

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

RP1930/2009

CASE NO.

UD1728/2009

- *claimant*

MN1667/2009

WT715/2009

against

EMPLOYER

-*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: Mr. P. O'Leary B L

Members: Mr. J. Reid
Ms. A. Moore

heard this claim at Dublin on 13th October 2010
and 22nd February 2011
and 23rd February 2011

Representation:

Claimant: Mairead Carey BL instructed by Ms. Joan O'Mahony, O'Mahony, Solicitor, 6
Clonkeen Road, Deansgrange, Blackrock, Co. Dublin

Respondent: Tom Mallon BL instructed by Janice Walsh, Byrne Wallace, Solicitors, 2 Grand
Canal Square, Dublin 2.
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The determination of the Tribunal was as follows:

Preliminary issue

On the first day of the hearing the issue was raised as to whether the claimant was an employee of the respondent. The Tribunal having heard the opening statements of both parties decided that they would have to hear the evidence in full to decide the claimant's status.

On the second day of the hearing the claimant's representative informed the Tribunal that the Chief Appeals Officer of the Department of Social Protection had deemed the claimant to be an employee of the respondent. The claimant's representative outlined that as a result of the Chief Appeals Officer decision the case as to whether the claimant was an employee or not could not be reopened in front of the Tribunal. This decision was final and the Tribunal were legally bound by it. The respondent could have appealed this decision to the High Court under the Social Welfare Acts but had not.

The respondent's representative referred to the Unfair Dismissals Acts 1977 to 2005 regarding the prerequisite of whether a claimant was an employee or not, this decision could not be delegated to the Department of Social Protection. The decision of the Department of Social Protection was an administrative determination. Social Welfare like Revenue statute could vary from year to year.

Both parties referred the Tribunal to case law. The Tribunal retired to consider this matter.

Determination

The Tribunal considered the submissions made on behalf of the claimant and the respondent in this matter regarding the question whether or not the claimant was an employee. The decision of the Chief Appeals Officer was opened to the Tribunal, which found that the claimant was an employee and insurable under the Social Welfare Acts from June 2004. This decision was not appealed by the respondent in this case.

The Tribunal noted Article 37 of the constitution:

“1. Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorized by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.”

The Tribunal finds that the Department of Social Protection Chief Appeals Officer is such a person authorised by law to exercise the functions and powers given to him by the Social Welfare Acts and therefore his decision once made and not appealed is final and conclusive on the matter and cannot be raised again in another forum. Issue estoppel applies in this matter. The Tribunal made the above decision having considered all the case law adduced by the parties and therefore the Claimant is an employee.

Cases considered were:

McLoughlin –v- Gordons (Stockport) Ltd (1978 IRLR 127 EAT)
Green and another –v- Hampshire County Council (1977G. No.3291)
Amstrad plc –v- Mike Walker (1993 E.L.R.173)

As the claimant was an employee the Tribunal proceeded with the matter. The claimant is a qualified electrician who worked for the respondent from 2001 until his contract ceased on the 19th May 2009. During the course of his employment he was treated as a contractor not as an employee,

however from the end of 2007 the claimant sought to have his employment status clarified with the respondent as he wished to become a permanent member of staff. The head of the corporate services gave evidence on behalf of the respondent that he had approached HR to clarify the claimant's position; HR had confirmed that the claimant was a contractor. The claimant provided his service to the corporate services division.

There are 150 people employed in the corporate services division, 100 of these are technical and general operatives. The claimant was equivalent to an electrical technician and the rates he was charging for his service was comparable to other contractors and an electrician.

Originally when the claimant commenced in 2001 with the respondent, he was employed to develop and maintain a computer system. The claimant worked on this system approximately 20 hours a week, mornings only, while in this position. This computer system required ongoing updating and implementation, this was done by the claimant. He would input data on behalf of the staff. The claimant in evidence explained in addition to this he was also involved in tendering service suppliers and administration. The claimant while in the respondent's employment "was never on the tools" as an electrician.

The respondents were developing a new premises (project A) in 2007 and as part of this; they set up a project team to fit out these premises. The claimant was moved from his work with the computer system on to this project team in 2007 on a full-time basis approximately 31 hours per week. In evidence the respondent expected project A to last 18 months and the claimant was informed verbally that this contract was on a fixed term basis. The claimant accepted that when he commenced on Project A he no longer had any involvement with the computer system; he had been involved with the training of the permanent member of staff who took over this position. The respondent explained that this computer system is now utilised directly by staff and the engineering supervisor who has been employed for 12 years ensures that the system is run smoothly.

The respondents informed the claimant that if there was no further work after project A was completed that his contract would be terminated. There had been plans to refurbish their main building and the claimant would have secured further work through this, however this plan is now on hold. The claimant informed the Tribunal that he was in shock when he was told on Christmas Eve 2008 that there would be no work available to him when project A was completed. The claimant's contract with the respondent terminated on the 19th May 2009.

The respondents gave further evidence that currently they have one electrician working for them who has been in their employment for over 20 years. This electrician is part of their engineering team. Currently, they have no requirement for an additional electrician so therefore there was no alternative work available for the claimant when project A was completed.

Determination

The Tribunal carefully considered the evidence adduced at the hearing. In the circumstances both parties acted in good faith, at the time of the claimant's termination both thought he was not an employee. The Tribunal finds that a redundancy situation existed in the respondent organisation and accordingly, the Tribunal determines that the appellant was made redundant and is entitled to his statutory redundancy lump sum payment under the Redundancy Payments Acts, 1967 to 2007 based on the following information:

Date of Birth: 10th May 1958

Date of commencement of employment: 30th June 2004
Date of termination of employment: 19th May 2009
Gross weekly pay: €1240.00

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period. Please note that there is a weekly ceiling of €600.00 on all awards made from the Social insurance Fund.

As the claimant is deemed to have been made redundant the claim under the Unfair Dismissals Act 1977 to 2005 is dismissed. The Tribunal awards the claimant the following under the Organisation of Working Time Act 1997 in respect of his holiday pay €4,466.00 for 2007, €7,192.00 for 2008 and €2,311.36 for hours worked in 2009.

The Tribunal award the claimant €2,480.00 being the equivalent of two weeks pay under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)