EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE *-claimant*	UD706/2011 WT289/2011

against

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms D. Donovan B.L.

Members: Mr J. Hennessy
Mr F. Dorgan

heard this claim at Kilkenny on 2nd November 2012

Representation:

Preliminary Issue:

There was a dispute between the parties regarding whether or not the claimant was engaged under a contract of service or a contract for service.

Respondent's case:

CA was the general manager of the hotel from May 2006 to September 2009. When he commenced employment in May 2006 the leisure centre manager was responsible for both the leisure centre and the beauty treatment rooms. The claimant had carried out beauty treatments within the hotel since September 1999. The employee on duty at the leisure centre made the appointments for guests for beauty treatments and this information was later relayed to the claimant. It was CA's recollection that the hotel had a list of names of beauty therapists. While the claimant may have been the first to be contacted, the next therapist on the list was contacted if the claimant was not available.

The number of hours provided to the claimant was dependent on the level of business received from customers. The claimant invoiced on a weekly basis and she was paid the following week. The amount paid varied depending on the type of treatment carried out. The claimant initially had been paid a flat rate but this was not working for the respondent from a cost perspective. CA took the initiative to meet with the claimant and agreed a payment scale dependent on the type of treatment carried out. To make up for the fact that the claimant lost out on certain treatments it was agreed that the claimant would receive a twelve-month contract. CA signed this and it was subsequently updated to cover a period ending on the 31st October 2010. This document was referred to as a memo of agreement. Prior to his departure in September 2009 CA discussed the arrangement with the claimant and stated that he was content for the arrangement to continue.

The Financial Controller gave evidence to the Tribunal that he was previously employed as an Inspector of Taxes for a number of years. As a result of having held this position he is aware of the complexities and compliance issues for tax matters concerning the subject of contract of services or contract for services.

When he commenced employment with the respondent in 2004 he did have concerns about the payment on foot of weekly invoices but he is satisfied from his Revenue background that the respondent was compliant on this issue.

Claimant's case:

The claimant stated in evidence that she considered herself to be an employee at all times. The claimant was employed in September 2009. She had become aware of a vacancy and having met with the leisure centre manager she was subsequently informed that she had been given the job. The leisure centre manager told the claimant that as it was not yet known what the demand for beauty treatments would be her role would at first be performed on an on-call basis. After a number of weeks the claimant was informed that she was responsible for paying her own tax.

In support of her case that she was an employee the claimant stated that she trained staff on new products as required, she was not exposed to financial risk in her position, she did not set her hours of work or the types of treatment and she supplied labour only to the respondent. The claimant added that she was sent on training courses by the respondent and did not have her own liability insurance. The claimant stated that she never refused work from the respondent unless she had scheduled a holiday or was taken ill. If there were no appointments the claimant did not get work but she stated that there was never a week where there were no appointments.

The claimant stated that when her employment commenced she initially received a cheque as payment without producing an invoice. She was paid hourly but later she was asked to invoice for the type of treatment carried out. The claimant confirmed that she did not receive annual leave and that she was responsible for her own tax affairs.

In November 2005 the respondent employed a beauty therapist on a full-time basis. During the time this person was employed the claimant received little work but that person left the respondent's employment about four months later. The clamant stated that she did not know why she was not offered the position.

In 2008 the new leisure centre manager advertised for a beauty therapist. The

claimant approached the general manager as she was unhappy that she was once again being replaced. Itwas decided at that time that her employment should be put on a more formal basis and it was atthis time that the written agreement was drafted. Prior to this the claimant had received a cheque from the leisure centre manager each week. From the time of the written agreement andwhen the scale of remuneration was agreed the claimant began to submit invoices. The claimant did not charge VAT on the invoices but she did pay her own tax and PRSI. The written agreement stated that the respondent's arrangement with the claimant would cease on 31st October 2010. The claimant felt that she had little option except to sign the agreement. Theclaimant confirmed to the Tribunal that she had not applied for the advertised position of beautytherapist.

The claimant was informed on 15th October 2010 by the General Manager that the agreement was due to expire on 31st October 2010 and that her position would be filled by a beauty therapist from a sister hotel. The claimant carried out treatments for the respondent until December 2010.

MR gave evidence on behalf of the claimant that she recorded appointments for customers as part of her role in the leisure centre from 2002 to 2008. MR confirmed that the claimant was the first person on the list to be contacted. MR considered the claimant to be an employee as she believed the claimant was treated the same as the other employees.

In reply to questions from the Tribunal, MR stated that if the claimant was not available to carry out the beauty treatment then MR contacted the next person on the list.

Determination:

Having considered the evidence adduced at the hearing the Tribunal finds that the respondent decided to carry out the provision of beauty treatments in the respondent hotel by way of engaging the services of a beauty therapist as an independent contractor rather than by employing a beauty therapist, by franchising the operation or otherwise. The Tribunal is satisfied that the respondent so did for economic reasons rather than to avoid any statutory obligations it would have towards an employee.

The Tribunal is further satisfied that the claimant never raised any issue as regards her status with the respondent and any issues she did raise with the respondent were regarding the provision of work and the reward for same as opposed to her status as self-employed.

The Tribunal accepts that there are several of the features of the claimant's employment that could point to employee status but they could equally apply to self-employed status. Taking into account the totality of the relationship between the claimant and the respondent the Tribunal finds that the claimant is an independent contractor and not an employee for the following reasons:-

1. There was no mutuality of obligations in so far as the claimant could refuse work offered. However, the Tribunal notes that the respondent had an obligation to give the claimant first refusal when work was available. The Tribunal notes that albeit that there was no mutuality of obligations the respondent during the ten year period

2. The Tribunal considered the submissions of the claimant's legal representative and in particular the submission regarding *Henry Denny & Sons Ltd. (Ireland) v TheMinister for Social Welfare* [1998] 1 I.R. 34. However, what was held in the *HenryDenny* case was that the appeals officer in the Dept. was entitled on the evidenceapplying relevant principles of law to reach the conclusion he reached that theparticular worker in that case was an employee. The Tribunal is of the view that the*Henry Denny* judgement does not rule out that the appeals officer may equally havebeen entitled on the evidence applying relevant principles of law to concludeotherwise in so far as some of the features can point to employee status but othersjust as convincingly could point to self-employed status and indeed some featuresare common both to employee and self-employed status.

3. The Tribunal finds that the respondent characterised the relationship as self-employed and the claimant accepted this status for the full term of her ten year relationship with the respondent and on the evidence the claimant would have continued working under this status had the respondent increased the reduced hourlyrate from €12.50 to €15.00 per hour.

4. The Tribunal considered the burden that would be fixed on the respondent if the claimant were found after such a lengthy period of time to have employee status and believes that in those circumstances characterising the claimant as employee status should only be done if on the evidence applying relevant legal principles no other conclusion could reasonably be reached. The Tribunal does not find that this is the case. The Tribunal distinguishes the instant case from the *Henry Denny* case in that in the *Henry Denny* case the worker had initially and for a number of years been characterised by her employer as an employee and her status was changed by a unilateral act of the employer from employee to self-employed.

5. The Tribunal is satisfied that the agreement entered into between the claimant and the respondent reflected the factual situation that existed between the parties. TheTribunal accepts that this agreement was signed by the claimant in order that she would continue receiving work from the respondent. However, the agreement didnot change the claimant's status whereas in the *Henry Denny* case the agreement purported to change the worker's status from employee to self-employed.

Therefore the Tribunal does not have jurisdiction to hear the substantive issue under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal having found that the claimant was not an employee of the respondent company cannot make an award in respect of the Organisation of Working Time Act, 1997 and thus dismisses this claim.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)