EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:	CASE NO.
EMPLOYEE	UD1957/2010
	MN1894/2010

against

EMPLOYER

and

EMPLOYER

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. J. Horan
Mr. N. Dowling

heard this case in Dublin on 22 February 2012

Representation:
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Claimant(s):

Respondent(s):

The determination of the Tribunal was as follows:-

Claims were brought under unfair dismissal and minimum notice legislation. The claimant was employed with a company (hereafter referred to as LX). It was claimed that his employment with LX ended without notice on 2 July 2010 but that he worked for LX's receiver/manager (hereafter referred to as SC) until 9 July 2010 (having received notice of dismissal on 8 July 2010). It was alleged that there had been unfair dismissal in the form of summary dismissal without contractual notice, proper procedures or payment in lieu.

The defence was the following. The claimant was employed by LX. On 2 July 2010 SC was appointed as receiver to LX and at all relevant times acted as the agent of LX. Whilst the claimant contends that his employment with LX was terminated on 2 July 2010 and that he was employed by SC from 2 July 2010 until 9 July 2010, this is denied. The claimant remained in employment with LX until 9 July 2010. Any purported termination of the claimant's employment on 2 July 2010 was ineffective given that it was specifically contemplated on 2 July 2010 that the claimant would be immediately rehired to work for a short period whilst his employer (LX) was in receivership.

With regard to the claim under the minimum notice legislation this is admitted as against LX. In this respect the form EIP1 has been submitted to the relevant government department in order to enable the claimant to claim the monies owing to him in this regard. It is respectfully submitted that the claimant is not entitled to make any minimum notice claim against SC. In this respect, the claimant was at no time employed by SC and, as such, SC can have no claim against him for payment in respect of statutory minimum notice or otherwise.

The claim against SC under unfair dismissal legislation is similarly denied on the basis that the claimant was not at any time employed by SC, having continued in his employment with LX for a short period during which LX was in receivership.

Giving sworn testimony at the Tribunal hearing, the claimant (hereafter referred to as EMX) said that he had managed sales and marketing for LX's rental property in the Beacon South Quarter. His claim form to the Tribunal stated that he had commenced employment with LX in November 2008. When bank difficulty led to receivership there was a very short meeting in a hotel in the Beacon area on Friday 2 July 2010. SC (the abovementioned receiver) presented himself. EMX was told that he was fired and rehired such that he would now be with LX in receivership. It was never said that SC held no personal liability nor that SC was just an agent. EMX thought that he was being retained and that he would continue working.

However, at the end of the week following Friday 2 July 2010, EMX received a phonecall telling him that he was being let go. There was no discussion of his re-engagement. A month later he received P45 documentation. It appeared that he had been dismissed twice.

It was submitted by EMX's representative that there would be a strange lacuna in the law if EMX had no protection while there was a receivership. LX continued to be in receivership and continued to trade. It was submitted that the receiver had become EMX's employer by operation of company law.

EMX said to the Tribunal that he had worked for LX but that, at the 2 July 2010 meeting, he had been fired and rehired such that nothing had changed until he had been let go the following week. He was working since four to five months later but was now earning less than half of his previous salary.

Speaking of when he had been let go, EMX told the Tribunal that there had been an assurance that all would stay the same and that employees had left "shellshocked". He was claiming that he had been in continuous employment because of the assurance given at the beginning of July that it would be the same but that his employment had been terminated without notice the

following week after an employment that had lasted almost two years but not long enough to entitle him to a redundancy lump sum.

Giving sworn testimony, SRX said that he had worked as a financial accountant for LX reporting to the financial controller and doing day-to day bookkeeping. He had obtained just over four-and-a-half thousand euro as a redundancy lump sum. He had obtained new employment for just over forty thousand euro per annum without delay.

SRX told the Tribunal that he had understood on 2 July 2010 that there was an employee transfer on that day to a new employer which he had thought was LX in receivership. They were told that all would be the same and then it all ended the next week. They had thought that LX in receivership would be their employer.

Giving sworn testimony, HRX said that he had started with LX in March 2005 but that he had not been at the Friday 2 July 2010 meeting. However, he was called to a meeting with NOD (an insolvency executive working to SC) early in the following week to be told that his old contract had ended and that he now worked for the receiver (SC). HRX was "reasonably confident" that there would be a role for him. He thought that he would get the same terms. He was surprised that he got a second P45.

HRX told the Tribunal that he had never met SC personally but had met NOD with whom he thought he would work. He was told that he would be offered the same terms.

HRX acknowledged that LX had been trading in a difficult environment and that the Beacon Quarter had been "in deep trouble". He claimed that someone else had done work that he would have done.

Some seven thousand euro was received by HRX as a redundancy lump sum. He had been unemployed for twelve months but had since succeeded in getting a lesser amount of remuneration from employment. He stated that he had had a six-month notice period in his contract and that he did not think that the receiver had acted professionally towards him or his colleagues.

Asked about what he thought in the week following Friday 2 July 2010, HRX replied that he had thought that he would work for the receiver.

Giving sworn testimony, SC said that he was the receiver and manager of LX and that he had been appointed on 2 July 2010. He denied that he had offered continued employment to employees on 2 July 2010 and stated that it had not been he but his own staff who had met employees early the following week. SC denied that he had personally employed EMX, SRX or HRX but said that LX in receivership had employed them. However, SC told the Tribunal that the functions of all three had disappeared because there was no trading in LX which was a "shell".

SC said that there was little point in holding employees of a company that was not trading forward. Some employees had "knowledge in their heads" so that LX "would not be left with

just a shell". SC mentioned "dismissal and simultaneous re-engagement for a very short period of time". Some existing work would be continued but SC told the Tribunal that it was "not reasonable to argue that the receiver would trade on" and, rather, that LX in receivership would be the employer in the week following 2 July 2010.

Asked if he had made it clear that he would not have personal liability, SC replied: "I did not think it necessary." He added that he had "applied this method no differently to other receiverships".

Giving sworn testimony, the abovementioned NOD said that he had been working in the insolvency area since 2002 and that he had assisted SC in this case. NOD met employees of LX "to discuss a potential role in the receivership if they were redundant". EMX, SRX and HRX were three of nine employees whom NOD met individually. One always tried to retain people. NOD "could work out who would be required". They "discussed roles". NOD "had to decide what was important and what was not". NOD "offered no job" with LX in receivership or with SC. He was "not in a position to offer a job". Some employees would be required and some would not.

NOD told the Tribunal that he had been at the 2 July 2010 meeting and that what SC had said had been correct. NOD said to the Tribunal that he did not recall the word "agent" having been used. He said that "we" say that "you will be re-engaged by" LX "to give them some comfort". NOD said that "it could have happened that I said agent but I don't recall". He added: "People like to be perceived as needed." However, only one employee (not one of EMX, SRX or HRX) was retained.

In a closing statement the employee legal representative submitted that a receiver had a duty to act reasonably, give notice and see about potential to re-engage. However, EMX, SRX and HRX got a quick phonecall and were dismissed. It was submitted that the receiver (SC) was respondent by operation of law under company legislation and that any consultations had not been genuine.

The respondent legal representative submitted that no undertaking had transferred as a going concern, that none of EMX, SRX or HRX had said that SC had said that he would employ anyone directly and that there had been as much consultation as circumstances permitted. There had been a degree of discussion and individuals were met individually to protect their dignity but there had been no transfer of assets.

Determination:

The claimant commenced employment with the respondent company Landmark Enterprises Limited ("the company") in November 2008. In 2010 the company went into receivership and SC (hereinafter called "the receiver") was appointed receiver on the 2nd July 2010.
The claimant has brought proceedings against the company and the receiver under the Unfair Dismissals Acts 1977 to 2007 and under the Minimum Notice and Terms of Employment Acts 1973 to 2005.

The receiver called a meeting of all the workers on the 2nd July 2010. It is not uncommon for a receiver to retain the services of some employees for a short period of time after a receiver's appointment. This is what happened in the case before this Tribunal in that the claimant was

retained for a short period of time and was paid for this work out of receivership funds. The claimant was advised that he would be retained on an "as required" basis.

The claimant did undertake some work for the receiver.

While the receiver did retain one employee who dealt exclusively with lettings this was entirely within the powers of the receiver and the Tribunal does not believe that the claimant was unjustly treated because of this.

Based on the totality of the evidence the claim under the Unfair Dismissals Acts, 1977 to 2007, fails against the company as the Tribunal does not believe that the claimant was unfairly selected for redundancy. The Tribunal is satisfied that there is no legal basis for the receiver having any personal liability to the claimant under the said Unfair Dismissals Acts arising out of the claimant's employment with his former employer. But the claimant's own evidence was that he only worked for some days for the receiver.

The claim under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, fails because it was not established to the satisfaction of the Tribunal that there had been a breach of the said legislation.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)