

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

EMPLOYEE –**First Named Appellant**

RP1496/2011

EMPLOYEE –**Second Named Appellant**

RP1777/2011

MN1437/2011

against

EMPLOYER –**Respondent**

under

**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 R. Maguire BL

Members: Mr T.L. Gill
Mr P. Trehy

heard these appeals at Tullamore on 7 December 2012.

Representation:

Appellants:

Respondent:

The determination of the Tribunal was as follows:

At the outset the claim of the second named appellant under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 was withdrawn.

The respondent is an employment agency which specialises in the supply of nurses. The appellants began an arrangement with the respondent, or in the case of the second named appellant with an agency taken over by the respondent in 2010, in 2004 whereby they worked in various hospitals and other medical facilities all which fell under the aegis of the HSE in order to provide cover for nurses on long or short term absence or any shortfall in the number of nurses available at any given time. The arrangement whereby the HSE used the services of the respondent to supply nurses was on an ad hoc basis, with various agencies supplying the HSE with nurses, until 2011 when the HSE went to tender for agencies to supply it with nurses. The tender for the Leinster region was won by a competitor of the respondent (the competitor) and, as a result, the respondent was no longer in a position to offer HSE work to the appellants in that region effective from 14 March 2011.

The respondent's position was that the appellants were not entitled to lump sum payments under the Redundancy Payments Acts as they were not employees of the respondent, there having been no mutuality of obligation in the arrangement that existed between the parties. It was further the respondent's position that both appellants had been offered alternative work, in the case of the first named appellant in either Dublin or Galway and in the case of the second named appellant who had worked one shift caring for a two year old child.

The first named appellant worked on average 30 to 36 hours per week and from mid-2005 the overwhelming preponderance of her work was in community care, essentially at two locations in Tullamore. Her position was that offers of work in Dublin or Galway did not represent an offer of suitable alternative work on account of the extra time and distance that would be involved compared to her work previously almost exclusively being in Tullamore.

The overwhelming preponderance of the second named appellant's work was in A&E in Mullingar. She worked a similar number of hours to the first named appellant. The second named appellant's position was that as a general nurse she had no paediatric experience and did not feel able to offer an appropriate service in that area. This together with her taking the same position on work in Dublin or Galway meant that she felt she had not been offered suitable alternative work.

Determination:

The Tribunal is satisfied that the Redundancy Payments Act 1967 as amended by the Redundancy Payments Act 2003 states at section 2(1) that a "contract of employment" includes a contract of service or apprenticeship, and:

"any other contract whereby an individual agrees with another person, who is carrying on the business of an employment agency within the meaning of the Employment Agency Act 1971 and is acting in the course of that business, to do or perform personally any work or service for a third person (whether or not the third person is a party to the contract)."

On that basis, it is clear that the Appellants were working under a contract of employment for the Respondent.

However, the Tribunal is not satisfied that there was a dismissal for the purposes of the Redundancy Payments Act 1967 as amended. On the facts as presented to the Tribunal, it appears that in fact there was a transfer of the business under S.I. No. 131/2003, the *European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003*. The same definition of contract of employment as above is contained in Regulation 2 of those Regulations, and it is herefore clear that when a transfer takes place, the agency workers who worked for that business also transfer. As to when such a transfer takes place, Regulation 3 sets that out:

“3. (1) These Regulations shall apply to any transfer of an undertaking, business, or part of an undertaking or business from one employer to another employer as a result of a legal transfer (including the assignment or forfeiture of a lease) or merger.

(2) Subject to this Regulation, in these Regulations -
“transfer” means the transfer of an economic entity which retains its identity;
“economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is for profit or whether it is central or ancillary to another economic or administrative entity.

(3) These Regulations shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain.

(4) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a transfer for the purposes of these Regulations.

(5) These Regulations shall not apply to sea-going vessels.”

Under the definition above, it is clear to the Tribunal that the organised grouping of resources of the Respondent that pursued the activity of providing nursing staff to the HSE in the midlands was carved out of the business of the Respondent and transferred. This was done pursuant to a tender process at the time.

Regulation 4 goes on to state what happens to the rights of those who worked under a contract of employment before the transfer:

“Rights and obligations.

4. (1) The transferor's rights and obligations arising from a contract of employment existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

(2) Following a transfer, the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.”

Regulation 5 states as follows:

“Dismissals and termination of employment.

5. (1) The transfer of an undertaking, business or part of an undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee and such a dismissal, the grounds for which are such a transfer, by a transferor or a transferee is prohibited.

(2) Nothing in this Regulation shall be construed as prohibiting dismissals for economic, technical or organisational reasons which entail changes in the workforce.

(3) If a contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee concerned, the employer concerned shall be regarded as having been responsible for the termination of the contract of employment.

(4) If a dismissal of an employee, in contravention of paragraph (1), constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to 2001 relief may not be granted to the employee in respect of that dismissal both under these Regulations and under those Acts.”

No apparent transfer of employees was arranged, and apparently the employees were not informed that they were being transferred. However, it seems clear that the operation by the respondent in the greater Leinster area was in fact continued or resumed by the employment agency that won the tender, and the work that the appellants had done over a number of years was from that time done by workers pursuant to contracts of employment with that other employment agency.

In summary, it appears that the rights and obligations arising from the contract of employment between the parties transferred to the undertaking that took over the provision of services in the Leinster area from the respondent. The appellants could not be dismissed because of the transfer simpliciter. To the extent that there were obligations on the transferee in relation to the terms and conditions from the date of the transfer, if those obligations were not fulfilled, the appellants had, under the Regulations, the possibility of making a complaint to a Rights Commissioner. However, no determination that affects the rights of that undertaking can be made by this Tribunal given that that undertaking was not on notice or a party to the claim between the parties.

The appeals before the Tribunal are under the Redundancy Payments Acts. The Tribunal finds that there was not a redundancy situation as provided for under the 1967 Act as amended, as there was no termination by reason of redundancy within the meaning of the Act as between the appellants and the respondent, the obligations of the respondent having transferred to the other employment agency. Accordingly, the appeals of both appellants under the Redundancy Payments Acts, 1967 to 2007 must fail.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)