Neutral Citation: [2017] IEHC 134

THE HIGH COURT

[2016 No. 104 MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO REGULATION 12(2) OF THE EUROPEAN COMMUNITIES (PROTECTION OF EMPLOYEES AND TRANSFER OF UNDERTAKINGS) REGULATIONS 2003

BETWEEN

TOP SECURITY LIMITED

APPELLANT

AND

THOMAS SADLIER, BARTOS BAZIUK, JOHN NICHOLSON, PADDY DOWLING AND DAVID MYTHEN

RESPONDENTS

JUDGMENT of Mr. Justice White delivered on the 10th day of March, 2017

1. This is a statutory appeal from a decision of the Employment Appeals Tribunal on the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003. (S.I. 131/2003.) The Employment Appeals Tribunal heard an appeal from the Rights Commissioner on 8th September, 2015, and 26th January, 2016, and issued its decision on 22nd February, 2016. An Originating Notice of Motion was issued on behalf of the applicant on 15th March, 2016, originally returnable for 18th April, 2016, grounded on the affidavit and exhibits of Guy Davies, General Manager of the applicant company, sworn on 14th March, 2016. A statement of opposition was filed and served on 30th May, 2016, grounded on the affidavit of Hugh Hegarty, Trade Union Official, sworn on 30th May, 2016. The appeal was heard in this Court on 13th December, 2016, and judgment was reserved.

2. Regulation 12(2) states:-

> "A party to proceedings before the Tribunal under Regulation 11 may appeal to the High Court from a determination of the Tribunal on a point of law and the determination of the High Court shall be final and conclusive."

3. The appellant contends that in its determination, the Tribunal erred in law as follows:-

> (a) There was no evidence before the Tribunal that the activity carried out by the respondents amounted to a stable economic entity that transferred from Manguard to the appellant.
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> (b) Strictly in the alternative, the evidence before the Tribunal was such that the decision by the Tribunal, to the effect, that the activity carried out by the respondents was a stable economic entity was irrational such that it was not open to the Tribunal to make such a finding.
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> (c) There was no evidence before the Tribunal that the activity carried out by the respondents was sufficiently structured and autonomous so as to enable the Tribunal to make a finding that it amounted to a stable economic entity.
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> (d) There was no evidence before the Tribunal that (and the Tribunal made no findings to the effect) the activity carried out by the respondents had any functional autonomy, 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 organisational structures of Manguard.
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> (e) The finding by the Tribunal that there was a transfer of an intangible asset in circumstances where the respondents transferred, was wrong. There was no agreement to transfer the respondents. The respondents did not transfer and with the exception of the fourth respondent, who retired - remained in the employment of Manguard. In the premises, the finding that there had been a transfer of an intangible asset was based upon a false premise.
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> (f) There was no evidence before the Tribunal that any good will transferred. The finding by the Tribunal that there was a transfer of good will was perverse.
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> (g) In finding that there was a transfer of undertakings, the Tribunal misdirected itself as to import of the decisions of the ECJ opened to it and in particular the decisions of the ECJ and *Francisco Hernandez Vidal SA & Ors* [1998] ECR 1-08179 and *Francisca Sanches Hidalgo & Ors* [1998] ECR 1-08237. The key principles set out in those authorities are as follows:-
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> (i) in certain circumstances a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity;
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> (ii) such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over a body of assets enabling him to carry on the activities or certain activities of the transfer or undertaking on a regular basis;
>
> (iii) the mere fact that the work carried out before and after the transfer is similar does not justify the conclusion that the transfer of an entity has occurred. A stable economic entity cannot be reduced to the activity entrusted to it;
>
> (iv) the identity of such an entity emerges from other 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.
>
> (v) a transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract.

(h) Applying those principles to the activity carried out by the respondents, the Tribunal was bound to conclude that there was no transfer. There was no evidence before the Tribunal that the provision of security services at the offices of the CSSO could, on its own, amount to a stable economic entity.

(i) There was no evidence before the Tribunal and the Tribunal made no findings (other than the perverse finding that there was a transfer of an intangible asset) or any other factors or elements or circumstances that could rise to a finding that there was a transfer of a stable economic entity.

(j) The determination by the Tribunal that the mere fact that the appellant was now carrying on the same activity formally carried out by the respondents in and of itself meant that there was a transfer of a stable economic entity was perverse and directly contrary to the ratio of the decisions of the ECJ referred to above.

(k) The Tribunal failed to have any or any proper regard to the position of Manguard and, in particular, failed to have regard to the fact that Manguard continued to employ four of the five respondents.

(l) The Tribunal failed to have any or any proper regard to the fact that the appellant had tendered for the contract on foot of a tender process that was subject to EU Council Directive 2004/18/EC as implemented into Irish law by S.I. 329 of 2006.

(m) It was common case that the appellant had tendered for the contract on the basis that it would provide the service using its own employees. The finding of the Tribunal entirely undermines the relevant provisions of public procurement law and, in particular, undermines the fundamental requirement that contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed on conditions of effective competition.

(n) The Tribunal erred in law in finding that the appellant breached Regulation 8 of the 2003 Regulations in circumstances where the respondents did not make any claim under Regulation 8.

4. The respondents to this appeal were employed as security guards providing security services to the Chief States Solicitors Office at Osmond House, Ship Street, Dublin 8 and the Chancery Building, Chancery Lane, Dublin 7. The evidence placed before the Tribunal was that the respondents were originally employed by Oscar Security each on separate dates ranging from 1988 to 2008 and all were transferred under the TUPE Regulations to Manguard Plus Limited on 25th October, 2010. They worked exclusively at these offices. On 31st May, 2013, the appellant submitted a tender to the Minister for Justice for the provision of security services at the same offices. Manguard Plus Limited was the incumbent service provider. On 19th July, 2013, the applicant was awarded the contract to provide the security services with effect from 26th August, 2013.

5. The tender document provided was a framework agreement for the provision of security services.

6. Paragraph 3.5 stated:-

"Transfer of Undertakings

Service Providers will be required to include an undertaking in their Tender and (the Contractor in any contract awarded) to comply fully with the provisions of Council Directive 2001/23/EC of 12th March, 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of undertakings or business and is implemented in Irish law by S.I. No. 131 of 2003 European Communities (Protection of Employees and Transfer of Undertakings) Regulations 2003 and to indemnify the Contracting Authority for any claim arising or loss of costs incurred as a result of its failure or incapacity to fulfil its obligations under the said Directive and Statutory Instrument.

Service Providers are required to include an undertaking in their Tender (the Contractor in any contract awarded) indemnifying the Contracting Authority against any claim by any new contractor engaged by the Contracting Authority in the future for losses arising from the failure of the existing contractor to comply with and fulfil its obligations under the terms and conditions of its employment contracts with its employees, during the term of the said contracts, who may subsequently be engaged by the new contractor."

7. The request for supplementary tender was furnished by Wesley Graham, Head of Office Services, Chief States Solicitors Offices on 15th May, 2013. It was for a fixed price contract. The applicant submitted a detailed tender in writing on 31st May, 2013.

8. There had been an exchange of emails on 22nd and 24th May, 2013, in which Mr. Graham made clear that "Tenderers should note that it is not a matter for a Contracting Authority to determine whether or not the Transfer of Undertakings Regulations apply. It is a matter of law depending on the surrounding facts and on the solution to be proposed by a Tenderer. This is a matter for Tenderers to address. The Contracting Authority does not give legal advice as to the application or non-application of TUPE.

9. By letter by registered post of 25th July, 2013, Sean Hall, the Operation Director of Manguard Plus Limited wrote to Mr. Guy Davies, General Manager, Top Security, Westgate House, Westgate Business Park, Ballymount, Dublin 24. The letter stated:-

"Dear Guy

We have been made aware that your company, Top Security, has been awarded the contract to provide Security services to the Chief States Solicitors Office at Osmond House and the Chancery commencing 25th August, 2013.

As per the requirements of the Security Service Framework Agreement, s. 3.5 and this tender award, you are required to comply with Statutory Instrument 131 of 2003, concerning the transfer of employees. This group of employees is protected under that instrument due to the unique nature of their employment, having been employed by Oscar Security at that site and then joining Manguard Plus under TUPE when we commenced this contract in October 2010 and having never worked at any other site during their employment with Manguard Plus.

We note that the Regulations require you consult with the employees affected and that this consultation must commence at least 30 days before the effective date of transfer. We also note that this consultation process has not commenced

and *de facto* you are not in compliance with S.I. 131 and we further believe from comments made that it is not your intention to comply with S.I. 131.

I can confirm that we have complied with a responsibility under S.I. 131 in relation to consultation and we now attach the employee information necessary to effect the transfer as further required.

Unless it is evidenced in writing within 7 days that you will comply with the contractual terms regarding TUPE we will seek a judicial review of the contract award. In that instance we will use this letter to fix costs for the review in Top Security."

10. The appellant has accepted it did not respond to this letter nor did it communicate directly with the respondents.

11. In respect of the alleged Transfer of Undertaking, the Employment Appeals Tribunal found as follows:-

"Having listened to the evidence both written and oral from both parties and having observed the demeanour of the witnesses, and having regard to the wide, varied unwieldy and at times contradictory nature of the law in this area (as stated), the Tribunal is of the view that the service involved was an "economic entity" and not a mere activity as it involved a service provider for a profit by groups of worker/wage earners in competition with other like services rendered and was rendered in two different locations and as such comes within the definition as outlined in S.I. 131.

That their identity was retained in that they would continue to carry out the same work for the same customers/client i.e. CSSO in the same two locations as outlined and that the same customer/client would also be transferring.

That the majority of the workforce pertaining to the locations which involved the transfer of five employees of a total of eight employees in the said entity would be transferred.

That the entity involved two different locations which amounted to a part of business or undertaking pursuant to S.I. 131.

That the words and phrases "economic entity" and "undertaking" and "business" are used interchangeably."

That the respondent agreed in evidence that a workforce and/or goodwill could amount to intangible assets and by implication amount to a transfer of intangible assets.

That in a transfer involving a service or services, that in such transfers, assets include intangible assets such as it work-force and goodwill, either solely or in addition to the transfer of tangible assets.

That the absence of a transfer of assets does not necessarily preclude the existence of a transfer of undertakings.

That the transfer would involve a change of employer.

That having regard to the letter from company M dated the 19th July 2013 stating that the client had confirmed that the TUPE Regulations would apply and requesting them to sign forms containing their details for the attention of the Respondent.

That arising from this and other undertakings given which were relied on by the appellants, that on balance it was envisaged that TUPE were part of the negotiations between the parties and that the Respondent knew or ought to have known that it was intended that TUPE Regulations would apply to this situation.

12. Paragraph 9(e) of the statutory appeal requires some clarification. The applicant alleges that the finding by the tribunal that there was a transfer of intangible assets in circumstances where the respondents transferred was wrong, and that the respondents did not transfer but remained in the employment of Manguard Plus Limited.

13. In a judgment of the European Court of Justice in *Abler v. Sodexho* [2004] IRLR 168, the court held:-

"The failure of a new contractor to take over an essential part of the staff which its predecessor employed to perform the same activity is not sufficient to preclude the existence of a transfer of an entity which retains its identity within the meaning of Business Transfers Directive 77/187 in a sector such as catering, where the activity is based essentially on equipment. Any other conclusion would run counter to the principal objectives of the Directive, which is to ensure the continuity, even against the wishes of the transferee, of the employment contracts of the employees of the transferor."

14. The uncontradicted evidence before the tribunal is that the applicant did not engage at all in the process.

15. The applicant is also incorrect when it asserts that four of the respondents did not lose their employment with the Transferring entity. The uncontradicted evidence was that Thomas Sadlier was re engaged by Manguard Plus Limited after unemployment of four weeks. He then covered holidays for other employees. When made permanent it was at a reduced wage. John Nicholson lost three weeks work, and recommenced work with Manguard Plus Limited at reduced wages. David Mythen was without work for eight weeks, and then procured three shifts a week, at a loss until early February 2014. Mr. Patrick Dowling worked three shifts, subsequent to the termination of his employment on 25th August, 2013. The court does not have any information about Bartosz Baziuk.

16. Mr. Davies in his affidavit did not agree that he had accepted in evidence that a workforce and/or goodwill could amount to intangible assets. As far as he was concerned no goodwill or employees transferred.

17. The court accepts the well established principle in relation to an appeal on a point of law that the Superior Courts have repeatedly applied a consistent significant curial deference to expert tribunals which is summarised by Hamilton C.J. in *Henry Denning & Sons Ireland Limited v. Minister for Social Welfare* [1998] 1 I.R. 34, stating:-

"That the courts should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced

judgments on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."

18. In the same case, Keane J. citing with approval the comments of Carroll J. in the High Court, stated:-

> "In an appeal on a question of law the court does not go into the merits of the decision. The primary facts are not in issue. Where there is a question of conclusions and inferences to be drawn from facts (a mixed question of fact and law) the court should confine itself to considering if they are conclusions and inferences which no reasonable person could draw or whether they are based on a wrong view of the law."

19. In the same judgment, Keane J. cited the decision of Kenny J. in *Mara (Inspector of Taxes) v. Hummingbird Limited* [1982] 2 ILRM 421, when he stated:-

> "If the conclusions from the primary facts are ones which no reasonable commissioner could draw, the court should set aside his findings on the ground that he must be assumed to have misdirected himself as to the law or made a mistake in reasoning. Finally, if his conclusions show that he has adopted a wrong view of the law, they should be set aside."

20. In section of (l) and (m) of the statutory appeal, the appellant has argued that the Tribunal failed to consider EU Council Directive 2014/18/EC as implemented in Irish law by S.I. No. 329 of 2006, that is the Public Procurement Regulations. That was not raised in evidence before the Tribunal. The respondents rely on a judgment of Laffoy J. in *Minister for Finance v. McArdle* [2007] IEHC 98, when she stated:

> "At the hearing before this court there was a dispute as to what matters were properly before the court. Counsel for the defendant referred the court to the judgment of Finlay C.J. in *Bates v. Model Bakery Limited* [1993] 1 I.R. 359. In his judgment, the former Chief Justice was addressing the issue of the proper procedure to be adopted on an appeal to the High Court on a question of law under s. 39 of the Redundancy Payments Act 1967. What prompted his observations was that evidence had been adduced before the High Court on the appeal which had not been before the first instance and primary decision maker, the Employment Appeals Tribunal. In the passage referred to by counsel for the defendant the Chief Justice stated that the appropriate procedure is that the summons provided for by the Rules of the Superior Courts 1986 should state the decision being appealed against, the question of law which it is suggested was in error and the grounds of appeal and it should be supported only by an affidavit or affidavits exhibiting the determination of the Employment Appeals Tribunal, including any findings of fact or recital of evidence made by it, and, in effect, identifying the parties and the grounds on which the aggrieved party seeks a determination of the question of law…… More importantly, no case appears to have been made before the Rights Commissioner that her jurisdiction was spent once the concession was made on the basis that issues in relation to the terms and conditions of a contract of indefinite duration are not within the ambit of the Act. Nor was that case made before the Labour Court. Counsel for the defendant submitted that it is not open to an appellant on an appeal on a point of law from a determination of the Labour Court under s. 15(6) of the Act to present arguments as to the legal position which were not addressed to the Labour Court, citing two authorities on appeals from the Information Commissioner: the decision of this Court (McKechnie J.) delivered on 11th May, 2001 in *Deely v. The Information Commissioner*; and the decision of this Court (Smyth J.) delivered on 31st May, 2005 in *South Western Area Health Board v. Information Commissioner*. In my view, that submission must be correct in point of principle, at any rate where the legal issue is whether the first instance decision maker (in this case the Rights Commissioner) or the appellate decision maker (in this case the Labour Court) had jurisdiction to make the relevant decision. Accordingly, I consider that the lack of *locus standi* ground is not properly before the court."

21. The grounds of the statutory appeal on the issue of public procurement cannot be considered by this Court as this issue was not raised before the Tribunal.

22. The applicant's submission that the respondents did not make a claim pursuant to regulation 8 is correct. The applicant has accepted that it did not inform or consult as it believed it had no responsibility to do so because in its view there was no Transfer of Undertaking. The responsibility for information and consultation rested with Manguard Plus Limited, unless the Transferee envisaged any measures in relation to the employees. The Tribunal was incorrect in law, in finding the applicant in breach of Regulation 8.

23. The matters set out at 9(a) to (k), are matters both of fact and law.

24. The Tribunal decision is a detailed one covering both the factual situation and the law. The decision refers to a number of European Court of Justice and Employment Appeals Tribunal judgments.

25. The Tribunal took the view that they were special and unique circumstances in this case when it stated:-

> "Accordingly the Tribunal is of the view that in the special and unique circumstances of this particular case that the TUPE Regulations would apply and that it would be appropriate that the remedy of compensation should be awarded."

26. 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.

27. There was a fairly unique situation here in that these employees had been in place in one location for a substantial period of time, there had already been a transfer of undertakings from Oscar Security to Manguard Plus Limited and the applicant was on notice in the tender documents of its responsibility to assess the situation in respect of any liability under the TUPE Regulations. The applicant ignored this.

28. To determine the matters set out at paras. 9(a) to (k) would be, in the court's view, to enter into a *de novo* hearing when the Tribunal was uniquely placed to decide and adjudicate on the issue.

29. I do not consider the failure of the Tribunal to take into consideration the relevant size and operations of Manguard Plus Limited is ultimately relevant to the determination as to whether there was a Transfer ofndertakings or not in the unique circumstances of this case.

30. I, accordingly, refuse the application of the applicants on the substantive ground that there was no transfer of undertakings.