

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

CASE NO.

Employee

UD1020/2006
MN665/2006

Employer

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr J. Fahy BL

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this claim at Sligo on 19th July 2007

Representation:

Claimant(s): Mr Shane McDermott, Mullaney's Solicitors, Thomas Street, Sligo

Respondent(s): Mr. David Farrell, IR/HR Executive, IBEC, Confederation
House, 84/86 Lower Baggot Street, Dublin 2

The determination of the Tribunal was as follows: -

Respondent's Case

Mr. DS, the operations manager told the Tribunal that he joined the respondent in 2003 and had a variety of roles in the organisation. He monitored waste disposal and customer service activities in the department and the situation was assessed over a period of six months. A transfer of undertaking took place in September 2005. Prior to the transfer he had a meeting with staff in Sligo. The director of HR at the time EJ met staff members. A decision was made to "hump and dump" the material on site and send it to other locations. The claimant was employed as a general operative. Six general operatives were employed and two general operatives in total were made redundant. The criterion that was used in the selection of candidates was last in first out. The respondent did not have a collective agreement with a union. The claimant did not have to serve a period of probation due to his service. The contract of employment was issued after the take over, and new contracts were issued to all employees. He relied on the information that the employer

gave him. He did not check the claimant's file and he could not say if HR checked the file. One other general operative joined after the claimant started and he was made redundant also.

He met the claimant and a colleague KC on 30 March 2006 and he told them how the decision to make them redundant was made. He told the claimant and KC to go home and take the rest of the day off. He informed the remainder of the staff of this decision. The claimant did not raise any questions when he was being made redundant. DS made the decision to make the claimant redundant and the head of the company and HR endorsed it. Since the claimant was made redundant the throughput in the company had increased by 50% and he has not had a request for a general operative. Some drivers have been hired. The claimant did not raise any concerns in September 2005 in relation to his contract of employment.

In cross-examination when asked if he was familiar with transfer of undertaking legislation and if he relied on due diligence of Waste Disposal Sligo he responded yes. He relied on the contract that the claimant had signed which was information that was provided during the acquisition. Based on the needs of the respondent a number of general operatives were employed. A general operative/helper helped with refuse collection. It was a low skilled job and anyone could do it. When asked that the claimant worked on bin lorries and that function continued he responded that operators are still employed. The claimant worked on bin lorries for 80 to 90% of his time. When asked who was now working as helper he responded two employees CG and AJ. When asked if the claimant commenced employment prior to these he responded that he did not employ anyone else. The respondent had two divisions in Sligo and the main function was to serve customers, a subsequent operation closed in 2006 and half of the claimant's time became available.

NC joined in April 2005 for a totally different business unit. When asked if he offered the claimant alternative employment in the company he responded that there was no other role in the Sligo depot. When asked if the claimant commenced work prior to 2005 he responded he was not present when the contract of employment was signed. The first time that he became aware of an issue was on 10 May 2005 when his decision was questioned. When asked if he had made any enquiries he responded that he did with Waste Disposal Sligo. The information given on foot of due diligence was that the claimant was employed prior to January 2005. He stated that on a number of occasions in September 2003/September 2004 attempts were made by the claimant to return to school but the claimant returned to work in Waste Disposal Sligo. The information that he had was that the claimant started in January 2005. After 30 March 2006 he offered the claimant support and references. The claimant was given time off to attend interviews. In relation to the decision that he made he went through the information that he had at the time. He could not get an answer as to when the claimant started. When asked that he deducted pay for the time off he responded that on first impressions he was surprised.

The second witness for the respondent Ms. LB told the Tribunal that she was Head of HR and at the time of the acquisition she was HR manager and reported to the HR director. She was not directly involved in the takeover. There were no transfer files provided for the transferees and the only information on staff was due diligence. She accepted that if the start date was January 2005 that there were implications if false information was provided. It was made clear that it was a legally binding document and no transferring files were transferred. She was not aware of concerns raised by the claimant regarding the start date and she would be surprised if an employee who had a problem and did not raise it.

In cross-examination when asked if she was familiar with transfer of undertaking legislation she responded that she was familiar with both transfer of undertaking legislation and due diligence.

She agreed that the onus was on the transferee to carry out due diligence. When asked if the claimant commenced employment in January 2002 she replied that the respondent relied on due diligence and if employees had issues she would expect them to be raised. The start date for the claimant was blank. When asked if the claimant left school to work with the respondent she responded that there was a contract in place and HR personnel were on site and there was no better opportunity to address the issue than when it was written down in front of you. When questioned if she ascertained the position with regard to the start date of June 2002 she responded that she had not received anything from Waste Disposal Sligo and a great number of companies did not have records. She believed that FB was the person likely to have met with employees on an individual basis. It was normal procedure on site to go through the contracts and the witness could not say that FB did that. When asked why existing employees signed new contracts she responded it was more a protection and employees felt more secure. The claimant was given the contract on 26 September and he had until 5 October 2005 to sign it. It was also another opportunity for the claimant to identify his start date.

Claimant's Case

The claimant told the Tribunal that he commenced employment with the respondent on 22nd June 2002 and his function was bin man and bin collection. He did not have a P60 for the year 2002. He was paid by cash and earned €250.00 per week. He commenced work in the yard and skip as a helper. He did not receive complaints about his work and he was paid by cheque in 2003. A number of his colleagues that he worked with in June 2002 were employed by the respondent in April 2006. These people worked as operatives and drivers/operatives. He was told at a meeting that general operatives were going to be laid off. Mr. DS told the claimant and a colleague that they were being made redundant.

After this he made numerous attempts to seek alternative employment. He made numerous telephone calls. In November 2006 he obtained employment as a general helper and his gross earnings were approximately €350 or €360 per week. He did not think that he was fairly selected for redundancy.

In cross-examination the claimant stated that he started work with Waste Disposal Sligo in June 2002 when he was aged 14. He was initially paid cash and he was then paid by cheque. He had left school and he stated that he raised an issue at a meeting in relation to his contract of employment. He could not remember if he accepted that January 2005 was the start date. He asked DS the operations manager why he was selected for redundancy. When asked that he did not raise any concerns at the meeting with DS he responded said that he did ask. When asked regarding Mr D.S's response to him when he asked him why he chose him for redundancy DS response was that he felt that the claimant should be made redundant. When asked if he was satisfied he responded that he was not and his parents made him pursue the matter further.

The claimant's mother told the Tribunal that her son had left school and she had to go to the school so that her son could leave. The claimant did not make attempts to return to school after he commenced employment.

Determination

The claimant was unfairly selected for redundancy. The Tribunal having heard all the evidence from the claimant and the respondent is satisfied that the respondent did not carry out appropriate and proper due diligence on the claimant's length of service with Waste Disposal Sligo in the Transfer of Undertaking. Had the respondent carried out a full and detailed examination of the transferors' employees and in particular the claimant's record of employment it would have been clear that the claimant had commenced employment in June 2002. The respondent seeks to rely on the contract of employment signed by the claimant on the 30 September 2005 where he indicated that he commenced employment in January 2005. The Tribunal is not satisfied that the respondent can so do and determines that the claimant was unfairly selected for redundancy notwithstanding that the respondent had introduced a policy of last in and first out in the company. Accordingly the Tribunal awards the claimant compensation in the amount of €11,500 under the Unfair Dismissals Acts, 1977 to 2001.

No evidence was furnished to the Tribunal in relation to minimum notice so therefore the Tribunal is not making any award under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

