

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **Claimant**

UD831/2010
MN788/2010

against

EMPLOYER

- **First Named Respondent**

EMPLOYER

- **Second Named Respondent**

EMPLOYER

- **Third Named Respondent**

EMPLOYER

- **Fourth Named Respondent**

EMPLOYER

- **Fifth Named Respondent**

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1967 TO 2005**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms K.T. O'Mahony BL

Members: Mr T.L. Gill
Ms S. Kelly

heard these claims at Limerick on 13-15 December 2011
and at Cork on 29 March 2012

Representation:

Claimant:

Mr Ben Shorten BL instructed by Mr John Boylan,
McNulty Boylan & Partners Solicitors,
Clarke's Bridge House, Hanover Street, Cork

Respondents:

Mr Eoin Clifford BL instructed by Mr Jerome O'Sullivan,
J W O'Donovan, Solicitors, 53 South Mall, Cork

The determination of the Tribunal was as follows:

Summary of Evidence

The fifth named respondent had a contract with the Department of Justice Equality and Law Reform for the provision of direct care services including hostel accommodation for asylum seekers. The first and third named respondents (R1 and R3) are directors of the fifth named respondent and the second and fourth named respondents (R2 and R4) are the respective spouses of those directors. At the commencement of the hearing of the case it was agreed that the fifth named respondent was the sole respondent in this case, hereafter referred to as the respondent.

The claimant was an employee of a company (the company) which contracted to operate three asylum seeker hostels in a sub-contract agreement with the fifth named respondent. The claimant was manager of one of those hostels (hostel A). The residents of hostel A came from troubled backgrounds.

As a result of events in which there was a breakdown of the contractual relationship between the respondent and the company. The claimant asserts that he was constructively dismissed on 27 November 2009. Accordingly, it fell to the claimant to make his case.

As a result of the afore-mentioned deteriorating contractual relationship, on or around 19 November 2009 the respondent gave four weeks' notice to the company of its intention to terminate the agreement between them as and from 16 December 2009. In the event the respondent effected a take-over of the operation of hostel A on 27 November 2009 on which day R3 and R4 were in attendance at hostel A and they had brought a number of security guards along with them. It is common case that neither the company nor the claimant had any advance knowledge of the take-over.

The claimant arrived at hostel A on 27 November 2009 at around 9.30am to find security guards at the entrance to the premises. Having identified himself he was then admitted to the premises and met R3 who told him that the respondent was now in control and wanted to talk to him. A manager from a hostel operated directly by the respondent was in attendance on 27 November 2009. The respondent's position was that she was introduced as the manager of another hostel, the claimant's position was that she was introduced as the new manager of hostel A. R3 offered the claimant continued employment as manager of hostel A; the purported contractual offer was on plain paper and unsigned. The respondent accepted that the claimant was being pressured into a verbal agreement without the benefit of being able to talk to his employer, the company.

The claimant attempted, without success, to telephone the general manager (GM), who was on his way to hostel A, and then telephoned MD to advise him of the situation. There had been some 35 residents in hostel A the previous night and some twenty of those were due to depart for Limerick on the hostel bus. It was common case that the claimant was very good at dealing with the residents. It was necessary for the claimant to reassure the residents about the situation. It was common case that the claimant had a good relationship and excellent rapport with the residents.

The claimant's position was that when he told R3 that a named person was a food technician

due to carry out a HAACP audit later that morning R4 accused him of lying and R3 sarcastically said the claimant was not lying. Hostel A's kitchen staff, who had continued to prepare food after the take-over, were given an ultimatum by R3 after the claimant instructed them to stop food preparation until he was satisfied as to its origin.

It was the claimant's position that R3 accused him twice of being an accomplice to fraud and told him he should seek legal advice as he would be in big trouble in regard to the reporting of the numbers of residents in hostel A.

Determination

Much attention was focussed on the application of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 to these claims. The company was on notice from mid-November 2009 that the respondent intended to terminate the arrangement between them from 16 December 2009. While this was clearly no normal transfer of an undertaking, the respondent accepted that by its actions on 27 November 2009, in taking over the operations of hostel A, it assumed all the obligations owed by the employer to the employees in hostel A.

The claimant arrived for work on 27 November 2009 to be met with a *fait accompli*. He was offered employment with the respondent but sought time to consider the position. The Tribunal is satisfied that, before he had any opportunity to consider the offer that had been put to him; he was described by R4 as a liar and accused by R3 of fraud. Such accusations as those made against the claimant clearly go the root of the contract in that they shatter the bonds of mutual trust and confidence that must exist between an employee and employer. In the circumstances there was a constructive dismissal and the claim under the Unfair Dismissals Acts, 1977 to 2007 succeeds. The Tribunal awards €45,200.00 under those Acts.

This being a case of constructive dismissal there is no entitlement under the Minimum Notice and Terms of Employment Acts, 1967 to 2005.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

