EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:	**CASE NO.**
EMPLOYEE - *appellant*	RP831/2008
	MN902/2008

against

EMPLOYER – *respondent 1*

and

EMPLOYER – *respondent 2*

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. O'Leary B L

Members: Mr. T. O'Sullivan
Mr J. Moore

heard this appeal at Dundalk on 12th February and on 30th November 2009

Representation:

Appellant: Ms. Marie Hayes, Citizens Information Centre, 4 Adelphi Court, Long Walk, Dundalk, Co Louth

Respondent 1: Dr. Mary Redmond, Arthur Cox & Co., Solicitors, Earlsfort Terrace, Dublin 2

Respondent 2: Mr. Donough McDonough BL, instructed by Peter McGuinness of Esther McGahon, McGuinness & Co, Kilgar House, Jocelyn Street, Dundalk, Co. Louth

The decision of the Tribunal was as follows:-

Full evidence was taken on the first day of Hearing, however due to the addition of a second respondent it became necessary to hear all evidence again on the second day.

Appellant's Case:

The appellant gave evidence and explained that he commenced employment with respondent 1 on April 1st 1996 as a driver. He had a good working relationship with respondent 1. In April 2008 the managing director met with him and informed him that the route he drove was up for tender again but it would not be a problem. He was also told that there would be work for him but he would have to do a course in handling hazardous chemicals. Then on 17th May 2008 the Managing Director met him and said there was no more work for him. He was being let go. He was told he would be paid redundancy and a minimum notice payment.

He was very upset about this. He contacted a friend about getting work. The following day he met the managing director of respondent 2 about a job. He worked out a weeks notice. This man told him on the following Sunday that he had the job. He finished his old job on Saturday and started work again on Monday.

In his new job he starts work earlier and finishes later and he is paid €1 a week less than he received.

Respondents' Case:

The managing director of respondent 1 gave evidence. Initially he had one route with the tendering company and in the end he had three routes. The appellant drove one of these routes. He drove at night.

In mid-April 2008 he had an unannounced visit from the operations manager of the tendering company. He was informed that his work with the tendering company was finished. One route finished immediately and the others would be put up for tender the following week. Financially the company was exposed because of significant debts. The operations manager was out to do him harm. The operations manager told him that he must pay the appellant redundancy so that he would not go to a new employer with that service. It was not the first time the operations manager had threatened him with loss of the tender.

On 26th April 2008 he met the managing director of respondent 2 at a conference and he told him about the operations manager's visit to him. The managing director of respondent 2 said the appellant would be welcome to come and work for him.

On the 14th May 2008 the linehaul coordinator of the tendering company phoned him to confirm that the contract was lost. She did not give a reason. He got two weeks notice that the contract would end on 30th May.

The managing director of respondent 1 did not interview the appellant before employing him. It was a condition of the tender. The appellant did not have a contract of employment. He was not invited to tender to keep the routes. The operations manager told him to make the appellant redundant. He knew the appellant had work with the managing director of respondent 2.

When he met with the appellant on 17th May 2008, he did not let him go. He knew the appellant had a job with respondent 2 to go to. Also he would have liked to keep the appellant on. He ended the tender a week before the end date suggested by the tendering company.

The operations manager of the tendering company gave evidence. When a tender is given a list of

conditions attaches. He did not insist on the appellant being employed. The operations manager did not recall his meeting with the managing director of respondent 1 being unannounced. It was the first time he was informed about the loss of a route. He went to the meeting to discuss finances. The managing director of respondent 1 wanted an increase but he wanted to decrease the price. For that reason the operations manager did not ask the managing director of respondent 1 to tender again for the routes. He did not tell the managing director of respondent 1 to pay the appellant redundancy. He did say to him the appellant is a good man and do the right thing by him.

The managing director of respondent 2 gave evidence.

Determination:

The Tribunal has given full consideration to the submissions of the parties in this matter. Respondent 1 in this case contends that the appellant was transferred to respondent 2 on the 30th. Day of May 2008 and that S.I. No. 131 of 2003 the European Communities (Protection of Employees of Transfer of Undertakings) Regulations 2003 applied to this transfer. Their contention is that the Regulations automatically transfer the appellant to respondent 2 or in the alternative that the appellant, on his own initiative, voluntarily left his employment.

The facts of this case are quite clear. The appellant worked on a truck run that was to be removed from respondent 1 and was to be given to respondent 2 on the 30th. Day of May 2008. Respondent 1 lost the contract and had no part in the assignment of that contract to respondent 2. The Regulations specified above incorporate the requirements of the EU Directive, which deals with the" transfer of an undertaking". In a case involving the Directive there must be a transfer and this implies that there must be a Transferor and a Transferee. In the Regulations Transferor is defined as "…. any natural or legal person who, by reason of a transfer within the meaning of these Regulations, ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;". Transfer is described as …"the transfer of an economic entity which retains its identity;". It follows that all that is required for a natural or legal person to become a transferor is that they cease to be the employer and for the transferee that they become the employer with certain exceptions. The Directive was intended to have the effect of preserving the rights of the employee where an employer disposed of an undertaking or part of an undertaking to another employer. This works well in cases that involve a simple transfer of an undertaking but difficulties do arise in some circumstances. One of these difficulties that arises is where an undertaking is taken from one employer and given to another i.e. where a contract is in the gift of a third party. This situation usually occurs where an undertaking decides to contract out a service that it had previously had done " in house" or where a lease of an undertaking is given to a lessee and is later taken back by the lessor and given to another lessee I.e. Ny Melle Kro 287/86(1987)ECR5465 and Daddy's Dance Hall 324/86(1988)ECR 739. When this is initially done and when it complies with the requirements expostulated in the Spijkers case 24/85 (1986) ECR 1119 i.e. whether " the business in question retains its identity inasmuch as it is transferred as a going concern, which maybe indicated in particular by the fact that its operation is actually continued or resumed by the new employer with the same or similar activities", then the Directive applies. In order to establish if the undertaking is a "going concern" means "it is necessary to consider all the facts characterising the transaction". These would include:

1. whether the tangible assets were transferred,
2. whether the intangible assets were transferred,
3. value of the intangible assets at the time of the transfer,

4. whether a majority of the employees were taken over by the new employer,
5. whether its customers were transferred.
6. the degree of similarity between the activity carried on before and after the transfer,
7. the period, if any, for which the activity was suspended.

The Court has said that no single factor was decisive and it was up to the national courts to give the necessary weight by its own assessment of the above and any other factor that may be present in the case. The Court has also held in the Merckx case C-171/94 and 172/94 (1996)ECR 1-1253 that "it is not necessary for there to be a direct contractual relationship between the transferor and the transferee". This is the principal arising out of the Daddy's Dance Hall case where the Court argued that the circuit of the transfer can be traced by finding that the transferor gives the lease to the first transferee and then takes back the lease from that transferee to the transferor and then gives it to the second transferee. It had been argued that a second generation contract such as in the above case does not apply and this was argued in the Ayse Suzen case (1997) ECR 1-1259 where it was agreed by the Court that a changeover of contractors per se does not amount to a transfer however it also stated that where a concomitant transfer from one undertaking to another of significant tangible and/or intangible assets or the taking over by the new employer of a major part of the workforce can amount to a transfer of undertaking.

In the *Oy Liikenne AB* v *Liskojarvi and Juntunen* case (2001) IRLR 171 (ECJ) the European Court held that where the economic entity is an asset reliant function a different enquiry must be made and the transfer of assets become much more important which was not the situation in that case where the transfer of the workers was the major consideration. That case concerned a competitive tendering exercise resulting in the change of bus operator on a number of bus routes in Helsinki where 33 out of 45 drivers were taken on by the new operator on less favourable conditions to what they had previously enjoyed. It was held that where the undertaking depends on the use of substantial assets i.e. plant, machinery and equipment the provision of the service could not fairly be regarded as an activity based essentially on manpower alone and therefore other factors have to be taken into consideration. It was held that as it was impossible to run the service without busses and as they were not transferred there was no transfer of undertaking although most of the employees were taken on.

In this case the appellant was an employee of respondent 1. He was a driver employed on a particular run for the tendering company and respondent 1 had another two drivers operating on runs for it. Respondent1 had five other employees working for it and driving on other work not involving the tendering company. It is common case that no assets, tangible or intangible, belonging to the tendering company were transferred from respondent 1 to respondent 2. Respondent 2 had to provide new trucks and trailers to fulfill the contract. The tendering company was involved in the matter before and after the transfer and it was essentially the same activity before and after. There was no break in the activity as the appellant finished on the Saturday and began working on the following Monday.

None of the workforce involved in the activity save for the appellant transferred to the new entity. None of the assets, tangible or intangible, respondent 1 were transferred save for the profit from the contract. When this is weighed against the other factors mentioned above the Tribunal does not consider it to have sufficient significance to outweigh them. It follows that the Transfer of Undertaking Directive does not apply in this case.

The Tribunal must now look at the question of whether the appellant is entitled to a redundancy payment. The evidence to the Tribunal was that on the 15th day of May 2008 the MD of respondent 1 rang him and asked him to meet him in Dublin on the following Saturday. At that meeting the appellant was informed that the contract with the tendering company had been lost and that an alternative position with his employer as a tanker driver had also fallen through. This latter position was the alternative employment on offer to the appellant from respondent 1 when the former was first told that the contract was coming to an end. The appellant then went to the new contractor, respondent 2, and secured the position of driving on the same route he had with respondent 1 with a substantially similar wage. The appellant finished with respondent 1 two weeks after the meeting of the 17th day of May 2008 and began with respondent 2 on the 30th day of May 2008, two weeks later. Based on the evidence given to the Tribunal it is clear that the position held by the appellant with respondent 1 was no longer there on the 30th day of May 2008 and that his position was therefore redundant. In the circumstances the Tribunal must find that the appellant is entitled to succeed in his claim under the Redundancy Payments Acts 1967 to 2003, based on the following information:

Date of Birth:	14 January 1954
Date Employment Began:	01 April 1996
Date Employment Ended:	30 May 2008
Gross Weekly Pay:	€430.00

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

The appellant was given two weeks notice of termination of employment. He was entitled to six weeks under the Minimum Notice and Terms of Employment Act 1973, therefore he was entitled tofour weeks notice under this Act, however he obtained work immediately following his dismissal ata rate of pay €1 less than he had previously and this entitles him to €4.00. under this heading inaccordance with Section 12 (1) of the Act.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)