EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:	CASE NOS.
EMPLOYEE – ***claimant 1***	UD1239/2008
	MN747/2008
and	WT329/2008
EMPLOYEE – ***claimant 2***	UD613/2009
	MN795/2008
against	WT355/2008

EMPLOYER – ***respondent 1***

and
EMPLOYER – ***respondent 2***

and

EMPLOYER – ***respondent 3***

and

EMPLOYER – ***respondent 4***

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. J. O'Connor

Members: Mr. D. Hegarty
Mr. K. O'Connor

heard this claim at Tralee on 3rd April 2009 and 9th June 2009

Representation:

Claimants: Mr. Conor Murphy, Murphy Healy & Co, Solicitors, Market Street, Kenmare, Co Kerry

Respondents: Mr. Kevin O'Gara, Kevin O'Gara, Solicitors, 1/2 New Street, Killarney, Co. Kerry (*for the first three named respondents*)

Mr. Pearse Sreenan B.L. instructed by Ms. Carmel Sreenan, Sreenan & Company, Solicitors, 4 Cromwell's Court, Kenmare, Co. Kerry (*for the fourth named respondent*)

(*The legal representatives for all parties opened a substantial number of documents to the Tribunal*

)

The determination of the Tribunal was as follows:-

Background:

These claims were made by claimant 1 and claimant 2 against two named individuals (*hereinafter referred to as Mack and Mard*) and a limited company (*hereinafter referred to as RLtd*), the individuals being directors of this limited company, and a second named limited company (*hereinafter referred to as JLtd*) which was unrelated to the first two named individuals. The nature of the business operated by both limited companies was that of a restaurant/café.

On about 3 March 2008, ownership of RLtd's restaurant was acquired by JLtd.

Opening submissions:

Counsel for JLtd stated that his client – *the purchaser* – had been mislead by RLtd – *the vendor* – in the general conditions of sale, in that they – *the purchaser* – were informed that no formal contracts of employment had been entered into and that both employees had less than a years service with RLtd. It was also the case that that the vendor had given an undertaking to indemnify the purchaser"against all costs, claims, and demands (if any) by the said employees arising directly or indirectlyout of their respective employment".

The claimants' legal representative contended that the general conditions of sale were outside the knowledge of the claimants and that ultimately, both had lost their jobs.

Counsel for JLtd also stated that per claimant 2's T1-A form (*Notice of Appeal*), her employment began on 9 March 2007 and ended on 2 February 2008, the hours proposed by the new owner were completely different from those she had worked when employed by the previous company and due to her personal circumstances, the proposed changes in the terms of her employment were not acceptable to her and she could not work for the new owner. It was clear from this information thatclaimant 2 did not have the required one years service to entertain a claim under the Unfair Dismissals Acts 1977 and that her claim was one of constructive dismissal which accordingly meant that she had no entitlement to notice. Claimant 2 had fifty-one weeks service with RLtd andin cases of constructive-dismissal; notice was not taken into account. The case of Stamp –v– McGrath Ud1243/1983 was cited. Accordingly, the Tribunal did not have jurisdiction to deal withclaimant 2's claim under the Unfair Dismissals Acts, 1977 to 2007. Counsel for JLtd made an application that the case of claimant 1 be dismissed.

The legal representative for the claimants denied that the case of claimant 2 was one of constructive dismissal, or that the cited case law was relevant to this case. He also suggested that if required, the days due to claimant 2 in respect of her annual leave entitlement could be added to make up the years service required for an unfair dismissals claim.

The legal representative of RLtd and the two named individual respondents argued that the two named individual respondents were directors of RLtd and they conducted their business as a limited liability company and accordingly, their names should be removed as respondents. The claimants' correct employer was RLtd. The contract of employment which claimant 1 received was for the employer RLtd.

The legal representative for the claimants contended that the claimants had commenced employment with the two individual named respondents and initially received payment of their

wages from them in cash. As RLtd was now in financial difficulty, he did not believe that the two named individuals could be taken out of the equation as named respondents.

Ruling on application:

The Tribunal ruled that if this was a case of constructive dismissal, the issue of notice does not apply. However, if JLtd offered a job to claimant 2, there would appear to have been a transfer of undertaking. As dismissal was contested, the onus was on the claimants to make their case, and if it is not to be a case of constructive dismissal, claimant 2 must show that her refusal to accept employment, if offered by JLtd, was reasonable. Accordingly, this would be a matter of her evidence.

Claimant 2's case:

In her sworn evidence, claimant 2 said that she had been working in a local hotel when she was told that there was a job available in the restaurant of RLtd. After speaking to Mard, claimant 2 commenced employment there as a waitress and progressed to the position of head waitress. She commenced employment on 9 March 2007, a week before St. Patrick's Day, and due to her family circumstances, she worked particular hours each day. She was paid €60.00 per day plus tips.

In February 2008, claimant 2 was told by a supplier and by local people that RLtd was in some trouble and may close its restaurant. When claimant 2 enquired from Mard as to the position, Mard told her that she did not know anything at that stage. Nine days later, the restaurant closed. Despite having asked for a contract of employment, claimant 2 never received one. It was when Mard told claimant 2 that the restaurant had been taken over that she was also told that her job was safe and was there for her for as long as she wanted it. She was never put on notice that her job was in jeopardy.

Claimant 2 stated that the contents of an email dated 22 February 2008 from the legal representative for RLtd to the legal representative for JLtd stating that her employment with RLtd commenced on 1 July 2007 was incorrect.

On Monday 3 March 2008, claimant 1 and claimant 2 called to the restaurant to find out about their jobs. They met with the restaurant's new owner/director (*hereinafter referred to as JMul of JLtd*) but were basically told that there were no jobs for them. Previously, claimant 2 had worked evenings for RLtd, from 3.30pm to close (i.e. 11.00 or midnight).

Claimant 2 established her loss for the Tribunal. She secured alternative employment after four weeks for a period on twenty-two weeks but at a rate of pay, which was less that when RLtd employed her. Since then, she had temporary work as a waitress and had also been in receipt of social welfare.

During the period of her employment with RLtd, claimant 2 only received one week's holidays, which was paid by cheque.

Claimant 2 never received a P60 form or a P45 form despite requesting same. Also, because she had concerns that income tax was not being paid for her, she had called to the tax office in September/October 2007 to enquire if she were on their system and discovered that they had no record of her.

Claimant 2 confirmed that she received a reference from Mard dated 5 March 2008. In it was stated in part that "[*claimant 1*] was full time employed as assistant manager in the [

*named]*restaurant [*location/town*] for the past 12 months".

In cross-examination from Counsel for JLtd, claimant 2 confirmed that her employment began with RLtd on 9 March 2007. At that time, there had been a few part time employees and two or three full time employees.

Claimant 2 confirmed that she had received at least €200 per week in tips, which she had not declared to the Revenue Commissioners, and a wage of €300 per week, of which €260 was paid by cheque, and the remainder was paid in cash. She had been out of work for four weeks before securing alternative employment, for which she was paid €350.00 per week. She accepted that during this period, she had suffered no loss.

Claimant 2 had worked the night shift, and some lunch times on Saturdays and Sundays for RLtd. Prior to meeting JMul on 3 March 2008, claimant 2 had met the manager (*hereinafter referred to as Shhy*) of JLtd on 28 February 2008. Shhy had told her that her working hours in JLtd would be different, starting at 7.00am doing mostly morning hours and returning to do evening shifts. Claimant 2 had told Shhy that these hours would not be possible for her because of family reasons. She agreed that she had known that JLtd was not a nighttime restaurant but her problem had been that she was unable to work mornings. She had only wanted the same hours of work from JLtd as she had had with RLtd. Claimant 2 did not remember what she said to Shhy when Shhy told her that working the same hours for JLtd as she had when she worked for RLtd was impossible. However, there had been nothing further for her to consider, as she could not work mornings.

Claimant 2 agreed that by 28 February 2008, she had known that JLtd was taking over the restaurant of RLtd, and by that date, Shhy had discussed working hours with her. She agreed that therefore, she had been consulted about same.

Claimant 1 and claimant 2 met JMul on 3 March 2008, which was the first day of operation for JLtd in the new enterprise. They had telephoned him to arrange this meeting. At the meeting, JMul had spoken mostly to claimant 1 and told him that there was no job for him at all. She agreed that she had told JMul that Shhy had offered her day-time hours of work in JLtd and that she had said that such hours did not suit her and that she was not interested in working in JLtd. She and claimant 1 had discussed with JMul the move of JLtd from their old premises to the new premises (i.e. the premises from which RLtd had previously operated) and they expressed an interest to JMul in starting their own business at JLtd's old premises. This was something they had been thinking about. She agreed that accordingly, their intention had been to start their own business and not come to work in JLtd. There had been no acrimony at the conclusion of their meeting with JMul.

In cross-examination from the legal representative of RLtd and the two named individual respondents, claimant 2 confirmed that she had commenced employment with RLtd working weekends and after four or five weeks had gone full time.

The first time claimant 2 heard from a supplier that the restaurant of RLtd was being acquired by JLtd, she though that it was a joke and did not believe it. When told the same thing by a second supplier and by people in the town, she had contacted Mard. Mard had told her that she did not know what was happening but that her job was safe. When she and claimant 1 met her, Mard told her again that her job was safe.

Replying to the Tribunal, claimant 2 confirmed that the meeting she and claimant 1 had with JMul on 3 March 2008 had effectively nothing to do with her. The meeting had been about claimant 1's job. He was told that as there was no job for a chef, there was no job for him.

In his sworn evidence, claimant 1 said that claimant 2 commenced employment in March 2007 and that he had commenced in February 2007. When asked how he was sure that it was in March that claimant 2 had commenced employment, he replied that it had been before the St. Patrick's weekend, "so it had to be March anyway".

When invited by the Tribunal, Counsel for JLtd and the legal representative for RLtd and the two named individual respondents confirmed that they did not wish to cross-examine on this evidence.

Claimant 1's case:

Claimant 1 had been employed in a hotel, a distance away, and then he was offered a job by Mack. As he was travelling this distance every day, he accepted Mack's job offer. For the first few weeks, he worked part time for RLtd because he was also working out his notice in the hotel. A week of two after the commencement of his employment with RLtd, he was handed a contract of employment by Mack. He had been engaged as a head chef and worked into 2008.

When his suppliers and different people told claimant 1 that the restaurant in the ownership of RLtd was to be taken over by JLtd within a week, he began to worry and so tried to discover what was happening by contacting Mard. She told him that nothing had been decided but that his job and the job of claimant 2 were safe. Subsequent to this, he was told nothing more.

Claimant 1 was familiar with JLtd and the fact that it operated as a café. He was concerned and wanted to know how JLtd could employ a fine dining head chef. He thought that they intended to open in the evenings and operate in a different way. However, at the meeting with JMul on 3 March 2008, he was told that JLtd was going to operate in its new premises as they did in their other cafés and that they had no job for him as a fine dining head chef.

Reference was made to two documents, claimant 1's contract of employment which stated that his employment began on 21 February 2007, and an email from the legal representative for RLtd to the legal representative for JLtd which stated that employment began on 11 March 2007. Claimant 1 stated that the date of 11 March was incorrect. Reference was also made to a cheque dated 11 March 2007 in the amount of €400.00 for wages, which claimant 1 confirmed that he received.

Claimant 1 established his loss for the Tribunal. He had been out of work for a period on five weeks before securing alternative employment at a similar rate of pay as when employed by RLtd.

Claimant 1's contract of employment specified an annual leave entitlement of twenty-one days. However, he had only received ten days of leave. It had also specified that he was entitled to a notice period of one month, but he did not receive same. The contract of employment also contained a grievance procedure, which specified that any grievances should be referred to Mack and Mard. However, at the stage of the end of the involvement of RLtd in the enterprise, claimant 1 had no grievances and by the time he had established that a grievance existed, Mack and Mard were no longer involved in the business.

Due to his concerns about his tax affairs, claimant 1 had visited the tax office where he learned that they had no record of him working for RLtd. The only record they had was of his working for his previous employer – the hotel. Consequently, when he was off work in January and February, he had been unable to claim social welfare as no contributions had been paid for him in 2007.

In cross-examination by Council for JLtd, claimant 1 confirmed that he had earned €515.00 per week, which was paid €400.00 by cheque and €115.00 in cash. He did not know why he was paid in this manner. It was highlighted to claimant 1 that in documents that were opened to the Tribunal,

it had been indicated that his gross wage had been €450.00 per week and tax of €155.00 had been deducted.

Claimant 1 confirmed that neither Shhy nor JMul told him that JLtd might operate the new enterprise as a night time restaurant. He agreed that he knew the type of operation conducted by JLtd (i.e. morning teas, pastries, lunches, etc). However, he had hoped that they might operate differently when they took over the restaurant of RLtd.

The meeting with JMul on 3 March 2008 had been an informal meeting. He was offered a job in the kitchen of another café of JLtd but it was not a position of head chef. He agreed that he did not get an offer of a job as head chef in fine dining. JMul explained what JLtd were going to do and what position was available, but with his qualification, it was not a job for claimant 1. When he was told that there were no jobs available for a fine dining chef, claimant 1 was not interested and did not listen to whatever else was said. When put to him that JMul had said that JLtd would operate its new enterprise as it did in its other cafés, that food would be delivered semi-prepared and that the job of the person in the position of claimant 1 would be to finish and serve this food and that consequently, there had been no discussion about shift hours for claimant 1because he was not interested in such a job, claimant 1 replied "obviously not". He agreed that he had conversed about opening his own restaurant in the premises vacated by JLtd. The meeting with JMul had concluded civilly.

In cross-examination from the legal representative of RLtd and the two named individual respondents, claimant 1 confirmed that the first pay cheque in the amount of €400.00 that he received from RLtd was dated 11 March 2007. Prior to this, he had been paid in cash. His contractof employment had been with RLtd and the date of his signature on it was 10 April 2007. He agreed that he had had time to consider the contract.

It was following information from a number of his suppliers that RLtd were closing the restaurant that claimant 2 had contacted Mard. At their meeting with her, Mard told them that nothing definite had happened and nothing had been signed by that date but that their jobs were safe and whenever something happened, they would be the first to know.

Replying to the Tribunal, claimant 1 confirmed that, for the first weeks of his employment with RLtd, he had been paid in cash. He had also been working in the hotel at the same time.

When claimant 1 discovered that a job as a fine dining chef did not exist with JLtd, discussions ceased. An alternative rate of pay for another job with JLtd was not even discussed.

Closing submissions:

Counsel for JLtd contended that as nothing seemed to be at issue from the evidence given by the

claimants, he wished to make a verbal submission.

The legal representative of RLtd and the two named individual respondents contended that he had intended calling Mard to give evidence in relation to the amount of notice that had been given to the claimants. His application to the Tribunal was that both named individuals be removed as respondents in this case. It was clear that the claimants knew that RLtd was their employer. This application was again opposed be the claimants' legal representative.

Counsel for JLtd made the following points in his submission…

1. by the terms of the sale agreement, there had been a transfer and this was not disputed. Within the sale agreement, the purchaser – JLtd – acknowledged its obligations to the employees under the Transfer of Undertaking Regulations.
2. Regulation 5(2) of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 does not mean that such employees can retain their old jobs
3. there was also the preliminary issue in that claimant 2 had to establish that she was dismissed rather that she having resigned. Counsel contended that she had resigned in that…
    - she said in evidence that she and claimant 1 wanted to start their own business and that they had been thinking about this for some time
    - she was aware that JLtd did not operate at night time in their restaurants
    - she said in her evidence that she had no interest in doing day time work
    - she confirmed that she had no animosity or bad feeling towards JMul

    These four points indicate that she resigned rather than being dismissed.
4. if it was not the case that claimant 1 resigned, then her case must be one of constructive dismissal. In relation to same, section 1(b) of the Unfair Dismissals Act 1977 provides that "*"dismissal", in relation to an employee, means — the termination by the employee of his contract of employment with his employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer*". The evidence of claimant 1 had not been that of the existence of intolerable conditions, as provided for in the Act and accordingly, she had simply resigned. In any event, if this was a case of constructive dismissal, claimant 1 did not have twelve months service so as to allow the Tribunal entertain her claim under the Unfair Dismissals Acts.
5. Regulation 5 (2) of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 provides that "*Nothing in this Regulation shall be construed as prohibiting dismissals for economic, technical or organisational reasons which entail changes in the workforce*". Even if there was a dismissal, it is not automatically unfair.
6. if claimant 2 became an employee of JLtd, her position was genuinely redundant because the nature of the business had substantially changed, there was no night time work and claimant 2 had no interest in day time work.
7. the Tribunal has to be satisfied that claimant 2 was an employee of JLtd. Counsel contended that she was not. She turned up with claimant 1 for a meeting with JMul of JLtd on 3 March 2008. However, she never actually worked for JLtd in that she never put on their uniform, or picked up a plate or served a meal for them.
8. accordingly to summarise the points in relation to claimant 2, the Tribunal has to satisfy

itself with …

- JLtd was claimant 2's employer
- there was a dismissal (but, from the evidence of claimant 2, the only possibility of this is a case of constructive dismissal)
- that claimant 2 had twelve months service for a claim under the Unfair Dismissals Acts (but nonetheless, per Regulation 5(2), a genuine redundancy situation had occurred to her position within JLtd)
- that she did not contribute to her own dismissal due to not considering the alternatives available from JLtd

9. in relation to claimant 1, his last pay cheque was that of 11 March 2008 from RLtd. There was no evidence whatever that JLtd had ever been his employer.
10. the Tribunal must establish if this was a dismissal rather that a resignation. Counsel maintained that claimant 1 resigned as he too had said that he wished to start his own business.
11. if the Tribunal were to consider that claimant 1 was constructive dismissed, Counsel contended that no circumstances existed, as provided for under section 1(b) of the Unfair Dismissals Act 1977, to justify the position that he could not reasonably have worked there.
12. claimant 1 had no interest in continuing in his employment with JLtd. He did not enquire about hours of work or his possible role therein. When he discovered that there was no position for a fine dining chef, he was not interested in being employed by JLtd. Counsel contended that it was unreasonable of claimant 2 to just terminate his position without first trying the alternatives.
13. if it were found that claimant 1 was dismissed by JLtd, then they would rely on the defence of Regulation 5(2) in that it was a redundancy situation as there was no position within JLtd for a head chef and that he contributed to his dismissal by not trying an alternative.

Replying to the above, the claimants' legal representative made the following points…

1. there was a transfer of undertaking but that transfer procedures were not complied with. The claimants were hijacked. Regulation 5 (3) of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 provides that"*If a contract of employment is terminated because the transfer involves a substantialchange in working conditions to the detriment of the employee concerned, the employerconcerned shall be regarded as having been responsible for the termination of thecontract of employment*". The claimant had an entitlement that they would not loosetheir jobs. The position should have been explained to the claimants.
2. it was not the case that the claimants resigned from their jobs. It was a *fate of compli.* Mard told claimant 2 that her job was safe. Claimant 2 never indicated by word or deed that she was resigning.
3. claimant 2 did not accept that night time work would not be available from JLtd or that the new operation would not be the same as that of RLtd.
4. claimant 1 was told that there was no job available for him
5. it was accepted that JLtd did not set out to dismiss the claimants.
6. it was not a redundancy situation for either of the claimants as neither of them were served with RP1 or RP2 forms.

The legal representative of RLtd and the two named individual respondents made the following submission, that

1. the European Communities (Protection of Employees on Transfer of Undertakings)

Regulations 2003 apply to this case both factually and contractually. The claimants moved to the employment of JLtd.

2. the consultation with the claimants by Mack and Mard in relation to the sale of the restaurant was done as far as humanely possible. The booking deposit on the restaurant was paid on 15 February 2008 and the deal was closed by 3 March 2008. The claimants had been told that their jobs were safe in so far as possible, though the correct language may not have been used.

Replying to the above, the claimants' legal representative stated that there had been no consultation with the claimants in relation to the transfer of the undertaking. The regulations provide for thirty days notice. It was only on discovering information from suppliers that they learned that something was happening. The two claimants were told that their jobs were safe. The legal representative maintained that the claimants were deceived.

Determination:

The Tribunal considered the evidence adduced. The first issue to be determined is the claimants' employer when their employment terminated. Based on the evidence of the claimants' and a statement made on behalf of respondent 4, the Tribunal finds that a transfer of undertaking occurredand that JLtd. (*respondent 4)* was the claimants' employer when their employment ended.

In respect of claimant 1, the Tribunal finds that the transfer of undertaking resulted in a substantial change in his working conditions to his detriment; therefore the termination of his employment is covered by Section 5 (3) of S.I. 131 0f 2003 European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. Claimant 1 is awarded €2,152.75.

Claimant 1's claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 succeeds and he is awarded €430.55 being one weeks pay.

Claimant 1's claim under the Organisation of Working Time Act, 1997 succeeds and he is awarded €831.10.

In respect of claimant 2, taking into account her entitlements to notice and holidays the Tribunal finds that she has the necessary service to make a claim for unfair dismissal. The Tribunal accepts that the transfer of undertaking resulted in a substantial change in her working conditions to her detriment; therefore the termination of her employment is covered by Section 5 (3) of S.I. 131 0f 2003 European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. The claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. Claimant 2 is awarded €960.00.

Claimant 2's claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 succeeds and she is awarded €240.00 being one weeks pay.

Claimant 2's claim under the Organisation of Working Time Act, 1997 succeeds and she is awarded €720.00.

The Tribunal is satisfied that the provisions of Section 7 (d) 12 of the Unfair Dismissals

(Amendment) Act, 1993 apply in this case and will notify the Revenue Commissioners.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)