EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.

EMPLOYEE – ***appellant*** UD2081/2010

against the recommendation of the Rights Commissioner in the case of:

EMPLOYER – ***respondent***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. O. Madden BL

Members: Mr. F. Cunneen
Mr. N. Dowling

heard this appeal in Dublin on 6th March 2012

Representation:

_____

Appellant: In Person

Respondent(s): Ms Catherine O'Flynn, William Fry, Solicitors, Fitzwilton House, Wilton Place, Dublin 2

The determination of the Tribunal was as follows:-

This matter comes before the Tribunal by way of an appeal of a decision of the Rights Commissioner dated the 12th August 2010. The decision of the Rights Commissioner was that the complaint should fail as the Claimant was not employed on a contract of service.

In the first instance there is a preliminary issue to be decided by the Tribunal as to whether or not the Appellant was an employee as defined in the Unfair Dismissals Acts or an independent contractor on a contract for services.

The Appellant's relationship with the Respondent began sometime in June 2008 having been invited to attend an interview with the Respondent on the 14th April 2008 to discuss the possibility of working on a freelance basis as an interpreter. The Respondent provides

interpretation services on a nation-wide basis.

The Respondent argued that the Appellant was considered to be an independent contractor and not an employee as all interpreters are engaged under contracts for service. In support of their argument the Respondent established a number of criteria indicative of the relationship being one of a contract for services.

In the first instance the Respondent argues that there was no obligation to provide work to the Appellant. He would be allotted to a customer depending on the specific requirements of that client. Thereafter once they have a selection of interpreters who meet the clients requirements, those interpreters are contacted by the Respondent to see who is available to take the assignment. It is for this reason that they can never guarantee a level of work to the interpreters. Recently there has been a downturn in demand due to the fall off in numbers of foreign nationals coming into Ireland.

The Respondent also argues that they never asked for an undertaking from the Appellant to carry out any work offered to him and so the Appellant was always free to refuse work if offered, without consequence. He was free to take work from anyone else that he wished to work for. The Respondent states that by their nature interpreters are regularly self-employed and are not integrated into either the Respondents or the customer's business. Furthermore the Appellant did not attend the Respondents offices and did not have any workspace there. The Appellant supplied his own equipment and in the event that he was unable to attend an assignment he was not required to arrange a replacement.

Clause 4 of the Non-Disclosure Responsibilities Agreement dated the 14th April 2008 was also opened to the Tribunal and it provides that the Claimant "shall be responsible for his/her own tax returns and payments and shall indemnify Lionbridge against all tax claims in respect of all payments". Furthermore Clause 7 provides that the Appellant "shall also assume responsibility for insuring his/her employees and/or contractors employed on behalf of Lionbridge are registered for tax and are tax compliant" Thirdly, not only is the Appellant obliged to be responsible for his own tax compliance, he must also be registered for VAT, when applicable, as per the Respondents "Code of Professional Conduct".

The Appellant argues that The Rights Commissioner in her decision dated the 12th August 2010, "took a narrow view of the matter" and should not have restricted herself to whether or not there was Mutuality of Obligation between the parties. The Appellant also argues that the Rights Commissioner was incorrect in relying on the Respondents Non-Disclosure and Deferred Responsibilities Agreement dated the 14th April 2008 which he claims is a "flawed document"

The Appellants response to the arguments made out by the Respondent above are as follows. It is the Appellants view that the Respondent has a moral and ethical responsibility to provide him with work and a mere failure to give him a commitment as to the level of work they could make available to him does not necessarily render him an independent contractor.

The Appellant also questions the sudden fall off in work being provided to him, which stopped

suddenly in or about August 2009, however it appears that the Respondent deals with this point explaining that there had been a dramatic decrease in the number of foreign nationals entering Ireland at this stage. He says there should be no requirement on him to give the Respondent an undertaking or guarantee as to the amount of work he would do because there is an implied agreement as with all employment relationships that he would do the work as is was offered to him.

The Appellant disagrees with the argument made by the Respondent when they say he was free to refuse work if offered to him. The Appellant states that once you are being paid for work offered to you why would anyone refuse it. He further disagrees with the Respondents argument that he was free to work for anyone else as he argues that whenever work was offered to him by the Respondent, which was almost daily, he would take it.

The Appellant argues that his lack of workspace at the Respondents offices is similar to the working conditions of Aer Lingus Cabin Crew and Eircom service Engineers who are considered to be employees. The Respondent had argued that the Appellant supplied his own equipment such as pens, pencils, paper, dictionaries, landline phone, mobile phone, fax machine and internet connection. The Appellants response to this argument is that this is simply an attempt to undermine him. He says they are alluding to the "Enterprise Test" as set out in the decision of Mr Justice Edwards in the case of Minister for Agriculture of Food V Barry & Ors[2008] IEHC 216 which the Appellant argues the Respondent fails to deal with adequately in their submissions.

The Appellant further disagrees with the Respondents contention that there is no penalty imposed on the Appellant if he is unable to attend an assignment. The Appellant argues that it would of course make him look unreliable and he would therefore be "denounced" by the Respondent.

Finally the Appellant disagrees with the Respondents contention that he is not obliged to arrange a replacement in event that he is not available. The Appellant states that this contradicts Clause 7 of the Respondents Non-Disclosure and Deferred Responsibilities Agreement in that there is nothing unlawful about an independent contractor sending one of his employees as a replacement but that the Respondent was fully aware that he was not allowed as an employee to send someone else as a replacement.

Determination

While the Appellant argues that he would never refuse work when offered to him, in reality the relationship between the parties was such that it was always open to him to do so and in turn it was also open to him to take work elsewhere. The Appellant disagrees with this view and argues that to refuse work would be to refuse income. Furthermore he submits that this would reflect badly on him as he would appear unreliable. No argument is put forward by him that the

Respondent would be in a position to trigger any form of disciplinary action or ultimately dismiss him if he failed to accept work from them or if he opted to accept work elsewhere. Furthermore the Respondent's Code of Professional Conduct provides for such a scenario where an Interpreter is not available for work and stipulates that the Respondent should be informed in such circumstances. It is quite clear to the Tribunal that there was no obligation on the Respondent to offer assignments to the Appellant and in turn there does not appear to have been any obligation on the Appellant to accept assignments offered to him by the Respondent. The Tribunal is satisfied that there was no mutuality of obligation in this instance.
Mr Justice John Edwards in the case of Minister for Agriculture and Food v Barry & Ors [2008] IEHC 216 commented that "The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of service.

The Appellant in this instance is also faced with certain obligations pursuant to the "Non-Disclosure and Deferred Responsibilities Agreement" dated the 14th April 2008 whichclearly deals with a scenario whereby the Appellant has his own employees. The Appellantargues that this is a flawed document. However, the Tribunal notes that it is signed by bothparties. A document of this nature tends to supports the view that the relationship between theparties must have been one of a contract for services.

Taking all the circumstances of this case into account the Tribunal is satisfied that the Appellant was not an employee and, accordingly, there is no jurisdiction to hear the claim under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)