EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NO.
Employee	UD740/2008 WT308/2008 MN677/2008
against	
2 Employers	
Under	

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mrs M. Quinlan

Members: Mr. M. Flood
Mr A Butler

heard this claim at Wicklow on 12th November and 22nd December 2008

Representation:

Claimant: Mr David Whelan B.L., instructed by Peter Nugent & Co., Solicitors, 16 Herbert Street, Dublin 2.

Respondent: Mr Tim McNulty B.L., instructed by Augustus Cullen Law, Solicitors, 7 Wentworth Place, Wicklow

The determination of the Tribunal was as follows:

Dismissal as a fact was in dispute in this case

<u>Claimant's case:</u>

The claimant gave evidence that he commenced working with the first named respondent JR Ltd as apprentice bricklayer on 1st December 2003 and was registered as an apprentice through FAS. He was not given a written contract of employment and was not told of disciplinary procedures. He was not given payslips, was not paid travel time and was just paid a weekly wage. There was no mention of pension contributions. His four-year apprenticeship ended on 1st December 2007. He continued to work with the same company and nothing changed after the end of his apprenticeship. On 25th March 2008 he phoned the MD asking for a pay rise. JR told him he would pay him redundancy for the four years but would re-hire the claimant on a C45 as a sub-contractor under a new company name. He received a pay increase of €150 per week.

On 3rd April 2008 he received a written warning under a new company name. He did not know anything about this company and was never told he was being changed from one company to the other. He was never given a formal reprimand. He made a few mistakes during his apprenticeship where he was told work needed to be changed but he was never told he was getting a verbal warning. When he went back to the site he had to take down a wall and re-build it and he was docked two days pay. The claimant owned up to his mistakes and took down the wall. On 4th April 2008 the MD told the claimant that he did not have to pay him redundancy as it was within the four-week period after the end of his apprenticeship. The claimant had not been formally told he was being made redundant. He rang the MD on 11th April and said he would look in to the matter, as he was four months out of this apprenticeship. On 17th April 2008 the claimant called to collect his wages and the MD's wife gave him his P.45 showing his date of leaving as 4th April, which was two weeks prior to its receipt on 17th April. The start date on the P.45 was shown as 3rd March 2008 which the claimant could not understand as he commenced his employment on 1st December 2003. He was also given a C45 form which he felt, meant that if he signed this form he would be a self-employed sub-contractor. The claimant did not sign this form. He had been given his P.45, was not paid redundancy and why should he go back as a sub-contractor. On 29th April 2008 he received a tax deduction certificate with the claimant shown as being a sub-contractor of JRC Ltd, second named respondent. He also received an application for a certificate of tax credits which showed his date of leaving as 29th February 2008. The claimant did not leave on 29th February. He was working to 17th April 2008 when he went to collect his wages. He did not work with the respondent after that date.

Evidence was also given regarding his efforts to obtain alternative employment.

In answer to questions from Tribunal members witness stated that the change of company name was never discussed with him.

Respondent's case:

The Tribunal heard evidence from PR wife of the MD. She did not give the claimant a P.45 on 17th April 2008. She gave him a document regarding working as a sub-contractor and asked him to come back and talk to her if there was any problem. She had spoken to him about this previously and there had been a negative response. A week or two previous to this she spoke to the claimant about the downturn in the work in the building industry. They were not getting the same volume of work and prices were going down. She had a similar discussion with another bricklayer and proposed he go as a sub-contractor and he signed the relevant form about a week later and changed to being a sub-contractor. Witness works as company secretary and does the administration. It is not her job to hire or fire anyone; this is her husband's role. When she had spoken to the claimant a week earlier he took the form and said he would ask his brother to look at it

as he is an accountant. The next conversation she had with the claimant was on the phone the next day,
Friday when he was expected at work. The claimant rang and stated that he needed his P.45 and that he was not working with the respondent any longer. When asked he stated that he was leaving and wanted his P.45.

In cross-examination witness stated that she was secretary of JRC Ltd, the second named respondent. The first named respondent JR Ltd was not trading at the first date of hearing this case. While employees were not given payslips all their taxes were paid. Witness did not know of the statutory obligation regarding the C.I.F. The claimant was not given notice of the change of company name, as his status had not changed. The respondent does not have procedures in relation to redundancy. The claimant was given the form to consider working as a sub-contractor and was asked to come back and discuss it if he had any problems but he did not revert to witness.

Evidence was also heard from the partner in the respondent's business. He had previously worked with the respondent as an apprentice for four years. Warnings are given to any employee if the work is sub-standard and he would get the bad news from the builder or would see the work himself. He mentioned a job that involved the claimant where a pier was not straight and witness had to go and rectify the work. On that same site a wall had to be taken down as it was out of line.

In cross-examination witness said that there were no written procedures but if something is wrong in relation to a job it was said to the employee involved and it had to be rectified. He never had apprentices who did not make mistakes and they would have three apprentices at any one time.

The Tribunal also heard evidence from the MD. Due to the downturn in the business he told his employees he could not keep them on. One job that he was asked to do were quoting a price, which was one third down from what would be the norm. He told the employees it was not viable to keep them on. At the time he had only two apprentices. The claimant was told his work was not up to standard and he was given a few verbal warnings. He was making the same mistakes day in day out. On one occasion a wall was built in the wrong place and he was told if that carried on he could not afford to keep him. He instructed his wife to issue the letter of 3rd April 2008 stating that he was being issued with a last written warning and if the poor workmanship continued his employment would be terminated.

In cross-examination witness said that when he transferred the business to JRC Ltd, the second named respondent, he was told it was above board. Four employees including the claimant were transferred to the new company. It was probably his mistake that the employees including the claimant did not get payslips. The claimant was told that he could not afford to keep him on PAYE due to the downturn. In relation to the letter of 3rd April 2008 witness stated that at this point the claimant had received four or five verbal warnings but this was the first written warning. He did not discuss redundancy with the claimant. The second named respondent, JRC Ltd came into being five to six weeks before the claimant left. Witness is the person who would sack an employee and did not sack the claimant. Two weeks prior to the 17th April 2008 he discussed with the claimant regarding becoming self-employed. The last day the claimant worked was 17th April 2008 and he was never employed as a sub-contractor by witness. The dates as given on the P.45's was a genuine mistake.

In answer to questions from Tribunal members regarding two company names witness stated that one company was trading and the other was not but it has not ceased trading.

A chartered accountant and auditor for the respondent said he dealt with all the taxation affairs of the company. He explained that the change of name for the respondent in early 2008 was adapted following legal advice. At that time P45s issued for administrative purposes only to all employees and that the claimant did not receive his for that reason. In April 2008 further P45s issued to the claimant under different circumstances. The witness formed the impression that the claimant was engaged by the respondent on a sub-contractual basis from early April.

Determination:

Having heard and considered the evidence and submissions the Tribunal is of the view that this is a case of constructive dismissal. The respondent's attitude and procedural approach to the claimant's situation was less than professional and lacked fairness. This lack of openness and clarity, together with the mixed messages being sent to the claimant, in the view of the Tribunal, created a degree of uncertainty, which made his work conditions impossible. The claimant clearly never agreed to work on a sub-contract basis or to be treated as a sub-contractor. The Tribunal is satisfied that the claimant has furnished sufficient evidence to prove he has been constructively dismissed and awards the claimant €27,000-00 as compensation for losses under the Unfair Dismissals Acts, 1977to 2007. This being a case of constructive dismissal a claim under the Minimum Notice and Termsof Employment Acts, 1973 to 2001 does not arise. No evidence having been adduced in this regardthe claim under the Organisation Of Working Time Act, 1997
fails for want of prosecution

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)