EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE - *claimant No 1*	UD2185/2010
EMPLOYEE – *claimant No 2*	UD2186/2010

against

EMPLOYER - *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms F. Crawford B.L.

Members: Mr R. Murphy
Mr P. Trehy

heard this claim at Dublin on 21st March 2012
and 15th May 2012
and 16th May 2012

Representation:

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Claimant(s) : Ms Imogen McGrath BL instructed by McKevitt & Company, Solicitors, 23 Mespil Road, Dublin 4

Street, Dublin 2

Summary of Case:

The claimants were directors and employees of a company known as (M) Limited which traded as a private members club in the Dublin city centre area from mid-2008 onwards. At its peak the club had 1500 members and 60 employees. Following the downturn in the economy the company experienced trading difficulties and was placed in examinership and subsequently went into receivership in January 2010. The claimants continued to work for the company becoming employees of the court appointed Receiver and the business continued to operate smoothly. The claimants enjoyed a good working relationship with the Receiver.

The claimants had discussions with a number of prospective investors and in June 2010 (M) Limited was bought by the respondent company as a going concern. A consultancy agreement was drafted by the respondent's legal advisors and presented to the claimants' legal advisor. A final draft of the agreement was signed on 25 June 2010 with completion date intended for July 2010. The consultancy agreement was completed on 21 July 2010 and set out the conditions of the claimants' appointments as consultants. The term of the agreement was for a period of one year and the respondent took control of the business on 22 July 2010. The claimants resigned as directors and employees of (M) Limited prior to the completion of the agreement. The remainder of the employees of (M) limited transferred as employees to the respondent company on 21 July 2010 as part of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 and accordingly their employment status was maintained.

(DP), director and shareholder of the respondent company gave evidence that he was part of the team that negotiated the acquisition of (M) Limited. Whilst he envisaged that the claimants would be an integral part of the new operation it would have been impossible to hire them as directors or employees. This was a joint decision by himself and another director of the respondent company known as (OGL). He told the Tribunal that three previous companies belonging to the claimants had gone bust and he did not know what was coming down the tracks in terms of adverse publicity. He gave further evidence of a meeting on 2 July 2010. Present at that meeting on behalf of the respondent company were himself, (OGL), her husband (BL) and two solicitors. The second named claimant was present at the meeting with his solicitor. At that meeting the witness explained the reasons as to why the consultancy agreement was being put in place. (BL) also outlined that the claimants would not have a shareholding entitlement in the new arrangement.

The Tribunal heard further evidence in relation to an asset sale agreement between (M) Limited (In Receivership) and the Receiver and the respondent company. The claimants were not party to this agreement. Specifically the Tribunal's attention was drawn to clause 6.1 of that agreement and a handwritten note of (DP) which suggested that the Receiver use his best effortsto seek the resignations of the claimants prior to the completion of the asset sale agreement, thenote stated as follows: "*The Receiver shall use best efforts by means of persuasion but not toincur any liability in relation thereto or otherwise to obtain the resignations of SS, (a namedthird person) and CS prior to completion."*

Discussions also took place at the meeting of 2 July 2010 concerning the claimants' holiday entitlements. The witness facilitated an arrangement whereby he agreed that 4 weeks of the 52weeks can be taken as time off to facilitate holiday and family commitments. This arrangementwas not incorporated into the consultancy agreement but was confirmed by way of a separateletter from the witness to the claimants dated 20 July 2010. The witness took over the day today running of the business on 22 July 2010 and the claimants then reported to him and (OGL).He gave evidence that the nature of their work changed following the acquisition by the respondent and over 90% of their work involved meeting and greeting members of the club. The claimants were no longer key holders of the club. They could not hire/fire staff. They hadno responsibility for any other staff. They had no role with bank accounts. They had noresponsibility for sourcing, ordering or payment authorisation for club purchases. They were notrostered for work but were required to work a minimum of 40 hours per week and the presenceof one or other of them was required on Friday and Saturday nights. The claimants receivedone payslip from the respondent following the takeover and thereafter submitted weeklyinvoices for their services. They were also responsible for paying their own tax and VAT.

(DP) told the Tribunal that the new arrangement did not work very well and the claimants were working against (OGL). The situation was becoming untenable and by September 2010 the relationship had become unworkable. The claimants were called to a meeting on 9 September 2010 by (OGL). The witness was not present at that meeting. A cessation agreement was put to the claimants at that meeting, but the claimants refused to sign this agreement. The claimants were then issued with a letter dated 16 September 2010 giving them notice of their termination as consultants in accordance with clause 5.1.1 of the consultancy agreement and paid their entitlements under the agreement.

The claimants gave direct evidence that they understood that they were going to be an integral part of the business following the investment by the respondent company in the business. They had no knowledge of (DP's) handwritten note in clause 6.1 of the asset sale agreement. Whilst they accepted that they had the benefit of legal advice prior to signing the consultancy agreement and their letters of resignation as directors and employees of (M) Limited, they felt coerced into signing these documents. They gave evidence that they did not understand the significance of their resignations, they just wanted to get on with their jobs and be part of the business. They were apprehensive about signing the consultancy agreement but they just wanted to work and their backs were to the wall. They did not feel that they were in a position to negotiate with the respondent over the agreement. They felt that their resignations were forced upon them and gave evidence that they reported for work on the following day after the agreement was completed. They reported to (DP) and worked up to 60 hours per week on occasions. They continued to deal with all aspects of the business and their duties were not confined to front of house business. They understood the consultancy agreement to be a different form of employment and never felt like independent contractors. They also received holiday pay and understood that they were no longer the decision makers in the business and had been excluded from considerations and plans for future changes to the club's arrangements.

The Tribunal heard further evidence that they were called to the meeting on 9 September 2010 by (OGL) without any prior notice. At that meeting they were presented with a termination letter. They were shocked to receive this letter and felt that arrangements for their replacements had already been put in place by the respondent. They refused to sign the cessation agreement.

Following the termination of the contract the claimants gave evidence of further alternative employment to date. The Tribunal heard detailed oral evidence in relation to loss and the Tribunal was also supplied with documentary evidence in relation to the claimants' loss.

Determination:

The claimants in this matter seek relief pursuant to the Unfair Dismissal Acts 1977 (as amended). Any entitlement is contingent upon the claimants being employees at the date of dismissal and of being employed under a contract of service. It is common case that the claimants had been employed by (M) Limited (a company of which the claimants were also directors) from June 2008 and had been operating a private members club. This entity went into receivership in January 2010. (M) Limited was sold by way of an Asset Sale Agreement to the respondent company. The Tribunal was informed that this Asset Sale Agreement dated 25 June 2010 was finalised with a completion date of 21st day of July 2010.

On 20 July 2010, the claimants signed resignation letters from their employment and as Directors of (M) Limited (in receivership) and entered into an Agreement entitled a "Consultancy Agreement" (herein after called the "Agreement").

In determining whether or not the Agreement was a contract of services or a contract for services, the Tribunal has assessed the evidence given in the case together with the facts of the case, the legal submissions and the relevant case law. It is clear that the existence of a contractual document purporting to govern the contractual relationship between the parties does not of itself denote decisively the nature of the relationship.

The Tribunal has considered the decision in Denny –v- Minister for Social Welfare [1998] 1 IR 34 and in particular the judgment of Keane J (as he then was). The Supreme Court determined that when deciding whether a person was employed under a contract of service or under a contract for services "*each case must be considered in light of its particular facts and of the general principles which the courts have developed. In general, a person will be regarded as being employed under a contract of service and not as an independent contractor where he or she is performing services for another person and not for himself or herself. The degree of control exercised over how the work was to be performed, although a factor to be taken into account, was not decisive. The inference that the person was engaged in business on his or her own account can be more readily drawn from where he or she provided the necessary premises or equipment or some other form of investment, where he or she employed others to assist in the business and where the profit which he or she derived from the business was dependent on the efficiency with which it is conducted by him or her."*

The Tribunal has also had regard to the decision of Edwards J. in the case of Minister for Agriculture and Food –v- Barry & Others [2009] 1 IR 215 which emphasised that there is not one test in determining the nature of the employment relationship and that the Tribunal should consider the case on its particular facts to draw the appropriate inferences from them by applying the general principles that the Courts have developed "*with exercise of judgment and analytical skill and not by testing the facts of the case in a rigid formalistic way.... it is for a Court or Tribunal seized of the issue to identify those aids of greatest assistance to them in the circumstances of the particular case and to use those aids appropriately."*

In determining this case on the particular facts and the general principles, by majority the Tribunal concludes, on balance, that the claimants were retained under a contract for services and thus were not employees within the meaning of the Act. In reaching this decision, the Tribunal has considered the following aspects, *inter alia* the fact that the claimants had applied to be registered for VAT albeit that they had not received a VAT registration number, the fact that the Second Named Claimant made self-assessment Tax returns and registered himself as self-assessed for tax purposes (these details were submitted to the Tribunal), the increase in pay from the date of the Agreement, the Profit Sharing Arrangement which allowed the claimants to be entitled to a percentage of the net profit of the Respondent Company on a periodic basis, weekly payments being at an agreed price and invoiced as such and no payslips being furnished (apart from the initial week).

The Tribunal notes that the side Agreement (dated 20 July 2012) allowed the claimants holidays on a pro-rata basis, however it has concluded that this does not change the nature of the relationship as outlined hereinbefore.

Even if the Tribunal is incorrect in this assessment, the Tribunal has to consider the issue of the resignation letter prior to any assessment of the Agreement. This matter is crucial in whether or not there was a continuity of employment. It is submitted by the claimants that the resignation letter and parallel Agreement were entered into by the claimants from a vastly inferior bargaining position and that they felt both compelled to enter the Agreement and coerced into signing the resignation letter. It was submitted by the claimants that the resignation letter should be deemed null and void as the claimants did not understand the consequences of the letter and felt compelled to sign same.

The Tribunal, by majority, disagrees with these submissions. The Tribunal concludes that the claimants resigned from their employment with (M) Limited (In receivership) and as Directors of this company (and indeed in the case of the second named claimant as the company secretary) with the benefit of legal advice and therefore should have been fully aware of the legal consequences of signing the resignation letter and the entering into the Agreement. The fact that the claimants made this decision with legal advice was a pivotal consideration which the Tribunal considered in concluding that the claimants were in a contract for services and were aware of this when entering the Consultancy Agreement of July 2010.

Dissenting Opinion:

By a dissenting opinion, a Tribunal member contended that there was a continuity of employment and that the claimants were employees of the respondent company and thus were transferred as part of the EC (Protection of Employees on Transfer of Undertakings) Regulations 2006 SI 683/2006. The wage slip was evidence that there was a transfer. It was decided that the claimants were employees and had been unfairly dismissed without correct procedures being applied and therefore entitled to succeed under the legislation. The claimants had been brought into the meeting of 9 September 2010 without any warning and had been dismissed, there were no fair procedures used and there was no right of appeal. The evidence of the claimants in respect of the dismissal is uncontested as there was no evidence proffered by the respondent company to refute the claims relating to the meeting of September 2010.

In assessing loss, the member in minority also has had regard to the details of the earnings information submitted to the Tribunal by the Claimants with details of P60's for the year ended2011 and payslips showing income from current Employer up to the date of the 30th March2012 (being for 13 weeks). It is noted that these amounts include bonuses which are of anunguaranteed nature. The Tribunal has also assessed the calculation of loss submitted on behalfof both Claimants. In this regard, having assessed the financial documentation, it is decidedthat the Claimants have no financial loss and pursuant to Section 7(c)(ii) of the 1977 Act (asamended) the award of compensation that each Claimant is entitled to is a maximum amount of4 weeks remuneration.

Whereas the majority of the Tribunal did not have to consider the aspect of loss given the preliminary determination, the whole Tribunal agreed that the Claimants had no financial loss and would have been subject to a maximum award of 4 weeks compensation.

Conclusion:

In conclusion, by majority decision the Tribunal finds that the claimants were not employees and therefore not entitled to seek relief under the Unfair Dismissals Acts 1977 to 2007. Accordingly, the claims are dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)