EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employee MN1039/2008 - appellant

RP715/2008

against

2 Employers - respondent

under

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001 REDUNDANCY PAYMENTS ACTS, 1967 TO 2003

I certify that the Tribunal (Division of Tribunal)

Chairman: Mr. P. Hurley

Members: Mr. J. Hennessy Ms. E. Brezina

heard this appeal at Portlaoise on 11th November 2008

Representation:

Appellant: Mr Michael Whelan, SIPTU, Dublin Construction & Allied Trades Branch, Liberty Hall, Dublin 1

Respondents: In person

The decision of the Tribunal was as follows:

Appellant's case:

The appellant's representative said that it was a Transfer of Undertaking from the company XXXX to XXXX. He said that he believed XXXX was also a limited company.

The appellant gave evidence that he thought he finished work with the respondent on 4 April 2008, but the P45 showed his termination date as 11 April 2008. He said that he didn't remember when he left XXXX to work for XXXX. He began to work for XXXX on 27 March 2006, but was never told at any time that he was working with a new company. RM gave him his payslips at XXXX, as he

did at XXXX. He only became aware that he was working for a new company after he left.

He said that he stayed working in the same location and on the same terms and conditions. He worked as a flagman (i.e. Traffic control) in Athlone. In the first week of April 2008, he was told that the project was finished and that there was no more work. RM told him to call him back in four weeks. He was never issued with an RP9. He said that he didn't ask for his redundancy because RM told him in the first week in April that he would have work for him in four weeks time. He sought information from SIPTU and then claimed his redundancy. He hasn't worked since and is now on Social Welfare. He got his P45 in September 2008.

Respondent's case:

The owner (RM) gave evidence that his company was registered in December 2006, but didn't begin trading until 1 March 2008. He said that he was an employee with XXXX but that there was no relationship between the two companies. XXXX was now in Liquidation. He said that the appellant received his notice on 28 March 2008, and that he finished work on 4 April 2008. He told the appellant to contact him when he returned from his holidays in Turkey, but he didn't hear from him until May, and he told him that he had no work.

He said that he didn't believe the appellant was continuously employed, as XXXX was not related to XXXX. He said that he had no financial interest in XXXX, but he got on well with the owner, and decided to start the new business with his partner. He paid no money for XXXX, and he said that the company was not in Liquidation when he took it over. He didn't believe it was a Transfer of Undertaking because there were different owners. He was not aware of any other redundancies in either XXXX or XXXX because some employees simply went working elsewhere.

He said that he only became aware of the term Transfer of Undertaking in May or June 2008. He agreed that he had not told the appellant he was working for XXXX. He admitted that he and five of his workmates are attempting to claim redundancy from XXXX.

Determination:

Having heard and reviewed all relevant evidence, the Tribunal is of the view that XXXX is an identifiable part of the previous entity XXXX. XXXX was clearly transferred to a new owner. Following Irish and EU jurisprudence, in order for a business activity to come within the definition of a transfer of an undertaking it must be established that the business in question retains its identity. The Tribunal takes note of the respondent's evidence that he paid no money for XXXX but is persuaded on the facts that there had been a transfer of an undertaking. The business entity had retained its identity after the transfer.

The new owner did not comply with the clear terms of the Transfer of Undertakings Directive as implemented in the state by the European Communities (Protection of Employees on transfer of Undertakings) Regulations 2003, to inform staff of a change of ownership. The transferor company should have informed its staff of its intention to transfer its business or part of its business.

The Tribunal takes cognizance of the opinion of the Advocate General in the *Rygaard* decision of the European Court of Justice. The appellant has clearly established a redundancy claim, which lies against the transferee company.

Accordingly, the Tribunal finds that the appellant is entitled to a redundancy lump sum under the Redundancy Payments Acts, 1967 to 2003 based on the following details:

Date of Birth	3 October 1964
Date employment commenced	27 March 2006
Date employment ended	11 April 2008
Gross weekly salary	€580.00

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

The Tribunal also awards him €1,160.00 (being the equivalent of 2 weeks pay) under the Minimum Notice and Terms of Employment Acts, 1973 to 2001.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.)_____

(CHAIRMAN)