

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

Against

Employer

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Hayes

Members: Mr G. Andrews
Mr P. Trehy

heard this claim at Dublin on 4th January 2012

Representation:

Claimant(s): Mr. Stephen O'Sullivan B.L. instructed by Anderson & Gallagher, Solicitors, 29 Westmoreland Street, Dublin 2

Respondent(s): Damar Consultancy Limited, Shamwari, 4 Redhills Park, Ellistown, Co Kildare

The determination of the Tribunal was as follows:

Background

The claimant worked for the respondent on a sub-contract basis from 10th November 2006 until April 2008 when he then became an employee of the company. In an opening statement, the respondent's representative maintained that the claimant's start date was from April 2008 and not April 2006 and that the claimant terminated his employment at his own volition in January 2009. The claimant's representative stated that the claimant was an employee of the respondent since 2006 and was told in January 2009 of a lay-off period until June 2010.

Claimant's case

Giving evidence, the claimant stated that he worked as a sub-contractor for the respondent from 10th November 2006 until 18th April 2008. He did not work for any other company during this time and he did not employ anyone himself. The claimant received instructions from the Foreman in relation to his work. On 18th April 2008, he became an employee of the company. There was no difference in the work he performed. He was still plastering and later, fixing. The only difference was that he did not now have to do his own accounts. He was subsequently told by friends that they could not work on the O2 site as sub-contractors'.

The claimant stated that in January 2009, he left the site before the break. He was told by the Supervisor to go home as there was no work. He had been working on fixing and taping that day and was told to collect his tools. There was no mention of lay-off that day. He texted the respondent asking for work and was told he would have to wait. After about one or two text messages, he did not receive any replies. He asked friends to ask about work for him. The claimant did not know if others were also told to go home that same day.

At the time there was about 30 employees working on the convention centre but the claimant was the only employee doing his particular work. When the claimant returned to collect his tools, there was another employee performing his work. He had not been told his job was at risk prior to January 2009 and he was not told why he was selected over others. The claimant stated that he never received a contract or terms of employment. He was not paid after 15th January 2009 and did not claim social welfare.

It was put to the claimant that the respondent would say that he came to collect a cheque after 29th May 2009 with a form. The claimant said that he has a file with his solicitor and confirmed that he did not receive a response to the RP9 form. He confirmed that he has not worked since 22nd June 2010 and was now back in Poland. He has no permanent work, just small jobs. He has not been an employee since 22nd June 2010.

In cross-examination, the claimant confirmed that he did not work after January 2009. He did not claim social welfare as he had been asked by the respondent to wait a couple of months. He lived on savings and his wife was working at the time. It was the respondent who suggested changing from sub-contractor to employee. He signed papers at the time but did not know what he signed. It was better for him to operate as an employee as it was more stable. He did not remember whether he paid more tax as a sub-contractor or as an employee. He was paid by bank transfer as a direct employee. He went back to Poland in February 2009 as he was told by the respondent to wait for a couple of months. He flew back to Ireland to obtain final documents from the respondent - documents confirming his work with the company. When asked if he had requested to leave the company, he stated that he was just asking for his papers.

The respondent's representative stated that the claimant accepted that he sought his P45 and that if this is accepted by the Tribunal, then all claims must fall as they are statute barred.

The claimant's representative stated that the claimant was in limbo and therefore asked for his paperwork. If the respondent maintains that the claimant resigned in January 2009, then why is May 2009 given at the end date.

The claimant stated that he was not sure when he requested his paperwork. It was probably

before the summer holidays of 2009. He could not remember receiving a cheque at the time and he never received his P45.

In reply to the Tribunal, the claimant stated that he supplied his own tools for the job. The employee carrying out the claimant's work had not previously performed those tasks, only plastering. The claimant was the only tiler and he also worked at fixing. He did not receive a contract of employment from the respondent. Two or three of the claimant's colleagues also became employees in 2008. The claimant would have returned from Poland if he had received a call to go back to the respondent. He could not remember the date of his last payment. It was approx. €500. It was not a full weeks wage. The Supervisor had promised him work and had said there would be definitely something for the claimant.

Respondent's case

The respondent's representative stated that the claimant began with the respondent as a sub-contractor. He supplied labour and tools and was not supervised. He was free to work for other people. In 2008 the claimant approached the company in relation to being a direct employee. There was nothing in it for the company. In May 2009 he sought his P45. His holiday pay was paid by cheque along with his P45. The claimant left his employment and did not return. An RP9 was not sought. The respondent accepts May 2009 at the end of employment. The Foreman did not give a commitment of work to the claimant. There was no lay-off time in this instance.

The respondent's representative told the tribunal the date the P45 was prepared is unknown. The termination date is the key for all claims. It was not a requirement of the O2 contract that all staff had to be direct employees.

No evidence was adduced on the respondent's behalf.

Determination

The claimant commenced working for the respondent on 10th November 2006. The arrangement made between them was that he worked as a sub-contractor and looked after his own tax affairs. In April 2008, he became an employee. In early 2009, he was placed on lay-off. The claimant puts forward the case that his employment ended in June 2010. However, the claimant sought and obtained, in 2009, a P45. The P45 gave the date of termination of employment as 29th May 2009. The Tribunal is satisfied that the claimant's employment had come to an end in May 2009.

This claim was submitted to the Tribunal on 5th July 2010. This is outside the time period stipulated by Statute for the bringing of a claim for unfair dismissal. The Tribunal is satisfied that no claim can be advanced under the Unfair Dismissals Acts, 1977 to 2007 and this claim is, therefore, dismissed.

The Tribunal is satisfied that the claimant was working until January 2009, when he was told that there was no more work for him. He periodically thereafter inquired as to whether any further work was forthcoming until his dismissal in May 2009. The Tribunal is satisfied that the cessation of his employment came about because of a genuine redundancy situation.

It was suggested on the respondent's behalf that the claimant had simply left work of his own

volition in January 2009 and that he never came back. No evidence was adduced on the respondent's behalf to substantiate this allegation. The Tribunal accepts the claimant's evidence that he was told to leave.

The Tribunal must establish the date of the commencement of the claimant's employment. The claimant contends that it was in 2006. The respondent contends that it was in 2008.

The claimant was engaged as a plasterer initially and subsequently as a fixer. He supplied his own tools, submitted invoices and looked after his own tax affairs. It was suggested on the respondent's behalf that the claimant was not supervised while on site and was free to undertake other work as a sub-contractor. Again, no evidence was adduced on the respondent's behalf to substantiate these allegations. The claimant told the Tribunal that he was supervised by the respondent's foreman. While he provided his own tools, it appears that all people working whether employees or otherwise did so. The Tribunal is not satisfied, therefore, that the ownership of tools is of assistance to it in determining the claimant's employment status.

It has been held by the Supreme Court in Henry Denny & Sons (Ireland) Limited v. The Minister for Social Welfare [1998] 1 IR 34 that the treatment of a person's tax affairs was not conclusive of the nature of the employment relationship. In essence, whether a person is employed under a contract of service depends on the totality of the relationship between the parties and not statements, express or implied, of their understanding of the nature of their relationship.

In this case, the Tribunal is satisfied that the claimant, since 2006, had been engaged on work for the sole benefit of the respondent and that this was done under the supervision of and at the direction of the respondent. It is of note that when he formally became a direct employee in 2008, there was no material change either to the nature of the work or the nature of the relationship.

The Tribunal is satisfied that the claimant was dismissed by reason of redundancy and that he is entitled to a redundancy payment, pursuant to the provisions of the Redundancy Payments Acts, 1967 to 2007 on the basis of the following factors:

Date of commencement:	10 th November 2006
Date of termination:	29 th May 2009
Gross weekly pay:	€703.58
Date of Birth:	21 st July 1982.

Any payment is subject to a ceiling of €600 in respect of maximum weekly pay and is made on the basis of the claimant having been in insurable employment.

The claim for redundancy was submitted to the Tribunal in excess of 52 weeks from the date of dismissal as required by the Redundancy Payments Acts. Given the nature of the claimant's dismissal and the lack of communication from the respondent, both before and after the dismissal, the Tribunal is satisfied that reasonable cause exists such that it should exercise its discretion to extend time.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)