**Case No 1.**

**THE HIGH COURT**

**Record No: 2008 663 SP**

**IN THE MATTER OF THE REDUNDANCY PAYMENT ACTS 1967-2007**

**AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 39 (14)**

**OF THE REDUNDANCY PAYMENTS ACT 1967 FROM A DETERMINATION OF THE EMPLOYMENT APPEALS TRIBUNAL DATED 1 JULY 2008**

**BETWEEN/**

**SYMANTEC LIMITED**

**PLAINTIFF/APPELLANT**

**-AND-**

**DECLAN LEDDY**

**DEFENDANT/RESPONDENT**

**Case No 2.**

**THE HIGH COURT**

**Record No: 2008 666 SP**

**IN THE MATTER OF THE REDUNDANCY PAYMENT ACTS 1967-2007**

**AND IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 39 (14)**

**OF THE REDUNDANCY PAYMENTS ACT 1967 FROM A DETERMINATION OF THE EMPLOYMENT APPEALS TRIBUNAL DATED 10 JULY 2008**

**BETWEEN/**

**SYMANTEC LIMITED**

**PLAINTIFF/APPELLANT**

**-AND-**

**DIARMUID LYONS**

**DEFENDANT/RESPONDENT**

**JUDGMENT of Mr Justice John Edwards delivered on the 28th day of May 2009.**

**Introduction**
The issue in both of these cases is the same. It concerns the correct interpretation of Regulation 4(1) of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003.

**Background**
The common Plaintiff/Appellant in each case is a software manufacturer. On the 10th of November, 2006 it transferred part of its undertaking to Corporate Occupier Solutions (Ireland) Limited in order to outsource its EMEA facilities. The Defendants/Respondents were at all material times employed by the Plaintiff/Appellant as a Manufacturing Engineer Grade 7 and as a Senior Manufacturing Engineer Grade 8, respectively. Both Defendants/Respondents were informed in or about the month of December 2005 of the proposed transfer of their respective contracts of employment to Corporate Occupier Solutions (Ireland) Limited as part of the outsourcing of the Plaintiff/Appellant's EMEA facilities. On the 10th of November 2006 both Defendants/Respondents objected to the transfer and chose not to transfer to Corporate Occupier Solutions (Ireland) Limited. They had each been informed in advance of this that a failure to transfer would be treated as a resignation of their respective positions.

Both Defendants /Respondents then contended that they had been dismissed by reason of redundancy and claimed to be entitled to lump sum redundancy payments under the Redundancy Payments Acts 1967 – 2003. The Plaintiff/Appellant

rejected their claims and contended that having regard to Regulation 4(1) of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 the Defendants/Respondents were not dismissed by the Plaintiff/Appellant by reason of redundancy.

The Defendants /Respondents then appealed to the Employment Appeals Tribunal (EAT) before which the same arguments were made by the Plaintiff/Applicant as to why they should be denied relief. However, their respective claims were upheld by the EAT which ruled that, in a transfer of undertaking, "the employee is not obliged to accept the new employer, and this is not inconsistent with the directive in relation to transfer of undertakings." They were both held to be entitled to lump sum redundancy payments under the Redundancy Payments Acts 1967 – 2003.

The Plaintiff/Appellant has in each case lodged appeals to the High Court against the determination of the EAT, pursuant to section 39 (14) of the Redundancy Payments Act 1967.

**The regulation at issue.**
Regulation 4(1) of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 provides:

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

**Legal Submissions**
Both sides have filed helpful written legal submissions for which the Court is grateful. Both sides principally rely on same two decisions of the European Court of Justice in support of their respective positions. These are the cases of *Katsikas v. Konstantinidis* (conjoined with *Schroll v PCO Stauereibetrieb Paetz & Co Nfl GmbH*) [1992] ECR I 6577 and Merckx & Neuhuys v. Ford Motor Co of Belgium [1996] ECR I – 1253, both of which considered the purpose and correct interpretation of Directive 77/187/EEC on the transfer of undertakings. Its successor Directive is 2001/23/EC. Counsel on both sides have also provided the Court with useful comparative law references.

**The Plaintiff/Appellant's Submissions**
It was submitted on behalf of the Plaintiff/Appellant that the purpose of Directive 77/187/EEC and its successor Directive 2001/23/EC (hereinafter "the Directive) is to safeguard the rights of workers in the event of a change of employer by making it possible for them to continue to work for the new employer under the same conditions as those in place with the transferor.

It was submitted that as the Defendants/Respondents contracts of employment were in being at the date of the transfer then by virtue of Regulation 4(1) of the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 the obligations and liabilities thereunder are the responsibility of the transferee Corporate Occupier Solutions (Ireland) Limited and not of the Plaintiff/Appellant.

They say that the European Court of Justice (hereinafter the ECJ) accepted in the case of *Berg v Besselen* [1998] ECR 2559 that the first subparagraph of Article 3 (1) of the Directive (the equivalent of Regulation 4(1) of the 2003 Regulations) must be interpreted as meaning that after the date of transfer and by virtue of the transfer alone, the transferor is discharged from all obligations arising under the contract of employment or the employment relationship, even if the workers employed in the undertaking did not consent or if they object, subject however to the power of the Member States to provide pursuant to the second subparagraph of Article 3(1) of the Directive for the joint liability of the transferor and the transferee for obligations arising under the contract of employment before the date of the transfer. This power has not been taken up in this jurisdiction. They say it must be presumed that the legislature in promulgating the said regulations and in particular Regulation 4 (1) was lending clarity to the position of employees directly affected by a transfer. It was not simply repeating the words of the Directive to no effect.

**The *Katsikas* Case**
In *Katsikas v. Konstantinidis* (conjoined with *Schroll v PCO Stauereibetrieb Paetz & Co Nfl GmbH*) [1992] ECR I 6577 the ECJ was asked, by means of Article 177 references from the Courts of Bamburg and Hamburg respectively, to consider the interpretation of Article 3 (1) of the Directive. Article 3 (1) provides:

> "The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.
>
> Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship."

In both the Bamburg and the Hamburg references the prospective employees refused to transfer to the employment of the transferee. The Bamburg Court referred the following question (*inter alia*) to the ECJ for a preliminary ruling:

> "Is it possible under Article 3(1) of the Council Directive of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (Directive 77/187/EEC) for an employee of the transferor at the date of transfer within the meaning of Article 1(1) of Directive 77/187/EEC to object to the transfer of rights and obligations from the transferor to the transferee, with the result that the transferor's rights and obligations are not transferred to the transferee?"

At paragraphs 31 – 36 inclusive of its judgment the ECJ held :

> "31 Whilst the directive, which effects only partial harmonization in the area in question (see the judgment in Case 105/84 (*Foreningen af Arbejdsledere i Danmark v Danmols Inventar* [1985] ECR 2639), cited above, paragraph 16),

allows the employee to remain in the employ of his new employer on the same conditions as were agreed with the transferor, it cannot be interpreted as obliging the employee to continue his employment relationship with the transferee.

32 Such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen.

33 It follows that Article 3(1) of the directive does not preclude an employee from deciding to object to the transfer of his contract of employment or employment relationship and hence deciding not to take advantage of the protection afforded him by the directive.

34 However, as the Court has held (judgment in Berg v Besselsen, cited above, paragraph 12), the purpose of the directive is not to ensure that the contract of employment or employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ.

35 It follows that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, the directive does not require the Member States to provide that the contract or relationship is to be maintained with the transferor. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be.

36 The Member States may, in particular, provide that in such a case the contract of employment or employment relationship must be regarded as terminated either by the employee or by the employer. They may also provide that the contract or relationship should be maintained with the transferor."

**The *Merckx* Case**

In the case of *Merckx & Neuhuys v. Ford Motor Co of Belgium* [1996] ECR I – 1253 the Court of Appeal in Belgium had referred a question to the ECJ for its consideration in relation to the existence of a transfer of undertakings. The ECJ held that Article 3 (1) of the Directive did not preclude an employee employed by the transferor at the date of a transfer of an undertaking from objecting to the transfer to the transferee of the contract of employment or the employment relationship.

The question that had been asked by the Belgian Court is set out at para 14 of the judgment of the ECJ and was reformulated by the ECJ as a two part query which is set out at para 15 of the judgment. We are only concerned with the second part of the reformulated question. Paras 14 and 15 are as follows:

"14. Having regard to the foregoing, the Cour du Travail, Brussels, decided to stay the proceedings and to refer the following question, drafted in the same terms in both cases, to the Court of Justice for a preliminary ruling:

> "Is there a transfer of an undertaking within the meaning of Directive 77/187 of 14 February 1977 if an undertaking which has decided to discontinue its activities on 31 December 1987 dismisses most of its staff, keeping only 14 out of a total of over 60, and decides that those 14 persons, while retaining their acquired rights, must work from 1 November 1987 for an undertaking with which that first undertaking has no formal agreement, but which has since 15 October 1987 held the dealership previously held by the first undertaking, and if the first undertaking has not transferred any of its assets to the second?"

15. That question seeks essentially to ascertain, first, whether Article 1(1) of the Directive must be interpreted as applying where an undertaking holding a motor vehicle dealership for a particular territory discontinues its business and the dealership is then transferred to another undertaking which takes on part of its staff and is recommended to customers, without any transfer of assets. *Secondly,* having regard to the facts in the main proceedings and in order to provide a helpful response to the national court, it is necessary to establish *whether Article 3(1) of the Directive precludes an employee of the transferor at the date of transfer of the undertaking from objecting to the transfer of his contract of employment or employment relationship to the transferee."* (my emphasis)

The second part of the reformulated question was answered in paras 33 – 39 inclusive of the ECJ's judgment:

"33. As regards the second part of the question as reformulated above, the Court held in Case 105/84 *Foreningen af Arbejdsledere i Danmark v Danmols Inventar* [1985] ECR 2639, paragraph 16, that the protection which the Directive is intended to guarantee is redundant where the person concerned decides of his own accord not to continue the employment relationship with the new employer after the transfer.

34. It also follows from the judgment in Joined Cases C-132/91, C-138/91 and C-139/91 *Katsikas and Others v Konstandinidis* [1992] ECR I-6577, paragraphs 31 and 32, that, whilst the Directive allows the employee to remain in the employ of his new employer on the same conditions as were agreed with the transferor, it cannot be interpreted as obliging the employee to continue his employment relationship with the transferee. Such an obligation would jeopardize the fundamental rights of the employee, who must be free to choose his employer and cannot be obliged to work for an employer whom he has not freely chosen.

35. It follows that, in the event of the employee deciding of his own accord not to continue with the contract of employment or employment relationship with the transferee, it is for the Member States to determine what the fate of the contract of employment or employment relationship should be. The Member States may provide, in particular, that in such a case the contract of employment or employment relationship must be regarded as terminated either by the employee or by the employer. They may also provide that the contract or employment relationship should be maintained with the transferor (judgment in *Katsikas and Others,* cited above, paragraphs 35 and 36).

36. Mr Merckx and Mr Neuhuys claimed, moreover, that in the case in point Novarobel refused to guarantee to maintain their level of remuneration, which was calculated by reference, in particular, to the turnover achieved.

37. In the light of that submission, it should be noted that Article 4(2) provides that if the contract of employment or the employment relationship is terminated because the transfer within the meaning of Article 1(1) involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having

been responsible for termination.

38. A change in the level of remuneration awarded to an employee is a substantial change in working conditions within the meaning of that provision, even where the remuneration depends in particular on the turnover achieved. Where the contract of employment or the employment relationship is terminated because the transfer involves such a change, the employer must be regarded as having been responsible for the termination.

39. Consequently, the answer to the second part of the question as reformulated must be that Article 3(1) of the Directive does not preclude an employee employed by the transferor at the date of the transfer of an undertaking from objecting to the transfer to the transferee of the contract of employment or the employment relationship. In such a case, it is for the Member States to determine what the fate of the contract of employment or employment relationship with the transferor should be. However, where the contract of employment or the employment relationship is terminated on account of a change in the level of remuneration awarded to the employee, Article 4(2) of the Directive requires the Member States to provide that the employer is to be regarded as having been responsible for the termination."

**The Plaintiff/Appellant's central contention**
It was submitted on behalf of the Plaintiff/Appellant that it is clear that it has been accepted by the ECJ in both *Katsikas* and *in Merckx* that an employee of the transferor is entitled to object to the transfer and cannot be obliged to work for the transferee. It was further submitted that the fact that an employee is not so obliged does not mean that his contract of employment is not transferred automatically to the transferee by virtue of the transfer itself. Article 4 (1) of the 2003 Regulations reflects this in as much as it provides for the unqualified automatic transfer of an employee's contract of employment at the date of the transfer of the undertaking.

It was submitted that in the circumstances the EAT erred in finding that the Defendants/Respondents were entitled to lump sum redundancy payments under the Redundancy Payments Acts 1967 – 2003. The Court was specifically referred to the definition of redundancy in s. 7(2) of the Redundancy Payments Acts 1967 (as amended) which states:

"….an employee who is dismissed shall be taken to be dismissed by reason of redundancy if for one or more reasons not related to the employee concerned the dismissal is attributable wholly or mainly to—

*( a )* the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased or intends to cease, to carry on that business in the place where the employee was so employed, or

*( b )* the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or are expected to cease or diminish, or

*( c )* the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or

*( d )* the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained, or

*( e )* the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained."

The Plaintiff/Appellant says: First, the EAT's determinations are unsupported by authority. Secondly, there is no legal basis for the finding of redundancy within the meaning of the Redundancy Payments Acts 1967 – 2003. Thirdly, it is self evident that the Transfer Regulations had application and it was open to the Defendants/Respondents to challenge the transferee that in fact (and in law) their positions were redundant but it is not open to them to challenge the transferor in that regard. Its obligations are complete at the time of transfer.

**The Defendants/Respondents' submissions**
As previously stated the Defendants/Respondents also rely on the decisions of the ECJ in *Katsikas* and in *Merckx* respectively. They contend those decisions in fact support their case.

**The Defendants/Respondents' central contention**
Their central contention is contained at paragraphs 11 and 12 respectively of their written submissions and it is this. They say that in light of the fact that the *Katsikas* and *Merckx* cases, respectively, were opened before the Tribunal it is difficult to understand how the Plaintiff/Appellant's argument is being maintained. They say that in circumstances where the court is dealing with a statutory instrument which implements a provision of European law the court must find that Regulation 4 (1) of the 2003 Regulations has the same effect as the ECJ has ascribed to article 3 (1) of the Directive. They say that if that is correct then the next question is to consider whether the Irish implementing legislation makes any particular provision as to what will occur if employees decide not to transfer. It does not. Accordingly, as determined by the Employment Appeals Tribunal and contrary to the contention made by the Plaintiff/Appellant in these proceedings, the 2003 Regulations had no relevance to the Defendants/Respondents respective claims for redundancy under the redundancy payments Acts 1967 to 2007. The tribunal said:

"The employee is not obliged to accept the new employer, and this is not inconsistent with the directive in relation to the transfer of undertakings."

It was submitted that this statement is manifestly correct and that, in those circumstances, the Plaintiff/Appellant's appeal, which is entirely based upon the supposed impact of the 2003 Regulations on the Defendants/Respondents

employment, must fail.

**Decision**
With great respect to the arguments advanced on behalf of the Defendants/Respondents the court disagrees profoundly with their view of the implications for Irish labour law of the ECJ's judgments in *Katsikas* and *Merckx* respectively. The court has no doubt but that the correct view of the matter is that which has been articulated on behalf of the Plaintiff/Appellant. As the Defendants/Respondents have rightly pointed out Irish implementing legislation does not make any particular provision as to what will occur if employees decide not to transfer. However, contrary to their belief, that fact operates against them. It does not follow that if an employee decides not to transfer a situation of redundancy automatically arises vis-à-vis the transferor. It cannot do so because the fact that an employee objects to the transfer does not of itself have the effect of negativing the transfer. It is just that an employee is not obliged to continue his employment relationship with the transferee. However, the transfer still goes ahead unless a member state expressly provides for the contrary in its implementing legislation. That this is so is clear from the judgment of the ECJ in *Katsikas*. That Court explained that the purpose of the Directive is to allow the employee to remain in the employ of his new employer on the same conditions as were agreed with the transferor. However, he is not obliged to avail of this facility. As the Court said "the directive does not preclude an employee from deciding to object to the transfer of his contract of employment or employment relationship and hence deciding not to take advantage of the protection afforded him by the directive." However, "the purpose of the directive is not to ensure that the contract of employment or employment relationship with the transferor is continued where the undertaking's employees do not wish to remain in the transferee's employ."

In my view nothing could be clearer. If the Irish legislature had wished the employment relationship with the transferor to continue so as to facilitate the employee in making a claim for redundancy it could have enacted legislation to that effect. It has not done so. This court is completely satisfied that by virtue of regulation 4 (1) it is not possible for the Defendants/Respondents in this case to make a redundancy claim against the Plaintiff/Appellant. In all the circumstances the court is satisfied to allow the appeals in both cases.