

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

Employee

– *claimant*

CASE NO.

UD174/2009

against

Employer

- *respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. K. T. O'Mahony B.L.

Members: Mr. M. Forde
Mr. K. O'Connor

heard this claim at Killarney on 8th June 2009

Representation:

Claimant(s): In person

Respondent(s): Mr. John Brennan, IBEC, West Regional Office, Ross House, Victoria Place,
Galway

The determination of the Tribunal was as follows:-

Preliminary Issue:

The respondent raised the preliminary issue that the claimant herein was not its employee and accordingly, the Tribunal had no jurisdiction to hear this case under the Unfair Dismissals Acts, 1977 to 2007. The claimant had been self-employed and had been paid on commission.

Respondent's case:

Classically within the industry which the respondent was engaged, tied agents work as contractors and the respondent had about two hundred such agents. Such agents are paid by commission, do not work set hours or days, do not receive holiday pay, do not get a set agenda and are called "Associates" of the respondent.

The claimant worked under an agency agreement dated 12th day of October 2005. Within same, she was described as an "Associate". The nature of this agreement was a commercial one and clause 7A of it provides that same "*shall be terminated with immediate effect by either party upon service of written notice to that effect on the other*". The reality of the relationship was

reflected in this contract and at no stage during her work relationship did the claimant raise an issue about this relationship.

The claimant received a salary of €500.00 per week at the commencement of her employment. This was similar to all trainees and was done until such time as the claimant started to make her own commission.

The claimant generated clients and referred them to the respondent. When she generated no business, she received no income, as was the case during certain periods of her employment. She was responsible for her own expenses such as her car and telephone. Her office was her home. The respondent did pay for the claimant's laptop and camera, and also provided for her professional indemnity, which they could provide at a cheaper group rate. The claimant had her own business, which was indicative of someone who could work their own hours.

It was contended by the respondent that the Tribunal had to be satisfied that they were dealing with an employment relationship of master and servant and, as such a relationship did not exist in this case, the claim was not properly before the Tribunal. Accordingly the Tribunal did not have jurisdiction to deal with the matter. The case of *Castleisland Cattle Breeding Society Limited –v– Minister for Social & Family Affairs* [2004] IESC 40 was cited in support of this contention.

Claimant's case:

In her direct evidence, the claimant confirmed that she had been self-employed when working for the respondent. She agreed that she was not employed directly by them but was an "Associate" as described in her contract with the respondent. The business, which she generated for the respondent, was done as she saw fit and in her own time. She was paid for the business she generated in that the respondent took 40% of same and she retained 60% as commission. The claimant confirmed that she paid her own PRSI.

When the claimant commenced employment with the respondent, she was in receipt of a salary of €500.00 per week. This salary was received for about the first seven months of her employment. The claimant moved to commission basis on the advice of a person in the office that greater income could be earned in this way. The claimant added that everyone in the respondent's employment has a second source of income.

The claimant's issue with the respondent was in the way she had been treated when her employment had been terminated. Legal advice had told her that this had been illegal and that she had a case against the respondent. The claimant concluded by stating that she appreciated the time given to her by the Tribunal and had appeared at this hearing as a matter of courtesy; she felt that as she had commenced these proceedings, she had to follow it through.

Determination:

It was common case that the claimant worked for the respondent as a tied agent under an agency agreement, entered into on 12th day of October 2005, which agreement was signed by the appellant and on behalf of the respondent on said date. It was stated therein: "*The Associate is an agent of the Company. Nothing in this Agreement or in the Associate's relationship with the Company shall be deemed to constitute the relationship of employer and employee between the Company and the Associate.*"

The Tribunal is satisfied that the reality of the relationship, as set out by both parties, is one of principal and agent and that none of the usual indicia of the employer employee relationship existed between the parties. As the Tribunal has no jurisdiction to hear a claim regarding the termination of that relationship, the claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)