EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.

EMPLOYEE - *claimant* UD242/2011
RP290/2011

against

EMPLOYER - *respondent*

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr M. Murphy
Mr O. Nulty

heard this claim at Mullingar on 4th July 2012

Representation:

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Claimant(s) : In Person

Respondent(s) : Mr Mark Connaughton SC instructed by Morgan McManus, Solicitors, The Diamond, Clones, Co. Monaghan

Summary of Case

The claimant carried out work as a Regional Claims Manager for the respondent company hereinafter known as (QI Limited) under a Service Contract and Agreement for the provision of Insurance Investigation and Settlement Services. The contract was opened to the Tribunal and the Tribunal's attention was drawn in particular to clause 1(f) which states that:

"*The Contractor will not be prevented or restricted by virtue of its relationship with (QI) from providing services to any other clients, subject to no conflict of interest arising".*

The claimant was a director and 100% shareholder of a company known as (AI Limited) and

payments were made to that company by the respondent company for work carried out by the Claimant. The claimant had requested by way of e-mail dated 22 September 2009 that all payments made after 1 October 2009 be made payable to (AI Limited). A copy of this e-mail was opened to the Tribunal. Prior to this payments were made by (QI Limited) to the claimant's personal bank account.

The claimant submitted invoices to (QI Limited) for payment. He accepted that he had no guarantee of work and (QI Limited) did not have to provide work for him. He had no control over the amount of work given to him by (QI Limited). He did not receive holiday pay or sick pay, and was not part of any pension scheme. He looked after his own tax affairs and used his own car in carrying out his duties for (QI Limited). He made his tax returns to the Revenue Commissioners as a self-employed person from 2007 onwards in accordance with schedule D which classified him as a self-employed person. **It was only afterwards when he viewed case law in the Henry Denny (HC 1995) (SC 1998) case that he considered himself to be an employee.**

The claimant gave evidence that he had to carry out the work himself and could not delegate his duties to anyone else. He was provided with business cards by (QI Limited) and was given a (QI Limited) e-mail address. His voice mail on his telephone was changed to state that he was from (QI Limited). He gave evidence that to the outside world he was an employee of (QI Limited). He had to be available for work between 9am to 5.30pm. He confirmed to the Tribunal that that he regarded himself as self-employed but in that regard he had no choice as (QI Limited) refused to employ him as a PAYE worker. He gave evidence that while other employees received pay increases he did not. He also made suggestions to (QI Limited) as to how they could increase their profits. He gave further evidence that he was unemployed from January 2011 to July 2011. Since July 2011 he has been in employment as a PAYE worker and details of his earnings were provided to the Tribunal.

Determination

In the first instance, Counsel for the respondent made an application that the Tribunal did not have jurisdiction to hear the matter because the clamant was not an employee as defined in the Unfair Dismissals Act 1977 but that he was an independent contractor. The Tribunal considered the evidence adduced taking into consideration all the factors relating to the working relationship between the Claimant and the Respondent.

The Tribunal noted the following facts which emerged during the hearing, which are now set out in summary hereunder, some supportive of the contention that the claimant was engaged as an Independent Contractor and others supportive of the claimant having employee status:

(i) the claimant considered himself an independent contractor since 2004

(ii) he was responsible for paying all his own taxes. In this respect he confirmed that he made revenue returns as a self- employed person, under Schedule D, from 2007 onwards;

(iii) the claimant's email of the 22nd September 2009 requested it was more tax efficient to trade as a limited company rather than as a sole trader and requested that all payments after the 1st October 2009 should be made to the company of which he was a 100 per cent owner;

(iv) he was not paid when out sick;

(v) he was not paid for holidays;

(vi) he was not part of any pension scheme;

(vii) he was not paid wage increases when other employees were;

(viii) he could work for other clients so long as there was no conflict of interest;

(ix) he submitted invoices for his services;

(x) the claimant had to carry out the work himself and could not delegate his functions;

(xi) he was given business cards by the respondent;

(xii) he was provided with an email address by the respondent;

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The High Court decision in the case of **The Minister for Agriculture and Food V Barry and Others (7th July 2008)** (hereinafter referred to as **"the Barry Case"**) contains a detailed analysis of the jurisprudence on the tests which should be considered in deciding whether a person is working under a Contract for Service [Independent Contractor] or a Contract of Service [Employee]. It is appropriate that we examine 'the Barry case' in detail as it is relevantto the case brought by the claimant.

In **'the Barry case'**, the Court allowed the appeal by the Department of Agriculture and Food against the decision of the Employment Appeals Tribunal (EAT) which had found that five Temporary Veterinary Inspectors (TVIs) were employees and accordingly entitled to payments under the Redundancy Payments Acts 1967-2003 and Minimum Notice and Terms of Employment Acts 1973-2001 following the closure of the Galtee Meats Plant at Mitchelstown, Co.Cork.

Mr. Justice John Edwards found that the TVIs were engaged as independent contractors, in other words, under contracts for service rather than as employees under contracts of service. The Department had argued that the TVIs were private veterinary practitioners who were also in business on their own account, and that they could and did continue in private practice along with undertaking temporary work for the Department. Further, the TVI's remuneration was paid on an hourly fee basis at rates fixed between the Department and their union, Veterinary Ireland.

Edwards J considered the Mutuality of Obligation Test which was referred to in the EAT Determination.

Mutuality of Obligation exists where the employer is obliged to provide work for the employee and the employee is obliged to perform that work as in a normal employer/employee relationship. Whilst the Court found that it was appropriate to apply the mutuality test, this does not mean that an implied contract of mutual obligation existed. Rather, the High Court agreed with the Department's view that they had no control over the level of work available to the inspectors, as this was within the control of Galtee.

Single, Several or umbrella Contracts

An interesting angle in this case, which differentiates it from previous case law in this area, is Mr. Justice Edward's finding that the EAT erred in trying to find as a preliminary point, whether a single contract, either for services or of service, existed. He considered that it was incumbent on the EAT to ask three questions:

* whether the relationship between each TVI and the Department was subject to just one contract or more than one contract ?
* what was the scope of each contract?
* what was the nature of each contract?

Accepting the possibility that each time the TVIs worked they may have entered a new contract with the Department, he felt that depending on the circumstances, each individual contract should then be analysed as to whether it was a contract for services or a contract of service. He also considered the possibility of a course of dealing over a lengthy period of time becoming an enforceable umbrella contract which he explained as being a type of overarching contract.

"The so called Enterprise Test"

Edwards J analysed the relevant jurisprudence in relation to "the so called Enterprise test". This test examines whether or not a person is in business on their own account. This test originated in a UK decision of **Market Investigations –v- Minister for Social Welfare** and was adopted by the Supreme Court in this Jurisdiction in the case of **Henry Denny and Sons Ireland Limited V The Minister for Social Welfare** (hereinafter referred to as **'the Denny case'**) and the application of the ratio decidendi in that case and in the subsequent decisions **Tierney –v- An Post (2000); Castleisland Cattle Breeding Society Ltd –v- The Minister for Social and Family Affairs (2004)** and the **Electricity Supply Board –v- The Minister for Social Community and Family Affairs & Others (2006)**. Mr. Justice Edwards noted that a very important "particular fact" common to these cases was the existence of a contractual document stating that the relationship between the parties was a contract for services. The fact that the parties agreed that the description of their relationship should be considered a contract for services should not be considered decisive or conclusive. Mr. Justice Edwards considered with great care the judgements in 'the Denny case' and referred to the statement of Keane J that when determining whether a particular employment relationship is to be considered a contract "for service" or "of service" [that] "each case must be considered in the light of its particular facts and of the general principles which the courts have developed"

Edwards J quoted the following paragraph from Keane J in the **Denny** case:

"It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general, a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises, or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her"

Mr. Justice Edwards criticised the misinterpretation of this passage which arose from "misguided attempts to divine in the judgement the formulation of a 'one size fits all'" approach to this difficult question. He went on to say that it was unhelpful to speak of a "control test", an "enterprise test" a "fundamental test" an "essential test", a "single composite test" as none of these "tests" can be relied on to deliver a definitive result. None of these tests were conclusive or exhaustive.

He considered that the appropriate test as to whether a person is engaged in business on his or her own account should consider, among other matters, the following factors:

* Whether he or she provides the necessary premises, or equipment or some other form of investment,

* Whether he or she employs others to assist in the business and

* whether the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.

Moreover, the Barry case further stipulated that in deciding whether a person is working under a Contract of Service or a Contract for Services a Court or Tribunal should have regard to the following:

(a) all possibilities should be investigated in determining the nature of the work relationship between the parties;
(b) the "so called enterprise test" is not determinative of the issue and that it is incorrect to assert that questions of control and integration are to be regarded merely as elements to be taken into account in applying the enterprise test;
(c) compare the question of enterprise to questions of control and integration as such a comparison will assist a court or tribunal with valuable assistance in drawing the appropriate inferences from the primary facts and no one factor is subsumed by another;
(d) there is no exhaustive list and there might be other factors which might also assist.

Some other factors may prove more helpful than others. In citing **Dillon L.J in Nethermere (St Neots)** Edwards J determined that
"the same question as an aid to appreciating the facts will not necessarily be crucial or fundamental in every case. It is for a court or Tribunal seized of the issue to identify those aids of greatest potential assistance to them in the circumstances of the particular case and to use those aids appropriately".
The binding element of the Judgement of Keane J in the **Denny case** is that *"each case must be considered in the light of its particular facts and of the general principles which the courts have developed"*. Therefore the test regarding whether "a person is in business on their own account" is reduced from being the fundamental test to one of the many factors that have to be taken into consideration in light of the particular facts of the case. Perhaps the main point to take from the case is that the various tests in this area should be considered as useful, rather than fundamental or single composite tests. Furthermore, each case should be examined on its own facts, giving particular attention as to whether or not a written contract containing a statement of the purported nature of the contract exists, or where no clear written contracts exists, whether in fact one, or more contracts or an umbrella type of contract exists. The Tribunal

considered itappropriate to refer to the Denny case as it was this particular case that prompted the claimantto make a claim that he was an employee. The Denny case does not support the claimant quiteas much as he suggests. The Denny case clearly states that "each case must be considered in thelight of its particular facts and of the general principles which the courts have developed". TheTribunal must consider **all** the facts in each particular case and cannot have a narrow focus.

It is clear that Paragraphs (i) to (ix) above strongly suggest that the claimant is an Independent Contractor while (x) to (xiii) support the contention that the claimant was an employee.
Whether a worker is an employee or self employed depends on a large number of factors. The Tribunal wishes to stress that the issue is not determined by adding up the numbers of factors pointing towards employment and comparing that result with the number pointing towards self employment. It is the matter of the overall effect which is not necessarily the same as the sum total of all individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another. When the detailed facts have been established the right approach is to stand back and look at the picture as a whole, to see if the overall effect is that of a person working in a self employed capacity or a person working as an employee in somebody else's business. If the evidence is evenly balanced, the intention of the parties may then decide the issue. In summary there is no single test. Each case must be considered in the light of its own particular facts.

Standing back and looking at the picture as a whole, and mindful of the legal principles set out in the Barry Case and the other cases referred to above, the Tribunal determines that the working relationship between the Claimant and the Respondent was one of a Contract for Services and that the claimant was working as an Independent Contractor. The Tribunal therefore does not have jurisdiction to hear the claim under the Unfair Dismissals Acts, 1977 to 2007 or the Redundancy Payments Acts 1967 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)