AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

**121TACD2021**

**BETWEEN**

**THE APPELLANT**

**Appellant**

**V**

**REVENUE COMMISSIONERS**

**Respondent**

## DETERMINATION

### Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") by the Appellant relating to employee tax credit for the year 2018. The Revenue Commissioners ("the Respondent") have denied the Appellant the applicable tax credit as an employee during part of 2018 on the basis that she was self-employed.

2. The Appellant submitted the appeal on 20th May 2020. The Commissioner has considered the Notice of Appeal, the Statement of Case submitted by both parties, the submitted documentation and the evidence given at the hearing on 13th July 2021. The Appellant was assisted by her husband at the hearing, who completes their tax returns. The Appellant and her husband presented as honest and committed to ensuring their tax treatment was compliant with the law.

### Background

3. The Appellant is a professional person and a qualified physiotherapist. The Appellant had worked for a physiotherapist practice ("the Practice") on a part-time basis. The Appellant was initially engaged in a self-employed capacity. The Appellant confirmed at the hearing that this was the case and makes no claim in respect of this period of self-employment. In September 2018, the Appellant was informed by the Practice that her status was changing as she was no longer being treated as self-employed but would now be treated as an employee.

4. As a result the Appellant was issued with a contract of employment dated 1st September 2018 ("the Contract"). It was signed by the Appellant and the Practice. The Contract sets out the name of the employer, the address of employment, the job description and duties, and that the Appellant was a "*part-time employee*". The Appellant was entitled to 4 weeks paid holiday leave. The only possible reference to a self-employed status was that the Appellant was to invoice the Practice every month. The Appellant was required to work on a Monday for a set shift pattern and on a Friday for a set shift pattern. The Appellant could not take unpaid leave without the permission of the Practice. The Appellant was required to give 4 weeks' notice. The Contract referred to the Appellant having a "manager". There

was a uniform policy to which the Appellant was required to adhere which included "*cream and white clothing with glamour in mind*". The Commissioner notes that the Contract is perhaps somewhat of a throwback to a different era but nonetheless is an employment contract.

5. The reason for the issuing of the Contract and the change in status was due to an audit of the Practice by the Respondent. This was confirmed in a letter from the Practice to the Respondent dated 11th April 2019, which was in the documentation supplied by the Respondent. The Practice wrote in that letter that in August 2018, following an audit by the Respondent concerning the employee status and contracts, the Practice introduced a conversation to change staff from contractors to employees. The Practice stated that the Appellant issued the Practice with invoices monthly and was paid gross. They stated that with respect to the Appellant it was "not felt practical to convert her position to employee status" as they could not guarantee the Appellant regular hours. But that letter is not substantiated by the Contract which issued in September and the Practice had converted the Appellant to an employee.

6. The Appellant submitted time sheets to the Commissioner for September and October 2018. They confirmed a regular pattern of work and up to 13 patients per day. The documentation confirms that it is a time sheet and record of payment of the individual patients. It is not an invoice. The Appellant had been requesting her payslips from September 2018. This is confirmed in the record of Whatsapp conversations sent to the Commission as part of this appeal.

7. The Appellant gave evidence at the hearing that relations with the Practice deteriorated when the Appellant asked to be paid as an employee and to receive her payslips. The Commissioner has no remit to address employment or contractual disputes. But the evidence provided by the Appellant and the documentation presented does disclose that the relationship deteriorated such that the Practice chose to terminate the contract with the Appellant. This was confirmed in a letter dated 7th January 2019.

8. The Appellant had sent an email to the Practice on 19th November 2018 about her missing payslips. The Practice accountant wrote to the Appellant on 26th November 2018 stating that she was not included in the October payroll as instructed by the Practice. The Appellant had enquired to the Practice owner about this instruction. On 17th December 2018, the Appellant was informed that she would not receive her payslips and that would only happen once she paid all taxes. On 7th January 2019, the Appellant received a letter of termination which included a stipulation that she settled all claims against the Practice in return for payment of her outstanding monies.

9. In January 2019, the Appellant informs the Respondent about the lack of PRSI contributions and payslips by the Practice. The Respondent set up an employment record for the Appellant and informs the Appellant that the PRSI should be paid by her. This relates to her own contribution and not that of the Practice. In October 2019, the Appellant opens another enquiry with the Respondent about the lack of a P60 from the Practice. The Respondent informs the Appellant that the Practice should issue a P60. In October 2019, the Appellant asks the Practice for her P60 but is informed that this is refused as there was no employment contract with her.

10. Following the termination of the Contract, the Appellant and her husband completed the appropriate Form 11 with the Respondent on 8th November 2019. The completion of the form made it clear that the Appellant was self-employed until September 2018 but then changed to become an employee and so the employee tax credit was claimed for that part-year.

11. The Respondent denied the Appellant the employee tax credit for September to the end of the tax year on the basis that they had not paid PAYE and due to a letter from the Practice dated 11th April 2019 enquiring as to why there was no payroll record for the Appellant. The Respondent chose to weight the letter from the Practice against the Appellant and so would not allow the employee tax credit.

12. The Respondent confirmed in the Statement of Case to the Commission and at the hearing that they relied on the letter from the Practice in April 2019 which informed Revenue that the Appellant was a self-employed contractor who was paid gross and only worked 8 to 10 hours per week and that they wrote to the Appellant on 11th June 2019 on that basis. The Respondent took the information as correct from the Practice despite the fact it had audited the Practice and asked for those previously termed as contractors (namely the physiotherapists) to be made employees. The Respondent also accepted that the Appellant was only working 8 to 10 hours per week but her timesheets indicated that every day in September and October she was dealing with at least 5 patients and up to 13 patients on some days. In October she had 122 patients which provided an income of €7,035 for the practice. This equates to more than 8 to 10 clients a week or 8 to 10 hours per week. This is consistent with the Contract which referred to a rate earned if over 100 patients per month.

**Legislation**

13. The relevant legislation that applies in respect of this appeal is section 472 Taxes Consolidation Act 1997 and section 472AB Taxes Consolidation Act 1997.

14. Essentially, an individual is entitled to a tax credit as an employee as referred to in section 472 Taxes Consolidation Act 1997 as the PAYE tax credit.

**Submissions**

*Appellant's submissions*

15. The Appellant submitted that she accepts she was self-employed until September 2018. But, in September 2018, she was issued with the Contract and was informed she was now an employee. She was available for work for the Practice and worked on the days set out in the Contract. She could not miss work on those days. She did not submit invoices but time records of how many patients she had seen each day and the payments they had made to the Practice. She had asked for her payslips but none had been forthcoming. Once she asked for her payslips and to be paid as an employee (as set on in the Contract) the relationship deteriorated and the Contract was terminated and she left the Practice.

16. The Appellant submits that she was informed by the Practice Manager that following an audit by the Respondent due to the recognised pattern of permanent work, the Appellant was being hired as an employee on an employment contract basis.

17. The Appellant submits that she is entitled to the employee tax credit for the period September to December 2018 as declared on the appropriate tax declaration form and all enquiries to the Respondent.

*Respondent's submissions*

18. The Respondent submits that the Appellant has been denied the employee tax credit as it relied on the Contract (which stated that the Appellant would submit invoices) and also relied on the letter from the Practice dated 11th April 2019 that confirmed that she was paid on a consultancy basis due to only working 8 to 10 hours per week and the Appellant issued invoices each month.

**Analysis**

19. The Appellant has found herself in an unfortunate position and it is a classic "Catch-22". She cannot be assessed as an employee as the Practice says she was not but she was only treated as an employee from September as a result of an audit by the Respondent. The Practice would not treat her as an employee until she paid the taxes but they would not account for the employee taxes. When the Appellant asked for the Practice to do so and issue her payslips, the Contract was terminated. The Respondent weights the Practice letter against the Appellant's evidence despite the fact that it was the Respondent's audit about the employment status of the Practice staff that initiated the change in the Appellant's status. This is most unfortunate.

20. The Commissioner could go through at length the various legal tests on employee/self-employed status. But that will not advance this appeal and is not necessary and is not the crux of this appeal. An individual should not be expected to have to be subject to the vagaries of their contracting party/employer and therefore be expected to accept whatever is the least favourable to them depending on extraneous circumstances and what the employer chooses to name the employment relationship depending on what is advantageous to the organisation. This is not conducive to a functioning tax system and the onus should not be on an individual to demonstrate that somehow they are the oddity, following an audit by the Respondent who found that the Practice should rationalise their staff to become employees.

21. It is evident from the Appellant's evidence and the letter from the Practice in April 2019 that an audit was conducted by the Respondent in August 2018. This asked the Practice to regularise the employment status of their staff. As the Practice was providing physiotherapy services this included the physiotherapists. As such, the Appellant received a new contract from the Practice. It was very clear that there was a change. The Contract was clear in that it stated it commenced on 1st September 2018. The heading is "Terms of Employment" and states "Part-time employee". There are a set of terms and conditions and duties. There is a "rate of pay" which is the term used for employees. There are 4 weeks' paid holiday, which is usually given to employees. There are stipulations about days of work that must be adhered to and so many shifts per week. The terms "shifts" is indicative of an employer/employee relationship.

22. The Appellant did not submit invoices but rather a schedule of her working week and how many patients she had seen each day. If it was an invoice it would have set out the rate

for the Appellant but it did not. It set out the payments made by the patients and according to these schedules/time records the Appellant earned the Practice €4,090 in September 2018 and €7,035 in October 2018. This is not consistent with the letter from the Practice in April 2019 which stated that the Appellant only worked 8 to 10 hours per week. The schedule confirms that the Appellant worked more than those hours. As such, the evidence given by the Appellant is accepted.

23. The Appellant accepted she was an employee from September 2018. She was at liberty to dispute this or work elsewhere. But she continued to work at the Practice and so expected the requisite benefits of being an employee, namely the applicable PRSI being deducted, PAYE at source deductions and payslips. But this did not materialise and on asking for these matters to be attended to, the Contract was terminated. Rather than the Respondent checking with the Appellant, it chose to believe the letter without verification of the Practice about the Appellant's sending an invoice and only working 8-10 hours per week. The Respondent should have asked for evidence of any invoices and the information about the hours.

24. The Commissioner does not accept the veracity of the letter of April 2019 from the Practice. It is unfortunate that the Respondent chose to weight the information provided by the Practice especially in circumstances whereby the Respondent had found them to conduct practices concerning staff that needed to be rectified.

25. If the Appellant was the oddity in the Practice and not an employee, it was incumbent on the Practice to assist the Appellant and inform her that the Contract was given in error and she was not considered an employee and hence the Respondent would be notified. In this scenario, the Appellant was given the Contract, informed she was now an employee and then treated for tax purposes as self-employed in direct contradiction to the Contract and the reality. The Appellant worked for than 8 to 10 hours a week, as evidenced by the time sheets. She had an employment contract, she had a manager, she had holiday pay, she had to submit timesheets, she did not submit invoices, she had terms and conditions regarding a dress code, she had to work certain set days and be available for certain shifts. These are all consistent with being an employee.

26. The Commissioner notes that if an enquiry had been made by the Respondent to the Appellant in respect of the timesheets, the invoices and her working pattern rather than relying on a letter from the Practice, this could have negated this appeal.

**Findings**

27. As such, the Commissioner finds that from September 2018 until her termination date with the Practice, the Appellant was an employee of the Practice and hence is entitled to the employee PAYE tax credit.

**Determination**

28. The Appellant succeeds in her appeal and is entitled to the PAYE employee tax credit for the appropriate period in question from 1 September until the termination of her employment with the Practice in January 2019. This Appeal is hereby determined in accordance with section 949 TCA 1997. This determination contains full findings of fact

and reasons for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 21 days of receipt in accordance with the provisions set out in the Taxes Consolidation Act 1997.

**Marie-Claire Maney**
**Chairperson**
**Appeal Commissioner**
**27th July 2021**