

EMPLOYMENT APPEALS TRIBUNAL

CLAIMS OF:

CASE NO.

EMPLOYEE - **claimant**

UD1079/2010

RP1493/2010

MN1046/2010

against

EMPLOYER - **first named respondent**

EMPLOYER - **second named respondent**

under

UNFAIR DISMISSALS ACTS, 1977 TO 2007
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. S. McNally

Members: Mr. D. Hegarty
Ms. H. Kelleher

heard these claims at Cork on 31 August 2011

Representation:

Claimant:

Mr. Patrick O’Riordan, Healy Crowley & Co. Solicitors,
9 O’Rahilly Row, Fermoy, Co. Cork

First Named Respondent:

Mr. Peter O’Shaughnessy, IBEC Confederation House,
84/86 Lower Baggot Street, Dublin 2

Second Named Respondent

No appearance by, or representation on behalf of

The determination of the Tribunal was as follows:

The claimant was employed by the first named respondent as a cleaner in the Fermoy premises of a medical co-operative (the co-operative) from September 2005. The first named respondent had a

contract with the co-operative covering four locations with two employees in Fermoy and one employee at each of the other three locations. The claimant was working fourteen hours a week until September 2009 when her hours were reduced to ten per week.

The co-operative gave the first named respondent one month's notice on 22 February 2010 that they had lost the contract to provide cleaning services to the four locations. On 26 February 2010 the human resource generalist (HR) with the first named respondent sent an email to the second named respondent in which HR stated that the first named respondent's employees were entitled, under the transfer of undertakings legislation, to move to the second named respondent. The key employment details of all five employees were attached. HR wrote to the employees on the same day with the same information and giving the employees the contact details for the second named respondent.

On 1 March 2010 the second named respondent sent an email to HR, which stated, "TUPE does not apply in this instance". On the same day HR then emailed the second named respondent asking why TUPE did not apply. No reply was received to this question. The claimant was on sick leave from 8 February until 29 March 2010. Around this time the claimant's husband contacted the second named respondent to be told there was no job for the claimant and the first named respondent was responsible for the claimant. On 30 March 2010 HR wrote to the claimant confirming the loss of the contract to the second named respondent, advising that TUPE applied and that all employees had transferred to the second named respondent on 22 March 2010 when her employment with the first named respondent had ceased. It is the first named respondent's position that their employee at one of the other three locations did transfer to the second named respondent.

Determination

The Tribunal notes with dissatisfaction the failure of the second named respondent to appear at the hearing. It is clear from the correspondence on file that the second named respondent was well aware of the details of the hearing. The claimant was pursuing a claim under the Redundancy Payments Acts against the first named respondent and claims under the Unfair Dismissals Acts and the Minimum Notice and Terms of Employment Acts against the second named respondent.

The Tribunal was referred to ECJ judgments in *Spijkers* by the first named respondent's representative and to *Suzen* by the claimant's representative. The Tribunal notes that *Spijkers* related to the operation of an abattoir in circumstances where the vast majority of the employees continued to work for the business after the new proprietors commenced operations. It appears to the Tribunal that *Suzen* has more relevance to the within case.

The Tribunal was not made aware of any transfer of assets, which had occurred in this case. The second named respondent took on only one of five employees. The Tribunal is not satisfied that a Transfer of Undertakings exists in this case and, accordingly, responsibility for the termination of the claimant's employment rests with the first named respondent. In these circumstances the claims against the second named respondent must both fail. The Tribunal is satisfied that the claimant was dismissed by reason of redundancy and is entitled to a lump sum payment, from the first named respondent, under the Redundancy Payments Acts, 1967 to 2007 based on the following criteria.

Date of Birth	3 September 1944
Employment commenced	13 September 2005
Employment ended	21 March 2010
Gross weekly pay	€133-00

The gross weekly pay has been calculated based on the fourteen-hour week the claimant was working until September 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)