

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:  
EMPLOYEE

CASE NO.  
UD1411/2008,  
RP1256/2008

against

EMPLOYER

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. M. Forde  
Ms. P. Doyle

heard this claim at Cork on 16th July and 8th October 2009

#### **Representation:**

Claimant : Ms. Jane Anne Rothwell BL instructed by  
Francis C. Kelleher & Co., Solicitors, 1 Pearse Square, Cobh, Co. Cork

Respondent : 1<sup>st</sup> hearing day: Ms.Linda Lyons, Patrick J. O'Shea & Co., Solicitors, 77 Main  
Street, Midleton, Co. Cork  
2<sup>nd</sup> hearing day: No legal representation

The determination of the Tribunal was as follows:

#### **Summary of the Evidence**

The claimant commenced employment as a mortgage administrator with the respondent in autumn 2000. Mortgage brokering was the respondent's core business at the time and he also had a life assurance and pensions business as well as an agency for a financial institution. The respondent later became involved in property and the claimant performed some duties in relation to this. The claimant worked a five-day week and was initially paid on a weekly basis. The respondent found her to be a reliable, good, obliging and trustworthy worker. The number of employees working for the respondent increased over the years and a number of workers were engaged on a self-employed basis. It was common case that the claimant and respondent had a good working relationship and on occasion she helped him with matters unrelated to work.

The claimant was on maternity leave from 18 March to 31 July 2003. The respondent issued her with a P45 at this time but there was no question of her not returning to work. The claimant agreed that it was issued for her benefit. Following the ending of her maternity leave in July 2003 the claimant returned to work on a three-day week basis as an employee on an hourly rate.

In December 2004 the parties reached an agreement whereby the claimant could work flexi hours on a self-employed basis. This agreement was not committed to writing. Under this agreement the claimant no longer worked as a mortgage administrator and instead her duties were in accounts and payroll as well as invoice inputting. She did not receive holiday pay or sick pay and was responsible for her own tax returns and social welfare contributions. Apart from undertaking tasks for the respondent the claimant was free to work for others. She worked for other entities in which the respondent had an interest as well as for one or two other entities the respondent referred to her. She invoiced the different companies for the hours worked on their various projects and received gross payment on an hourly basis. It was the claimant's position that she did not submit invoices until 2007. According to the respondent it suited the claimant to be self-employed as she was interested in developing a career in accounting and pursuing studies and courses to this objective.

It was the claimant's position that while she had wanted to work part-time in December 2004 the respondent felt that if he allowed one person to work on a part-time basis others would also want it. The respondent then gave her three options: change to being self-employed, work three days or leave. She opted to become self-employed and her rate of pay was increased to €15.00 per hour.

The respondent made the case that being classed as self-employed had enjoyed certain benefits: she could claim expenses such as the use of part of her home as an office, a portion of her electricity and phone charges, travelling expenses and she was paying lower tax and PRSI. The respondent accepted that self-employed workers do not receive a PAYE credit and that the relevant PRSI class carries fewer entitlements.

The claimant was on the respondent's vodafone account and used his email address. The respondent's evidence was that he initially refused the claimant's request to put her on his vodafone account but when the claimant established that it is cheaper to bundle all the minutes together he agreed and she paid her share of the bill according to her actual usage. The respondent agreed that employees were also on the account but they went on and off it because it was not as beneficial as expected.

While the claimant made the case that she used the respondent's email address the respondent's evidence was that other self-employed workers also used it because he had anti-spam on his system and furthermore, it gave him access to client information for which he was responsible. He denied that this was a control issue.

When the respondent moved his business to the city in early 2005 all those involved in the mortgage business transferred to the new premises but the claimant did not. When the claimant moved to a building part-owned by the respondent she did not pay rent because she was working on his accounts.

It was the respondent's evidence that they agreed that the claimant could take files home. He trusted her and she would bring them back the next day. The claimant was adamant that she was not allowed to take files home.

Initially, staff in the respondent's EA's (the external auditor's) office helped the claimant with her new duties and she was a fast learner. She had done a SAGE course in 2003 and she was doing an accounting technician course and was becoming more proficient in her duties. EA assisted the claimant in making her first tax returns (in 2006 in respect of 2004-2005). The respondent and the claimant had weekly meetings about her work.

Initially, the staff in the external auditor's office helped the claimant with her new duties. According to the external auditor she was a fast learner. She had done a SAGE course in 2003 and she was doing an accounting technician course and was becoming more proficient in her duties. EA assisted the claimant to make her first tax returns (in 2006 in respect of 2004-2005 tax year) and GR helped her the following year.

While the respondent paid the fee for the claimant's SAGE course while she was his employee he also paid half the fee for the first year of her accounting technician's course in 2006 and he offered to pay either half her the fee for the second year course in 2007 or the full amount in 2008 if she was successful in her examinations. The respondent maintained that such payment was a bonus to the claimant for work well done. In 2007 the claimant asked the respondent for assistance and the two assistants he assigned to help her were employees.

In June 2007 the respondent took on GR (an accountant) on a self-employed basis to provide a service similar to the claimant's and he also submitted invoices. In 2007 he helped the claimant with her tax returns. He advised the claimant that she would be better off on PAYE. In July 2007 the claimant raised the possibility of returning to the status of employee with the respondent and while he had no problem with this nothing further happened because within a few days the claimant realised she was pregnant.

The claimant was on maternity leave from 21 January 2008 to 15 July 2008. It was intended that GR would take over the claimant's work while she was on maternity leave but he became ill and ultimately left the employment. In late January she was admitted to hospital and her baby was born in mid-February 2008. While in hospital before the birth of her baby, the claimant acceded to the respondent's request to do some work for him. This got the respondent out of a difficulty and the claimant was paid for her work. She also did some work for the respondent three weeks after the birth of her baby. According to the external auditor's evidence that the respondent worked long hours and often contacted him after normal work hours. Later on in her maternity leave the respondent asked the claimant to come in to work on a part-time basis and told her that she could bring her baby if she was breastfeeding. The claimant offered to work from home but this was unacceptable to the respondent and he told her that he would find somebody to do it.

There was a dramatic decline in the respondent's business in 2008 and in June he informed the claimant of the situation, that he was looking at cost cutting and that her job might not be there when her maternity leave ended. Around this time the respondent made a large number of his employees redundant. On 22 July 2008 he informed the claimant that her job was no longer viable because of the downturn in the economy. On 23 July the claimant asked the respondent about redundancy and he told her that she was not entitled to it because she was self-employed.

The Tribunal heard evidence on the respondent's subsequent arrangements for dealing with his book-keeping.

**Determination:**

The claimant and the respondent reached an agreement that the claimant would become self-employed. Some years later the claimant wished to revert to being an employee and the respondent agreed but for personal reasons nothing more was done about it. The claimant enjoyed the benefits that flow from being self-employed as well as a significant increase in her hourly rate of pay. She did not deny that she was free to work for others. She was not paid a wage. Payments to her for the work done for the various entities varied in amount and frequency. She did not receive holiday pay and was responsible for her own tax returns and social welfare contributions. All these indicia lead to the conclusion that the claimant was employed under a contract for services. The Tribunal considered the indicia which seemed inconsistent with the claimant's being self-employed: the respondent's control over where the claimant did the work, not charging rent when she changed premises and paying or being willing to pay her course fees. Having considered all these and the entirety of the evidence adduced the Tribunal finds that the claimant was employed under a contract for services. It finds support for its conclusion in *Massey v Crown Life Insurance Co.* 1978 ICR 590 where in the English Court of Appeal, Lord Denning stated that if the working relationship is ambiguous then the employee "having made his bed as being self employed he must lie on it".

As the claimant was employed under a contract for services, the Tribunal has no jurisdiction to hear the claims under the Unfair Dismissals Acts, 1977 to 2007 and Redundancy Payments Acts, 1967 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)