

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
Employee

CASE NO.PW79/2007

against the recommendation of the Rights Commissioner in the case of:

Employee

v

Employer

under

PAYMENT OF WAGES ACT, 1991

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms E Kearney

Members: Mr T Gill
Ms H Henry

heard this appeal at Galway on 12th June 2008

Representation:

Appellant: Ms Carol Nash BL instructed by Mr Thomas O'Dea,
Thomas St. John O'Dea, Solicitor & Notary Public
25 Upper Abbeygate Street, Galway

Respondent: Mr Loughlin Deegan, IBEC, Confederation House,
84/86 Lower Baggot Street, Dublin 2

This case came before the Tribunal by way of an appeal by the employee against the recommendation of a Rights Commissioner Ref: r-046566-pw-06. The employee was seeking to have the recommendation upset.

The decision of the Tribunal was as follows:

A preliminary point arose concerning whether the appellant was an employee.

The appellant has been engaged since the early nineties as a swimming instructor by the respondent company. The respondent company advertise annually for swimming instructors for the creation of a panel to cover classes. The appellant has submitted an application every year indicating the hours she is available for. The annual contract lasts for an eleven-month period from September to July. Originally, the appellant was hired by the school to teach the lessons, but this changed to the panel system when the leisure centre was updated in the nineties. The appellant instructs sixteen to eighteen classes per week for the company and augments her income by coaching swimming clubs.

The appellant contends that she should be recognised as employee owing to the number of years she has been engaged by the company and because she has no control over her wages or hours.

The respondent company maintain that the appellant has never been an employee and has always been hired as an independent contractor, and as such, she is not entitled to redress under the Payment of Wages Act 1991. As an independent contractor the applicant must take care of her own tax obligations and provide a tax clearance certificate annually to the company. The appellant is also obliged to have her own insurance, which she has through Swim Ireland. Unlike employees the appellant can work for other swimming clubs which hire the facility. The appellant is not required to wear the company uniform and does not have access to the staff room; a different room is provided for the swimming instructors.

Determination:

The issue that has arisen in this case, upon which the Tribunal has to determine, is whether or not the appellant is employed on a contract of services to enable the Tribunal to assume jurisdiction to hear the appeal under the Payment of Wages Act 1991. The Tribunal, having heard the evidence of the appellant and the respondent company in relation to this issue, and legal argument from both parties have decided the following:

That it is the Tribunal's determination that the appellant is not employed but rather works for the respondent under a contract for services and is a self-employed person.

The Tribunal comes to this determination taking into account the practicalities of how the contract, as between the appellant and the respondent, is executed, and also taking into account the actual contract itself. A number of factors bore weight with the Tribunal, namely, the fact that the appellant is paid by virtue of her raising an invoice monthly, that she is assessed under schedule D as self-assessment for income tax, that she has to provide a tax clearance certificate before being paid, that she takes out her own insurance with Swim Ireland, that there is no presumption of work each year, that the job is re-advertised each year and she has to reapply for same, that she indicates the hours she is available to work, and that she is then assigned hours accordingly, and that she is free to work for other persons/clubs if she chooses to do so.

Alongside these factual considerations the Tribunal believes that it should also take into account how persons are described in the relevant contract in relation to the work they execute. The appellant is clearly described as an independent contractor and not as an employee of the respondent company. The Tribunal has taken into account the current legal authorities as submitted by counsel on behalf of the appellant and solicitor for the respondent.

Having heard the evidence adduced, the Tribunal determines that the appellant is self-employed and working under a contract for services. Therefore, the Tribunal has no jurisdiction to hear the appeal under the Payment of Wages Act 1991.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)