

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD177/2010, RP449/2010
MN170/2010

against

EMPLOYER

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. O'Connor

Members: Mr G. Andrews
Mr O. Wills

heard this claim at Tralee on 4th October 2012

Representation:

Claimant : Mr Stephen O' Halloran B L instructed by
Cashell, Solicitors, 119 Rock Street, Tralee, Co Kerry

Respondent : Mr Micheál Munnelly B L instructed by
Steen O'Reilly, Solicitors, 31/34 Trimgate Street, Navan, Co Meath

Prior to this hearing this case came before the Tribunal in September 2011. Following a consultation on the adduced evidence the Tribunal decided to hold a full hearing into this case. The previous evidence while not unimportant does not form part of this new reconvened hearing.

In addition to the fact of dismissal being in dispute the Tribunal also had to consider the employment status and relationship between the claimant and the respondent. The respondent contended that the claimant was employed under a contract for services whereas the claimant is adamant he was an employee of the company. The respondent, in this case, publishes regional directories which contained in the main advertisements relevant to that area and its potential readership. It employed sales agents throughout the State to maintain existing customers and to source and secure new clients.

The appeal under the Redundancy Payments Acts, 1967 to 2007 was withdrawn at the outset of this hearing.

The determination of the Tribunal was as follows:

Claimant's Case

In 1962 the claimant became registered as a sole trader. Subsequent to that registration he ran his own wholesale enterprise and also acquired a value added tax (vat) number. He regarded himself as a career salesperson and in that capacity he joined the respondent in the spring of 1986. At the outset of that employment he informed the contemporary managing director of his involvement in business activities elsewhere and that minor outside business was "no problem" for the respondent. In taking up this position of sales agent in the south and later south west regions of the country the claimant was provided with a company car and the running and maintenance of that vehicle was financed by the respondent. After some time he gained the position of manager which meant he directed several other sales agents in those regions and received a percent of their sales. At that time and for a numbers of years the claimant received a regular and reliable remuneration from the company. That payment was based on his own sales plus that of his team, and expenses.

Within eighteen months of commencing with the respondent the claimant was presented with an untitled document relating to his status with the company. That one page sheet stated inter alia I agree that I shall be paid for acting as an agent on a commission basis only and shall be paid a percentage on paid sales net of VAT. The claimant refused to sign that document and indeed never signed any form of contract with the respondent. He told the Tribunal that he regarded himself as an employee of the company for the full duration of his time with the respondent. He accepted that no statutory deductions were imposed on his income from the respondent and that he was responsible for his own taxation and social welfare affairs.

While there was regular telephone contact between the parties the claimant only physically reported to the office of the company once a year. At one such meeting he was told that he together with others formed the nucleus of the company. The respondent maintained control over the price of his services and the claimant had discretion as to where and when to work. The witness submitted handwritten claims forms invoices on his sales to the office for processing. One such form dated week ending 24 August 2007 stated that two accountants and a tax inspector concluded the claimant was self-employed. He told the Tribunal that this was not the case as he was then and always had been an employee of the respondent. However, he accepted that he was not in a "traditional" employment relationship with the respondent.

By September 2009 the claimant still had an ongoing dispute with the respondent over expenses. He wrote to one of the directors of the company and also engaged in a telephone conversation with him on this issue. During the course of that correspondence the claimant said he was subjected to bullying and abusive behaviour. While he again wrote to the respondent on 17 September complaining of the treatment he was receiving from the respondent the claimant subsequently received a letter from the respondent dated that day which informed him that his "agency agreement" was now terminated. The author of that letter wrote that the claimant was refusing to verbally communicate with officers of the respondent.

Respondent's Case

The respondent was established in the 1980s and commenced publication of directories for different regions of the country. A former director of the company who relinquished that position in June 2010 told the Tribunal that a brother who was also a director had at times a "short fuse". Their father who he described as a career salesperson was its managing director. While this witness was not present at the claimant's interview he nevertheless was sure that it was made clear to the claimant at that interview that his status with the company was that of self-employed. It was the respondent's practice then and since to engage sales agents on a

non-employee basis. No agent including the claimant was led to believe that their status with the company was that of a contact of services. According to this ex-director ninety-nine percent of agents signed an agreement to that effect. The claimant did not seek clarification on his employment status with the company.

Sales agents' remuneration was based on their sales and commission. Those agents were free to seek business where and when they choose and were "left to their own devices". However, the company did provide cars to some of the agents including the claimant and paid for their upkeep. The respondent was keen to portray their agents as professional sales people. Each region had a manager who generally and broadly controlled the activities of those whom they managed. The respondent neither paid them for their leave, never sought medical certificates from them, nor did it contribute to their social welfare payments. The agents including the claimant were also liable for their own taxation affairs which were between them and Revenue. The respondent had no input into that arrangement.

Determination

The Tribunal finds that the working relationship of the parties was somewhat loose and may have changed intermittently over its duration. The complexity of the matter was compounded by the failure of the respondent to insist on the applicant signing a contract. Nevertheless, taking into account that the applicant considered that he owned his own sales, submitted VAT invoices for same in his own name, paid his own tax and PRSI, never drew any sick pay when he was off due to illness, and ultimately claimed a self-employed old age pension at sixty six years of age, that the respondent's business was run on the basis of commission agents the Tribunal determines after much deliberation by a majority decision that the applicant was not an employee and was in fact self-employed.

Consequently the Tribunal has no jurisdiction to further determine this case under the Unfair Dismissals Acts, 1977 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)