

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

CASE NO.

Employee
- *claimant*

UD986/2008
MN924/2008

against

Employer
- *respondent*

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr E. Murray

Members: Mr D. Hegarty
Mr K. O'Connor

heard this claim at Cork on 9th April 2009

Representation:

Claimant: Ms. Emer O'Callaghan, Barry M. O'Meara & Son, Solicitors,
18 South Mall, Cork

Respondent: XXXX

The determination of the Tribunal was as follows:

The parties in this case have asked the Tribunal to make a preliminary determination in relation to the nature of the Claimant's relationship with the Respondent, and that is whether or not the Claimant was engaged on foot of a contract for services in which case she would not be entitled to any relief under the Unfair Dismissal Acts 1977 to 2007 or contract of service in which case she would be entitled to seek relief.

Evidence in relation to the preliminary point was given by the Claimant. She said that she became

aware of the existence of XXXX Counselling services in or about January 2002, after meeting the Respondent's Counselling Services Manager at a function of the Irish Association of Counsellors and Psychotherapists. The Respondents were starting a counselling service in Ballincollig and after a meeting with the Chief Executive she agreed to commence working there. She worked on Tuesdays occasionally on Thursdays and on Fridays. Previously she had been practising as a Counsellor from home and continued to see some private clients for a while after starting her relationship with the Respondent. She had however given up seeing private clients after a certain length of time and could not now remember when she had last seen a private client. She was paid per session and in common with the other Counsellors working for the service, used to submit invoices to the Respondent for the number of sessions that she had done during a particular period. She was responsible for paying her own taxes and made no financial contribution of any kind to the Respondent. She was not at liberty to sub-contract her work. She regarded her Chief Executive as her first point of call in the event of her having any difficulty and she had to produce evidence of Professional Indemnity and Public Liability Insurance every year and had to produce a Tax Clearance Certificate every year.

She had not given much consideration as to whether her status was that of employee or sub-contractor until her relationship with the Respondent had been terminated. She described the various documentation that she had received from the Respondent and now felt that her status was that of employee rather than independent contractor.

Evidence on behalf of the Respondent was given by the Chief Executive Officer and the Counselling Services Manager of the Respondent. The confluence of this evidence was that the Respondent was a charitable foundation providing both residential and non-residential facilities for the community including a counselling service. The Counsellors were independent contractors who operated within the premises and were subject to certain regulations as to health and safety issues that the foundation laid down. The Counsellors individually invoiced the foundation in respect of the number of clients that they saw and were paid accordingly. The Counselling Service was loss making and depended on the contributions made by the clients and subvention received in respect of the people who could not afford the service themselves.

The Counselling Service began as a Bereavement Counselling Service but developed into a more comprehensive service and now employed eight Counsellors. Analogous services that the

foundation provide are chiropody, aromatherapy, physiotherapy and they also have Social Workers. There are approximately eighty fulltime employees of the foundation and twelve are providing services on foot of contract for services.

In their view the Claimant could not have been under any impression other than that she was an independent contractor. All of the Counsellors regarded themselves as independent contractors and all of them provided invoices to the foundation in the same manner as described by the Claimant. They all provided their own insurance and worked whatever hours they wanted to. They did not receive holiday pay or sick pay, and they did not contribute to a pension nor did the employer pay PRSI on their behalf. They were all free to take on other work outside their relationship with the Respondent if they so wished, and without reference to the Respondent.

In deciding whether a person is employed under a contract of service or under a contract for services, each case must be considered in the light of its particular facts. Some guidance has been developed by the Courts in this regard. In the case of *Henry Denny and Sons (Ireland Limited) v The Minister for Social Welfare (1998 1IR34)* Mr Justice Keane held that:

“It is accordingly clear that while each case must be determined in the light of it’s particular facts and circumstances, in general a person will be regarded as providing his or her services on a contract of service and not as an independent contractor where he or she is performing those services for another person and not for himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that a person is engaged in business on his or her own account is more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependant on the efficiency with which it is conducted by him or her.”

In the same case Murphy J said that:

“ I am satisfied that the Appeals officer was correct in his conclusion that he was required to consider the facts or realities of the situation on the ground to enable him to reach a decision on the vexed question of whether the respondent was an employee or an independent contractor.”

In the case *In Re. The Sunday Tribune Ltd* (1982 no 10390P) Miss Justice Carroll J held

“The court must look at the realities of the situation in order to determine whether the relationship of employer and employee in fact exists, and must do so regardless of how the parties describe themselves.”

Determination

Whereas in this case the Claimant;

1. Determined her own hours.
2. Did not receive holiday pay, sick pay, employer’s PRSI or pension
3. Was free to take on work outside of her relationship with the Respondent.
4. Took her holidays when she saw fit
5. Invoiced the Respondent in respect of the work she did in their premises
6. Had to produce a Tax Clearance Certificate on an annual basis.
7. Dealt with all her own tax affairs
8. Had to produce evidence of Professional Indemnity and Public Liability Insurance to the Respondents on an annual basis
9. Was in an environment where all of her colleagues regarded themselves as being independent contractors

Nonetheless the Tribunal by a majority decision (Mr. Murray dissenting) finds in favour of the Claimant on the preliminary issue by virtue of the fact that the Claimant;

1. Executed a document dated the 1st of December 2003 which was entitled “Employment Contract/Code of Practice/Regulation”.
2. The above document provided the designation “employee” for the Claimant’s signature.
3. While associated with Westgate was subject to the direction of the Chief Executive and was subjected to a disciplinary process provided for in the employee’s handbook, (first issued on the 1st of November 2004) a fact that is not consistent with the Respondent’s case that the Claimant was an independent contractor and
4. Was subject to the direction of a line manager who verified the hours that she worked

and ensured that the Respondents operating guidelines were observed.

5. That the terms of the document headed “contract for services” executed by the Claimant on the 20th of December 2007 and a similar contract executed by the Claimant on the 13th of February 2007 were more consistent with a contract of employment rather than with a contract for services.

Consequently, the Tribunal finds that the Claimant’s relationship with the Respondent was that of employee and the Claimant is entitled to proceed with her claim under the Unfair Dismissals Act.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

