EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF: CASE NO.

Employee UD503/2006

against

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. Sheedy

Members: Mr G. Phelan
Mr. J. McDonnell

heard this claim in Cork on 12 July 2007 and 22 October 2007

Representation:

_____

Claimant:
Mr. Kieran Hughes, B.L., instructed by
Ms. Fiona Foley, Fiona Foley & Company, Solicitors,
2/3 Station Road, Ballincollig, Co. Cork

Respondent :
Mr. Eoin Clifford, B.L., instructed by
Babington Clarke & Mooney, Solicitors,
48 South Mall, Cork

The determination of the Tribunal was as follows:-

The issue in this case was whether the claimant is an employee or an independent contractor.

The claimant worked for a long number of years in the in the haulage business. From the 80's onwards he worked as an independent haulier. In 2002 his status changed to that of owner/driver.

Claimant's case:

The claimant in his evidence told the Tribunal that he is sixty four years of age and has been in the haulage business since he was eighteen or nineteen years old. From the 1980's he worked as an independent haulier for the respondent and other companies. He was classed as an independent

haulier. The respondent supplied building materials/aggregate for the construction of houses and roads. In Cork their main centre was in Ovens and they also had a sandpit nearby. The respondent had some employees on their own payroll as well as other independent hauliers like the claimant. As an owner/driver you get priority of loads in addition to getting diesel at a reduced rate supplied by the respondent. He told the respondent of his interest in becoming an owner/driver and was appointed in 2002.

From the time he became owner/driver in 2002 he could only work for the respondent. The insurance policy was arranged by the respondent and a deduction was made from his cheque in relation to the insurance. His insurance did not cover him to haul other goods. The truck was painted blue and white which are the colours of the respondent and they were also to put the respondent's logo on the truck but this never happened. The respondent told the claimant what to do and decided on his starting time for work. He generally started between 7am - 8am. He was told by the office to take a load of sand and was issued with a docket telling him where he was to bring that load. The claimant had a sign on his window indicating twenty eight ton which the size of the load he could carry. This sign was made by one of the respondent's managers. The sign was visible to the loader to give the claimant that amount of sand. If there were no loads there he would be told to pull over until a load came in. He was told not to go out with a hazardous load and the respondent told him what to do at all times.

In relation to payments, he received a letter and cheque around the middle of each month. He did not invoice the respondent. Deductions were made in respect of insurance and union dues. The respondent arranged a lease with a hire purchase company in relation to the vehicle in question. He also got the fuel at a reduced rate and had pin number for this purpose. The union membership was pre-arranged by SIPTU. A sickness plan through Canada Life was also put in place by therespondent but the claimant did not ever have to make a claim under this plan. There was also aprovision for a pension plan but the claimant choose not to join. As an independent haulier he wasnot offered tickets for the social club. From 2002 his contract stated that if he were sick he couldget a driver to fill in for him and he had a driver from that time but he subsequently got another jobwhich meant that from 2004 he did not have a driver. Documents were furnished to the Tribunaland reference was made to "Letter to all owner drivers" which was effective from 1st January 1996and signed by the claimant on 25th June 2002. Letter dated 5th September 2002 confirmingresponsibilities in relation to owner/drivers was also referred to however this was not signed by theclaimant. He was now an owner/driver working for the respondent only and looked after his owntax affairs and was responsible for maintaining the vehicle.

In cross-examination the respondent's three categories of drivers were put to the claimant and he accepted that in 2002 he moved from being a haulier to being an owner/driver i.e., he moved from category three to two. He did what he was told by the respondent in relation to sick benefit and pension. He was told by the office what time to come to work in the morning and if he arrived late he was reprimanded by the respondent. If there was no load he would sit in the truck and wait. If he wanted a day off he would have to give notice unless it was an emergency. If he was sick he employed another driver and deducted tax for him. The claimant was registered for V.A.T. If he were an independent contractor he could get his load at any time or go elsewhere to get a load however this was not the case as an owner/driver. He was supposed to be there at all times and do as he was told by the respondent. He was paid by the ton and sometimes by the hour. It was put to the claimant that he signed a contractors declaration form in 2003. While he had no choice but to sign this form he would not accept that he was a sub-contractor. He accepted he did have an employee up to 2004. When that employee did work for someone else the claimant invoiced the company in question and got paid accordingly. As an independent haulier he had a Road Freight

Carrier's Licence from September 1999 to September 2002. In relation to his insurance policy he had a named driver on his policy in 2002 until that person got a job with the respondent.

In 2002 he got cheaper diesel and more work and still paid V.A.T. He had two independent vehicles after 2002 and he drove one of these himself. He invoiced other companies but not the respondent. In relation to loads he got a delivery docket which he was told to get signed and hand in and he agreed that this was also the practice prior to 2002.

In answer to questions from Tribunal members the claimant said that as far as he was concerned he worked for the respondent. The benefit in being an owner/driver was that he got priority in relation to loads.

Respondent's case:

Giving evidence, the respondent's former transport director spoke of two types of driver. One was a driver for hire and reward and the other was a driver on his own account. The witness said that a driver for hire and reward needed a carrier's licence before he could carry another's goods. This licence had to be obtained from the Department of Transport.

The respondent's drivers were paid by a schedule of rates. There were three categories. The first of these was direct employees of which the respondent had nineteen when the witness left. The second was owner/drivers of whom there were 102 or 103. In 2002 the claimant became one of these. The claimant had been in the third category i.e. hacker/haulier (of whom 100 to 150 worked with the respondent).

A direct employee would get a regular wage and overtime. He would check in and out. He would get holiday pay. He would be in the company/union agreement. There would be a grievance procedure etc.. The truck would be maintained for him by the respondent.

An owner/driver would be the owner of his vehicle and he would be responsible for it. This would include maintenance, NCT, tachograph, insurance and payment to anyone who might drive on the owner/driver's behalf.

Asked if the claimant could work for someone other than the respondent, the witness said that employees could not do so. The respondent had a reasonable flow of work but there was no guarantee. A lot of drivers would work as sole traders just for the respondent.

Asked what was the net effect of the 2002 change for the claimant, the witness referred to a pecking order for drivers and said that the claimant "would feel a bit more secure as an owner/driver"

The witness acknowledged that the claimant had had the option of getting fuel directly from the respondent if he so wished. A price was negotiated. It was a two-way bet. A fixed charge was built into the rate. The witness paid a "surcharge" to all hauliers who did not buy fuel from the respondent. They got compensated for not buying fuel from the respondent at a reduced rate.

Under cross-examination, the witness said that the claimant had been the owner of his vehicle and had been paid solely according to loads carried (i.e. according to work done) whereas an employee would be paid for each week even if the truck he used was broken down. The witness said that employees had to check in but the claimant and "similar" men did not report to a foreman. Dispatch clerks determined what was to be carried.

The Tribunal was referred to a document headed "Independent Driver Scheme – Regulations". The witness said that there was "no other way we could do it".

The Tribunal was referred to a document headed "LETTER TO ALL OWNER DRIVERS". The witness confirmed the document's statement that an "owner/driver should, at his own expense, keep his vehicle(s) clean and, in all respects, in good and substantial repair and condition and display the John A. Wood Ltd logo on the cab of his vehicle(s)". The witness added that "people would usually have the name of the main contractor on the truck".

It was put to the witness that the claimant had said that he was not let work for others. The witness replied: "I did not say that."

It was put to the witness that the claimant had had to be available to the respondent exclusively. The witness replied that the claimant could do jobs for others if he wished and that the witness had had no objection to that.

It was put to the witness that he had told the claimant not to do work for others but the witness said that he did not recall that.

Asked if he had had control, the witness said that the respondent had organised deliveries.

Speaking about deductions made from remuneration, the witness acknowledged that deductions had been made from employees and that the respondent allowed the deduction of trade union dues from the claimant. Asked if deductions had been made for a named life assurance company, the claimant said that he was not sure about this and suggested that the question be directed to another witness for the respondent. The witness rejected the contention that the claimant had been an employee of the respondent.

In re-examination it was put to the witness that a number of companies asked drivers to put the company logo on trucks. The witness accepted this. In final cross-examination, it was put to the witness that there would never be a truck with two logos. The witness replied: "I don't think so."

Questioned by the Tribunal, the witness said that the respondent "could have slack periods" but that the work was "fairly constant". The claimant could have a different driver drive for him but the claimant was paid from "scheduled rates" i.e. there would be no pay if no truck-driving required. The witness told the Tribunal: "The only consistency was the inconsistency."

Speaking about the three categories of driver who did work for the respondent (i.e. direct employees, owner/drivers and independent hauliers), the witness said that the claimant had been one of a number who had gone from the third category to the second. The witness told the Tribunal that he was "mystified" as to why the claimant "could think himself an employee" because the claimant "came in under the owner/driver category". The claimant had come to him "on a personal issue". The witness had thought that he (the witness) "was doing a favour".

Giving evidence, a witness for the respondent said that he was in the accounts payable department of the respondent. The witness confirmed that the claimant had been able to get fuel at a preferential rate. The witness said that the respondent was part of a major group which dealt with

particular insurance brokers but that there was no obligation to be part of the respondent's scheme. Two or three drivers did so.

It was put to the witness that the claimant had said that his insurance policy prevented him from working for others. The witness replied that the claimant's insurance policy covered him to carry goods for others. The witness added that the respondent would not be responsible for damage caused by the claimant while carrying goods for the respondent.

The witness told the Tribunal that employees had to join the respondent's pension plan but that in the claimant's case it was optional. The respondent would have agents calling and asking to speak to drivers but there was no obligation on owner/drivers to take out a pension plan. The respondent did do deductions for union subscriptions.

Regarding deliveries, the witness said that owner/drivers would get a docket to deliver a load and that the claimant would keep a diary of loads done. It was based on the truck's number. All drivers were to keep a record of loads done. All owner/drivers were VAT-registered. If a driver did not have a C2 the respondent would have to deduct tax at source.

The Tribunal was furnished with a table of payments to the claimant in the years 2002 to 2005. The witness said that the claimant got paid gross and that it was then left to the claimant to "sort it out with the taxman".

The witness said that employees did not own trucks and did not have to make lease repayments. Nothing would come from an employee's pocket if he were in an accident. An employee got sick and holiday pay and share options. An employee did not have to keep a record of his loads. He would get the same pay whether he worked or not.

The witness told the Tribunal that "an owner/driver could go to Australia but would not get paid unless he sends somebody to work for him". Employees had to give notice in advance in order to take holidays and would get paid while on holiday.

Under cross-examination, the witness said that the respondent had a mandatory pension scheme for employees but that many companies did not. The witness said that both the claimant and the respondent's employees paid a subscription. Insurance was deducted from the claimant's earnings. The claimant was paid at the rate of work done rather than on the basis of clocking-in just as a bricklayer might be paid by bricks laid. One had to have a C2 to get a haulier's licence. Tax would be deducted if the claimant did not have a C2.

Questioned by the Tribunal, the witness said that the claimant had not worked for a period in January 2005 and surmised that "either the truck was broken down or there was no work there at the time". The witness said that this was not unusual in January.

Asked about pension arrangements, the witness said that he would get an instruction to do a deduction for the life assurance company. The respondent would not contribute. The respondent gave drivers the option of making a deduction from their earnings every time they received a cheque. The witness told the Tribunal that this "was just for administration".

In re-examination by the respondent's representative, the witness said that life assurance was optional and he confirmed that the making of deductions "just saves owner/drivers writing a cheque".

In further cross-examination, the witness was referred to a certificate of insurance for the claimant from 1 June 2005 to 31 May 2006. It was put to the witness that the certificate made specific reference to an indemnity to the respondent. The witness replied: "I'm not an insurance expert."

Giving evidence, a former transport supervisor for the respondent said that "if things were quiet" the hackers would be affected first followed by the owner/drivers. However, he said that "the last few years have been busy". It was put to the witness that the claimant had said that he would be reprimanded if he did not turn up. The witness disagreed but said that the respondent would expect a phone call if the claimant was "not going to turn up".

Regarding holidays, the witness said that owner/drivers should tell the respondent if they were going to be out of the country. The witness told the Tribunal that "an owner/driver could take eight weeks off and put another driver in if he was suitably qualified".

By way of comparison and contrast, the witness said: "Our drivers would drive our vehicles and would clock in. Their holidays were scheduled in a certain way. We'd get them to stagger their holidays. Owner/drivers could take all their holidays in one week (at the same time). We could not stop that."

The witness concluded his direct evidence by saying that if an employee of the respondent had an accident the respondent would be responsible whereas if an owner/driver had an accident the owner/driver would be responsible.

In cross-examination the witness said that he had been many years in transport, that he knew the claimant and that the claimant had "turned up when requested". The witness said: "An employee would not be paid if he took eight weeks off. I could not get somebody to come in for me."

The witness said that the claimant would be asked to take a particular load and that, regarding loads, "the more he took, the more he earned". The witness said that the claimant "would have to go where he was told" and that the claimant had the logo of the respondent on his truck.

The witness told the Tribunal that the claimant "would be obliged to inform the company of any accident". The witness was asked if it would be the same for any employee. The witness said that it would be.

Questioned by the Tribunal, the witness said that there was not much difference between a hacker/haulier and an owner/driver but that (if things went quiet) the first trucks "packed up" would be those of hacker/ hauliers and that an owner/driver would have more consistent work.

Determination:

Having carefully considered the evidence adduced, the Tribunal makes a unanimous finding that the claimant was not an employee of the respondent and that the claim under the Unfair Dismissals Acts, 1977 to 2001, fails. In arriving at this determination the Tribunal took cognisance of the fact that the claimant had the opportunity to increase his earnings, that the claimant supplied the vehicle and that he could employ other drivers. The Tribunal considered the relevance of the control test but did not find it to be decisive.

The claim under the Unfair Dismissals Acts, 1977 to 2001, is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)