

EMPLOYMENT APPEALS TRIBUNAL

CLAIM(S) OF:

EMPLOYEE 1- *Claimant 1*

RP1216/2010

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

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr T. Taaffe
Members: Mr. A. O'Mara
Mr N. Dowling

heard this claim at Trim on 21st March 2012 and 31st October 2012

Representation:

Claimant(s) : Ms J Paye, Richard Grogan & Associates Solicitors,
16 & 17 College Green, Dublin 2

Respondent(s) : In person

Preliminary Issue

The claim under the Unfair Dismissals Acts, 1977 to 2007 was withdrawn on behalf of the appellants. The representative for the claimants told the Tribunal that when the respondent company lost a cleaning contract in a shopping centre no Transfer of Undertaking occurred and no redundancy payments were made to the appellants.

Case of Claimant 2

The first named claimant VU gave evidence of commencing employment with the respondent company on the 22 December 2004. She confirmed that her employment ended with the respondent on the 30 September 2009. She told the Tribunal that she continued working in the shopping centre as a cleaner for the new employer. Although she confirmed she received a new contract of employment she was unable to confirm if her terms and conditions had changed and

did not have a copy of the contract with her at the hearing. She told the Tribunal that her pay rate was higher with the new employer and there were no changes to her hours of work. She was unsure if her years of service with the respondent were recognised by the new employer.

Respondent's Case

DT a director of the respondent company told the Tribunal that the company which operated a contract cleaning business lost the cleaning contract for a shopping centre. The contract ended on the 1st of October 2009 having held it for nine years. The shopping centre management informed her that another contractor had won the contract. She had a meeting with staff to inform them that a new contractor was taking over and that the shopping centre management had assured her that staff would be retained by the new contract cleaning company. A member of staff acted as a translator to assist in communicating with all employees at that meeting. DT made attempts through her accountant to contact the new cleaning contractor in order to establish if employees were transferring and if a Transfer of Undertaking was taking place. The new contractor never responded to the questions raised. She explained that as all staff transferred to the new contractor the respondent company ceased trading at that time and she could only assume a transfer of undertaking existed as none of the employees contacted her after that meeting.

DT explained that 19 of the company's 20 employees went to work for the new company. One employee, who was on sick leave at the time, chose not to. DT understood that this employee was given a redundancy payment but she could not confirm this.

The claimants' representative cited the European Court of Justice case *Süzen v ZehnacherGebäudereinigung GmbH Krankenhausservice and another* (Case C-13/95) together with *Danny Digan v Sheehan Security Corporation Limited* (ud235/03), *Kathleen Collins v ExcelProperty Services Limited* (rp27/98), *Maria Bruton v Knights Cleaning Services Limited*(ud803/97) & *Mary Canon v Noonan Cleaning Limited* (ud200/97). She argued that notangible assets had been transferred and so contended that no transfer of undertakings had occurred and so therefore the claimants were entitled to a redundancy lump sum payment from the respondent.

Determination

The Tribunal carefully considered the evidence adduced and the submissions made.

It is confirmed that (a) the claims under the Unfair Dismissals Acts, 1977 to 2007, were withdrawn and (b) that no evidence was adduced in respect of the claims for minimum notice. Accordingly, the claims under the Minimum Notice and Terms of Employment Acts, 1973 to 2005, are dismissed. It is proposed that since similar grounds are present in each case for each of the claimants to issue a joint determination which will apply separately to each of them.

Since the claimants' claims are solely for redundancy the only issue to be addressed and determined is whether (a) the claimants were made redundant prior to or at the time of the termination of their employment with the respondent or (b) whether on their immediate commencement of employment with another firm (which we shall call company "B"), after such termination there took place a transfer of engagements the effect of which would have been to transfer their years of service with the respondent to company "B".

It is common case that (a) on the change of employer that a contract was signed by the claimants with company “B” which is silent on the issue being determined (b) that on this change that the entire workforce of the respondent including the claimants with one exception commenced employment with company “B” on broadly similar terms and conditions doing similar work (c) with the exception of the claimants that none of this changed workforce have claimed redundancy and finally (d) that the respondent lost the contract to provide cleaning services at a designated shopping centre to company “B” after engaging in a tendering process involving them the result of which was not disputed or appealed.

The claimants’ case is based on the European Directive on the Transfer of Undertakings (77/187/EEC) which was incorporated into Irish domestic law by the European Communities (Safeguarding of Employee’s Rights on Transfer of Undertakings) Regulations 1980 (S.I. 306 of 1980). It was submitted by the claimants that what had taken place in respect of the changed workforce was (a) a transfer of service provider (b) that this workforce had suffered a loss of service and (c) that there had been no transfer of assets from the respondent to company “B” at the time of the change of workforce.

It was finally submitted by the claimants that the Tribunal should consider a number of decided cases (referenced above) including what is commonly known as “the Suzen” case and that such consideration would in their view support the claimants’ cases. It is found and determined that the respondent took steps to contact and inform their staff of their understanding of what was taking place concerning them and made efforts to confirm with employer “B” that their understanding was correct. It is noted that company “B” has neither confirmed nor denied that a transfer of undertakings has taken place.

The Tribunal is unanimously of the view that the central question that it is required to address is whether or not any assets transferred to company “B” so that what could be described as an “economic entity” transferred to company “B”.

Having carefully considered (a) the Directive and statutory instrument referred to (b) the under-mentioned case law submitted and (c) the evidence of the parties the Tribunal is satisfied not only that the respondent ceased trading after the loss of their contract (and accepts their evidence in this regard) but that an asset also transferred. This asset consisted of a major part of the workforce in terms of numbers and skills of its employees. It therefore finds and determines that an “economic entity” transferred to company “B”. In these circumstances the new employer (company “B”) took over a body of assets enabling them to carry on the activities of the respondents undertakings on a regular basis.

The Tribunal finds therefore and determines that a transfer of undertakings took place upon company “B” taking over the respondent’s contract. The claimants’ claims therefore fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)