

## EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:	<i>Appellant</i>	CASE NO.
EMPLOYEE	A	UD1080/2011, TU8/2011
EMPLOYEE	B	UD1081/2011, TU9/2011
EMPLOYEE	C	UD1082/2011, TU10/2011
EMPLOYEE	D	UD1083/2011
		TU11/2011
EMPLOYEE	E	UD1085/2011, TU13/2011

against the recommendation of the Rights Commissioner in the case of:

	<i>Respondent</i>
EMPLOYER	X
	Y

under

### UNFAIR DISMISSALS ACTS, 1977 TO 2007 PROTECTION OF EMPLOYEES ON TRANSFER OF UNDERTAKINGS REGULATIONS 2003

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr M. Flood  
Mr P. Woods

heard this appeal at Dublin on 18th October 2012 and 17th April 2013

#### **Representation:**

Appellants :

Respondents: No representation listed

These cases came before the Tribunal by way of appeals by former employees against recommendations made by a rights' commissioner references r-095393, r-095397, r-095399, r-095401-tu-10/TB, and r-095470-tu-10/TB. The ud references are r-095392, r095395, r-095989, r-095400-ud-10/TB and r-095468-ud-10/TB

The determination of the Tribunal was as follows:

#### **Respondents' Case**

It was submitted on behalf of the claimants that there had been a purported redundancy which was, in fact, unfair dismissal involving breach of transfer of undertakings requirements. The claimants were all bar staff. A certain bar (OB) had been transferred to a manager (hereafter referred to as

PR). Reliefs could be sought under transfer of undertakings regulations. However, it was not alleged that there had been a transfer to the new owner because this was after the end of the claimants' employment. There was a duty to inform and consult but this was not done.

It was contended on behalf of the claimants that a transfer had happened on the day after the claimants' employment had ended and that it should have been discussed with staff. Regulations prohibited termination for reasons of transfer. It was argued that an unfair dismissal could be found to have occurred, that the transfer was the reason for dismissal and that the burden (of proof) was on the employer. It was pleaded that the information and consultation aspect mattered.

It was stated on behalf of the employer hotel that the hotel had had serious losses. In January 2009 the working week was reduced. In May 2009 there was a pay cut. The bar had closed but was kept going for regulars and long-stay customers. Employees were made redundant. One employee (TF) was suspended and ultimately had to leave.

Giving sworn testimony, JH said that he was the company secretary since March/April 2009 and that his father-in-law was the managing director. JH had been involved in the bar. He was from a mechanical background and looked after building problems. In 2009 losses were found in the business. Turnover was down by €3.4m in 2010. There was a series of pay cuts. The hotel was still losing money. They tried all alternatives such as cuts in hours, cuts in pay and all else to save the situation. The bar would be open three to five nights. Even Friday and Saturday nights were bad. Finances were grave. Turnover in the disco had gone down. The hotel had gone from six to four to two nights per week. The bar was no longer "affordable". They had to reduce their overheads. They had another person as financial controller.

Nine or ten people in the bar were made redundant. "For a while" JH and family members worked there. They got PR (disco manager and second-in-command to management). PR approached JH to lease the bar from the hotel. This was "run by" the hotel.

This was five or six weeks after the redundancies. A temporary agreement was drawn up and was signed on 26 May 2010. A copy was furnished to the Tribunal. PR took on the lease. JH no longer ran it. One burden was released.

Giving sworn testimony, PR said that he had been nightclub manager for the hotel before the redundancies. After a few months, in March/April, he offered to run the bar. At the end of May he took over.

PR told the Tribunal that he had looked after merchandising and that there were now six or seven employees including chefs. They were open every day still working at a loss to pay arrears and were not making money.

Evidence from 17 April 2013

The Tribunal is satisfied that the respondents were properly notified of this hearing. Neither the respondents nor representatives on their behalf appeared for this hearing.

## **Appellants' Case**

A former security guard whose employment ceased with respondent *X* in December 2010 told the Tribunal that when the appellants left in February 2011 that the premises remained open. In addition to being refurbished at least one of the bars came under new management and new staff were employed there. That premises remained open during that operation and this witness named the two new management team.

Appellant *B* gave an account of events that applied both to him and some of the other appellants. He had up to twenty-one years service with respondent *X*, the last twelve of which was as bar manager. Following a meeting with respondent *X* on 7 December 2009 he and his colleagues were issued with a letter from that company. That letter informed them that their roles would no longer exist because the company was to close. That letter also told them that a period of consultation was to commence. This witness told the Tribunal that not only did the hotel not close but that neither he nor any of the other appellants were consulted about a redundancy process.

On the 26<sup>th</sup> February 2010 this witness was told that redundancy payments were to be paid to him and the other appellants. Shortly before this transaction was to take place the witness met with representatives of respondent *X* where he was presented with a document. That document carried general allegations against him and some of his colleagues. The message from the company was clear. In the event that both he and the other named and accused appellants accepted their redundancy payments then the company would seek to prosecute them. Conversely there would be no attempt to prosecute should they opt not to take those payments.

This witness then brought that document to the attention of those relevant appellants (no allegations were made against Appellant *E*). All denied and dismissed those allegations and opted eventually to take their redundancy payments. This witness named respondent *Y* as the person who took over the bar.

Appellants *A*, *C*, and *E* gave separate evidence. Appellant *D* gave evidence he was a bar worker and worked in all bars in the hotel. He was rostered to work on the 26<sup>th</sup> February 2010 and was not subject to the redundancy at that time.

All the appellants confirmed they took redundancy payments and also detailed their losses as a result of their cessation of employment with respondent *X*.

## **Determination**

The Tribunal have carefully considered the evidence. On the first day of the hearing it was suggested by the respondent that they purported to engage in a collective redundancy given a downturn in business in and around December 2009.

All of the appellants gave evidence that the respondent *X* had one meeting on the 7<sup>th</sup> December 2009 wherein a letter of the same day issued concerning a collective redundancy. No further consultation and or correspondence was entered into by the respondent *X* in relation to this purported collective redundancy. No substantive evidence was given by the respondent *X* in way of accounts to support the necessity of this purported collective redundancy. Furthermore all the appellants gave evidence that the bars in the hotel and the nightclub remained open to the public after the 26<sup>th</sup> February 2010, the date the majority of the appellants received their redundancy notices.

In all the circumstances the Tribunal considers that this purported collective redundancy was not a real redundancy and that all of the appellants were unfairly dismissed. As a result of this the Tribunal does not need to consider the appeals under the Protection Of Employees On Transfer Of Undertakings Regulations 2003 and they are therefore dismissed.

All appeals against the respondent *Y* are dismissed.

The Tribunal awards the following sums under the Unfair Dismissals Acts, 1977 to 2007 and in so doing the Tribunal have taken into account all the redundancy payments made to each of the appellants in this matter:

Appellant *A*: The sum of € 10,000.00

Appellant *B*: The sum of € 15,000.00

Appellant *C*: The sum of € 2,000.00

Appellant *D*: The sum of € 10,000.00

Appellant *E*: His evidence was that he was a HGV driver since his dismissal from the first named respondent. He did not give any substantive evidence of work to replace the work with the first named respondent. Therefore the Tribunal finds his loss to be minimal and awards him the sum of € 2000.00

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)