

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYEE - *appellant*

CASE NO.
UD1933/2010

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. D. MacCarthy S C

Members: Mr J. Flanagan
Mr F. Keogh

heard this appeal at Dublin on 13th February 2012

Representation:

Appellant(s) : Mr. Brendan Archbold, 12 Alden Drive, Sutton, Dublin 13

Respondent(s) : Mr. Tom Mallon BL instructed by Matheson Ormsby Prentice, Solicitors, 70
Sir John Rogerson's Quay, Dublin 2

This case came before the Tribunal by way of an appeal by the employee against the recommendation of the Rights Commissioner (r-084329-ud-09/DI) under the Unfair Dismissals Acts 1977 to 2007

Preliminary Issue

The Tribunal had to deal with a preliminary issue as to whether or not the appellant was employed under a contract of service or a contract for service with the respondent organisation. The Tribunal proceeded to hear evidence on this preliminary issue.

Appellant's Case

The appellant gave evidence that he commenced working for the respondent in July 1992. He was engaged as a licensing agent under a service provider contract and he was responsible for licensing premises in the Co. Monaghan area where copyright music was being made available to the public. His area of work subsequently expanded into Counties Cavan and Louth. He had to ensure that the correct royalties were being paid by the business premises concerned. The level of payment was based upon the size of the premises and was decided by the respondent organisation. He was provided with an electronic measuring tape to find the measurement of the businesses concerned. He was also issued with a camera. The claimant had no discretion about the level of fees paid by the businesses. He was paid on a commission basis and this

commission was calculated on a percentage of the tariff charged to the business premises. He had specific targets to achieve and in order to meet these targets he had to work 35 hours per week. In carrying out his duties he drove his own car and provided details of his commercial motor liability insurance to the respondent organisation. He provided reports of his weekly work to the respondent by way of registered post. After over 17 years working for the respondent he had a dispute regarding non-payment of commission which was owed to him. He spoke with (Mr.S) from the respondent organisation by telephone but refused to meet with him as his commission was being withheld. He was then dismissed. He subsequently received his commission payment.

In cross-examination he said that prior to working for the respondent he was a self-employed insurance agent. He currently works as a self-employed agent for a sub-contracting firm engaged by a large broadcasting organisation. He accepted that he made his own tax returns while working for the respondent and he made those returns as a self-employed person. The respondent organisation also requested a tax clearing certificate which he provided to them. He was not registered for VAT at that time. He generally worked from 2pm until 9pm and also did weekend work. From time to time he monitored premises and was paid a fee by the respondent for that. He accepted that the service provider contract contained a clause which allowed him to engage the services of third parties to assist him in the provision of the services but he never availed of this. He was not aware that some of his colleagues engaged third parties to assist them in their work as service providers. He accepted that he issued invoices to the respondent for his commission payment on a monthly basis and he did not request holidays as he did not think he had an entitlement to holidays.

(BB) also gave evidence on behalf of the appellant. He was initially employed by the respondent as an employee, as a licensing inspector. He carried out similar work as that outlined by the appellant and drove a company car. He was made redundant in the 1990's and was paid a lump sum redundancy payment at that time. He subsequently returned to work for the respondent as a licensing agent carrying on similar work to what he had done as an employee. As a licensing agent he was not provided with a company car and was paid on a commission basis. He accepted that he was self-employed when he returned to work for the respondent as a licensing agent.

Respondent's Case

Counsel for the respondent submitted that the appellant was not an employee and was employed under a contract for service. In particular he relied on the unanimous Supreme Court Judgement in the case of *Castleisland Cattle Breeding Society Limited v Minister for Social and Family Affairs* [2004 I.R 150] which he submitted was practically on all fours with this case.

Determination

It seems to the Tribunal that (BB), the witness called to support the appellant's case, was in almost exactly the same position as the employees in the *Castleisland*, where Geoghegan J, said:

“Mr. Walsh, as did the other men at the time, knew well the reason why their contracts of service were terminated and that the redundancy arrangements were entered into entirely in the context of what was to happen in the way of new arrangements involving contracts between the appellant and independent

contractors. The change of contractual arrangements had obvious consequences. The most important of these were that the inseminators, including Mr. Walsh, became self-employed for tax purposes. Mr. Walsh made returns on that basis and claimed tax allowances under the self-assessment system. Even more importantly the inseminators under the new contractual arrangements had to carry their own insurance”.

Since (BB), when working as an agent was in the same position as the appellant, it follows that the appellant was also a self-employed agent, not an employee.

Accordingly the Tribunal must find that the appellant is not covered by the Act, and has no jurisdiction.

The Tribunal upholds the finding of the Rights Commissioner and the appeal fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

