

EMPLOYMENT APPEALS TRIBUNAL

Correcting Order

CLAIM OF:
Employee

CASE NO.
UD884/2007

against

6 Employers

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. A. O'Mara
Ms. E. Brezina

heard this claim at Dublin on 25th March and 11th June and 5th November 2008

Representation:

Claimant: Ms. Mary Fay BL, instructed by
Donal Taaffe & Company, Malthouse Square, Smithfield, Dublin 7.

Respondents: Mr. John McGuigan BL, instructed by Pdraig O'Donovan & Company,
Abberley Law Centre, High Street, Tallaght, Dublin 24

Mr Matthew Jolly B L instructed by
Peter McGarry & Company, Solicitors, 27 Capel Street, Dublin 1

XXXX

This Amending Order should be read in conjunction with UD884/2007 signed on 11 December 2008.

The final sentence of the Determination is replaced by:

The claims against the second and third named respondents under the Unfair Dismissals Acts, 1977 to 2001 fall.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:
Employee

CASE NO.
UD884/2007

against

6 Employers

Under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. M. Levey BL

Members: Mr. A. O'Mara
Ms. E. Brezina

heard this claim at Dublin on 25th March and 11th June and 5th November 2008

Representation:

Claimant: Ms. Mary Fay BL, instructed by
Donal Taaffe & Company, Malthouse Square, Smithfield, Dublin 7.

Respondents: Mr. John McGuigan BL, instructed by Pdraig O'Donovan & Company,
Abberley Law Centre, High Street, Tallaght, Dublin 24

Mr Matthew Jolly B L instructed by
Peter McGarry & Company, Solicitors, 27 Capel Street, Dublin 1

Pastor Gerry Byrne, c/o Victory (Ireland) Christian Fellowship,
35 Westland Row, Dublin 2

The determination of the Tribunal was as follows:

The claimant initially listed seven respondents on his T1-A in his application to the secretariat of the Tribunal in this case. At the outset of the original hearing the claim against one of them, Dublin City Council was withdrawn by the claimant.

The primary purpose of the preliminary issue was to establish both the connections between those respondents and their combined and individual working relationship with the claimant. When the case against Dublin City Council was withdrawn it effectively left three respondents albeit with different addresses in two of those cases. The claimant who is a holder of an Italian passport is exercising his right under section 36 (2) of the National Minimum Wage Act, 2000 to take a case of unfair dismissal against those respondents. That section reads:

(2) Dismissal of an employee in contravention of subsection (1) shall be deemed to be an unfair dismissal of the employee within the meaning and for the purposes of section 6(1) of the Unfair Dismissals Acts, 1977 to 1993 (but without prejudice to sections 2 to 5 of the Unfair Dismissals Act, except that it is not necessary for the employee to have at least one year's continuous service with the employer and that Act shall apply as if the Worker Protection (Regular Part-time Employees) Act, 1991, were repealed in relation to the number of hours an employee is normally expected to work for the purposes of that Act) and those Acts, with the necessary modifications, shall apply accordingly.

All of the respondents separately deny they employed the claimant. Evidence was adduced in an attempt to clarify the status of the claimant and to identify his employer(s) if any for the purposes of this case.

Claimant's Case

The claimant's relationship with the respondents started as a result of his attendance at services conducted by the Victory (Ireland) Christian Fellowship. In June 2006 he submitted a copy of his curriculum vitae to a member of that organisation. That led to another member of that congregation, J O'R contacting him and invited him as part of an interview to take up residence on a rent free basis at 7A Oakley Road for the purposes of managing that house and its residents. The relevant social services and Dublin City Council selected those residents. The claimant accepted this position and in addition to his board and lodgings he also received the sum of €1300.00 per month. That amount was discharged in cash and cheques by J O'R and the claimant treated it as net income for taxation and social welfare purposes. Despite his previous work experiences in other jurisdictions dealing with the relevant tax authorities the claimant did not approach Revenue here to clarify his tax status. He felt J O'R was responsible for that. At no time during his employment was the claimant furnished with a contract of employment nor was he told his job was on a self-employed basis.

When the claimant commenced work on the premises he found himself putting "things in order" as the house was "a mess". He was supplied with two report books by J O'R where he had to write details on the condition and general running of the residence. Initially the claimant had no knowledge of the different arrangements and connections involved in this house. He considered himself the manager there and soon became conscience of the presence and input of other people and organisations linked to this house. Although he met J L some three weeks into his residence and employment the claimant at that stage did not know of his status or involvement in the house.

A further meeting attended by J L and J O'R to resolve a dispute left the claimant in no doubt that J L had more clout and control than J O'R. According to the witness J L was the boss and instructed J O'R to reinstate him back into his position in the house. The claimant contended that J O'R had earlier dismissed him over lack of cover during a visit by a social worker. J L made references to that incident in a letter addressed to him dated 16 December 2006. Since the claimant took his instructions from J O'R he returned to the house on his day off when asked to by him in order to meet that worker.

A source of the dispute between the claimant and J O'R lay in having time off to attend to other affairs. The claimant worked permanently at the house up to October 2006 without a break or any time off. When that scenario changed J O'R either arranged cover for the claimant's absences from the house or else went there himself. At times friends of the claimant called to the house for social reasons but did not provide cover at any time. The claimant was on a day off on 14 March 2007 when he returned to the house in the evening. An identified person who was acting on J O'R instructions to provide cover did not allow him entry to the house. However, when he managed to gain access to his room the claimant discovered that all his belongings were no longer there. Those belongings were subsequently recovered from another residence. The claimant called the Gardai and reported that incident to one of its members. As a result of that incident the claimant considered he was dismissed and began proceedings for unfair dismissal against the above respondents.

The claimant observed that a relationship existed between J L and J O'R and between J O'R and the Victory (Ireland) Christian Fellowship, at least in the form of its pastors. One of those pastors close relatives had an input into the maintenance of the house while the other pastor had a degree of control over it as well as over the working conditions of the claimant. The claimant had discussions with that pastor about his days off and he in turn spoke to J O'R about that issue. While J O'R stated that the claimant was his employee, he (J O'R) in turn acted on the behalf of J L.

A community Garda who was based at Rathmines station for twenty-three years and who was generally familiar with the situation at 7A Oakley Road, felt that the claimant was responsible "for everything" there. Apart from the residents he was the only person he met from that house. The Garda described the claimant as a honourable good man who was very helpful. He was shocked to witness the claimant's expulsion from that house on 14 March 2007 particularly the way his belongings were discarded. While attending the scene of this incident the Garda met an identified man who told him that his employer was on the way to that scene. Later another male appeared who identified himself as J O'R. That man also said that he employed the claimant. This was the first time the witness met this person. The Garda had no knowledge of J L, one of the other respondents.

A former resident of 7A Oakley Road who spent eighteen months there from June 2006 said that the claimant looked after the house. While he was aware that J L was one of the owners of this house the witness never met him or indeed the pastors of the Victory (Ireland) Christian Fellowship. However this former resident met J O'R in the house and formed the view that the claimant was working as "an agent" for him. J O'R arranged cover for the claimant while he was absence from the premises such as attending language classes. The claimant told the witness that J L was "his boss" and it was the witness's impression that J L in turn was the boss of J O'R.

Respondents' Case

Second named Respondent

J L accepted he is the owner of 7A Oakley Road, Ranelagh, Dublin 6. In that capacity he and Dublin City Council have an unwritten ongoing monthly contract whereby the Council pays a fee to the witness to allow them to use the premises to house certain people. The Council lays down certain conditions as to how the house and its occupants should be managed. The owner in turn pays J O'R a monthly fee to care for and manage this house. The witness stated that he did not exercise any control over J O'R in the way that management is operated. No written contract between them on this issue was submitted. However the witness understood that J O R "got someone" to look after the house. In this case that person was the claimant and he was running the house better than the previous equivalent person. J L maintained he had no employment relationship with the claimant. According to the witness the claimant was employed by J O'R.

Prior to December 2006 the witness attended a meeting together with the claimant and J O'R. The purpose of that meeting was to resolve a dispute between the claimant and J O'R. During the course neither of that meeting nor at any other stage did the claimant indicate he had been dismissed. The witness's rationale for getting involved as a mediator in that dispute was to prevent the domino effect that in the event that J O'R lost his ability to manage the house then the claimant as an employee of J O'R would also lose his job. Since the witness had an employment relationship with J O'R he wanted to prevent a breakdown in relations between the claimant and the person with whom he had arranged to manage his house. That dispute was resolved and the witness referred to it in a letter dated 16 December 2006 to the claimant.

The witness replied to an email from the claimant on 14 March 2007. The claimant had earlier that day informed him and J O'R separately that he intended to take four complaints including one under the National Minimum Wage Act, 2000 to a Rights Commissioner. In reply J L again emphasised that he was not the employer of the claimant and suggested he direct his correspondence to J O'R only as he was "your employer". Subsequent to the claimant's cessation of employment the witness received further correspondence from the claimant in late March to which he did not respond. That correspondence accused J L of dismissing the claimant and asked him to give a written explanation for that dismissal. Those letters also gave notice to the witness that complains under the Unfair Dismissals Acts, and the Payment of Wages Act would be taken against him.

The link in this case between this respondent and the Victory (Ireland) Christian Fellowship was, according to the witness, more personal than institutional. J L stated he was not a member of that body. However, J O'R and his predecessor as manager of 7A Oakley Road were members of that organisation, the latter holding the position of pastor. The witness had met those two people in the company of the claimant and Dublin City Council to discuss the council's requirements for the running of that house. The homeless services section of the council addressed their inspection reports on that house to the pastor of that church in 2006 and up to February 2007. It emerged that the witness continues to engage the services of J O'R to manage this house.

First named Respondent

A national from South Africa resident in this State on a student visa said he commenced managing 7A Oakley Road in early January 2008. He receives a monthly gross remuneration of €1850.00 for that work from J O'R in addition to residing rent-free on the premises. Since he has to arrange

considerable amount of substitute cover while he is absent from the premises the witness in turn pays for that cover from his own income. He regards himself as “his own boss” and added that he was tax compliant. He stated he has a written contract of employment in relation to his job as manager. This contract was drafted by him only and was not submitted to the Tribunal. His understanding was that J L was the owner of the house, Dublin City Council has a contract to run it and he was the person doing just that. He commented that J O’R did not employ him to do that. His initial introduction to this house was through the Victory (Ireland) Christian Fellowship.

Prior to the claimant taking up duties at the house at Oakley Road the pastor of the third named respondent acted as manager/caretaker there. On hearing that the claimant was available for that position J O’R introduced him to that house and in a short briefing outlined the duties entailed with its running. Following that introduction the witness (J O’R) visited the house every day for the first week of the claimant’s work there and satisfied himself that all was in order. He described the claimant at the time as a fantastic worker, very enthusiastic who had a good heart and empathy with the residents there. No written agreement or contract of employment was entered into between the witness and the claimant. The witness paid the claimant a gross monthly allowance as the claimant also took up residence in the house. The witness did not deal with the claimant’s taxation or social welfare affairs or provide holiday pay to him. J L owned this property, J O’R described himself as a sub-contractor and manager of that house and viewed the claimant as a “sub-manager”. No written contract or agreement existed between J O’R and J L. However the latter had the final “say” in matters concerning this house. The witness described him as the boss.

In June 2006 the witness wrote a letter entitled To Whom It May Concern under the guise of O’Rourke security, an entity that had earlier ceased business, stating that the claimant was an employee of that entity. In evidence he accepted this was wrong and explained the background to the issuing of that letter. In a further undated handwritten note the witness stated that the claimant was not invited to take up the post of caretaker at the house in Oakley Road by either Dublin City Council, the Victory Christian Fellowship or the second named respondent. That note also stated that he offered that position to the claimant. In hiring the claimant on “goodwill” the witness did not enquire into his status on residency or work in this jurisdiction.

Twenty-four hours, seven days a week cover was needed for this house. When the claimant started applying for days off from his duties at the house the witness realised that he did not understand his role within that house. In many cases the witness provided and paid for cover when the claimant was unavailable to carry out his duties. As the witness became increasingly concerned with the claimant’s behaviour and poor communications he decided to dismiss him in October 2006. However, that action was soon reversed primarily due to the intervention of J L in that situation as the witness reinstated the claimant back to his job. Following more misgivings about the claimant’s work the witness said the claimant was verbally given a month’s notice to leave the premises as his employment there was being terminated.

The witness was unable to say when the claimant told him he was applying to the Labour Relations Commission (LRC) for redress under certain Acts. The witness response was to wish him well. J O’R acknowledged he received texts and an email from the claimant on 14 March 2007 informing him of that intention. He described the claimant as calculating in reference to those applications and maintained the claimant’s application to the LRC post-dated the termination notice. According to the witness that notice and subsequent dismissal was a consequence of other factors unrelated to the claimant’s proposed application to the LRC. When he “recognised” that the claimant was not going to leave the premises the witness arranged that his belongings be removed and located elsewhere.

That action was taken on 14 March 2007 some hours after receiving the claimant's texts and emails.

Determination

There was little in this case that could be described as orthodox. In the first instance the claimant had less than twelve months continuous service with the respondents to allow him to take a case directly under the unfair dismissals legislative. The Tribunal therefore needed to establish whether he came under the protection of section 36 (2) of the Minimum Wage Act, 2000, and if so, was his termination of employment by the respondents due to his notification to his employers that he intended to pursue a claim under that Act. Having considered these issues the Tribunal finds it has jurisdiction to hear and determine this case under section 36 of the aforementioned Act.

Based on the adduced evidence it is clear to the Tribunal that the claimant notified two of the respondents on 14 March 2007 of his intention to formally bring several complaints to the attention of the Rights Commissioners'. One of those complaints explicitly named the National Minimum Wage Act, 2000. Later that day the claimant found himself without a job and removed from his lodgings at Oakley Road. The Tribunal is of the view that the action taken against the claimant amounted to unfair dismissal and that such a dismissal was due to his intention to bring certain complaints against his employer to the Rights Commissioners.

The employment status of the claimant was another issue that needed to be addressed. A distinct lack of documentation among and between all parties was a feature of this case. A laissez-faire approach was seemingly adopted by all parties. Based on the evidence the Tribunal is satisfied that the claimant was working under a contract of service. In other words he had an employer. Considering the lack of clarity on behalf of the respondents in dealing with the claimant it is understandable that he was unable to precisely identify that employer. Following a full hearing of this case the Tribunal finds that the claimant's employer was the first named respondent acting as a sole trader.

The claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds against that respondent. The Tribunal is not satisfied that every effort was made to mitigate his loss and thus awards him €6000.00 as compensation under those Acts.

The claims against the first and third named respondents under the Unfair Dismissals Acts, 1977 to 2001 fall.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)