

SUMMARY

ECJ 28 January 2015, case C-688/13 (Gimnasio Deportivo San Andrés SL, in liquidation - v - Tesorera General de la Seguridad Social (TGGS) and Fondo de Garantía Salarial), Transfer of undertaking

Facts

Gimnasio is a commercial company whose main activity consisted in the management of the Escuela Laia, a secondary school with over 150 pupils. By order of 2 September 2013, Gimnasio was, on its own application, declared insolvent. By order of 15 October 2013, the competent judicial authority approved the award of the Escuela Laia to the Institució Pedagógica Sant Andreu SL, a company formed by a group of teachers at the school which submitted the sole purchase offer. The Institució Pedagógica Sant Andreu undertook to maintain the activity of Gimnasio and take over its employment contracts.

The award was made subject to a number of conditions. One was that the transferee would not be liable for any employment-related debts of the transferor, including social security debts, that existed before the date of the transfer.

National proceedings

The social security authority TGSS and a group of former employees challenged the award order on the ground that it infringed Article 44 of the Workers' Statute, which is in the Spanish transposition of Directive 2001/23 on transfer of undertakings.

The court before which the claimants challenged the award order referred seven questions to the ECJ. Essentially, the court asked whether Directive 2001/23 must be interpreted as precluding a rule of national law which, where there is a transfer of undertakings and the transferor is the subject of insolvency proceedings, provides or permits that the transferee be authorised not to bear the charges payable by the transferor in respect of contracts of employment or employment relationships, including charges relating to the statutory social security system, provided that those debts arose before the date of the transfer of the production unit. The referring court also asked whether the fact that the employment relationship ended before that date has any bearing in that regard.

ECJ's findings

Directive 2001/23 lists exhaustively the provisions from which Member States may derogate. Those derogations must be interpreted strictly. One of the derogations is Article 5 (1). It provides that Articles 3 and 4 of the directive do not, as a general rule, apply to the transfer of an undertaking where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority. However, Member States are permitted to apply Articles 3 and 4 to the transfer of an undertaking where the transferor is the subject of insolvency proceedings which are under the supervision of a competent public authority. Where a Member State exercises that option, it is nevertheless permitted, under certain conditions, not to apply certain guarantees referred to in Articles 3 and 4 of Directive 2001/23 provided that insolvency proceedings have been opened and that such proceedings are under the supervision of a competent public authority (§ 37-48)

Thus, by way of derogation from Article 3(1) of Directive 2001/23, a Member State may provide (i) that the transferor's debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings are not to be transferred to the transferee, provided that such proceedings ensure, under the law of that Member State, protection at least equivalent to that guaranteed by Directive 80/987 on the protection of employees in the event of insolvency of their employer, and/or (ii) that, in so far as current law or practice permits, alterations to the employees' terms and conditions of employment may be agreed with a view to safeguarding employment opportunities by ensuring the survival of the undertaking (§ 49).

Article 5(4) provides that Member States must take appropriate measures with a view to preventing misuse of insolvency proceedings in such a way as to deprive employees of the rights conferred by Directive 2001/23 (§ 50).

Article 8 provides that the directive does not affect the right of Member States to apply or introduce a scheme which is more favourable to employees (§ 51).

It follows from the foregoing that, first, Directive 2001/23 establishes the principle that the transferee is bound by the rights and obligations arising from a contract of employment or an employment relationship existing between the employee and the transferor on the date of the transfer of the undertaking. The transfer, to the transferee, of charges that are payable, at the time of the transfer of the undertaking, by the transferor on account of the fact that it is an employer, encompasses all the rights of employees provided that they are not covered by an exception expressly provided for by the directive itself. Therefore, just as wages and other emoluments payable to employees of the undertaking in question are an integral part of those charges, so are contributions to the statutory social security scheme payable by the transferor, since those charges arise from contract of employment binding the latter (§ 52-53).

Secondly, under Article 5(1) of Directive 2001/23, that principle does not apply where, as in the main proceedings, the transferor is the subject of insolvency proceedings and is under the supervision of a competent public authority of the Member State concerned. In such circumstances, the payment of debts arising from the relationship between the employees and the insolvent employer is guaranteed under Directive 80/987 (§ 54).

Thirdly, despite that derogation provided for in Directive 2001/23, Article 5(1) permits each Member State to apply, inter alia, Article 3 of that directive to the transfer of an undertaking where the transferor is the subject of insolvency proceedings. Article 5(2)(a) provides that, where a Member State exercises that option, it is entitled to derogate from Article 3(1) of Directive 2001/23 so that charges arising from contracts of employment or employment relationships and payable by the transferor as at the date of the transfer or the opening of the insolvency proceedings are not transferred to the transferee, provided, however, that that Member State ensures a level of protection at least equivalent to that resulting from Directive 80/987, which requires the establishment of a mechanism that guarantees the payment of claims payable to employees under contracts of employment or employment relationships concluded with the insolvent transferor. That optional derogation does not only guarantee the payment of the wages of the employees concerned, but also safeguards employment opportunities by ensuring the survival of the undertaking in difficulty (§ 55).

Fourthly, under Article 8 of Directive 2001/23, it is open to Member States to adopt and implement any alternative scheme in relation to transfers of undertakings, provided that it is more favourable to employees than the scheme established by that directive. That approach is consistent with the objective pursued by Directive 2001/23, as set out in paragraph 34 above. Thus, a Member State is not deprived of the option of applying Article 3(1) of that directive, even in the case where an operator takes over an undertaking that is insolvent (§ 56).

Fifthly, it is apparent from both the wording of Directive 2001/23 and the scheme established

by that directive that, apart from the obligation imposed on Member States to protect employees no longer employed in the transferor's business on the date of the transfer as regards rights conferring on them immediate or prospective entitlement to the benefits referred to in Article 3(4)(b) of Directive 2001/23, the EU legislature has not laid down rules regarding the charges payable by the transferor as a result of contracts of employment or employment relationships terminated before the date on which the transfer takes place. Nevertheless, for the same reasons as those set out in the previous paragraph, a Member State is not precluded from providing that such charges are to be transferred to the transferee (§ 57).

Ruling

Council Directive 2001/23/EC [.....] must be interpreted as meaning that:

in a situation where, in the context of the transfer of an undertaking, the transferor is the subject of insolvency proceedings which are under the supervision of a competent public authority and where the Member State concerned has chosen to make use of Article 5(2) of Directive 2001/23, the directive does not prevent that Member State from providing or permitting that charges payable by the transferor as at the date of the transfer or the opening of the insolvency proceedings as a result of contracts of employment or employment relationships — including charges relating to the statutory social security system — are not to be transferred to the transferee, provided that such proceedings ensure a level of protection for employees which is at least equivalent to that resulting from Directive 80/987/EEC. Nevertheless, that Member State is not precluded from requiring such charges to be borne by the transferee, even where the transferor is insolvent, subject to the provisions laid down in Article 3(4)(b), Directive 2001/23 does not lay down any obligations so far as concerns the charges payable by the transferor as a result of contracts of employment or employment relationships terminated before the date of transfer, but it does not preclude legislation of the Member States which permits such charges to be transferred to the transferee.

Creator: European Court of Justice (ECJ)

Verdict at: 2015-01-28

Case number: C-688/13