EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:		CASE NO.
EMPLOYEE	*-claimant*	UD497/2009 RP518/2009 MN516/2009 WT219/2009

Against

EMPLOYER *-respondent*

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr P. Hurley

Members: Mr. M. Forde
Mr. T. Kennelly

heard this claim at Limerick on 25th November 2009

Representation:

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Claimant: Ms. Caroline Keane, Sweeney McGann, Solicitors, 67 O'Connell Street, Limerick

Respondent: Mr. Duncan Inverarity, Byrne Wallace, Solicitors, 2 Grand Canal Square, Dublin 2

The determination of the Tribunal was as follows:-

Respondent's Case

The respondent is a large retail operation that was both tenant and landlord of the shopping centre the claimant was employed in. The Respondent contracted out the Management of the shopping centre to a specialist management service provider who in turn employed the claimant. The respondent terminated the contract they had with the management service provider.

The Property Manager (DC) is responsible for all the properties where the respondent is the landlord. The duties include responsibility for Supervision, Budgets, and Contract Payments for the Security, Cleaning and Maintenance. Normally the respondent would take responsibility for the premises from its inception, this premises was the exception.

The respondent terminated the contract with the management service provider by written notice on the 18th of December 2008. DC requested the claimants C.V. on the 13th or 14th of January in order to circulate it internally to ascertain if he was suitable for a role with the respondent. DC arranged a meeting with the claimant for the 22nd of January and issued him with a draft contract of employment with the respondent. At the meeting they discussed the detail of the contract, a possible start date and the terms and conditions of employment and the fact that he would start with the respondent as a new employee with no continuity of service.

It was decided internally that the claimant would not be employed; all of the management processes would be taken on internally. DC phoned the management service provider to inform them of this and sent a letter dated 30th of January 2009 emphasising that,

> *"To avoid any doubt, (the respondent) does not accept (the claimant's) employment transfers on the 1st of February 2009."*

All the management functions are now performed by DC or the retail managers on the premises; the management office on-site is now closed. There has been no increase in the respondent's staff levels as a result of not employing the claimant.

Cross-examination

The net points from the contract discussions with the claimant were the job specification, VHI benefit and the probation period requirement. DC made an undertaking to clarify the issues and revert to the claimant by the 26th of January 2009. On the 27th of January DC informed the claimant that the matter was now with the respondent Directors for consideration. All further discussions had to be put in writing; the claimant did not have the opportunity to speak to the respondent's HR department. The claimant appeared for work as normal on the 2nd of February2009. DC told the claimant he had one hour to gather his belongings and leave as he was no longeremployed there and that his point of contact should be the management service provider.

Claimant's Case

The claimant was the Shopping Centre Manager for the management service provider contracted by the respondent. The claimant was informed that the respondent had terminated the contract with the management service provider but would be retained as per the Transfer of Undertakings legislation.

On the 22nd of December the claimant received a phone call from DC advising him that he wanted to discuss his employment. They discussed the claimant's future and decided to talk more after Christmas. The claimant received a text requesting his C.V. on the 12th of January 2009.

The claimant met with DC on the 22nd of January where they scrutinized the details of the contract. The claimant assumed his employment had been transferred and the differences between his old and new contract would be resolved. One of the problems the claimant had was the probationary period requirement as it was a transfer of employment and the claimant had already been employed for years. The claimant expected to hear from DC by the 26th of January regarding the contract details. On the 27th of January DC informed the claimant that the matter was with the respondent's Directors. On the 30th of January a security guard on the premises approached the claimant and

'wished him luck' as he was leaving. The claimant arrived for work as normal on the 2nd of February 2009. DC phoned the claimant and told him he had an hour to remove himself from the premises and that 'he was sorry it was the Director's decision not his.' The claimant has not found employment since this date.

Cross-examination

The claimant did not pursue the management service provider for Redundancy as he had received legal advice regarding the application of the Transfer of Undertakings legislation. The claimant has witnessed similar situations to his own employment and regarded the transfer as a normal practise. The claimant understood that he was 'negotiating' his contract with DC prior to the transfer on the 1st of February. The contract addressed to the claimant dated the 21st of January 2009 opened with;

> *"We are pleased to offer you a position with (the respondent.)Your commencement date will be XXXX."*

The claimant appeared for work as normal on the 2nd of February as he did not receive any notice that his employment was being terminated. DC had informed the claimant that his employment would definitely be transferred.

The HR Manager (JC) with the management service provider was asked by the respondent for the claimant's Terms and Conditions of Employment and confirmation of the claimant's salary. On the 28th of January JC spoke to the respondent; he was advised by DC that the claimant would not be employed by the respondent and to put any further queries in writing. The respondents HR department did not respond to efforts made by JC to contact them. JC wrote to the claimant statingthat the management service provider disagreed with the respondent's decision regarding his employment. On receipt of the letter from DC dated the 30th of January JC advised the claimant thatthe transfer of employment would not be proceeding. DC phoned on the 2nd of February wonderingwhy the claimant was in work to which JC replied *"I don't know he's your employee now."*

Determination

In arriving at a determination in this case the Tribunal would adopt the approach outlined in the Tribunal's previous determination in *Cannon v Noonan Cleaning company Ltd and Cps CleaningServices UD 200/97.* In that case the Tribunal' s exposition of the precepts of European law and itsinteraction with national law may be considered instructive. The tribunal stated in that case :-

> *Directives in EU law provide for the minimum legislation that a Member state may enact in the particular area that they are intended to affect. They have direct applicability but not direct effect in that a member state is required to enact legislation to give effect to the Directive. ... In deciding this case the Tribunal must not confine itself to an interpretation of Directive alone but must give consideration to the impact of an enhanced protection that Irish law would give workers in such a situation not only in respect of S.I. 306 but any other legislation since enacted. ... A tribunal is bound by the legislation it operates under common law and constitutional law principles and any decisions made by a higher jurisdiction including the European Court and must only operate within the terms of such parameters.*

The tribunal has had the benefit of the parties' evidence, and also of the written legal submissions of the parties' legal representatives and of previous redacted cases submitted by the parties in support of their respective submissions. The tribunal would however emphasise that previous Determinations of the Tribunal are not necessarily of precedent value but may be of persuasive value.

The tribunal would distinguish the transactional and factual background to the present case from that pertaining in the case of *Cannon v Noonan Cleaning company Ltd and Cps Cleaning Services UD 200/97,* relied on by the Respondent in its written submission, in that the respondent company in the instant case, terminated the management contract of the claimant's employer and did not transfer or assign that contract to another contractor but rather took charge of the management services itself. This statement of fact is common case in the parties' written submissions.

The management services provided or carried out involved contract payment for security cleaning and maintenance and budgets. The claimant submits that this activity is an economic activity capable of being the subject of a transfer and thus of benefitting from the provisions of the Directive as transposed in national legislation. The claimant was employed as centre manager.

The importance of the claimant's position was such that the Respondent interviewed him for a 'new' position as centre manager to be installed once the transfer of management functions had been effected. To this end the Respondents wrote to the claimant on 21st January 2009 issuing him a draft contact and a position with the company. While this letter is interpreted by the respondent as being in the nature of a draft document and asserts that the claimant's employment did not transfer to the respondent on the cessation of the services contract with the management service provider, the claimant's evidence is that he was at all times in negotiation with the respondent to finalise the terms of his pending employment with them.

The irreducible fact in the narrative portrayed is that the claimant was never employed by the respondent, either prior to or as a consequence of the transfer of the management services to the respondent's head office

In *Schmidt v Spar und Leihkesse der Fruheren Amter Bodesholm* [1994] IRLR, relied on by the claimant in his solicitor's written submission the ECJ ruled;

Article 1(1) of Council Directive 77/187 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses is to be interpreted as covering a situation in which an undertaking entrusts by contract to another undertaking the responsibility for carrying out cleaning operations which it previously performed itself, even though, prior to the transfer, such work was carried out by a single employee.

Neither the fact that such a transfer relates only to an ancillary activity of the transferor not necessarily connected with its objects, nor the fact that it is not accompanied by any transfer of tangible assets, nor the number of employees concerned is capable of exempting such an operation from the scope of the directive since the decisive criterion for establishing whether there is a transfer for the purposes of that directive is whether the business in question retains its identity, as indicated in particular by the actual continuation or resumption by the new employer of the same

or similar activities.

In the instant case the activity in question was more economically sophisticated than a simple cleaning contract - the *leitmotif* in the *Schmidt* case - and accords more closely with the notion of a stable economic activity, not ephemeral in nature. The management of a well established shopping centre, in the view of the tribunal is a significant economic activity and while it may as such be capable of coming within the ambit of activities intended to attract the application of the Directive, the precepts of the *Süzen* case qualify to a very significant degree the circumstances in which a transfer of undertaking may be said to have occurred.

The respondent relies on the case of *Süzen v Zehnacker Gebaudereingigung GmbH Kranken Hausservice* [1997] IRLR and in particular the following passage cited by the tribunal in *Mary Cannon v Noonan Cleaning Company and CPS Cleaning Services ltd* UD 200/97.

> *The decision of the Court in the Süzen case is that the Directive does not apply if there was no concomitant transfer from one undertaking to another of significant tangible or intangible assets or the taking over by the new employer of a major part of the workforce, in terms of their numbers and skills assigned by his predecessor to the performance of the contract*

to assert that the Directive has no application in the instant case.

It is clear that from the evidence given to the Tribunal that the business transacted by the management company post transfer was significantly different in terms of substance location and function to that carried on by the management service provider. The claimant states that the customers of the shopping centre would largely be unaware of the transfer transferred to the Respondent on the cessation of the management service provider's contract. The respondent states in their submission that the office previously occupied by the Claimant has been closed and that management functions are carried on by the respondent's staff in the Shopping Centre and their head office in Dublin.

In these circumstances the economic integrity of the management company was not preserved.

In such circumstances a Transfer of Undertaking did not occur and the Claimant's claims against the respondent under the Unfair Dismissals Acts, 1977 to 2007,Redundancy Payments Acts, 1967 to 2007, Minimum Notice And Terms of Employment Acts, 1973 to 2005 and the Organisation of Working Time Act, 1997 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)