EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/1 No obligation to inform employee representatives of transfer of business entity until final agreement (FI)

<p>The management of a company informed the employee representatives that part of the company’s business – its stone building materials department – had been sold. It did so immediately after the purchase agreement was executed, 7½ hours before the transfer of ownership. The two responsible directors were prosecuted for violation of the Finnish Act on Co-operation within Undertakings (the “Codetermination Act”). At first instance, they were fined, but on appeal the court acquitted them. The Court of Appeal found that there was no legal obligation to inform the employee representatives until after reaching final agreement on the transfer of an undertaking and that the directors had informed the representatives “in good time” as provided by the law transposing Article 7 of the Acquired Rights Directive in Finland.</p>

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Facts

The defendants in this criminal case were, respectively, the CEO and the COO of Tulikivi Oyj, a publicly listed company and a manufacturer of stone products such as fireplaces and sauna stoves, as well as stone building materials. On 14 April 2011, the company issued a press release stating that it was considering focusing on its core functions and divesting the stone building material business. On the same day, the CEO was instructed by the Board of Directors to sell the business. In compliance with this instruction, the CEO entered into negotiations with a number of potential buyers. In the course of May and early June 2011, the employee representatives were informed that the company was contemplating transferring this part of the business and focussing on its core functions and were told about the potential effects of this on the employees.

On 15 June 2011, one of the potential buyers, Vientikivi Oy, made a conditional offer of purchase. The same day, the Board authorised the CEO to sell the business to Vientikivi Oy on condition that agreement was reached on the terms of the sale. At this point, no agreement had yet been reached on the fundamental issues, including the purchase price, or on a number of other elements of the transaction. Moreover, there was no Letter of Intent, Heads of Agreement or any other document explaining the status of the negotiations.

There were phone conversations on 28 and 29 June and the parties reached a mutual understanding about the terms of the sale on 30 June around 1 p.m. Immediately after this, the parties signed a business purchase agreement, under which Tulikivi sold its stone building materials business to Vientikivi by means of an asset transfer, which was to take effect on 1 July 2011. The employee representatives were informed of the sale of the company between 16:30 and 18:00, 7½ hours before the transfer was to take effect. The company also issued a press release about the sale.

It is not known whether the staff of the transferee were informed of the transfer and, if so, at what time.

The prosecutor brought charges against the CEO and COO, who had mainly been responsible for the negotiations, claiming that they had neglected their duty to inform the employee representatives in good time prior to a transfer of the undertaking.

The Codetermination Act provides that the transferor and the transferee involved in a transfer are required to provide certain information to the employee representatives about the transfer in good time before its completion. Finnish law and case law do not contain explicit guidelines explaining what is meant in practice by "in good time". Therefore, it is not clear what the minimum requirements are for providing the information. However, an executive who intentionally or negligently fails to provide the information may be sentenced to a fine. The Codetermination Act implements the information obligation provided for in Article 7(1) of the Acquired Rights Directive, which provides that the transferor and transferee must provide their employee representatives with certain information "in good time, before the transfer is carried out". The Finnish Codetermination Acts repeats this wording.

Under Finnish law, there is no other consultation obligation in connection with the transfer of an undertaking.

The lower court found that the management had neglected its duty to provide information to the employee representatives, ruling, inter alia, that a mere 7½ hours prior to the actual transfer could not be considered to fulfil the requirement of "in good time" before completion of the transfer. It considered that the parties could have provided the information sooner, for example, a couple of days prior to 30 June, at a point when the parties had a serious intention to conclude the transaction or, alternatively, the parties could have agreed for the transfer to take effect on a later date - after the duty to provide information had been fulfilled.

The lower court ordered both defendants to pay fines. They appealed to the Court of Appeal in Turku.

Judgment

The Court of Appeal ruled, in accordance with a decision of the Helsinki Court of Appeal in a similar case, that there was no obligation to provide the information to the employee representatives before the final agreement on the business transfer has been concluded. The Court examined in detail the evidence about when the final agreement to sell the business was reached and concluded that the essential terms of the sale not had been agreed until 30 June 2011, just before the signing of the business purchase agreement. The Court also found that the employee representatives had been informed right after the business purchase agreement had been signed. On these grounds, the court reversed the lower court's judgment and ruled that information had been provided to the employee representatives in good time.

Commentary

The court's decision was simple and straightforward and the prosecutor did not apply for leave to appeal to the Supreme Court. Therefore, the same question could end up being considered by the courts again. The court did not take a stand on the specifics of how many hours or days before a transaction is carried out would be enough to be considered "in good time". But the court was very clear that there is no obligation to provide the information until the final agreement has been reached.

What is key about this judgment is that there was strong evidence that the mutual understanding had only been reached on 30 June 2011 and the business purchase agreement prepared and the employee representatives informed straight afterwards. If the evidence had been different, the end result could have been different too. The evidence also showed that the employee representatives had been provided with preliminary information about the business transfer and its possible effects on the employees in May and June and this may have had an effect on the end result.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): According to Czech law, the transferor and transferee must consult the employee representatives or, if none, they must inform the affected employees of (at least) the matters required by statute, no later than 30 days before the transfer is effective. Breach of the consultation or information duties may be sanctioned with a fine or, more seriously, may entitle the employees to claim damages.

In the Czech Republic, it would be risky, therefore, for an employer to do what was done in this case. In similar circumstances, we would advise the employer to agree a later start date for the transfer so that the employees could be properly informed.

The Netherlands (Peter Vas Nunes): What a world of difference between Finland and the Netherlands when it comes to worker influence on management decisions. It is almost inconceivable that the management of a Dutch company with a works council (compulsory for all 50+ companies) would get away with selling the company's business without involving the works council in the sale of their company well before the final decision was made. The Dutch Works Councils Act requires management to seek the works council's advice on a (proposed) decision of this type no later than the stage at which the works council's advice can have "real influence" on the decisionmaking process.

Romania (Andreea Suciu, Andreea Tortov): Romanian law expressly provides that both the transferor and transferee must inform the employee representatives, or the employees

themselves if there are no employee representatives, about the transfer in writing, 30 days prior to the transfer.

The transferor and transferee must inform the employee representatives of: the date or proposed date for the transfer; the reasons for the transfer; the legal, economic and social consequences for the workforce; any planned measures in relation to the employees; and their anticipated new working conditions.

Moreover, this obligation exists even if the decision to go ahead with the transfer was taken by a company controlling the transferor.

Although there is no sanction for failure to observe the duty to inform as such, the law provides that failure to meet obligations relating to transfer of undertakings (including the duty to inform) is sanctionable with a fine of between RON 1,500 (approximately € 340) and RON 3,000 (approximately € 680).

Thus, if a situation such as the one described happened in Romania, the company would probably have been fined. However, the management of the company would not have been prosecuted personally for failure to inform the employee representatives, as there is no such offence in the Criminal Code and the failure would be classified as simply a misdemeanour.

Slovak Republic (Beáta Kartíková): In contrast to some other jurisdictions, Slovakia is quite specific about how much notice should be given upon transfer of undertakings. According to the Slovak Labour Code an the transferor and transferee are obliged to inform the employee representatives, or if none, the employees themselves, in writing no later than one month before the transfer of employment rights and obligations. This leaves no room for the courts to consider the question of what is “in good time”.

Interestingly, this also affects the contractual freedom of employers (e.g. in the case of a sale of business) since the effectiveness of their contract is dependent on compliance with this rule.

Slovak law also lists the information that needs to be given, which must include the date or proposed date of the transfer, the reasons for it, the legal, economic and social implications of the transfer for employees and any planned measures that will be applied to the employees. In practice, failure to comply with these conditions may result in a fine being imposed by an inspection authority, but the transfer cannot be declared invalid as a result of failure to inform. In our view, the decision of the Finnish Court of Appeal frustrates the purpose of provisions originally intended to protect employees.

Subject: Transfer of undertakings – information and consultation

Parties: Prosecutor – v – J. Toivonen and M. Vauhkonen as directors of Tulikivi Oyj

Court: Turun hovioikeus Turku (Appeal Court of Turku)

Date: 3 December 2014

Case number: R13/2005

Internet publication: not published

Creator: Turun hovioikeus Turku (Appeal Court of Turku)
Verdict at: 2014-12-03
Case number: R13/2005