

## EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE –**claimant**

UD715/2010

against

MN674/2010

EMPLOYER  
–**respondent**

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

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 4 October  
and 15 December 2011

#### **Representation:**

Claimant:

Mr Alastair Purdy, Purdy Fitzgerald Solicitors,  
Kiltartan House, Forster Street, Galway

Respondents:

Mr Brian Foley BL instructed by Ms Gráinne Gleeson,  
Mason Hayes & Curran Solicitors, South Bank House,  
Barrow Street, Dublin 4

The determination of the Tribunal was as follows:

There was a preliminary issue in this case whereby the respondent contended that the claimant was not an employee as defined in the Unfair Dismissals Acts but rather an independent contractor.

The claimant’s relationship with the respondent began in August 2006 when she was recommended to the respondent’s regional manager (RM) as a possible candidate for a role of program director/trip leader (PD). The claimant had experience as both a tour guide and a coach driver having performed both these roles in the preceding eighteen months for other companies. The respondent, which is based in the USA, operates tours throughout the world. Some of those tours come to Ireland and it was solely for the purpose of guiding Irish tours that the parties became involved with each other.

The respondent operated two types of tours, one for a group of sixteen people for twelve days and a second for 44 people with a duration of twelve or seventeen days. In order to learn about the respondent's operations the claimant acted as a driver for the coach company providing the transport for one of the respondent's tours.

In or around October 2006 the claimant attended a workshop run by the respondent in Dublin for PD's. She then attended a four-day spring workshop in Ennis in February 2007. At the end of this workshop the claimant received a copy of the respondent's program director & trip leader handbook. The claimant was then required to provide RM with a list of block-off dates when she was unavailable to act as PD on the respondent's tours. She was then offered some tours throughout 2007 and it is common case that the claimant was very good at her job.

The claimant's position is that she intended to use some of her block-off dates to do tours for other companies but that RM scheduled her for a tour for the respondent at the same time. It is further her position that this pattern of scheduling tours for her over her block-off dates continued in 2008. It is accepted that the claimant acted as guide on some tours for other companies during the period she was involved with the respondent.

On 19 February 2008, during the spring workshop, the claimant signed an independent contractor agreement (the agreement). This document sets out the duties of a PD, it also provides

"As an independent contractor the PD agrees to accept individual assignments from the respondent periodically when his/her schedule and/or other circumstances permit. The rate of pay for such assignments shall be a contract payment per calendar day worked during such assignment plus an allowance for meals and actual authorized expenses in accordance with the respondent's then-current policies and as detailed on the Addendum entered into in connection with this Agreement. The PD may receive, where applicable, authorized expense monies before the tour departs and will receive the contract payment within a reasonable amount of time after the respondent receives the final reports on the assignment. All final documentation must be submitted within seven calendar days after the completion of an assignment."

It further provides

"Both parties to the Agreement acknowledge that the PD is free to exercise reasonable independent judgment in the performance of his/her services and that, as an independently established business, the PD is free to accept individual assignments from other tour companies. The parties also agree that the respondent, at its sole discretion, may cancel this Agreement at any time and for any reason, with or without cause, and that this Agreement is not to be construed as a guarantee of any future assignments."

## **Determination**

If this case were to be determined on the basis set out in the Code of Practice for determining Employment or Self-Employment status of Individuals (the code) there is no doubt but that many features of the relationship between the parties point to there being an employee/employer relationship in existence. However before any analysis of the points covered in the code is embarked upon it is necessary to consider the question of mutuality of obligation between the parties as were that to be absent there can be no question of the claimant being an employee.

There is no doubt that once tours were allocated then there was an obligation between the parties but that is not determinative of the issue. At the beginning of each year the claimant was required to submit block-off dates to the respondent when she was not available for tours in the year to come. The agreement between the parties states that the claimant was free to accept individual assignments from other tour companies. Clearly there was no obligation on the claimant to make herself available to the respondent at any particular time. Once in receipt of the claimant's block-off dates it was then open to the respondent to offer tours to the claimant. Again there was no obligation on the respondent to offer particular, or indeed any, tours to the claimant. Without this mutuality of obligation the Tribunal must find that the claimant was not an employee. Accordingly, there is no jurisdiction to hear the claims under the Unfair Dismissals Acts, 1977 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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