

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
EMPLOYEE

CASE NO.
UD1865/2010
MN1822/2010
WT831/2010

against
EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 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: Dr. A. Courell B.L.

Members: Mr D. Morrison
Ms A. Moore

heard this claim at Donegal on 14th March 2012 and 24th May 2012 and 25th May 2012

Representation:

Claimant: McIntyre O'Brien, Solicitors, Castle Street, Donegal Town, Co Donegal

Respondent: Michael Shiel & Co, Solicitors, Ballyraine, Letterkenny, Co Donegal

The determination of the Tribunal was as follows:-

At the outset a jurisdictional point was raised in that the respondent did not accept that the claimant had been an employee.

The respondent contended that the claimant was not an employee of the respondents as defined in section 1 of the Unfair Dismissal Acts and that accordingly the Tribunal did not have jurisdiction to hear the case under the under the said Acts. They claimed she was a self-employed and was paid by a percentage of the monies taken from each client at the end of each day.

The respondent in this case is a dental surgery and the claimant a dental hygienist.

Claimant's Case:

The claimant SOL worked for the practice since 1996. Her hours increased steadily from occasional days to five days a week. She operated in one of the dental surgeries and was paid cash at the end of each day. Her wages were calculated at 50% for each patient that was referred to her by DC the dentist and owner of the practice. SOL stated that she had no financial risk, no expenses and no overheads, she paid no rent and all the equipment she used was owned and supplied by DC. She provided her time and expertise and he provided everything else. SOL had no control over her annual leave but was not paid for it, could not refuse to see any patient and had to ring in sick the same as the other members of staff. The claimant and her husband were both self-assessed for tax purposes.

Around Easter 2010 SOL felt that things changed, DC was having personal difficulties and the practice was in the process of being sold even though staff were unaware of the facts. She made contact with the SCOPE section of Social Welfare because she became concerned about benefits. She underwent an assessment she was deemed to be an employee.

After the Easter break SOL received a telephone call from a colleague saying that the practice was not opening on the Monday and to take another day off. Things became erratic and nobody knew where they stood. The claimant enquired if her position and was told her job was safe.

An incident occurred on the Monday before her sacking where the claimant said that DC “launched into her”. SOL was told of three issues, **1** that she had barged into a private meeting **2** money was left lying around and **3** her car was parked in an area it shouldn't be in.

She didn't confront it at the time as she needed her job but tried to talk to him after lunch. He began shouting again. A further incident occurred where DC did not like the terms she was using with regard to dentistry, he told her she was making them up, she gave him the definitions and he asked her to repeat them, she told him she was happy not to use them if that was what he wanted. He then proceeded to say terrible things to her that were of a confidential nature. SOL saw her first patient and then was not allowed to see anyone else. DC looked after them himself. She was told at lunch time to get her stuff as the working relationship was over. The claimant didn't have her car and said she would pick up her stuff on the following Monday morning. She went to work just before 9am picked up her stuff, spoke to her colleagues who were all crying and heard nothing further from DC.

Under cross examination SOL stated that she had not received a P45 or a P60, she was not aware if her colleagues received P60's or not, it was never discussed. She had worked for other dentists on a casual basis but stopped doing so in 2004. She did ask for a contract but never received one.

Asked about her Revenue arrangement SOL stated that her accountant handled it.

DC's mother had opened up to her and told her of problems he was having, she didn't think it was inappropriate to mention his marital status to him as he was finding it difficult to cope and she wanted him to know that the staff were there to support him. She was not trying to undermine him by using terminology he seemed unaware of, he needed to be aware of what was in her notes.

SOL did tell DC at some stage that she was carrying him and regretted doing so.

SOL's Accountant gave evidence. She stated she had compiled SOL's accounts for 6 or 7 years. She stated SOL was self-employed with the respondent.

The Dental Nurse / Receptionist (PMG) gave evidence. She had worked for the respondent from May 2005 to July 2010. She confirmed the claimant was paid cash at the end of each day. 50 % was paid to her and 50% was paid to the respondent. She had never heard if the claimant paid 50% of the rent to the respondent. She would work with the claimant and give her a list of her patients for the day. The respondent accepted medical cards. The claimant never worked when the respondent was not on the premises but she could start 15 minutes before the respondent arrived.

All staff were off for a week at Easter 2010. They were due back the following Monday but the witness received a call to say the respondent had cancelled all patients appointments for a week. The premises opened a week and a half later – end of March 2010. The respondent seemed distracted and informed the staff that another dentist (Dr. M) would be covering his work. At this time there was a “horrible atmosphere” in the office.

On June 18th 2010 the claimant attended work. Her first patient arrived and informed her the respondent had scaled and polished her teeth. This had never happened before unless the claimant was on leave. The respondent dealt with all her patients from 9.45 am to 12.30 pm. The claimant asked the witness why her patients were not coming to see her and was informed the respondent had dealt with them. One patient did not want to attend the respondent. The claimant was very upset and shaken, she left. The atmosphere was very tense and no-one knew what was happening. The respondent said nothing to the witness. The respondent attended the claimant’s patients for the remainder of the day.

On June 21st 2010 the claimant arrived at around 8.55 a.m. She was expecting to speak to the respondent. She normally arrived to work around 9.35 a.m. The respondent rang and said the claimant should start working on her first patient but the PMG told the respondent the claimant had left the premises. He arrived around 10.00 a.m. He asked a couple of times had the claimant rang as he continued to deal with patients. He got the witness to type and sign a letter stating:

“(The respondent) rang the surgery that morning on the morning of the 21st June to say he was running late. He instructed me to tell (the claimant) to go ahead with her patients. (The claimant) had a full list of patients on that day. (The claimant) came in at 9.00 a.m.. She took her belongings and then left”

The letter was dated July 22nd 2010. The claimant never came back.

On cross-examination she stated she the claimant may have drafted a reference she got the witness to type concerning her – the claimant. This was in April 2010. She was unaware the claimant was working in the premises of her new employer. She agreed there had been a downturn in business as medical card payments had declined. The witness told the Tribunal that she was a fully PAYE / PRSI employee and was paid monthly by the respondent. She thought the claimant looked after her own payments. When asked she said the claimant had not worked her own hours. Neither she nor the claimant were paid for sick leave. The witness told the Tribunal that it as very unusual for the respondent to ring and tell the claimant to commence work. She could not remember if the respondent had asked her to contact the claimant.

The respondent’s Account ant gave evidence. The claimant was not paid a salary like the respondent’s employees were paid. He believed the claimant was self-employed. The claimant didnot pay any rent to the respondent. No-one was paid for sick leave.

Respondent's Case:

The respondent gave evidence. He bought the practice in 1997. He explained that all hygienists were treated as self employed practioners and not employees. However if you were a Health Board hygienist you would be treated as an employee. The claimant had been working for other dentists while working for him. At first she only worked one day a week but this increased to two. From January 1997 she worked exclusively for the witness.

Business began to decline from April 2010 as the rules for medical cards had changed. Until 2010 the relationship between the witness and the claimant was excellent. In Easter 2010 the practice closed for a week. His wife was heavily pregnant and they had other small children. He rang the Dental Nurse and informed her he was taking another week off and Dr. M would cover for him. Dr. M wanted to set up a practice in Donegal and the witness said she should buy his practice. They spoke about it for months. He had told the staff before Easter that he was selling the practice. Talks terminated in April 2010. Dr. M set up her own practice where later his Dental Nurse and the claimant went to work for.

On April 19th 2010 he spoke with the claimant concerning work. She said that she had heard he had had a mental breakdown.

The witness explained that hygienists could not work without a dentist on site to direct them. It is a regulation from the Dental Authority. The claimant was paid on a commission basis. She was not paid hourly like his employees and was not paid overtime or travel and substance. She did not receive a payslip. The claimant paid for all her own courses. She was given a list of patients daily. She decided whether to see patients or not. If there was an accident the respondent's insurance would pay for it. The claimant had her own medical insurance.

The witness took time off to consider if he would sell the practice but decided not to. On his return problems arose. There was an incident regarding the moving of her car. She did not move it when asked. On June 18th 2010 the claimant and the witness had a heated discussion. He told her to pack her belongings. Later he felt he had been unfair and went to speak to her. She asked was she dismissed and they discussed the matter. The claimant told him she was having personal problems. A patient arrived and she asked would she see him. He told her to go get a coffee. She asked about work on Monday. She asked would she see the first patient but he replied no he would be in at 9.30 a.m. It was the last time he saw her.

On June 21st 2010 he rang the surgery and was told the claimant had left the premises with her belongings. He was very upset about it. He rang her mobile phone but it rang out. He did not leave a message and did not try it again. The following Monday he asked the PMG had the claimant been in touch and was told the claimant had told her, PMG, she had got another job. She never came back but he told the Tribunal that he had not dismissed. A month later he hired a new hygienist for eight months. This person had a contract for services just like the way the claimant had been hired.

On cross-examination he reiterated on several occasions that the claimant was not an employee and had a contract for services. He explained that if a patient did not pay for treatment he would still pay the claimant 50% of their bill.

Determination:

The Tribunal have carefully considered all the sworn evidence adduced and submission made in the case. The Tribunal finds the claimant was an employee of the respondent and was unfairly dismissed. Accordingly, the Tribunal awards the sum of € 6,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Loss having been established the Tribunal awards the sum of € 4,142.56, this being four weeks gross wages, under the Minimum Notice and Terms of Employment Acts, 1973 to 2005.

The claim under the Organisation of Working Time, 1997 is dismissed as no evidence was adduced.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)