

SUMMARY

**2015/39 Care and support for residents of a specialised housing complex is asset-intensive (NO)**

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*Five of the employees who were dismissed due to the termination, instituted proceedings against the City of Oslo claiming the arrangement constitute a transfer of undertaking pursuant to the Norwegian Working Environment Act (WEA) chapter 16 (which implements Directive 2001/23/EC in Norway).*

*The main questions were whether the monitoring services constituted an economic entity before the transfer, and if so, if the entity had retained its identity after the transfer to the City of Oslo. The Norwegian Supreme Court concluded that the arrangement did constitute a transfer of the undertaking.*

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## **Summary**

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## **Facts**

In 2005, the City of Oslo initiated a project called "Gode Hus for Skjeve Liv". The project consisted of two steps: (1) to develop a model for the establishment of permanent housing in Oslo for those entitled to housing offers under the Norwegian Social Services Act, and (2) to operate the housing.

The Church City Mission in Oslo (CCM) contributed to the project with academic input based on their extensive experience with people with dual diagnosis issues. CCM was selected as a supplier of the care and support services at a purpose-built housing complex owned by the City of Oslo, and an agreement was concluded between the City of Oslo and CCM, effective from 1 February 2006 until 1 February 2009. Subsequent to a public tender competition in 2009, the agreement was renewed from 1 May 2009 to 1 May 2013. All residents of the housing complex had a history of heavy drug abuse and mental health problems. The services performed by CCM focused mainly on care and support services to help the residents with their everyday life and ensure they received the healthcare and treatment they needed.

In June 2012, the relevant district committee in Oslo decided that the district itself would operate the housing project after expiry of the agreement with CCM. The municipality initially

assumed that the takeover of the care and support services was a transfer of the undertaking pursuant to the WEA. In a letter of 12 November 2012 to CCM, it emerged, however, that the municipality had changed its mind following a legal opinion, which stated that the takeover would not be a transfer because CCM was not involved in the lease of the housing complex in any way, nor did they assist the residents in relation to this, and the contractual relationship between the municipality and CCM was therefore solely regarded as the provision of a workforce.

The services were in-sourced to the City of Oslo on 1 May 2013. Subsequent to this, CCM terminated the employment of the employees who had worked at the housing complex. The municipality employed two of CCM's employees to continue working at the housing complex, which constituted about a fifth of CCM's employees at the complex.

## **Judgment**

On 4 June 2013, five of the employees dismissed due to the termination, took out proceedings against the City of Oslo, claiming that their employment with CCM had transferred to the City of Oslo pursuant to the WEA. Further, they also claimed compensation, the level to be determined by the court. In defence, the City of Oslo argued that the transfer of the care and support services did not constitute the transfer of an autonomous entity. The only thing to have transferred from CCM was the operational tasks conducted for the municipality under the expired contract.

On 19 December 2013, the Oslo District Court ruled in favour of the City of Oslo, stating that the transfer did not constitute the transfer of an undertaking.

The plaintiffs appealed the district court's decision to the Borgarting Court of Appeal. The CCM intervened in support of the plaintiffs. The Court of Appeal reached a different conclusion than the district court, as it concluded that the municipal takeover was a transfer pursuant to the WEA, and that the employees had transferred to the City of Oslo. They also ordered the City of Oslo to pay compensation to the plaintiffs.

The City of Oslo appealed the decision to the Supreme Court.

The two main issues considered by the Supreme Court were (i) whether the care and support services constituted an independent economic entity before the transfer, and if so, (ii) whether the entity had retained its identity after the transfer to the City of Oslo.

The Supreme Court stated that in order for a transfer to constitute a transfer of an undertaking, it must involve an independent economic entity and - as the Supreme Court had stated in a previous judgment – this must constitute an operational entity capable of delivering the services that characterise the business activity.<sup>1</sup> CCM's operations at the housing complex were organised independently and physically separate from other activities. The Supreme Court did not place much weight on the City of Oslo's argument that all that was provided at the housing complex was care and support for CCM's other activities, as the Court's view was that the operations did form an independent economic entity.

The Supreme Court then went on to discuss the requirement that the entity must retain its identity after the transfer. The City of Oslo argued that CCM's services were characterized by its employees, and as only 20% of CCM's employees continued working in the housing complex after the transfer, this meant that the entity could not have retained its identity after the transfer.

In this regard, the Court referred to several cases of the ECJ, C-13/95 (Süzen), C-127/96 (Hernández Vidal), C-51/00 (Temco), C-173/96 and C-247/96 (Hidalgo), implying that in certain service providing industries, where the workforce is the most substantial part of the activity in the business, a significant portion of the workforce must be transferred for the identity to be preserved.<sup>2</sup> In the Supreme Court's view, the workforce at the complex undoubtedly provided an essential element of the service that CCM performed under the contract with the City of Oslo. However, the Supreme Court concluded that the workforce was not the dominant factor in the business, as the use of a customised building was a significant element of the service in itself.

The Court stated that as the workforce was not the dominant factor, the transfer of only 20% of the employees did not preclude the entity from preserving its identity. Further, the court referred to C-340/01 (Abler/Sodexho) where the continuous use of a facility's premises and equipment was the decisive factor for the identity to be preserved. However, the court emphasised that it should be careful to make any direct links, as the Abler/Sodexho case concerned a production facility/business. In this case, as CCM only provided services, the facility was an important factor in the assessment, but should not be regarded as the only decisive one.

Project Gode Hus for Skjeve Liv was, from the beginning, dependent on the building it served, which was suitable as a residence for people with severe behavioural problems and included safety measures and reinforcements. The property was important for preserving the entity's identity before and after the transfer, and constituted a major factor in the Supreme Court's assessment of whether the municipal takeover of the services constituted a transfer of the

undertaking, as the services were considered closely linked to the building.

In the Supreme Court's view, it was immaterial whether the service provider owned the assets or not, as long as they were placed at the provider's disposal.<sup>3</sup> As long as the office and public areas were made available for CCM for the performance of their services, the Supreme Court did not consider it essential that the City of Oslo owned the premises.

The Supreme Court also took into consideration the fact that the service was based on knowledge and experience gathered over time through the efforts of CCM's employees, during two contract periods. The City of Oslo hired two previous employees of CCM who had extensive experience in CCM at the complex. By hiring those two, the municipality gained access to the experience and insight that characterised CCM's care and support of residents. Further, the Supreme Court found that the care and support services the City of Oslo offered were essentially the same as those offered previously, with only minor adjustments.

The Supreme Court concluded that the transfer of the services should be treated as a transfer of undertaking in accordance with the WEA, and dismissed the appeal.

## **Commentary**

The decision is interesting with regard to the boundaries as to what constitutes a transfer of an undertaking pursuant to the WEA and the directive 2001/23/EC in the service providing sector.

The Supreme Court concludes that a service providing business which is partly identified by its employees, may retain its identity even if only a limited part of the workforce transfers, as long as the workforce is not considered the only dominant feature of the business. However, it is debatable whether the outcome of the case would have been the same if the City had employed even fewer of CCM's employees, or if none had been taken on.

Further, the court concludes that the ownership of business assets is of limited importance, as long as the assets are at the provider's disposal.

The Supreme Court concludes that the specially customised building was an essential element in the identity of the business. The building was significant as an infrastructure to enable provision of the services. The services were specifically connected to the housing complex and they continued to be provided in the same building after the transfer.

However, what constitutes a transfer is always fact-specific and so this particular case may be of limited application.

### **Comments from other jurisdictions**

Austria (Daniela Krömer): Even though cases of transfers of undertakings are fact-specific, this one is nonetheless very interesting, if unsurprising. First, it highlights the importance of a thorough assessment of the (possibly) transferred business. Second, it seems that ownership of the business assets is of limited importance, but what matters is the identity of the business. An Austrian case comes to mind in which the legal basis for the transfer was a cooperation agreement between two companies. The Austrian Supreme Court ruled that it did not matter that the entity - 'organised grouping of resources' - was based for a while on this cooperation agreement, as long as it continued to exist (OGH, 9 ObA 5/00a).

Germany (Dagmar Hellenkemper): In a similar way to the Norwegian decision, the German Courts differentiate between businesses where the economic identity consists mainly of machinery, IP and movable or immovable property and those where the economic identity consists mainly of the 'human capital' of the employees. The latter type are deemed to be 'businesses with few assets' (betriebsmittelarm). There is no guidance on how many employees have to be taken over for the Courts to assume a transfer of a business with few assets. In two separate decisions from 1998 relating to cleaning services, the BAG established that the employment of 2/3 of the staff was not sufficient, while the employment of 85% of the staff constituted a transfer. If there are considerable assets forming the economic identity – in this case, the special housing building – the Courts usually decide on a case by case basis, depending on the know-how and special qualifications of the employees retained by the transferee. The transfer of expertise can represent an additional feature of the transfer of an economic entity. This could include intangible assets such as customer files, business practices and the acquisition of 'know-how providers' with knowledge specific to the business. It is hence likely that the employment of 20% of the staff would be sufficient to establish a transfer of the business.

The Netherlands (Peter Vas Nunes): Some leading Dutch scholars hold the view that in cases where an activity is outsourced, insourced or transferred from one contractor to another, the ECJ focuses mainly, if not exclusively, on the rather strict distinction between what is 'asset-intensive' and 'labour intensive', whereas in 'normal' TUPE situations the ECJ applies all of the

Spijkers criteria. What makes this Norwegian case interesting is that the Supreme Court seems to not make a sharp distinction between asset and labour intensity, rather attaching importance to the combination of (i) the fact that the service provider made use of the building (in particular, an office within the building) and (ii) the fact that the City took over 20% of the workforce. Would the outcome of the case have been different had the City not offered employment to any of CCM's employees? Or if CCM had not had the use of an office?

This judgment exposes a difficulty that Abler creates. I can imagine (with some difficulty) that the use of a hospital's kitchen equipment makes an activity asset-intensive. Although cleaners also, of necessity, 'use' the building they clean, their activity is not asset-intensive. Where is the borderline? Monitoring and caring for residents seems to fall somewhere in between providing meals (Abler) and home-help service (Hidalgo) or cleaning (Hernandez Vidal, Clece).

*Subject: Transfer of undertakings*

*Parties: Lucy Catherine Swann, Erik Andre Sætrang Holm, Harald Brustad, Hege Garshol Lofthus and Sondre Solheim – v – the City of Oslo*

*Court: Oslo tingrett (District Court of Oslo), Borgarting lagmannsrett (Borgarting Court of Appeal) and Norges Høyesterett (the Supreme Court of Norway)*

*Date: 17 June 2015*

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**Footnotes**

1 cf. Supreme Court of Norway's decision Rt.2001.1755 section 53.

2 cf. Case of Clece - v - Spain, case number C-463/09 section 36.

3 cf. Case of Abler - v - Sodexo, case number C-340/01 section 41.

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**Creator:** Høyesteret (Supreme Court)

**Verdict at:** 2015-06-17

**Case number:** HR-2015-1276-A