

THE HIGH COURT

[2013 No. 9 CAT]

CIRCUIT APPEAL

WESTERN CIRCUIT COUNTY OF GALWAY

BETWEEN

SABINA MURPHY

CLAIMANT/RESPONDENT

AND

GRAND CIRCLE TRAVEL

RESPONDENT/APEALLANT

JUDGMENT of Mr. Justice Moriarty delivered on the 22nd day of May, 2014

1. The procedural history of this Circuit Court Appeal, arising out of the termination of the Plaintiff's engagement with the Defendant as a Program Director in its Irish tourism operations, is already quite extensive. The Plaintiff brought an Unfair Dismissal claim before the Employment Appeals Tribunal against the Defendant, which was heard in Galway. The preliminary issue which is at the heart of the differences between the parties, namely whether the Plaintiff's retention was as an employee or an independent contractor, was heard in the first instance by the Tribunal, which ruled in favour of the Defendant, to the effect that the Plaintiff had not been an employee, and accordingly was not entitled to any relief from the Tribunal, in a written determination, dated 18th January, 2012. From this determination, the Plaintiff appealed to the Western Circuit of the Circuit Court, and following a hearing before His Honour Judge Keenan Johnson, her appeal was upheld in two Judgments, dated respectively 20th November, and 12th December, 2012, the net effect of which was to find that the Plaintiff was within the scope of Unfair Dismissal legislation, had been unfairly dismissed, and was entitled to compensation in the sum of €50,900 plus costs, computed at an estimation of financial losses over the maximum allowable period of two years.

2. From this determination, the Defendant appealed to this Court, as on the authority of *McCabe v. Lisney and Sons* [1981] ILRM 289 was plainly its entitlement. A number of applications and orders of an interlocutory nature, primarily as to discovery on the part of the Plaintiff, were made in hearings before Kearns P. and Hedigan J., before the matter was listed before me for hearing on the concluding day of the Galway High Court sittings of February of this year. Up to the conclusion of the Circuit Court proceedings, the Plaintiff had privately retained solicitor and counsel for both hearings. For the High Court appeal, she had successfully sought Civil Legal Aid, being assigned Senior and Junior Counsel, but differences arose between herself and her new legal team as a result of which I acceded to an application by the Galway Office of the Legal Aid Board to come off record. On the day stipulated for the hearing, the Plaintiff became unwell, a condition that was medically certified, and the hearing of the Appeal was adjourned until the recent two days in Dublin fixed, where I heard evidence and argument from both sides. For this hearing, and certain of the matters preceding it, the Plaintiff has proceeded as a litigant in person, both in the hearing before me, and in providing detailed written submissions. In each instance, she has shown impressive fluency and acumen and her submissions have reflected diligent research into Irish and other Common Law legal authorities, as well as some from Europe. For convenience, I shall continue to refer to the parties as Plaintiff and Defendant.

3. In forming a view on the substantive matter of the Plaintiff's status, whether employee or independent contractor, which I directed should be heard as a preliminary issue, I have had occasion to read and consider, in addition to what was stated at the two day hearing, a very considerable volume of discovered documentation, submissions, correspondence and pleadings. That I have not set forth my conclusions in a lengthy Judgment in no sense means that I have not reflected carefully on all that has been proffered to me by each side, in a contest that has been conducted with much detail and intensity, reflecting very strongly held views by both parties. It, however, remains the case at this juncture that the necessary and substantive focus must be upon the issue of whether the Plaintiff's retention by the Defendant was as an employee under a contract of service, as she contends, or as an independent contractor, as the Defendant contends. Accordingly, while the evidence and submissions to date at times digressed into extraneous matters, probably reflecting some measure of animus and ill-will that has arisen in the course of differences, I have confined myself to assessing the matters that primarily throw light on the legal nature of the employment relationship. The proceedings at this juncture are not a free-ranging and exhaustive scrutiny of all that transpired between the parties during and on either side of the three years of holiday tours that the Plaintiff was engaged for, but depend upon the conclusions properly to be drawn from the evidence and argument recently heard. That evidence comprised, on the Defendant's side, Mr. Tom Horgan, the Management Official who had been the Plaintiff's Senior Supervisor during her three years of engagement, a person who was no longer connected with the Defendant, and who had not been available to testify at the Galway Circuit Court hearing, and Ms. Barbara Long, a Senior Tour Guide, who stated that she had had engagements with the Defendant since 2005, along with other Tour Companies, and viewed herself unhesitatingly as an independent contractor, self-employed and offering her services in accordance with her availability to the Defendant from year to year, a practice she believed she shared with other colleagues in the industry who were known to her. The Plaintiff then gave her evidence, both direct and in cross-examination by Mr. Mark Connaughton, Senior Counsel for the Defendant, following which she outlined the legal submissions that she subsequently expressed in greater detail in her written argument.

4. I have carefully considered all the matters which seem to me to throw light upon the nature of the relationship between the parties, including any documentation purporting to record that nature, in addition to correspondence and memoranda relating to daily dealings during the three seasons of engagement, and documentation recording remuneration and other financial dealings between them. It is well settled from the Irish and English case-law cited that controversies of this nature can rarely be resolved by an aggregation of documentation all pointing utterly unequivocally to one conclusion or the other. In this regard, Mr. Connaughton properly acknowledges that some occasional documentary references to "employment" may be found, and he also accepts that, for what he argues is nonetheless an independent contractor relationship, the measure of residual control exercised by his client over the

Plaintiff is comparatively high. But he nonetheless points to a preponderance of other documentation which he contends is to the contrary effect, in addition to a formal document executed by the Plaintiff, which is expressly designated as an "Independent Contractor's Agreement" and contains terms that clearly accord with that description of the engagement. In her evidence, the Plaintiff complains that her signing of this document was effectively thrust upon her by Mr. Horgan, a considerable time subsequent to her engagement commencing, in circumstances in which she had no adequate opportunity to consider the full content, or take independent legal advice, and where Mr. Horgan, whilst not actually forcing her to sign, had conveyed that "Boston" the home city of the Defendant, wished it to be done. Having observed both witnesses carefully in the course of the hearing, just as I found it hard to categorise Mr. Horgan as a tyrannical martinet, I do not readily see a lady who has sturdily asserted her rights before the Defendant and the legal system meekly assenting to the signed endorsement of a document expressly purporting to commit her to a regime fundamentally at variance with her perception of her engagement already then over several months. It seems to me that she must have been aware of the nature of the engagement to which she was signifying her commitment.

5. I similarly acknowledge some concerns over documentation relating to the Plaintiff's remuneration, which, in its categorisation in Revenue terms, appears clearly referable to the status of an independent contractor rather than an employee. This and other documentation, including bank records, sought as discovery by the Defendant, proved to have been belatedly provided, and incomplete. Insofar as they are dealt with in the Plaintiff's written submission, this portion is somewhat of a belated mention at the latter part of what is otherwise a spirited and well compiled document. Nor was I impressed by the Plaintiff's designation of Ms. Long's evidence as something akin to an "act" commissioned by the Defendant since, while no amount of judicial experience can guard being on occasion duped, Ms. Long struck me as a relaxed and credible witness.

6. Overall, while I have not addressed sequentially all the agreed criteria by way of formal and informal documentation, mutuality or the lack of it, and other criteria referred to in the decided cases, I have come to the view that the overall probabilities, including my feeling that the Plaintiff's work over the three years involved a degree of engagement by tourism entities other than the Defendant in excess of the small incidence she referred to in evidence, warrant a finding that the relationship was that of an independent contractor. I have also had full regard to all that was heard in relation to the matter of gratuities or "tips". In coming to that view, I have had full regard to the case of *Denny and Sons Limited v. Minister for Social Welfare* [1998] 1 I.R. 34, to *Castleisland Cattle Breeding Society Limited v. Minister for Social and Family Affairs* [2004] 4 I.R. 150, along with the other authorities relied upon by both sides, including recent decisions of Edwards J. and Hedigan J. I have not found it necessary to embark into the aspect of requisite continuity of service under Unfair Dismissals legislation. Somewhat regrettably, it seems to me that I am accordingly constrained to allow the Defendant's appeal; I say this partly in the context of equality of arms since, whatever the background, it is never particularly palatable when a lone litigant in person is opposed in a matter of much importance by Senior and Junior Counsel skilled in employment law, and instructed by a senior firm of commercial solicitors. I have also found the Defendant's management style more than a little hectoring and sententious, and I am conscious of the degree of disappointment occasioned to the Plaintiff by this outcome after all her endeavours. Nor was I unduly impressed by the Defendant's "Open Offer" of 7th December, 2009. But nonetheless, in a field of controversy in which no single feature can be utterly determinative, I find on the evidence adduced and the law applicable that the balance relatively clearly favours the Defendant.

7. Having heard each of the parties as to costs after delivering extempore the substance of this Judgment, it seems to me that I am entitled to exercise some degree of discretion in the matter, but nonetheless cannot ignore the outcome at which I have arrived. In all the circumstances, bearing in mind that no provision for costs arises in hearings before the Employment Appeals Tribunal, I will make no order in relation to the proceedings in the Circuit Court in Galway but will award the successful Defendant's costs limited to a one day hearing in the appeal heard by me.