EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:		**CASE NO.**
EMPLOYEE	*- claimant*	UD2407/2009
		RP2752/2009
		MN2224/2009

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 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr G. Hanlon

Members: Mr M. Murphy
Ms. A. Moore

heard this claim at Cavan on 17th February 2011
and 5th May 2011
and 11th November 2011

Representation:

Claimant: Mr Enda O'Carroll, Wells & O'Carroll, Solicitors, Main Street, Carrickmacross, Co Monaghan

Respondent: Mr. Eamonn McCoy, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

On the first day of the hearing the claim under the Redundancy Payments Acts, 1967 to 2007 was withdrawn.

Preliminary issue

The respondent maintained that the claimant was employed under "a contract for services" and was not an employee. Whilst the claimant had commenced employment in 1971 there was a clear transition to the claimant being engaged under a "contract for services" in 1994. The Tribunal

were referred to the last P60 issued to the claimant from the respondent dated 1993. The sub-contractorpayments cards produced were evidence of this change. The claimant was a truck driver whoprovided his own transport and was paid by the distance travelled.

The claimant representative explained that at the time of the change in the claimant's contract he was assured that nothing would change. The claimant was doing piecework and had always regarded himself as an employee.

The Tribunal having heard the preliminary issue decided to hear the case in full to enable them to establish the claimant's status.

Claimant's Case

The claimant gave direct sworn evidence; he commenced employment with the respondent in 1971. In 1993 he was approached by a director who discussed new working arrangements with him. This director explained that while his work would be the same, and that he would be getting two runs a day, he would have to takeover the running of the truck.

The respondent bought the truck for the claimant, taxed and insured it. The claimant was paid once a month based on the rates agreed; the cost of the truck was deducted from this. This truck had the respondents name on it and the claimant was not allowed to use it elsewhere. The truck up to four years ago was insured through the respondent. However at this time it was explained to the claimant that they did not want the liability of the claimant going on to sites. Nine years into this new arrangement the claimant approached the respondent seeking a pay rise, the respondent agreed to pay for the insurance on the truck. Though out his employment with the respondent every 4 to 5 years the claimant would change the truck and the respondent would deduct the cost from his invoices.

The claimant went on holidays in 2009 and when he returned to work there were hauliers in doing runs for the respondent. While he was doing a run to Belfast for €340 to €350 these hauliers were doing the same for €180. He telephoned the respondent and explained that he could not compete with these hauliers due to his outgoings. Up to this stage he had always thought he was an employee and could not work for anyone else. He had last purchased a new truck in 2006.

Under cross-examination he explained he had changed his truck in 2006 and on that occasion he had not sent the invoice for same to the respondent, he had bought it. In 2009 when his position wa s terminated he had the same truck, but owed approximately €30,000 on it. At this time the truck was worth €40,000 but he had to sell it at €20,000. The respondent in 2009 paid the tax and insurance for his truck. He agreed that the agreement between both parties was that he would gettwo loads a day, and if there was no work the respondent would get him work in other companies.He was the only haulier who had this agreement with the respondent. After delivery a load hewould go back to the respondent and if there was another load there he would do it but in the lasttwo years it was rare to have two runs per day. If there was not a second load available he wouldload the truck up for the next day and bring it home. He would leave with the load at about 5.30amand be back at the respondents around 10.30/11.00am. He explained he worked to the schedule ofthe taco graph; he very seldom refused to do a run for the respondent. No one else had ever done adelivery in his truck. Nobody replaced him when he went on holidays he would inform thetransport manager when he was going on leave and the transport manager would work around this.

He does a small bit of farming but this is more of a hobby than an income. He accepted that the C47 (Sub contractors) Revenue document from 1994 indicated a change in the relationship between him and the respondent.

When the new hauliers started operating he was never approached on cost savings. He was willing to take a deduction but he could not do a run to Belfast and back for €180. When he approached the director and explained this to him, the director told him he would have to compete as there was nothing he could do for him. In September 2009 he had worked 11 days, however there were other loads available which he could have done. He always carried the maximum loads. On the 1st of October 2009 he was offered a load but he could not do it as he was in debt, losing money and could not afford the diesel. He asked to speak to the director but was told he was busy. He had tried to go through his union but the director informed him that he was an outside haulier.

Respondent's Case:

The production director gave evidence. He explained that he knew the claimant but did not deal with him on a day-to-day basis. The transport manager contacted the hauliers when orders came in for delivery. Different rates were charged to the respondent for different distances undertaken. Hauliers, including the claimant, then invoiced the respondent.

In 2008 the market in the Republic of Ireland dropped and deliveries were halved as a result. The plant closed for 26 weeks. The company continued to market in bricks but they had too much stock. Various management meetings were held as a 10% in savings had to made. An email wassent to the witness regarding the savings which included negotiating special rates on "flats" for bigger jobs, cheaper means of getting samples on site, requites from hauliers and local deliveries around the country to be negotiated. The claimant finished working for the respondent in October2009.

On cross-examination the witness explained that he could not be sure if he was present when the discussion took place in 2004 for the claimant to change from an employee to a contractor but was aware the claimant was advised nothing would change. The claimant negotiated a different rate of pay to the other hauliers as the respondent paid the claimant's tax and PRSI in lieu of an increase in rates.

When put to him that the claimant was on annual leave when other hauliers were contracted to carry out the Belfast runs for a reduced rate of €180 he replied that the claimant could not have been informed until his return.

Determination:

The Tribunal have carefully considered the sworn evidence adduced and documentation provided in this case. The preliminary issue was to ascertain whether the claimant was employed under "a contract for services" and was not an employee.

The claimant was initially employed as an employee but this changed in 1994. The sub-contractor payments cards produced were evidence of this change. The claimant was a truck driver who provided his own transport and was paid by the distance travelled.

The Tribunal finds that the claimant was a sub-contractor and not an employee. Therefore the claims under the Unfair Dismissals Acts, 1977 to 2007 and the Minimum Notice and Terms of

Employment Acts, 1973 2005 fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)