

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NOS.

EMPLOYEE - *claimant*

UD2450/2010
RP3312/2010
MN2399/2010
WT1088/2010

against

EMPLOYER 1 – *respondent 1*

EMPLOYER 2 – *respondent 2*

Under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms S. McNally

Members: Mr D. Hegarty
Mr J. Flavin

heard this claim at Cork on 19th July and 24th October 2012

Representation:

Claimant: Mr Frank Hannon of Hannon Solicitors, 70 Shandon Street,
North Gate Bridge, Cork

Respondent: Ms Anne Tait of Anne Tait & Co. Solicitors,
7 St. Patrick's Terrace, Douglas West, Co. Cork

The determination of the Tribunal was as follows:

Respondent's Case

Respondent 1 gave evidence. She had employed the claimant's sister to work in her fruit & vegshop. She got to know the claimant when her sister suffered a period of ill health. Respondent 1 was approached by the claimant who was looking for work as a cleaner.

The claimant worked for no more than 3 hours a day and for no more than 3 days a week. She did general house-keeping tasks. Respondent 1 considered the claimant to be self-employed.

The claimant did not have a contract of employment. Respondent 1 paid the claimant weekly in cash; an envelope left on the kitchen window, but did not pay tax or PRSI for her. Respondent 1 paid the claimant with money from her own salary. Respondent 1 did not keep receipts for the money paid to the claimant. The claimant had no entitlement to sick pay or to holiday. The claimant cleaned for other clients but she told respondent 1 that their names were confidential. The claimant asked respondent 1 to call her Joan and not her real name on the phone. Over the years respondent 1 had employed a number of people and she was aware of the obligations of an employer. The claimant was a self-employed contractor and therefore respondent 1 did not have employer obligations towards her.

Respondent 1 did not dismiss the claimant. The claimant was not an employee and therefore could not be dismissed. The claimant's mother was ill and her husband advised her to cut-back on work. It was the claimant who terminated the arrangement.

One of the shops run by the respondents closed and times were difficult financially. Respondent 1 now has a cleaner who comes in 1 day a week for 3 hours.

The claimant's husband gave evidence. He is employed and makes a joint return to Revenue. The claimant's income was not disclosed by him. He understood his wife's income to be net and that her employer paid tax and PRSI for her. He got advice on the matter and understood that he did not have to report his wife's income. The claimant worked 5 mornings a week. The claimant was also a key-holder for the respondents' house.

The claimant's sister gave evidence. She worked for the respondents' business for 30 years. Her employer always paid her tax and PRSI. The claimant's sister was paid every week. The envelopes came out from the market, one for each employee, and were collected from the till. There was an envelope for the claimant every week, like the other employees.

The claimant's sister presumed that her sister worked 5 days a week. If the claimant's sister ever phoned her employers' home, her sister always answered the phone.

The girlfriend of the respondents' elder son gave evidence. She met the claimant in the respondents' house on one occasion.

Claimant's Case

The claimant gave evidence. She started working for the respondents in 1992 during the spring or summer. The claimant knew the respondents' previous cleaner was giving up. The claimant worked from 10 minutes to 8 until 1.00pm. When she started the claimant gave her p.45 to respondent 1. She assumed her tax was paid. She cleaned the house and did laundry. The claimant was not given a list of things to do. She never asked to be called Joan there was no reason. The claimant went to the shop each Saturday to collect her pay. She was given a small brown envelope like the other employees containing her pay in cash. The envelopes came from the market. She had never been sick so the issue of sick pay did not arise. She got 2 weeks holidays every year, one week at a time and gave one month's notice.

During the school holidays the claimant would make breakfast for the 2 boys and would have their company while she worked. On holy days their father would phone and tell the claimant to make sure the boys got up and went to mass.

The day the claimant's employment ended she was cleaning one of the bedrooms when respondent 1 came in and said that her accountant had told her to cut her household expenses by 80%. When the claimant asked what she meant respondent 1 said that she must cut household expenses by 67%. Respondent 1 said that she would be doing the cleaning herself and told the claimant you are gone and you can finish now. The claimant wanted to finish work on the Friday but respondent would not agree. The claimant did not leave to care for her mother. The claimant's mother is elderly but does not need 24 hour care.

The claimant established her loss.

A neighbour of the claimant's gave evidence. The claimant worked for the respondents as long as she had known her.

Respondent 1's sister gave evidence and said that on the rare occasions that she phoned her sister, it was the claimant who answered the phone.

The respondents' elder son gave evidence. The claimant had worked in the house but he did not know what hours she worked.

The respondents' younger son gave evidence. He did not take notice of the hours the claimant worked.

Determination

The Tribunal carefully considered the evidence adduced and the submissions made in this case. The first issue to be considered by the Tribunal is the employment status of the claimant, whether she was employed under a contract for service or a contract of service. Mr Justice Edwards in the case of **Henry Denny and Sons Ireland Limited V The minister for Social Welfare** considered that the appropriate test 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.

On the basis of the evidence given and in light of the test above the Tribunal determines that the claimant was an employee. The working relationship between the claimant and the respondents was one of contract of service.

The Tribunal accepts the evidence of respondent 1 that her business declined significantly. She needed to cut costs. The Tribunal finds that the claimant's employment terminated as a result of redundancy. Redundancy is not an unfair dismissal and accordingly the claim under the Unfair Dismissals Acts 1977 to 2005 fails.

The claimant is awarded a redundancy lump sum, under the Redundancy Payments Acts, 1967 to 2007, based on the following information:

Date of Birth	31 July 1955
Date Employment Began	15 June 1992
Date Employment Ended	15 October 2010
Gross Weekly Pay	€200.00

This award is made subject to the claimant having been in insurable employment under the Social Welfare Acts during the relevant period.

The claim under the Minimum Notice and Terms of Employment Acts 1973 to 2005 succeeds and the claimant is awarded the sum of €1600.00 being eight weeks' wages.

The claim under the Organisation of Working Time Act 1997 succeeds and the claimant is awarded the sum of €200.00 being one week's wages.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)