

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

Employee

CASE NO.

TU4/07

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

Employer

under

EUROPEAN COMMUNITIES (PROTECTION OF EMPLOYEES ON TRANSFER OF UNDERTAKINGS) REGULATIONS 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. E. Daly B.L.

Members: Mr. A. O'Mara
Ms M. Maher

heard this appeal at Dublin on 22nd October 2007.

Representation:

Appellant : In Person

Respondent: Mr. Cian Beecher, Arthur Cox, Solicitors, Earlsfort Centre, Earlsfort Terrace,
Dublin 2

This case came to the Tribunal by way of an appeal of a Rights Commissioner reference
r-047420-tu-06/TB

The decision of the Tribunal was as follows:-

Appellant's case:

The appellant commenced employment with XXXX on 13th September 2001. The appellant transferred from XXXX to XXXX as a result of internal reorganisation of the XXXX on 1st January 2005. On completion of five years service with XXXX the appellant would have been entitled to a long service award of €496.00. The appellant was informed in a letter dated 2nd December 2004 from XXXX that this transfer would leave all his employment terms and conditions intact.

In October 2005 XXXX and also SIPTU were advised of the modification of the policy by the substitution of the five-year award with a thirty-year award. The company felt the change was necessary as a result of the integration of three groups of employees into one organisation. The

appellant was not a member of SIPTU at that time but has since joined the union. A notice dated 21st October 2005 was displayed on the staff notice board informing staff that the service pay award would be changed with effect from 1st January 2006 and the five-year award would be abolished. The appellant was not aware of this notice.

XXXX linked the transfer and the change to the service award scheme to introduce a new policy in order to open up the awards scheme to all employees.

The implementation of the new service award was deferred until late in 2006. The appellant only became aware of the reason for the non-payment of his five-year service award in a letter dated 2 October 2006 from XXXX when he enquired about his five-year service award. He was informed that the award had been removed from the organisation and no longer existed.

The appellant submitted that there was no provision within EU law to vary his contract of employment. He did not accept that a clause in his contract of employment allowed for a change in his terms and conditions of employment as a result of a transfer of undertakings. He felt that both the transfer of undertaking and change in his conditions were unrelated.

The appellant did not invoke the company's grievance procedures at that time.

Respondent's case

The respondent submitted that the terms of employment contained a variation clause. The Employee Handbook 2004 contained a variation clause, which said that XXXX reserved the right to vary or add to the Terms and Conditions laid out in this section. The respondent altered one aspect of the service award and this was brought to the Employee Forum. It was open to the employer to supplement a five-year award with a thirty-year award. The employer had a number of employees who were now approaching thirty years service and would have been entitled to avail of the new award. The respondent contended that the variation clause was not connected with the transfer of undertaking. There were only nominal changes within the new restructured company

Determination:

It is a principle of employment law that a term of a contract relating to pay, is a fundamental term and cannot be altered so as to reduce that which is payable to an employee by an employer unless there is agreement by the employee affected by that change. The variation clause in the handbook cannot operate to give the respondent liberty to alter terms as they decide but can only do so where the variation is not fundamental to the contract and where the variation is reasonable. The Tribunal finds that the service award term is a pay term of the contract of employment and as such is a fundamental term. It does not accept that it was merely an ancillary benefit incapable of being enforced. No submission was put forward by the employer that the award was discretionary or performance related. It was purely based on service and the Appellant had been employed for the requisite five year period when he applied for the award.

The position where there has been a transfer of an undertaking is that the terms of an employment contract that exist prior to the transfer remain intact post transfer unless the employee agreed to the change or unless there are economic, technical or organisational reasons relied upon by the employer to change the terms. Firstly, the appellant did not agree to the change. The fact that SIPTU agreed on behalf of its members does not alter this because the appellant was not a member of SIPTU and the fact that the appellant was on notice of the proposed changes by a posted notice

on the notice board does not of itself, imply consent. Secondly and significantly, no economic, technical and organisational reasons were relied upon by the respondent for this variation of the contract, either at the time of the change on 1 November 2005 or in presentation to the Rights Commissioner or to this Tribunal.

The Tribunal finds that the decision to restructure the service awards was linked to the transfer of undertaking. The contents of the notice to staff posted on 21 October 2005 supports this. The fact that the decision was implemented ten months after the transfer of undertaking is not evidence that there was no link. In fact, it was probably during this period that the negotiations with the unions and staff about the change, which the respondent admits were unpopular with staff, took place.

Therefore, the Tribunal overturns the Rights Commissioner's decision and awards the appellant the service award of €496.00.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

