

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF: **CASE NOS.**

EMPLOYEE UD1925/09

- claimant no. 1

EMPLOYEE UD1926/09

- claimant no. 2

Against

EMPLOYER - respondent no. 1

EMPLOYER - respondent no. 2

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr. J. O'Neill
Ms. P. Ni Sheaghda

heard this claim at Naas on 12th November 2010 and 28th September 2011.

Representation:

Claimants: Ms Ciara Bradshaw BL, instructed by Mr. John McKenna, Lavelle Coleman,
Solicitors, 20 On Hatch, Lower Hatch Street, Dublin 2

Respondent: Mr. Andrew Cody, Reidy Stafford, Solicitors, 1-3 Moorefield Terrace,
Newbridge, Co. Kildare

The determination of the Tribunal was as follows:-

Preliminary Issue:

A preliminary issue was raised that the claims were not received in the Employment Appeals Tribunal within the relevant six month period.

Section 8(2) of the Unfair Dismissals Act, 1977 states:

“(2) A claim for redress under this Act shall be initiated by giving a notice in writing (containing such particulars (if any) as may be specified in regulations under section 17 of

this Act made for the purposes of subsection (8) of this section) to a rights commissioner or the Tribunal, as the case may be –

- (a) within the period of 6 months beginning on the date of the relevant dismissal, or
- (b) if the rights commissioner or the Tribunal, as the case may be, is satisfied that exceptional circumstances prevented the giving of the notice within the period not exceeding 12 months from the date aforesaid as the rights commissioner or the Tribunal, as the case may be, considers reasonable”.

The Tribunal considered the preliminary issue and allowed the extension of time of the two claims.

Background:

The claimants were employed by first named respondent (SAM) and were made redundant and accepted their redundancy payments on 31st August 2008. The first named respondent was responsible for the establishment and ongoing management of an Arts Centre (RAC). SAM was funded by KCC, the Arts Council and box office receipts. SAM leased the premises from KCC. Claimant No. 1 worked as a Technical Manager and Claimant No. 2 worked as Front of House Manager.

SAM was wound up but Counsel for the claimants did not formally withdraw claims against SAM. Claimant No. 1 alleged he suffered serious bullying in SAM and contended there was a campaign to get rid of him. Claimant No. 2 said she was assured when the Arts Centre reopened she would get her job back. RAC Ltd. was incorporated on 13th February 2009. Jobs similar to those of the claimants were advertised in February 2009 and both reapplied and were unsuccessful.

Claimants' Case:

Claimant No. 1 gave evidence. He worked as a Technical Manager in SAM since April 2001. He ran the technical end of the Centre's business. Shows were staged four nights each week.

The claimant suffered ill health in 2004/2005 and was absent from work for nine months. He had difficulties at work during that time. The manager (MB) frequently reprimanded him and also undermined him. It became unbearable for him. His relationship with MB was very distant.

He returned from sick leave in March 2006 and in April/May 2006 a new manager (JOB) was appointed. The claimant had known JOB for some time and they understood each other.

The claimant was also safety representative for the Centre. In April 2008 he raised an issue in relation to the library van. He had concerns that one person manning the van was not in compliance with health and safety requirements. MB was displeased that he had raised this issue. Following this incident the claimant had to sit down with his manager and justify his role. The claimant also had a disagreement with MB when she refused to let performers into a show early. MB said "I'll bring you down, I've brought bigger and better down". The claimant felt victimised.

Following JOB's resignation in April 2008 KCC employees entered the manager's office, took the company cheque books and financial documents and changed the locks. The Centre was repainted and furniture was moved.

Five Board members resigned on 13th May 2008 and ED was appointed manager of the Centre.

In July 2008 staff were put on protective notice and told their jobs were at risk. In mid-July 2008 staff were told that SAM would cease to trade from 31 August 2008 and their jobs were being redundant. The claimant's last week at work was 23 - 31 August 2008.

The claimant contended that he found the whole process traumatic and that he was left out in the dark. He received his redundancy payment on 31 August 2008. He had been told his job was gone and that it was a genuine redundancy.

Events continued to be held in the Centre from 3 October 2008 onwards. He was surprised no one got in touch with him to give the technical support required. The claimant contacted his union representative to get to the bottom of it and KCC confirmed in a letter that technical work was being carried out in the centre. The centre purported to be closed but yet events were ongoing. He was aware of twelve to fifteen events taking place. DD was looking after technical support.

The claimant recalled events taking place in the Centre between January 2009 and June 2009. He was surprised to see his job advertised yet applied for that position in February/March 2009. He was unsuccessful in his interview and heard on a radio announcement that DD secured the position.

Since the termination of his employment the claimant did some voluntary work for a community radio station, secured a job for two weeks in June 2011 and is now on a FAS Theatre Workshop Scheme.

Claimant No. 2 gave evidence. She worked as Front of House Manager looking after banking, general administration, programme events and dealt with the public. She got on very well at work. She always thought the Centre was going well. However, she was aware that there were ongoing problems among the Board of Directors.

On 30 June 2008 she attended a meeting with ED and all staff were told that their jobs were at risk and they were put on protective notice.

In July 2008 the claimant met MN, Chairperson of the Board of SAM and he told her that she had nothing to worry about as she was the face of the Arts Centre. She became aware that LR, Arts officer, had said that she did not like claimant no. 1 and this was a way to get rid of him.

The claimant subsequently raised her concerns with Co. Council members who reassured her that her job was safe. When she was informed that she was being made redundant she felt pressurised into signing the relevant redundancy form. After she received her redundancy on 31st August 2008 she continued to work for an in house dance company in the Centre on a voluntary basis.

Events continued to be run in the Centre in the following months. Tickets had already been sold in advance for such events.

The claimant saw others, EG and SB, carrying out her role in the Centre. She never raised any issue into others doing her job in the Centre. She assisted UC in an Open for Ideas research into the Arts Centre. They spoke about upcoming events. Events were ongoing in the Centre in the months January to July 2009.

BG intimated to her that her job was being advertised and she duly applied for the position. She attended for interview but was unsuccessful in securing the Front of House Manager position which she had previously held. She trusted people. She was shocked and upset and felt betrayed by her colleagues and friends.

Since the termination of her employment the claimant applied for many positions. She has since secured two days/eight hours work per week in an accounts department in a hotel. She is paid the minimum wage.

A former board and chairperson of SAM (JMacK) gave evidence. During his time as chairperson the Board comprised of five direct nominees of KCC, two elected co. council representative and six members from the voluntary sector. He found both claimants to be pleasant and professional in their roles. Claimant No. 1 was criticised by two Board members. Six different entities operated from the Centre. Manager JOB reduced the debts of the Centre during his tenure.

The Centre was run by KCC after redundancies were made at the end of August 2008. JMacK was aware of research being carried out by UC and met her offsite to discuss the centre. He was disappointed with her report and felt it was a bland document. He saw it as a PR exercise and felt there was no need for it as debts were down and audience attendances were up. He was aware that fifteen events took place post August 2008. Approval was sought for an additional overspend of €80,000 towards the functioning of the Centre for the period August to December 2008. The KCC was anxious to regain control of the Centre and to close SAM.

JMacK contended that there was a change of name and that the same business was continuing. The new limited company used the seating and lighting that SAM had purchased. The Centre may have "gone dark" for a few months till early April 2009 whereby no events would have taken place but work would still have been available.

On 18th May 2008 he and four other Board members of SAM tendered their resignations.

Respondent's Case:

Assistant Chairman of RAC Ltd. (EP) gave evidence. The limited company receives a grant from KCC, a grant from the Arts Council and revenue is generated at the Box Office. The Board comprised of two Co. Council representatives and five appointees from the voluntary sector. He was approached by DP from KCC to join the new company. He had been involved in community projects. He had a background in HR. He chaired a sub committee which set the criteria for upcoming interviews and designed an assessment system. He had no involvement in interviewing employees for positions. The positions were advertised in

February 2009.

At the first Board meeting he became aware that an audit needed to be carried out on the Centre. Items were missing. DD was appointed to the technical manager position and L to the Front of House position.

EP contended that no activities took place in the Centre in the period February to July 2009.

Determination:

It is the Tribunal's opinion that the protection of workers is paramount in the application of Directive No. 2001/23/EC. Having considered the evidence of both parties the Tribunal considers there has been a transfer of undertaking pursuant to the said Directive. In applying the case of *Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et Alfred Benedik en Zonen BV. Case 24/85* the Tribunal must look at the circumstances of the case in their totality and not make a decision based on one single factor. In doing so the Tribunal considers that;

- a) The entity in question retained its economic identity throughout the period;
- b) The essential function of the Centre remained the same;
- c) The same assets were used in running of the Centre ;
- d) The same funding structure of the centre applied during the tenure of the first named respondent and now under the tenure of the second named respondent.

Furthermore, evidence was given that both claimants' jobs exist in the new entity, the second named respondent. In the circumstances, the Tribunal considers that no real redundancy situation existed. Counsel for the claimants opened the case of *P. Bork International A/S, in liquidation v Foreningen af Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, and Jens E. Olsen and others v Junckers Industrier A/S. Case 101/87* which deals, inter alia, with the issue of the termination of employment prior to a transfer under the Directive being effected. The Tribunal follows this decision.

Evidence was taken from both parties as to whether or not activities in the Centre continued between September 2008 and July 2009. It is accepted by both parties that there were certainly activities between September 2008 and December 2008. However, the respondent maintains that the first named respondent carried out no further activities from January 2009 until it was dissolved in April 2009. In turn, it is maintained by the respondent that the second named respondent although incorporated in February 2009 did not hold its first event until July 2009. In the circumstances, the second named respondent maintains there was no economic activity at all between January 2009 and July 2009.

The Tribunal does not accept this position. There was an independent report commissioned by KCC concerning the ongoing running of the Centre in or about August/September 2008 which was not finalised until March 2009 which indicates to Tribunal that there was an ongoing plan for the Centre and its activity was never formally wound down. It was common case between the parties that there is an industry recognised quiet period for theatres called 'dark periods' which allows a theatre time for maintenance etc. The Tribunal accepts the evidence of the claimants that the period between January and July 2009, or part thereof, could have amounted to a 'dark period'. Furthermore, it was also accepted in evidence there was a recruitment period between January 2009 and May 2009

for the Centre which would also indicate on going activity.

The case of *Dr. Sophie Redmond Stichting v Hendrikus Bartol & Ors Case C-29/91* was opened by Counsel for the claimants in support of the involvement of a public authority in the present case. The public authority referred to is KCC and although not a party to these proceedings, the Tribunal considers it had a high level of involvement in the running of the Centre but under the control of the first named respondent and again under the second named respondent and had significant influence on the running of the Centre to the detriment of the claimants.

Both claimants gave evidence of their attempts to mitigate their loss which the Tribunal accepts. The T1As of both claimants seek reinstatement to the second named respondent. Neither the claimants nor the respondent made any argument for or against this proposition. The Tribunal considered the remedies available and determines compensation the appropriate remedy.

The Tribunal finds that both claimants were unfairly dismissed and that relief will lie against the second named respondent because the transfer of undertaking under Directive No. 2001/23/EC has taken place. In determining the appropriate award account has been taken of the amounts already paid to and accepted by the claimants.

The Tribunal awards claimant no. 1 €40,000.00 and claimant no. 2 €35,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)