

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

EMPLOYEE

- claimant

MN1815/2011

UD1768/2011

WT699/2011

Against

EMPLOYER - respondent

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
UNFAIR DISMISSALS ACTS, 1977 TO 2007
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms Dorothy Donovan B.L.

Members: Mr James Hennessy
Mr John Flavin

heard this claim at Waterford on 21st May 2013.

Representation:

Claimant:

Respondent:

The determination of the Tribunal was as follows:-

The issue as to whether the claimant was engaged under a contract of service or a contract for service was heard by the Tribunal as a preliminary issue.

Determination on the Preliminary Issue

Having carefully considered the evidence and submissions tendered by the parties the Tribunal finds as follows:-

1. Whereas the respondent did exercise some control over the claimant it did not exercise the level of control normally exercised by an employer nor did

the respondent exercise control over those matters that an employer normally exercises control over such as the actual days and times that the claimant worked and the amount of time the claimant spent working on the respondent's business as opposed to the claimant's own business. The control the respondent may have exercised over the appearance of the garage was consistent with the obligations that the respondent owed to the landlord. Likewise the control the respondent may have exercised over staff employed by the claimant was consistent with protecting the image of the garage and whereas the agreement between the parties required that the consent of the respondent be obtained by the claimant regarding hiring of staff the claimant in fact hired staff without obtaining the consent of the respondent.

2. The claimant was in the enterprise on his own account in that if he carried out the work of the respondent's business himself and employed as few people as possible to assist him he would retain more of the money paid to him by the respondent and the more oil he sold over and above a certain level the more money he was paid.
3. The basic set amount of money paid to the claimant by the respondent each month was based on a sales figure of oil rather than on the number of hours that the claimant spent on the respondent's business.
4. The claimant charged and received VAT on all payments he received from the respondent.
5. The claimant submitted self-employed returns to the Revenue.
6. The claimant paid a self-employed level of PRSI.
7. The claimant did not get paid annual leave.
8. The claimant was not required to carry out the work for the respondent himself but was free to employ others to do it and he was the registered employer of those others so employed.
9. Regardless of whether the agreement between the parties contained a mutuality of obligations clause the garage was continuously open during the claimant's tenure and the claimant appears to have been continuously there. However, when the claimant was present at the garage he would also be attending to his own car sales business and car wash business.

The Tribunal is satisfied taking into account the totality of the situation that the claimant is an independent contractor rather than an employee.

Accordingly, the Tribunal has no jurisdiction to hear the claims under the Unfair Dismissals Acts, 1977 to 2007, the Minimum Notice and Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)