

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
Employee

CASE NO.  
UD688/2006

Against

Employer

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O' Mahony B.L.

Members: Mr F. Cunneen  
Ms. N. Greene

heard this claim at Dublin on 14th February and 12th June 2007

### Representation:

Claimant: Mr. Conor Bowman, BL instructed by  
Catherine Ryan, Ryan & Company, 42 Woodley Park, Kilmacud, Dublin 14

Respondent: Mr Peter Ward B L instructed by  
O' Meara, Geraghty, McCourt, Solicitors, 51 Northumberland Road, Dublin 4

The determination of the Tribunal was as follows:

### Respondent's Case

The principal of the respondent company told the Tribunal that he was in a relationship with the claimant and after initial difficulties in a very turbulent relationship their first daughter was born in 1989. The relationship ended and recommenced in September of 1991. The claimant moved in to his house in November 1991 and within a year and a half she was pregnant with their second child, who was born in May 1993. The claimant, against his wishes, availed of the opportunity to take redundancy in September 1994 from the TSB and invested her redundancy money in property. The claimant was concerned about her appearance and teeth and wanted to have PRSI to enable her to have work done on her teeth. She suggested that the best way for her to get this done was to go through the respondent's books. In September 1994 the principal placed the claimant on the books and paid her as an employee. She was placed on the books at an entry level where she did not have to pay tax and her salary remained at that level; they both paid PRSI. On occasions when he did not have anyone to answer the telephone the claimant was called on to come in, if child-minding allowed, but this was only between 1994 and 1996. He estimated that the claimant had spent two days, in all, working in the office in that period and she had not worked there at all since 1996.

Since then he has had at least one apprentice at all times and since 1998 he had an assistant solicitor as well. Over time he had employed secretaries, two of whom became legal executives. He currently employs one qualified solicitor, two legal executives and one secretary.

His personal relationship with the claimant was very turbulent and not a happy one for either of them. It ended in the early 2000s. On 14 February 2005 he received a letter from the claimant's solicitor to the effect that the relationship between the claimant and himself had irretrievably broken down. When the claimant indicated that she was initiating litigation against him, it was no longer feasible to have her on the books. She was an independent person and should be making appropriate tax returns in respect of her property. He terminated the claimant's employment at the end of the tax year, on 31 December 2005.

The claimant was never his spouse and he had no maintenance obligation to her. He moved out of their home in September 2005 and rented a house. They made an arrangement that he would see his four children at weekends. He paid the claimant approximately €1,437.00 per month and replaced it with a monthly payment of €1,000.00 from January 2006. The claimant was not replaced.

In cross-examination the respondent stated that he and the claimant had a shared obligation to maintain their children. He was entitled to pay anyone that he chose as an employee. The arrangement that was in place made financial sense to the claimant and it benefitted both of them. He could have terminated the claimant's employment when he received the letter on 14 February 2005 but he waited until 31 December to take her off his books. He had been intending to take her off the books earlier in 2005 but never got around to it and it was a neat arrangement to do so at year-end. He terminated her employment primarily because he wanted to address the issue of the claimant's personal finances and also because they both had suffered. Having received the letter on 14 February 2005 he became engaged in ongoing discussions with the claimant, over a number of months, about her financial situation as well as his own. He was very concerned about her personal property and told her to get an accountant and as part of the process he would take her off his books. He denied that he dismissed the claimant because she discovered in summer 2005 that he was having an affair with another employee. Any other relationship he had was irrelevant to his decision to dismiss her. If that had been the reason, he would have dismissed her earlier in 2005 when she came to the office a number of times to speak to another female. It was "absolute nonsense" to say that the claimant was gainfully employed in the office. The claimant had not done "one iota of work" in the office after November 1996. She was not his personal assistant; he had two wonderful personal assistants over the years. Starting in January 2006 he paid the claimant a sum of money from his personal account for maintenance of their children. This replaced her wages. He denied that the payments made to the claimant prior to January 2006 were simply a tax-efficient way to pay her maintenance. The monies paid to her prior to that date, were at her request and that arrangement had been convenient for both of them.

The claimant visited the office from time to time but she had no duties there. He did the registered post but on occasions if he did not get it done at work he took it home and asked the claimant to register the post in the post office across the road from their home. It was "fanciful" to suggest that she was an integral part of his business. He agreed that if he had not been involved in a personal relationship with the claimant, she would not have been on his books. The claimant's dismissal was not due to a redundancy situation or to misconduct on her part. The dismissal was a regularisation of their positions.

## **Claimant's Case**

The claimant commenced part-time work with the respondent in 1994. Her work was "simple" to start with as she undertook tasks such as filing, typing and cleaning. She did the registered and ordinary post, bought the light bulbs, organised presents and collected his suits from the dry cleaners. She went on an IT course in 1993 to upgrade her computer skills. She collected loan cheques from the bank and documents from the office. She was the general gofer in the business and received a set net wage for this. Her duties were "very simple and very part-time" and she could come and go. Her contribution extended to seeking potential clients for the business and in that capacity she attended social events on behalf on and for the respondent. From 1996 on she spent less time in the office and her typing duties ended. Her other tasks including doing the post and some bank duties were performed from her home. She remained at the "beck and call" of the respondent in the performance of her duties and felt she was "doing her part for the business".

Her solicitor wrote to the respondent in February 2005 stating that her personal relationship with the respondent had broken down. The principal and herself had not been on speaking terms, apart from conversations about their four children, since August 2005 when she discovered that he was having an ongoing affair for two and a half years with an employee in the office. In August 2005 TM instructed her to no longer call to the office and to stop intruding on his life but he continued to pay her until 31 December 2005. He did not want any rows or confrontations to affect his business.

He moved out of the house in September 2005 and later moved in with his "new love". She complied with the instruction not to go to the office for both professional and personal reasons. She could not go back into the office and face the girl with whom he was having an affair. Even though there might have been an absence of trust on a personal level the witness felt that this did not present a problem in her employment relationship with the respondent. However she also stated that her employment relationship was unsustainable from August 2005 onwards. The respondent stopped paying her from the end of December 2005.

In early 2006 the respondent left her P45 and a short letter of termination on the kitchen table for her. The contents of that letter indicated she had been made redundant from 31 December 2005. She had no prior notice of her dismissal. She was shocked at the dismissal and the manner in which it was executed. She insisted that there had been no discussions about her employment status with the respondent between August 2005 and the date of her dismissal. The claimant did not receive any payments relating to notice or redundancy from the respondent at the time of her dismissal.

## **Determination**

There was a majority decision in this case.

Whilst the parties themselves did not raise the question as to whether or not the claimant was an employee as a preliminary issue, the Tribunal, in view of the evidence adduced on the first day of the hearing, indicated to the parties, on that day, that it would be considering this issue in view of the reality of the relationship as shown by the evidence.

The majority finds that the evidence of the claimant was unconvincing. Having regard to the thrust of the respondent's evidence and notwithstanding the fact that the respondent did not cross examine the claimant on her employment status, the majority, having considered the underlying reality in this case, finds that the claimant was not employed by the respondent under a contract of service and accordingly was not an employee. The majority relies on *In re Sunday Tribune Ltd.* [1984] IR505, where Carroll J, citing *Fergus v John Dawson & Partners Ltd.* [1976] 1 WLR 1213, stated:

“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 it must do so regardless of how the parties describe themselves.”

In the circumstances the majority finds that it does not have jurisdiction to hear the claim under the Unfair Dismissals Acts, 1977 to 2001.

*Ms Greene’s dissenting opinion*

Ms Greene was satisfied that the claimant was an employee. She was under the direct control of the respondent/employer as to how, when, and where her work was to be carried out. She was further satisfied that the claimant received a fixed hourly/weekly/monthly wage and that her employer deducted PRSI. In dissenting from the majority decision Ms Greene was also satisfied that the claimant’s having considerable freedom and independence in the carrying out of her work was not inconsistent with her being an employee.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)