EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF: **CASE NO.**
Employee RP187/2008

against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath BL

Members: Ms. J. Winters
Mr. J. Moore

heard this appeal at Navan on 10th July 2008

Representation:

Appellant(s): Ms. Maureen Finlay, Advocacy Resource Officer, Citizens Information Centre, 1 Brews Hill, Navan, Co. Meath

Respondent(s): Ms. Lorna Lynch BL instructed by Mr. Patrick Branigan, Patrick Branigan & Co., Solicitors, Teach An Chúinne, Dyer Street, Drogheda, Co. Louth

The decision of the Tribunal was as follows:-

Appellant's case:

In his sworn evidence, the appellant said that on 6 November 2007 while the owner (*hereinafter referred to as S*) of the respondent company (*the franchisee company*) was in Belfast at a meeting with the franchisor, he was informed that S was being relieved of the franchise because he was in breach of contract. He was told that the franchisor was taking over the operation but subsequent events did not allow this to work out. He was told that his employment would continue with the respondent company until the following Friday but on that Friday, he failed to gain entry to the factory. The appellant said that he was not paid his wages at the end of that week. Following negotiations over the weekend, work recommenced on the following Monday and Tuesday but on Wednesday, the factory entrance was blocked again. From that date, employment with the respondent company had ended.

In cross-examination, the appellant confirmed that he had been an employee of the respondent company, a manufacturer and fitter of wardrobes. He denied that he had been aware of problems

that the respondent company was experiencing but confirmed that on 6 November 2007, he had been informed that the franchise was being terminated and that he was transferring to the new company.

An email dated 6 November 2007 was opened to the Tribunal. This email had been sent to all employees of the global group of the franchisor company wherein they had been advised of the termination of the franchise agreement and that they would transfer to the franchisor. The appellant denied that he had seen this email on the 6 November 2007 but said that he saw it at a later date.

The appellant confirmed that he continued working in the premises until Friday 9 November 2007, when, on that day, he failed to gain entry to the factory because S had blocked the access, and he was threatened with trespass if he did enter. He said that the employees of the franchisee had hoped that their employment would continue with the franchisor and that they had attended a meeting in a local hotel in relation to same. He said that the franchisor had assisted with the payment of the wages that the employees had been owed by the franchisee, by way of a loan, but they – *the franchisor* – had been unable to guarantee that their employment would continue. He denied that an offer to make him an employee of the franchisor or an offer of employment at the franchisor's factory in Belfast, had been made. The offer that had been made by the franchisor was that if things worked out, the employees of the franchisee would be offered their jobs back.

The appellant confirmed that he got his P45 form and a reference from the respondent company. He had not spoken to the owner of the respondent company since then though he was aware that this owner was now trading as another new company. He agreed that he had not looked for a job in this new company. He also said that S had offered him a job in his new company.

The production director of the franchisor (*hereinafter referred to as H*), said in his sworn evidence that on 6 November 2007, S had been informed that the franchise was being terminated. He said that if there had been an orderly transfer between franchisor and franchisee, the employees of the franchisee would have kept their jobs as employees of the franchisor. However an orderly transfer had not happened because the franchisor had been locked out of the franchisee's factory.

In cross-examination, H denied that he had told the employees of the franchisee that they had become employees of the franchisor. He said that they would have become employees of the franchisor if the business had been handed over. He said that if they did not have premises, they did not have a business. He agreed that the franchisor had continued to fill the orders that had been generated by the franchisee and had collected money in relation to the supply of same. However the franchisor had no agreement to take on the employees of the franchisee because no orderly transfer had occurred.

The witness agreed that he had called the meeting in the local hotel for those who had been the employees of the respondent company. He said that these people had been advised if they got alternative employment, they should take it and if they, the franchisor got work, they would employ them. In relation to the wages that had been due to the employees from the franchisee, the witness said that the franchisor had lent the employees money but had not paid the wages that had been due to them. He rejected the argument that by paying the employees of the franchisee, the franchisor had become their employer and explained that the franchisor is a big family and so they mind people. The suggestion that the setting up of the loan situation was an attempt to avoid redundancies was also rejected because the employees of the franchisee had never become employees of the franchisor.

Replying to the Tribunal in relation to the content of the email of 6 November 2007, the witness said that the employees of the franchisee would have become employees of the franchisor with an orderly transfer.

Respondent's case:

The owner/director of the respondent company, S said that he had the franchise to make and fit the products of the franchisor and the appellant had been the production manager in the factory.

In his sworn evidence, S said that while at a meeting in Belfast with the franchisor on 6 November 2007, he received a telephone call informing him that the franchisor was taking over the franchise and his premises. He had a long-term lease on the premises so he contacted the landlord so as to protect the leased property. A subsequent telephone call from the landlord confirmed to him that the premises were his.

On Monday 12 November 2007, a heads of agreement was drawn up between the franchisor and the franchisee where the franchise was to revert to the franchisor and he was to retain the premises. The employees were also to go to the franchisor. The heads of agreement was signed on 12 November 2007 but was broken the next day, at which time S changed the locks so as to protect his premises. However, the staff were still the employees of the franchisor. S argued that the franchisor had being instructing staff so it could not now put liability for the staff back on the respondent company because the heads of agreement had failed. Despite the premises of the franchisee being locked and closed, the franchisor continued to fill the orders of the franchisee and to collect money for same.

The franchise ceased on 31 November 2007 and at that time, the respondent company also ceased. Subsequently, S formed a new company. The appellant had not been offered a job in this new company because he had not asked for one. S also said that redundancy would have been paid to the appellant if he had been entitled to it.

In cross-examination, the appellant's representative stated that if people's employment is being terminated, their employer surely should inform them of same. In this case, nothing, either verbally or in writing had been put to the employees by the respondent.

Replying to the Tribunal, S said that no consultation had been conducted between himself and the franchisees' employees in relation to a transfer. Also, prior to 6 November 2007, no consultation had been conducted between the franchisor and the franchisees' employees. He confirmed that he had been aware that problems existed between the franchisor and the franchisee but had been unaware that the franchise could end.

Closing statement:

It was the respondent's case that from 13 November 2007, an actual transfer of undertaking from the franchisee to the franchisor had occurred. Counsel for the respondent argued that once the economic situation and activity of the franchisee had been accepted back by the franchisor, they had also accepted the employees of the franchisee. The place of work did not form part of the franchise so the physical premises did not form part of the economic activity.

Determination:

A claim for redundancy has been brought by the appellant against the respondent company.

The Tribunal has carefully considered the evidence adduced during the course of this hearing. The question that the Tribunal must consider is whether a transfer of undertaking occurred on or about the 6 November 2007 such that the franchisor took over the economic entity that was the respondent company.

The respondent relies on an email circulated to the workforce, which certainly states that the franchisor intends that staff will transfer to the franchisor. The respondent has asked the Tribunal to accept that from the issue of that email, the employees became the concern and responsibility of the franchisor.

The Tribunal accepts that arising out of adverse and difficult relations between the respondent company and the franchisor, it was intended that a resolution of those difficulties would include a transfer of undertaking such that the staff and business carried out by the respondent would be taken over by the franchisor. The Tribunal cannot find, based on the evidence adduced that the path to a complete transfer ever moved beyond an intention. Talks were entered into and these talks collapsed. The respondent closed down the premises and the staff were unable to take up their employment

As a result of the foregoing, the appellant no longer had a job and the respondent company made the appellant redundant. The Tribunal therefore finds that the appeal under the Redundancy Payments Acts, 1967 to 2003 succeeds and the appellant is awarded a redundancy lump sum, which is to be calculated on the basis of the following criteria:

Date of Birth:	29 December 1963
Date of Commencement:	April 2001
Date of Termination:	6 November 2007
Gross Weekly Wage:	€645.00

This award is made subject to the appellant having been in insurable employment under the Social Welfare Acts during the relevant period.

Please note that a statutory weekly ceiling limit of €600.00 applies to all payments from the Social Insurance Fund.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)