

SUMMARY

ECJ 26 November 2015, case C-509/14 (Administrador de Infraestructuras Ferroviarias (ADIF) - v - Luis Aira Pascual and others), Transfer of undertaking

Facts

ADIF is a public undertaking responsible for handling containers in the port of Bilbao. In 2008 it outsourced the management of the container terminal to Algeposa, which performed a service in ADIF's facilities, using cranes belonging to ADIF. In 2013, ADIF terminated its agreement with Algeposa and proceeded to provide the service with its own staff, as before 2008. Algeposa dismissed its employees including Mr Aira Pascual.

National proceedings

Taking the position that the insourcing of the service in 2013 constituted a transfer of undertaking, Mr Aira Pascual brought proceedings against ADIF (and others). He claimed that his dismissal should be annulled and that ADIF should be ordered to reinstate him, with compensation. The court of first instance found in his favour. ADIF appealed. The Court of Appeal considered that the ECJ had not yet ruled on whether the concept of a transfer of undertaking within the meaning of Directive 2001/23 encompasses cases in which an undertaking responsible for providing a public service resumes the direct management of that service, where (i) that undertaking decides to perform that service using its own staff, without taking on the staff employed by the subcontractor to which it had previously entrusted the management of that service and (ii) the material resources used, essential to the provision of that service, belonged at all times to that undertaking, which stipulated their use by the subcontractor. Accordingly, the Court of Appeal referred a question to the ECJ.

ECJ's findings

The ECJ recalls (i) that the fact that a transferee is a public body does not place the transfer outside the scope of the directive; (ii) that the directive applies wherever, in the context of contractual relations, there is a change in the legal or natural person who is responsible for carrying on the undertaking and who by virtue of that fact incurs the obligations of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the tangible assets is transferred; (iii) that the directive applies to 'insourcing' situations; and (iv) that, in order for the directive to apply, the transfer must concern an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether that activity is central or ancillary (§ 25-31).

In order to determine whether an economic entity has retained its identity, it is necessary to consider all the 'Spijkers' criteria. The degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of Directive 2001/23 will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking (§ 32-34).

The ECJ has held that, in a sector where the activity is based essentially on manpower, the identity of an economic entity cannot be retained if the majority of its employees are not taken on by the alleged transferee. However, handling containers cannot be regarded as an activity based essentially on manpower, since it requires significant amounts of equipment. ADIF put cranes and facilities — which appear to be essential to the activity at issue in the main proceedings — at Algeposa's disposal. That activity is therefore based essentially on equipment. As already noted, the fact that the tangible assets essential to the performance of the activity at issue belonged at all times to ADIF is not relevant (see *Abler*, C-340/01). (§ 35-40).

Failure of the new contractor to take over, in terms of numbers and skills, an essential part of the staff which its predecessor employed to perform the same activity is not sufficient to preclude the existence of a transfer of an entity which retains its identity within the meaning of Directive 2001/23 in a sector, such as that at issue in the main proceedings, where the activity is based essentially on equipment. Any other conclusion would run counter to the principal objective of Directive 2001/23, which is to ensure the continuity, even against the wishes of the transferee, of the employment contracts of the employees of the transferor (§ 41-42).

Ruling

Directive 2001/23 of 12 March 2001 must be interpreted as meaning that the scope of that directive covers a situation in which a public undertaking, responsible for the economic

activity of handling intermodal transport units, entrusts, by a public service operating agreement, the performance of that activity to another undertaking, providing to the latter undertaking the necessary facilities and equipment, which it owns, and subsequently decides to terminate that agreement without taking over the employees of the latter undertaking, on the ground that it will henceforth perform that activity itself with its own staff.

Creator: European Court of Justice (ECJ)

Verdict at: 2015-11-26

Case number: C-509/14