

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE - claimant

CASE NO.
UD1277/2009
MN1273/2009

against

EMPLOYER - respondent

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. D. Donovan BL

Members: Mr. J. Hennessy
Ms. S. Kelly

heard these claims in Waterford on 21 July 2010

Representation:

Claimant(s): Mr. Gareth Hayden BL instructed by
Nolan Farrell & Goff, Solicitors, Newtown, Waterford

Respondent(s):
No legal representation at the hearing

The determination of the Tribunal was as follows:-

The claim

The claimant commenced employment with the respondent in August 2007 as a personal trainer. In November 2007 he signed a contract of employment with the respondent. However, he was not provided with a copy of this contract despite requests for same.

On Thursday 18 December 2008 the claimant received a text message from GOC of the respondent at approximately 8.20 p.m. thanking the claimant for his help but saying that he and GOC would part company, that they did not suit each other and that they could talk the next day. The claimant continued to work his shifts until Saturday 20 December 2008 but he had no contact with his employer after 18 December 2008. The claimant requested copies of payslips, contract of employment and P45 on a number of occasions but was not provided with same.

The defence

The respondent was operating a franchise gym outlet (EDG) in Waterford City. The structure of this business was that the respondent would use the services of independent self-employed consultants to provide services for personal trainers.

The claimant was not entitled to any relief claimed by him as he was never an employee of the respondent. Like all other personal trainers used by the respondent he was an independent self-employed consultant. All other personal trainers used by the respondent set up their own companies and the claimant was no different. In March 2008 he set about setting up his own company. As with all other independent consultants used by the respondent, the claimant was paid for his services and, thereafter, the matter of payment of tax was a matter for himself to look after. He did not receive a contract as he was not an employee of the respondent and he was aware that he was not entitled to nor would he receive same.

At the end of October 2008 the respondent was advised by other self-employed consultants (who provided services similar to those of the claimant and in the same capacity as self-employed consultants) that they were terminating their contract for services with the respondent. The consequences of the actions of these companies placed the respondent in a precarious position as the respondent had lost approximately seventy per cent of the personal trainer services that had been provided to it. The only remaining personal trainer providing services to the respondent was the claimant and there was only one other self-employed individual (TS) who was a part-time receptionist. The claimant was at all times aware that the services he was providing might no longer be required as the respondent could not continue as it was.

In order to facilitate the claimant, the respondent offered to assist him to find an alternative position within the EDG structure whereby he could provide services on exactly the same terms when the closure of the business was imminent. The claimant was originally from Dublin and it was thought that he would be happy to relocate back to Dublin. Despite the respondent approaching the claimant a number of times to discuss the matter he refused to make a decision.

In addition, as the claimant was a self-employed consultant he was free to make contact with whomsoever he wished and it came to the attention of GOC that the claimant was pursuing alternative forms of strength training with a potential client of the respondent for his own benefit.

As a result of these developments and a marked downturn in business activity the respondent was forced to close its operation in Waterford prior to the Christmas recess on 20 December 2008 and from 20 December 2008 the services which the claimant provided for the respondent were no longer required.

It was denied that the claimant was an employee of the respondent. Also, it was contended that the claimant was not entitled to any reliefs claimed by him as the respondent ceased business in Waterford on 20 December 2008 and so his services were no longer required.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. The Tribunal finds that the claimant was an employee of the respondent. The Tribunal finds that the claimant's employment was terminated due to the closure of the respondent's business. The claim under the Unfair Dismissals Acts, 1977 to 2007, fails.

The Tribunal finds that the notice given to the claimant was otherwise than in accordance with law. The Tribunal finds that the claimant was entitled to one week's notice. The Tribunal awards the claimant an amount of €500.00 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)