[2019] IEHC 634

THE HIGH COURT

[2017 No. 173 MCA]

IN THE MATTER OF S. 46 OF THE WORKPLACE RELATIONS ACT, 2015 BETWEEN

THE MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION

APPELLANT

AND

THE LABOUR COURT AND MARY DUNNE

RESPONDENTS

Judgment of Mr. Justice Michael MacGrath delivered on the 4th day of July, 2019.

1. This is an appeal on a point of law pursuant to s. 46 of Workplace Relations Act, 2015 by the Minister for Employment Affairs and Social Protection ("*the Minister*") from a determination of the Labour Court made on 19th April, 2017 which concerns the interpretation and application of Regulation 3 of the Transfer of Undertakings Regulations 2003 ("*the Regulations*"). Ms. Heffernan was the manager of a Branch Office of the Minister's department which was responsible for the delivery of certain services in connection with the disbursement of social welfare payments, in Edenderry, County Offaly. Ms. Dunne was an employee of Ms. Heffernan. The Labour Court determined that a transfer within the meaning of the Regulations occurred on or about 11th December, 2005, when Ms. Nuala Heffernan retired as Branch Officer. The services previously provided by Ms. Dunne were transferred to and subsumed into a greater range of services provided by the Minister's department at its Intreo office in the town.

2. Section 46 of Workplace Relations Act, 2015 ("*the Act of 2015*") provides:-

> *"A party to proceedings before the Labour Court under this Part may, not later than 42 days from the service on that party of notice of the decision of the Labour Court in those proceedings, appeal that decision to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive."*

The Regulations

3. Regulation 3 of the Transfer of Undertakings Regulations 2003 ("*the Regulations*") provides:-

> *"(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."

4. An important purpose of the Regulations is to safeguard the rights and entitlements of employees when the business or part of the business in which they are employed transfers from one employer to another. It is a fundamental requirement of the Regulations that the *service* must constitute an economic entity but it can only do so if it is engaged in an economic *activity*. "*Economic activity*", however, is not defined in the Regulations but has been addressed in caselaw. An issue arises as to whether this court should entertain arguments on the issue of economic activity as it applies to the circumstances in this case; as it is contended that this is not an issue which was argued or addressed in the Labour Court. A similar controversy arises as to whether any such transfer constituted an administrative re-organisation or a transfer of administrative function within the meaning of Regulation 3(4).

Factual Background

5. Ms. Nuala Heffernan was contracted by the Department of Social Protection, pursuant to what is described as "*a contract for services*", to run and manage a social welfare Branch Office in Edenderry. Under her contract, she was required to provide necessary premises and associated facilities, including staff, and to deliver services relating to the distribution of social welfare payments, as agent of the Department. Ms. Dunne, the second respondent, was employed by Ms. Heffernan who retired on 11th December, 2015. In anticipation of that event, the department made a decision to alter arrangements regarding the provision of those services. It did not seek to enter into a further contract for service with an alternative contractor but decided to consolidate the delivery of the services with other services that it intended to provide through its Intreo office in the town. Ms. Dunne had been employed under a contract of service with Ms. Heffernan from 2nd June, 2002 to 11th December, 2015 when the business ceased operating.

6. By letter dated 2nd November, 2015 the Department advised Ms. Heffernan that it did not consider that the Regulations applied to her staff as no transfer of undertaking was occurring. There would be no change of ownership of the Branch Office and it would merely cease to exist following her retirement. All social welfare services were to be provided via the department's existing office in the town which would become an Intreo office. It was explained that this was part of an administrative reorganisation of the department's public services for the area and, once closed, the Branch Office could not reasonably be regarded as retaining its identity nor could it be considered as remaining in operation as a going concern.

7. The Branch Office ceased to operate from midday on Thursday, 10th December, 2015. By the next morning equipment was already installed in the new office.

8. Ms. Dunne, who was the only full-time employee of the Branch Office, was not paid redundancy nor was she afforded the opportunity to transfer her employment to the new Intreo office. She complained to the Workplace Relations Commission that her "*new*

employer" did not ensure that her terms and conditions transferred from her previous employer.

9. An adjudication officer upheld her complaint. The Minister was not represented at the hearing, but made submissions which the adjudicator took into consideration in arriving at his conclusion. This decision was appealed to the Labour Court. It was rejected. The matter now comes before this Court pursuant to the provisions of s. 46 of the Act of 2015. The Minister does not accept that the consolidation of the delivery services in Edenderry constituted a transfer of undertaking within the meaning of the Regulations.

10. By way of historical background, counsel for the Minister, Mr. White S.C., drew the court's attention to *O'Coindealbhain (Inspector of Taxes) v. Mooney* [1990] 1 I.R. 422 where the history of branch managers was discussed. They were appointed to pay out social insurance under the Labour Exchange Act, 1909 and apart from being assigned additional functions there have been no major changes to the structure. To this day those offices carry out this function on behalf of the Minister. While various different schemes have been introduced over the years, their basic function has remained unaltered. Blayney J. noted that they were established, in the main, in rural areas where it would have been too costly to set up a district office of the parent department staffed by civil servants.

The role of the court

11. This is an appeal on a point of law from a specialist body. Appropriate deference must be shown by this court to its decisions. What this means has been the subject of debate. It is submitted on behalf of Ms. Dunne that it is only in the most exceptional of circumstances that this court should or ought to set aside a determination of the Labour Court on appeal. Ms. Bolger S.C. submits that in accordance with *dicta* of O'Sullivan J. in *Mulcahy v. Minister for Justice, Equality and Law Reform and Waterford Leader Partnertship Ltd* [2002] 13 E.L.R. 12, that it is only if tribunal's conclusion is "*so abhorrent to logic and common sense or involves an error of law*", that the High Court should intervene. A practical reason for this court not to interfere is that it has not heard the evidence. Mr. White S.C. acknowledges that the court is not at large and that it may intervene where it finds that the decision is based on an identifiable error of law or an unsustainable finding of fact, but that its jurisdiction is wider than that which applies in judicial review applications.

12. In *Fitzgibbon v. The Law Society* [2015] 1 I.R. 516 Clarke J. (as he then was) observed at para. 51:-

> *"Where the legislature confirms a right to a statutory appeal, it must evidently be assumed that this was intended to have some meaning and some purpose. Where, for example, judicial review is independently available, it must be considered as conferring some additional benefit(s) on the appellant. Something separate from a mere "test" for legality, or the mere quashing or remitting of a decision based on standard judicial review grounds. The range of possibilities in this regard is extensive, varying from a full appeal, as from the Circuit Court to the High Court on circuit (s. 38 of the Courts of Justice Act 1936), to one strictly limited, say on a*

point of law, perhaps even further limited by the nature of the point and only then on due certification by the trial court (see as examples, s.29 of the Courts of Justice Act 1924 as substituted by s. 22 of the Criminal Justice Act 2006 and as later amended and s. 50(3)(f) of the Planning and Development Act 2000). In between, one can find several other variable forms of "appeal". It therefore follows that the availability of such a right does not mean that all reviews, by way of appeal, are necessarily the same: quite obviously they are not. As Costello J. pointed out in Dunne v. Minister for Fisheries [1984]1 I.R. 230, "in every case the statute in question must be construed" (p.237). Barron J. in Orange said "the test for competition cases cannot be a guide for other cases" (p. 238): certainly, without much concordance on many other important factors, this surely must be right. This therefore being the situation, it then becomes necessary to consider each legislative framework in its own right."

He observed that one must take into consideration matters such as the nature of the body in question, the knowledge and expertise within it, the type of decisions involved and the process leading to that decision, including whether the appellant had a full right of participation. Observing that expertise and knowledge is at the very heart of the rule and that the greater level of expert knowledge which a body has, the greater should be the respect shown to it, he cautioned:-

"The basic rationale for the rule is both clear and well justified and is one which I fully support. The problem as I see it is that, the concept has free-wheeled and continues to do so: it now seems that on the public law side, curial deference, almost to a standard level, must be afforded to any body or entity with any type of decision making role, with little regard being paid to the level or degree of expertise within it. This has the capacity to fundamentally undermine the very purpose of its existence in the first instance. It would be a great loss, if through omission, its function was unnecessarily attenuated by its over application."

13. In *UCC v. Bushin* [2012] IEHC 76 Kearns P. stated that such deference should be to a significant degree. In *An Post v. Monaghan* [2013] IEHC 404, Hedigan J. commented that the role of the Court is limited and it may intervene only where it finds that the decision is based on an identifiable error of law or an unsustainable finding of fact. In acknowledging that such decisions are made by an expert administrative tribunal, he observed:-

"Unless a claim of irrationality is sustained, the court cannot weigh the strengths or weaknesses of the arguments or evaluate its determination thereon…The court may, however, examine the basis upon which the Labour Court found certain facts. It can consider whether certain matters ought or ought not to have been considered or taken into account by the Labour Court in determining the facts."

14. In *Dunnes Stores v. Doyle* [2014] 25 E.L.R. 184, Birmingham J. considered that findings of fact by the Employment Appeals Tribunal was deserving of greater respect because it was a tribunal representing both sides of industry. In *Top Security Limited v. Thomas*

Sadlier and Ors [2017] IEHC 134, White J. stressed the supervisory nature of the jurisdiction.

15. Where the issue concerns one of legal interpretation, however, the role of the court of necessity must be wider than that which it enjoys in an application for judicial review. In *Doyle v. Private Residential Tenancies Board and another* [2015] IEHC 724 Baker J. stated:-

> *"When the Oireachtas provides a statutory right of appeal on a point of law, it must have intended some greater degree of court involvement with the decision than the perhaps more constrained approach taken by a court on a judicial review... The appeal on a point of law, then, gives a wider scope to a court to reverse or vary a decision of the body at first instance, and while that is not to say that the court will set aside a finding of fact, more important for present purposes, it does suggest that a court hearing a statutory appeal may set aside a finding which arises from an incorrect interpretation of the law or of legal documents, including contractual documents which bear on the dispute, or a mixed question of law and fact"*

General Principles on Transfer of Undertakings

16. The court has been referred to a considerable number of decisions of the CJEU on the meaning of "*transfer of undertakings*", with greater or lesser emphasis placed on particular authorities in support of positions taken. Having reviewed those authorities, it appears to me that the main principles are as follows:-

i. The aim of the Directive (and thus the Regulations – no case being made that there is any issue on transposition) is to ensure continuity of employment relationships with an economic identity: *Süzen v Zehnacker Gebäudereinigung Krankenhausservice* (C-13/95). The Directive expressly acknowledges as one of its purposes, the necessity to provide for the protection of employees in the event of a change of employer and in particular to ensure that their rights are safeguarded.

ii. The transfer must concern an *economic entity*, meaning an organised grouping of resources which has the objective of pursuing an *economic activity*.

iii. The economic entity must retain its identity after being taken over by the new employer, as indicated, *inter alia*, by the fact that its operation is actually continued or resumed: *Süzen; Amatori & Ors v. Telecom Italia SpA & Ors* (C-458/12); *Ricardo v. Portimão Urbis E.M. SA* (C-416/16).

iv. In deciding whether there has been a transfer, all the circumstances must be looked at, *including* those listed at 5 below: *Spijkers v. Abattoir & Anor* (C-24/85) and *Abler & Ors v. Sodhexo* (C-340/01). Nevertheless, the circumstances thus referred to are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation: *Administrador de Infraestructuras Ferroviarias (ADIF) v. Luis Aira Pascual and Others* (C-509/14) at para. 32.

v. The circumstances to be considered include:-

a. the type of undertaking or business in question,
b. whether or not its tangible assets, such as buildings and movable property, are transferred,
c. the value of its intangible assets at the time of the transfer,
d. whether or not the majority of its employees are taken over by the new employer,
e. whether or not its customers are transferred,
f. the degree of similarity between the activities carried on before and after the transfer,
g. the period, if any, for which those activities were suspended.

vi. The degree of importance to be attached to any one of these criteria will necessarily vary according to the activity carried on, or the production or operating methods employed in the relevant undertaking, business or part of a business: *Aira Pascual.*

vii. The mere fact that one economic entity takes over the economic activity of another entity is not a ground for concluding that the latter has retained its identity. The identity of such an entity cannot be reduced to the activity entrusted to it. Its identity emerges from several indissociable factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it: *CLECE SA v. María Socorro Martín Valor and Ayuntamiento de Cobisa* (C-463/09).

viii. What is relevant for the purpose of finding that the identity of the transferred entity has been preserved is not the retention of the specific organisation imposed by the employer on the various elements of production which are transferred, rather the retention of the functional link of interdependence and complementarity between those elements. The retention of a functional link of that kind between the various elements transferred allows the transferee to use them even if they are integrated, after the transfer, in a new and different organisational structure to pursue an identical or analogous economic activity: *Dietmar Klarenberg v. Ferrotron Technologies GmbH,* (C-466/07); Ferreira da Silva e Brito and Others (C-160/14). Thus the fact that an economic entity is wound up and its activities transferred to two other entities does not, in itself, preclude the applicability of the Directive: *Ricardo*.

ix. Where a transfer relates to an economic activity, it falls within the scope of the Directive. The public law or private law nature of the transferor and the transferee is of little importance in this regard. Excluded in principle from classification as economic activity are activities which fall within the exercise of public powers. By contrast, services which, without falling within the exercise of public powers, are carried out in the public interest and without a profit motive and are in competition with those offered by operators pursuing a profit motive have been classified as economic: *Ivana Scattolon v. Ministero dell'Istruzione, dell'Università e della Ricerca* (C108/10).

x. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets: *Süzen*.

xi. That tangible assets do not belong to a predecessor and are provided by the contracting authority does not preclude the existence of a transfer within the meaning of the Directive*: Carlito Abler and Others v. Sodexho MM Catering Gesellschaft mbH* (C-340/01).

The Determination of the Labour Court (No TUD 174)

17. Having reviewed the authorities, the Labour Court acknowledged that the decisive criteria for a transfer within the meaning of the Directive is whether the entity retains its identity, by reference to whether its operation is continued or resumed. It also placed emphasis on *Dr. Sophie Redmond Stichting v. Hendrikus Bartol and Ors* (C-29/91) where it was held that the expression "*legal transfer*" encapsulated circumstances in which a public authority decided to terminate a subsidy paid to one legal person, as a result of which the activities of that legal person were terminated; and to transfer it to another legal person with a similar aim. Applying such reasoning to the facts of this case, the Labour Court concluded that the Minister had terminated the financial arrangement with Ms. Heffernan on the natural expiration of her contract. Those services were transferred to the department itself in the guise of the Intreo office. The court found that it was *irrefutably* the case that the mandate of the Intreo office included the continued delivery of those limited activities previously performed by the Branch Office. Therefore, on the basis of the reasoning in *Stichting* and *Spijkers*, a transfer of undertaking must be taken to have occurred on the 11th December, 2015.

18. Addressing the Minister's argument that no staff had transferred, the Labour Court acknowledged that a distinction ought to be drawn between businesses which are asset-reliant and those which are labour intensive. It took the view that *significant tangible* assets, which were essential to the performance by the Branch Office of its functions, consisted of the data of the recipients of the relevant social welfare schemes administered by the Branch Office, and stated:-

> *"It is common case, that the respondent was at all times the Data Controller in respect of that personal data and that it reverted fully into the respondent's control following the closure of the Branch Office. Moreover, it is not denied by the Respondent that those data subjects whose social welfare entitlements were administered through the Branch Office up to the date of its closure continued to have those same entitlements administered on their behalf by the Intreo office thereafter, following a seamless transition of responsibilities from the Branch Office to the Intreo office."*

19. Referring to *Abler* the Labour Court accepted that although tangible assets did not belong to the predecessor and were provided by the contracting authority, this could not preclude the existence of a transfer within the meaning of the Directive. It determined

that those assets comprised the significant operational assets of the economic activity and that the transfer of the files of the relevant customers enabled the respondent through its Intreo office to continue the activities performed previously by the Branch Office:-

> *"The key to the continuation of the provision of social welfare services in question was in fact the availability of a service user's files (or more precisely, the data therein) to the staff in the Intreo office."*

20. The court concluded that the activity which was the raison d'etre of the Branch Office was seamlessly continued by the respondent at the Intreo office. Therefore, there has been a transfer of undertaking and that the complainant was entitled to transfer her employment from the Branch Office to the Intreo office on no less favourable terms and conditions and to have her continuity of service preserved.

The Minister's Submissions

21. While seven grounds of appeal are advanced in the notice of appeal, Mr. White S.C. states that these are reducible to three critical issues.

22. First, he submits the Labour Court erred in law in holding that the activities of the Branch Office constituted an *economic entity* for the purposes of the Regulations. The Branch Office did not and could not have had the objective of pursuing an economic activity, it did not have functional autonomy and the Labour Court wrongly equated the Branch Office with the activity entrusted to it. None of the activities in the branch could be carried out otherwise than under the instructions or remit of the Minister. The Branch Office operated entirely as agent for the Minister in the administration of relevant statutory and non- statutory scheme. In short, what occurred was a succession of function and no more. While there is no dispute that what was available in the Branch Office was subsequently available in the Intreo office, the fact that the activity transfers is not the end of the issue and the Labour Court misdirected itself and appears to have believed that the transfer of the activity was of greater relevance than it can or should be. In *Aeroports de Paris v. Commission of the European Communities* (C-82/01), the Court observed that any activity consisting of offering goods and services on a given market is an economic activity. It is argued that the activities engaged in by the Edenderry Branch Office are classically those of a public authority. The recipients of the benefits are not customers.

They have no choice as to where they must attend to receive State benefits and it is submitted that the Labour Court failed to fully engage with this point. There is no competition for any such market. It is further submitted that the services previously provided by the Branch Office consist of the exercise of public authority and therefore are not economic activity. That Ms. Heffernan was engaged by private contract was immaterial.

23. Second, the Labour Court erred in law in misconstruing the evidence before it and in concluding that the Branch Office had *retained its identity* when it was integrated into the Intreo office. The test enunciated in *Stichting*, involves consideration of all the facts and

circumstances characterising the transaction. This the Labour Court failed to do. In the alternative, inferences were drawn from facts that no reasonable tribunal could have drawn. Certain matters were not considered and inordinate weight was given to certain facts. Mr. White S.C. submits that the assets which were taken into account are department records and department files. They are of no use to anyone but the department. Ms. Heffernan did not own or have those assets independently of the department. Inordinate weight was attached to the suggested tangible assets and there was an unjustifiable and inordinate elevation of the files and computers to the status of essential assets. There was no evidence to suggest that these items are, or were indispensable, to the onward provision of the services. There was no evidence as to their value. There was no evidence that the transfer of these assets was necessary to carry out the work. The Intreo office is paperless, a key difference, it is submitted by the Minister, between it and the Branch Office. With regard to the criteria as outlined in the case law of the CJEU, there was a failure to consider the type of undertaking and to see the clear distinction to be drawn between branch activities on the one hand and commercial activity on the other. No immovable property was transferred and there was no evidence to support the finding that the Branch Office was asset reliant. No employees were transferred. No customers were transferred. Persons availing of the service are not customers. They are recipients of the social welfare payments. Insufficient weight was given to the completely new dispensation and services in the Intreo office. The uncontested evidence is that a whole range of additional services are now being provided in that office which had not previously been provided in the Branch Office. While not a decisive point, it is one that had to be weighed in the balance. No attention was given by the Labour Court to this factor relating to the similarity or otherwise of the activities being carried out in each office.

24. Third, the Labour Court, in particular, failed to have regard to Regulation 3(4). It is submitted that this was an administrative organisation of administrative authority. There was evidence before the Labour Court regarding the rationale for the reorganisation which related to administrative efficiency and the provision of an accessible service to individual claimants and recipients. The Minister was now insourcing and the fact that the activities had been previously provided to a private sector employment contract did not alter the position. Reliance is placed in this regard on *Henke v. Schierke* (C-298/94), as supporting the contention that there was a reorganisation of social protection services in the Edenderry area following the retirement of the branch manager and that this fell into a category contemplated in Regulation 3(4).

25. Counsel submits that Branch Offices and the Branch Officers in charge were established solely for the purposes of discharging a public function being the allocation and distribution of State supports. Branch managers are contracted to act as the agent of the Minister in the geographic area in which the branch operates and as determined by the Department. The position is filled through an open competitive selection process. Contracts are only awarded to individuals as personal service is required. It is submitted, therefore, that it must have been clear to the Labour Court that the activities of the Branch Office were at all times an integral part of the social welfare system. Thus, the

Branch Office was never involved in economic activity. It is submitted that no entity other than the State allocates entitlement for social welfare payments, with the exchequer being the sole source of funding for this. There is no competition with services offered by operators who seek to make a profit.

26. The Minister submits that the Labour Court misapplied decisions of the European Court of Justice as authority for the proposition that the Branch Office was an autonomous economic entity within the meaning of the Directive and the Regulations. It is submitted that with the exception of *Amatori & Ors v. Telecom Italia SpA & Ors* (C-458/12), the judgments referred to by the Labour Court do not address the issue of what constitutes an economic activity for the purposes of the directive.

27. The Minister is also critical of the Labour Court's interpretation of the European Court of Justice's reasoning in *Stichting*. It is submitted that reliance on that decision is misplaced, because the Court of Justice repeatedly pointed out that the mere fact that work carried out by the transferor and the transferee was similar did not justify the conclusion that there had been a transfer of an economic entity.

28. In CLECE SA, Advocate General Trstenjak stated:-

> *"The organisational entity which existed before the transfer must essentially continue to exist as such without change after the transfer. It is therefore crucial, first of all, whether an autonomous economic entity actually existed before the transfer."*

The Advocate General distinguished between a succession of function and a transfer. The fact that the work or the activity continues is one of a number of indicators but was not decisive and the Minister argues that the Labour Court made a significant error of law in concluding that the Branch Office constituted an economic entity. It is submitted that the office did not have functional autonomy, and the Labour Court wrongly equated the Branch Office with the activity entrusted to it.

29. Mr. White S.C, in answer to arguments focusing on the contract for services, disputes that analysis of contract terms is equivalent to an analysis of the undertaking and in any event is contrary to the case made by the complainant in the Labour Court. No case was made that Ms. Heffernan was in the business of providing buildings etc and the department has no requirement for the buildings. The Minister could not be the transferee and the customer. The contract, while not irrelevant, is the instrument created by the parties but it is not the entity. The question addressed in case law is directed at the service being provided.

The Second Respondent's Submissions

30. Ms. Bolger S.C., on behalf of the second named respondent, submits that two of the three points argued on this appeal were not raised in the Labour Court; those relating to economic activity and Regulation 3(4). This is supported by reference to the contents of the notice of motion on this appeal. No attempt was made to expand on these grounds

when the notice of motion was amended. To permit such arguments now is to breach her client's constitutional rights to make her case, to call evidence, to make submissions and to cross examine on those issues. Not raising this issue below deprived Ms. Dunne of the opportunity of adducing evidence, for example, from Ms. Heffernan of the nature of services provided. The authorities on this point concerning appeals to the Supreme Court from the High Court, while helpful, it is submitted, must be viewed in the context of the limited appeal on a point of law which is permitted on a statutory appeal such as this. In Top Security, White J. ruled that the grounds of the statutory appeal, in that case, on the issue of public procurement, could not be addressed by him as that issue had not been raised below. In *Russell v. Mount Temple Comprehensive School* [2009] IEHC 533 Hanna J. excluded points made on appeal but not before the Labour Court. In so doing he reviewed initial correspondence and the matters put before the Labour Court and refused to entertain arguments which would have the effect of denying the respondent the right to test or contest the evidence adduced.

31. Adopting such approach, therefore, it is submitted that an analysis of the submissions and correspondence in this case reveals that two of the three issues were not addressed. While reference may have been made to a number of the leading authorities, emphasis was placed on the question of retention of identity, not economic activity, as addressed in those cases.

32. It is submitted that, in any event, *ADIF v. Aira Pascual* is an answer to any points that may arise on economic activity or Regulation 3(4) and that this much was acknowledged by the Minister in his submissions to the Labour Court made on 4th October, 2016 when it was stated at p. 5 that:-

> *"In the light of the Court of Justice judgment in ADIF v Pascual, an attempt to submit that the Directive/Regulations are absolutely precluded is unlikely to succeed. However, the facts as they arise in this case are near the extreme and any proper consideration of the facts yields to the conclusion that no transfer has occurred."*

It is submitted that this is a correct statement and it is why the two issues were not raised before the Labour Court. It is also of note that the key question as identified in that paragraph was stated to be:-

> *"has there been a transfer of an economic identity which has retained its identity in light of the cessation of contract with Ms Heffernan and the subsequent bringing 'in house' of services and the expansion of same with the Intreo office located at an entirely separate premises?"*

In passing it is to be observed that counsel for the Minister submits that the facts in *ADIF* fall clearly into the category of economic activity.

33. Counsel submits, and in the alternative, the Branch Office operated by Ms. Heffernan constituted an autonomous economic entity within the meaning of the Regulations as

interpreted by the European Court of Justice in cases such as *Stichting and Jaoa Felipe Ferreira da Silva Brito and Ors. v. Estado Portogues* (C-160/14).

34. It is also contended that any argument based on Regulation 3(4) of the Directive, cannot and does not arise on this appeal for similar reasons. In any event, and in the alternative, in *Didier Mayer v. Association Promotion de L'Information Messine* (APIM) (C-175/99) it was held that the transfer of an economic activity from a person governed by private law to a legal person governed by public law does in principle fall within the scope of Directive 77/187/EC. It is therefore submitted that it was abundantly clear to the appellant and to the court that the exception did not apply on the facts of this case. The argument was not raised and the court was not required to deal with it.

35. Counsel highlights the nature of the contractual obligations placed on Ms. Heffernan under her contract of service and the business nature of that contract. Thus, for example, it places an obligation on the branch manager to provide accommodation and it may be terminated for a number of reasons. She operates a business on her own account, and that one must distinguish between the contract under which she operates and the duties she is bound to perform under that contract.

36. It is further submitted that in so far as '*economic activity*' and '*market'* is concerned, that the market is a captive one does not exclude the operation of the directive. Analogy is drawn with the facts of *Abler* where catering services provided to a hospital were brought in house.

37. Ms. Bolger S.C. submits that the Labour Court's finding was based on uncontroverted evidence. She submits that assets used by Ms. Heffernan were subsequently used in the Intreo office to serve the same individuals previously served by the Branch Office. The Minister had engaged a firm of logistics experts to remove all files and records from the Branch Office. This commenced in October, 2015. Furthermore, older files and records were removed for secure storage to the respondent's premises in Sligo, whereas current files and all other property of the respondent, including the computer and scanner were removed to the Intreo office and the service provided by the Branch Office continued to be provided through the Intreo office. The Branch Office and the Intreo office covered the same geographical area. An automated message was placed on the former Branch Offices' telephone number to inform callers that the services had been relocated to the Intreo office and provided the telephone number for that office. Finally, it is submitted that the local office number which had been used to identify customers of the Branch Office remained in use at the Intreo office.

Decision

Basis for Intervention

38. This is an appeal on a point of law from a determination of the Labour Court. It is not a full re-hearing. Neither is it a judicial review of that determination. That this court might disagree with the Labour Court's conclusions on the facts is not a basis upon which it can or ought to intervene. Equally, it must be recognised that the statutory appeal process is not equivalent to an application for judicial review. The principles applicable in judicial

review are softened somewhat and the court's jurisdiction is wider than that which is enjoyed in judicial review. Nevertheless, given the particular expertise of the Labour Court in employment related issues, drawing on representation from both sides of industry, it's decisions should be afforded significant deference. It has been stated that the court should only intervene if there is an identifiable error of law or an unsustainable finding of fact or where inferences and conclusions from the facts are drawn, such that no reasonable tribunal should have found.

39. In *National University of Ireland Cork v. Ahern* [2005] 2 I.R. 577 McCracken J. addressed circumstances where the court might intervene in relation to factual matters. He stated:-

> *"The Respondents submit that the matters determined by the Labour Court were largely questions of fact, and that matters of fact as found by the Labour Court must be accepted by the High Court in any appeal from its findings. As a statement of principle, this is certainly correct. However, this is not to say that the High Court or this Court cannot examine the basis upon which the Labour Court found certain facts. The relevance, or indeed admissibility, of the matters relied on by the Labour Court in determining the facts is a question of law. In particular, the question of whether certain matters ought or ought not to have been considered by the Labour Court and ought or ought not to have been taken into account by it in determining the facts, is clearly a question of law, and can be considered on an appeal under s.8(3)".*

Grounds of Appeal

40. I accept Ms. Bolger's submission that the Labour Court cannot be criticised for not engaging with arguments not made before it. Further, I also accept that even if a matter is raised in the notice or grounds of appeal and was not argued below, that this court should be slow to entertain arguments on any such issue.

41. In *ACC Bank v. Lynn* [2015] 2 I.R. 688 Charleton J. stated at para. 10:-

> *"There is a continuum between lack of merit in bringing in fresh points on appeal simply because they have occurred to the parties or their lawyers late in the day and cases where the discretion should favour an appellant. In exercising that discretion, the fundamental point is where the balance of fairness lies. That, however, cannot be the only factor. Given that the Constitution, as Henchy J stated in Movie News Ltd v Galway County Council (Unreported, Supreme Court 25th July 1997), contemplates a full hearing of all issues at first instance and an appeal only on such points of law as have been fully ventilated at first instance, a party seeking to raise a novel legal issue on appeal must justify that by reference to some special or extraordinary factors."*

It was not possible to give any definitive list of factors. The urgency or importance of a decision on a point of law which affects a multitude of cases and the conduct of the litigation may also be important. Thus, he continued:-

> *"In Koger Inc. & Anor v. James O'Donnell & Ors [2013] IESC 28, the argument of a new point on appeal was disallowed where it was completely opposed to the points raised during the trial in the High Court. On the other hand, in Cussens & Ors v Brosnan (Inspector of Taxes) [2015] IESC 48, a fresh ground which was closely related to the arguments advanced at first instance was allowed, it being regarded as arising from the questions already posed in the case. In the context of the fundamental obligation of the courts under the Constitution to seek to dispense justice to litigants, earlier cases on the exercise of this discretion are of limited assistance; see for instance London, Chatham and Dover Railway Company v. South-Eastern Railway Company (1888) 40 Ch D 100 and Davis v Galmoyle (1888) 39 Ch D 322. Any discretion to enable a new point to be argued on appeal is to be exercised in order to pursue the aim of fundamental fairness within the limitations of the constitutional structure"*

42. O'Donnell J. in *Lough Swilly Shellfish Growers v. Bradley* [2013] 1 I.R. 227 at para. 28, referred to the spectrum of cases in which a new issue is sought to be argued on appeal. I return to this at para 48 below.

43. An analysis of the submissions, including supplemental submissions, made by and on behalf of the Minister to the Labour Court indicates that emphasis was placed on the issue of retention of identity. Little or no emphasis was placed on "*economic activity*". Emphasis was placed on what transferred, rather than the activity being pursued by Ms. Heffernan, and this is highlighted by the description, in the submissions, of the key question as being whether there had been a transfer of an economic entity which had retained its identity. Significant emphasis was placed on the characteristics of the transaction, as discussed in *Süzen*. At p. 7 of the submissions, *dicta* in *Francisco Herndandez Vidal SA v. Gomez Perez* is recited. While it is true that in the quotations referred to mention economic activity, they occur in the context of insourcing:-

> *"The term economic entity refers to an organised grouping of persons and assets enabling an economic activity which pursues a specific objective to be exercised. The mere fact that the maintenance work carried out first by the cleaning firm and then by the undertaking owning the premises is similar does not justify the conclusion that the transfer of such an entity has occurred." .*

44. In the Minister's supplemental submissions, issues arising from the decisions in *Spijkers* and *Stichting* were addressed. When addressing *Spijkers*, where one of the questions posed was "*does the fact that the circle of customers is not taken over prevent there being such a transfer…*", emphasis was again placed on what was transferred, rather than the type of activity being pursued, save that reference was made to the issue of the transfer of customers. In this context, it was submitted, at p. 4, that:-

> *"As pointed out in the principal submissions, the transfer of customers in the orthodox sense is of limited assessment benefit in the present case, given that recipients of social protection would inevitably transfer as a result of the insourcing decision made by the Department."*

45. If anything, the submissions tend to downplay the significance to be attached to the transfer of customers. See p. 7 where it is stated: -

> *"…recipients of social protection would always benefit ultimately from the Department but this fact alone cannot, it is submitted constitute a factor in the analysis of whether a transfer of an undertaking has occurred (given its inevitability). Further or in the alternative, if the Labour Court is to consider it as a factor, it is respectfully submitted, that its import is de minimis."*

46. It is clear that the Labour Court interpreted these submissions as not raising an issue regarding the concept of economic activity and it proceeded on the basis that the issue did not arise for discussion, at least to any significant degree. Thus, for example, at p. 5 of the determination, in addressing the respondent's supplemental submissions, the court observed:-

> *"Counsel for the respondent reiterated his view that the facts of the instant case clearly indicated that the economic activity in question (i.e. the social welfare services previously provided for the public via the branch office in Edenderry) did not retain its identity, as required by Article 1(b) …"*

47. In the circumstances, I am not satisfied that it can be said that the concept of economic activity was addressed by the respondent in a direct or meaningful sense before the Labour Court.

48. In *Lough Swilly*, O'Donnell J. acknowledged that there was a spectrum of cases in which a new issue is sought to be argued on appeal, at one extreme of which lies cases where argument of the point necessarily involves new evidence, and with a consequent effect on evidence already given, or where a party seeks to make an argument which was actually abandoned or where an argument is sought to be made which is diametrically opposed to that which has been advanced in the High Court. He held that in such cases leave would not be granted to argue a new point of appeal. At the other end of this continuum lie cases where a new formulation of argument is made in relation to a point advanced, or where new materials are submitted or perhaps where new legal argument is sought to be advanced which is closely related to arguments already made in the High Court or are a refinement of them. These would not be in any way dependent upon the evidence adduced below. He observed that in such cases while a court might impose terms as to costs, the court nevertheless retained the power in appropriate cases to permit the argument to be made.

49. Although the Minister may not have directly addressed the issue of economic activity before the Labour Court, and certainly not to the extent and in the manner which that issue has been addressed on this appeal, it seems to me appropriate to consider the submissions for a number of reasons. First, in terms of the spectrum of cases referred to by O'Donnell J. in *Lough Swilly*, I am satisfied that the consideration of this issue comes, albeit marginally, within that end of the spectrum which might be said to be a new legal argument, closely related to arguments already made in the High Court, but with one

caveat. O'Donnell J. stated that such argument should not in any way be dependent upon the evidence adduced. Ms. Bolger S.C. forcefully makes the point that had this issue been addressed before the Labour Court, it would have been open to her client to adduce evidence in relation to her business and clearly great care ought to be exercised in the consideration of this issue. Second, in *Lynn*, Charleton J. spoke of the requirements to exercise the discretion to enable a new point to be argued on appeal being exercised in order to attempt to achieve fundamental fairness, within the limitations of the Constitutional structure. Third, the Minister has submitted that this case has potential ramifications for a considerable number of other situations. Fourth, insofar as the issues of *autonomous economic entity*, and *customers* have been addressed by the Minister in the submissions to this court, as components of economic activity, analysis of the decision of the Labour Court illustrates that both of these issues were addressed to some extent, albeit in the context primarily of submissions made on behalf of the employee.

50. Counsel for Ms. Dunne relied on a number of decisions of the CJEU as authority for the proposition that the branch office operated by Ms. Heffernan constituted an autonomous economic entity. This is reflected in the determination. Mr. White S.C. contends that the authorities relied upon do not support this proposition - an argument which, from what I can glean, was not made in the Labour Court. Nevertheless, I believe that it is instructive to look at these decisions to see what they in fact decide. In *Nurten Guney-Gores v Securicor Aviation (Germany) Ltd and Ors* (joined cases C-232/04 and C- 233/04) the claimants were employees of Securicor as security attendants at Düsseldorf airport. Securicor had a contract with a German state authority to carry out security checks on passengers and baggage. All of the security equipment was provided by the state authority, its employees receive training on a special course and had to pass an examination to qualify as an aviation security assistant. In carrying out airport security checks, Securicor's employees were under the authority of the Federal Border Guard. Securicor's contract was not renewed and the complainants' contract was terminated. Another company was engaged to carry out security checks and took on a considerable number of employees who previously had been employed by Securicor - but not the complainants. The issue which the court had to decide was whether there was a transfer of business where the equipment was not owned by the original contractor. The Court, observing that the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract, held that the fact that the tangible assets were taken over by a new contractor without those assets having been transferred to him for independent commercial use did not preclude the application of the Directive. It is true that there does not appear to have been any direct discussion of the concept of autonomy, but neither was it placed in issue. In *Hernandez Vidal v. Gomez Perez Case* (C-127/96), the complainants were employees of a cleaning company and were allocated responsibility for cleaning the premises of Hernandez Vidal. The cleaning contract was terminated, with the company assuming to itself the task of cleaning its own premises. The court held that for the Directive to be applicable, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. The mere fact that the maintenance work carried out by the cleaning firm and the work then carried out itself by the undertaking which owns the premises is similar, did not

justify the conclusion that there had been a transfer of an economic entity between the two undertakings. The reason was that such an entity could not be reduced to the activity entrusted to it. Identity would emerge from other factors such as the workforce and the way the work was organized in the operational resources available to it. It held that the Directive applies to a situation in which an undertaking which used to entrust the cleaning of its premises to another undertaking decides to terminate the contract and in future carry out that cleaning work itself, provided that the operation was accompanied by the transfer of an economic entity between the two undertakings. Again, it is true that the judgment does not refer to the concept of economic activity, but neither does exclude it.

51. Mr. White S.C. submits that the more relevant authority is *Lorenzo Amatori v. Telecon SRL* (C-458/12), a decision concerning the re-organisation of Telecom Italia. Before the re-organisation the company structure included a division called a '*Technology and Operations Division'*, made up of a number of sections including, in particular, an '*Information Technology*' section, which covered IT activities. During the internal reorganisation, the company subdivided that section into several sections including an IT Operations Section. After the creation of this section, employees assigned to other sections continue to collaborate with one another. Further, after the creation and transfer of the IT Operations Section, the Software and Test Factory unit received specific instructions from Telecom Italia. Telecom Italia then transferred that section to a subsidiary and the applicants in the main proceedings, who were assigned to that section, continued their employment relationship without having consented to it. The applicants took the view that the legal transfer could not be classified as a transfer of part of an undertaking and sought a declaration that the transfer could not be relied on against them and that, consequently, their employment relationship with Telecom Italia continued.

52. It is of note, however, that it was there conceded and agreed for the purpose of the reference that the particular section in question was not functionally autonomous. Furthermore, the section had not existed before the transfer. Thus, the court operated on the basis that there was not a functional autonomous entity at the heart of the debate. It ruled that the absence of functional autonomy before the transfer meant that the transfer would not be covered by the directive. The decision, however, does not appear to me to address or decide what constitutes functional autonomy, that issue having been agreed.

53. Counsel for the Minister submits that the activity carried out at the Branch Office did not have functional autonomy because it operated entirely as agent for the Minister under the relevant schemes. It seems to me that the determination of such issues is very much fact dependent, and it is difficult to see that the facts of Amatori are necessarily inconsistent with the facts in this case. The court acknowledged that the concept of autonomy:-

> *"referring to the powers granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly to give instructions and allocate tasks to subordinates*

within the group, without direct intervention from other organizational structures of the employer".

Can it be said that under no circumstances did Ms. Heffernan not have that type of autonomy to organise her own business or to make arrangements in relation to the employment of others, or to give them directions as to how to go about their work, in order to fulfil the contract which she had with the Minister? Again, it appears to me that this is essentially a matter of fact to be determined on the evidence adduced. If the Labour Court had been requested to specifically address this issue, could it be said that any such finding of autonomy would be unreasonable, or be incapable of being substantiated on the facts? Had that argument been made, and had a specific conclusion arrived at by the Labour Court on the question of functional autonomy, it is not at all clear to me that the court would necessarily have intervened. But again, this is somewhat hypothetical because the argument concerning lack of functional autonomy was not addressed in a direct manner.

54. It is clear that the effect of the provisions of Regulation 3(4) was not addressed to the Labour Court and in accordance with established authority, I should not entertain this ground of appeal.

55. Nevertheless, even if I am incorrect in this, it appears to me that the argument made by the Minister on this point is far from conclusive. The Minister submits that there was evidence before the Labour Court on the rationale for the reorganisation which related to administrative efficiency and the provision of an accessible service to individual claimants and recipients. The availability of new technology and the development of a more integrated service to customers were at the heart of the decision, it is submitted, together with the fact that the Department already had premises and staff located in Edenderry. Reliance was placed on Henke. As against this, *Didier Mayeur v. Association Promotion de l'information messine (APIM)* (C-175/99) is clearly authority for the proposition that the transfer of an economic activity from a person governed by private law to a legal person governed by public law does in principle fall within the scope of the Directive.

56. Analysis of *Henke* suggests that there are significant differences between that case and this. There, the purpose of a grouping together of municipal authorities was to improve the performance of those municipalities' administrative tasks. In the circumstances the transfer between the municipality and the administrative collectivity related only to activities involving the exercise of public authority. Even if it is assumed that those activities had aspects of an economic nature, they could only be ancillary.

57. In *Mayeur*, the court ruled at para. 35:-

"..the transfer of activities here in question does not constitute a reorganisation of structures of the public administration or a transfer of administrative functions between public administrative authorities within the meaning of Henke… The fact that APIM was created on the initiative of the Mayor of that city, that it was directed by elected representatives, and that its resources were derived in the main

from municipal grants does not alter the fact that APIM was an entity distinct from that which took over its activities…"

The complainant in *Mayeur* was employed under contract of unspecified duration by the respondent ("*APIM*"), a non-profit association established to promote, propagate and make known by all possible means opportunities offered by the city of Metz. APIM directly or through others, published and distributed brochures, magazines, leaflets as part of this activity and it produced a magazine. Mr. Mayeur was responsible for the publicity activities of APIM. In that capacity, his duties were to canvas traders in the city and advertisers to collect funds for the publishing of advertisements in the magazine. APIM was dissolved and its activities were taken over by the city of Metz. Mr. Mayeur was informed that he had been dismissed because APIM had ceased its activities.

58. Having considered those authorities, and without making any determination on this point, it appears to me that it may not be irrational or unreasonable for a decision maker to conclude that the facts of *Mayeur* more closely resemble those of the case under consideration, than do the facts of *Henke*. Again, this is but an example of the significance of the consideration and findings of fact.

Retention of Identity

59. This brings me to the third argument, as to whether there is an identifiable error of law or an unsustainable finding of fact in the context of the Labour Court's consideration of the issue of retention of identity.

60. The real controversy between the parties, in my view, is not so much the legal principles applicable to the retention of identity issue, they were clearly set out by the Labour Court, rather whether the findings are such as to give rise to a conclusion that it is unreasonable and unsustainable to find that Directive, and thus the Regulations, apply.

61. It appears to me, therefore, that the issue which I must address is whether relevant factors were ignored or certain factors, which although relevant, were elevated disproportionately in the Labour Court's reasoning, which led to the conclusion that there had been a transfer of undertaking. Allied to this, it seems to me, is analysis of whether, on a global assessment of the matter, undue weight was afforded to particular facts or particular criteria, such as to render the overall finding of fact unsustainable.

62. It is clear from the authorities (see *Ricardo* para. 37) that the scope of the Directive cannot be determined solely on the basis of a textual interpretation. It ought to be viewed in the light of its purpose which is to safeguard employee's rights. In *Ricardo*, it was acknowledged by the Court that the concept of a legal transfer must be given a sufficiently flexible interpretation in keeping with the objective of the Directive. It is also clear that it is for national courts (and, thus the appropriate deciding authority within the jurisdiction) to determine whether the identity of the transferred entity has been retained.

63. That a largely fact-based analysis ought to be carried out to determine if the relevant criteria have been fulfilled, in my view, was acknowledged by the manner in which the

case proceeded in the Labour Court and is further acknowledged by the request made of that court to hear oral evidence. It is also reflected in the decisions of the CJEU, practically all of which conclude by referring to the function of the national courts on such issues.

64. The Labour Court acknowledged that the decisive criteria for establishing the existence of a transfer within the meaning of the Directive is whether the entity in question retains its identity, as indicated by the fact that its operation continued or resumed. It recorded that the decision in *Spijkers* remains the cornerstone of the jurisprudence of the court and quoted extensively from that decision. While this is so, however, those passages and the criteria outlined therein cannot be equated to statutory requirements. No one criteria must be viewed in isolation and that particular criteria are not present will not be fatal to the case made for the application of the Directive. The degree of importance to be attached to the criteria will necessarily vary according to the activity in question and all circumstances must be viewed as single factors in the overall assessment to be made. Equally, it must follow that simply because it has been decided in any given case that a particular type of activity is not precluded by the Directive does not mean that the Directive necessarily applies. Thus, as has been stated, each case will be heavily dependent on its individual facts and circumstances.

65. It is important to highlight the fact analysis approach which is required to be adopted, and thus the reticence which this court must have when considering whether to interfere with Labour Court's assessment of those facts, it being an expert body which has been entrusted with that function by statute.

66. Referring to *Stichting* and to the definition of the expression legal transfer, the Labour Court stated that it was common case that the Minister had terminated the arrangements with Ms. Heffernan on her retirement. It considered that the services were transferred to another legal person with a similar aim, the department itself. It recalled that it was necessary to consider all of the factual circumstances characterising the operation in considering whether the functions performed were in fact carried out or resumed by the new legal person with the same or similar activities. The court acknowledged that the activities being performed by the Branch Office were of a special nature, i.e. of a limited nature vis-à-vis the broader suite of social welfare services subsequently delivered through the Intreo Office. On this, it stated:-

> *"Nevertheless, it is irrefutably the case that the mandate of the Intreo office included the continued delivery of those limited activities previously performed by the Branch Office. In light of the ECJ's reasoning in Dr Sophie Redmond Stichting, therefore, a transfer of undertaking must be taken to have a occurred between the Branch Office and the industrial office on 11 December 2015." (Emphasis added)*

67. The Minister maintains that the Labour Court misdirected itself in law in the manner in which applied *Stichting* and while the CJEU has stated that the deciding body must look at the facts and circumstances, the single matter of the continuance of delivery is not conclusive or definitive. It is submitted that the Court of Justice has repeatedly pointed

out that the mere fact that work carried out by the transferor and transferee is similar does not justify the conclusion that there has been a transfer of economic identity. Further, in *Süzen*, the Court reiterated that identity cannot be reduced to the activity entrusted to it, and that other factors have to be considered, such as its workforce, its management staff, the way in which the work is organised, its operating methods or indeed, where appropriate, the operational resources available to it. But it is equally clear from the authorities, as I have stated above, that there is not one check list which must be satisfied and that if one or even more than one of the characteristics referred to in *Stichting* is missing, that the conclusion must necessarily be that there is not a transfer of undertaking.

68. I am satisfied, however, having considered the decision in its entirety, that to place the significance which the Minister seeks to attach to the word *therefore* as being indicative of the court's failure to look at all the circumstances, and thereby to misdirect itself in law, is to take this part of its reasoning out of context. It is clear that the court considered other factors such as transfer of assets, the non-transfer of employees, and the issue of the transfer of customers. I do not believe, therefore, that a reasonable interpretation of the decision of the Labour Court, when viewed in entirety, leads to the conclusion that it placed undue weight on the issue of continuance of delivery of services, an issue which it was entitled and obliged to address.

69. Consideration was also given to the position which pertains when an asset based, as opposed to a workforce-based, transfer occurs. It concluded that the significant tangible assets that were essential to the performance by the Branch Office of the functions entrusted pursuant to the contract in place with Ms. Heffernan, consisted of the data of the recipients of the social welfare schemes administered by the Branch Office. The Labour court noted that it was not denied by the respondent that those data subjects who social welfare entitlements were administered through the Branch Office up to the date of closure continue to have the same entitlement administered on their behalf by the Intreo office, following what it concluded was a seamless transition of responsibilities of the Branch Office to the Intreo office. In support, it referred to *Abler*, which decided that the fact that tangible assets taken over by a new service provider did not belong to its predecessor but were provided by the contracting authority, cannot preclude the existence of the transfer within the meaning of the directive. Applying the logic of *Abler*, it found that there was a transfer of assets between the Branch Office and the Intreo office consisting of files and data pertaining to relevant service user and that these assets comprised the significant operational assets of the activity, being the economic activity at the centre of the case. Further, it concluded that the transfer of files of the relevant customers enabled the respondent to continue the activities performed up to that date by the Branch Office. The key to the continuation of the provision of social welfare services was in fact the availability of the service users' files, more particularly the data therein, to the staff in the Intreo office. This was described as the key operational asset.

70. That this court might take a different view, or indeed express surprise at the view taken by the Labour Court, that assets were transferred is not sufficient to justify intervention.

Certain decisions of the CJEU, such as *Abler*, provide some support for this finding. I am unable to conclude that it is a legally unreasonable or unsustainable finding. By way of aside, and without determining this point given that it was not the subject of argument, can it be said that the right to use technological information is not capable of being considered an asset in itself?

71. Further, I find it difficult to accept that this particular finding, when viewed in the context of the reasoning of the Labour Court in its entirety, must necessarily be considered to be disproportionate or to be such as requires the intervention of the court. In coming to this conclusion, it must be restated, that this court did not have the benefit, which the Labour Court had, of assessing all of the evidence and witnesses who gave such evidence. It was one of a number of matters which were addressed by the court and even if I disagree with this finding, I am not satisfied that it is one which might throw the entire decision out of kilter and make it unsustainable.

72. Counsel for the Minister expresses concern that this decision may have widespread ramifications for situations where previously outsourced business is brought back in-house by relevant Government departments. I do not believe that this is, or could necessarily be, the case. This court exercises a supervisory jurisdiction and does not purport to make findings of fact. Each case will be heavily fact dependent and ultimately will require to be determined on the basis of the issues raised before the adjudication officer or the Labour Court, the evidence to be adduced and addressed and within the parameters of the legal principles applicable.

73. It is clear that the parties take opposing views on the effect and application of the various authorities to which reference has been made. In this regard, I reiterate what White J. stated in *Top Security*, when stressing the supervisory nature of the jurisdiction, he observed:-

> *"The Tribunal having heard the evidence of the parties, was best placed to apply the facts so found to the legal principles. In applying the law, it preferred some precedents over others. There are merits to the submissions of both parties and the court can see how different interpretations based on the facts determined by the tribunal could arise. However, the court is not deciding the case, but exercising a supervisory jurisdiction. I do not consider the submissions made by the applicant of sufficient persuasion to overturn the decision of the tribunal on the transfer of undertakings. The decision of the tribunal was not irrational, perverse or based on an identifiable error of law, or an unsustainable finding of fact."*

74. In the circumstances, I am not satisfied that it has been demonstrated that the Labour Court came to a conclusion in its determination that was based on an error of law, an unsustainable finding of fact or in placing undue weight on the facts which it addressed and found, I must therefore refuse the appeal.