~EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF: CASE NO.

EMPLOYEE *claimant* UD512/2011

against

EMPLOYER *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr R. Murphy
Ms. E. Brezina

heard this claim at Dublin on 20th July 2012

and 16th October 2012

Representation:

Claimant(s): Mr. Kevin Callan BL instructed by Mr Frank Egan, Egan O'Reilly, Solicitors, 19 Upper Mount Street, Dublin 2

Respondent(s) Mr. Michael McNamee BL instructed by Aidan McGrath, Das Group, Das Legal Expenses, 12 Duke Lane, Dublin 2

The determination of the Tribunal was as follows:-

At the outset of the hearing it was agreed between the parties: that the claimant supplied labour to the respondent; that she was not on a fixed hourly wage; she did not provide equipment/machinery; she did not receive expense payments nor receive extra pay or time off for overtime.

Claimant's Case

The claimant told the Tribunal that she was a qualified dentist since 2007. She joined the respondent in August 2008 and was dismissed in August 2010. She worked four and a half days a week and her hours of work were from 8.30am. until 5p.m. Her hours of employment were agreed from the outset and she did not negotiate her hours. Initially when she was employed she did not work her full hours but after a short while she did. She did not believe that she could have worked Monday afternoons and she was never invited to work these hours. She saw patients in half hourly appointments and she had one hour for lunch. She did not undertake work for any other business during her two years with the respondent. When she was given her employment contract the respondent suggested that she leave the holidays per annum blank and this was favourable to the respondent and the claimant. If she needed holidays she agreed the timing of the holidays with the respondent and he informed her when he was taking his holidays. The respondent asked her to see his patients on his behalf. In the first year of her employment she took three to four weeks holidays and in the second year she had similar holidays. These were taken in consultation with the respondent. She was aware when the respondent took holidays and that determined when she took holidays. No locum was employed for holiday cover as far as she could recall. The respondent never asked her to increase her hours apart from working through lunch. The issue of a locum if she was ill or on holidays was never raised and it never happened. The claimant was never ill while employed by the respondent. She was unsure if her services could have been substituted by another person. On one occasion her cousin had a dental problem and she asked the respondent for permission to use the premises, which was granted.

She had no involvement with the ownership or rental of the premises. She did not lease any dental equipment. She had a separate room in the surgery and standard equipment including a dentist's chair. If the equipment was broken she contacted the respondent to establish if he could resolve the problem. She did not pay for any repairs. Disposable products were under the respondent's control. Four other staff were employed, the respondent, his nurse, the claimant's nurse and a receptionist. She had no involvement in employing any staff. She observed the respondent interview a nurse and she did not have any input in the hours that the staff worked.

She did not have an investment in the practice. If a patient had a problem she would remedy it and that was always the practice. The respondent had a system in place whereby patients were booked for half hour slots. The respondent collected patient fees and incurred laboratory fees. The laboratory invoiced the respondent and fees were deducted, the balance was split between the respondent and the claimant. She was given a schedule of the fees every month. Laboratories were used if a patient needed a denture /crown and the dentist took impressions. The laboratories that were used were chosen by the respondent. The receptionist collected the fees in cash and by credit card on behalf of the respondent.

Some patients had entitlements as they were medical card holders and the HSE paid for the treatment. The respondent collected the fees. The HSE and medical card fees were paid to her. The respondent paid her for private fees. During the first year of her employment the patients were predominately private and accounted for 62% of her work; in year two patients on the medical card scheme accounted for 42% of her work. The respondent had more patients than she did. The receptionist was given instruction regarding the booking of patients. The patients were screened at the appointment stage and allocated to herself or the respondent.

She saw patients for regular treatments and implants. She referred patients to different specialists. She did not advertise for business. She did not have a plaque with her name outside the door. She had professional insurance and she gave the respondent a copy. She did not have public liability insurance.

When she left the respondent she did not bring the patient list with her. She thought that she had a good working relationship with the respondent. Becoming a partner in the future was her long term aspiration and she discussed this with the respondent. The respondent had a computer system and the respondent was aware of her patients. The respondent had no issue with the work she undertook. The respondent directed her on how equipment should be cleaned and requested that the suction system be sterilised a certain way. When she attended for interview the respondent told her he was too busy to see all the patients and he needed an assistant. The respondent bought the practice from an older dentist who had retired. He sent a circular to existing patients that he had taken over the practice. When the respondent's business was first established patients were booked six weeks in advance. In August 2010 the bookings had reduced and appointments were made a week in advance.

In cross examination she stated that she was responsible for all her own tax. She was a recent graduate and had no real experience of private practice. She did her tax returns and an accountant procured the figures. She had a responsibility to be tax compliant. She presumed she made Schedule D tax returns. She was not an independent contractor. When her employment terminated she applied for a position in a practice for maternity cover and she commenced on the 18th October 2010. She was out of work for six to seven weeks.

When she obtained alternative employment she was not given a written contract of employment. She worked in another practice on Tuesday afternoons, Wednesday mornings and a session on Thursday. She was always available for work and she has two part time jobs. She was not given a P60.

She was never approached by the respondent about changing her hours of work. When she was asked if she was free to work in any other dental practice she replied it was an issue she was never aware of. If she did not attend work she expected that she would not be paid. The question of holidays did not arise. The issue of a locum never arose. When she was asked if the respondent was of the view that the claimant could provide a locum she replied it never occurred to her and it was not her responsibility.

She confirmed that she had a key to the surgery herself. She did not have any involvement in the recruitment of a nurse. She would have made a suggestion regarding her preferred candidate but she did not have the final say. If a patient attended the surgery while she was on leave the respondent would see the patient. Thirteen to fifteen patients a day were allocated to her. She did not feel that she could increase the number of patients she attended to during the day and she was as efficient as she could be. She had a list of patients but they were the respondent's patients. She enquired about a plaque but it never happened.

In answer to questions from the Tribunal she confirmed that on one occasion she asked the

respondent to use a particular laboratory. The respondent had not mentioned it to her previously and she had heard good reports about it. She further confirmed that the respondent would have seen her patients while she was on holidays. A locum was not employed when she was absent. She planned holidays well in advance and she consulted with the respondent. She covered for the respondent while he was on holidays. Likewise if one of her patents attended when she was not there the respondent would have seen to the patient. She had no input into the allocation of patients to her, which was done by the receptionist. When she commenced employment she had a few appointments but once her practice was established it was constantly busy and after Christmas each year the business was quiet. It was not her understanding that she could substitute a dentist to do her work. She was of the view she worked exclusively for the respondent and was fully employed from Monday to Friday. She had the same qualifications as the respondent. The dental nurse started work at 8.30a.m. The respondent contacted laboratories and they supplied the respondent with materials.

The respondent paid Tax and PRSI. PRSI and HSE fees were paid directly to her bank account. The respondent collected 100% of private fees and gave her 50% after deductions. If she was ill she telephoned the respondent. She got paid for the patients that she attended to. Some tax was deducted at source and she paid her own tax. She did not provide any independent services. Her full attendance was required at work. The respondent issued her with the schedule and she was kept aware of private patients. Payments were made every month and were consistent. She had no say in how patients were allocated. She could have done some of the work on implants and the respondent had a rapport with a consultant who undertook implants.

In further cross examination on the 16th October 2012 she disagreed that the respondent told her she could work later in the evenings. It was not the practice that nine extractions could be undertaken in a half hour, every extraction was different. A filling usually took thirty minutes. There was no way that she could undertake ten fillings in a thirty minute slot. Invoices that were addressed to her were opened by the receptionist. She never processed an invoice even though her handwriting was on an invoice and she stated that there must have been an issue with that particular invoice. The respondent instructed that she use a particular laboratory. The receptionist booked the patients.

In answer to questions from the Tribunal she stated that she could absolutely not get a substitute if she were absent. She was not told this directly but it would be very strange if it happened. The HSE had claim forms and they sent her a statement for reimbursement. She reiterated that she never submitted an invoice. She was not paid if she was absent on sick leave and she was rarely absent due to sick leave. She never received holiday pay, that was factored into her salary and she was not part of a pension scheme. She could not have undertaken work for another party and she worked four and a half days a week. She started at 8.30a.m. and finished at 5.30p.m. She did not feel that she could work from 7a.m. until 2p.m. as the dental nurses worked from 8.00a.m. until 5p.m. She completed her own tax returns.

Her name may have been on the respondent's letter headed paper. She considered herself an employee; she went to work at 8.30am. and treated patients. The equipment was there and the patients were supplied to her. She did her own tax returns as it was her first job but it seemed

strange. She never paid for invoices and she never wrote a cheque for invoices. She did not receive any payment for holidays and she always asked for permission to take holidays. She would have known when the respondent was on holidays and someone had to be present.

In re-examination she stated that she was not allowed to take patients with her to another practice. The respondent may have asked her to start work earlier.

Respondent's Case

The respondent JB told the Tribunal that when he first recruited the claimant he advertised for an associate. The claimant was the best candidate and he invited her to work with him on a self-employed basis. Self-employed was raised when they discussed remuneration. The majority of the work that the claimant undertook was government schemes/HSE. He told her that monies could be paid into her account. There were different types of patients, private, and self-employed, a HSE scheme for medical card holders and the treatment was paid for at end of the next month. He had a separate account number with the HSE. The claimant completed a handwritten form after treating patients. The money was paid into a bank account, withholding tax was deducted at source and the balance of the money was transferred into an account. Both the respondent and the claimant had a fifty per cent agreement regarding payment, the payments for social welfare patients and medical card patients were added and subtracted from the laboratory fees and they divided what was left. There was an issue with one invoice whereby the claimant had to pay the respondent €1,600.00.

In 2008 the claimant stated that she submitted claims on his panel number. Sometimes he owed her money and it could happen that she could owe him money. He asked her at one point if she wanted to work an evening but it did not suit her. The claimant was self-employed. Three other staff were employees and any changes that needed to be addressed would have to be renegotiated with them. The claimant could increase her financial takings by increasing patients in the allocated time slot. However he agreed that it was not recommended that dentists see patients on their own. He could not do five extractions in a thirty minute slot.

The claimant was in a position to take a financial hit, i.e. for some treatments the HSE deducted money and the claimant would sustain a loss. A dental impression that the claimant undertook was inaccurate and €500.00 was deducted as a result of this. The claimant was not on a fixed weekly salary. The claimant had accounts with different laboratories established in her name. He did not preclude her from sending work to a particular laboratory.

There were no rules set down regarding the choice of dentist that the patients requested. He liked to see his own patients and he endeavoured to do this. At the time the claimant commenced employment he had a backlog of work of up to several weeks with HSE and PRSI patients. He did not "own" a patient. The matter of a substitute dentist for the claimant never arose. The claimant was always in work and was never sick. The claimant was not paid sick pay. The idea of the claimant working for another practice was mooted once due to the cuts in the pipeline. He discussed with her that due to the foreseeable cuts there might not be enough work for her. He did not have discussions with the claimant as to whether she

considered herself an employee. Atone point they had informal discussions regarding the respondent's accountant. They both completed schedule D tax returns.

In cross examination he stated that as far as he was aware that the claimant was employed as an associate. The landscape has changed regarding associates and he did not know if associates have become employees He attended a course when he established the practice and was given a contract template. He was worried about the practice, he was always really busy and he worked a late evening. He told the claimant she could work a late evening. He would have a discussion with the support staff if the claimant was going to work the late evening. He had informal discussions with the claimant, and it took eighteen months for the cuts to be implemented. He was concerned how things would be for the claimant when the cuts would be implemented.

Private patients attended his practice in the evenings. The slots for patients could be fifteen, thirty and forty five minutes. His practice differed from the claimant in that he undertook orthodontics and some implant work. He could access the claimant's diary by clicking on the PC and this was not something he did on a daily basis. Some patients who attended the claimant requested that they return to her. Patients put the staff under pressure and it was the patients' choice as to the dentist they attended. Many of the patients would have to return for follow up appointments if they needed a number of fillings. A patient could request a specific dentist.

He relayed a problem that the claimant had when an appointment ran late. This occurred at lunch time; she asked one of the dental nurses to clean the suction equipment over lunch time. He told her it was not standard practice to do this at lunch time and that she would have to arrange this for another time. He was the dental nurses' employer.

He had a plaque outside his door and he did not have a discussion with the claimant about this. He had no recollection of the claimant requesting a plaque. He took annual leave around Christmas and the claimant was aware of this. When put to him that the claimant requested permission to take holidays he replied that the clamant took more holidays than he did. He would check the slots in his diary when going on holidays. There was no stipulation regarding the claimant's holidays. The claimant was self-employed and this was never going to be an issue. If the claimant was going to be absent for eight to ten weeks this would have caused an inconvenience and he would be very busy.

He could confirm that the claimant's mail was never opened; the respondent received a large amount of promotional material. The claimant had a mail box in her surgery. A number of forms had to be completed to indicate that work was undertaken. He did not tell the claimant what to charge a patient for a treatment. He told her what he would have charged for a treatment. The claimant charged €85.00 for an extraction and there was a degree of variance on this.

In answer to questions from the Tribunal regarding employee status and that the claimant should be at work from 8.30a.m. until 5p.m. he replied that when he started off that this was how all dentist practices worked. The employment agreement was not determinative. Both the claimant had the respondent had their own professional indemnity insurance.

It was difficult to simplify how more slots could be worked. There were dentists who could work more work slots but it would not be fair to put the claimant in that position. The agreement that he had in place was a disaster, he was completely naive in accepting it and it was something that was handed out and most of it came from the UK. A number of Associates had it. He did not vet laboratories that the claimant used.

He was the direct employer of the three employees in the office which included the two dental nurses and the receptionist.

He received a percentage of what the claimant earned. He was paid directly by some patients. The money the claimant received from DSW /HSE had withholding tax deducted at source. The monies earned by the respondent varied every month.

Determination

The claimant commenced working for the Respondent in August 2008 and was dismissed in August 2010. The claimant submitted a claim for unfair dismissal to the Employment Appeals Tribunal.

At the commencement of the hearing the Respondent's Representative submitted that the Tribunal did not have jurisdiction to hear the claim because the clamant was not an employee as defined in the Unfair Dismissals Act 1977 but that she was an independent contractor. The Tribunal could not rule on this application without hearing all the evidence. This is clear from a number of High Court decisions referred to hereafter.

While in most cases it is obvious whether a person is an employee or self-employed, it can sometimes be difficult to assess whether an individual providing services to another person or business can properly be described as self-employed. The terms "employed" and "self-employed" are not clearly defined in law, but some guidance has been provided by the courts. It is necessary to look at what the worker actually does, the way the worker does it and the terms and conditions under which the worker is engaged. What the parties call their relationship is not conclusive; it is the reality of the relationship that matters. When the claimant commenced employment the parties entered into an Associate Agreement but unfortunately the Agreement is silent on so many matters that could have assisted the Tribunal. The use of word 'Associate' suggests that the parties intended that the relationship between them would not be the normal "master/servant" but the signed Agreement is only one of the factors that must be taken into account, in considering whether the claimant was working under a Contract for Service [Independent Contractor] or Contract of Service [Employee].

The Tribunal considered existing case law in this contentious area cognisant of the fact that it would be difficult to find a set of circumstances in a previously decided case that exactly mirrors "the particular circumstances" of the case in issue. Recourse is therefore made to cobbling *ratio decidendi* from a number of relevant cases to fit the circumstances of the case before the Tribunal.

The Tribunal then considered the evidence adduced taking into consideration all the factors relating to the working relationship between the Claimant and the Respondent. These factors 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.

The High Court decision [which is under appeal to the Supreme Court] in the case of **The Minister for Agriculture and Food V Barry and Others 1998 ELR 36 (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 relevant to 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 (hereafter "the TVI's) 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 (hereafter "Galtee").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 Departmentand their union, Veterinary Ireland. The TVI's paid PAYE and PRSI and each was issued with aP60 annually. The TVI's were not obliged to maintain their own professional indemnityinsurance. The TVI's did not charge VAT, and were not paid VAT even though VAT waschargeable on TB testing.

Edwards J considered the following pertinent matters in reaching his decision:

Mutuality of Obligation

This 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 viewthat they had no control over the level of work available to the inspectors, as this was within thecontrol of Galtee.

"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 his/her 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 veryimportant "particular fact" common to these cases was the existence of a contractual documentstating that the relationship between the parties was a contract for services. The fact that theparties agreed that the description of their relationship should be considered a contract forservices should not be considered decisive or conclusive. Mr Justice Edwards considered withgreat care the judgements in **'the Denny case'** and referred to the statement of Keane J that whendetermining whether a particular employment relationship is to be considered a contract "forservice" or "of service" [that] "each case must be considered in the light of its particular facts andof the general principles which the courts have developed" Edwards J quoted the followingparagraph 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 to were conclusive or exhaustive. Accordingly this Tribunal should not reduce its consideration to a few tests. It is clear from 'the Barry case' and from Denny that all possibilities must be investigated before coming to a conclusion. This is what the Tribunal must now do.

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.

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 must consider **all** the facts in the case before it and must not have a narrow focus.

The Tribunal found the Denny case particularly useful in considering its decision. It is worth setting out the facts of this case: A demonstrator had been engaged by the Appellants to demonstrate their food products in various supermarkets. She was employed under a series of temporary contracts which were renewed every year. Her contract clearly specified that she was not an employee rather she was an independent contractor. Some of these statements were:-

"You are deemed to be an independent contractor",

"It shall be your duty to pay and discharge such taxes and charges as may be payable out of such fees to the Revenue Commissioners or otherwise",

"It is agreed that the provisions of the Unfair Dismissals Act1977 shall not apply etc",

"You will not be an employee of this company",

"You will be responsible for your own tax affairs"

However her duties were to be carried out in a very specific way; she would be given a minimum period of notice before each job; if she could not do the job another person approved by the employer could do it for her; she had to wear a uniform provided; she was paid by the days she worked, payment being made on receipt of an invoice which was only valid if signed by the store manager. She submitted an invoice and payment was made each fortnight without deduction of tax or PRSI.The demonstrator was deemed to be an employee notwithstanding statements to the contrary in her contract.

The Judge in the Denny case felt that statements, such as "you are deemed to be an Independent Contractor" etc, in the contract should be disregarded, on the basis that they represent the opinion

of the contracting parties but were of minimal value in deciding the work status of the person engaged.

In 'the Denny case'

The Supreme Court held that in order to decide whether a contract is one for service or of service each case should be considered on its own particular facts and in the light of the general principles which the courts have developed **McAuliffe V Minister for Social Welfare 1995 ILRM 421** approved;

Whilst the degree of control exercised by a person may provide guidance in deciding whether a contract is one "for service" or "of service" it may not always be a satisfactory test to apply **Cassidy V Minister for Social Welfare 1951 2 KB 343** and **Queensland Stations Property Limited V Federal Commissioner of Taxation 1945 70 CLR 539** considered. The degree of control is not decisive. **Market Investigations Limited V Minister for Social Security 1968 3 AER 732.**

The inference that a person is engaged in business on their own account is more readily drawn when they provide their own premises or equipment, where they employ others to assist them in their business and where the profit is dependent on the efficiency with which they conduct their business.

Whilst a written agreement was drafted with a view with a view of ensuring that the demonstrator was regarded in law as an independent contractor, this was only one of the factors to be taken into account The facts or realities of the situation on the ground must also be taken must be taken into account.

The Tribunal then considered the facts of the case before it with commentary of previous case law and taking into account the facts and realities on the ground. In doing so the Tribunal found some factors more helpful than others. The Tribunal notes the observations of Edwards J in **Dillon L.J in Nethermere (St Neots)** 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".

In **the Barry** case Mr Justice Edwards 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 [see below], the following factors:

The Tribunal applied three of the tests, which Mr Justice Edwards deemed appropriate, to the case before it as follows:

Whether the person provides the necessary premises, or equipment or some other form of investment.

In the case before the Tribunal the claimant did not provide premises, equipment or any investment. Furthermore the claimant had no involvement with the ownership or rental of the building. She had a separate room in the surgery with equipment supplied including a dentist's chair. If equipment was broken the respondent fixed/replaced it.

Whether the person employs others to assist in the business.

The claimant did not employ 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.

This is debatable. The Tribunal finds it difficult to see how the claimant could have earned more money by conducting the business more efficiently. Her appointments were booked for half hour slots and it is difficult to see how she could have earned more by being more efficient. Perhaps she could have worked at weekends but this would have entailed engaging a dental nurse to comply with best practice.

That it is not confined to these three tests is clear from Mr Justice Edwards reference to "among other matters". The "other matters" which the Tribunal considered were:

The claimant was responsible for paying all her own taxes. In this respect she confirmed that she made revenue returns as a self-employed person, under Schedule D. The Tribunal is mindful that an employee working under a contract of service does not normally pay their own tax under Schedule D but the Tribunal reminded itself that this is just one of the factors which must be taken into consideration in deciding the employment status of the claimant. The Tribunal notes that in **the Denny Case** the demonstrator paid her own tax yet this factor alone did not make her an independent contractor.

In the Barry Case PAYE and PRSI was deducted by the Department from the TVI's pay. The Employer's PRSI contribution of 10.75% was paid by the appellant in respect of each TVI, rendering each TVI insurable for all purposes of the PRSI Acts. Each TVI was issued annually with a P60, which named the appellant as the "Employer" and the TVI as the "Employee". The fact that the TVIs had tax/PRSI deducted did not persuade the High court to hold that the TVIs were employees. While the fact that an employee pays his/her own tax and PRSI is persuasive that he/she is an employee it is not the defining fact. Furthermore even Revenue do not accept the fact that because an individual has registered for self-assessment or VAT automatically makes that person self-employed. In the same way Revenue do not automatically accept that because a person is taxed under the PAYE system that the person is automatically an employee. This is clear from the 2010 document – Code of Practice

for Determining Employment or Self-Employment Status of Individuals;

She had to attend at the surgery during the opening hours 8.30 to 4.30/5.00 which is strongly indicative of employee status;

Substitution: while the respondent gave evidence that the claimant could substitute another dentist to carry out her work there is nothing in the Associate Agreement authorising this. Independent Contractor Agreements usually have a clause dealing with the right of the contractor to engage a substitute to carry out the contractor's work subject to the approval of the end user to such a substitute. Independent Contractor Agreements dealing with professionals also usually have a clause stipulating that the substitute must have professional indemnity insurance. In general terms an independent contractor does not have to carry out the tasks himself;

While the respondent gave evidence that the claimant could have earned more money by working longer hours the Tribunal does not accept that this was realistic because she would have to have a nurse with her to comply with best practice so it is not a straightforward matter;

No credible evidence was presented to the Tribunal that the claimant was in business on her own account. In **O'Coindealbhain (Inspector of Taxes V Mooney) [1990]** IR 422 the critical question was considered to be whether the person was performing the relevant services as a person in business in his/her own account.

Whilst the degree of control exercised by a person may provide guidance in deciding whether a contract is one "for service" or "of service" it may not always be a satisfactory test to apply. This is clear from the cases referred to above **Cassidy V Minister for Social Welfare 1951 2 KB 343** et al. The Tribunal considered the question of "control" and found that the respondent exercised certain control over the claimant. For example bookings were made through reception; the patient paid the fees to reception; in general the respondent dictated which laboratories were to be used. In addition the respondent directed her on how the equipment should be cleaned and that the suction system should be sterilised;

Holidays: evidence was given to the Tribunal that when the claimant wanted to take holidays she had to agree the timing of the holidays so as not to clash with the respondent's holidays. In general terms an Independent Contractor does not have to take his holiday entitlement in consultation with the end user. What is quite significant is that the respondent saw the claimant's patients while the claimant was on holidays. An end user does not do an independent contractor's work while the independent contractor is on vacation;

Support Staff: The claimant sat with the respondent on only one occasion to interview a nurse. She made a suggestion regarding her preferred candidate but did not have the final say. Apart from this she had no involvement/responsibility for staff. This is one of the factors that does not assist the Tribunal greatly as an employee could interview or be responsible for other staff.

HSE Contracts: the claimant was paid directly by the HSE for treatment to medical card holders. This is suggestive of Independent Contractor status and is one of the factors which the Tribunal

has to take into consideration in reaching its decision;

When the claimant attended for interview the respondent told her he was too busy to see all the patients and that he needed an assistant;

The claimant had no plaque on the door/at the entrance to the practice informing the world that she was there practising as a dentist. It is inconceivable that an Independent Contractor would not have a plaque advertising her services;

the respondent collected the fees for private work and paid the claimant 50% of these fees after deductions. Again this is indicative of Independent Contractor status but it is not conclusive as an employee could be working on a profit sharing basis;

The patients were the patients of the respondent and she did not "take them" with her on the termination of her employment;

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 working relationship as a whole, and mindful of the legal principles set out in the cases referred to above, the Tribunal determines that the working relationship between the Claimant and the Respondent was one of a Contract of Service and that the claimant was working as an employee for the respondent.

The Tribunal therefore does have 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