EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE - *appellant*

CASE NO.
RP1169/2008
MN1276/2008

against

EMPLOYER
- *respondent*

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr T. Gill
Mr T. Kelly

heard this appeal at Nenagh on 26th April 2010

Representation:

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Appellant: Ms. Diane Jackson, Branch Organiser, SIPTU, No 3 Branch, Forster Court, Galway

Respondent: Mr Patrick Treacy BL instructed by Patrick F. Treacy & Co., Solicitors, 29 Pearse Street, Nenagh, Co. Tipperary

The decision of the Tribunal was as follows:-

The respondent contended that the claimant was not an employee and accordingly was not entitled to maintain a claim under the above Acts.

Summary of the Evidence

The manager of mart B (MMR) invited the appellant to sell sheep at the mart on Thursdays. Having agreed the daily rate of pay with MMR the appellant worked there every Thursday for 22 years, from June 1985 until December 2007, with the exception of holidays and one or two breaks. It was the appellant's understanding that he was to work every Thursday unless the manager informed him that there would not be a sale. MMR instructed him in his duties and provided himwith a clerk. MMR told him when to commence and what to do. If the appellant

had a grievanceand if customers complaints were made the manager dealt with them. Mart B was taken over by therespondent in January 2005 and a new CEO was appointed at that time. MMR had been themanager from April 1992 to 2005.

The appellant's evidence was that he was paid a fixed daily rate irrespective of the hours he worked or the sales he made. He was paid by cheque at the end of the month, week or when he wanted it. He was a member of a trade union that negotiated some increases in his rate of pay. He did not sign in for work but he did have to provide the respondent with a list of days he worked. He did not have to supply any tools or equipment to carry out his role, he only supplied labour. The respondent provided him with a place to work, clerk and stock. Over the years he always attended the Christmas parties. He was not exposed to financial risk and did not have the opportunity to make profit. He was not paid travel expenses. His employment with the respondent was terminated on 20th December 2007. The appellant also worked in other marts on Mondays, Tuesdays, Wednesdays and Saturdays. In one of these marts he was treated as a PAYE employee and provided with P60s.

The appellant's evidence was that his accountant did his yearly tax returns and informed him that he did not have to register for VAT. He maintained that the respondent treated him in the sameway as he was in mart G where his PRSI, holiday pay and pension contributions were paid. Henever knew that the respondent did not pay his PRSI. He had no pension rights with the respondentas this had only come in over the last few years. He received €200.00 per day in to his hand fromthe respondent. He did not know whether he was taxed as an employee or self-employed personbecause his accountant organises his tax affairs. He got a tax clearance certificate because heneeded it to get his auctioneers licence.

CEO's evidence was that there were no records in Mart B to show that the appellant was treated as an employee before 2005: there was no record of his having filled out form 12A; P45s were issued to all employees at the time of the transfer of business to the respondent but none had been issued to the appellant; there were no P60s or tax deduction cards in relation to him or any record of pay slips made out to him. The respondent's P35 for the year 2007 listing their employees, does notinclude the appellant's name. There is a clocking in system for the employees but the appellant didnot clock in. A full-time auctioneer commenced employment with the respondent in August 2005. Extracts from the respondent's Cash Payment Journal show that the appellant was paid auctioneerfees; he was paid a fee and was responsible for his own tax affairs. The respondent had the samearrangements in place for the appellant as for the other self-employed auctioneers they engaged. This extract also showed a wages column listing all employees paid and a separate column forauctioneer's fees where payments made to the appellant are listed.

The appellant's relationship with the respondent continued over 22 years but the nature of the appellant's engagement with the respondent had changed over a period in 2001 and in 2003. Therewere no auctions during the period 26 January 2001 to 19 June 2001 due to the foot and mouth crisis. The appellant had not received any payment from the respondent in that period. Not all ofthe mart employees were laid off during the foot and mouth crisis. The respondent had facilitatedthose who had been laid off by completing the relevant forms so they could claim social welfare. The appellant was not so facilitated, because he was not an employee. The appellant's evidence was that he had received social welfare during that period. When it was put to the appellant that hehad received social welfare during the period on foot of his engagement in another mart which paidhis PRSI, his evidence was that he did not know. Over the first seven months in 2003 the sheep andcattle sales were consolidated and held on Mondays; the two auctioneers worked alternateMondays during the period. The appellant disagreed and maintained that that both auctioneers werepresent on the Mondays during that time. Payment records

produced in evidence confirmed the respondent's position. The consolidation of sales did not work out and the appellant reverted toselling sheep on Thursdays. CEO's position was that the respondent was not under any obligationto provide the appellant with work every Thursday but it was the practice to so do.

The appellant's position was that some years prior to the take over by the respondent he had informed MMR that he was entitled to holiday pay and for the following three or four years up until the take-over in 2005 he was paid 8% of his earnings at the end of the year; this was holiday pay. MMR was not in attendance at the hearing. The appellant accepted had not received holiday pay from the respondent and did not request itbut this was because the mart was not doing too well.

The appellant's position was that he did not have the authority to sub-contract his work to someone else. Under the former owner MMR arranged holiday cover for him but on one occasion he gave MMR the name and phone number of a livestock auctioneer (LA) who would do the sheep sales during his holidays. In 2005 when he was going on holidays CEO asked him if he knew anyonewho would do the auctions in his absence and asked him to ring LA, which he did out of courtesybut he did not pay LA for this work. CEO' s position was that the appellant arranged a substitute/replacement for his holidays in 2005 and he understood the appellant to say that he would look after LA's fees. CEO's evidence was that he had no role in engaging LA but approvedthe replacement on the basis that the appellant was subcontracting his work to LA . There were 49auctions in 2005 and the appellant was paid the fees for the whole 49 sales. .

LA confirmed that he had covered the sheep sales for the former owner over two or three years prior to the business transfer to the respondent and MMR always paid him. He also did the sheep sales at Mart B for the respondent in 2005. LA understood that that he was employed by the respondent. LA could not recall if management or the appellant informed him of the number of weeks he had to work in 2005. He did not receive any payment for the 2005 holiday cover he provided and he did not pursue the matter because he thought he might get more work through the respondent.

The appellant never requested a contract of employment from him and nor did he find any record of the appellant requesting same previously. The appellant accepted that he never requested a contract of employment in writing but during the course of his employment he had asked MMR for a contract of employment a number of times. He agreed that he had never received a code of conduct or disciplinary procedures or any training from the respondent.

In April 2007 the respondent advised the appellant that the sheep sales were to be consolidated into R mart which would result in the termination of his engagement with the respondent. The Board confirmed this decision to the appellant in early Decdmber 2007. On 20th December 2007 the appellant announced to their clients at the auction that it was the last sheep sale in Mart B.

CEO's evidence was that he had requested the appellant to submit invoices for payment of his fees and the appellant did so. The appellant denied ever having furnished invoices and maintained that he had supplied a list of days worked. CEO agreed that the appellant had submitted his invoices on plain paper rather that his headed notepaper after April 2007, and the notification to him of the impending consolidation of the sheep sales, but prior to that they had been submitted on headednotepaper bearing the appellant's name and including a description of the appellant's business as "*livestock and property sales"*, followed by his address. A number of these

documents predating April 2007 were presented in evidence. The appellant's position was that these documents were notinvoices but billheads and referred to another copy of a plain page on which he submitted for payment for the period 31st June 2007 to 20th December 2007. The appellant explained that thiswas how he was paid when the respondent took over the mart, prior to this he was paid everymonth.

The appellant described his occupation as an auctioneer involved in livestock and property sales. The appellant has his own auctioneering license for about 15 years and prior to this he had worked on the respondent's licence. The respondent produced its auctioneering license and the appellant is not named on this.

Determination

To be entitled to a redundancy payment under the above Acts the appellant must inter alia be an employee. The question whether the relationship in a particular instance is that of employer and employee has been considered by the courts in a number of cases. The principles, tests or criteria enunciated by the courts are but aids in the endeavour of determining the nature of the work relationship between the parties. It is clear form judicial decisions that there is no precise test or exhaustive list of the criteria to be applied in this endeavour. However, it is clear from the judgments that the reality of the situation in each case must be examined in its entirety. It is apposite at this stage to quote a passage from *Henry Denny & Sons Ltd v Minister for Social Welfare* [1998] IR34 where Keane J. observed:

> "The observations of Lord Wright, of Denning L. J. and of the judges of the U.S. Supreme Court suggests that the fundamental test to be applied is this: Is the person who has engaged himself to perform these services performing them as a person in business on hisown account. If the answer is no then the contract is a contract of service. No exhaustivelist has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to theweight which the various considerations should carry in particular cases. The most that canbe said is that control will no doubt always have to be considered, although it can no longerbe regarded as the sole determining factor; and that factors which may (emphasis added) beof importance are such matter as the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risks he takes, whatdegree of responsibility for investment and management he has, and whether and how farhe has an opportunity of profiting from sound management in the performance of task"

Later in his judgement Keane J. continued:

> "It is, accordingly clear, that while each case must be determined in the light of its particular facts and circumstances, in general (emphasis added) a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself."

Edwards J in his judgment in *Minister for Agriculture and Food v Barry and Others* [2008] IEHC 216, having reviewed major English decisions was satisfied that Keane J in the above passage was not endorsing the position of there being a "fundamental test":

> "while each case must be determined in the light of its particular facts and circumstances, in general (emphasis added) a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself.
>
> The words "in general" constitute a caveat that the approach in question is not one of universal application. By definition they contemplate the possibility of exceptions to what is generally true."

In light of the above, the Tribunal having carefully considered all of the evidence adduced, submissions made and other decisions, finds that the appellant is not an employee.

It is satisfied that the appellant is a professional auctioneer who supplies his services to the respondent and other marts for a fee. He provided invoices at irregular intervals for payment for these services. When the claimant became aware that the three marts were amalgamating in 2007, he changed the presentation of his demand for payment. He was responsible for his own tax affairs and was not in receipt of holiday pay. Furthermore, there was no corroborative evidence before the Tribunal that the claimant at any stage during his twenty-two-year engagement with the mart attempted to establish his status as an employee.

Accordingly, his appeals under the Redundancy Payments Acts 1967 – 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 are dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: CASE NO.
EMPLOYEE -appellant RP1169/2008
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EMPLOYER

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REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. Quinn BL

Members: Mr. W. O'Carroll
Mr. J. Le Cumbre

heard this appeal at Nenagh on 29th May 2009

Representation:

Appellant(s) :
Ms. Diane Jackson, Branch Organiser, S.I.P.T.U., No.3 Branch, Forster Court, Galway

Respondent(s) :
Mr. Patrick Treacy BL instructed by
Patrick F. Treacy & Co., Solicitors,
29 Pearse Street,
Nenagh, Co. Tipperary

The decision of the Tribunal was as follows:-

RULING OF TRIBUNAL
ON RESPONDENT'S APPLICATION FOR DIRECTION
AT CONCLUSION OF APPELLANT'S CASE

At the conclusion of the Appellant's evidence, Counsel for the Respondent, made an application to the Tribunal for a direction dismissing the Appellant's claim.

In a submission in support of his application, at the outset, Counsel invited the Tribunal to hold that "even on a *prima facie* basis, the burden of proof which rested upon the Appellant had not been discharged."

Counsel then enumerated a number of factors which he contended were inconsistent with the Appellant being employed under a contract of service with the Respondent, namely

(i) a period of engagement of 1-2 hours weekly.

(ii) the absence of a written contract of employment and a failure by the Appellant to request a statement in writing of the terms and conditions of his employment,

(i) the form and content of documentation submitted as *"invoices",* by the Appellant to the Respondent in the course of his employment with it and which bore the following heading PAT DEVANE ESTATES, Livestock And Property Sales, Kilmore, Togher, Tuam, County Galway and provided fixed line and mobile telephone numbers.

(iii) the responsibility of the Appellant for the payment of income tax in respect of sums earned by him with the Respondent and the admission by him that he would have operated a VAT system had his earnings been above the appropriate threshold.

(ii) the absence of any official tax relationship between the Appellant and the Respondent, coupled with all the Respondent's official, financial and accounting documentation being indicative of the Appellant's status *vis a vis* the Respondent, as that of an independent contractor, as opposed to an employee.

(iv) the absence of any provision for, the payment of a travel allowance or expenses to the Appellant, or the availability of a pension scheme for him.

(i) the absence of any notification to, or interaction with the Appellant in the form of provision of a P60 or P45 at the time of the Respondent's acquisition of the business, which constituted a transfer of undertakings.

(ii) the licence under which the Appellant operated in the course of his employment with the Respondent, was his own personal auctioneering licence.

In reply, the Appellant's representative submitted that,

(i) there was no statutorily prescribed minimum period of hours per week that an employee must work to qualify for a redundancy payment.

(ii) the provision of a written contract of employment was the prerogative of the Respondent, whose testimony was that he had made a request of a Mr. W. at one time for a statement of terms and conditions of his engagement.

(iii) the testimony of the Appellant was that the documents submitted were not in the nature of *"invoices",* but merely his record of attendances for the purposes of reconciling same with the Respondent.

(iv)-(v) the tax status or treatment of an employee with an employer, was not determinative of the nature or status of their employment relationship in law and referred to the case of *Henry Denny & Sons (Ireland) Limited, trading as Kerry Foods –v- The Minister for Social Welfare [1998] 1 I.R. 34*

(vi) the absence of any provision by an employer for the payment of travel expenses, or availability of a pension scheme, to an employee is not determinative of the nature and status of their employment relationship in law, nor uniquely inconsistent with employment under a contract of service.

(vi) the Claimant had previously received holiday pay from the transferor of the undertaking and was entitled to have all his entitlements maintained on the transfer of the

undertaking concerned and that it would not be appropriate to issue such documentation in the nature of a P45 or P60 in a transfer of undertaking situation.

(viii) for the first 10 years of his employment, the Claimant was not in possession of an auctioneer's licence in his own name and was named on the permit or licence of the operator of the mart at the time, as a person authorised to conduct auctions on its behalf and that an auctioneering licence was only obtained by the Claimant in more recent times when he commenced a property sales business.

It is important to note that in making his request for a direction, Counsel informed the Tribunal that there would be evidence available from the Respondent in the event that the application for a direction was unsuccessful.

In such circumstances and with reference to the decided authorities of ***O'Toole –v- Heavey, 1993 2 I.R. 544*** and ***O'Donovan –v- Southern Health Board, [2001] 3 IR 385,***the Tribunal is of the opinion that, its appropriate function, in ruling on the application for a direction, is purely to consider, assuming that the Tribunal was prepared to find that all of the evidence of the Claimant was true and taking his case at its highest, whether there was any evidence adduced, from which it could be inferred, that the Claimant was employed by the Respondent under a contract of service.

Whilst the Tribunal also considers that having regard to the decision of the Supreme Court in ***Hetherington –v- Ultra Tyre Service Ltd [1993] 2 IR 535***it could properly defer its decision on the issue, as to whether the evidence adduced by the Claimant is not sufficient to establish a case against the Respondent, until it has heard all of the evidence, it is the unanimous determination of the Tribunal, that having regard to the nature of the threshold concerned, there was some evidence adduced before it, from which it could be so inferred, that the Claimant was employed by the Respondent under a contract of service.

In this regard, the Tribunal notes for example the evidence of the Claimant that he supplied labour only, received a fixed weekly wage, was under the control of the Respondent's Manager as to how, when and where his work was to be carried out, could not sub-contract his work or organize a replacement for himself if he was unavailable, was never in a position to benefit financially from how he performed his tasks and attended the Respondent's Christmas parties

However, it is important to note, that the Tribunal is cognisant of the fact that there is a considerable distinction between

(i) evidence from which the status of the Claimant as an employee of the Respondent under a contract of service may be inferred, and

(i) whether the status of the Claimant as an employee of the Respondent under a contract of service, has, in fact, been established, on the balance of probabilities, having regard to all of the circumstances of this case.

For the present, it is neither necessary or proper, to rule at this stage, whether or not it has been so established by the Claimant, as a matter of probability, that he worked with the Respondent under a contract of service and for the present, the Tribunal merely determines that the hearing should proceed to hear the available evidence of the Respondent, as so intimated by Counsel for the

Respondent.

Sealed with the Seal of the Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)