EMPLOYMENT APPEALS TRIBUNAL

Appeal Of: Case No.
Employee RP578/2007
WT346/2007

Against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Quinn B.L.

Members: Mr. G. Phelan
Mr. T. Kennelly

heard this appeal at Nenagh on 28th October 2008

Representation:

Appellant: Ms. E.J. Walshe B.L. instructed by Ms. Elaine Morrissey, James Kelly & Son, Solicitors, Patrick Street, Templemore, Tipperary

Respondent: Mr. Michael O'Sullivan, Human Resources Advisor, Castlelost West, Rochfortbridge, Co. Westmeath

The decision of the Tribunal was as follows:

At the outset of the hearing, the Respondent's representative applied for and was granted, leave to represent the Respondent, as provided for by the provisions of Section.12 of S.I. No. 24 of 1968.

The Tribunal heard there was a dispute between the parties as to whether the Appellant was engaged under a contract of service, or a contract for services with the Respondent from the 29th August 2005 to the 7th September 2007 when he ceased employment with the Respondent. The nature of the Appellant's working relationship with the Respondent prior to that period of time was not in dispute and at all material times the Appellant was employed as a blocklayer.

In the month of July 2005 the Appellant attended a meeting with the Respondent at which the Respondent's Managing Director, Office Manager and two other block layers were present. The Appellant was informed that the Respondent had undergone an audit by the Revenue Commissioners.

It appears that the Revenue Commissioners in the course of this audit had raised a number of issues pertaining to status of certain persons employed by the Respondent at that time, including the

Appellant.

Apparently the Revenue Commissioners had determined that the Appellant would henceforth have to be employed by the Respondent either on a C2 basis as a C2 sub-contractor, or through the PAYE system.

The Appellant testified that at this meeting he was given a choice of becoming either a direct employee of the company, or of working for it as a sub-contractor, employed in business on his own account. Having considered the matter, the Appellant opted for becoming a direct employee of the Respondent. Previously the Appellant had been registered for VAT, as he was self-employed and working for the respondent as a C 35 sub-contractor. After the meeting aforesaid and in consequence of the decision subsequently made by the Appellant, he ceased to be registered for VAT. The Appellant's gross weekly stage at the date of termination of his employment was €1,121.40.

Whilst the Managing Director did not attend at the hearing before this Tribunal, the evidence of the Respondent's Office Manager with responsibility for the accounts department of the Respondent was that subsequent to the meeting in July 2005, the Appellant agreed and continued to beemployed as a blocklayer under the same conditions as a sub-contractor, but was paid through thePAYE system purely as a matter of convenience.

The Respondent's Office Manager further testified that subsequent to the meeting in July 2005 and before the Appellant had made a decision, one way or the other on the matter, the Appellant had contacted him with a query concerning deductions for employer's PRSI. The Office Manager testified that the Respondent was unwilling to pay a further 10.75% just to facilitate processing the Appellant through the PAYE system and that as C2 sub-contractors paid their own PRSI as self-employed individuals, the Respondent expressed the view that the Appellant should also pay employer's PRSI element and that the sum deducted from the Appellant's pay for employer PRSI was returned to Revenue as part of the employer's PRSI.

It was contended by the Respondent that the Appellant agreed to operate as a sub-contractor of the Respondent but to be paid through the PAYE system, that *"the workings were used to calculate a figure to put through the payroll system every week"* for the Appellant, that nothing had changed for the Respondent except that the Appellant was thereafter paid through the PAYE system, was given a cheque every week and paid the same as the Respondent's other sub-contractors.

The Appellant testified that the Respondent's managing director dictated to him the hours of work as being from 8am to 5pm. It was further alleged that the Respondent's managing director instructed the Appellant as to the manner and schedule of his work, by highlighting and identifying which houses were required to be worked upon, as well as the times for the commencement and completion of work thereon. The Appellant could only work on one house for the Respondent at a time. The Appellant did not work for any other person from Monday to Friday. The Appellant was not paid overtime in the event that he worked on a Saturday. The Appellant did not have his own insurance cover. The Respondent's foreman oversaw the works and checked that the Appellant's work was carried out to the appropriate standard. This testimony was uncontroverted.

The Appellant alleged that during the course of his employment for the period concerned he did not receive any holiday pay from the Respondent. In this regard, the Appellant testified that the situation that pertained was one where the Respondent's managing director had informed him that

deductions were being made from his weekly wage in respect of holiday pay and which would be reimbursed to the Appellant when he availed of his annual leave.

The Respondent's Office Manager testified that deductions made from the Appellant's remuneration were retained as holiday pay for him until 2006 when the Appellant allegedly furnished the Respondent with an instruction that he would henceforth *"take care of his own holiday pay"*

It appears that in the year 2005, the Appellant was being remunerated at the rate of €1.08 per block, which over time increased to rates of €1.20 and €1.30 per block. It was contended for by the Respondent that such the foregoing increases were *"to facilitate holiday pay, sick pay etc"* Inresponse to this proposition, the Appellant confirmed that he had consented to deductions from hisweekly wage slips on the basis as had been outlined to him by the Respondent's managing director.

The Appellant took leave from his employment with the Respondent in late 2005. The Respondent's Office Manager testified that it would be unusual for an employee of the Respondentunder a contract of service to take annual leave in November, as the Respondent generally closedcompletely in July/August in conjunction with the holidays for the construction sector, although onoccasions a skeleton work force might have continued over the vacation period, depending on theRespondent's schedule. However, it appears that the Appellant's leave in respect of the foregoingperiod coincided with his impending marriage at the time and the Appellant also testified that manyconstruction employees did not tend to take leave during the traditional construction sector holidayperiod, if good weather prevailed, but opted instead for other periods, when the weather here wasless enjoyable.

As regards the manner of remuneration, the evidence to the Tribunal disclosed that the Appellant was paid an agreed price depending on a particular house type, the constituents of which would have encompassed a certain number of blocks. The practice that pertained was that at the end of each week, the Appellant would inform the Respondent's office manager of the number of blocks laid for a particular house and the duration for which the two apprentices had worked with the Appellant on that week.

It appears that an agreed daily amount was deducted from the Appellant's remuneration by the Respondent in respect of the two apprentices, irrespective of the number of blocks laid by those apprentices. It would also appear that on occasions when the Appellant ceased working on grounds of inclement weather, the services of the apprentices were redeployed elsewhere on site by the Respondent.

The Appellant accepted in cross-examination that the more efficient he was in the laying of blocks, the earlier it was, that the agreed sum in respect of each house would have been earned by him, thus generating a profitable enterprise for himself.

A number of the Appellant's payslips were introduced into evidence before the Tribunal. Whilst not entirely intelligible in each and every respect, these *inter alia* disclosed apparent deductions in respect of Pay Related Social Insurance by the Respondent, which the Tribunal considers reflect a deduction by the Respondent of social insurance contributions in respect of the Appellant as an employee.

Furthermore, the Tribunal was provided with copies of P.60's in respect of the Appellant completed

by the Respondent. It is important to note that these official documents are expressed *to be given to each employee who was in your employment"* on 31st December 2005 and 2006, whether or not tax was deducted. These forms describe the Appellant's social insurance class as A1.

It is the Tribunal's understanding that Contribution Class A applies *inter alia* to people in industrial, commercial and service-type employment under a contract of service. The Respondent has certified on these documents that the particulars given thereon include *inter alia* the total pay-related social insurance contribution in respect of the Appellant's employment with it.

Respondent's Submissions

The thrust of the Respondent's submissions were that in so far as the Appellant was employed by the Respondent from July 2005 onwards, the Appellant was so engaged in business on his own account and deriving profit from this enterprise, a situation that had always pertained in so far as the Appellant's employment with the Respondent was concerned.

The Tribunal was referred by the Respondent to a number of factors alleged to indicate this state of affairs, including the following;

(a) the Appellant supplied his own tools.
(b) the Appellant was allocated two apprentices and afforded an opportunity to derive profit from their labour.
(c) the Appellant was paid on price, *"through the opes"* and had an opportunity through his own production to earn a profit from the enterprise.
(d) the Appellant did not work on wet days.
(e) the Appellant took holidays at his own discretion
(f) the increase in the pricing structure.
(g) in 2006, the Appellant paid for his safe pass certification.

In support of the Respondent's submissions, the Tribunal was referred to the cases of *Henry Denny & Sons (Ireland) Limited, trading as Kerry Foods –v- The Minister for Social Welfare [1998] 1 I.R. 34* and the *Minister For Agriculture & Food –v- Barry & Ors [2008] IEHC 216.*

The Appellant's Submissions

The main thrust of the Appellant's submissions was that the Respondent, in presumed compliance with its legal obligations, having declared the Appellant to the Revenue Commissioners as an employee and so registered him, cannot approbate and reprobate his status with them, as its employee under a contract of service.

Determination

In the case of *Minister For Agriculture & Food –v- Barry & Ors.,* Mr. Justice Edwards noted that *"The test to be applied in identifying whether a contract is one of employment or for services is a pure question of law and so is its application to the facts. But it is for the tribunal of fact not only to find those facts but to assess them qualitatively and within limits, which are indefinable in the abstract, those findings and that assessment will dictate the correct legal answer. In the familiar phrase "it is all a question of fact and degree"*

Whereas in the case of *Minister For Agriculture & Food –v- Barry & ors.,* the High Court, on the

facts, expressed surprise that the EAT decided to deal with the matter by hearing a preliminary point as to whether the Appellants were employed under a contract of service, or contract for service because posing the question in that way immediately limited the possibilities to just two and noted that it was unclear why such an approach was adopted, in the instant case, this approach was suggested by the Appellant and the Respondent and agreed to by the Tribunal.

Whilst of course, such alone would not have been decisive of the matter, or binding on this Tribunal, from a consideration of all of the evidence adduced, it was also apparent to this Tribunal, on the facts of the instant case and from a consideration of the relationship between the parties, in particular from the 29th August 2005 onwards, that such was subject to a single contract between them and also having regard to the scope and nature thereof.

In the first instance, the Tribunal in examining the relationship in question between the parties in this case, determines that mutuality of obligation was a feature of it. The Tribunal is satisfied that there were mutual obligations on the Respondent to provide work for the Appellant and on the Appellant to perform work for the Respondent. Of course, the mere fact of the existence of this feature is not, of itself, determinative of the nature of the relationship and it is necessary for this Tribunal to examine the relationship further.

As observed by Edwards J. in *Minister For Agriculture & Food –v- Barry & ors.,*

"*The principal judgment in the Supreme Court appeal in the Henry Denny case was delivered by Keane J with whom Hamilton C J. and Murphy J agreed. The ratio decidendi of the case ……is to be found in the following passages from that judgment.*

"The criteria which should be adopted in considering whether a particular employment, in the context of legislation such as the Act of 1981, is to be regarded as a contract "for service" or a contract "of services" have been the subject of a number of decisions in Ireland and England. In some of the cases, different terminology is used and the distinction is stated as being between a "servant" and "independent contractor". However, there is a consensus to be found in the authorities that each case must be considered in the light of its particular facts and of the general principles which the courts have developed: see the observations of Barr J., in McAuliffe v. Minister for Social Welfare *[1995] 2 I.R. 238*

.

At one stage, the extent and degree of the control which was exercised by one party over the other in the performance of the work was regarded as decisive. However, as later authorities demonstrate, that test does not always provide satisfactory guidance. In Cassidy v. Ministry of Health *[1951] 2 K.B. 343, it was pointed out that, although the master of a ship is clearly employed under a contract of service, the owners are not entitled to tell him how he should navigate the vessel. Conversely, the fact that one party reserves the right to exercise full control over the method of doing the work may be consistent with the other party being an independent contractor: see* Queensland Stations Property Ltd. v. Federal Comissioner of Taxation *[1945] 70 C.L.R. 539.*

In the English decision of Market Investigations v. Min. of Soc. Security *[1969] 2 Q.B. 173, Cooke J., at p. 184 having referred to these authorities said:-*

> *"The observations of Lord Wright, of Denning L. J. and of the judges of the Supreme Court suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?'. If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what*

degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

In evaluating the *ratio decidendi* of the *Henry Denny* case, Edwards J. in *Minister For Agriculture & Food –v- Barry & ors.* went on

"*It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under 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 the person is engaged in business on his or her own account can be 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 dependent on the efficiency with which it is conducted by him or her."*

and concluded that *"the* ratio decidendi *……..to be encapsulated in the statement of Keane J that in considering whether a particular employment is to be regarded as a contract "for service" or "of service" ..."each case must be considered in the light of its particular facts and of the general principles which the courts have developed".*

Furthermore, Edwards J. believed that the general principles referred to by Keane J. in *Denny* "*are those which have been identified as potentially being of assistance to a court or tribunal in the drawing of appropriate inferences",* some of which Keane J. had himself sought to elucidate as being of particular relevance to the case then before him and as appears from the extract set out above.

However, Edwards J. also further observed that whereas the oft quoted passage referred to respresented an important summary of some of general principles that the courts have developed, it could not be said to fully encapsulate the *ratio decidendi* of the *Henry Denny* case, as it omitted one very important general principle developed by the courts which assumed a significant importance in that case, namely "*the existence of a contractual document which purported to contain the expression of an agreed intention of the parties that their relationship should be governed by a contract for services. The existence of that particular fact brought into play the "general principle" that a characterisation or description as to the status of a party contained in a contract intended to govern a work relationship is not to be regarded as decisive or conclusive of the matter."*

In applying the foregoing to the facts of the instant case and in utilising the questions posed by Cooke J. in the case of *Market Investigations v. Min. of Soc. Security [1969] 2 Q.B. 173* above referred to, as an aid to this Tribunal in drawing inferences as to whether the Appellant, was at the material time employed by the Respondent uder a contract of service, or a contract for service, the Tribunal, having considered this case, in the light of its particular facts and the evidence adduced and of the general principles which the courts have developed on the matter, determines that, on the balance of probabilities, the Appellant was employed by the Respondent at the material time under a contract of service, although it has to be acknowledged that not all features of the relationship between the parties, fulfilled the criteria of the Appellant being an employee of the Respondent.

On the balance of probabilities, the Tribunal does not believe that an appropriate characterisation of the Appellant's relationship with the Respondent in the period from the 29th August 2005, was as a

person employed to perform his work as a person engaged in business on his account.

In also arriving at its determination and as an aid to the drawing of appropriate inferences on the nature of the relationship between the parties, the Tribunal has also had regard to the provisions of the *Code of Practice For Determining Employment or Self-Employment Status of Individuals,* prepared by the Employment Status Group set up under the Programme for Prosperity and Fairness.

Whereas a number of factors pertaining to the employment relationship between the parties were equivocal as regards identifying the Appellant's employment status, in so far as the particular factors outlined by the Respondent were concerned, the Tribunal was not swayed by the fact that during periods of inclement weather the Applicant did not work for the Respondent, which the Tribunal considers would have been of equal application to any blocklayer, regardless of employment status. The Tribunal also notes that the Appellant was not paid on such occasions.

Furthermore, in so far as two apprentices worked with the Appellant and it is alleged afforded him an opportunity to derive a profit from their labour, the Tribunal notes that such apprentices were apprenticed to the Respondent and assigned to the Appellant by the Respondent's managing director and the Appellant exercised no control over the recruitment of apprentices, or what persons were apprenticed to him and those persons that were assigned to him, were so presented to the Appellant as a *fait accompli* by the Respondent. Furthermore, it appears to the Tribunal that it would have been the Respondent who benefitted from the training afforded to their apprentices by the Appellant.

In so far as the Appellant supplied his own tools, such consisted of a small trowel, a level, a hammer and a measuring tape, items which the Tribunal considers all blocklayers would be in possession of, regardless of their employment status. On the contrary, it is worthy of note that any machinery and equipment which would have been utilised by the Appellant, in the nature of mixers, power tools, scaffolding, blocks, cement and sand was all supplied and provided to the Appellant by the Respondent.

In so far as it was contended that the Appellant availed of holidays at his own discretion, in the absence of testimony from the Respondent's managing director, the uncontroverted sworn testimony of the Appellant was that unlike sub-contractors who apparently came and went as theypleased, in order for the Appellant to take time off work, he had to request and obtain permissionfrom the Respondent's managing director in these respects and if the Respondent's managing director denied the Appellant's request, the Appellant could not have availed of such leave, albeitsuch *"permission"* was never denied by the Respondent.

Whilst the Respondent's Office Manager testified that the Respondent paid for the safe pass of all of its employees, but not of its contractors and it was commoncase that the Appellant paid for his own safe pass certification in 2006, the Appellant testified that he was obliged to do so at the time in circumstances where the Respondent had informed him that it was not prepared to pay for same, in the light of the requirement for payment of an increased tariff for such certification. In any event, in the year 2002, when it was commoncase that the employment status of the Appellant was that of a contractor in business on his own account, the Respondent had paid for the Appellant's safe pass certification nonetheless.

In so far as determining that the status of the Appellant was as an employee of the Respondent under a contract for service, the Tribunal had particular regard to the P 60's furnished to the Appellant by the Respondent.

Whilst of course the Tribunal is mindful that the existence of a contractual document which purported to contain the expression of an agreed intention of the parties that their relationship should be governed by a contract for services brings into play the "general principle" that a characterisation or description as to the status of a party contained in a contract intended to govern a work relationship is not to be regarded as decisive or conclusive of the matter, the Tribunal is of the opinion that the application of such principle is diluted in its application to the present situation, when one considers, that such expression of an agreed intention has been conveyed to an independent Third Party, with regulatory responsibility for overseeing the conduct of the parties financial affairs. (ie the Revenue Commissioners).

In addition, the Tribunal, in exercising its judgment in analysing this case in the light of its particular facts and in considering those facts and drawing particular inferences from them by applying the general principles which the courts have developed, identifies a number of factors, which aided the determination of the Tribunal, as to the status of the Appellant as an employee of the Respondent under a contract of service, namely its findings that

(i) the Appellant was under the control of the Respondent who directed, how, when and where, the work was to be carried out by the Appellant.
(ii) the Appellant essentially supplied his labour only and did not supply materials for his task, or any equipment other that small tools of his trade.
(iii) the Appellant's remuneration had a fixed, structured element to it.
(iv) there was no evidence that the Appellant could sub-contract his work and pay it on himself.
(v) the Appellant worked for the Respondent alone.

Redress

By reason of the foregoing, the Tribunal finds that the Appellant is entitled to a lump sum payment under the Redundancy Payments Act, 1967 to 2003, based on the following criteria

(i)	Date Of Birth	16th December 1978
(ii)	Date Of Commencement Of Employment	29th August 2005
(iii)	Date Of Termination Of Employment	07th September 2007
(iv)	Gross Weekly Pay	€1,121.40

The foregoing award is made subject to the Appellant having been in insurable employment under the Social Welfare Acts during the relevant period. It should also be noted that payments from the Social Insurance Fund are limited to a maximum of €600 per week.

The Tribunal notes that there was no claim before it under the Minimum Notice And Terms Of Employment Acts 1973 to 2001. Whilst the Tribunal was referred by the Appellant to pg. 130 of *Termination, Redundancy and Grievance Procedures* by John Barry, Ciaran O'Mara and Tom Hayes, in support of a claim for a notice payment, the Tribunal notes that a dismissal notice was received on the 14th August 2007 and that the Appellant's employment ended on the 7th September 2007. Furthermore, the Respondent objected to the Tribunal entertaining any claim in respect of a notice payment and whilst that in itself, would not be determinative of the matter, in all of the circumstances, the Tribunal was not satisfied that the Appellant, on the balance of probabilities, established an entitlement to a notice payment pursuant to the Redundancy Payments legislation.

The quality and probative value of the evidence adduced by both the Appellant and Respondent concerning the Appellant's receipt and Respondents' payment of holiday pay, or otherwise, was not

of the requisite standard, particularly in so far as public holiday entitlements were concerned.

However, the Tribunal determines that on the balance of probabilities, it is more likely than not, that the Appellant is due some monies in respect of his holiday entitlements. Accordingly, in so far as the Appellant's claim under the Organisation of Working Time Act 1997 was concerned, the Tribunal, doing the best it can and having determined the Appellant to be an employee under a contract of service, taking the 1st April as the commencement of the leave year for holiday purposes and the Appellant having ceased to be employed in the first half of the leave year 2007, therefore awards the Appellant the sum of €6,548.98 under the legislation aforesaid, to include outstanding annual leave entitlement from the previous leave year.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)