

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD1062/2009

MN1068/2009

RP1208/2009

against

Employee

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007 UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr F. Moloney
Mr F. Barry

heard this claim at Dublin on 1st February 2010

Representation:

Claimant(s): Mr. Brendan Archbold, 12 Alden Drive, Sutton, Dublin 13

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

The determination of the Tribunal was as follows:-

Claimant's Case

The claimant told the Tribunal that he first obtained work when he answered an advertisement on the Internet. He attended for interview and JR interviewed him. He did not know who JR was at that point. The claimant was a sole trader and on that basis he obtained work. He did not have a contract of employment with the respondent and he did not receive a document from the respondent regarding his employment. He was responsible for his own tax. His job entitled assembling furniture in the respondent premises, in the respondent's warehouse and in customers' homes. Two to three times a week he went to the store and assembled furniture and also undertook repairs.

If work was not available with the respondent he undertook work for another company. Eighty to eighty five per cent of the work he undertook was on behalf of the respondent. He delivered goods to locations where and when he was required to do so. JF a manager in the logistics department

would contact the claimant in the event of an emergency. If there were a problem with a delivery the customer would contact the respondent. The claimant submitted an invoice to the respondent for work undertaken. If he was really busy on the job he had up to six people working for him. The respondent would inform him if he needed less people. Work began to decrease in summer of 2008 and assembly work was scaled back. In January 2009 work was non-existent. The amount of money he earned varied from week to week. He returned to New York in January 2009 and he commenced work for the family business. He now earns €500.00 per week.

In cross-examination he stated that in 2001 he did not know that JF was an independent contractor.

He did not receive a company handbook, a contract of employment or payslips. He asked for a contract once to secure his job. He understood that the respondent did not vet him and the respondent had a policy in place whereby employees outside of the EU were vetted. He never got to the point of being an employee. There were two elements to his work assembly and repair. In 2001 the respondent moved warehouse and he did not know the exact structure that was in place. He was not aware that another company had taken over the deliveries. For a long time the process that was in place was unclear. He received faxes from the respondent regarding work that had to be undertaken. The work varied from day to day only because a new set of technicians were brought in. The number of assemblies varied from day to day and it was usually was ten to twenty. A number of assemblies were undertaken in the warehouse and that work did not fluctuate. He always wanted to be an employee and he submitted invoices to the respondent.

He was not provided with a company car and he was given fifty to seventy five cent mileage allowances. He undertook a high proportion of his work in Dublin. He undertook repair work and that depended on the customers' availability. Other contractors invoiced the respondent separately. At times he could charge more for the work he undertook and this was set out in a formula that JR gave to him. He had discretion about passing work on to others. He could undertake work for other companies. If he broke an item in a customer's home he was responsible for making good this item. He was told by JF to keep the technicians busy. He undertook work for another company in 2007 until the end of 2008 for which he was paid a substantial amount of money. At the end of 2008 he invoiced the respondent for €145,000 and invoiced another company for €75,000. Between 2001 and 2004 drivers did a high degree of assembly. In 2008 he was told there was work on the assembly side and he was informed that he was getting less and less repairs and he got less work. JF told him to get rid of everyone else. He did not want to tell his workers that he was doing everything. He wanted it to be transparent and he brought one of his workers in.

In answer to questions from the Tribunal he stated that he was not insured. He charged VAT for the service he provided. He self assessed his tax. He never refused work from the respondent and he endeavoured to undertake work for the respondent. It was up to his workers to pay their own tax. He did not respond in writing to a letter he received on 21 October from JF. He did not consider himself a supplier. He believed he spoke to JF regarding these issues. He returned to the USA in 2009.

Respondent's Case

JF told the Tribunal that the claimant was a service provider and assembled and repaired furniture for the respondent. The claimant billed the respondent for the service he provided and the standard rate was €50. JF would sign off on the invoice that the claimant furnished. There was no formal agreement with the claimant and the respondent regarding mileage. The sequence of events in relation to assembling of furniture was that the customer went to the shop, bought the goods and

paid a deposit. The item was ordered and manufactured. The sales person took the balance from the customer and it was then assigned to a contractor if it needed to be assembled. The respondent did not ask the claimant to undertake work directly; if furniture needed assembly the claimant would do it. It was a matter for the claimant to decide who undertook the assembly work. He did not have a concern about the claimant undertaking work for a competitor. There was no change in the relationship. From November 2008 to March 2009 there was no reply from the claimant and no discussions.

In cross-examination he stated another company provided the service for the last fifteen to twenty years. This was changed in 2004 and the company was brought back. The arrangement with the claimant and the respondent was to provide furniture assembly for the respondent. There was no contract. The witness did not have a contract with the respondent. The claimant had access to the respondent's warehouses.

Determination

Having heard all the evidence adduced the Tribunal is of the view that the claimant was an independent contractor and not an employee. The claimant had inter alia the opportunity to profit from the sound management in the scheduling and performance of engagements and tasks. He could hire other people on his terms to do the work, which had been agreed to be undertaken. He was able to provide the same services to more than one business at the same time and indeed did so.

He was registered for self-assessment and VAT. The claimant is deemed to be an independent contractor.

The claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, the Redundancy Payments Acts, 1967 to 2007 and the Unfair Dismissals Acts, 1977 to 2007 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

