

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

MN832/2007
UD1077/2007
WT361/2007

Against

2 Employers

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997
UNFAIR DISMISSALS ACTS, 1977 TO 2001**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr M. Kennedy
Ms. C. Byrne

heard this claim at Dublin on 10th March 2008
and 4th June 2008

Representation:

Claimant(s): Mr. Frank Drumm BL instructed by Mr Damian Reilly, F.H. O'Reilly & Company, Solicitors, The Red Church, North Circular Road, Phibsborough, Dublin 7

Respondent(s): Peter Duff & Co., Solicitors, 34 Main Street, Blackrock, Co. Dublin

The determination of the Tribunal was as follows:-

Preliminary Issue

Claimant's Case

The claimant told the Tribunal that he was a teacher for twenty-seven years. He had a keen interest in local history and in 1987 published a book "The Meadow of the Bell" and one chapter was dedicated to Bram Stoker. He established the Bram Stoker Organisation in 1991 and he organised the first Irish International summer school. He established a cultural heritage centre for the community for fans to visit Dublin and he went on radio and TV. He met PS CEO of Tempelvelle Developments who was interested in the project. They had a meeting in which the claimant

presented an eight-point plan to PS, which included details on research, theatre, coffee shop, souvenir shops and they discussed the opening date. PS told him that he would send the eight-point plan to his solicitor. PS told the claimant that he should write his own contract. They agreed on an admission charge of £5, which they would split. PS told him that he would get a contract but he never did. He stood for election in the Clontarf area. He met PS and KF at the premier of a film Van Hesling. PS told him that he would help him with his election posters. The centre opened initially in May 2003 and was officially opened in July 2003. He gave up his teaching job in September 2001 and he was confident that it would work out. He did not have a contract and KF told him he would be employed in the box office. He started in the box office in November 2006. He reiterated that KF told him that he would have a position in the box office at the entrance of the Dracula centre. The centre was divided in two parts; part one was the academic side and part two was the tunnel, the wall of the vampire and scenes from the Dracula film, which scared people. His ambition was to be manager and director of Bram Stoker. A new manager DW was appointed who told the claimant that he was an employee. CR, an electrician was going to be a manager also and was appointed manager of the gaming area.

The claimant had to clock in and complete a time sheet and in January 2005 he retained a record of the hours that he worked. CR told him staff that are in control did not have to clock in and out. CR always gave him instructions especially when he had groups visiting the centre. The claimant was familiar with discipline and CR gave him instruction regarding this. The claimant felt he knew how to do his job. He was told to take in the cash and dispense tickets and physically he could not do all of this. He had to check the float every day to ensure it was accurate. He worked approximately ten hours on Friday, Saturday and Sunday. On occasion when the owners had special guests who wanted to visit the centre he came in during the week. CF told him that he needed to open the centre. The claimant did not have any control. One Saturday evening near closing time he closed the centre and he was informed that he had no right to close it unless he was given permission. He was the official PR and he did interviews. He had a letter ready to send to schools and KF told him that someone else would sign the letter, this occurred about a year into the venture. He thought that it would be "the centre" in the world. He ran a business and he saw a future in it for himself, he accepted his status as an employee. He last worked with the respondent on 3 November 2006. He submitted weekly invoices and he got paid most weeks by cheque. He was never told to change his hours and the only time he attended a meeting was at the very end. He was on call twenty-four seven and would do anything to build up the centre. During the summer it attracted numerous students. He hoped to develop the centre and have it open seven days a week.

In relation to his pay he dealt with his own accounts, he did not take holidays. He did not receive holiday pay from May 2003 to November 2007. He worked all bank holidays and he was too interested in getting the centre up and running to focus on what he was entitled to.

In cross-examination he stated that he accepted his lot as an employee. Asked if he considered himself to be an independent contractor he replied what he did was not irrelevant. It was not the case that he did not consider himself an employee. As an employee he took instructions from everyone in Templeville and he had no say in what was done. He sold a minute amount of merchandise and he sold two types of mugs, large and small for which he received a cut of twenty five percent. He kept account of the merchandise he sold and he recouped the cost from the respondent. He was CEO of the Dracula amateur society, which had fifty to sixty members in the country. From the moment he commenced employment he considered himself an employee. PRSI was not deducted from his pay.

Asked if he met the solicitor for the respondent in August 2006 he replied that he put a proposal to him and that he met with stonewall resistance. He was invited to the Christmas party but he did not attend. He was expected to be in work at all times and holidays never bothered him. He submitted an invoice. Asked if he never asked for an increase he replied he was happy to keep the centre going. Asked if he set up his own wage he replied that he did not set up anything. In 1991 he organised the Bram Stoker International Summer School and charged £5 per person. He did not organise walks or get paid for them. Asked if DW was not in a position to give him instructions he replied that he was the general manager.

He looked for a franchise and lease of the premises. He hoped that he would be a director from the start and he never got a contract. When he purchased new products he invoiced PS directly. He instructed his accountant to deal with accounts. The respondent did not deduct tax and he did not receive payslips. He did not seek a PRSI contribution and he worked regular hours.

BF was the CEO and he spoke with her on several occasions and he regarded her as his boss. He never took holidays or sick leave. His accountant looked after his P60. Asked if CR gave him instruction he replied that he was a friend and he told him to watch his checking in and out. CR was bar manager and area manager. The claimant never worked as a contractor. KF told him what to do and CR told him not to close before 11 o'clock. The claimant was informed that the arrangement regarding invoices had changed and there was an issue over work and the claimant was suspended. Between November 2006 and July 2007 he submitted a cumulative invoice. He submitted an invoice from the 1 April to June and prior to that he did not submit an invoice. He submitted invoices on 22 September, 30 November, 6 December, and 28 December 18 January, 1 April and 10 June. Asked how many invoices were furnished from November to June 2007 he replied he did not have them. Asked if he submitted invoices for 13 November and 6 December he replied he might have sent a weekly one and not received a response.

Asked if the invoice in the amount of €7,400.00 was unusual he replied that was for merchandise from a supplier. Asked why he left it so late to submit this invoice he replied that he was in a state of turmoil and he was suspended. When the incident occurred he was frogmarched off the building.

Invoices had built up over the years. Asked if he was not attending the premises in November 2006 he replied that he thought the matter would blow over. Asked if the arrangement had changed and that he was receiving twenty five per cent of all tours he arranged he replied he did not accept this. He had met KF and had a meeting, which had no status, and nothing came of it. It was mentioned that he could be paid twenty five percent of all bookings arranged. Asked if he worked thirty hours a week from May 2003 until March 2007 he replied that was a suspicion in November 2006 that he did not work. He did not work after November 2006 at anything else. He had no involvement in the running of a café. His employment with the respondent terminated on 3 November 2006.

In re-examination he stated that he was suspended on 3 November 2006. He was informed that the matter would be resolved in a week. He was suspended as someone had reported an alleged incident. He was not told he could bring someone to a meeting, it all happened in five minutes. There was no communication and after his suspension he telephoned KF to keep the line of communication open. He met KF on 24 November 2006 and she suggested that he get twenty five per cent on bookings and that was nothing new. No agreement was reached at the meeting.

Respondent's Case.

The group financial controller PB told the Tribunal that he was not the claimant's boss. He met the claimant at the Tribunal hearing and prior to that had never met him or spoke to him. The accounts department provided a list of all invoices that the claimant submitted from June 2003 to 5 November 2006. He was not aware if company employees submitted invoices. The invoice had to be verified before payment could be issued. A P45 or P60 was not issued to the claimant as far as he was aware. All employees of the respondent have a contract and the claimant did not have a contract. If the claimant worked three days he received €300 and for two days he received €200. He did not know who decided this and he inherited it. He started in 2003 and took over accounts in 2005/2006. The claimant was paid €100 per day. All employees and contractors clocked in and out. After November 2006 the claimant was paid twenty five per cent of all tours. The claimant was paid up until 3 November and all invoices were paid in full.

In cross-examination he stated that the respondent was a company limited by guarantee. He was the group financial controller and was a qualified chartered accountant. He was appointed in April 2003 and took over accounts in April 2006. He reported to the MD. The respondent had a managing director, property developer, bar/restaurant, HR manager and a health and safety manager. He was a director of the company and he was not a financial director. He reported to BF the MD. He did not know how many reported to BF or who was in charge of a specific area. Alan was responsible for group health and safety. COR was manager of the bar. KF looked after the games area. He did not know when the original agreement was arranged in relation to the claimant's pay and the claimant was never on the payroll. The last invoice that he paid to the claimant was in respect of weekend of 3 November. He then received an invoice from the claimant, which stated that the claimant was owed €10,000, he was quite surprised. KF told him to pay the claimant twenty five per cent of the takings and this was possibly sent to him by e-mail. It was not always the case that the accounts department requested instruction in writing. He knew that KF was in charge of the gaming area by just being there. He had never seen an organisational chart. He sent a letter to the claimant in which he requested him to discontinue submitting invoices. KF informed him that the arrangement had changed.

In re-examination he stated that he considered the claimant a supplier. The claimant's employment ended on 14 November 2007.

The director and MD of the respondent BF told the Tribunal that she did not give instructions to the claimant. She instructed the manager of barcode but she did not give instructions to them for the claimant. The general manager of the respondent met with AC the HR manager and due to an incident the claimant was asked to leave. The claimant was escorted off the premises and told not to come back until the matter was investigated.

In cross-examination she stated that the respondent had a staff of six hundred in total. She had staff report to her. KF was director of marketing and she was on the payroll. Asked if KF reported to the general manager in barcode she replied that sometimes the general manager would not be on the premises. The claimant reported to KF and to COR as well who was general manager of Barcode. Asked if anyone gave the claimant instructions she replied that of course the claimant would be given instructions and the general manager gave him instructions. KF was responsible for Barcode. She met the claimant more than once or twice and she first met him in 2001 after a

meeting. She never had arranged meetings with the claimant. Asked if the claimant made proposals regarding Bram Stoker she replied that Bram Stoker was up and running. The claimant was a contractor and she signed his cheques every week. She did not have discussions with the claimant at the outset. She met the claimant the day he was escorted off the premises. If a member of staff was suspended they were always escorted off the premises. The investigation had concluded and the position is that the claimant could not be back on the premises.

KF told the Tribunal that she was PR and marketing manager and she takes care of the Bram Stoker programme. Her job was to keep the place open and promote it. She had to ensure that the staff reported for work and that the actors were on site. The claimant met groups and the claimant was not her assistant. She consulted with the claimant on a number of issues and they worked together.

The claimant had his job and she had hers. She did not say that the claimant was an employee. She had no involvement in the claimant's talks and she did not instruct him. The claimant had sold small merchandise and at the later stage he provided more merchandise. The claimant was a businessman and he used to give walks as part of the organisation.

In cross-examination she stated that she had a contract and was on the payroll. Asked if she never gave the claimant instruction she replied that they worked together. She was a manager and he was a contractor. The claimant had a lot of friends who were schoolteachers and they brought in groups. Asked regarding the system in place for recouping money she replied she would get a PO number and give it to the manager. Asked in relation to the new arrangement and if she wrote to the claimant she said that PB sent the letter. She did not discuss giving the claimant a contract. The claimant was paid to provide a service and she was clear in her mind that he was paid to give a talk and leave. She did not ask the claimant to provide insurance or a form of indemnity. She met the claimant off site and they discussed twenty five per cent on booking fees. She thought that the claimant was happy and that he wanted to be involved in the Dracula experience. He was told that the claimant could not be on the premises.

COR told the Tribunal that he was the general manager of Barcode and the bar manager. He was not the claimant's boss. He knew the claimant to see.

Asked if he was bar manager in Templeville Developments and was general manager for the last two years and when he took over the franchise he replied he was still there and was paid by Templeville as general manager. All contractors that reported to him had a contract to provide the services. All were perceived as contractors.

Determination on Preliminary Issue

Having adduced the evidence in this matter the Tribunal are not of the view that there was an intention to form a contract of employment. Therefore the Tribunal does not have jurisdiction to hear the claim under the Unfair Dismissals Acts, 1977 to 2001, the Organisation of Working Time Act, 1997 and the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

