

EMPLOYMENT APPEALS TRIBUNAL

APPEALS OF:

CASE NO.

EMPLOYEE
EMPLOYER

TU15/2011

and

EMPLOYER
EMPLOYEE

TU16/2011

against the recommendation of the Rights Commissioner **TU92982/10/MR** in the case of both parties:

Under

EUROPEAN COMMUNITIES (PROTECTION OF EMPLOYEES ON TRANSFER OF UNDERTAKINGS) REGULATIONS, 2003

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms K.T. O'Mahony BL

Members: Ms M. Sweeney
Ms S. Kelly

heard these appeals at Castleconnell on 27 March 2013

Representation:

First Named Party (The Employee):

Second Named Party (The Employer):

This case came before the Tribunal by way of appeals by both the employee and the employer against the recommendation of a Rights Commissioner Ref: **TU92982/10/MR**. The employee was seeking to have the recommendation varied whereas the employer was seeking to have the

recommendation upset.

Summary of Evidence

The employee worked as a static guard at a business centre (the centre) in Limerick from some time in 2005. It was common case that the employee transferred to the employment of the employer following a transfer of an undertaking on 1 January 2011. Prior to the transfer the employee was working 47.5 hours per week; 8-30am to 6-00pm. It was further common case that from 4 January 2011, the first working day after the transfer, the customer service manager (CS) of the employer asked the employee to begin work each day at 8-00am as the employer had contracted to supply a 50 hour per week service at the centre. The employee's position was that prior to the transfer he had been credited with 2.5 hours as time in lieu each week and for this consideration he had undertaken the collection to a central point of refuse generated by some of the units in the centre. It was common case that from the time of the transfer the employee began work at 8-00am each day.

In February 2011 the General Manager (GM) of the respondent expressed concern about the employee's working 50 hours per week as being in apparent contravention of the Organisation of Working Time Act, 1997 whereby the maximum working week is 48 hours. On foot of this CS wrote to the employee in early February 2011 to notify him that he was being reduced to 48 hours per week with immediate effect.

The employer's position was that around this time and in consequence of the necessity to reduce their costs they had negotiated an agreement at national level with SIPTU whereby static guards, who commonly work twelve hour shifts, were put on to an arrangement of averaging. The employee's position was that, whilst many guards had been put on to a 48/36 alternate week roster there had been no negotiated agreement at national level about this. He did not wish to consider work at alternate sites as this would have necessitated his working nights which he did not want to do.

The employee was further given four weeks' notice of the reduction of his hours to 40 hours per week, that is four days as against five previously. The employer's position was that, as a normal working day at the centre was of ten hours' duration, it made no sense to give the employee 47.5 hours and allocate only 2.5 hours to another employee. The employee's union representative (UR) wrote to CS in mid February 2011 to register the employee's dissatisfaction with this proposed change to his hours of work.

Determination

The employer made an assertion that there had been an agreement at national level between the union representing this employee and it relating to hours of work. No documentary evidence in support of this assertion was opened to the Tribunal. Accordingly, the Tribunal is not satisfied that any such agreement exists. It must follow that the employer cannot therefore rely on the employee being bound by any such agreement as a defence to the claim under regulation 4. The Tribunal is

satisfied that claim is well founded and the employee had an entitlement to remain on the 47.5 hours per week which he was working prior to the transfer. Nevertheless, as the centre, at which the employee wished and was entitled to remain, operated on a ten-hour five-day week basis, which hours exceeded the maximum permissible under the Organisation of Working Time Act, and it being impractical to provide another employee for 2.5 hours a week, the Tribunal finds it just and equitable in all the circumstance to vary the decision of the Rights Commissioner and awards the employee €11,500-00 under the European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)