

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER- *appellant*

CASE NO.

TE74/2010

against the recommendation of the Rights Commissioner in the case of:

EMPLOYEE - *respondent*

under

TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994 AND 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Fahy BL

Members: Mr. W. O'Carroll
Ms H. Henry

heard this appeal at Galway on 7th April 2011

Representation:

Appellant(s) : Ms. Cliona Boland BL instructed by Mr Greg Nolan, Patrick Hogan & Co,
Solicitors, Dunlo Street, Ballinasloe, Co Galway

Respondent(s) : Mr. Alistair Purdy, Purdy Fitzgerald, Solicitors, Kiltartan House, Forster
Street, Galway

This case came before the Tribunal by way of an appeal by an employer (the appellant) against the decision of a Rights Commissioner (r-084716-te-09) under the Terms of Employment (Information) Act, 1994 and 2001.

Respondent's Case

The respondent gave direct evidence that he commenced working as a wages clerk and auctioneer's clerk for the appellant in November 1961. He was appointed as mart manager in 1973 and continued working in the capacity of manager and relief auctioneer until his retirement as manager in 2004. From 1973 to 2004 his duties were divided between manager and relief auctioneer. He was never provided with a contract of employment. Following his retirement as manager in August 2004 he returned to work two days later and carried out his duties as an auctioneer at a sheep sale. He continued working as an auctioneer four days per week doing approximately 2-3 hours per day until June 2009. He reported to the mart manager and was rostered for duty along with other auctioneers. He also assisted on office duties during busy periods and completed and signed off on VAT returns on a regular basis for the appellant. He

was paid a daily rate and did not issue an invoice for his time. At all times he considered himself to be an employee of the appellant organisation. He also acted as manager for a three month period in the absence of the regular manager who was unavailable for that period of time. He continued working for the appellant until the termination of his employment in June 2009.

Under cross examination he agreed that he retired as manager in 2004 and that an amount in the region of slightly less than €100,000.00 was paid into a pension fund for him by the appellant. He denied that he approached the appellant seeking to return to work as an auctioneer. He told the Tribunal that it was pre-understood that he would continue as an auctioneer following his retirement as manager. He received a P60 in 2004 but did not receive a P60 thereafter. He was paid a daily rate for his work and did not supply invoices.

He confirmed that he hired employees in his role as mart manager. He hired auctioneers and they did not supply invoices for their work. He told the Tribunal that the mart manager organised the rosters and had the option of changing the rosters if he wished. Changes were made to the rosters occasionally. He confirmed that he spent about 5/6 hours every two months completing VAT returns. Sometimes he completed this work from home. From 2004 until 2009 he spent about 180 hours doing this work. He accepted that in January 2010 he invoiced the appellant for an amount of €36,000.00 for the completion of VAT returns work. He also invoiced the appellant for amounts of €22,000.00 and €2,775.00 in respect of work done as acting manager and auctioneers fees. He did so as he was of the view that he was owed wages following the termination of his employment in June 2009. He did not receive any reply to this invoice. He accepted that he was responsible for paying his own tax during his period of employment as an auctioneer and he confirmed that he did not receive any extra payment for his auctioneering duties when he worked as mart manager. He was on a salary as mart manager. Post 1994 he did not request his terms of employment from the appellant.

Appellant's Case

(LC) gave evidence that he has worked as an auctioneer at the appellant's premises for the past 18 years. He works as one of two main auctioneers. He considers himself to be self-employed and does not consider himself to be an employee of the appellant organisation. He is paid a standard daily rate and understands that there is no obligation on the appellant to provide work for him. Since the appointment of a new manager he submits invoices for his work. Prior to the appointment of the new manager he was paid by the appellant without submitting invoices. He told the Tribunal that he is free to work as an auctioneer at other mart sales if he is not working for the appellant at a sale.

(MM) gave evidence that he is the chairperson of the appellant organisation. He told the Tribunal that the respondent approached him seeking to remain working as an auctioneer following his retirement as mart manager. The witness was happy to accede to this request as the respondent was well liked and trusted by the appellant. He agreed that the respondent carried out other duties along with his auctioneering duties and was very popular. From 2004-2009 he understood that the respondent was operating as a relief auctioneer.

(DOB), Mart Secretary, gave evidence that a sum of €96,000.00 was paid to the respondent following his retirement. He was not in a position to provide the Tribunal with any written documentation to reflect this payment. He was unaware if there was any documentary record of this payment.

Determination

The Tribunal heard comprehensive evidence from both parties in the case. The Tribunal notes that the respondent was employed as mart manager from in or about 1973 to August 2004 where in addition to his role as mart manager, the respondent also performed as part of his contract of employment, relief auctioneering duties. In August 2004 the respondent retired from his employment and evidence was adduced at the hearing which showed that he received a sum of approximately €96,000.00 as a retirement package which was paid into a pension fund for the respondent. The Tribunal is satisfied that the payment of €96,000.00 was in recognition of the respondent's long service with the appellant and represented a final payment of any and all financial obligations to the respondent up to that time. The Tribunal is satisfied that the respondent's contract of employment with the appellant had now terminated in August 2004.

The respondent returned to work with the appellant as an auctioneer and there was evidence before the Tribunal that he would work for some two to three days per week and was paid a fixed payment of €180.00 per day. There was some dispute as to who initiated the return to work for the respondent. The respondent said that it was the appellant who requested that he return to work as an auctioneer whereas the appellant said the request came from the respondent. The Tribunal is satisfied that when the respondent returned to work as an auctioneer with the appellant in August 2004, he did so in a different capacity and with a different working arrangement from that which existed between the parties up to the date of his retirement. The respondent accepted that he retired from his position as mart manager in August 2004. The Tribunal has carefully considered the submissions of both the appellant and the respondent and have had an opportunity to consider the authorities opened by both parties, which have been most helpful.

The Tribunal is satisfied that after August 2004 and up to the date of the respondent being let go from the appellant's place of work he was employed under a contract for services. Accordingly the appellant's appeal against the decision of the Rights Commissioner succeeds.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

