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Any lawyer, HR practitioner or business manager who has ever been involved in the transfer of a business, or indeed part of a business, or has been involved in an outsourcing exercise or a changeover in contractors, has come across the European Communities (Protection of Employees' Rights on Transfer of Undertakings) Regulations 2003 ("the TUPE Regulations"). The TUPE Regulations provide, in very basic terms, that the employees attaching to a business which is being transferred must transfer with the business to a new employer. Not only must the employees be transferred but they must be transferred with their accrued years of service, their existing terms and conditions of employment (with a limited exception in relation to pensions), and also with the benefit of any collective agreement to which they may already be subject.

The application of the TUPE Regulations has been fraught with difficulties and has often given rise to more questions than answers. One of the questions legal practitioners have struggled with over the course of the past number of years is what happens when an employee refuses to transfer (with the assets to a new employer).

Up until very recently, the question as to what actually happens an employee who refuses to transfer remained unanswered. There were two schools of thought. Some practitioners believed that in a situation where an employee refuses to transfer, his/her employer is obliged to find alternative employment, failing which his/her position is redundant and an entitlement to redundancy pay ensues. Others were of the view that an employee who refuses to transfer in a situation where his/her terms and conditions of employment are guaranteed, he/she is effectively resigning.

Two weeks ago, the High Court (in overturning the decision of the Employment Appeals Tribunal) held that a refusal to transfer is, in fact, a resignation.

A short background to the case is as follows:

In November 2006, Symantec Limited ("Symantec") transferred part of its business to Corporate Occupier Solutions (Ireland) Limited ("COS") following a decision by Symantec to outsource its EMEA facilities. The defendants/respondents to the appeal, Messrs. Lyons and Leddy, were employed by Symantec at the time of the transfer of the business to COS. Prior to the transfer, they were informed of the proposed transfer of their employment to COS as part of the outsourcing. However, both objected to the transfer and chose not to transfer to COS. Although they had been told by Symantec that their failure to transfer would be treated as a resignation of their respective positions, both defendants/respondents 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. They also claimed to be entitled to ex-gratia redundancy payments.

Syantec rejected their claims and contended that by reason of the TUPE Regulations, no redundancy situation applied as the two individuals were entitled to their same jobs with COS and on the very same terms and conditions of employment in accordance with the TUPE Regulations.



Messrs. Lyons and Leddy brought their claims to the Employment Appeals Tribunal (EAT) which held that they were entitled to redundancy payments. Symantec appealed the two decisions of the EAT to the High Court on a point of law. The appeals, which were heard together, were heard in January of this year and judgment was given by Mr. Justice Edwards last Thursday morning. In his judgment, Judge Edwards stated emphatically that "...it does not follow that if an employee decides not to transfer a situation of redundancy automatically arises vis-a-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 negating the transfer. It is just that an employee is not obliged to continue his employment relationship with the transferee...".

Mr. Justice Edwards went on to state that "...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 those circumstances, Mr. Justice Edwards allowed Symantec's appeals in both cases.

This judgment is of huge significance to any clients who are or become involved in a transfer to which the TUPE Regulations apply as it finally clarifies how employees who object to a transfer should be treated by the transferor (i.e. the original employer). It is entirely possible that the decision may be appealed to the Supreme Court but for now at least, we have the guidance long sought by practitioners in this area that an employee's refusal to transfer does not automatically constitute a redundancy.

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