

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD915/2006

against
2 Employers

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Kearney BL

Members: Mr G. Phelan

Mr D. McEvoy

heard this claim at Cashel on 27th June 2007

Representation:

Claimant: Mr. Dan Walsh BL instructed by Mr John Joy, Joy Brennan & Co,
1 New Quay, Clonmel, Co Tipperary

Respondent: Mr. Mark Connaughton SC instructed by Ms Melanie Crowley of
Mason Hayes & Curran, Solicitors, South Bank House, Barrow Street, Dublin 4

The determination of the Tribunal was as follows:

Preliminary point:

The case before the Tribunal under the above Act concerns whether the Claimant had a contract for service or a contract of service; whether he was an employee or not. The Respondent's case is that he was self-employed and the Claimant's case is that he was an employee.

Claimant's case:

The Tribunal heard evidence from the Claimant. He commenced work in 2002. His work entailed issuing small loans and shopping vouchers also collecting monies on a weekly basis. Every Monday morning he visited the Respondent's office and gave the receipts into the office. He also lodged money on Monday. Monday was a "paying-in day". He spoke to his manager and received instructions from him and they also discussed the week's performance.

He phoned the office daily and spoke to his manager three or four times a day. The company provided everything to him and the only thing that he provided himself was his own transport.

He accepted that he signed an agency agreement. It was not open to him to pursue alternative employment while he was with the Respondent company. He did not have any alternative

employment while he was with the Respondent.

Clause nine of the agreement that the Claimant signed was opened to the Tribunal:

“The Agent agrees that he/she will not directly or indirectly and whether on his/her own behalf or on behalf of anyone else:

- (a) during the period of this Agreement set up, carry on, or be engaged in any Competing Business
- (b) for six months following the termination of this Agreement
 - (i) in relation to any Competing Business solicit or accept business from any Customer
 - (ii) solicit or endeavour to entice away from the Company any person who at the termination is to the Agent’s knowledge an Agent of the Company”

The Claimant was asked if he was ever in breach of this clause and he replied that he was not. He believed that if he was in breach of this clause that there would be a difficulty.

Cross-examination:

The Claimant agreed that he took the contract on in 2002. He agreed that it was made clear to him as to how he would be treated (regarding his employment status). He paid tax on his income. He claimed motor expenses. He had his own mobile phone and used his own mobile phone. He did not claim expenses for his mobile phone. He made yearly returns or several yearly returns under “schedule D”. The Claimant agreed that from 2002 he never raised difficulty (regarding employment status) with the Respondent or with the Revenue Commissioners or with the Department of Social and Family Affairs.

The Claimant explained that he had been self-employed for ten years previously but that with the Respondent company he had to go to his manager once a week. He further explained that he had worked for the Respondent from 1985 till 1990. He agreed that when he was employed with the Respondent in 1985 to 1990 the procedure was the same as it was when later employed there.

The Claimant agreed that the times he met the customers was a matter between himself and the customer. He agreed that he was entitled to appoint someone as a delegate with the manager’s approval, that the approval of the manager was because of security vetting and regulated by financial regulations for example theft, but that he could choose his delegate was not made clear to him.

He again agreed that he provided his own car and telephone. He agreed that he could not get expenses and that he was paid on commission. He agreed that his expenses were “out of his commission”.

The Claimant was asked about aforementioned clause nine and if he went to his manager to say clause nine is a problem. The Claimant explained that any difficulty he had he would raise with his manager. The Claimant agreed that there would have been no problem had he done other work.

The Claimant explained that he did not believe that he was self-employed. He was asked why he put on his claim form that he was self-employed. He explained that, “I did as I was told to do what I was told was...” “The company told me I was self employed”.

The Claimant agreed that the company did not file his tax returns and that he himself filed his own tax returns.

The Tribunal asked clarification of the Claimant on some of the matters raised:

The Claimant explained that he signed a similar agreement with the Respondent when he undertook work with the Respondent on a previous occasion. He worked Thursdays Fridays and Saturdays. On Mondays he went to the office. Tuesday was his day off and he went to collect the vouchers on Sunday. He was asked why in particular he did the work on Thursdays Fridays and Saturdays and he replied, "Because those were collection days".

Further explaining his revenue situation the Claimant explained that he did not have his revenue return forms with him and regarding pay related social insurance he paid class S.

He did not get annual leave allotment. He felt that "My time was not my own I had to go to the office on a Monday". "I could not do it on a Tuesday or a Friday, I had to go to the office on a Monday, I had to be available to go to the office on a Wednesday morning (if needed)".

The Claimant was asked if the agreement document was the only document or was there another document i.e. was the agreement the only document. He replied, "I think so yes".

Arising:

Counsel for the Respondent asked the Claimant if he received an "Agent Manual". He agreed that he might have. He agreed that he signed for an Agent Manual on 28th February 2005 and it was an up-dated version. The Claimant agreed that "self-employed" was mentioned many times in the manual.

The Tribunal heard legal argument from both parties.

Determination:

The issue that has arisen in this case that the tribunal has to determine upon is whether or not the Claimant was employed on a contract of service to enable the tribunal to assume jurisdiction to hear the case under the Unfair Dismissals legislation 1977 – 2001.

The Tribunal having heard the evidence of Mr Phelan in relation to this issue and legal argument from both parties have decided the following:

That the Claimant was not employed but rather operated under an agency agreement and was a self-employed person.

The Tribunal comes to this determination taking into account the practicalities of how the contract as between the Claimant and the Respondent was executed and also taking into account the actual contract itself and how the Claimant himself described himself in his TIA form. It became clear to the Tribunal that in the practicalities of the carrying out of the contract, the Claimant did an annual tax return under schedule D, and claimed the appropriate expenses, as one is entitled to do as a self-employed person. During the period 1985 to 1990 the Claimant worked as an independent self-employed agent for the Respondent and he never raised any issue in connection with his status during that period of time. There was no evidence that the Claimant ever had issue with his status, or made any complaints in this regard until his contract was terminated. The Claimant could see customers and do his actual work on his own time and at his own discretion, and quiet importantly in the Tribunals opinion could delegate his job or a portion of same to someone else with the Respondent's approval. This approval was solely to satisfy the Respondent that the person would be trustworthy. This in the Tribunals opinion shows a level of total control and obvious responsibility for that deputy, over how the Claimant carries on business on his own account. The Claimant had his own car and phone, and was paid a rate of commission based on a formula

worked out on the basis of output, or in other words his earnings were solely commission based.

Alongside these factual considerations the Tribunal believes that it is of importance how persons are described in the relevant contract in relation to the work they execute. The Claimant was clearly described as an independent contractor and not as an employee of the Respondent company. Further, the Claimant operated under an agent manual which when one reads same, it further assists the Tribunal in determining whether the Claimant was a self-employed person.

Bearing in mind the legal authorities referred to by Counsel on behalf of both parties, it is clear from the decisions in *Henry Denny & Sons (Ireland) Ltd v The Minister for Social Welfare* 1998 1 IR 34, and *Castleisland Cattle Breeding Society Ltd v Minister for Social Welfare and Family Affairs* 2004 IESC 40 that it is how the contract is worked out in practice is of major importance in determining this issue and mere wording cannot determine the nature of the contract.

In the opinion of the Tribunal the fact of this case fall squarely in line with the authority and rationale as laid down by Mr Justice Geoghegan in *Castleisland Breeding Society Ltd v Minister of Social Welfare and Family Affairs*.

The Tribunal is of the unanimous opinion that the working practice, as explained by the Claimant in his evidence, was exactly as was written in his contract of employment and as expanded upon in the agent manual. Further after listening to all the evidence proffered the factual situation could only lead the Tribunal to determine that the Claimant was self employed and working under a contract for services.

Therefore the Tribunal has no Jurisdiction to hear the claim under the Unfair Dismissal Acts 1977-2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)