

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

Employee

CASE NO.

RP639/08

Against

Employer

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. T. Ryan

Members: Mr. J. Reid
Mr A. Butler

heard this appeal at Dublin on 13th November 2008.

Representation:

Appellant : In person.

Respondent : Mr. Jim Stafford, Friel Stafford, Corporate Recovery, 44
Fitzwilliam Place, Dublin 2

The decision of the Tribunal was as follows:-

Appellant's Case:

The appellant commenced employment on 8th July 1999 with the XXXX (subsequently referred to as "the respondent company"). Her employment ended on 8th May 2008. She received no contract of employment or payslips. Her salary was paid by direct debit into the Bank. Her gross weekly wage was €459.48.

She worked as a general warehouse operative. She had a company car because she looked after the deliveries. Approximately two days before her employment ended an officer from the Sheriff's office arrived at the company and handed both herself and another employee a similar letter. This letter outlined that the Sheriff had seized all goods which were the property of the respondent and that staff were now unemployed.

The appellant's parents gave her sister and herself a loan of €50,000, which was used to set up a new company. This company was incorporated on 12th June 2008. The company did not trade

for several weeks. The new company engaged in similar activities, did business with many of the same customers and had the same registered address as the respondent company. A courier company looked after deliveries for the new company.

Respondent's Case:

The liquidator appointed to the respondent company gave evidence. The appellant's parents were the shareholders of the respondent company. He had received a letter from the Office of the Dublin County Sheriff who indicated that only one male employee of the respondent company had been handed a letter indicating that all goods had been seized and that staff were now unemployed. This letter was for this employee's benefit solely to apply for Social Welfare benefits. The company incorporated by the appellant was operating from the same address and using the same telephone and fax numbers and carrying on the same business as before.

On 20th August 2008 the liquidator wrote to the appellant asking that she contact him to make arrangements for the motor vehicle she used to be collected by the liquidator's auctioneers. The appellant did not respond to this letter. The appellant's father had advised him that he provided the appellant with a vehicle previously owned by the respondent company as compensation for her purported redundancy. The liquidator gave evidence that on several occasions when he telephoned the appellant's company he spoke with the appellant's father who he contended was working for the appellant's company.

In the liquidator's letter to the appellant he pointed out that she was not entitled to any redundancy payment as her employment transferred across to the newly incorporated company owned by herself and her sister. He believed a very clear-cut case of transfer of undertaking existed.

The liquidator contended that the appellant was now a shareholder and employee of the newly incorporated company and that her service would carry across to the new company. He said in the event of the cessation of the appellant's employment in the newly incorporated company, that the appellant would be entitled to a redundancy payment.

Determination:

The Tribunal carefully considered the evidence adduced at the hearing. There are no hard and fast rules governing what is, and is not, a transfer of undertakings. To determine whether the legislation applies, the facts of each individual situation must be considered. In a leading case, known as the "Suzen" case the European Court of Justice attached great importance on identifying the key assets of the business. This case stated that if significant operational assets are included in the transfer it indicates that the legislation will apply. These assets can be people or equipment. It is also important to consider if the business, or part of the business, is being transferred as a going concern.

Retention of the identity of the business may also be a deciding factor. In addition, a change of employer or person conducting the business may also indicate a transfer of undertakings.

Applying this to the present case the Tribunal notes that the company incorporated by the appellant:

1. was operating from the same address;
2. used the same telephone number and fax number;
3. operated the same business as before;
4. dealt with pretty much the same customer base as the respondent company;
5. the incorporation of the new company and the establishment of the business was financed

by a loan of €50,000 from the appellant's father who was one of the shareholders in the respondent company;

6. the appellant's father continued to work for the new company/business

Accordingly the Tribunal determines that the appellant's employment transferred across to the newly incorporated company under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. Therefore the appellant's appeal under the Redundancy Payments Acts, 1967 to 2003 is dismissed.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)