

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

EMPLOYEE
- **Appellant**

UD1755/2010

against the recommendation of the Rights Commissioner **r-087176-ud-09** in
the case of:

EMPLOYER
- **Respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr D. Herlihy

Members: Mr G. Andrews
Mr F. Dorgan

heard this claim at Castleconnell on 14 May
and 10 September 2012

Representation:

Appellant:

Ms Colette Hannon BL instructed by Mr Kieran O'Brien,
O'Brien & Associates, Solicitors, Mill House,
Henry Street, Limerick

Respondent:

Mr Chris O'Donovan, Regional Director, IBEC,
Gardner House, Charlotte Quay, Limerick

This case came before the Tribunal by way of an appeal against a recommendation of a Right's
Commissioner Reference number r-087176-ud-09

Preliminary Issue

In circumstances where not alone was dismissal in dispute, but also the employment status of
the appellant, it was agreed that the preliminary issue would be addressed along with the
question as to whether there had been a dismissal. It fell to the appellant to prove his case.

The appellant worked for a large dairy product company for fourteen years before his position became redundant in early 2004. The appellant then joined the respondent, which delivers goods to shops mostly in the Munster area, as a driver for one week in March 2004. The appellant was unhappy with the remuneration in this position and left to work for a large retailer for a few months. It was common case that both with the dairy product company and the initial spell with the respondent that the appellant was an employee.

Sometime in June 2004 the appellant re-joined the respondent and provided his own vehicle, a van, for the purpose of carrying out delivery work on behalf of the respondent. It was common case that appellant did not receive payslips, holiday pay and did not have tax or PRSI deducted by the respondent. The appellant's position was that it was agreed that he would be paid €10 per hour, or €20 per hour if using his own van. The respondent's position was that the only agreement was that the respondent would pay on invoice from the appellant. The appellant's position was that use of his van dwindled over time as the appellant used a higher capacity truck provided by the respondent. The records submitted by the respondent covering the period from August 2005 until the arrangement came to an end in October 2009 show that the appellant used his van during 160 weeks of the arrangement between the parties and the truck during 170 weeks of the arrangement. The appellant submitted 182 invoices during this period. It was accepted that the appellant received a higher rate of remuneration when using his own van.

The appellant submitted copies of some handwritten time-sheets to the Tribunal with no monetary amount on them. The respondent submitted handwritten invoices from the appellant which include the monetary amount handwritten by the appellant. The appellant felt that his attempts to ascertain his employment status within the company were "fogged off". While he felt he was an employee he was not sure what his position was as regards his employment. The appellant never formally raised a grievance with the respondent.

The respondent had around 30 employees and three contractors, including the appellant, at its peak in 2007, this number had reduced to around 23 by the time there was no more work for the appellant in October 2009. The respondent's position was that they had successfully undergone a tax audit in 2009 and that Revenue understood that cheques paid to the appellant were to an outside contractor.

A certified public accountant who had previously acted on behalf of the appellant was approached by him in October 2009 about his taxation issues with respondent and Revenue. She then interviewed the appellant and his wife in an attempt to determine their status using as a guide the Code of Practice for Determining Employment or Self Employment Status of Individuals. Based on that code and the circumstances of the appellant she concluded that he was employed under a contract of service with the respondent. She conveyed that finding in a letter written to the tax inspector who was dealing with the appellant. There was no official response to her letter and therefore she assumed Revenue accepted that conclusion as no action was taken against the appellant regarding tax liabilities arising from his employment income from the respondent. This witness added that SCOPE section of the Department of Social

Protection was involved in this case and that the appellant was subsequently the recipient of social welfare payments.

Determination

It should be noted that there was a dearth of documentary evidence before the Tribunal from both the Revenue Commissioners and the Department of Social Protection. Having considered the intention of the parties at the start of the second relationship the Tribunal is satisfied that in June 2004, having previously been unwilling to accept the terms on offer to him as an employee, the appellant chose to re-join the respondent as an independent contractor. Accordingly, the Tribunal has no jurisdiction to hear the appeal and affirms the recommendation of the Rights Commissioner under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____
(Sgd.) _____
(CHAIRMAN)