

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE –**claimant**

UD393/2010

against

EMPLOYER –**first named respondent**

EMPLOYER –**second named respondent**

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms P. Clancy

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

heard this claim at Galway on 3 October  
and 14 December 2011

#### **Representation:**

Claimant:

Ms Kate Kennedy BL, instructed by Ms Hilary Molloy,  
Blake & Kenny Solicitors, 2 St. Francis Street, Galway

Respondents:

Mr John Brennan, IBEC West Regional Office,  
Ross House, Victoria Place, Galway

The determination of the Tribunal was as follows:

#### **Preliminary Issue**

The respondents' position was that the claimant had worked under a contract for services and that at the time the relationship ended the claimant was providing that service to the second named respondent.

The first named respondent is an organisation which provides services for people with intellectual disability. The second named respondent, which has existed for in excess of fifteen years as part of the first named respondent, provides opportunities for service users of the first named respondent, and others, to express themselves by in a creative way. Following receipt of funds from FAS under a local training initiative (LTI) from December 2007 it became necessary for the second named

respondent to become incorporated and this was achieved on 11 June 2009.

In early 2007, following an injection of funds and in response to the recognition of the need to get help in fundraising, the director of the second named respondent (the director) approached the claimant and he agreed to fund raise on behalf of the second named respondent on a one day a week basis. This arrangement began in April 2007, in May 2007 the claimant began to fund raise on two days a week and he continued to submit invoices to the second named respondent on a weekly basis. He was at all times paid by the first named respondent being responsible for paying his own tax and producing a tax clearance certificate to the first named respondent. The claimant was not able to delegate another to perform the work, he had little or no choice in the days of the week he worked and received a fixed amount of remuneration per day. The claimant received pay for periods which were taken as holidays.

From December 2007 the second named respondent was in receipt of LTI funding from FAS and from this time the claimant worked four days a week with the rate of remuneration calculated from an agreed salary scale. He further received back pay in November 2008 following agreement on an adjustment to the pay scales dating from December 2007 when the LTI began. From this time the claimant submitted his weekly invoices to the first named respondent. Following the incorporation of the second named respondent there was no communication from either respondent regarding any change to the relationship between the parties.

### **Preliminary Determination**

In its preliminary determination given ex-tempore on the first day of hearing the Tribunal found that an employee/employer relationship existed between the claimant and the first named respondent.

### **Substantive Issue**

As previously stated the claimant was hired to fund raise, specifically to make grant applications and to seek corporate sponsors, on behalf of the second named respondent from April 2007. What started as a one day a week commitment rapidly, by May 2007, became two days a week. In December 2007, following the introduction of the LTI through FAS funding the claimant moved on to a four day week. The claimant became the LTI administrator as co-ordinator of the scheme. The first named respondent's sector manager (SM) told the Tribunal that as the first named respondent was under pressure from the HSE in regard to its whole time equivalent employee (WTE) analysis the decision was taken not to put the claimant on a fixed term contract but to retain the existing employment arrangement.

In the summer of 2008 additional funding became available for an assistant administrator; it was a requirement of FAS that interviews be held for this position. The director, who at all times has been an employee of the first named respondent, was successful at interview for the position of assistant administrator. When it was pointed out that the director as the claimant's line manager was also the assistant to his role as co-ordinator this apparent discrepancy was obviated by making the director the co-ordinator and the claimant the assistant co-ordinator. This was accomplished without any drop in pay for the claimant.

Following the incorporation of the second named respondent the positions of the co-ordinator and the assistant co-ordinator were advertised. The director was one of seven candidates for the

co-ordinator role and was successful at interview. It was conceded by SM, who was on the interview panels, that if the director had not been successful that would have caused a difficulty as the role of co-ordinator had been subsumed into the director's role. There were some 150 applications for the position of assistant co-ordinator of which eight, including the claimant, were interviewed on 21 July 2009. The claimant was unsuccessful at interview. Immediately following the interview he went abroad on holiday and learned of his failure to get the position in a voice mail sent to him by the director. No written correspondence concerning his failure to obtain the position was opened to the Tribunal. The claimant was paid up until 17 August 2009.

## **Determination**

SM told the Tribunal that difficulty with WTE analysis led to the decision not to put the claimant on a fixed-term contract from December 2007. Regardless of that decision the Tribunal has already found that the claimant was an employee of the first named respondent. The evidence of the FAS Manager called to give evidence at the Tribunal was that, whilst there had been a necessity to advertise the assistant co-ordinator position in 2008, there was no requirement from FAS for any interview in 2009 as the positions were already filled. The first named respondent chose to interview for the position of assistant co-ordinator in July 2009 in circumstances where there was an incumbent who had been working for over two years at this time. The failure of the claimant to be confirmed in the position he already held amounts to a dismissal without any or fair procedure. Such dismissal is unfair. The Tribunal awards €37,500-00 under the Unfair Dismissals Acts, 1977 to 2007

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)