**EMPLOYMENT APPEALS TRIBUNAL**

APPEAL OF: CASE NO.

EMPLOYEE **– appellant** UD1715/2009

against the recommendation of the Rights Commissioner **R-067839-UD-08/MR** in the case of:

EMPLOYER **–respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. N. Russell

Members: Mr. J. Hennessy
Mr. F. Dorgan

heard this claim at Clonmel on 10 November 2010
and 27 January 2011

**Representation:**

Appellant: Mr. David Humphries B.L. instructed by Ms. Una Power
John J.M. Power & Company, Solicitors,
Main Street, Hospital, Co. Limerick

Respondent: Mr. Paul McDonald, Mason Hayes & Curran, Solicitors,
South Bank House, Barrow Street, Dublin 4

This appeal arose as a result of an employee (the appellant) appealing against a recommendation of a Rights Commissioner **R-067839-UD-08/MR** in the case of an employer (the respondent)

The determination of the Tribunal was as follows:

**Preliminary Issue**

The first day of hearing was spent dealing with the jurisdictional issue of whether the appellant had, in fact, been an employee of the respondent.

From 1998 the respondent and a separate organisation (SO) had been acting in concert to provide a joint guidance, counselling and psychological service to vulnerable youth in South Tipperary. SO

provided the service at its facility in Clonmel and the respondent through XXXXXX in Tipperary later transferred to Cappawhite. In 2000 the two organisations became aware of European funding having become available through FAS for the provision of an advocacy service and on 8 February 2000 a letter, signed by a representative of both organisations was sent to the FAS area office seeking sanction to provide such service and submitting a proposed budget. It was proposed that the service be provided three days (22 hours) a week in Clonmel and two days (13 hours) a week in Tipperary.

In the event the position was sanctioned, a joint advertisement was placed in the media, interviews held, with a four person interview panel with two members from SO and two from the respondent and the appellant was appointed from 30 October 2000. The employment was administered in terms of payroll by SO. In February 2001 the FAS regional community services manager wrote to SO to suggest that the appellant would effectively have two employers.

On 21 September 2007 the co-ordinator of the XXXXXX centre wrote to the respondent's adult education officer (AE) again advising that SO did not believe they were the appellant's sole employer. As a result of discussions about a formal service contract with FAS for the provision of the advocacy service the chairman of SO wrote to the respondent's CEO on 9 November 2007 confirming SO's view that the appellant was an employee of the respondent when in the XXXXXX centre.

In a preliminary decision delivered ex-tempore at the end of the first day of hearing the Tribunal was satisfied that the appellant was employed by SO when working in Clonmel and by the respondent when working for the XXXXXX centre.

**Substantive Issue**

The appellant's employment was uneventful from its commencement in 2000 until 2006 when a national report was published into the effectiveness of the advocacy service. A particular issue arising out of this report was the provision of career guidance and the requirement for this to be done in a classroom setting conflicting with the independence of the advocacy service providers. Previously the appellant had provided career guidance in a classroom setting but now stated that she no longer wished to deliver career guidance in that way, rather she would deliver that service on a one to one basis. In September 2006 the appellant required by-pass surgery and as a result was away from work until June 2007. During this time both organisations made separate arrangements to cover for the appellant's absence by the provision of substitutes.

The appellant's position, which is uncontroverted, is that shortly before her return to work in the XXXXXX centre, which had moved to Cappawhite during he absence, the co-ordinator of the centre told her "Don't bother coming back". At a meeting in Clonmel following her return there was a discussion over the closure of the XXXXXX centre for refurbishment and the appellant was directed to work out of Clonmel five days a week until Cappawhite re-opened at the end of August. It was agreed that she could maintain her caseload in Cappawhite whereupon the co-ordinator said "What caseload? You can't have one you're just back". The appellant asserts that the following day the co-ordinator stated that AE had grave concerns with her.

On 7 January 2008 CEO wrote to the chairman of SO that the XXXXXX centre no longer required an advocacy service and that the service provided by "SO's employee (the appellant)" would no longer be required as and from 7 February 2008. On 17 January the co-ordinator wrote to CEO to

raise a grievance against the appellant alleging harassment by the appellant in his office on 14 June 2007. It is common case that both AE and the manager of SO were aware of the co-ordinator's issues with the appellant from soon after 14 June 2007. An independent investigator appointed in accordance with the respondent's agreed procedures investigated this complaint. The appellant was kept on 35 hours a week by SO until 31 March 2008 when she reverted to 22 hours a week.

The respondent's position was that as they no longer provided an advocacy service at the XXXXXX centre this was a redundancy situation as provided in Section 7 (2) (b) of the Redundancy Payments Acts, 1967 to 2007

**Determination**

Having considered the totality of the evidence before it, the Tribunal, in a majority decision, is not satisfied that the respondent has discharged its onus to establish the existence of a redundancy. The majority is of the view that, even if a redundancy situation existed, it was not the main reason for the dismissal. The proximate causes of the dismissal were unresolved issues as to responsibility between the respondent and SO as regards the appellant's employment, the clear absence of agreed criteria as to the appellant's duties from the outset of the employment and the negative reporting delivered by the co-ordinator, the appellant's immediate superior, to AE and passed on to CEO.

Both AE and CEO had knowledge of a significant unresolved issue between the appellant and the co-ordinator. In those circumstances the majority is of the view that a reasonable employer would have enquired further and not simply relied on the reports received from the co-ordinator. Due to its mistaken belief that the appellant was not their employee there was a complete absence of due process on the part of the respondent. It must follow that the dismissal was unfair.

The majority believes that there is a role for the appellant in the services provided by the respondent and the Tribunal orders that the appellant be re-engaged under the Unfair Dismissals Acts, 1977 to 2007 on the basis of thirteen hours per week either as an advocate with the XXXXXX programme or in a role similar to that previously enjoyed by her within four weeks of the issue of this determination

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)