

## SUMMARY

# 2014/1 Transfer of undertaking may happen in unexpected cases (CZ)

***&lt;p&gt;There is a transfer of an undertaking not only in cases where the employer&rsquo;s undertaking, or part of it, is transferred to another employer based on an agreement or other legal reason but also where a company ceases to trade and another company owned by the same people starts to perform the same activities in the same premises, for the same clients but without any agreement on the transfer of the business itself, but where equipment has been contractually transferred between the two companies.&lt;/p&gt;***

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### Facts

The plaintiff in this case was a female employee who worked in a dental laboratory called ALTABOR. In 2009 she was dismissed for organisational reasons caused by adverse financial circumstances of her employer. She brought a claim in court because she considered the dismissal unfair (according to her, the true reason of her dismissal was the risk of occupational disease).

While the proceedings were ongoing, one of the original owners of ALTABOR (the ‘original defendant’) established a new company called JK Dent with two other partners, based at the same address as the original defendant, performing the same activity for the same clients and employing the same employees. The original defendant even sold some of its equipment to JK Dent but no agreement covering sale of customers, transfer of employees, the lease arrangements or other matters was made between the two companies.

Based on these changes, the plaintiff asked the court to alter the identity of the defendant from ALTABOR to JK Dent, arguing that there has been a transfer of the undertaking. The Czech Civil Procedure allows a defendant to ask the court to replace it with another party. If the court consents to this, the former defendant can withdraw from the case.

The court of first instance agreed to a change to the identity of the defendant because it considered that because the new defendant had continued with the activities performed by the original defendant on the same premises, using original defendant’s business contacts and equipment without interruption, this qualified as the transfer of an undertaking. This decision was later confirmed by the court of second instance.

However, JK Dent filed an extraordinary appeal with the Supreme Court, arguing that the Czech regulation of transfers of undertakings must be interpreted in accordance with EU Directive 2001/23/EC and therefore the court must consider whether there had been a transfer of an economic unit which preserved its identity and which may be considered as organised grouping of assets. JK Dent further emphasized that the scope of the assets transferred from the original defendant to him was small in comparison with the whole of the original defendant’s assets. JK Dent also argued that the original defendant had preserved its ability to be an employer by law. Therefore, according to JK Dent, the transferred assets did not amount to a business entity that had preserved its identity within the meaning of the Directive and ECJ case law, and no transfer of undertaking had occurred.

The plaintiff in her reply stated that the Directive is not a direct source of law in the Czech Republic. In the alternative, she argued that there had been a transfer of a business unit, which amounted to a unity of tangible, intangible and personal components and that this kind of transfer constitutes a transfer, not only according to Czech law, but also under the Directive.

## **Judgment**

The Supreme Court came to the same conclusion as the lower courts and rejected the extraordinary appeal because the new defendant had taken over most of employees, assets and customers and performed its activities on the same premises with no gap between the end of the original defendant’s activities and the start of those of the new defendant, meaning that

a transfer had indeed taken place.

The Supreme Court also responded to the new defendant's argumentation. It began by stating that a directive merely obligates a Member State to ensure that its domestic legislation is compliant with that directive, i.e. that the domestic law achieves what the directive aims to do. A directive is not directly binding between private parties. However, according to the Czech Supreme Court, even if the Directive in question had been directly binding, that would not have altered the situation, given that the value of the transferred assets is not the only element that must be considered when determining whether there has been a transfer under Article 1(1) of the Directive. In addition, it was also necessary to consider for example, the kind of activities involved, whether most of the employees were taken over, whether the customers remained the same, whether there was a gap in performance of activities, etc. By contrast, the question of whether the original employer preserved its ability to be an employer, is not relevant.

### **Commentary**

Czech law on transfers of undertakings resembles the UK's 'TUPE' legislation, in that its definition of a transfer is broader than that of Directive 2001/23. The result is that where a transaction qualifies as a transfer within the meaning of the Directive, it is also a transfer under Czech law, and conversely, a transaction that does not qualify as a transfer within the meaning of the Directive may nevertheless be a transfer under Czech law. For this reason, the courts of first and second instance in the case reported here applied only domestic Czech law. The defendant seems to have hoped that application of the Directive would yield a more favourable outcome. The Supreme Court could have limited its judgment to a statement to the effect that the Directive is not relevant, given that Czech law is more extensive than the Directive requires, but instead, the Court used the opportunity to explain why it was of the view that the situation at issue qualified as a transfer, not only under domestic law, but also within the meaning of the Directive.

This Supreme Court's ruling gives employees a level of protection in cases where their employer decides to continue its activities under the auspices of another company. It is not uncommon for former owners to set up a 'new' company to effectively continue the business, leaving behind the 'old' company's debts and ridding itself of other problems, such as disputes between the former owners. As the concept of transfers of undertakings is still not widely known in the Czech Republic and there is little case law on the topic, the rules on transfers are sometimes not applied in these situations. A Supreme Court judgment such as the one reported here should serve as a warning that such practices do not always have the desired effect and that employees are protected exactly as the EC legislator intended when it

introduced the concept of transfers in 1977.

### **Comments from other jurisdictions**

Cyprus (Anna Praxitelous): In Cyprus, the law that provides the framework for the transfer of an undertaking to another employer is the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses Law of 2000 (Law No. 104(I)/2000) which came into force on 7 June 2000 ('the Law'), as amended in 2003. The Law transposes Directive 2001/23/EC (the "Directive"), adopting the same basic principles and even reiterating a number of words of the Directive verbatim.

The Law applies to any transfer of (parts of) undertakings or businesses to another employer as a result of a legal transfer or a merger. A "transfer" means any transfer of an economic entity which retains its identity as an identifiable grouping of resources pursuing an economic activity, whether or not that activity is main or ancillary. The Law excludes from its scope vessels and ships as well as the reorganisation or redistribution of functions of public bodies.

The Law is relatively new and as such there is a lack of case law in Cyprus dealing with this matter. The courts will rely largely on precedents from other EU jurisdictions.

In the case of *Kyriakoulla Polycarpou - v - Frigg Restaurant Ltd and Redundancy Fund*, reported in EELC 2011/37, the issues were whether: (i) the dismissal was actually due to redundancy reasons; and (ii) whether there was a transfer of undertakings. According to the facts of the case, the company ceased to operate and after a certain period of time, the same activity was carried on by a second company. According to the Court, the non existence of staff during that period of time, together with the fact that the company ceased to operate could not exclude the existence of a transfer as defined in the Directive and the Law, since the undertaking retained its identity. The Court also took into account the fact that there was no allegation that the dismissal was due to economic, technical or organization reasons that would justify a finding of redundancy. In light of the facts of this case, the Court concluded that the dismissal in question was unfair and that the applicant was entitled to compensation.

*Slovakia (Beáta Kartíková)*: Pursuant to Slovak law, the transfer of rights and obligations arising from employment relationships occurs either by law upon legal succession or by agreement. The Slovak Republic has transposed the provisions of EU Directive 2001/23/EC into the Slovak Labour Code that state that if an economic unit (the business or part of it) or an employer's tasks or activities, or part of them, are transferred to another employer, the rights and obligations arising from employment relationships towards the transferred employees shall pass to the transferee. The term 'transfer' means the transfer of an economic unit which retains its identity as an organised grouping of resources (with tangible, intangible

and personnel components), aimed at the pursuit of an economic activity, whether it be a core activity or an ancillary one.

We agree with the opinion of Czech courts that when judging whether there has been a transfer of a business (or an economic unit) not only the value of the transferred assets, but also other aspects should be considered.

There is no comparable case law dealing with transfers of employers in the Slovak Republic, but we would expect that in similar cases the Slovak courts would follow the opinion of the Czech courts.

*Subject: transfers of undertakings*

*Parties: L.K. – v – JK Dent s.r.o.*

*Court: Nejvyšší soud České republiky (Supreme Court of the Czech Republic)*

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**Creator:** Nejvyšší soud (Czech Supreme Court)

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