EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
EMPLOYEE **-claimant**	UD365/2010 RP2819/2009 MN340/2010 WT159/2010
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 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. L. O'Cathain

Members: Ms. M. Sweeney
Ms. H. Kelleher

heard this claim at Cork on 19 October 2010
and 15 February 2011

Representation:

Claimant: In person

Respondent: Ms. Angela Grimshaw, Peninsula Business Services Limited,
Unit 3 Ground Floor Block S, East Point Business Park, Dublin 3

The determination of the Tribunal was as follows:

At the outset a jurisdictional point was raised in that the respondent did not accept that the claimant had been an employee. The Tribunal decided to conduct a combined hearing into both this issue and the substantive matter relating to the ending of the arrangement between the parties. At this point the claim under the Redundancy Payments Acts, 1967 to 2007 was withdrawn.

The claimant is a draughtsman who specialises in the use of a particular software program (the program), which is widely used in the structural steel industry. From 1997 the claimant worked in

the UK as a self-employed program detailer and formed his own company for the purpose. In the autumn of 2005 the respondent, a steel fabrication and structural engineering business, which had some 75 employees including four program detailers, had a requirement to hire another detailer. The claimant responded to an on-line advertisement and came for an interview with the managing director (MD) at the respondent's premises. The claimant rejected the offer of employment made as a result of this interview. Following this rejection MD and his father, the founder of the respondent, then met the claimant in Manchester and made an increased offer to him.

On 7 October 2005 the claimant sent an email to MD in which he agreed to join the respondent. A section of the email reads "In the first instance we invoice salary/12 each month as the UK limited company as though your company is hiring my UK companies services. Then when I am over, I find an Irish accountant and my UK accountant will speak to him and we will transfer to being an Irish company invoicing salary/12 each month. That way he believes we can take advantage of the claimant's wife being a director as I do now". It is common case that the respondent wanted the claimant to be an employee as were the rest of their workforce and that the afore-mentioned arrangements were to be put in place at the behest of the claimant.

The claimant commenced working for the respondent, whilst still residing in the UK, from November 2005 and his company invoiced the respondent for the first three months and did not add VAT to the amount invoiced. From February 2006, when the claimant moved to Co. Cork, he submitted invoices in his own name and added VAT to the amount invoiced and this was paid to the claimant. The claimant consulted an accountant and decided to take advantage of his wife's tax allowance as a partnership and be self-assessed for tax.

The claimant was reimbursed for his removal expenses and the respondent paid the rent on the claimant's house for 6 months. The claimant worked regular hours, was paid the same every month regardless of whether he took holidays or was sick. He received a bonus at the end of 2006. The claimant retained an individual licence for the program and was reimbursed for the cost of this by the respondent. It is accepted that the electronic key for the claimant's licence of the program rarely if ever left the respondent's premises.

No written contract of employment was adduced to the Tribunal, the claimant's position is that he received such a document but no longer has it. The respondent's position is that no written contract was ever created. It is common case that once the claimant began to submit VAT invoices from February 2006 he never raised the subject of his status in the respondent until the arrangement between the parties came to an end.

From October 2008 the respondent began to reduce its workforce because of the downturn in the economy. By August 2009 the respondent had only one detailer apart from the claimant. On 5 August 2009 it was agreed that the claimant could take parental leave during September 2009. When the claimant returned on 1 October 2009 some detailing work had been sent off-site to an independent detailer. On 20 October 2009 MD told the claimant that, due to the downturn in the construction industry, they were giving him 30 days notice that they no longer needed his services. Whilst the claimant last worked for the respondent on 22 October 2009 he received payment in lieu of the notice period. The remaining detailer has worked for the respondent for in excess of 30 years.

Determination

The Tribunal is satisfied that, ab initio, the arrangement that existed between the parties was at the behest of the claimant who made no attempt to change that situation until the arrangement came to an end. In those circumstances the Tribunal is not satisfied that an employee/employer relationship existed between the parties. It finds support for this conclusion in *Massey v Crown Life Insurance Co*. 1978 ICR 590 where in the English Court of Appeal, Lord Denning stated that if the working relationship is ambiguous then the employee "having made his bed as being self employed he must lie on it". Accordingly, the Tribunal has no jurisdiction to hear the claims under the Unfair Dismissals Acts, 1977 to 2007 or the Minimum Notice and Terms of Employment Acts, 1973 to2001. No evidence was adduced under the Organisation of Working Time Act, 1997.

In the event that the Tribunal is in error in regard to the preliminary issue it was necessary to consider the substantive matter. In that regard the Tribunal is satisfied that, if the claimant had been an employee, the decision to end the arrangement was not unfair. Additionally the claimant received notice in excess of the entitlements of an employee with between two and five years service under the Minimum Notice Acts.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)