

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:
EMPLOYEE *-claimant*

CASE NO.
UD2153/2011
RP2763/2011

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 P. McGrath B.L.

Members: Mr G. Mc Auliffe
Mr A. Butler

heard this claim at Dublin on 28th March 2013

Representation:

Claimant: In Person

Respondent:

Preliminary Issue

The respondent contends that the claimant was employed under a Contract for Service and is therefore not entitled to bring a claim under the Acts. Both parties gave oral evidence and provided the Tribunal with written submissions.

Claimant's Case

The claimant gave evidence with the use of an interpreter. The respondent is a service for people with intellectual disabilities. The claimant is a Sign Language tutor. She commenced employment with the respondent in 2004. The claimant gave sign language lessons to the staff and a service user for 1.5hrs twice a week, her hours were allocated by the house manager and she continued to work those hours until January 2011.

The claimant had been diagnosed with cancer in 2010 but she continued to work for the respondent throughout her treatment. In January 2011 the claimant required surgery as part of her treatment. The claimant knew she would be fit to return to work in May 2011. The claimant sourced someone to cover her temporary leave and passed that person's details to her manager, the assistant director of nursing. The claimant brought her temporary replacement to

the respondent and introduced him to everyone as such. The claimant's temporary replacement commenced work in February 2011.

On the 12th and the 13th May 2011 the claimant e-mailed the respondent to inform them that she was intending to return to work. In response the new assistant director of nursing (OH) said that she was not in a position to sanction the claimant's return. The claimant also contacted her temporary cover to inform him of her return; he replied that he was 'staying on'.

The claimant sent in regular invoices to the respondent for payment. She was responsible for her tax affairs. The claimant's employment had no connection with the organisation DeafHear. The claimant could have worked for another employer at any stage during her employment with the respondent and has on occasion. She did not receive any annual leave or sick leave entitlements. The claimant did not receive a contract of employment.

Respondent's Case

The respondent's assistant director of nursing (OH) gave evidence. OH believes that as they had someone in place providing the sign language service, they could not sanction the claimant's return to work, 'it was not in my gift to sanction her return, as far as I was concerned the service was provided by DeafHear and it was their decision.' OH was not aware at the time that the respondent was paying the claimant directly. The claimant's e-mail was so 'direct saying she was turning up' but OH could not sanction 2 people providing the same service and the claimant's replacement was already scheduled to work the day of the claimant's return.

Determination

The Tribunal has carefully considered the oral evidence heard and has read through the submissions, both factual and legal provided by both parties. The claimant comes before the Tribunal claiming to have been unfairly dismissed in and around May 2011 when she sought to return to the workplace following a period of illness.

The only matter being addressed by the Tribunal at this time is the preliminary issue raised by the respondent, to the effect that the claimant was never an employee of the respondent company and was only ever engaged by them on a Contract for Service.

The claimant had been engaged as far back as 2004 by the respondent company for the specific purpose of communicating with a particular client being cared for by the respondent and to teach some basic sign language to the staff. The claimant was engaged to do 3 hours a week and diligently carried out this work for a seven year period.

On reading the submissions of the parties and on considering the evidence adduced, the Tribunal can be in no doubt that the claimant was not an employee of the respondent company. The claimant invoiced the respondent for her services and was never really under their control, instruction or direction as the respondent had no expertise in the provision of sign language skills.

The issue of whether the claimant was employed or self-employed only came into focus in early 2011 when the claimant indicated that she needed an operation, which would make her presence in the workplace untenable for a period of five months. It was clearly understood between the claimant and the respondent company that the claimant intended that she return to the

workplace as soon as her health allowed and indeed the suggestion was there that the claimant would be in a position to return by May 2011. To facilitate the respondent company, the claimant found her own replacement and went to the trouble of introducing him to the workplace and the client.

The Tribunal greatly admires the effort displayed by the claimant in this regard. The claimant was faced with a very difficult medical procedure but showed great professionalism by organising her own replacement so as not to discommode the respondent or their client.

As per her agreement with the respondent company, the claimant indicated a willingness to return to the workplace in and around May 2011. For reasons unexplained, the respondent company refused to allow the claimant return to her position and in effect rewarded her seven years of dedicated service by cutting her adrift without care or reason given.

The Tribunal cannot find the claimant to be an 'employee' under the relevant legislation; the claimant is not therefore afforded the protection of the relevant employment legislation. Whether the claimant has recourse elsewhere remains to be seen.

The Tribunal finds that it does not have jurisdiction to hear these claims, consequently they are dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)