

PRELIMINARY DETERMINATION
EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE - Claimant

UD1431/2011

Against

EMPLOYER - Respondent

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms P. McGrath B.L.

Members: Mr. L. Tobin
Mr. J. Dorney

heard this claim at Wicklow on 4th February 2013.

Representation:

Claimant: In person

Respondent : Ms Deirdre Lynch, Matheson Ormsby Prentice, Solicitors, 70 Sir John
Rogerson's Quay, Dublin 2

The determination of the Tribunal was as follows:-

Determination with respect to Preliminary issues:

The Tribunal has carefully considered the evidence adduced. The claimant comes before the Tribunal seeking redress under the Unfair Dismissals legislation. The claimant was employed on an on again off again basis from at least 2005 onwards.

The respondent company is a t.v. and film production company. Witnesses on behalf of the respondent company gave evidence to the effect that for the four or five years prior to the claimant's termination of employment in 2010 the company would pitch for work without any assurance that a contract would be landed. As it happens, the respondent company had been very fortunate to win the contract for such productions as 'The Tudors' and 'Camelot' which resulted in the need to assemble its film crew for up to six or seven months a year.

The claimant is a carpenter and indicated that every year when production commenced he would be taken on as second carpenter for the duration of filming. It is common case that production would be of a six or seven month duration during the year. The respondent witnesses were adamant that the claimant could not consider himself an employee as they could not guarantee work and with each production a different company was set up to employ the claimant and therefore there was no continuity of employment. The evidence adduced several companies were indeed set up to deal with different productions although it seems the workforce remained largely the same.

The Tribunal notes that the setting up of companies had, in fact, more to do with Revenue compliance than the objective of preventing any individual from acquiring rights under the employment legislation.

The claimant's case is that he had been employed on an annual basis from as far back as 2000 with the same two individuals who were the Directors of each and every company under whose title he had worked. In effect the claimant's evidence was that he knew he would be employed as and when the contract was landed. The claimant indicated he was paid very well on set and this reflected the fact that there would follow a lean period of lay-off until such time as the next filming contract was landed. As in any lay-off situation the claimant is not precluded from picking up work during a period of lay-off – which he did on at least one occasion.

There can be no doubt that the claimant believed he had a legitimate expectation from year to year that he would be taken on as part of the filming team that would be required by the two individuals who pitched for and landed the work. It is noted that the two individuals pitched under the name O.F. Ltd and as and when the contracts were landed a new production company would be set up for the duration.

Ultimately at the point of break down in relations between the parties the claimant was employed by the respondent company which said company was the last in a series of companies set up for Revenue purposes by the two individuals named in the T1A form.

On balance the Tribunal finds that there is continuity of service going back to at least 2005 (the claimant having been out sick before that date) and that the claimant was subject to Transfer of Undertaking on an annual basis leaving the claimant in employment of the respondent company when the relationship between the parties ultimately broke down.

The Tribunal finds that the claimant is an employee of the respondent company (and its predecessor) and has the relevant period of employment such that allows him to bring a claim under the Unfair Dismissals Act.

The Tribunal must now address the fact that the claimant's T1A form received in the offices of the Employment Appeals Tribunal on 5th July 2011 is just shy of a full year after the claimant's last day on set – 16th July 2010.

In keeping with its previous finding the Tribunal must consider the custom and practice of the parties. In July 2010, the claimant left the workplace arising out of what he says was a hostile atmosphere. The respondent company purported to terminate the claimant's contract by letter dated 9th July 2010. The Tribunal sees this letter as having been prepared as similar letters had been prepared in previous years. The claimant's case is that the termination is for the purposes of that particular production and the claimant is in effect on lay off until such time as the next

production contract is landed.

On 21st April 2011 the claimant wrote to the company indicating availability and readiness to re-commence employment on whatever project may be in the pipeline. This request was not taken up and the Tribunal must assume that it is at this point that the claimant must consider himself to have been dismissed. The T1A received in the offices of the Employment Appeals Tribunal on 5th July 2011 is therefore within time for the purposes of the Act.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)