

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
Employee - claimant

WT143/2008

CASE NO.
UD301/2008
MN272/2008

against

Employer - respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. Clancy

Members: Mr. G. Phelan
Mr. A. Kennelly

heard this claim at Limerick on 2nd March 2009

Representation:

Claimant(s) :
XXXX

Respondent(s) :
Mr. Lorcan Connolly BL instructed by
Hassett Considine, Solicitors,
9 Carmody Street Business Park,
Carmody Street, Ennis, Co. Clare

The determination of the Tribunal was as follows:-

In the written claim to the Tribunal it was alleged that the claimant had been employed by the respondent from 12 July 2006 to 11 January 2008. After the claim was served on the respondent the respondent's solicitors wrote to the Tribunal alleging that the claimant, on whose behalf no P.A.Y.E. or P.R.S.I. payments had ever been made by the respondent, had not been an employee of the respondent but had, in fact, worked with the respondent as a lecturer as an independent contractor.

At the Tribunal hearing the respondent's representative additionally submitted that, even if the claimant had been an employee of the respondent, the claimant did not have a year's continuous service with the respondent because the claimant had been with the respondent from 25 July 2006 to 16 May 2007 and from 1 October 2007 to 11 January 2008. The claimant's representative submitted that the claimant had been employed from July 2006 and, having received no contract (fixed-term or otherwise) thought that he had been in continuous employment. It was contended that the claimant was employed right through to the end of his relationship with the respondent in January 2008.

The respondent's representative submitted that it was for the claimant to establish that he had been an employee of the respondent. The claimant's representative countered that, under the Terms of Employment Act, (1994) the claimant should have got a contract within thirty days and that there had been an onus on the respondent to provide this document.

Case for the Respondent

Giving sworn testimony, a respondent witness (hereafter referred to as HC), said that the respondent was responsible for the training of international students. The respondent might have twenty or thirty students coming from abroad to do a course such as hotel/catering. The respondent would therefore need a panel of teachers for a course that might or might not go ahead. The claimant was one of those who replied to an advertisement placed by the respondent.

By letter dated 22 May 2006 TOD from the respondent wrote to the claimant enclosing the various modules that made up the first year of the hospitality management programme and stating that the course would last for twenty-six weeks delivered over the respondent's "academic year from September 26th to late 2007". The letter continued:

"Examinations for each module are held in early May, the exact dates are yet to be finalised. The course is of a 3 year duration and is validated by the Institute of Commercial Management.

We anticipate (subject to satisfactory number of students) to timetable the hours from 1.30 – 5.30 pm Monday to Friday.

Term One will be from 26th September to 12th December and Term Two from 17th January to approximately 23rd May 2007.

I am not sure how many of the modules you can deliver but if you feel you are able then I will timetable you 16 hours per week commencing 26th September 2006.

As per our normal method of payment you will assume a self-employed status and be responsible for your own taxation affairs. The initial rate per hour will be €28 (€450 per week). This will be reviewed at the end of Term One.

We offer our associated lecturers a fixed term contract from September to May subject to satisfactory performance and sufficient student numbers and we may offer permanent positions to suitable candidates.

Should you require any further information please do not hesitate to contact me."

By letter dated 30 May 2006 the claimant wrote to the respondent as follows:

“Thank you for your letter dated May 22nd regarding the Hospitality Management Programme. I am looking forward to the new challenge, and am delighted to commence on September 26th.

I will telephone you in the next week to discuss various issues, for example resources available, text books etc.

Please be assured of my full support.”

HC told the Tribunal that TOD had resigned and had handed the college over to her when HC wrote (by letter dated 22 March 2007) to the claimant saying:

“Please note, (the respondent) is honouring your current agreement with the college to the end of the academic year ending on the 17th of May 2007. The college will review your position on the 1st of September 2007.

“(The respondent) looks forward to meeting with you at that time.”

By letter dated 27 June 2007 the respondent’s principal (NG) said the following regarding the 2007/2008 academic year :

“Dear Lecturer

Students will be returning to college on the 24th September and all that week will be given to registration.

We hope to be in a position on the following week to bring all lecturers back to work but as you will appreciate it can be difficult to gauge how many students will return.

We hope to inform you by Wednesday 26th September what the exact situation is and whether or not your contract will be renewed, depending on the numbers at this time.

We hope this will be positive but at this time we are unable to say because of the nature of our business.

We trust you understand this position.”

HC said that all lecturers would be sent this letter.

HC said to the Tribunal that the claimant had had self-employed status and that the claimant had to give the respondent an invoice for hours worked whereupon the invoice was then paid. The claimant’s position was the same as for all of the respondent’s lecturers. The respondent provided the company invoice at induction. The lecturers would then give the respondent an invoice weekly

or monthly depending on how often they wanted to be paid. The claimant had “free rein”. All that was given was the syllabus. Lecturers provided their own notes and slides. That was what they were contracted for.

Students had to attend one particular place during daytime and do sixteen hours per week. The claimant had to produce his own notes, cover the syllabus and get the students to the exam. The respondent “put no rules and regulations on him”. The claimant’s notes were “his copyright”. He was free to work elsewhere using those notes. His notes “were not college property”.

HC said to the Tribunal that “if (the claimant) had got another job somewhere else he would not be available” but that he had recommenced lecturing on 1 October 2007. He was contracted as a lecturer. He did not start until the respondent had students. Induction was a week or a week-and-a-half. He finished on 11 January 2008.

HC told the Tribunal that the claimant “would have been told that P.A.Y.E. and P.R.S.I. were his responsibility to pay” and that TOD “would have” verbally told lecturers this. All lecturers (including the claimant) gave invoices and were liable for P.A.Y.E. and P.R.S.I.. She added that up to the “start date” the respondent might not know how many students it would have.

Asked at the Tribunal hearing if the claimant had been self-employed, HC replied: “Yes, I think so.” She agreed when it was suggested to her that the claimant had in fact been self-employed for fifteen years.

Giving sworn testimony, another respondent witness (BH) said that lecturers gave in an invoice which was cross-checked against their attendance sheets before a cheque was written. BH agreed that the claimant had undertaken to be responsible for his own tax affairs in that all lecturers were engaged on that basis. However, BH admitted: “I was not there in June 2006.”

Asked about the period from 16 May 2007 to 1 October 2007, BH said that the claimant had not been paid for that period and that the claimant had not looked for money for that time. The claimant would not have been entitled to it but he was free to do as he pleased in that period. BH confirmed that no further payment had been made to the claimant after 11 January 2008.

An official from the Revenue Commissioners was now called to give sworn testimony. The claimant’s representative contended: that the claimant’s revenue status was not a matter for the Tribunal; that this was not a revenue audit of the claimant; that how the claimant had dealt with the Revenue Commissioners was a private matter for the claimant; and that the payment of taxes was not relevant to this case before the Tribunal. The respondent’s representative argued that he was entitled to call this witness and that he was not precluded from doing so but said that he would “keep it narrow”.

Asked if the claimant had been self-employed or if he had had an employer for 2006 and 2007, the witness replied that the claimant had had an income from employment in this period. Asked when returns had been submitted, the witness gave dates and said that it could happen that someone could make returns as being self-employed and subsequently amend to the status of an employee.

Case for the Claimant:

Giving sworn testimony, the claimant, denying that he had ever had a “lecturing business”, said that the respondent’s job had been advertised in a Limerick newspaper in January 2006 and that he had thought that it would be a new challenge. He applied for the post of lecturer with the respondent. TOD, who was HC’s partner in the respondent, asked the claimant to go for an interview in March 2006. TOD employed him after a two-and-a-half-hour interview. Thereafter, the claimant reported to TOD.

Commenting on the 22 May 2006 letter from the respondent, the claimant said that he had been very happy to get the job and that TOD had said that the post would run for about three years. He acknowledged the letter and looked forward to starting.

Asked if the term was to be from 26 September, the claimant replied that TOD had rung him in the first week of June asking if he would be available in July to meet the registrar. The claimant told TOD that this would not be a problem. The claimant gave the date of 12 July. He worked from about 10.00 a.m. to 1.00 p.m. and went for lunch with two staff. Asked if he had got lunch expenses, he said that TOD had offered expenses. The claimant got training. TOD impressed on him that he needed to be “proficient in E.C.D.L” and would need Word and Power Point. The claimant’s Power Point skills were not good and so he travelled to the respondent in Clare for training in Power Point. This training was by the respondent. The claimant “passed E.C.D.L” and “got a note of congrats”.

Asked if he had had interaction about course material, the claimant said that he “went in” about ten days in the summer of 2006. He worked with the academic registrar of the time. The respondent identified what books should be used and ordered them. The claimant told the Tribunal that they had drawn up a course plan and a lesson plan for each of about fourteen weeks up to Christmas.

The claimant told the Tribunal that he had done ten days in July with the respondent but that the respondent had ordered the wrong books. The claimant was doing a computer course but corresponded with the respondent contacting the respondent by e-mail. The respondent ordered the wrong books a second time. The claimant started to design and develop a course to be delivered but he did not get the material until the second week of the course.

There were four course modules (covering front-office procedures, food-and-beverage management, food production and hospitality) when the claimant started. There were about fourteen books in total. All of the books were supplied by the respondent.

Asked at the Tribunal hearing if he had discussed his status regarding, for example, holidays, the claimant replied that he had done so, that Christmas was coming up near the end of the first term and that, regarding holidays, TOD had said that it would all be sorted out in due course.

Asked if he had believed that he was a member of staff, the claimant replied that he had so believed, that this had been a new challenge for him, that he had “got very involved” and had gone to Paris with students. Also, having done a dozen weeks of theory, he brought students to a major hotel where a front-office manager gave information about procedures and how the use of computers had taken over from use of diaries.

The claimant told the Tribunal that TOD left in January 2007 but that he had believed that he (the claimant) had a secure post with the respondent. He confirmed that the term had ended in May

but said that, in the first week of June, NG (the principal) had phoned him to ask him if he would represent the respondent at a Chamber of Commerce lunch. NG had told him that HC (course director now that TOD had left) had said that the claimant would be very good at networking for the respondent.

Asked if he had had other interaction with the respondent in the summer of 2007, the claimant said that he had spoken to the respondent's administrator (CK) who had said that there were twelve students already in for September and that he would definitely be required. The claimant told the Tribunal that he "knew" he would be going back to the respondent because of these twelve students having already registered and paid by end June.

Regarding preparation for a second academic year, the claimant said that he had material from the first academic year on a memory stick and that it was the same course. He started it on 12 September 2007. However, around the second week of August, NG had phoned him to ask him to represent the respondent at an open night and he had said that he would do so.

Determination of Preliminary Issue:

Having carefully considered the evidence adduced and submissions made, the Tribunal determines that the claimant was an employee of the respondent but that he did not have the required twelve months' continuous service for a claim under the Unfair Dismissals Acts, 1977 to 2007. The claim under the said legislation fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)