SUMMARY

2017/53 Transfer of bus services was a transfer of undertaking (DK)

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Legal background

Under the Danish Act on Employees' Rights on Transfers of Undertakings, which implements the Transfers of Undertakings Directive (2001/23), the transferee will take over the transferor's obligations towards its employees if the transfer falls within the scope of the Act. When assessing if the transfer falls within the Act, the court will consider whether the transferred assets or activities constitute an economic entity which has retained its identity.

In the case at hand, the question before the Danish Labour Court was whether a privately-operated bus service which transferred back to the municipality fell within the Act.

Facts

In Denmark, all municipalities have a statutory obligation to provide transport to and from school for children with special needs. In the case at hand, a municipality had contracted with a bus operator, which carried out the contract using 22 minibuses and around 22 bus drivers. In the spring of 2014, the municipality was informed that bankruptcy proceedings would be initiated against the bus operator and the bus service would cease four days later.

The municipality had only four days to arrange school transport for 200 children. It decided to operate the bus service itself with effect from 20 May 2014. For drivers, the municipality hired almost all of the drivers that had worked for the bus operator and for minibuses, it contacted several suppliers and bought 22 secondhand minibuses. However, to the municipality's surprise, it turned out that 15 of the 22 minibuses had previously been used by the bus operator because the operator had sold its buses to the supplier.

Based on this, the bus drivers' trade union argued that the arrangement constituted the transfer of an undertaking. However, the municipality argued that it did not because the way the buses had been made available to them did not involve a contract with the bus operator.

Judgment

The Danish Labour Court held that it was undisputed that the municipality had hired 22 bus drivers from the previous bus operator and that 15 of 22 buses it had purchased from the bus supplier had previously been used by the bus operator.

In order to assess whether the agreement constituted a transfer, the Court considered two questions. The first was whether the employees were still employed by the bus operator on the date that the municipality took over operation of the bus service. The employees were released from their duties the day before the municipality took over. The Court held that a bona fide employment relationship still existed on the date of the takeover. Therefore, this was the transfer of an undertaking and the Danish Act on Employees' Rights on Transfers of Undertakings applied.

The second question was whether bus transportation was an economic entity that could transfer and whether it had retained its identity. The Court then stated that bus transportation constituted an economic entity that could transfer. The Court further found that bus transport is mainly based on tangible assets, rather than manpower. Therefore, the essential factor in determining whether a transfer of an undertaking had taken place, was whether a significant part of the tangible assets had been taken over by the municipality.

In terms of retention of identity, the Court noted that the municipality had failed to investigate where the buses came from or make it a condition of the agreement that the buses did not come from the bankrupt bus operator. Therefore, identity had been retained and the transaction constituted a business transfer within the meaning of the Danish Act on Employees' Rights on Transfers of Undertakings.

Commentary

With this judgment, it is now well-established that bus transport is mainly based on tangible assets, as opposed to manpower. This is settled law in the ECJ, as in the case of Liikenne (C-172/99) the ECJ established that there was no business transfer unless physical assets (i.e. buses) had transferred. The Danish Supreme Court had in fact also concluded this in a judgment of 24 May 2016.

Note however, that whether an economic entity has retained its identity must always be assessed on the facts. Therefore, in the case at hand, the court considered the municipality's failure to find out where the buses came from.

The decision provides guidance on how a transferee might behave in potential business transfer situations involving tangible assets. In the case at hand, the Labour Court held that the municipality should have investigated the origin of the buses before buying them from the supplier and should have made it a condition of the agreement that the buses did not come from the bus operator. Considering the time-pressures, those obligations seem harsh. However, the Court is very clear on this and it demonstrates that these actions must be taken to avoid a transfer.

A hot topic in Denmark is the 'insourcing' of activities formerly outsourced by local government. In the last decade, the Danish government has made substantial efforts to privatise care of the elderly at home. In recent years, several of the private contractors that won these contracts have experienced financial difficulties and a considerable number have become insolvent. This affects private contractors, municipalities and unions – but even more so – employees and the elderly.

In an insolvency situation, employees are normally entitled to compensation from the Danish Employees' Guarantee Fund if they have not received a salary at the time of the insolvency. However, the Fund refuses to cover lost salary if a transfer of the undertaking has taken place.

For the employees, the issue is whether they are entitled to be paid by the municipality that takes on responsibility for providing the care or if they can claim compensation from the Fund.

A case concerning these issues is currently pending before the Danish Western High Court. More than 100 employees of a former provider of elderly care at home have sued both the municipality that took on the elderly care services after the private operator went insolvent, and the Fund, which refused to pay compensation. In reality, the dispute is between the municipality and the Fund, as one of them will have to pay for the employees' loss of salary. The parties are in dispute about whether a transfer of undertaking has taken place. The Fund is arguing that it has. Another aspect of the case is whether the municipality's statutory

obligation to provide the services affects the transfer of the undertaking in any way. It will be interesting to see how the case pans out.

Comments from other jurisdictions

Belgium (Gautier Busschaert, Van Olmen & Wynant): This case is interesting from a Belgian perspective as it shows that Denmark has implemented Directive 2001/23/EC through an Act applicable to both private and public undertakings.

Belgian Collective Bargaining Agreement n° 32bis regulates the maintenance of employees' rights in case of a change of employer following a business transfer. This CBA, as any other CBA adopted within the framework of the Act of 5 December 1968 concerning CBAs and joint committees, does not apply to undertakings in the public sector.In Belgium therefore, employees can only claim rights related to the transfer of an undertaking from or to the public sector on the grounds of Directive 2001/23, by invoking the direct effect of all provisions that are sufficiently clear, precise and unconditional against the public authority involved in the transfer.

This may create difficulties in the case of a transfer between a private and public undertaking as the direct effect of directives is only vertical and so cannot be invoked against private businesses.

Italy (Caterina Rucci, Bird & Bird): Changes in service provision are not considered transfers of undertakings if there are clear differences in the way the services are provided by the new operator. However, this comes from a new provision, applicable to subcontracting only and which has only been applied in one or two cases. Therefore there is no settled Italian case law on this point.

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): According to the Finnish Employment Contracts Act (55/2001, as amended) the transferor and transferee are jointly and severally liable for the employee's pay or other claims deriving from the employment relationship that have fallen due before the assignment. However, in line with Directive 2001/23, where an undertaking is transferred by an insolvent estate, the transferee is not liable for the employee's salary or any other claims that have fallen due before the transfer. Insolvent companies typically have a lot of unpaid employment-related receivables which could significantly hinder transfers of undertakings of businesses that could be revived. Hindering such transfers is not in the interests of either the economy or the employees.

If an insolvent employer cannot pay employees, they may request wage security by filing an application to the Centre for Economic Development, Transport and the Environment.

According to the case at hand, the Danish Employees' Guarantee Fund refused to cover lost salary if a transfer had taken place. We contacted the responsible authority in Finland in order to clarify whether the liability distribution would be similar in Finland and discovered that the assessment in such situations would be conducted on a case-by-case basis. Thus, it seems to be possible that the Centre for Economic Development, Transport and the Environment could claim the amounts of wage security paid out to be repaid by the transferee after the transfer. However, according to our understanding this interpretation would be in contrary to the starting point set by Directive 2001/23, i.e. that the transferee is not liable for employees' salary that became due before the transfer in situations where the transferor is subject of insolvency proceedings. This would make transfers of undertakings in relation to insolvent companies less financially viable.

Subject: Transfers of undertakings

Parties: The Danish Confederation of Trade Unions for the United Federation of Danish Workers – v – Local Government Denmark for Horsens Municipality

Court: Arbejdsretten (the Danish Labour Court)

Date: 12 January 2017

Case number: AR2015.035

Hard copy publication: Not yet available

Internet publication: Available from www.arbejdsretten.dk

Creator: Arbejdsretten (the Danish Labour Court)
Verdict at: 2017-01-12
Case number: AR2015035