**EMPLOYMENT APPEALS TRIBUNAL**

| CLAIMS OF: | CASE NO. |
|---|---|
| Employee | RP75/2006<br>WT56/2006<br>MN101/2006<br>UD181/2006 |
| against | |
| Employer | |

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001**
**ORGANISATION OF WORKING TIME ACT, 1997**
**REDUNDANCY PAYMENTS ACTS, 1967 TO 2003**
**UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr E. Murray

Members: Mr G. Phelan
Mr. T. Kennelly

heard this claim at Limerick on 3rd May 2007
and 9th October 2007

Representation:

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Claimant :

Ms Elizabeth O'Connell, B.L., instructed by Ms. Marian O'Leary, O'Leary, Carter & Co., Solicitors, Strand Street, Kanturk, Co. Cork

Respondent :

Ms Serena Bennett, B.L., instructed by Ms Pauline Kearns, Cagney Kearns Forde, Solicitors, Main Street, Charleville, Co. Cork

The determination of the Tribunal was as follows:-

Evidence was heard from the respondent BC and the claimant MMcE. The claimant who is now 59 years of age started her working relationship with the respondent on the 01st November 1993. Initially she provided book keeping and other administrative

services on a contract for services basis to the respondent. She was at that time self employed and was providing services to other clients also.

As time went by the respondent's practice, which was in its infancy when the claimant joined, was getting increasingly busy and the demands on the claimant's time became greater to the point where by September 2003 it provided her sole and only income.

The respondent in this case fairly acknowledges that he summarily and unfairly dismissed the claimant on the 30th September 2005. It is therefore not necessary for the Division to make any finding with regard to dismissal, in light of this concession.

The claimant, until quite recently regarded herself as being an independent contractor which would of course be fatal to her claim under the Unfair Dismissals Acts 1977 to 2001. The respondent regarded the claimant as being an employee which in certain circumstances could be fatal to his case under the Acts.

It falls to the division of the Tribunal to decide whether or not the claimant was, at the time of her dismissal, and for twelve months prior to her dismissal, an independent contractor or an employee of the respondent.

In deciding whether a person is employed under a contract of service or under a contract for services, each case must be considered in the light of its particular facts. Some guidance has been developed by the Courts in this regard. In the case of Henry Denny and Sons (Ireland Limited) v The Minister for Social Welfare (1998 1IR34) Mr Justice Keane held that:

*"It is accordingly clear that while each case must be determined in the light of it's particular facts and circumstances, in general a person will be regarded as providing his or her services on a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that a person is engaged in business on his or her own account is more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependant on the efficiency with which it is conducted by him or her."*

In the same case Murphy J said that:

*" I am satisfied that the Appeals officer was correct in his conclusion that he was required to consider the facts or realities of the situation on the ground to enable him to reach a decision on the vexed question of whether the respondent was an employee or an independent contractor."*

In the case In Re The Sunday Tribune Ltd (1982 no 10390P) Miss Justice Carroll J held

*"The court must look at the realities of the situation in order to determine whether the relationship of employer and employee in fact exists, and must do so regardless of*

*how the parties describe themselves."*

It is clear from the evidence given in this case that for a period of at least one year prior to 30th September 2005 the following applied to the claimant's working conditions.

1. She worked exclusively for the respondent.
2. She worked in the respondent's premises.
3. She used the respondent's equipment, computer and office furniture.
4. The claimant worked fixed hours as determined by the respondent.
5. She had no staff or other employees.
6. She was not in a position to delegate her work to a sub contractor.
7. An increase in productivity on her behalf would not have increased her profits or income from employment.
8. She bore no financial risk.
9. She incurred no expense for providing the service that she provided.
10. She was paid the same rate of pay during the course of her annual holidays.

It appears that the only indicator that the claimant was an independent contractor was the manner in which she was paid. The reality of the situation "on the ground" was indicative of an Employer/Employee relationship and not that of Contractor and Client.

Consequently this division of the Tribunal finds that the relationship between the claimant and the respondent was much more consistent being that of Employer and Employee and consequently holds that the claimant in this case was an Employee of the respondent and was an Employee for the qualifying period provided for in the Acts.

The division must now consider the appropriate remedy to be given to the claimant and whether the claimant has adequately mitigated her losses.

Having heard the evidence of the claimant and the respondent, and having regard to the fact that there is a family connection between them and that lengthy discussions took place between them with regard to finding a resolution to the dispute between them which unfortunately failed, the decision of this division of the Tribunal is that the remedy of reinstatement or re-engagement are not appropriate ones to impose and consequently finds that the appropriate remedy is compensation.

Counsel for the respondent has made a strong case in respect of the claimant's failure to mitigate her loss and argues:

1. That the claimant should have employed reasonable diligence in seeking work.
2. That the claimant failed to mitigate her loss by not returning to work when requested to do so.

With the regard to the first proposition it appears to the Division that during the period of September 2005 to February 2006 the claimant was in ongoing negotiations with

the respondent and his representatives. A number of meetings were held and the claimant presumed there was a reasonable chance that she would be resuming work with the respondent. In the initial stages of these discussions it appears that a sincere effort was made by both parties to reach an accommodation but unfortunately as time went on the relationship became stale and the negotiations were ultimately doomed to failure.

The Tribunal finds that it would be unreasonable to expect the claimant to have sought alternative employment between the date of dismissal and 01st February 2006 and makes an award in the sum of €8,775.00 in respect of this period.

With regard to the second proposition the Tribunal feels that here may be some merit in the argument that the respondent was clearly anxious that the claimant would return to work quickly in the early stages of the breakdown of their relationship. It is difficult however, to criticise the claimant in this regard. She described herself as being "psychologically paralysed" which is understandable having regard to the overall relationship between herself and the respondent.

Thereafter the claimant did not commence to seek work until about July of 2006. She attributed this to the shock and upset that she felt at her dismissal. The Tribunal feels that this was not an unreasonable delay on her part and the Tribunal is satisfied that after July 2006 she made a reasonable effort to obtain alternative employment and has produced evidence of this. She did not get alternative employment until the 23rd May 2007 and this employment comprised of part time work for which she is paid €20 per hour for 20 hours per week. This is considerably less than the sum of €675.00 she had previously been earning with the respondent.

In all the circumstances the Tribunal finds that the claimant has suffered considerable economic loss and awards the applicant an additional sum of €20,000.00 to take account of her economic loss from February 2006 onwards. Making a total award in respect of the Unfair Dismissals Acts 1977 to 2001 claim of €28,775.00.

With regard to the claimant's claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 the respondent paid the claimant for three weeks after the dismissal. It is difficult to ascertain precisely what the claimant's entitlements may have been because of the uncertainty as to when she became an employee. Payment of three weeks wages for her loss in this regard seems reasonable, and an award under this heading is declined.

As no evidence was led in respect of the Organisation Working Time Act of 1997 no award is made in respect to this aspect of the application.

The claim under the Redundancy Payments Acts, 1967 to 2003 is dismissed.

Consequently the Tribunal awards the claimant the sum of €28,775.00 in total.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)