working.

The Respondent told the Court that on three separate occasions it was obliged to close its retail stores by order of the government. On each of these three occasions it provided support payments to its retail staff, with a different formula applied during each of the three lockdowns. During the first lockdown, payment was based on average earnings. During the second lockdown, payment was based on 80% of the bottom of the band. During the third lockdown, payment was based on 80% of the top of the band.

The matter for the Court to consider is whether the circumstances that prevailed during the three lockdowns amounts to an established practice sufficient to imply a variation into the Complainant's contract of employment. In

[O'Reilly v Irish Press](#)<sup>1937</sup> 71 I.L.T.R 194 Maguire P considered how a term can be implied into a contract of employment by custom and practice. In that case, the plaintiff argued that he had an entitlement to a 6-month notice period by virtue of custom and practice in the industry. In assessing if such an entitlement was implied into the plaintiff's contract of employment through custom and practice, Maguire P said for this to happen it must be proved:-

- *"by persons whose position in the world of journalism entitles them to speak with certainty and knowledge of its existence. I have to be satisfied that it is so notorious, well known and acquiesced in that in the absence of agreement in writing it is to be taken as one of the terms of the contract between the parties."*

Ms Whelan told the Court in evidence how in the exceptional circumstances arising at the time, the company had to react swiftly. There were specific time constraints each time a lockdown was announced. Employees are paid fortnightly, which gave a narrow window for making any decisions on pay. She also said that during the lockdown periods decisions on payments to retail staff were made on a monthly basis. This evidence is supported by the communications which issued to retail staff during the relevant period, which conveyed the decision to continue to pay employees for a further month, after which time the situation would be reviewed should the lockdown period be extended further. It is clear to the Court that was a challenging time for all and decisions in relation to pay were made and communicated to staff one month at a time. Taking account of the exceptional circumstances that prevailed during national lockdowns, and the specific circumstances outlined in this case, the Court does not accept that a practice had developed that was so notorious and well known that employees were certain of its existence, such that, in the absence of agreement in writing, it could be taken as one of the terms of the contract between the parties. Based on the evidence submitted, the Respondent has not established to the satisfaction of the Court that the Complainant's contract of employment was varied by custom and practice, such as to allow the Respondent to rely on Section 5(1)(b) of the Act.

## Finding

The Act at Section 5 prohibits an employer from making a deduction from the wages that are properly payable to an employee unless the deduction (a) is required or authorised to be made by virtue of any statute, (b) is required or

authorised to be made by virtue of a term of the employee's contract of employment or (c) the employee has given her prior consent in writing to it.

The Court is satisfied that the documents submitted, and arguments relied upon by the Respondent in this case do not require or provide authorisation for the deductions made. Emergency measures introduced to limit the application of employment rights legislation during the pandemic did not amend or change obligations or protections provided under the Payment of Wages Act. The deductions made were not *required or authorised* to be made by virtue of any statute. The deductions were not *required or authorised* to be made by virtue of a term of the Complainant's contract of employment. Finally, the Complainant did not provide her written consent to *authorise* a deduction in wages as permitted by section 5 (1)(c) of the Act. In the circumstances outlined to the Court the Respondent cannot rely on Section 5(1) of the Act to say that the deductions made from the Complainant's salary were lawful. Accordingly, the Court finds that an unlawful deduction from the Complainant's wages occurred during this period and so determines that the complaint is well founded.

**Redress** The Act at Section 6 provides as follows:

- *(1) A decision of an adjudication officer under section 41 of the Workplace Relations Act 2015, in relation to a complaint of a contravention of section 5 as respects a deduction made by an employer from the wages of an employee or the receipt from an employee by an employer of a payment, that the complaint is, in whole or in part, well founded as respects the deduction or payment shall include a direction to the employer to pay to the employee compensation of such amount (if any) as he considers reasonable in the circumstances not exceeding—*
  - (a) the net amount of the wages (after the making of any lawful deduction therefrom) that—*
    - (i) in case the complaint related to a deduction, would have been paid to the employee in respect of the week immediately preceding the date of the deduction if the deduction had not been made, or*
    - (ii) in case the complaint related to a payment, were paid to the employee in respect of the week immediately preceding the date of payment,*
  - or*
  - (b) if the amount of the deduction or payment is greater than the amount referred to in paragraph (a), twice the former amount.*

Having decided that a complaint is well founded, the Court must consider what award, if any, is reasonable in the specific circumstances of each case.

In its submission to the Court the Respondent argues that no compensation is reasonable in the particular circumstances arising in this case, and that the wording of the Act clearly allows the Court to make a nil award based on the facts of the case before it.

For her part, the Complainant submits that the Respondent company is profitable and did not need to make a pay cut to survive the consequences of the pandemic.

In the Court's view, it is appropriate to consider the wider circumstances in which the deductions occurred.

The deductions made occurred during the height of the global Covid-19 pandemic. The pandemic had an unprecedented impact on the normal social and economic life of the country, with Government enforced lockdowns required all non-essential services including retail stores to close.

The challenges facing both the Respondent and its workers were exceptional and significant in scale. The Respondent did not have an online presence. Stores were closed and retail workers could not work. The Respondent engaged with the union, of which the Complainant is a member, to agree a way to manage the situation.

A decision was made to pay the Complainant 80% of her basic contracted hours when the stores were closed. She did not physically work during this period.

Approximately 5000 retail staff in the Respondent company also received a payment based upon that formula. This measure was acceptable to the vast majority of the workforce. In this regard, the Court was advised that no other claims regarding the Respondent's pay decisions during the third lockdown were lodged by individual employees, or by the trade union representing retail workers in the company, of which the Complainant was a member.

In providing support payments the Respondent took measures to maintain the employment connection of employees to the employer and to avoid a lay-off situation, which otherwise could have resulted in a significant cost to the State.

It is clear to the Court that the Respondent acted in good faith during this tumultuous period to protect its workers. Few employers were in a position to continue to pay employees in those circumstances. The Complainant set out a clear and cogent case as to why a contravention of her employment rights occurred. However, having regard to the facts of this case and the unprecedented circumstances that prevailed at the time, where the employer took considerable steps to protect its workers which were acceptable to the vast majority of the workforce, the Court considers that an award of no compensation is reasonable in the circumstances.

#### Decision

The Court finds that the complaint is well founded. The Court determines that the Complainant suffered a deduction from her wages during the cognisable period for the within complaint and that this deduction was unlawful. For the reasons set out above, the Court determines that an award of no compensation is reasonable having regard to all of the circumstances giving rise to this complaint.

The decision of the Adjudication Officer is overturned. The Court so Determines.

Signed on behalf of the Labour Court

Katie Connolly

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25 November 2022

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Deputy Chairman

NOTE Enquiries concerning this Determination should be addressed to Therese Hickey, Court Secretary.