

EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:

EMPLOYER

CASE NO.

- *appellant* TU14-TU20/2009

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

EMPLOYEE
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EMPLOYEE -*respondents*

under

**EUROPEAN COMMUNITAIES PROTECTION OF EMPLOYEES ON TRANSFER OF
UNDERTAKINGS REGULATIONS 2003**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L

Members: Mr J. Flanagan
Mr C. Ryan

heard this appeal at Dublin on 17th May 2010
and 23rd September 2010

Representation:

Appellant: Tom Mallon BL instructed by Rhona Murphy and Mr. Eamonn McCoy, Ibec,
Confederation House, 84/86 Lower Baggot Street, Dublin 2

Respondent: Marguerite Bolger BL instructed by Dundon Callanan, Solicitors, 17 The Crescent,
Limerick

This case came before the Tribunal by way of an employer appealing against the Decisions of the Rights Commissioner ref:(r-068473-tu-08/MMcG, R-068477-tu-08/MMcG, r-68481-tu-08/MMcG, r068485-tu-08/MMcG, r-068489-tu-08/MMcG,r-068493-tu-08/MMcG, r-068497-tu-08/MMcG)

The decision of the Tribunal was as follows:-

Respondent's case

One of the respondents gave direct sworn evidence on behalf of all of the respondents. The respondents were employed as announcers at a greyhound stadium. She is an actor and in the mid 90s she commenced employment with the appellant. She described their typical nights shift in the stadium. She would arrive at 19.30, give announcements on the weight variations, then the jackpot regarding the pick 6 or pick 4 or the carryover pool from the previous night. She would also announce what races they were on. They would be encouraged by the tote staff to persuade the punters to bet on these. They would also greet punters and welcome any special events, they also would make the safety announcement and they may have to give any change in the line up for the night. At about 19.50 they would commence talking about the first race and every 10 to 15 minutes from this there would be a race, the last race took place at 22.20. They would give the runners of each race and would announce that they were in the parade room, then they would name the dog and the trainer in each of the traps and would also announce the start of the race by saying "and there off". They would recommence announcing when the tote results were in for the race.

In 2000 commentary was introduced to the races. They were not informed of this development, suddenly there were two voices theirs, and the commentators. (The commentating was provided by a father and son hereinafter referred to as Company A). She requested a meeting regarding this, but this meeting never happened. After this they would announce that the dogs were approaching and being placed in the traps, then the bell would ring and the commentator would commence. The commentator would then give the results of the race and then they would recommence announcing with the tote results. Between the races they would be plugging the jackpots, telling the punters how to fill a bet, explaining wagers and filling time. They would only do the family/birthday announcements around the eighth race. Ninety five percent of the time it was their voices heard in the stadium.

When the tender was put out they did not apply. This job was very important to her as an actor, it was a large proportion of her income and it allowed her to continue paying her PRSI stamps. The respondents would meet and together they would arrange the rosters months in advance. She gave an example when in 2002 to 2005 she was working in Galway for six months and while in Galway she was not working for the appellant but from August to February of these years she was doing 2 to 3 nights at the stadium.

Under cross-examination she explained that her primary working role was that of an actor, she also teaches drama, shows houses and does announcing. Most of her time is taken up with acting. She has never applied for a job or has been invited to do commentary. She had never seen the commentators in an acting role. When it was put to her that she was an actor and they were commentators she replied I suppose so.

All she heard the commentators doing was the thirty seconds of each race, she was aware that they received live feed from Cork and that the races in the country were all synchronised. She was also aware that Company A wrote the racecards she would not have the knowledge to do this, however the role of commentating was in their capabilities as actors. The appellants representative outlined to her that Company A did the live feed both before and after the races, prepared the racecards gave tips and forecasts. When asked if she could tell the track record, she did not know as she had been never asked to do this. In her opinion it was all about performance, creating a good atmosphere, giving information and commentating on the races. Commentating services are not included in her

CV.

She could commit to the appellant if she knew what time she had off from acting. If she had three weeks off she could do three nights at the stadium She accepted that the entire rostering was done to fit their needs and not the appellants needs. She also accepted that if the appellant wanted continuity they could not have delivered this. The commentators have three voices while they have seven.

Appellants Case

The head of wagering gave evidence on behalf of the appellant. She explained that the tote is the main revenue for the appellant. Up to 2000 bookmakers are the primary source. They operate ten stadium and the other seven in the country are privately owned. However they have the license to operate the tote at all seventeen and also issue the licenses to the bookmakers who operate at these tracks.

From the mids 90s the appellant developed stadiums and they felt that if they had continuity announcers on track it would be a plus. These announcers gave information regarding weight variations, any non runners, greetings for parties and safety announcements. There was no commentary on races at this stage. The commentary was introduced in 2000. The appellant entered in to a partnership with a US operator and they were they required to give race commentary. They had to invest heavily in satellite space and they extended in to intertrack betting, live pictures of the races in Dublin were transmitted to the the provincial stadiums. This allowed people in other stadiums to place bets on the races in Dublin. This meant all bets would be in one pool. The timing of the races were synchronised in locations.

While in the Dublin stadium the punter only heard the race commentary from the commentators, the other stadium heard the commentators introducing the dogs, giving up to date information on tote, bookmakers, breeding lines, owners and trainers. The racecard for Dublin would be available in Cork. The announcers would not be relayed to Cork while the commentating was.

In 2007 they proceeded to develop an online product, and in November 2007 they tested to go live it was then they decided to have a "one voice" policy on track, intertrack and on line. On this basis they decided to tender for this they also thought it was necessary to have expertise in form guide and tipster included in this tender as their business is worth 100million in terms of the tote. They had to have a seamless operation, the continuity of one voice, they could no longer have any interjections of birthday/safety announcements these were dropped. Company A plus one nominated person do all announcements apart from rare announcement from the stewards. In relation to the actors having the ability to do the commentating, she explained that commentating is a definite skill and not that easy for somebody to just do it, mistakes cannot be made. It als requires knowledge, it is important that commentators can recognise as a dog could be fighting or could be censored, there is a lot of money invested in these thirty seconds so it has to be right. Company A have been involved in greyhound racing for numerous years as had the other voice. The Tender was advertised on their own website, e-tenders and other enterntainment sites.

The decision was made to give the tender to Company A, but they were not the only applicants. As a result of this the announcers were to be made redundant. The board of the appellants did not think it was appropriate for the announcers transfer to Company A. There are six race nights in Dublin a week and only one position per night. Now on race nights Company A and the other

voice deliver all, on track, intertrack and online from 19.30.

She did not think that the actors would have the necessary knowledge in racing to carry out this task. Company A also deal with trends in betting, dog injuries other reasons why betting trends are drifting in and out. They require definite skill and knowledge of dog racing.

Under cross examination she agreed with the range of work the respondents did, but they did not have the skills to explain the final nuances of betting. She had no issue with the performance of the announcers. Company A possessed technical knowledge about greyhound racing that the respondents did not have. The commentators have to know all the background of each dog in each race. While each dog wears a different colour the commentators call them by name. There are eleven races each night with six dogs in each race. The appellants would find it difficult to commentate, she recall one night where a GAA commentator covered for Company A at the end of this night he remarked that he would never do it again.

She was referred to the "Invitation to Tender" Document. "Tenders are invited from interested parties for a contract ("the Contract") to provide the services of (a) greyhound racing meetings commentator; (b) on-track and online Tote marketing support provider; (c) stadium announcer and (d) greyhound racing meetings for guide provider at" two stadiums. She accepted that the respondents in their role were partly doing (a), (b) all of (c). The tender document further states "the board is also seeking through this Invitation to Tender the provision of Form Guide or Tipsterservices which appear on the printed and online Race Cards for all meetings at " two stadiums. Payment for the daily race attendances and the weekly rate for form guides were separate in the tendering process. It was put to her that this was a clear distinction between announcing and providing form guide, and within the tender document they were drawing some distinction between announcing, commentary and form guide, she explained that they were tendering for all services together and that was the way the tender document was structured. Company A charge an annual amount for their services which is paid monthly.

She was further referred to where it is stated that the tender submissions should be prepared having regard to the following objectives.

"Promotion of Tote Wagering on track/inter-track and online consistent with the format provided by the board

Presenter/Commentator must be well informed, making a connection and building a relationship with all our customers, informing and motivating them in relation to all wagering products on offer throughout the race meeting.

The Presenter /Commentator is the voice of the stadium and inter-track and online racing and must deliver relevant information in an interesting and compelling way thus ensuring increased Tote revenue from all wagering outlets.

The Presenter/Commentator must demonstrate a high level of commitment and support to the stadium and its management team during the three and half hour race meeting – six days a week.

A central element of this role is the promotion of the Tote. The Presenter/Commentator must take direction from both Tote personnel and General Manager during a race meeting."

She accepted that the respondents were doing most of this on track, however not on inter-track and

online. The respondents were delivering information on the race cards that were provided to them, while company A had all background knowledge. She agreed that the respondents generated the Tote at the track, but this was also being done on the inter-track and online by others. Company A would have additional knowledge to what was on the race cards. All customers at provisional stadiums would have access to the inter-track. Prior to 2008 they had continuity on inter-track as Company A provided this service since 2000.

The overall merit in the tender documentation was 40% presentation/commentary, 25% price, 20% previous experience, 15% knowledge and experience of greyhound and tote. While the witness accepted that the announcers in their role were doing a lot of the presenting required on track, they had not done it online or intertrack, but they had not the knowledge to do the commentary, nor the background information that Company A had of the greyhounds or tote wageirng. It was put to her that they had place less significance on the knowledge during the tendering process, this she said is crucial and very important. They now have one voice per race meeting, on track, on line and intertrack and that is the result they wanted. She had never discussed with the respondents their ability to commentate, she had sat down with them and informed them it was open to them to tender for the contract. The relevant information from knowledge and experience is crucial as it impacts on the bookmaking bets.

In reply to questions from the Tribunal they met with the respondents on the 4th March 2008 where they were informed of the tender process. They were informed of their impending redundancy on the 14th May 2008. She denied that all along that Company A was going to win the tender. Prior to their tendering success Company A were second generation contractors.

Determination

The Tribunal is aware that the appeal from the Rights Commissioner was made by the appellant and the other respondents mentioned in the recommendation of the Rights Commissioner did not appeal this decision. It should therefore be understood that the Tribunal in this matter is dealing solely with the appeal of the appellant. The Tribunal gave careful consideration to the submissions made on behalf of the parties represented at the hearing.

In considering the Directive and Statutory Instrument No. 131 of 2003, which gave effect to the Council Directive No., 201/23/EC of 12/03/2001 the evidence given before the Tribunal indicated that what was transferred in this case was a function performed by eight actors for the appellant on a casual basis. These actors were employees for the purposes of the Protection of Employees (Part -Time Worker) Acts 2001 and were entitled to all the benefits applying to any worker under worker protection legislation. The function that these actors undertook for the appellant was that of announcer. From the evidence the Tribunal were made aware that the function of commenting on the races was being done by people with a particular expertise, which the respondents did not possess. The appellant made a decision that it wanted one voice only to perform all the functions. The respondents were not capable of performing all the functions. However they did indicate in the evidence given that with training they probably could perform such a function. The respondents claim that the function that they performed for the appellant was transferred to the sub contractors that were now performing both functions for the appellant.

In considering this above claim the Tribunal looked at Statutory Instrument No. 131 of 2003 and in particular at Section 3(2) where "transfer" is defined as the transfer of an economic entity which retains its identity. In this case it is noted that the function of the respondents was merged with another function and for which the respondents were incapable of performing without further

training. In the opinion of the Tribunal along with this training a person performing this new function would also have required considerable experience. The Tribunal determines that the Transfer of Undertaking Directive does not apply in this case because the economic entity did not retain its identity following the transfer.

The Tribunal therefore sets aside the decision of the Rights Commissioner under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)