

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:
EMPLOYEE

- claimant

CASE NO.
MN29/2010
UD32/2010
WT19/2010

against
EMPLOYER
under

- respondent

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr G. Hanlon

Members: Mr P. Pierson
Ms. A. Moore

heard this claim at Cavan on 23rd May 2011

Representation:

Claimant(s) : Mr. Kieran O'Callaghan BL instructed by:
Mr Barra Ó Cochláin, John Glynn & Company, Law Chambers,
The Village Square, Tallaght, Dublin 24

Respondent(s) : Michael J Ryan, Solicitors, Athbara House, Cavan

The determination of the Tribunal was as follows:-

The claimant gave sworn evidence with the assistance of a Lithuanian interpreter.

Respondent's Case:

The Principal of the school gave evidence. He explained that the school was funded by both the Department of Education and Skills and voluntary fundraising. An advertisement was placed yearly in the local paper for people to tender their bid for the school's cleaning contract. A Board of Management oversaw the running of the school. The caretaker and cleaning staff did not have contracts of employment.

In January 2008 an advertisement was placed in the local paper for school cleaners as the person employed at the time was leaving to move elsewhere in the country. The claimant applied for the position and was interviewed by the witness. The claimant had poor English and the witness mainly spoke to her partner. He handed over a list of cleaning duties to be carried out.

The memo also stated the fee of € 60 to be paid per day and the contract was for three days a week. The cleaning schedule was to be carried out between 3.00 p.m. and 8.00 p.m., which was after school hours. The claimant was to look after the payments of her own PRSI and tax affairs. The claimant would not be paid during the school holidays, as no cleaning would need to take place.

The claimant commenced employment on January 28th 2008. During the summer of 2008 the school was extended. It was decided the claimant and her partner would carry out a major clean of the premises. It was agreed they would be paid € 10 per hour and a total amount of € 690 was paid to the claimant for the work. After this it was decided that because of the extra duties to be carried out the claimant would be paid € 80 per day for a five-day week of work.

When asked he stated that he had left hand written notes for the claimant concerning certain tasks to be undertaken during her cleaning duties. The Board of Management decided at one of their meetings that the cleaning bill was too high and felt they could tender it out to get a cheaper price. The witness wrote a note to the claimant stating the Board of Management had decided to advertise the cleaning contract for the period September 2009 to June 2010 and was told to check the local paper for the advertisement.

On June 20th 2009 the claimant submitted her tender for € 14,700 but this was declined. The claimant was informed. The claimant's partner asked and received a reference for the claimant. When asked he stated that it had been a misunderstanding that the claimant had been issued with a P60 and P45 as she had not been an employee. He said that he had instructed the company's accountant to issue them.

On cross-examination he disagreed the claimant had been an employee. When shown the P60 and P45 he said that the accountant must have come up with the figure for tax and PRSI the claimant had paid during her employment as he, the accountant, must have presumed she was an employee. When put to him he agreed he had directed the claimant's list of duties. The contract was put out to tender in June 2009 as the school's funds were running low. When asked by the Tribunal if the claimant had given a price in her first tender in January 2008 he replied that he did not think she had.

Claimant's Case:

The claimant gave evidence. She explained that she had applied for the position of cleaner having read an advertisement in the local paper and submitted her c.v. She and her partner met with the Principal and as her English was poor her partner did most of the talking. The witness told the Tribunal that she had not offered a price for the job. The Principal gave them a list of duties and the hours and price for the position. She never told the Principal what duties she would carry out. When asked she stated she was not registered as a self-employed person, did not provide her own insurance and was not registered for V.A.T.

In June 2009 she received a letter from the Principal. She believed he wanted her to make a "service contract" with her. However she realised that the respondent was looking for someone to work for them for less money. She submitted a tender for the position, as she did not want to lose her job. The respondent provided all the equipment for her to carry out her duties. The position was offered to someone else and she was not afforded the right to appeal the decision. The claimant gave evidence of loss.

On cross-examination she said she felt she should have been paid for annual leave and bank holidays. She was available to work during the time the school was closed. She had been paid the sum of € 200 for a cleaning job she had carried out during the Christmas holidays of 2008. When

asked she stated that she did have a set of keys for the premises and would often meet staff leaving work for the day.

When put to her had she paid the PRSI quoted on the P60 she replied that she had not paid it herself. She assumed that and the tax was paid by “whoever paid” her. She explained that when she commenced employment with the respondent she had handed the Principal a form 12A, which is an application for a tax credit certificate. When put to her she had not been paid enough money to pay V.A.T. or tax she replied that she knew nothing about that. When asked by the Tribunal she stated that this position was her first employment in the Republic of Ireland, which was why she had handed in the form 12A to the Principal for a tax credit certificate. When asked she stated that in order to receive a payment from the Department of Social Protection she had to submit her P45.

Determination:

The Tribunal have carefully considered all the evidence adduced and the submissions made. The claimant, on the commencement of her employment, submitted a form 12A to the respondent in order to register with the Revenue Commissioners for tax credits. On the termination of her employment she was given a P45 and P60 detailing her earnings, tax and PRSI paid. Having considered all this information the Tribunal find that the claimant was an employee and she was unfairly dismissed.

Accordingly the Tribunal award the sum of € 8,000.00 under the Unfair Dismissals Acts, 1977 to 2007. An award has also been made under the Organisation of Working Time Act, 1997 under the following calculations in respect of monies earned during her employment:

2008: 8% of € 10,092 earned = € 807.36 awarded under the Act

2009: 8% of € 10,575 earned = € 846.00 awarded under the Act.

The Tribunal also awards the sum of € 1,440, this being 18 bank holidays owed under the Organisation of Working Time Act, 1997.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)