EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE **- Claimant**	UD59/2009 RP40/2009 MN60/2009 WT27/2009

against

EMPLOYER-**First Named Respondent**

EMPLOYER- Second Named Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 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. K.T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. K. O'Connor

heard this claim at Killarney on 13 November 2009
and 20 & 21 January 2010

Representation:

Appellant:
In person on the first day, Ms Jane Ann Rothwell B.L.
instructed by Ms. Diane Hallahan, Solicitor,
Park House, Tuckey Street, Cork on the subsequent days

Respondent:
Ms. Elizabeth Murphy, instructed by Mr. Paul O'Donoghue,
on the first two days and Mr. John O'Dwyer on the last day
both of O'Donoghue O'Dwyer Solicitors,
Langford Street, Killorglin, Co. Kerry

The determination of the Tribunal was as follows:

Preliminary Issue

The respondent contended that the claimant was not an employee of the respondents as defined in section 1 of the Unfair Dismissal Acts and that accordingly the Tribunal did not have jurisdiction to hear the case under the under the said Acts.

The Evidence

The respondents, who are both general practitioners, are partners in a medical practice. The claimant, a native of Hungary, is a doctor who specialises in paediatric medicine. In May 2006 theclaimant, who was doing research in New Zealand, responded to an on-line advertisement placedby the first named respondent seeking to replace a partner in the practice who had relocated elsewhere for family reasons. Following the checking of the claimant's CV, communication by telephone and various emails on 1, 4, 5 & 8 May 2008 it was agreed that the claimant would cometo the respondents' practice on a three-month trial period. The precise employment status of the claimant was not discussed at this stage. The claimant arrived in Ireland and commenced work inthe practice on 12 June 2006. She was provided with free accommodation, in an apartment ownedby the respondents, for up to a maximum of twelve months. The claimant received a set rate of pay,set hours of work in the surgery and had some after hours/on-call duties for the co-operative locumservice. The claimant was paid on a monthly basis and was not required to submit invoices to thepractice for payment. She could keep private fees earned after hours. There was no written contractbetween the parties at this stage.

Both parties were satisfied with the work relationship and towards the end of the busy summer season, around the end of August 2006, the claimant and the first named respondent sat down and reached agreement for the arrangement to continue for a further twelve months. This agreement was reduced to a document setting out the following:

- The claimant's surgery hours
- The on-call requirement
- Accommodation arrangements
- The claimant was responsible for her own professional/medical insurance
- The claimant was to pay her own tax
- The claimant was entitled to six weeks holidays per annum and was to cover the partners' holidays

The respondents' position is that the claimant was at all times an independent contractor to the practice; the first named respondent had told her to deal with her own tax affairs and recommended that she get independent advice. In the event the claimant obtained the services of an accountant in May 2007, at a time when she was buying a house and on the respondent's advice she was registered as self-employed from 16 May 2007.

The claimant's name was displayed, in equal prominence with the respondents, on the practice letterheads and prescription pads. Her work was not supervised by the first named respondent. While it was the respondent's position that the claimant was free to do any private work that she wished, her position was that the hours she was required to work in the practice precluded her from such opportunity. In autumn 2007, when the claimant indicated that she wished to cover the out of hours for a local doctor the first named respondent discouraged this because, according to him,

there were gaps in the claimant's training and there was a risk that it could reflect badly on the respondents' practice and he offered her his out of hours work instead, which she accepted. She had managed to take a two-day paediatric locum in another county during two days of her holidays and had arranged a one-week paediatric locum in Scotland but left the practice in June 2008, two days before this was due to commence. All monies generated during her contracted hours were accepted to be the property of the respondents.

At the end of August 2007 the claimant and first named respondent entered an agreement for a further year and as part of this agreement he increased the claimant's pay to €1,500 per week. The claimant's level of training did not qualify her to be admitted to the general medical scheme (GMS) as a GP specialist, a level required before a doctor can become a partner in a practice. The respondents were happy to assist the claimant in achieving this. The claimant's position is that thiswould require her to return to Hungary for three further years' training.

Preliminary Determination

The Tribunal finds that neither *O'Coindealbhain(Inspector of Taxes) v Thomas B Mooney* [1990] 1 IR 422 nor *O'Freil v St. Michael's Hospital* UD303/1980, to which it was referred, were helpful in this case.

It is well established that there is no precise test for determining whether a worker is an employee. The Tribunal is required to look at the reality of the situation that existed between the parties and it must do so irrespective of how the parties described themselves (*See In Re Sunday Tribune Ltd.* [984] I.R. 505 where Carroll J in the High Court referred to *Ferguson v John Dawson and Partners Ltd* [1976] 1 WLR1213 on this point. The Tribunal finds that the claimant's description of herself, on the instructions of the first named respondent was not determinative of the status of the relationship between the parties in this case.

In *Re Sunday Tribune* Carroll J continued:

> "The simple test is whether the employer possessed the right not only to control the work the employee was to do, but also the manner in which it was done. However that test is no longer of universal application. In the present day when senior staff with professional qualifications are employed, the nature of their employment cannot be determined in such a simplistic way."

While the first named respondent made the point that he did not supervise the claimant in the performance of her duties, the claimant was a professional who could work without supervision. While the degree of control is of less significance in professional relationships such as this, it nonetheless must be present to some degree for the relationship of employer and employee to exist. The majority find that the claimant was to a degree subject to the control of the first named respondent in a number of aspects as regards her work: in particular her hours of work including the on call requirement and the entitlement to holidays and when they could be taken.

The financial agreement between the parties, notwithstanding the claimant being responsible for her own tax has the hallmarks of a salary for which she did not have to present invoices. The claimant worked full-time hours and there was no opportunity for her to affect her level of income during her contractual hours.

Having carefully weighed all the factors, the Tribunal finds, by the afore-mentioned majority, that the claimant was employed under a contract of service. Accordingly, the Tribunal has jurisdiction

to hear the claim under the Unfair Dismissals Acts, 1977 to 2007.

Substantive Issue

As dismissal was in dispute between the parties it fell to the claimant to prove the fact of dismissal

A dispute arose between the claimant and the respondents over a paediatric locum in Scotland, which the claimant wanted to undertake and resulted in her being unavailable to work in the practice from Thursday 26 June to Friday 4 July 2008. It is common case that the respondents did not expect any doctor to be away from the practice during the busiest period of the summer, that is July and the first three weeks of August. The claimant's position is that the respondents made it difficult for her to take holidays other than in winter and the first time she had been allowed a summer holiday during the employment was in June 2008. It was her case that in order to undertake paediatric locum work she would be required to use her holidays from the practice for that purpose.

The claimant asserts that she told the first named respondent of her intention to undertake the Scottish locum before the respondents went on holiday from 2 to 9 June 2008. The respondents' position is that the claimant merely mentioned that she had seen lots of advertisements for locum work, in which she was interested, to the first named respondent. During the afternoon of 24 June 2008, the day the claimant had returned to work after her holiday and after the claimant had left to do work at the outlying dispensaries, the first named respondent discovered that the claimant had booked herself out of the practice for the period from 26 June to 4 July 2008 when he saw the annual planner on the wall in the claimant's consulting room. The respondents' position was that, ideally, they wanted three months' notice of a request for time away from the practice but would accept around one month's notice. It was the claimant's evidence that the first named respondent had needed her at work on the Friday afternoon as there was a family wedding and he asked her to cancel her flight.

Because of commitments the first named respondent was unable to speak to the claimant about this matter on 24 June 2008 despite phone messages having been left by both sides for each other. The first named respondent telephoned the claimant between 8.15 and 8.30am on 25 June 2008. It is common case that this telephone call was not a pleasant experience for either party. The first named respondent made clear his unhappiness at the claimant's proposed absence from the practice and during the conversation he said to the claimant, "If you let me down by leaving the practice at the busiest time, you will have to consider your future". The claimant's husband (CH) heard part of this conversation as the claimant put the call on speakerphone. Some time after the end of the conversation CH left their apartment, which is at the same location as the surgery, and drove the five-minute journey to the respondents' residence. The respondents' position is that the second named respondent, who was driving to the surgery, was almost forced off the road by CH who exited his car, approached her shouting and roaring and banged on the window of her car. CH then continued to the respondents' residence where an incident occurred between CH and the first named respondent in the latter's residence, the end of which was witnessed by the second named respondent, who had returned home following her encounter with CH on the road. The first named respondent was traumatised and unable to work for the remainder of that day. The second named respondent proceeded to the surgery where the waiting room was full. She was shaking and very shocked. She asked the nurse to tell the claimant, who was already in the surgery, to call to her consulting room and when she did the second named respondent said to her, "Out now". According to the claimant the first named respondent said to her, "Leave immediately".

The claimant left the premises and followed CH to the local Gardai where she made a statement

and then contacted a solicitor. Later that day the solicitor sent a letter to the first named respondent, stating:

> *"We act for [the claimant].*
>
> *We have been advised that on 25 June 2008 you had a telephone conversation with our client in which you abruptly and in an aggressive manner terminated the employment of our client. Later that morning in the surgery [the second named respondent] instructed her to "leave immediately".*
>
> *Our client has worked for you for the last two years and has performed all her duties in a diligent and professional manner and feels that she has worked in excess of the agreed level of work.*
>
> *Please be advised and without further notice that our client wishes to be re-instated with immediate effect and wishes to recommence employment this Monday 30 June 2008.*
>
> *In the alternative we will pursue the matter by way of legal proceedings."*

It was common case that the first named respondent left a voice mail for the claimant on 26 June but she did not reply to it. On 27 June 2008 the respondents' solicitor replied to the claimant's solicitor categorically denying the dismissal. The letter continued:

> *"Your client came into the practice of our client in June 2006 and worked initially as a Locum for a three month period. In September 2006 it was agreed that she would be given an annual contract and this was extended again from September 2007 to September 2008.*
>
> *The allegations that she (the claimant) worked excessive hours is particularly curious in that it was she who requested additional hours of work within the practice and was paid accordingly for same.*
>
> *Your client is well aware that the principal in this practice is [the first named respondent] and we wish to repeat that [the first named respondent] did not terminate the employment of your client but did ask her to give careful consideration to her position when without proper notice she advised of her intention to work as a Locum in another practice from the 27th June onwards. Your client has been on vacation from the 14th to the 24th June and without the consent or knowledge of our client blocked out bookings from the 27th June for an approximate ten day period while she proposed to go on this locum work. Surely it must be accepted that our client is entitled to ensure the smooth running of his practice.*
>
> *In spit of all that has happened our client is willing to honour the commitment to your client that she remains in the practice until September 2008…"*

The letter then outlined a number of conditions for the continuation of the relationship which are summarised as follows:

- The claimant would recommence on 30 June 2008 with agreement to make up for time lost to the practice
- The claimant would vacate the respondents' apartment within a reasonable time

- The claimant would be able to pursue paediatric locum work but not in the months of June to August
- Reasonable notice to be given for any paediatric locum work
- CH should not attend the practice premises or interfere with any member of staff

The respondents had previously had some problems with CH and had asked him to stay away from the premises. The claimant's evidence was that she flew to Scotland on 27 June 2008 and at that stage was unaware of the contents of the respondents' solicitor letter. The claimant maintained that she had inputted/booked holidays on the computer one month earlier to cover the time she would be on locum in Scotland. This was denied by the respondents.

It was the claimant's evidence that she was only able to work the first night of her locum in Scotland and was so distressed that she returned to the area on 28 or 29 June 2008. The claimant's solicitor wrote to her on 30 June 2008 enclosing a copy of the 27 June letter setting out the conditions for her return to the practice. Following the failure of the claimant to return to the practice on 30 June 2008 the respondents' solicitor again wrote to the claimant's solicitor seeking the claimant's intentions in the matter. It was the claimant's evidence that she had not instructed her then solicitor to seek re-instatement on her behalf.

On 10 July the locum service wrote to the claimant, with a copy to the first named respondent, seeking the claimant's comments on her failure to report for duty on her rostered shift on 9 July 2008. On 14 July 2008 the respondents' solicitor wrote to the claimant's solicitor stating their position was that in light of the claimant's failure to return to work the claimant had resigned from her position. The claimant was paid until the date of this letter.

Determination

The Tribunal does not accept that the words uttered by the first named respondent to the claimant on the telephone on 25 June, that she should consider her position, constituted a dismissal. The words themselves do not admit of a dismissal. Furthermore turning up for work, within an hour of the said words having been uttered to her on the telephone, is not the action of someone who believes that she has been dismissed.

While there is a conflict as to the exact words used by the second named respondent to the claimant later that morning in the surgery the Tribunal unanimously finds that whichever words were uttered it was reasonable for the claimant to believe that these constituted words of dismissal. The Tribunal is further satisfied that the second named respondent effected the dismissal while in a traumatised state following the earlier incidents on that morning, which are analogous to "a heat of the moment dismissal". That same day the claimant's solicitor sought re-instatement for the claimant to which the respondents acceded. Whilst the claimant made a bare assertion that she had not sought re-instatement she offered no corroborative evidence of this. The Tribunal does not accept the claimant's assertion.

Whilst there were five conditions set out in the letter offering re-instatement, apart from the first condition, these did not alter the pre-existing situation between the parties. The claimant herself accepted that the said first condition was reasonable. In the circumstances the Tribunal finds, by majority, that the offer of re-instatement amounted to a withdrawal of the dismissal. In such circumstances the afore-mentioned majority find that there was no dismissal. Accordingly, a claim under the Unfair Dismissals Acts, 1977 to 2007 does not arise.

Similarly no claim arises under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

The Tribunal is satisfied that the claimant is entitled to €1,500.00, being one week's pay, under the Organisation Of Working Time Act, 1997.

The claim under the Redundancy Payments Acts, 1967 to 2007 was withdrawn.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)