Transfer of Undertakings *

In the case of Vaiva Navickiene and Noonan Services Group Limited RP684/2013 the EAT had to deal with what is now becoming a common question as to what is the position where an entity contracts with an outside service provider to provide services and subsequently cancels that contract and brings that particular service in-house. The issue which arises then is whether there has been a Transfer of Undertakings or whether this is simply a new contractual situation therefore giving rise to a dismissal for the purposes of the Redundancy payments Acts or a continuation of the employment. In the case in question the EAT gave a very considered decision having referred to the case of ECM-v- Cocks [1998] IRIR416 and Section 7(1) of the 2003 Regulations finding that there was no new employer where a company had brought a service back in-house. In such circumstances the employee was entitled to bring a claim for redundancy. In this case the employee was not engaged by the original contracting party when they brought the services in house. This case opens up the possibility of the following situation arising.

Example

Company A outsourced its cleaning services in 2000.

Company B received the contract and provided four individuals to act as cleaners.

On the 31st December 2014 Company A terminated the contract with Company B. Company A agrees to take on the four cleaners. They provide them with a contract stating that their employment shall be continuous for the purposes of the Unfair Dismissal legislation and by implication the Redundancy Payment Acts.

The four individuals then bring a claim for redundancy against Company B.

Subsequently 6 months later Company A ceases operations. The employees can claim under their contracts for redundancy for 4.5 years from Company A.

It would appear in such circumstances following the reasoning of the EAT which is a reasoned decision that the employees in those circumstances will in fact be able to maintain a case against Company B and subsequently Company A for redundancy.

If Company A did not have a clause protecting the employees' rights in the new contract then if Company A ceased after 2 years the employees would have a redundancy claim based on 2 years' service not 6.5 years' service.

We had been saying it for some time but the issue as to what is a transfer under our Regulations is often difficult to determine particularly where a service is being provided. This is one area of law where attention is needed to clarify exactly what the law is so that employers and employees will know what their obligations are. The EAT is obliged to apply the law even if they do not like the law. This decision of the EAT in the recent case is a reasoned and we believe correct decision. It clearly opens the potential for employees where the contracting parties deal with matters fairly to be able to claim redundancy and maintain a right by contract subsequently to an additional redundancy payment if they were ever made redundant, or to lose out subsequently. That may seem strange but that would appear to be the position.

Before acting or refraining from acting on anything in this update legal advice from a Solicitor should be obtained.

In contentious cases a Solicitor may not charge fees or expenses as a percentage of any award or settlement.

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