

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:  
Employer

CASE NO.  
TU77/2006

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

Employee

under

### TRANSFER OF UNDERTAKINGS REGULATIONS 2000

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms Penelope McGrath B.L.

Members: Mr M. Flood  
Mr G. Lamon

heard this appeal in Dublin on 12th February 2007

#### **Representation:**

Appellant: Mr. Tim O'Connell, IBEC, Confederation House, 84/86 Lower Baggot Street,  
Dublin 2.

Respondent: Mr. Kevin McMahan, SIPTU, Liberty Hall, Dublin1

This case came to the Tribunal by way of appeal against Rights Commissioner Recommendation R-039135-tu-05/JH

The determination of the Tribunal was as follows:

The Tribunal has carefully considered the evidence presented before it in connection with this case. Although this matter came on appeal from the Rights Commissioner it has been treated as a de novo hearing.

The applicant brings this claim as a breach of the European Communities (Protection of Employees of Undertaking) Regulations, 2003. It is common case that the Applicant had been working with P.S.S. since 1993. P.S.S. was taken over by Group 4 Securicor in 2002 and this transfer was covered by the appropriate Transfer of Undertaking legislation.

The Tribunal finds that the Applicant's contract of employment, which included the collective agreement, handed in as evidence was absolutely silent on the expected age of retirement. The Tribunal further accepts that where a particular fact has not been addressed the parties enter a

grievance or negotiation process to find a resolution.

XXXX had a retirement age of 65. They purported to impose this retirement age on P.S.S. employees whose retirement age was not set in stone. Of some significance is the existence in the workplace, of a P.S.S. employee who had not been retired at the age of 65 and continues in employment to this day. He's a mailroom worker and the respondent company tried to distinguish him on the basis of job title. However, XXXX was at least entitled to present this man as a comparator in making his case for being allowed to continue in full employment after the age of 65.

The Tribunal finds therefore that the employee was entitled to engage in a negotiation/consultative process with the employer regarding the age of retirement. It is accepted that it would have been more appropriate for him to have initiated the grievance or negotiation procedure by setting his case out in written format. However the Tribunal does not find that that failure precluded him from being entitled to have the process implemented. The employer allowed him no opportunity to do so.

The Tribunal cannot predict whether the grievance or negotiation process had it been entered into would have resulted in any success on the part of the Applicant.

A breach of the terms of the collective agreement has resulted in a breach of the Transfer of Undertaking Regulations and in these circumstances the Tribunal finds the award of €15,000.00 to be appropriate.

Sealed with the Seal of the

Employment Appeals Tribunal

This \_\_\_\_\_

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

(CHAIRMAN)