

SUMMARY

2015/40 The nature of a transferred activity, including its asset or labour intensiveness, determines the existence of a transfer of undertaking (HU)

<p>In the case of an asset-intensive business, a transfer of undertaking may occur if the tangible assets are transferred, even though the employees are not taken over by the transferee. </p>

Summary

In the case of an asset-intensive business, a transfer of undertaking may occur if the tangible assets are transferred, even though the employees are not taken over by the transferee.

Facts

The defendant, a private entrepreneur (individual), operated a petrol station based on an operation management agreement with the Hungarian-based oil company, MOL Nyrt (MOL). The petrol station with all of its assets and equipment, was owned by MOL. In December 2011, the defendant concluded a fixed-term employment relationship with the five employees who worked at the petrol station.

In March, 2012 MOL terminated the operation management agreement with the defendant, as a result of which the operation of the petrol station reverted to MOL on 17 April 2012. On that same day, 17 April 2012, MOL entered into a new operation management agreement with a third party regarding the continued operation of the petrol station.

On 20 April 2012, the defendant terminated the contracts of his five employees with immediate effect. He based this decision on a provision in the Labour Code in force at that time, according to which all employment contracts terminate automatically upon the dissolution of a company.

Three of the defendant's employees concluded a new contract of employment with the new operator of the petrol station. They started working there based on new employment contracts which did not recognise their service with the defendant. These three employees and the two who were not hired by the new operator submitted a claim against the defendant. They argued that the termination of their employment relationship by the defendant was unfair and claimed compensation for damages. The defendant argued that, since there was a transfer of undertaking based on the Labour Code, the employment relationships of the five claimants had transferred automatically to the new operator of the petrol station on 17 April 2012, so that the termination notice on 20 April 2012 was ineffective, given that the defendant was not the claimants' employer at the time.

The first instance court accepted the claim submitted by the claimants. According to the reasoning of the first instance court, there was no transfer of undertaking based on the following:

there was no direct agreement regarding the transfer between the defendant and the new operator company. The defendant could not, and therefore did not, transfer any of the assets to the new operator company, since the assets were owned by MOL. MOL, which had a contract with the new operator, was not the employer of the claimants. The defendant had no intention to transfer the claimants and the new operator company concluded new contracts of employment with some of the claimants.

The court found that the termination with immediate effect was unfair. The said provision in the Labour Code regarding automatic termination upon dissolution of the employer could not be applied where the employer was an individual, not a company.

The defendant filed an appeal. The second instance court confirmed the ruling of the first instance court. It noted that in the present case the law in respect of transfers of undertakings cannot be taken into consideration since it was not a reason provided in the termination

notice and therefore the employer could rely on this in the litigation as a defence.

The defendant submitted a claim for extraordinary review to the Hungarian Supreme Court (Curia). He asked the court to annul the judgment of the second instance court and to reject the claims.

Judgment

The defendant argued that there was a transfer of undertaking; therefore, the new operator company was under a legal obligation to continue the employment of the claimants. If employers failed to comply with the rules on transfer of undertakings, this does not affect the transfer of the employment relationships, as this occurs by operation of law.

The defendant relied on the authority of *Carlito Ablar and Others – v - Sodexho MM Catering GmbH* (2003) C-340/01, in which the ECJ stated that a failure to transfer staff does not mean a transfer of an undertaking has not taken place, since the issue is whether the business retains its identity. The defendant also relied on the authority of *Francisca Sánchez Hidalgo and Others and Asociación de Servicios Aser and Sociedad Cooperativa Minerva*, (1998) C-173/96, and the joined case of *Albert Merckx and Patrick Neuhuys – v - Ford Motors Company Belgium SA*, (1996) joined cases C-171/94 and C-172/94 where the ECJ found that the contractual relationship, which is a condition of the transfer, does not necessarily need to be between the transferor and the transferee: it is sufficient if there is an indirect contractual link via a third party. The primary question is whether the business (in the present case the business unit of the petrol station) retains its identity.

In the case at hand, the petrol station had transferred to the new operator company in order to continue operating as a petrol station using the same assets and commercial property, therefore, the business retained its identity. On the day of the transfer of the petrol station (17 April 2012), the employment of the employees working there transferred to the new operator company, as the transferee. Since the transfer took place prior to the delivery of the termination notices by the defendant (20 April 2012), the notices were invalid - the employment had actually terminated earlier.

The Curia found that the request for extraordinary review was justified. In its decision it referred to the court practice of the ECJ and the rules contained in Acquired Rights Directive 2001/23/EC of 12 March 2001, emphasising that the transfer of an undertaking takes place if the business transferred retains its identity following the transfer. The Curia referred to the “Spijkers criteria” of the ECJ in *Spijkers – v - Gebroeders Benedik Abattoir CV* (1986) C-24/85. These provide that, in order to understand whether an economic entity has retained its identity the following must be considered: (i) the transfer of movable and immovable assets;

(ii) the transfer of immaterial assets; (iii) the transfer of the majority of the staff; (iv) the similarity of the activities carried out by the economic entity before and after the transfer; (v) the (possible) continuation of the activity carried out before the transfer; (vi) the transfer of clients. The criteria must be considered together, but the presence or absence of one condition alone is not necessarily decisive.

The Curia also emphasised that the lack of a direct contractual relationship between the transferor and the transferee does not exclude a transfer, as ECJ case law does not indicate that is this a requirement.

In the present case the operation of the petrol station owned by MOL was continued by the new operating company. In order to understand whether, as a business, it retained its identity, the Curia referred to the practice of the ECJ, which is to consider the nature of the activity and whether the business is asset or labour-intensive. If the business does not require significant assets (facilities, machinery), it retains its identity by transferring the majority of the employees. On the other hand, if the business is mostly asset-intensive, it retains its identity by transferring the majority of the assets (*Oy Liikenne Ab - v - Pekka Liskojärvi and Pentti Juntunen* (2001) C-172/99).

In the present case, the operation of the petrol station was transferred together with the right to use the assets, facilities and machinery. Since this right had transferred from the transferor to the new operating company by virtue of the contractual framework with MOL, there was a transfer of the undertaking on 17 April 2012, even though the staff did not transfer on that date. As a consequence, the employment relationships of the claimants automatically transferred to the new operator on the date of the transfer. At the time the termination notices of the defendant were received (after 20 April 2012), it was no longer the employer. As a result, the termination notices had no legal effect.

Commentary

Cases on transfers of undertakings are still rare in Hungarian employment tribunals. This is illustrated by the fact that although the defendant referred to the practice of the ECJ throughout the process, only the Curia considered it, applied the correct test and used arguments based on the nature of the business. The present decision is significant in explaining how the Hungarian rules on transfers of undertakings should be interpreted and confirming that the ECJ case law must be taken into account. We expect more court cases in this field due to increasing awareness of the statutory consequences of transfers of undertakings by employees.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): It is easy to determine what the Federal Labour Court in Germany would have decided in this case: in EELC 2015-1, we reported a case with striking similarities, about the economic identity of a petrol station. While the Court in our case decided that the transfer of the business required the transfer of assets such as tanks, pumps and roofing, it also explained obiter, that the mere replacement of the leaseholder would constitute a transfer of the business. This seems to be the case at hand as well. While the oil company owned all the immovable and movable assets, the defendant in this case merely operated the gas station. The economic identity (which, according to the BAG consisted of the petrol station equipment with underground tanks, pumps, a special carriageway, roofing, a pole indicating petrol prizes and a shop), remained the same. It is very likely that the German Courts would have come to the same conclusion as the Hungarian Curia.

Creator: Curia (Supreme Court)

Verdict at: 2014-12-03

Case number: Mfv.I.10.156/2014