

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:
EMPLOYER - *appellant*

CASE NO.

Against

EMPLOYEE – *respondent*

TU11/2009

&
EMPLOYEE – *respondent*

TU12/2009

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

EMPLOYEE

&
EMPLOYEE

Against

Langan Couriers Limited
Oranmore Business Park, Oranmore, Co Galway

under

**EUROPEAN COMMUNITIES (PROTECTION OF EMPLOYEES ON TRANSFER OF
UNDERTAKINGS) REGULATIONS 2003**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P Hurley
Members: Mr W O'Carroll
Mr T J Gill

heard this appeal at Loughrea on 30th June 2010 & 25th August 2010

Representation:

Appellant(s): Mr Michael Molloy
Blake & Kenny Solicitors
2 St Francis Street, Galway

Respondent(s): 1st Respondent:
Ms Diane Jackson

SIPTU

Galway No. 3 Branch, Forster Court, Galway

2nd Respondent:

Mr Owen Swaine

Solicitor

Swaine Solicitors, 14 Fr Griffin Road, Galway

The decision of the Tribunal was as follows: -

This case came before the Tribunal by way of an employer appealing against the decisions of a Rights Commissioner under the Protection of Employees on Transfer of Undertakings Regulations refs: (r-074804-tu-09 & r-074810-tu-09).

Appellant's Case:

The Transport Manager of the transferor, a courier company, gave evidence that the respondents (hereinafter referred to as the employees) were notified of the transfer by him on Friday 1st August 2008 and the following Monday 4th August 2008. He gave all employees a copy of the transferee's contract of employment. There was no written contract of employment under the transferor. All of the employees refused to sign the contract, as they believed they would be worse off under the conditions stated therein.

The Transferor, a sole trader, gave evidence that he understood that the first named employee was informed of the transfer not on Monday 4th August, but on Tuesday 5th August as the Monday was a public holiday. He negotiated with the transferee company to ensure that the drivers would not be worse off 'net' after the transfer.

The Accountant for the transferee gave evidence that he negotiated with the Transferor regarding the wages of the employees. He contended that without that negotiation there would have been a greater gap between their wages on transferring to the new company. He contended that the wages being paid by the Transferor were out of line with the industry. The Transferor was also including €175.00 per week of subsistence pay as part of the total taxable pay and paid PRSI on it. The Accountant wanted to separate the subsistence payment, as it is a tax-free payment.

The Accountant also looked at the routes the drivers were on and he could not foresee that their hours were necessary going forward. He changed the structure to a 39-hour week instead of the hourly sheets submitted by the drivers at the end of a week. He contended that the drivers were not worse off because of this, as they would be paid for 39 hours every week. The transferee did not pay overtime; employees were paid a composite rate.

He understood that the Transferor held meetings with the employees after he had provided copies of the contract of employment, which was in the latter part of August. The transfer was effected on 1st September 2008.

In August 2009 the second named employee requested to have his pay reverted to the system employed by the Transferor, which was duly done. The employee's average wage with the Transferor in 2008 was €582.24 per week. The employee's average net wage with the transferee company from January to August 2009 was €608.58 per week. When his wages were changed to the old system his average weekly net pay reduced to €540.00 per week. At the end

of 2009 the employee requested that his wage structure change back to the transferee's system. All employees took a pay reduction in 2010 due to the financial circumstances of the company.

The transferee company did not track the hours worked by the employee. When the employee reverted to the old system the employee had to keep timesheets. His hours had reduced by approximately 10 hours per week with the new company but he was receiving a greater net wage.

The first named employee's average weekly net wage in 2008 with the Transferor was €524.66. His average weekly net wage with the transferee company was €565.90 until the termination of his employment at the end of December 2008.

During cross-examination the Accountant agreed that the Transferor's payslips to the employees did not indicate that the total basic pay included €175.00 subsistence payment. He disputed that the employees' terms and conditions were changed but rather contended that the calculations were changed. He did not discuss the changes with the employees.

The tachograph reports of the first named employee's hours had since disappeared. He was carrying out the same routes and therefore his basic hours shouldn't have varied too much. He had noted that the timesheets submitted by the employee to the Transferor were found to be excessive and the Transferor paid a reduced amount. The Accountant was not aware that the employee kept a record of his hours.

The Managing Director (MD) of the transferee company gave evidence that the Transferor's business transferred to his company on September 1st 2008. He believed that the employees had been notified on the Friday of 'Galway Race Week'. He was on holidays at the time. The Transferor paid all outstanding holiday pay due to the employees before the transfer. The MD said that the letter he sent to the Transferor on September 8th 2008 referred to the 'contracts of employment issued last week' because that was when the transfer took effect.

The second named employee who reverted to the old pay method had initially been on a Dublin route, but this route was lost and redundancies were made. As the employee was one of the longest serving employees with the Transferor the MD put him on the Galway route, which was shorter, but left him on the same pay. The first named employee's route did not change during his employment with the transferee company. He did not ask to revert to the old method of pay. Neither employee complained of being paid less money for more work.

During cross-examination the MD stated that the second named employee worked from 3am to 2pm when on the Dublin route and 8am to 6pm when on the Galway route. The start time was calculated from when the engine was switched on. Loading time was not accounted for, but unloading time in the evening was. He worked 20% less hours in 2009.

He had no documentation regarding what hours the first named employee worked after the transfer. He did not accept that the record the employee kept for his own reference was accurate. The employee was required to return the truck to the depot in the evenings instead of keeping it at home as was the practice with the Transferor.

The MD did not issue any written notification of the transfer to the employees. He agreed that he had received a letter from SIPTU on behalf of their members regarding the transfer, but he had not responded to it.

Respondent's Case:

The first named respondent gave evidence that he worked as a HGV driver for the appellant company. He lived in Offaly. He kept the truck at home as he made a call every evening to Birr and brought the load to the depot in Galway at 6am the following morning. The hours could vary if he was waiting for a load. He kept time sheets and submitted them to the Transferor to calculate his wages. His wages were calculated to the time he finished. He was paid €13 per hour. A basic week was 39 hours, beyond that overtime was calculated at a rate of time and a third.

The Transferor informed him of the transfer on September 1st 2008 when he arrived at 6am. He was given a copy of the contract. He asked if anything was going to change and he was told it wouldn't. However when he later read the contract on he saw that his pay would change. He read that his basic wage with the transferee company would be €400 per week whereas it had been €507 with the Transferor. He asked the Transport Manager about his pay and about not being paid for overtime. He was told that no more money was due to him. No one explained the changes to him. He met his colleagues and they decided to join SIPTU.

The transferee company did not take timesheets from the drivers, he was told it was recorded on a tracking device, but he continued to keep them for himself. He considered that his weekly loss was €107. When he had to leave the truck at the depot in the evenings he then had to drive home in his car, which cost him €80 in fuel every week.

He was paid holiday pay in August by the Transferor, but he was not told why. He knew he was due holidays but was not on holidays at the time. He was dismissed from his employment on December 19th 2008.

During cross-examination he accepted that his average net wage with the Transferor in 2008 was €524.66 and that the net average with the transferee company was €565.90. However this did not include overtime. He worked an average of 50 hours with the Transferor. He agreed that there were often disagreements with the Transport Manager about the hours he claimed and he often reduced them as a concession. Five hours were taken off drivers every week in respect of their break. He did not accept that he received more pay when he was with the transferee company. His average gross including overtime was €639.00 with the Transferor. He disputed the contention that he met the Transferor on August 5th 2008 in regard to the transfer. He agreed that the arrangement with the truck changed after the transferee company lost a contract.

The second named respondent gave evidence that was paid €14 per hour for a basic week of 39 hours when working for the Transferor. He was paid time and one third for overtime. He became aware of the transfer on Friday August 29th 2008. The Transferor and the Transport Manager gave him a copy of the new company's contract. They told him that there would not be any changes and showed him a figure on the back, but he later discovered that he was taking home less pay.

He complained to the Transport Manager as he was receiving €507 per week regardless of hours worked. He considered that the gross difference between his pay with the two employers was a loss of €337 gross per week when average overtime was considered. The MD of the transferee company told him that the subsistence payment compensated him as he was paying less tax. He still considered that he was at a loss of €16,000 over a two-year period.

During cross-examination he agreed that the figures produced suggested that he was better off net with the transferee company but he didn't think he was. He asked the MD of the transferee company to revert his pay to the Transferor's method of calculation. He thought he would be paid overtime but he wasn't. He believed it placed him in a higher tax bracket and so he asked to revert to the transferee company's method of calculation as he received more net pay that way.

He disputed the Transferor's contention that he was informed of the transfer on August 1st 2008. He did not know why he was paid extra money in August 2008.

A witness for the respondents' gave evidence that he was an employee of the Transferor when the transfer occurred. He was made redundant six months later. He was notified of the transfer on Friday August 29th 2008. He considered that his wages were reduced by €150 per week. He believed that because of the accounting method his redundancy payment was €1,500 less than it should have been.

Determination:

The Tribunal, having heard all the evidence and having carefully examined all the documents submitted, is of the view that there were clear breaches of Regulation 8 of the European Communities (Protection Of Employees On Transfer Of Undertakings) Regulations 2003 in that both employees were not given the requisite period of notice in writing. The evidence given by the employees was that they were verbally informed of the transfer on August 29th and September 1st 2008 following no attempt made to set out the terms of the transfer in writing. There was a blatant breach of Regulation 8(3) & (2) in that respect, and accordingly, the Tribunal upholds the decisions of the Rights Commissioner in respect of Regulation 8 and awards the employees €2,000 (two thousand euro) each.

The Tribunal finds that there was also a breach in relation to Regulation 4. While the Tribunal is satisfied on a perusal of detailed, minute oral and documented evidence presented that there was no material change to or unilateral alteration of the take home pay of the employees, the Tribunal is of the view, their statutory entitlement to holiday pay was prejudiced by the manner in which the figures were calculated subsequent the transfer.

Taking all matters into consideration the Tribunal varies the decision in respect of Regulation 4 and awards €634.00 (six hundred and thirty-four euro) to the first named employee (Tribunal ref: TU11.09, RC ref: r-074804-tu-09) and €1,314.00 (one thousand three hundred and fourteen euro) to the second named respondent (Tribunal ref: TU12.09, RC ref: r-074810-tu-09) and instructs the employer to reinstate the contractual conditions applicable to the employee on the date before the transfer. The employee should be paid subsistence when applicable.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____

(CHAIRMAN)