

**CORRECTING ORDER
EMPLOYMENT APPEALS TRIBUNAL**

CLAIM(S) OF:
EMPLOYEE
(*claimant*)

CASE NO.
RP874/2010
UD641/2010
MN586/2010
WT267/2010

Against
EMPLOYER (*respondent 1*)

EMPLOYER (*respondent 2*)

EMPLOYER (*respondent 3*)

under

**MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2005
ORGANISATION OF WORKING TIME ACT, 1997
REDUNDANCY PAYMENTS ACTS, 1967 TO 2007
UNFAIR DISMISSALS ACTS, 1977 TO 2007**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Mr. P. O'Leary B L
Members: Mr. P. Pierson
Mr. P. Trehy

heard this claim at Mullingar on 4th October 2011 and 22 March 2012

Representation:

Claimant: Byrne Carolan Cunningham, Solicitors,
Oak House, 39/41 Mardyke Street, Athlone, Co Westmeath

Respondent 1: No appearance by or on behalf of the respondent

Respondent 2: No appearance by or on behalf of the respondent

Respondent 3: Ms. Mairead Crosby,
IBEC, Confederation House, 84/86 Lower Baggot Street, Dublin 2

This is a correcting order and should be read in conjunction with the original determination dated 10th September 2012.

The fifth paragraph under the heading Determination should read as follows:

In the circumstances the claimant was not transferred and it follows that he is entitled to a redundancy payment, minimum notice and holiday pay from respondent 2.

Sealed with the Seal of the
Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)

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At the outset the T1A form was amended giving the registered name of respondent 3. It

was put to the Tribunal that there had been significant changes in contracts with regard to the transfer of undertakings.

There was no appearance by or on behalf of respondent 1 or respondent 2 and the Tribunal is satisfied that they were properly notified of the hearing.

Claimants Case

The claimant stated that he was a security operative with respondent 2 and commenced his employment on 4th May 2007. During the course of his duties he patrolled the perimeter fences and reported in every hour. In August 2009 he was laid off without notice and was told that the company he had worked for did not win the new contract. He was told the new employer, respondent 3, would continue his employment under the Transfer of Undertaking Regulations (TUPE). He received an e-mail outlining this position which was opened to the Tribunal. A letter dated 7th August 2009 from respondent 2 to the claimant was also opened to the Tribunal in relation to the claimant transferring to respondent 3 under TUPE.

Employees were told that the new company would be in touch with them between the 7th and 23rd August 2009. No contact was made by the new owners during that period and the claimant did not know who to contact.

At the date of termination of employment the claimant was due 16 days holidays and had not taken any.

At the commencement of the resumed hearing on 22nd March 2012 it was agreed with both parties that the correct name of respondent 3 is as above.

Respondent's case

Respondent 3 contented that they were not liable in this matter and that it was respondent 1 and respondent 2 who were liable.

The contract that respondent 3 entered into was to encompass the whole of Ireland and included aspects besides security. Respondent 1 & 2 were solely security and specifically located. Therefore, respondent 3 did not take over a contract and informed respondent 1 & 2 that there was no Transfer of Undertaking.

Determination

The Tribunal is satisfied that respondent 1 and respondent 2 are one in the same and the proper title of that company is as per respondent 2. Therefore for the purposes of this determination the Tribunal will refer to respondent 1 and respondent 2 as respondent 2.

The Tribunal considered the written submissions and the evidence adduced at the hearing. The facts are undisputed. The claimant had worked for respondent 2 for more than 2 years. In August 2009 a customer withdrew a contract with his employer and allocated it to respondent 3. The question arose as to whether or not the Transfer of Undertakings Directive (T.U.P.E.) applied in this case. If T.U.P.E. applied then respondent 3 would be responsible for the claimant's claim. If T.U.P.E. did not apply then respondent 2 would be responsible for the claimant's claim.

Both of the aforementioned companies were notified of these claims and of the time and date of the hearings. Respondent 2 did not attend or indicate any reason for their non-attendance. The Tribunal proceeded to hear the parties in this matter.

On the basis of information and evidence given to the Tribunal it appears that the claimant's employer, which was respondent 2, had their contract with a customer withdrawn. This would have been a 1st generation contract and required that company to supply security services to the customer. This did not require anything other than personnel to implement the contract. Therefore the contract was for services only and there was no tangible assets transferred. The awarding by the customer of the contract for security services to respondent 3 was a 2nd generation contract. As no tangible assets were transferred between the 2 companies and indeed the employer of the claimant continued to trade elsewhere after the loss of the contract, the Tribunal determines that T.U.P.E. does not apply in this case.

In the circumstances the claimant was not transferred and it follows that he is entitled to a redundancy payment, minimum notice and holiday pay from respondent 3. Accordingly the Tribunal awards the claimant €1,248.62 under the Organisation of Working Time Act, 1997 and €960.48 under the Minimum Notice and Terms of Employment Acts, 1973 to 2005 together with a redundancy lump sum of €2,698.95 under the Redundancy Payments Acts, 1967 to 2007 in accordance with the following criteria. The claim under the Unfair Dismissals Acts, 1977 to 2007 is dismissed.

DOB	9 th February 1948
Commencement Date	4 th May 2007
Date notice received	23 rd August 2009
Termination date	23 rd August 2009
Gross pay	€480.24 per week

This award is made subject to the claimant having been in insurable employment, during the relevant period, in accordance with the Social Welfare Acts.

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(Sgd.) _____
(CHAIRMAN)