

EMPLOYMENT APPEALS TRIBUNAL

APPEAL OF:
EMPLOYEE - *appellant*

CASE NO.
RP1350/2009

against

EMPLOYER - *respondent*

under

REDUNDANCY PAYMENTS ACTS, 1967 TO 2007

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr M. Gilvarry

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this appeal at Donegal on 8th February 2010

Representation:

Appellant: In person

Respondent: Peninsula Business Services (Ireland) Limited, Unit 3, Ground Floor, Block S, East Point Business Park, Dublin 3

The decision of the Tribunal was as follows:-

Background

The appellant received a redundancy payment for the period August 2002 to April 2009, but was seeking additional redundancy for the period October 1997 to 13th August 2002 he maintains there was a transfer of under taking.

Appellant's case.

The appellant gave direct sworn evidence, he commenced employment with MBL in October 1997. It was a steel fabrication business and was based in a workshop in Newstowncunningham. He continued to be based in this workshop until he was made redundant in April 2009. In 2000 the sons of the directors took over the business MM and BS and traded under a name MSE. In 2002 the business was taken over by a HF and TD. In 2002 they were told that HF and TD were taking over the business and that the employees would continue their employment, this arrangement started in August. He never received a P45 in 2000, or in 2002. He had never received a contract of employment. He had witnessed a lease agreement between a MS a director of MBL and MSL on the 13th August 2002 for the premises, he explained he was just asked to sign it; he had not read nor asked what he was witnessing. During the course of his employment his bosses were as follows, WM up to 2000, MD and MS up to 2002 and from August 2002 onwards TD and HF. His wages did not change in 2002.

During cross examination it was put to him that in 2000 he was aware that he was answering to

different bosses, he explained he continued on as normal in work, he knew that the company had changed its name. He was asked to recall a meeting on the 26th July 2002 where TD had come down to the canteen and informed them that when they returned from their annual leave they would be working for him and HF. The appellant denied that TD had said they might be working for them but he knew they were going to be working for a new owner but his employment would continue.

He did not recall signing the lease, he had been called up to witness number of things over the course of his employment but never questioned what he was witnessing. He was asked to recall the meeting of the 16th January 2009. He explained a lot of things were going on at that time, he had received training, also received an employee handbook and terms and conditions of employment. He could not recall word for word what they were told when they were issued with these documents. He did recall that they were to read through the terms and conditions and if they had any queries they should ask about them. He did not read the terms and conditions of employment. At the time, C had said 2002 was his commencement date however the appellant did not know at the time what C meant. He accepted that it was his signature on the terms and conditions of his employment. He did not receive his P45 in 2002 when his employment had ceased with MSE and was only seeing this P45 for the first time today.

When he was made redundant he assumed he would be receiving 11.5 years but it was only then he was informed that he had been employed with his current employer since 2002. He had thought he was in continuous employment since 1997 and reiterated that he had received no P45 in 2002.

Respondents Case

TD gave direct sworn evidence on behalf of the respondent. He had never worked for MSB and commenced working for MSE in January 2002 as the office manager. He was responsible for the books, processing purchases, sales invoices and wages. On the 26th July 2002 he informed the employees the MSE was ceasing trading as they were insolvent, also that he and HF hoped to form another company and the employees would have the option to stay or to go. On the 26th July 2002 he knew he had no employment unless he and HF took over the company. The directors of MSE did not inform their employees of the situation. The decision to form this company was taken over the summer break. MSL a new company was formed with this witness, B and HF taking a third share, MSL commenced trading on the 13th August 2002. They took a lease out on the building, and continued to use MSE machinery that they would purchase in the future. He did not recall the appellant witnessing the lease. P45s were issued at the time from MSE. He could not recall issuing the employees with these P45s. He rang Revenue to arrange the issue of new tax deduction cards.

He explained again that MSE were insolvent, he was unemployed if they did not form the new company MSL. There had been no transfer of assets or liability between MSE and MSL. They had purchased some machinery from MSE in May 2003.

In reply to questions from the Tribunal as to how an insolvent company gave MSL free use of the machinery for eight months, he explained that was because one of MSE's directors had paid their debts and none of the employees has applied for redundancy. At the time MSE had 12 employees most had been there over 2 years he did not know why none of them had applied for redundancy. He was not aware of any cross over of customers from MSE to MSL, and they received very little repeat business from MSE clients. They had taken over one of MSE's contracts, which was worth about €170,000.00. The twelve employees of MSE's all became new employees of MSL, they were not issued with new contracts as they were doing the exact same work as before and there were no changes in their terms and conditions of employment.

Next to give evidence on behalf of the respondent was HF. He explained that MSB commenced as

a steel fabrication plant and ceased trading in 2000, he was not aware of the change to MSE until he noticed the name change on his pay check. He was employed as the shop foreman. In 2002 things were not going well for MSE there was not the volume of work being done for the expenses being incurred. There was no stock in the workshop and money was not coming in from clients. On the 26th July 2002 he thought he had no employment so he and TD planned to get another company going. He was at the meeting where TD had told the MSE's employees that they were ceasing trading and that witness and TD were going to get another company going if they wanted a job.

The new company MSL commenced trading on the 13th August 2002. He did not recall obtaining the lease on the building as he looked after the workshop. He recalled the meeting in the canteen of the 16th January 2009. C had given the employees a talk and had explained to them quite clearly in respect of the terms and conditions of employment being issued. In reply to questions from the Tribunal he confirmed that neither he nor none of the other employees had sought redundancy from MSE.

C gave evidence that he commenced working for MSL in September 2008. He had a background in HR and MSL had no Health and Safety nor terms or conditions in place. He set about with the help of an outside agency introducing Health and Safety and HR procedures to MSL. On the 16th January 2009 he issued all the employees with Terms and conditions and employee handbooks. He informed them not to sign them till they had read them. The appellant and two other employees informed him of their start date that was inserted in to their terms and conditions. He had no knowledge of the lease between MSE and MSL. He gave evidence of the appellants holiday pay.

Determination

The Tribunal finds that a transfer of undertaking took place therefore the appeal under the Redundancy Payments Acts, 1967 to 2007 succeeds. The Tribunal determine the commencement date of the appellant to be October 1997 and accordingly awards the appellant the balance of his redundancy lump sum, which is to be calculated on the basis of the following criteria:

Date of Birth:	13 th November 1973
Date of Commencement:	October 1997
Date of Termination:	8 th April 2009
Gross Pay:	€414.00

It should be noted that the appellant has already received redundancy in respect of the period 13th August 2002 to 8th April 2009. 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)