

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE – **Claimant**

UD655/2011
RP919/2011

against

EMPLOYER- **Respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms F. Crawford BL

Members: Mr T. O’Sullivan
Mr J. Flannery

heard these claims at Trim on 27 November 2012
and 5 April 2013

Representation:

Claimant:

Respondent:

The determination of the Tribunal was as follows:

This was a case whereby the respondent raised a preliminary issue that there was no jurisdiction for the Tribunal to hear the within claims as the claimant had not been an employee of the respondent. In order to determine this issue it was necessary for the Tribunal to hear the evidence of both the preliminary and substantive matters in order to reach its conclusions.

The respondent has published a directory, the Business & Shopping Guide (the Guide) since 1980. The claimant began to sell advertising for the Guide from 2000 and it was common case that the claimant entered into an agency contract as a commission agent to sell advertising space in the Guide on 29 June 2000. The claimant undertook to discharge all Income Tax, PRSI and VAT arising from his appointment as an agent.

Prior to entering into this arrangement with the respondent the claimant had been working, since 1991, for another company, the publisher of a local newspaper, two of whose directors were in common with the respondent. The claimant had been selling advertising for the paper and worked

one day a week on its distribution. He continued his work in the distribution of the paper until that business folded with the appointment of a liquidator in June 2010.

The respondent provided the claimant with a fully maintained car which was taxed and insured by the respondent. The respondent further paid the claimant €100-00 per month for his mobile phone costs. The respondent also paid Health Insurance contributions for the claimant. The claimant apparently only obtained a PPS number shortly before his marriage on 11 June 2009.

On 10 November 2010 the respondent informed the claimant that, due to their inability to meet the insurance bill for the company fleet going forward, it had been decided to discontinue the agency agreement with the claimant and that arrangement came to an end on 16 November 2011.

At the conclusion of the evidence the claim under the Redundancy Payments Acts, 1967 to 2007 was withdrawn.

Determination:

The Claimant in this matter seeks relief pursuant to the Unfair Dismissal Acts 1977 (as amended). Any entitlement is contingent upon the Claimant being an employee at the date of dismissal and of being employed under a contract of service and therefore the Tribunal having jurisdiction to hear the claim.

An analysis of the arrangement between the parties (and in particular the agreement of June 2000) might well lead one to conclude that the claimant was not operating under a contract of service. In coming to the decision if the claimant was self-employed or an employee, the Tribunal has considered all the evidence over the two day Hearing, submissions made and the case law.

The Tribunal notes the decision in Denny –v- Minister for Social Welfare [1998] 1 IR 34 and in particular the judgment of Keane J (as he then was). The Supreme Court determined that when deciding whether a person was employed under a contract of service or under a contract for services “*each case must be considered in light of its particular facts and of the general principles which the courts have developed. In general, a person will be regarded as being employed under a contract of service and not as an independent contractor where he or she is performing services for another person and not for himself or herself. The degree of control exercised over how the work was to be performed, although a factor to be taken into account, was not decisive. The inference that the person was engaged in business on his or her own account can be more readily drawn from where he or she provided the necessary premises or equipment or some other form of investment, where he or she employed others to assist in the business and where the profit which he or she derived from the business was dependent on the efficiency with which it is conducted by him or her.*”

The Tribunal has also had regard to the decision of Edwards J. in the case of Minister for Agriculture and Food –v- Barry & Others [2009] 1 IR 215 which emphasised that there is not one test in determining the nature of the employment relationship and that the Tribunal should consider the case on its particular facts to draw the appropriate inferences from them by applying the general principles that the Courts have developed “*with exercise of judgment and analytical skill and not by testing the facts of the case in a rigid formalistic way.... it is for a Court or Tribunal seized of the issue to identify those aids of greatest assistance to them in the circumstances of the*

particular case and to use those aids appropriately.”

The Tribunal has also had regard for the case law submitted at the Hearing.

In determining this case on the particular facts and the general principles, the Tribunal concludes, on balance, that the Claimant was retained under a contract of services. The Tribunal has factored the following matters in coming to this conclusion, *inter alia* the provision by the respondent of a motor vehicle to the Claimant, payment by the Respondent of the costs of the car (tax, insurance and fuel), payment by the Respondent of repair costs if the car broke down, payment by the Respondent of the phone costs of the Claimant, the fact that the claimant was told where and when he was to work, the fact that prices were dictated by the Respondent and that Health Insurance (VHI) contributions were paid by the Respondent.

Accordingly, there is jurisdiction for the Tribunal to consider the claim of unfair dismissal.

In November 2010 there is no doubt but that the respondent was under financial pressure to reduce its costs and took the decision to no longer provide vehicles for the claimant among others. At the same time the decision was taken to release him from the agreement between them. This situation meets the definition of a redundancy situation. No evidence was adduced to the Tribunal of any objective criteria being used in the selection of the claimant. It must follow that the dismissal was unfair. Having carefully considered the evidence of loss the Tribunal awards €9,400-00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)