

## EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:  
EMPLOYER  
- *Appellant*

CASE NO.  
TU2-TU7/2010

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

1. EMPLOYEE-*Respondent*
2. EMPLOYEE - *Respondent*
3. EMPLOYEE - *Respondent*
4. EMPLOYEE - *Respondent*
5. EMPLOYEE - *Respondent*
6. EMPLOYEE- *Respondent*

under

### **PROTECTION OF EMPLOYEES ON TRANSFER OF UNDERTAKINGS REGULATIONS 2003**

I certify that the Tribunal  
(Division of Tribunal)

Chairman: Ms J. McGovern B.L.

Members: Mr W. Power  
Mr J. Jordan

heard this appeal at Dublin on 26th September 2011

Representation:

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Appellant(s) : Mr Paul Dunne, IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

Respondent(s) : Ms Claire Bruton BL instructed by Ms Gillian Conefrey, George Lynch & Son, Solicitors, Bridge Street, Carrick-On-Shannon, Co Leitrim

The decision of the Tribunal was as follows:-

This case came before the Tribunal by way of an employer appealing against the Decisions of the Rights Commissioner refs: R075014-TU-09/GC, R075000-TU-09/GC, R075009-TU-09/GC, R-075001-TU-09/GC, R075004-TU-09/GC and R-075015-TU-09/GC

### **Appellant's Case**

The Business Development Executive of the appellant company JC explained he was responsible for new business and tendering for new contracts. The appellant submitted two separate tenders to a separate third party for static and mobile cleaning contracts only. It was a new tender for the appellant with this third party and the contract was previously bundled together to include cleaning, landscaping and security. The process involved in the tendering

included a meeting with a representative and a walk about the sites. In January 2009 having successfully won the contract for 60 static sites and mobile sites the 82 employees of the company who previously had the contract for the static sites were taken on by the appellant. Mobile sites would be cleaned 10 times per year. The witness for the appellant indicated that his tender stated that employees for mobile sites were not required as the appellant had their own in-house industrial unit to carry out the cleaning work. No equipment or transport vehicles were retained by the appellant. The appellant was invoiced separately for the static and mobile contracts. JC confirmed for the Tribunal that all employees were retained with the exception of 6 employees who worked on the mobile sites. The 6 employees of the previous contract cleaning company were not retained as they were different in that they travelled between sites with transport vehicles and cleaning equipment. JC described static employees as those based at the same building or offices for daily cleaning duties where the cleaning equipment is permanently on site where as mobile employees were required to transport cleaning equipment from site to site. JC told the Tribunal he did not have a copy of the tendering documentation or a copy of the contracts. He confirmed that the only asset that transferred was labour at the static sites.

### **Respondent's Case**

1. BG gave evidence of commencing employment with a contract cleaning company in 2007. When the contract was awarded to another company in January 2008 he transferred and continued with the same duties. Duties involved cleaning mobile and static sites which could be buildings or containers. Some sites were cleaned once a week with cleaning equipment at some of the locations and others it was necessary to bring equipment from the van. BG said there was no difference between static or mobile sites as the duties performed at both sites were general cleaning duties. In August 2008 BG was informed by his employer that the landscaping and building maintenance duties were no longer included and pay was reduced accordingly. The locations he had responsibility for were Leitrim, Sligo, Roscommon and Longford areas and he was provided with a van to travel to each location. In January 2009 he received a letter from his employer advising that he return the van to the company Head Office and that his employment was transferring to the appellant company. The van and equipment was returned and he received no contact from the appellant. The respondent contacted the appellant company and was told his employment was not being transferred.
2. MM began full time employment with a contract cleaning company in the Cork and Kerry region in December 2007. Duties involved general cleaning of offices and secure units. Some locations had cleaning equipment on site. The company provided a van to travel to the different locations and to transport cleaning equipment. The respondent referred to his job title as a mobile cleaner. From August 2008 building maintenance and landscaping were no longer part of his duties and pay was reduced accordingly. In January 2009 MMcM received a letter from his then employer requesting the return of the van and equipment to the Head Office of the company and advising him that his employment was being transferred. He returned the van and equipment. He told the Tribunal that he received no communication from the appellant and when he contacted the company himself was told that his employment was not transferred.
3. MR informed the Tribunal that he was employed as a cleaning operator since January 2008. Duties included cleaning, landscaping and building maintenance. MR worked in the Waterford, Kilkenny and South Tipperary region covering 105 sites. He confirmed he had a company van to transport equipment and travel between sites. The cleaning duties he performed at both static and mobile sites were the same. MR understood that

mobile cleaner meant cleaning of multiple sites. In August 2008 he was informed that his employer had lost the building maintenance and landscaping contract and that his duties changed to cleaning only. In January 2009 he received a letter seeking the return of the van and equipment. The letter advised that the appellant company would contact him regarding the transfer of employment. Having had no contact from the company he contacted them and was informed that he would not be taken on by the company. MR told the Tribunal that there was no difference between cleaning a static site or a mobile site. The duties involved general cleaning at both sites.

4. KE commenced work with a contract cleaning company in January 2008 covering Laois, Cavan, Offaly, Kildare and Westmeath cleaning both static and mobile sites. Some static sites had cleaning equipment on location and others required the equipment from the van. Sites in Birr and Roscrea were cleaned twice a week, sites in Athy and Kildare were cleaned once a week and mobile sites were cleaned every eight weeks. During August 2008 the building maintenance and landscaping was removed from regular duties. In January 2009 the respondent received a letter regarding the transfer of his employment and the return of the van and equipment. He contacted the HR Department of the appellant company who told him that his employment was not being transferred. KE said there was no difference between his cleaning duties and the duties of the 82 employees taken on by the appellant.
5. DC told the Tribunal that he started working in January 2008. With agreement from all parties and the Tribunal DC was assisted by his son acting as an interpreter. The regions covered were Tuam and Ballina and included 3 static sites with duties including general cleaning and building maintenance. From August 2008 duties were reduced to cleaning only. The same general cleaning duties were carried out at all sites with some sites having cleaning equipment at the location and others requiring the use of equipment from the van. DC said he did not understand why 82 employees transferred when the same cleaning work was involved. DC covered 100 sites and that was why he had a company van. In January 2009 DC received a letter from his employer asking for the return of the van and equipment and informing him of the appellant company taking over the contract. He received no contact from the appellant company.
6. NE commenced work with the contract cleaning company in January 2008 working in the Donegal and Sligo region. He referred to his job title as a cleaner. He also did landscaping and building maintenance but from August 2008 he was cleaning only and his pay was reduced as a result. In Bundoran and Lifford he cleaned static sites which could be large buildings once a week with 80 sites in total. He said there was no difference between his duties and the duties of the 82 employees who transferred. Some of the sites had equipment others had not and equipment was transported between sites in the company van. NE told the Tribunal that he was a mobile cleaner because he had a van to travel between sites. In January 2009 NE received a letter from his employer requesting the return of the van and equipment and advising that his employment would transfer to the appellant contract cleaning company. He received no contact from the appellant.

## **Determination**

Having considered the evidence of both parties it is the Tribunal's opinion that the protection of workers is paramount in the application of Directive No. 2001/23/EC. Based on the case law in applying the cases of *Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV et*

*Alfred Benedik en Zonen BV. C- 24/85 and Ayse Suezzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice. [1997] EUECJ C-13/95* the Tribunal upholds the decision of the Rights Commissioner.

The Tribunal must take into consideration all of the factors pertinent to this case and not rely on one single element as being determinative of the issues. In doing that the Tribunal believes that an economic entity was transferred for all 88 workers, and therefore the Directive applies to the 6 respondents. It is common case that the work the subject matter of the appellants tender and contract with the third party was cleaning.

Evidence was given by the appellant that it tendered for two separate contracts, a mobile contract cleaning contract and a static cleaning contract. This differentiation did not exist with the previous employer as both were bundled into one single contract. The appellant gave evidence that under the mobile contract the work was to be completed in-house, no assets transferred and the economic identity of the mobile contract was not retained therefore no transfer of undertaking arose. It was the witness for the appellant himself that decided, as part of his tender, the work under the mobile contract should be completed in-house not the third party tendering the work. The appellant submitted, inter alia, that the six respondents covered both mobile and static locations and therefore should have been included in the workers that transferred. The Tribunal accepts all six respondent's evidence that their job at the time of transfer was cleaner. All six gave evidence that they understood there was no difference between static work and mobile work. They considered themselves mobile by virtue of the fact they travelled between sites and not for the reasons proffered by the appellant. Furthermore their duties with the previous employer were the same as the 82 who transferred i.e. cleaner. In fact evidence was given on behalf of the appellant that the main difference between the six employees (had they been taken over) and those 82 that did transfer would be the allocation of work ( i.e. rostering) and not the actual work itself. Both the appellant and the respondent rely on the Suzen case and in applying Suzen the Tribunal has to consider the facts of this case and apply the law. .

Paragraph 24 of the Suzen decision provides as follows

*The answer to the questions from the national court must therefore be that Article 1(1) of the directive is to be interpreted as meaning that the directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is no concomitant transfer from one undertaking to the other of significant tangible or intangible assets or 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.*

The Tribunal considers, in applying Suzen, that there was a transfer of the major part of the workforce for the work the subject matter of the within proceedings i.e. cleaning. It is the

Tribunals opinion that Suzen also requires us to look to what the predecessor did in the performance of the contract. In doing so, based on the evidence, it is clear from the various respondents' points of view that there was no differentiation between static and mobile contracts. Even if there had been, evidence was also given that they worked on what they now understand to be static sites as well as mobile sites. The performance of the contract is and was cleaning and the location of the cleaning should not be the primary factor in determining this case. It should also be noted that neither the tender documentation nor the contract was presented by the appellant in evidence nor was any detailed evidence given as to their terms.

In conclusion, in looking at the facts as a whole the Tribunal considers the Council Directive No. 2001/23/EC applies and upholds the decision of the Rights Commissioner.

Sealed with the Seal of the  
Employment Appeals Tribunal

This \_\_\_\_\_

(Sgd.) \_\_\_\_\_  
(CHAIRMAN)