

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee

CASE NO.
UD418/2006
MN260/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr. D. Hegarty
Mr. J. McDonnell

heard this claim in Cork on 27 August 2007

Representation:

Claimant(s) :

Mr. Frank Nyhan, Frank Nyhan & Associates, Solicitors,
11 Market Square, (Opposite Courthouse), Mallow, Co. Cork

Respondent(s) :

Mr. Tony Stout, IBEC, Knockrea House, Douglas Road, Cork

The determination of the Tribunal was as follows:-

Preliminary Issue

Claimant's Case

Giving evidence, the claimant said that he had started to do life and pensions business for the respondent in January 2005. He worked in the respondent's Mallow office where he had an office and a desk. He reported to the respondent's managing director (hereafter referred to as the MD). He signed a contract in July 2005 and then signed another in January 2006. However, he finished at the end of February 2006. He had initially done his own tax.

Under cross-examination, the claimant said that his wife was working for the respondent and that she had been told that a post was available. The claimant was looking for a job and had a meeting with the MD who said that the respondent was looking for a full-time financial services consultant. They discussed the job before the claimant took it.

The Tribunal was furnished with a copy of a “letter of appointment of mortgage intermediary for the purpose of Section 116 of the Consumer Credit Act 1995” which purported to appoint the claimant as mortgage intermediary of the respondent within the meaning of the said Act and which gave the claimant’s home address as the address of the business premises utilised by the claimant. This document was dated 4 January 2005 and was stated to be valid until 3 January 2006. However, at the place in the document where the claimant had signed it, the date of 22 February 2005 appeared.

The claimant told the Tribunal that the above was explained to him “from the point of view of compliance with IFSRA” (the Irish Financial Services Authority) and that it was said that, as he needed the said letter of appointment, he would have to apply to the regulator for the “certificate”.

Asked about the address given for the claimant on the document, the claimant said that his home address had not been his correct work address and that he had never worked from home but rather that he had “worked the whole time in Mallow”.

The Tribunal was furnished with a copy of a “Mortgage Intermediary Authorisation” by which IFSRA authorised the claimant “to engage in the business of being a Mortgage Intermediary” under the name of the claimant “on behalf of” the respondent. This authorisation was valid for a period of twelve months commencing on 16 February 2005 and referred to the claimant’s home address as his “principal place of business”.

The claimant told the Tribunal that he had neither done mortgage business nor processed any mortgages but that he had worked full-time Monday to Friday in Mallow. He was paid by cheque on business done. He was told this was how he would be paid initially.

The claimant acknowledged that a “50% life commission” of €2,000.00 dated 15 March 2005 had been the first payment he had got from the respondent. It was put to him that he had been there two months before that. He replied that he had had to write business before the respondent would pay him and that the MD had told him that this would be rectified in time.

Asked about invoices that he had submitted to the respondent, the claimant said that he had been told that he would have to operate in this way.

The Tribunal was furnished with a copy of a letter to an inspector of taxes requesting that the claimant be registered as an employee as and from 2 August 2005. The claimant acknowledged that he had hitherto done his own tax but added that he had been told that this would be rectified. He had done his own tax returns but he had been there full-time from January 2005.

The Tribunal was furnished with a copy of an employment contract with an issue date of 12 July 2005 and a start date of 2 August 2005. It was signed by both the claimant and the MD on 20 July 2005. It stated: “This contract will be in effect from date of commencement, until 6 months probation expires, or until altered in writing.”

Copies of payslips for August 2005 and September 2005 were furnished to the Tribunal. The

Tribunal was also provided with copy P60 documentation giving a commencement date of 2 August 2005. The claimant reiterated that he had been there full-time Monday to Friday since January and that he had had his own office there. He added that he had done a forty-hour week there from January, that he had done no business for any other company while with the respondent and that he had seen himself “as an employee right from the start”. They had reached an agreement that he would be paid on sales made. He told the Tribunal: “It was all business written.” He took no holidays. He was “only new” to the respondent. He did not recall if he had been paid for public holidays. Asked if he had got statements of pay and deductions, he replied: “I was paid by cheque.”

In questioning by the Tribunal, the claimant was asked if he had thought that he would be made an employee of the respondent. Answering in the affirmative, the claimant said: “I considered myself to be the financial adviser of the company. I was giving them life business. They did mortgages. I did the life side. I considered myself to be a full-time employee. I was led to believe this would be addressed down the line.”

The claimant told the Tribunal that he was ten years in the industry. Naming a major life assurance company, he said that he had been an employee of that company but was then “self-employed for a period”.

The claimant said that he had had a “full-time role” with the respondent, that it had been “expected” that he “would be there all the time” and that he, with a lady that he named, had had a “full-time office”. His “last payment” was “March or February” of 2006. He had left in March 2006. He had “had to resign”.

Respondent’s Case

Giving evidence, the respondent’s managing director (hitherto and hereafter known as the MD) told the Tribunal that he had had a good relationship with the claimant’s fiancée and that she had asked him to meet the claimant. The respondent had purchased an office in Mallow. The MD wanted to advance the life and pensions aspect of the business. He met the claimant and they had “a couple of discussions”. The claimant had been self-employed and remained so. The claimant retained the same accountant. The MD had no control over the claimant’s hours. The respondent had a practice of e-mailing the claimant with regard to any given policy. The respondent made facilities available to the claimant but the claimant had meetings off-site as well. The claimant worked his own hours and had his own laptop and e-mail account.

It was put to MD that the claimant had said that he had worked forty hours per week. The MD replied: “No. He had the use of facilities in Mallow. Life business was under separate authorisation. There was no requirement at that time for him to be in the office.”

The MD said that the claimant had had other commitments outside the respondent and that the respondent used to e-mail the claimant to the claimant’s e-mail account.

Asked about the claimant’s holidays, the MD said that there had been no holiday entitlement to calculate as the claimant had been self-employed and had had his own accountant. The MD said that a “service agreement” had been done in May 2005 but that a six-month probationary contract had come into effect in August 2005.

A copy of the said contract was furnished to the Tribunal. It was signed by both the MD and the

claimant on 20 July 2005. It had a “date of issue” of 12 July 2005 and a “start date” of 2 August 2005.

Asked what had brought about the change, the MD replied that the claimant was getting married on 21 July 2005, that “when one gets married one looks for regular income” and that the claimant had asked for a regular pay structure although the claimant did have income from other sources. On 2 August 2005 the claimant returned after his wedding.

Asked how the claimant had previously been paid, the MD said that the claimant would have invoiced the respondent and that the respondent would issue a cheque based on that invoice.

In cross-examination it was put to the MD that the claimant had said that he had worked forty hours and had had an office at the respondent’s premises but had not been challenged on this testimony. The MD was asked if he himself had worked full-time in Mallow. He replied that he “travelled round”. Asked if he had travelled outside the office often, he replied: “I met some clients outside.”

The MD said that there were life consultants on a P.A.Y.E. structure but that the claimant had been independent because the claimant had requested it and the MD wanted to have an income stream. It was put to the MD that it would have been more natural for him to have had the claimant as an employee. The MD replied that the claimant had asked for an independent role. It was put to the MD that the claimant “refutes” that. The MD replied that he had taken the oath and that he refuted what the claimant said.

The MD was asked if he had thought of committing his relationship with the claimant to writing in any form. The MD replied that there had been a service agreement from 1 May 2005 to 31 July 2005 but conceded that he did not have the claimant’s signature to this. The MD did not indicate to the Tribunal that there was any signed agreement for the period from January 2005 to May 2005. The MD said that the relationship had been “embryonic” and that it had been “finding its path and structure”. The claimant had retained his own laptop and phone. The claimant was not paid mileage or any holiday entitlements. The respondent’s office manager had a roster for employees. It only pertained to P.A.Y.E. people. It had not been applicable to the claimant. The MD admitted to the Tribunal that he did not have this roster and that he did not have any evidence of the claimant earning income other than from the respondent but said that the claimant had controlled his own hours.

In questioning by the Tribunal, it was put to the MD that the claimant had said that he had been in waiting for his position to be regularised. The MD replied: “No other employee was under self-assessment. We acceded to that one request.”

It was put to the MD that the respondent had regularised the claimant’s situation. The MD accepted this saying: “Life and pensions is lucrative once it’s structured.” Regarding a meeting held in a Mallow hotel at which it was agreed to instigate a full-time P.A.Y.E. structure for the claimant, the MD was asked if it had been he or the claimant who had wanted it. The MD replied that it had been a bilateral meeting.

Determination of Preliminary Issue:

Having carefully considered the evidence adduced, the Tribunal is unanimous in finding that the claimant meets the requirement that he have one year's service as an employee with the respondent company and, therefore, is entitled to proceed to have his substantive claim under the Unfair Dismissals Acts, 1977 to 2001, heard at a further hearing of the Employment Appeals Tribunal. The Tribunal noted that the respondent did not draw up a written document for the claimant to sign which could have excluded the possibility of his subsequently claiming to be an employee even if he worked a forty-hour week at the respondent's Mallow office.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)