

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:

CASE NO.

Employee

UD736/2007

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

Employer

under

UNFAIR DISMISSALS ACTS, 1977 TO 2001

I certify that the Tribunal
(Division of Tribunal)

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

Members: Mr. R. Prole
Ms. N. Greene

heard this appeal at Dublin on 22nd January 2008, 18th December 2008 and 3rd March, 2009

Representation:

Appellant: Alex White BL, instructed by: Mary Claire Markey, Ivor Fitzpatrick & Co, Solicitors,
44-45 St. Stephen's Green, Dublin 2

Respondent: Ms. Claire Hellen, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

This case came before the Tribunal by way of an appeal by the employee against the recommendation of a Rights Commissioner, ref: r-044625-ud-06/JT dated 29 June 2007

The determination of the Tribunal was as follows:

Appellant's case:

The appellant gave evidence that XXXX was awarded the warehousing contract by XXXX. The appellant went there in Jan 2005 and reported to the Operations Director of XXXX (SF). The employer was XXXX at first and then XXXX. Some of the employees chose to stay, others chose redundancy. The transfer to XXXX took place in mid 2005. He said that XXXX was his the employer from time to time in 2003. He said that he worked as a consultant. He said began full-time employment with the company in 2004. SF told him he wanted him for the XXXX operation, and he moved there in early 2005. He said that his employer now was XXXX on the Nangor Road, and he was now earning a higher salary. In January 2005 the staff were XXXX

employees, and they became XXXX employees in mid 2005. After XXXX took over he reported to the General Manager (SB). He said that he was the only member of staff who was available to transfer, but he did not do so.

The appellant's representative said that the transfer of operation from XXXX to PRL was a Transfer of Undertakings. 45 employees were transferred to PRL but not the appellant: why? He was part of the operation and was entitled to the transfer. The Tribunal is not confined to awarding loss under the Unfair Dismissals Acts, 1977 to 2001, but also loss under Transfer of Undertakings legislation, but if the claim was made under both Unfair Dismissals and Transfer of Undertakings, then they couldn't claim loss for both. If there is a breach of regulations, then he is entitled to claim loss.

The General Manager (SB) gave evidence that he worked at the Nangor Road site, and in 2005 he was General Manager in Clonshaugh. He said that the appellant's role was crucial to the operation in Clonshaugh. When PRL got the contract he was asked to change over to them but he said no, because he had an offer to go to Kilcarberry with XXXX. He said that most, if not all of the XXXX employees changed over to PRL, and the appellant was part of that group. There was no reason why the appellant should have been treated differently than the others. He said that the appellant was a forthright person and could be tricky to deal with.

He said that he met JOR 3 times prior to the transfer. JOR asked him would he be interested in transferring, he said no because he already had a job. He wanted the appellant with him on the Cork site. He agreed the appellant moved from site to site. He also met the warehouse manager (MM) at the time. He denied that SB introduced the appellant to him as the manager and not MM. There were 4 managers on the Longmile Road site. The appellant had no job to go to but XXXX had work for him. He did not raise the possibility of the appellant being left without employment with JOR because this was PRL's responsibility. He told JOR that the appellant would fall within the transfer process like all the other the employees.

Respondent's case:

The appellant never transferred to PRL from XXXX, and is still employed by XXXX. He was not part of the economic entity, so there was no transfer. The appellant suffered no loss, so it cannot be just to award loss. He worked on site for XXXX and was not part of the unit that changed over.

The Managing Director of PRL group (JOR) gave evidence that XXXX had asked them to tender for a contract to store and deliver product for them at the Longmile Road site, because the contract with XXXX had broken down. They were awarded the contract in January 2006, and 45 employees on the site transferred to PRL under the Transfer of undertakings legislation. They had sought legal advice, and IBEC advice on the issue beforehand. He said that he was not informed that the appellant was available to transfer. MM gave him a list of employees to be transferred, and there was also a list from XXXX. The appellant's name was not on these lists.

He said that SB told him he would need to talk to the appellant, so he asked their HR consultant (TL) to talk to the appellant. When TL came back to him he was told that there was no case for the appellant to be part of the group to be transferred. No one in XXXX, other than SB, had mentioned the appellant to them, nor had anyone said he was part of the group. Subsequently TL met the appellant who said that he was going to "walk the plank" and that we would hear from him. The appellant never outlined to TL what his role was, or that he was part of the group.

He said that when PRL got lists of the employees to be transferred, the appellant's name was not on them. He said that the operation was observed closely for 3 weeks before the transfer, and that it could not be said that the appellant was an integral part of the operation. He only saw the appellant once on the site within that time. He asked XXXX about the appellant but no information was forthcoming from them. SB and MM were the people who dealt with the respondent from XXXX. He was told that the appellant was a troubleshooter who dealt with weaknesses in the working processes. He said MM and XXXX told him that the appellant was not part of the group to be transferred. If he felt that he was part of the group, he would have come to work for PRL on 6 March 2006.

The Payroll Manager in TDG (CC) gave evidence regarding a document, which purported to show a break in the appellant's service. However the Tribunal did not allow this document to be entered into evidence.

The Operations Director (BOH) gave evidence that he was the Operations Manager at the time in question. He said that he met the warehouse manager (MM) who introduced him to the appellant and this was the only occasion he saw him. JOR had informed him that MM was the Manager. He denied that he discussed data issues with the appellant on a number of occasions. He said that he saw the list of employees that MM gave to them, but was not aware of a second list.

Appellant's closing submission:

JOR gave evidence that the appellant was not part of the transfer. The simple case is that there is agreement that the transfer took place. The appellant gave evidence that he was an integral part of the economic entity that transferred and SB's evidence conclusively proved this. TL's notes fortify the appellant's position, why would they make an offer to him if he wasn't part of the group. It is the appellant's entitlement as a matter of law to transfer over to PRL. It was not sufficient for JOR to make a judgement call that the appellant was not part of the economic entity, observation was not enough to make this decision.

According to regulation 10, (5)(c) of S.I. 2003, if the Tribunal decides to award compensation, they have the jurisdiction to give what is just and equitable but not more than 2 years salary. if the Tribunal decides to award compensation, they have the jurisdiction to give what is just and equitable but not more than 2 years salary. The Tribunal is not confined to financial loss but can award compensation. The point is that compensation must be adequate. The Equality Directive of 1976 although repealed is almost identical to the Acquired Rights Directive so the Tribunal can accept that view of the EU. There should be substantial compensation.

Respondent's closing submission:

The appellant's evidence was that he worked as a consultant with TDG. He moved between sites, therefore he didn't form part of the economic entity that transferred. PRL's obligations began in March 2006. JOR & BOH spent long periods on site in the lead up to the transfer and only once saw the appellant on site. It is clear he was not part of the entity economic entity that transferred, if he had been it would be unusual that XXXX failed to tell PRL that he would be part of the entity. It is apparent from TL's notes that the appellant did not give any reason why he should be considered part of the group. No one came to PRL after the change saying that he was dismissed or that he had been left behind. It was 5 months before he took his claim to the Rights Commissioner. If he felt excluded, there is no evidence that he went to his employer about this.

The fact of dismissal is in dispute, the appellant was never an employee of PRL so there was no dismissal. The purpose of Transfer of undertakings legislation is not to improve an employee's terms of employment, but to safeguard his rights. The Rights Commissioner says up to 2 years pay can be awarded, but there is no evidence of any damage or loss incurred, so no sum should be awarded, it would not be just or equitable to do so. Relief may not be granted under both The Unfair Dismissals Acts, 1977 to 2007, and the Transfer of undertakings legislation. Compensation must be based on actual loss, but there is none, so at most only 4 weeks can be awarded. There was no breach of the Transfer of undertakings regulations, the company has adhered as best as it could to them. It was never apparent that anyone was excluded from the transfer.

Determination:

The Tribunal heard conflicting evidence regarding the status of the appellant's employment when the transfer of business took place in March 2006. The Tribunal prefers the evidence given by the respondent in this regard. Therefore the appellant was not part of the economic unit at the material time.

Accordingly, the decision of the Rights Commissioner under The Unfair Dismissals Acts, 1977 to 2001, is upheld.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

