EMPLOYMENT APPEALS TRIBUNAL

APPEAL(S) OF:	**CASE NO.**
EMPLOYEE - *appellant*	RP2097/2010 MN1500/2010 WT660/2010

against

EMPLOYER 1 - *First named respondent*

EMPLOYER 2 – *Second named respondent*

under

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: Ms. E. Daly B.L.

Members: Mr. D. Morrison
Ms. R. Kerrigan

heard this appeal at Donegal on 22nd August 2011
and 22nd November 2011

Representation:

Appellant:	Mr Vernon Hegarty, Siptu, Hanson Retail Park, Cleveragh, Sligo
First Named Respondent:	Patricia Mc Callum BL instructed by P.A. Dorrian & Co, Solicitors, St. Annes Court, High Road, Letterkenny, Co. Donegal
Second Named Respondent:	A director

The decision of the Tribunal was as follows:

On the first day of the hearing the claim under the Organisation and Working Time Act 1997 was withdrawn.

Preliminary Issue:

The representative for the first named respondent explained that a transfer of undertaking took place between her client and the second named respondent. At the time the appellant worked as a security guard on an ESB site, her client lost the contract to provide the security service on this site and the second named respondent took over this contract. The appellant's employment automatically transferred to the second named respondent.

The appellant's representative disputed that a transfer of undertaking had taken place. There was no contact between the transferor and the transferee, no notice was given to his client.

The Tribunal considered the matter and amended the T1A to include the second named respondent, as they should be a party to the proceedings to enable them to establish if a transfer of undertaking took place. The case was adjourned to a later date.

On the second day of the hearing all parties to the appeal were in attendance.

Second Named Respondent Case:

A director (BK) gave evidence on behalf of the second named respondent. He explained that they were asked to put in a tender for the contract of providing security to the ESB site in May or June 2009. The contractor did not provide them with information regarding a transfer of undertaking. They had no contact with the first named respondent before they took over the contract on site. The original contract they applied for was for 123hours cover per week, this had changed with an additional of 69 hours per week. The day shift changed and there were additional duties for the night shift.

When word got out that they had won the contract a number of guards in situ contacted their office, they were told that they had staff in place, however they would look at their applications and interview staff. They recruited the claimant and two other guards from five that had been working on site for the first named respondent. On commencement of the contract they brought in their own vehicles, torches and report books.

They took over the contract at midnight on the 1st July 2009 and had a supervisor cover the first two shifts. He had known the claimant beforehand and interviewed him 2/3 days before the contract commenced when he had got in touch in respect of applying for the job. They had no discussion with the new employees in respect of rates of pay as these were governed by the Security Employment Regulation order.

He had a conversation with the claimant 3 to 4 days before they took over the contract. The claimant had contracted him asking if they were taking over the contract. The operations manager took over the shift at midnight on the 1st July 2009 and discussed it with the staff on site.

Under cross-examination from the first named respondent, he confirmed he was aware of the Private Security Authority regulations and accepted that to work on an ESB site a safe pass is required. He disagreed that he had a conversation with the first named respondent seeking confirmation that the guards on site had a safe pass before they took over the contract. However he recalled that the only time he had spoken with the first named respondent was two weeks ago before this hearing. The first named respondent's representative explained that they were saying that there was an agreement between him and their client. The witness denied this. The appellant was aware that he was going to finish work at midnight on the 1st July 2009 and would not be returning to work for a few days. The appellant knew that he had to leave theemployment of the first named respondent to work with them. The appellant was not issued with a contractuntil six months later not because it was a smooth transfer of his services rather that the second namedrespondent was going through restructuring at the time of his recruitment. The appellant's duties were similar with them but he had more duties.

Appellant's Case:

The appellant gave direct sworn evidence. He commenced employment with the first named respondent on the 12th May 2007. He was employed at the hourly rate of €9.48 per hour which was increased to €10.01 in January 2009. He received no contract of employment.

On the evening of the 30th June 2009 he received a telephone call from a director (MH) of the first named respondent who informed that the contract was finishing at 12.00 midnight, he did not know anything else and would contact him. At about 11.15pm a supervisor (EC) from the second named respondent arrived on site and told him that whoever was due to start at midnight that she would be doing that shift. EC gave him

an application form and he went home.

About a week before the first named respondent's contract ceased the tenderer informed him of the situation. He heard that the second named respondent was taking over the contract so he telephoned BK, explained he was working on the site and asked if there was any chance of a job. BK informed him that he would arrange to meet him and his colleagues also employed on the site. He met BK on site around the 2nd July 2009 who gave him a form to complete. BK did not discuss his prior terms and conditions with the first named respondent but explained his hours and rates of pay. His shift changed to 15 hours with the second named respondent and also included day shifts. Three of them who had worked on site with the first named respondent where taken on by the second named respondent. He was not aware if his other two colleagues had applied to the second named respondent for a position. Nothing was arranged between him and BK to arrange the loss of the contract to the first named respondent.

Under cross examination from the first named respondent he explained that he did know BK since 2006 and had previously worked for him in Sligo. He was not aware that it was a fixed term contract the first named respondent had with the tenderer. He had always worked on this site while in employment with the first named respondent and had not worked elsewhere for them. He did not telephone MH when he had heard that they had lost the contract but nor did MH until the 30th June 2009. MH never offered to redeploy him; he denied that he had told MH that he was sorted in respect of a job. MH had told him he would come back to him and he in turn told MH if he found another job he would inform him. He had telephoned the firstnamed respondent's office on a number of occasions seeking to speak to MH and looking for his P45 butwas told that MH was not available. On the third occasion he asked that a message be passed on to MH thathe wanted his P45 and all monies owed to him. He did not lose a day's work he took it upon himself totelephone BK as there was no offer of alternative employment coming from MH.

The reason he did not sign the new contract with the second named respondent for six months was because he was on probation. He was unsure as to whether he returned to work on site on the 3rd or the 4th of July 2009 for the second named respondent.

First Named Respondents Case:

The managing director (MH) gave evidence on behalf of the first named respondent. At the time they lost the contract in 2009 they had about 9 to 10 other contracts in the North West. He is licensed by the Private Security Authority (PSA) to act as a contractor providing security. To obtain this licence you have to abide by the PSA regulations, screen staff and provide adequate training. In respect of the site guards working here are required to have their PSA license, safe pass and green card from the contractor as there are a lot of health and safety issues on this site. The appellant had commenced work for him in May 2007 he was aware at this stage that the appellant had worked previously for the second named respondent. The appellant was employed as a static security guard and understood that he could be moved to other locations to work while in their employment. The appellant had worked on the Rory Gallagher Festival for them in 2008. Overall during the course of his employment the appellant had worked off the site 1 or 2 times.

He found out about month before the contract ceased that they had lost same. The appellant was not surprised as he told him that he had arranged to meet with FK along with his colleagues, this was by telephone on the 30th June 2009. Previous to this all of his staff were aware that the contract was out for tender. As far as he was concerned all of his staff working on this site were being transferred over to the second named respondent. He had spoken with BK about two weeks before the contract ceased, he thought that BK had telephoned him on this occasion. BK asked about his staff in situ and if they had the licenses and qualifications in place to do the job. He confirmed with BK they had.

He spoke with the appellant by telephone on the 30th June 2009 and explained that the second named respondent was taking over the control of the contract at midnight. Their manager JF would be in attendance to handover to the second named respondent's representative. He also told the appellant that his job was okay. He did not know that the appellant was not happy with these arrangements. When the second named respondent took over the contract, they removed all the equipment they had on site. If the

claimant had informed him that he did not want to work for the second named respondent he would have reassigned him. No other guard from this site contacted him requesting to stay in his employment.

Under cross-examination from the appellant's representative he explained that he had not informed his employees that they had lost the contract when he found out as he understood their employment would not cease but would continue with the second named respondent. All of his employees transferred to the second named respondent, if they had not he would have reassigned them.

At the end of the hearing the Tribunal requested that both parties provide written submissions in respect of the cases referred during the course of the hearing, so they could consider same.

Cases referred to at the hearing.

Bannon –v – Employment Appeals Tribunal IR(1993)500
Doyle & Ors –v- Rimec Limited EAT RP434.2004
Azen Suzen –v- Zehnacker Gebaudereinigung Gmbh Krankenhausservice (1997) IRLR 225
Digan –v- Sheehan Security Corporation Limited EAT UD235.2003
Case 24/85 Spijkers(1986)ECR 1119

Determination:

The appellant's case was based on the European Directive on the Transfer of Undertakings (77/187/EEC) which was made part of Irish domestic law by the European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980 (S.I. 306 of 1980). The second named respondent argued that the Directive did not apply to the facts of this case.

The first argument made by the second named respondent was that it conducted the security service in a manner different from the way it had been conducted by the first named respondent.

More difficult questions arise as to determine whether the change of contact amounts to a transfer within the meaning of the Directive. Issues arising from contracting-out of services have had a long and rather vexed history under the Directive with a large number of cases referred to the European Court of Justice. There seems to be a distinction between contracting-out in the first instance, where a company decides to "outsource" an activity, such as cleaning, catering or security, to a outside contractor specialising in that activity, and what are sometimes called "second-generation" changes, where a service contract of such a kind comes to an end and a new contract is issued to a different contractor. In Ayse Suzen v. Zehnacker Gebaudereinigung GMBH, the Court held:

> "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 this case the second respondent did take over most of the existing workforce, but it is also clear to the Tribunal that there was no transfer of assets for example, the van.

The central test laid down by the ECJ in a succession of cases from Schmidt's case onwards, and later incorporated in the amending Directive was "whether the business in question retained its identity". In Suzen's case the Court held that "an entity cannot be reduced to the activity entrusted to it.

In Suzen's case the Court also ruled that the mere loss of a service contract to a competitor cannot by itself indicate the existence of a transfer. In such a situation the service undertaking previously entrusted with the activity does not, on losing a customer, cease to exist, and therefore a business or part of a business is not

transferred.

Given these considerations, the fact that the majority of the existing workforce at the premises was engaged by the respondent does not mean that the "business in question retained its identity". A given "identity" with a separate existence was not transferred.

There is clearly no asset transfer, nor can it be said that the business retains its identity. Following Suzen's case, this does not, in our view, amount to a transfer within the meaning of the Directive.

Accordingly, the Tribunal finds a transfer of undertakings did not take place and further evidence in the appeals under the Redundancy Payments Acts, 1967 to 2007 and the Minimum Notice and Terms of Employment Acts, 1973 to 2005 can now be heard.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)