

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **Claimant**

UD712/2010

MN671/2010

WT305/2010

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
ORGANISATION OF WORKING TIME ACT, 1997**

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:

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 (hereafter referred to as the respondent) in this case.

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 respondent. The claimant, who is a brother of the managing director of the company (MD), had a role as general manager for the company in the three hostels. His position was that he spent the majority of his time (some 90%) in one of those hostels (hostel A). The residents of hostel A are 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 dismissed on 27 November 2009. In circumstances where the respondent denied this assertion, it fell to the claimant to prove the fact of dismissal

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 manager (HM) arrived at the hostel 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 respondents' position was that she was introduced as the manager of another hostel. HM's position was that she was introduced as the new manager of hostel A. R3 offered HM continued employment as manager of the hostel; the purported contractual offer was on plain paper and unsigned.

HM attempted, without success, to telephone the claimant, 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 the hostel the previous night and some twenty of those were due to depart for Limerick on the hostel bus. It was necessary for HM to reassure the residents about the situation.

The claimant arrived at hostel A at around 10.15am and, having been stopped and questioned by security at the front gate, accessed the hostel by a rear entrance. R3 met the claimant and asked the security guards to escort him from hostel A. The claimant contacted the Gardai and then went to his office. The claimant noticed that the CCTV in the office had been disconnected. It was the claimant's position that R3 said to him, "Don't touch anything, Get out of my building." and "You're to leave this building. I own it and everything in it." The claimant

asked R3 for documentation to support his assertion. R3's position was that he told the claimant that they were taking over and his job was safe but the claimant responded in impolite terms and told him that he was in charge. R3 denied saying to the claimant that he would be sent his P45. It was common case that the Gardai told R3 that the claimant was entitled to be there and advised him to reconnect the CCTV. After the Gardai left the claimant was locked out of his office and was being constantly followed around the building by R3 and security guards and being told to leave that he was finished. The claimant was denied access to the kitchen. The respondent provided food, which they had brought with them, to the residents from the back of a van. The claimant denied that he told the residents that the food would poison them but he did tell them that he could not vouch its safety. The residents were very upset and the claimant spent a lot of time trying to reassure them. Both R3 and R4 found the claimant to be aggressive. It was common case that the claimant had a good relationship and exceptional rapport with the residents.

MD arrived at hostel A at around 2.30pm in a bus with around fifteen others who were employees of the company and staged a sit-in. HM left hostel A at around 5.30pm and did not return. The claimant remained at the hostel overnight and continued to do regular checks on the residents throughout hostel A. After 5.00am on 28 November 2009 the fire alarm was activated by a fire which had started on an upper floor of hostel A. The respondent's position was that the claimant initially failed to assist in the fire-fighting operation. The claimant's position was that he had assisted in dealing with the fire by instructing the security guards where to find the fire panel and how to disable it. CCTV evidence shows that the claimant co-operated with the operation within 70 seconds of being told by security guards that there was a fire on the top floor. He had not immediately assisted because the respondent had its own security guards to deal with it and he was locked out of his office from where he would normally control a fire and furthermore the alarm is often activated when residents smoke. The claimant's evidence was that when R3 arrived he said to him, "You stupid man that's the final nail in your coffin". The claimant was outraged by this accusation and again called the Gardai and gave them his name so that he could assist in any investigation they may undertake. R3 denied making this statement. R4's evidence was that the claimant, using foul language, instructed two of the company's security guards not to take instructions from her when she sought assistance in dealing with the fire.

The claimant eventually left hostel A at around 11.00am on 28 November 2009. He felt that he had been abused, threatened, locked out of his office and accused of starting the fire. He claimed that he was run out of the place. It was the respondent's position that all employees working in hostel A were offered continued employment but the claimant took the decision to opt out of the employment.

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 19 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 Tribunal rejects the respondent's assertion, made a number of times, that the claimant was

not employed in hostel A. The manager of hostel A, up to the time of the events herein, confirmed that the claimant spent most of his time in hostel A. Arising from the nature of the take-over a tense atmosphere prevailed in hostel A, no doubt heightened in the claimant's case by virtue of the fact that he was the brother of MD, who had the contract for the operation of hostel A. Some harsh words were uttered. While there was a conflict of evidence as to whether R3 told the claimant to leave the building, R3 accepted that he instructed his removal from the building when he had organised a sit-in. There was no evidence before the Tribunal that the claimant had organised the sit-in. The Tribunal is satisfied that, in locking the claimant out of his office and instructing his removal from the premises the respondent effected his dismissal. The respondent failed to show grounds justifying the dismissal and furthermore failed to invoke any or any fair procedures in dismissing the claimant. Accordingly, the dismissal is unfair. In light of the accusation levelled against the claimant that he had started the fire and other events that occurred on 27 November 2009 it was not unreasonable of the claimant not to resume employment in response to the respondent's letter of 11 January 2010. The Tribunal finds that the claimant contributed to his dismissal and having taken this contribution into account it awards him €55,000.00 under the Unfair Dismissals Acts, 1977 to 2007.

The Tribunal further awards the claimant €2,000.00, being two weeks' pay, under the Minimum Notice and Terms of Employment Acts, 1967 to 2005. No evidence having been adduced in regard to the claim under the Organisation of Working Time Act, 1997 that claim fails.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)