

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF: CASE NO.
Employee RP259/2008
Against
2 Employers
under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. O'Connell B.L.

Members: Mr. A. O'Mara
Mr G. Lamon

heard this appeal at Dublin on 3rd September and 7th November 2008

Representation:

Appellant: Mr Michael Vallely B L instructed by
Brennan & Co., Solicitors, 26 Upper Pembroke Street, Dublin 2

Respondent: Mr. Liam Bell BL instructed by C.C.K., Eastmoreland Place, Ballsbridge, Dublin 4

The decision of the Tribunal was as follows:

Appellant's Case

The appellant was employed as a general maintenance man with the respondents from April 2000. According to the witness one of those respondents owned "a rake of flats" around Dublin. Among those properties were hostels for emigrants and asylum seekers and tourist accommodation. The appellant mainly worked at a tourist hotel and other properties apart from a hostel for homeless people at Charlemont Street in Dublin where he spent up to fifteen percent of his working time.

In September 2007 a manager at the respondents told the witness he was being made redundant due to changes in the ownership and structure of their properties. The appellant was not aware of how the respondents operated their properties and did not know "what was going on". He received a letter from them on 27 September 2007 informing him XXXX would no longer employ him. That letter indicated his new employer would be Crosscare from 1 October. In the meantime the appellant attended a meeting hosted by Crosscare on 25 September. That organisation did not state they were assuming responsibility for the appellant's continuing employment. The witness commented that maintenance work with that organisation was "a different kettle of fish" compared to his work with the respondents.

The witness referred to a letter he received from XXXX dated 1 October 2007. That letter offered him a three-month contract. Subsequent to that development the appellant sought a redundancy payment from the respondents.

Respondent's Case

JM told the Tribunal the reason for a transfer of the operation of a hostel for the homeless on behalf of Dublin City Council was that DCC wanted a new provider. The preferred option was that Crosscare take over staff and that it be handed over as smoothly as possible. The appellant was employed at the time in general maintenance and undertook cleaning and a variety of roles. He was going to retain the appellant who was due to retire in a couple of years and who would be in receipt of a pension. JM had six buildings, one that could provide one hundred and seventy five beds was split in half and the other half was a hostel for tourists. The appellant spent fifty to sixty per cent of his time working in this building.

People with social problems stayed in part of the building and he applied for planning. DCC felt that it could not fund the private group. JM operated fifty-six beds and DCC may have wanted the entire one hundred and seventy five. The appellant had in depth knowledge of the lay out of the building. In October DCC asked JM if it could defer the take over until the following year. He was then told that the building was closed down and that Crosscare wanted all staff. The appellant lived in the hostel in an adjoining building and he discussed the matter with the appellant on a couple of occasions. He was in regular contact with the appellant. The appellant asked him for redundancy and JM checked this with his accountant. Under the transfer of undertaking JM could not make the appellant redundant. Crosscare indicated that they were going to take all staff.

JM had a large hostel in Mountjoy Square and he made it clear to the appellant that he could not make him redundant as he had work for him. It was his understanding that six staff were transferred to XXXX and that they had a contract with XXXX. He had several meetings with the appellant to establish what he wanted to do. DCC indicated that it wanted the appellant in the building and it was taking over the entire building. The appellant had two options either to remain with JM or to transfer to XXXX. At this time the appellant was still living in the hostel in Charlemont Street and around Christmas the appellant approached him regarding a query about holiday pay. The appellant told him that he had signed a new contract with XXXX. He asked the appellant to bring in the contract and he never did.

He sent a letter to the appellant on 22 September 2007, as he wanted to inform him that Crosscare would take over responsibility for the hostel from 1 October 2007. He spoke to staff some months before XXXX took over. In the letter of 22nd September 2007 he did not refer to the matters that CH, Director of XXXX outlined to him in the letter of 21 September 2007 as he was satisfied that all the boxes were ticked and he was not well acquainted with legal matters. XXXX told him that it was going to take all staff and he was put under pressure to transfer staff. The appellant attended for interview with XXXX, he did not consult JM that he was going to work for XXXX and undertake the same work as he had undertaken for him. The appellant did not report to him after 22 September 2007.

In cross-examination JM stated that the appellant undertook work in all of his buildings. He had a site in Harold's Cross. The appellant undertook ten to fifteen per cent of his work in the hostel in Charlemont Street and the remainder he undertook on other projects. The appellant worked in the two hostels in Charlemont Street, tourists were accommodated in one of the hostels and he did not

want to have problems with the neighbours. Some of the clients in the hostel were drug dependent. He stated that on the 21 September 2007 the appellant did not know what he wanted to do. On 21 August 2007 he met the appellant and tried to advise him of the issues, the appellant did not want to work for JM and he did not want to go. He spoke to the appellant on 7 June 2007 after the building had been vacated. He had notes in his diary regarding the minutes of a meeting. The reason the appellant remained in the hostel was that he had no place else to stay and he had his own reasons for joining XXXX.

The appellant undertook cleaning work one day a week in a block of flats in the North side of the city and he had other staff employed in this building. He reiterated that he did not know what the appellant wanted to do, his choice was to remain with him or work with XXXX. The appellant now works for XXXX and JM stated that he has work for the appellant.

In answer to questions from the Tribunal he stated that he had a written contract with DCC. He did not have an agreement with XXXX. In his opinion six staff transferred to XXXX. In a letter dated 25 September 2007 addressed to CH, director of XXXX he indicated that he had notified employees of the impending transfer and the preservation of their terms and conditions of employment. DCC told JM that he should advise CH. After the transfer he was quite happy that the appellant would work for him. If the appellant and five others transferred all would have protection. It was the appellant's decision to go to XXXX and he did not have a problem with that. He was satisfied with the appellant's work. DCC took over the building and he spoke to all staff about this. The staff that he spoke to were of the opinion that they would be transferred to whichever group was awarded the contract. The appellant asked JM about redundancy and JM's accountant advised him that under transfer of undertaking regulations he could not give the appellant redundancy and he informed the appellant of this. Employees PPS numbers and P45's were given to XXXX. He was not aware that the appellant was employed on a fixed term contract and he thought his contract was for a year. It was not a redundancy situation. He did not know when XXXX was going to take over. When the witness was asked that his solicitor received letters in May 2008 and that was the first time that he found out about the contract he replied that he was surprised about it. There was very little that he could do, he spoke to the appellant and he told him that he had signed a new contract. No one reverted to him on this matter. He did not receive correspondence from XXXX that the appellant was excluded. In relation to the interview with XXXX he stated that all staff attended a meeting in a nearby hotel as XXXX wanted to formally meet staff

CC for the respondent told the Tribunal that she was employed as an assistant to JM. She undertook e-mails and correspondence. Staff were paid a week in arrears. The appellant was undecided whether he would transfer or not. She had meetings with the appellant on 21 August and 21 September 2007. The appellant enquired about redundancy and she told him that there was a job for him. The appellant was told that there was no possibility of redundancy regardless of whether or not he remained with the respondent. The appellant attended two official meetings and his work situation was discussed. She had to explain to staff what was happening. She was aware that the appellant undertook general maintenance work and cleaned buildings. He also assembled beds.

In cross-examination she stated that she met employees individually. She undertook the preparatory work in relation to the hand over and DCC had all the paperwork. The appellant always worked in the XXXX. On some days the appellant undertook repair jobs. He undertook a considerable amount of work in the hostel including general maintenance and he worked in the tourist hostel as well. He occasionally looked after the bins in a building in Church Street. The

appellant along with five other staff went to XXXX on a transfer. All employees were happy to put their name forward to work with XXXX. She gave three months notice to the appellant. She was an administrator and she received help from an accountant. The appellant never mentioned a fixed term contract to her. She definitely attended a meeting with the appellant on 21 August 2007. The letter dated 22 September 2007 addressed to the appellant by JM was left in reception for him.

PG told the Tribunal that he was employed as a manager in May 2005. He attended a meeting on 21 August and 21 September 2007. The appellant raised the issue of redundancy at a meeting on the 21 August 2007. The appellant was aware that JM would not give him his redundancy.

In cross-examination he stated that he is a contractor and operates the tourist hostel since October 2007.

Determination

The termination of the appellant's employment was involuntary. However the Tribunal believes that the appellant was made redundant and he is accordingly entitled to a redundancy lump payment under the Redundancy Payments Acts, 1967 to 2003 based on the following criteria: -

Date of birth	10 February 1944
Date employment commenced	27 April 2000
Date employment ended	28 September 2007
Gross weekly pay	€440.00

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

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

