EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NOS.
EMPLOYEE – *claimant 1*	UD243/2010 RP459/2010 MN231/2010 WT118/2010
EMPLOYEE – *claimant 2*	UD244/2010 RP460/2010 MN232/2010 WT119/2010
EMPLOYEE – *claimant 3*	UD245/2010 RP461/2010 MN233/2010 WT120/2010

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
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms M. Levey BL

Members: Mr C. Lucey
Mr N. Dowling

heard this claim at Dublin on 5th & 6th September 2011

Representation:

Claimants: Mr Declan McNulty of Eames Solicitors, 2 Malt House Square, Smithfield, Dublin 7

Respondent: Mr Michael Vallely BL instructed by Mr Ronan Brennan of Brennan & Co. Solicitors, Georgian Business Centre, 20 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows:

Respondent's Case

The employee relations manager gave evidence. He was based in the Belfast office until he took early retirement in 2005. The respondent took over the business in 2003. The three claimants came to Belfast to receive information on their terms and conditions such as holidays, pensions, and grievance procedures. They were taken on a tour of the plant and given instruction on technical matters. The claimants all worked a 37 hour, 5 day week.

The employee relations manager stated that the claimants had all attended an induction process. He did not speak to them about pensions because they were not employees of the respondent.

The brands manager gave evidence. He initially worked in Belfast. He was sent to Dublin in 1981. There were no contractors then. The cleaning of beer lines was done by temporary staff. Then contractors were used to do this work. The contractors were paid a fee for each item of work. Claimant 3 was one of the first contractors and at the start he was paid through an agency. Then in 1993 three of the contractors formed a partnership and received a contract. Later the partnership broke up and claimant 3 became a sole trader.

The arrangement changed in 2002. He met the three contractors and they wanted extra money. The discussions were long drawn out. Also the respondent took over the operation. He and the contractors wanted to formally set out the work and the pay. They also wanted a three year plan. The contract was drawn up by the company. The brands manager did not draft it. The three claimants all signed a contract. Each claimant was responsible for his own tax and VAT. They all worked in the Dublin area. They were 3 separate individuals but they worked as a unit. They each invoiced the respondent for work done. Claimant 2 did not charge VAT but the other two did. The claimants were not forced to sign the contracts. There was agreement on what needed to be done and on what would be paid.

The claimants were not employees. Employees were supplied with cars and their tax was paid. The claimants supplied their own cars and paid their own tax. The claimants were also responsible for their own insurance. They were supplied with tools. They were also supplied with caustic soda for cleaning lines.

In the Dublin area there were 3 contractors, the claimants, and 3 employees. Details of work to be done were texted to each person's mobile phone. The work was supervised by the area controller. The brands manager had left before the claimants ceased working for the respondent.

The operations manager gave evidence. He was instrumental in putting together the 2003 contracts with the claimants. He was unequivocal that the claimants were contractors. They spoke to the brands manager about a rate increase. The contracts were drafted and signed. The claimants received an increase of 8%. They were not pressured to sign. The use of contractors was best practice for the business. There were both employees and contractors are used by the respondent.

The operations manager wrote to the claimants on 5th December 2008. This letter was only sent to contractors. It was not sent to employees. The operations manager did not know whether the then brand manager met with the claimants but he would be surprised if he had not. The business was under review.

The quality manager gave evidence. He supervised the three claimants and three technical advisors who were employees. They all did similar work. Each had a target of lines to clean. A

omputer generated a list of lines to be cleaned each week. He gave each of the 6 a run to complete every week. Their official hours of work were 9 – 5 but if someone started early he could finish early. There was no official flexibility of hours but adjustments were made.

A computer generated list was faxed to each person with a target list of lines to clean. When a task was completed a text was sent to the office. The quality manager allocated out the other jobs; regardless of whether the person was a contractor or a technical advisor. He did not treat the contractors differently from the technical advisors. He would have been surprised if the contractors had time to work for anyone else.

When health and safety courses were run both contractors and technical advisors attended. Technical advisors were supplied with trousers and shoes but the contractors were only supplied with shirts and jackets. The contractors were supplied with installation equipment and some cleaning equipment. The contractors were supplied with gloves goggles and chemicals. Company bonuses were paid depending on the performance of the whole team. The contractors were not paid bonuses. The contractors were responsible for their insurance but there was an ad hoc arrangement whereby the company paid for the insurance.

The quality manager had left before the claimants' contracts were terminated.

A technical advisor who had worked with the claimants gave evidence. They did exactly the same job as him. They all reported to the office every day. The technical advisor had income tax deducted at source.

When the technical advisor was made redundant he was paid 5 weeks per year of service. He was given access to a consultant who advised him with CV preparation and job applications.

Claimants' Case

Claimant 3 gave evidence. He started as a technical advisor as a summer job in 1988. Then he was approached to continue in a piece meal way and he was paid for what he did. After about a year the arrangement was formalised.

At one stage the three claimants formed a partnership but one member had tax problems so they were unhappy with the arrangement. They went back to the operations manager. When the contract was negotiated he was not happy with it. He wanted sick pay to be included. However it was his understanding that the company would only deal with them on that basis. He did not feel he had a choice about signing. There were no benefits from being a contractor. He just had the hassles of paying tax and getting a van and then working 9 to 5. Initially he had been included under the company's but later the contractors had to arrange their own insurance and then invoice the company for it.

Claimant 3 was advised by his father to get an accountant to pay his tax. When the partnership arrangement was put in place he set up a company. He was not happy with the partnership because if one partner had a difficulty they would all be involved. His accountant later dissolved the company. Claimant 3 was adamant he had not been seeking tax advantages by being a contractor rather than an employee.

At the suggestion of his accountant claimant 3 gave the operations manager a copy of the Revenue guidelines. The operations manager that he was a contractor and that they would not deal with him

on any other basis. Also they would not put holiday pay into the contract.

His day to day work was doing maintenance within an area. He fixed taps, installed taps and removed taps. He was supplied with gloves, goggles and branded shirts and jackets. All equipment was supplied; gas kegs and all fittings and taps. He had a few tools of his own but all specific tools were supplied. He was also given a mobile phone. He had to pay for personal calls.

He kept a work diary. He was told to hold on to his work diaries for 6 years but he has 20 years of work diaries. There was no provision for sick leave. The contractors and the technical advisors worked as a team in Dublin. They phoned one another directly and kept the work going.

Claimant 3 said that from a customer's point of view there was nothing to distinguish a contractor from a technical advisor. There were meetings on a Tuesday morning to discuss business ideas. Each member of the team took a turn chairing the meeting. The contractors always attended the Christmas party at which accommodation was provided. The contractors could also buy beer at a discount.

When their contracts were not renewed the operations manager met them and made them an offer. However they would lose half of the proposed sum in tax. It is not normal practice to make such an offer but the operations manager felt an obligation to them.

Since his employment with the respondent ceased claimant 3 has obtained similar work as an employee of another service provided.

Claimant 2 gave evidence. He commenced in 1994 as a brands dispense technician. He did line cleaning in the city centre and surroundings. He was given no written terms and conditions in 1974. The contract in 2003 was his first written terms and conditions. He had misgivings about the contract but felt compelled to sign it because he understood that otherwise the job would not continue.

Claimant 2 kept a work diary and invoiced the company. No deductions were made for sick days. They worked as a team. He covered for others and they covered for him. He felt that he should have been an employee.

He has secured part-time employment doing similar work.

Claimant 1 gave evidence. He started in June 1996 doing relief summer work. He had no contract. A contract was produced in 2003. He understood that if he signed the contract his employment would continue but that the alternative seemed to be to leave.

Claimant 1 was supplied with safety gear and equipment together with a mobile phone and fax. No deductions were made for sick days. He had to keep a work diary. He attended tap drives and promotions. He helped new employees. He went to team talks and the Christmas party. He had to source his own insurance but then invoiced the company for it.

To pay his tax claimant 1 went to an accountant. His supervisor would print out an invoice to the company every month. Then claimant 1 would fill in the amount and sign it. His supervisor would hand it in and then the cheque would be paid. He did not see any benefit in being a contractor rather than an employee. He felt that he was an employee and was treated no differently than his colleagues.

When his employment ended he went to a hotel with the other 2 claimants. The supervisor went with them. When the supervisor was asked to leave the room and the operations manager made them an offer. Claimant 1 is sorry that he did not accept the offer as he felt that it was fair although it was not acceptable to his colleagues.

Claimant 1 has secured part time work in a similar capacity with another company.

Determination:

The Tribunal carefully considered the evidence adduced and the submissions made. The first matter to be considered was whether the claimants' relationships with the respondent are to be considered a contract 'for service' or 'of service'. The High Court decision in the case of **The Minister forAgriculture and Food V Barry and Others (7th July 2008)** contains a detailed analysis of thejurisprudence on the tests which should be considered in deciding whether a person is workingunder a Contract for Service or a Contract of Service. Mr Justice Edwards said that the followingmatters, among others should be considered:

- Whether the person provides the necessary premises, or equipment or some other form of investment,
- Whether the person employs others to assist in the business and
- Whether the profit which the person derives from the business is dependent on the efficiency with it is conducted.

When all aspects of the working relationship between the claimants and the respondent are taken into account and in particular that they were supervised and organised no differently from employees, that they were expected to work 9 to 5, five days a week, the claimants were not in business for themselves and did not control their own work, the Tribunal finds that all three claimants were employees and that their relationship with the respondent was one of contract of service.

The Tribunal accepts the respondent's assertion that the claimant's employment terminated by reason of redundancy and therefore the claims under the Unfair Dismissals Acts, 1977 to 2007 are dismissed. The claimants are each awarded a redundancy lump sum based on the following information:

Claimant 1

Date of Birth	17 April 1966
Date Employment Began	15 June 1996
Date Employment Ended	30 November 2009
Gross Weekly Pay	€945.18

This award is made subject to claimant 1 having been in insurable employment under the Social Welfare Acts during the relevant period.
It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.

Claimant 2

Date of Birth	30 September 1964
Date Employment Began	15 June 1994
Date Employment Ended	30 November 2009
Gross weekly Pay	939.41

This award is made subject to claimant 2 having been in insurable employment under the Social Welfare Acts during the relevant period.
It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.

Claimant 3

Date of Birth	15 March 1963
Date Employment Began	15 November 1988
Date Employment Ended	30 November 2009
Gross Weekly Pay	€939.41

This award is made subject to claimant 3 having been in insurable employment under the Social Welfare Acts during the relevant period.
It should be noted that payments from the social insurance fund are limited to a maximum of €600.00 per week.

No evidence was adduced concerning the claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and under the Organisation of Working Time Act 1997 and therefore these claims are struck out.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)