**EMPLOYMENT APPEALS TRIBUNAL**

| CLAIMS OF: | CASE NOS. |
|---|---|
| EMPLOYEE – claimant | UD648/2009 |
| | MN661/2009 |
| | WT280/2009 |

against

EMPLOYER – respondent

&
EMPLOYER – respondent

under

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. T. O'Sullivan
Mr. O. Nulty

heard this claim at Drogheda on 25th January 2010 and 30th March 2010

Representation:

Claimant: Seamus Roe & Company, Solicitors, The Green,
Ardee, Co.Louth

Respondent: Mr Bart O'Donnell, Solomon Legal, 55 Oughtagh Road,
Killaloo, Co. Derry, BT47 JTR

The determination of the Tribunal was as follows:-

The respondent raised a preliminary issue as he contended that the claimant was a self-employed therapist (SET) at the beauty salon.

**Respondent's Case:**

The saloon owner gave evidence. The salon was established in 2005 with a mixture of salon employees and SETs. The employees mainly carried out facials and the therapists carried out other therapies. The claimant approached the owner seeking a self-employed position. The SETs had a different contract from the employees. The claimant had negotiated a new contract for the SETs, but she had not signed it.

The SETs, including the claimant, rented rooms for a number of days per week. This rent had to be paid, even if the claimant had no clients. The rent paid covered administration expenses including the receptionist's wages and payment of utilities. The claimant provided her own oils, music and bed coverings. The SETs also contributed towards advertising costs. When she started the claimant worked Thursdays and Fridays. Later she changed to working Mondays and Thursdays.

It was up to the claimant and the other SETs to arrange cover if they were not available. They could decide who they wanted to cover for them, but the respondent could veto the replacement if he deemed the replacement unsuitable.

The receptionist took bookings for the whole salon. If a particular therapist was requested that client was assigned to him/her. Otherwise, clients were assigned based on what therapy was requested and who was available. The receptionist took the payment for a treatment by a SET. Payments were forwarded to the therapists at the end of each week. No deductions were made. The SETs were responsible for their own tax. The manager gave evidence that she produced a report at the end of every day from the cash register and worked out who did what work. She sent the SETs their takings and paid her staff their commission. The SETs did not usually provide an invoice, though since 2009 some of them did.

The owner stated that he never instructed the receptionist to favour any particular therapist. The respondent disputed the claimant's allegation that he deprived her of work. She had changed one of her working days from Friday to Monday and since Monday was the quietest day of the week and that this was the reason for any loss of business.

The SETs also had their own public liability insurance. SETs were required to pay for breakages. The SETs were to provide exclusive services, but they negotiated that this would only extend to within a five-mile radius. They could take clients at home. The SETs paid for their own uniform whereas employees were provided with one. SETs chose when to go on holidays.

The salon had a pricelist, but the SETs could give discounted or free treatments to their clients if they wished.

The owner gave evidence that the claimant was not paid while she was out sick, nor was she paid for annual holidays/public holidays.

The claimant had no set working hours but she had to adhere to the opening hours of the Spa for reasons of safety and security.

The owner drew the attention of the Tribunal to the claimant's email of the 22nd September wherein the claimant notified the Respondent that said 'I plan to cease renting a room'. The claimant hadleft the business amicably on 29th September 2008. There was only a small issue concerningadvertising costs and this was resolved.

During cross examination the owner denied that the claimant was precluded from working for anyone else; that she could not contact clients; that she was not prevented from giving a discount without his consent.

The receptionist gave evidence that if a client had no preference for a therapist she decided whom to assign them to. She tried to be fair in her allocation. She had not been instructed by the respondent or the salon who she should allocate work to.

The receptionist gave evidence that she allocated the work evenly and that the owner of the Spa had no input into this.

A self-employed therapist gave evidence that he rented rooms from the respondent since 2005 and that his prices were not dictated by the Spa and that he was allowed give discounts.

**Claimant's Case**

The claimant gave evidence that she approached the respondent seeking a self-employed position and commenced working with the respondent in January 2006. Her contract describes her position as self -employed therapist. The contract required her to be available for training, wear a uniform and provide exclusive service and bound her by a confidentiality agreement. She paid rent and covered her own public liability insurance. A new contract was under discussion but was not agreed before her employment ceased.

The owner decided the prices charged. The Spa was up and running when she started and she had no input into the price structures. She did negotiate a discount for a regular customer and for her sister but she needed the approval of the manager for this.

A client who wanted to book a treatment would phone the receptionist who would then allocate the client to a particular therapist. Clients were not aware of the distinction between SETs and saloon employees. She was not allowed to contact clients directly. Her colleague was given a warning for contacting a client. Her contract also contained an exclusivity clause that prevented her from working elsewhere.

The claimant and her colleagues wanted to advertise their services. The owner agreed to fund one third of the cost. They drafted the advertisement and gave it to the owner. However when the advertisement appeared they found out that the owner had altered it without any reference to them.

The claimant altered her pattern of work in January 08. Up to that date she had worked Thursdays and Fridays, but working two 12-hour days in a row was bad for her back. She changed her working days to Monday and Thursday. Working two twelve hour days in a row had been putting pressure on her back. Monday was a shorter day and less busy so her income reduced. But the change was at her request. In September 08 her income went negative. Her income was no longer covering her work related expenses. Massages and reflexology clients were assigned to her but from September 08 these treatments were assigned to fixed rate therapists. She contacted the owner and he confirmed the new arrangement.

One Thursday she came to work and her colleagues told her that two appointments had been removed from her roster. She tried to contact the owner but he was on holidays. She decided to cut

her losses and leave. She did not contact her clients because she had no way of contacting them.

In her email severing her connection with the Spa she did not raise any issues with the owner. She felt that this was the professional way to behave. She had raised the issue of her income being withdrawn with the owner and in response he told her, 'I have a business to run'.

Her situation is different now. She deals with customers and can advertise without the involvement of the landlord. When she left she did not have a business. She had to start from scratch.

The claimant's former colleague (also an SET) gave evidence that she contacted a client directly on one occasion to confirm that a product, which the client ordered, was available. She was rebuked by the owner for doing this and was warned that clients were "company property" and must not be contacted by therapists.

**Determination**

The Tribunal considered the evidence adduced taking into consideration all the factors relating to the working relationship between the Claimant and the Respondent. The Tribunal noted the following facts which emerged during the hearing, which are now set out in summary hereunder:

(I) the claimant approached the respondent seeking a self employed position;

(II) she rented a room from the respondent;

(III) she contributed to advertising her business;

(IV) she could arrange for a replacement to do her work qualified only by the respondent having the right to object to an undesirable replacement;

(V) Claimant made her own tax returns;

(VI) She was not paid for Public Holidays / Annual Holidays;

(VII) Paid her own Public Liability Insurance,

(VIII) Equipped Room;

(IX) All money taken by the claimant was handed over to her;

(X) The SETS wore a different uniform to employed Therapist

(XI) Claimant was not paid if she was out sick;

(XII) Self-employed people initially stipulated the days they wanted to work;

(XIII) No set working hours qualified only by complying with opening hours of the Spa Therapy Centre;

(XIV) Claimant didn't get paid if she didn't work;

(XV) Claimant could come and go as she pleased.

(XVI) The contract between the parties describes the Claimant as a self-employed Therapist (although of course this is not determinate of their relationship);

The High Court decision in the case of **The Minister for Agriculture and Food V Barry and Others (7th July 2008)** (hereinafter referred to as **"the Barry Case"**) contains a detailed analysis of the jurisprudence on the tests which should be considered in deciding whether a person is working under a Contract for Service or a Contract of Service. It is appropriate that we examine 'the Barry case' in detail as it is relevant to the case brought by the claimant.

In 'the Barry case', the Court allowed the appeal by the Department of Agriculture and Food against the decision of the Employee Appeals Tribunal (EAT) which had found that five Temporary Veterinary Inspectors (TVIs) were employees and accordingly entitled to payments under the Redundancy Payments Acts 1967-2003 and Minimum Notice and Terms of Employment Acts 1973-2001 following the closure of the Galtee Meats Plant at Mitchelstown, Co.Cork.

Mr. Justice John Edwards found that the TVIs were engaged as independent contractors, in other words, under contracts for service rather than as employees under contracts of service. The Department had argued that the TVIs were private veterinary practitioners who were also in business on their own account, and that they could and did continue in private practice along withundertaking temporary work for the Department. Further, the TVI's remuneration was paid on anhourly fee basis at rates fixed between the Department and their union, Veterinary Ireland.

Edwards J considered the **The Mutuality of Obligation Test** which was referred to in the EAT Determination

Mutuality of Obligation exists where the employer is obliged to provide work for the employee and the employee is obliged to perform that work as in a normal employer/employee relationship. Whilst the Court found that it was appropriate to apply the mutuality test, this does not mean that an implied contract of mutual obligation existed. Rather, the High Court agreed with the Department's view that they had no control over the level of work available to the inspectors, as this was within the control of Galtee.

**Single, Several or umbrella Contracts**

An interesting angle in this case, which differentiates it from previous case law in this area, is Mr. Justice Edward's finding that the EAT erred in trying to find as a preliminary point, whether a single contract, either for services or of service, existed. He considered that it was incumbent on the EAT to ask three questions:

1. whether the relationship between each TVI and the Department was subject to just one contract or more than one contract
2. what was the scope of each contract
3. what was the nature of each contract

Accepting the possibility that each time the TVIs worked they may have entered a new contract with the Department, he felt that depending on the circumstances, each individual contract should then be analysed as to whether it was a contract for services or a contract of service. He also considered the possibility of a course of dealing over a lengthy period of time becoming an enforceable umbrella contract which he explained as being a type of overarching contract.

**"The so called Enterprise Test"**

Edwards J analysed the relevant jurisprudence in relation to “the so called Enterprise test”. This test examines whether or not a person is in business on their own account. This test originated in a **UK decision of Market Investigations –v- Minister for Social Welfare** and was adopted by the Supreme Court in this Jurisdiction in the case of **Henry Denny and Sons Ireland Limited V The Minister for Social Welfare** (hereinafter referred to as ‘the Denny case’) and the application of the ratio decidendi in that case and in and the subsequent decisions **Tierney –v- An Post** (2000) **Castleisland Cattle Breeding Society Ltd –v- The Minister for Social and Family Affairs** (2004) and the **Electricity Supply Board –v- The Minister for Social Community and Family Affairs & Others** (2006). Mr Justice Edwards noted that a very important “particular fact” common to these cases was the existence of a contractual document stating that the relationship between the parties was a contract for services. The fact that the parties agreed that the description of their relationship should be considered a contract for services should not be considered decisive or conclusive. Mr Justice Edwards considered with great care the judgements in ‘the Denny case’ and referred to the statement of Keane J that when determining whether a particular employment relationship is to be considered a contract “for service” or “of service” [that] “each case must be considered in the light of its particular facts and of the general principles which the courts have developed”

Edwards J quoted the following paragraph from Keane J in the Denny case:

*“It is, accordingly, clear that, while each case must be determined in the light of its particular facts and circumstances, in general a person will be regarded as providing his or her services under 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 the person is engaged in business on his or her own account can be 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 dependent on the efficiency with which it is conducted by him or her”*

Mr. Justice Edwards criticised the misinterpretation of this passage which arose from “misguided attempts to divine in the judgement the formulation of a ‘one size fits all’” approach to this difficult question. He went on to say that it was unhelpful to speak of a “control test”, an “enterprise test” a “fundamental test” an “essential test”, a “single composite test” as none of these “tests” can be relied on to deliver a definitive result. None of these tests to were conclusive or exhaustive.

He considered that the appropriate test as to whether a person is engaged in business on his or her own account should consider, among other matters, the following factors:

- Whether he or she provides the necessary premises, or equipment or some other form of investment,
- Whether he or she employs others to assist in the business and
- whether the profit which he or she derives from the business is dependent on the efficiency with which it is conducted by him or her.

Moreover, the Barry case further stipulated that in deciding whether a person is working under a

Contract of Service or a Contract for Services a Court or Tribunal should have regard to the following:

1. all possibilities should be investigated in determining the nature of the work relationship between the parties;
2. the "so called enterprise test" is not determinative of the issue and that it is incorrect to assert that questions of control and integration are to be regarded merely as elements to be taken into account in applying the enterprise test;
3. compare the question of enterprise to questions of control and integration as such a comparison will assist a court or tribunal with valuable assistance in drawing the appropriate inferences from the primary facts and no one factor is subsumed by another;
4. there is no exhaustive list and there might be other factors which might also assist. Some other factors may prove more helpful than others. In citing Dillon L.J in **Nethermere (St Neots)** Edwards J determined that *"the same question as an aid to appreciating the facts will not necessarily be crucial or fundamental in every case. It is for a court or Tribunal seized of the issue to identify those aids of greatest potential assistance to them in the circumstances of the particular case and to use those aids appropriately".*
5. the binding element of the Judgement of Keane J in the Denny case is that *"each case must be considered on the light of its particular facts and of the general principles which the courts have developed". Therefore the test regarding whether "a person is in business on their own account" is reduced from being the fundamental test to one of the many factors that have to be taken into consideration in light of the particular facts of the case.* Perhaps the main point to take from the case is that the various tests in this area should be considered as useful, rather than fundamental or single composite tests. Furthermore, each case should be examined on its own facts, giving particular attention as to whether or not a written contract containing a statement of the purported nature of the contract exists, or where no clear written contracts exists, whether in fact one, or more contracts or an umbrella type of contract exists.

Taking all the elements, (set out at (I) to (XVI) above) of the working relationship between the Claimant and the Respondent, into consideration, and applying the legal principles set out in the Barry case, the Tribunal finds that the claimant was not an employee. The Tribunal determines that the working relationship between the Claimant and the Respondent was one of a Contract for Services. Therefore the claim under the Unfair Dismissals Acts, 1977 to 2007 fails. The claims under the Minimum Notice and Terms of Employment Acts 1973 to 2005 and under the Organisation of Working Time Act 1997 also fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _________________________

(Sgd.) _________________________
(CHAIRMAN)