SUMMARY

2014/38 Czech Supreme Court applies ‘good practice’ rather than transfers of undertakings rules (CZ)

<p>An employee transferred from one legal entity to another. Even though the transfer qualified as a transfer of undertaking, the employee was paid severance compensation. When he was dismissed a few months later, the transferee demanded repayment of 3/5th of the compensation, pursuant to Czech law. The Supreme Court rejected the demand. It did so without applying the transfer of undertakings rules. Instead, it held the demand to be “contrary to good practice”.</p>

Summary

An employee transferred from one legal entity to another. Even though the transfer qualified as a transfer of undertaking, the employee was paid severance compensation. When he was dismissed a few months later, the transferee demanded repayment of 3/5th of the compensation, pursuant to Czech law. The Supreme Court rejected the demand. It did so without applying the transfer of undertakings rules. Instead, it held the demand to be "contrary to good practice".

Facts

The defendant in this case was Z.Č. He was employed by a private organisation established by

the State, known as the Consolidation Agency, as the managing director. His average salary, including bonuses, was € 38,000 per month. The Consolidation Agency was dissolved by operation of law with effect from 31 December 2007, without going into liquidation. Its rights and obligations were transferred to the State, acting through the Ministry of Finance. The Consolidation Agency paid the defendant severance compensation equalling five times his average monthly earnings, i.e. € 190,000.

On 28 December 2007, the defendant entered into an employment contract with the Ministry of Finance, which employed him at a salary of € 1,400 per month, i.e. less than 4% of what he previously earned. Upon termination of this contract in March 2008, after only three months, the Ministry of Finance clamed repayment of 3/5th of the severance compensation of € 190,000, i.e. € 114,000. The claim was based on Article 68 of the Labour Code. It provides that if an employee is rehired by the same employer that paid him severance compensation, and if this happens within as many months from the termination date as the number of months' severance compensation, the employee must pay back a pro rata portion of that compensation, in this case 3/5th (three because the defendant was employed anew for three months and five because he received five months' salary by way of severance compensation). The rationale for this is that severance compensation is intended to help the employee overcome the difficult situation in which he finds himself as a result of losing his job through no fault of his own. The compensation is designed to mitigate the unfavourable impact of organisational changes in the form of a lump sum payment. If the employee, after the termination of his employment, resumes employment with his original employer within the period that the compensation is designed to compensate him for (in this case, within five months), the compensation no longer serves its intended purpose.

The defendant submitted three reasons why he need not repay any part of the severance compensation he had received:

the fact that rights and obligations transferred from the Consolidation Agency to the Ministry of Finance did not mean that those two bodies were identical, i.e. the defendant was not rehired by the same employer;
his salary with the Ministry of Finance was totally inadequate to enable him to repay € 114,000;
prior to taking up employment with the Ministry of Finance it had assured him that his new engagement would not impact on his severance compensation. Therefore, demanding repayment of 3/5th of that compensation was contrary to "good practice".

Judgment

The Czech Supreme Court emphasised in its judgment that the phrase 'previous employer' means not only the employer with whom the employee's employment was terminated, who paid the severance pay and with whom the employee 'resumes' employment, but also any person or entity to whom the rights and obligations arising from the employment relationship were transferred from such employer. This means that the term also covers the transferee employer with whom the employee would have worked (by virtue of the transfer of rights and obligations arising from employment) had the employment not been terminated prior to such a transfer of rights and obligations.

The Czech Supreme Court further noted that, with regard to the obligation under the Czech Labour Code to return the received severance pay, it is of no relevance how much salary is paid to the employee under the new employment contract, nor how it compares to the salary under the previous contract (on which the severance pay was based). The Czech Labour Code assumes in this respect that it is solely and exclusively at the employee's discretion whether he resumes work with the previous employer, even if it is on slightly less, or significantly less, advantageous terms. Likewise, it is at the employee's sole discretion whether or not to accept a new engagement with his previous employer, even though this entails repaying the severance pay or part of it, as long as the new salary is not below the statutory minimum wage.

However, the Czech Supreme Court attached importance to the fact that the Ministry of Finance, when it entered into the new contract of employment, assured the defendant that no refund of the severance pay would be required. If the employee resumed work for the previous employer in reliance on this assurance and reasonably believed that he would not have to refund the severance pay, it would be contrary to good practice for the employer to demand a refund of the severance pay despite this assurance. The Czech Supreme Court reproached the lower courts for not considering the case in light of this aspect, overturned the judgments of both courts and returned the case to the court of first instance for further proceedings.

Commentary

Article 1(1) (b) of Directive 2001/23 excludes "the transfer of administrative functions between public administrative bodies" from the scope of the directive. However, the Czech legislator has provided that the rules regarding transfers of undertakings also apply to situations such as the one at issue in this case, where the law provides that all rights and obligations transfer from one part of the State to another. There is no need to consider the question of whether in those situations Czech law must be interpreted in accordance with the Directive, because that question did not arise in this case, as the fact that there was a transfer of an undertaking was clear. The Supreme Court recognized and confirmed that transfer. However, it did not apply the transfer of undertakings rules. Instead, it applied the doctrine of "good practice". In that

way, it had no need to address the issue of whether there had been a need to pay the defendant severance compensation in the first place. It should not have been paid, but despite that, the Supreme Court protected the defendant against the claim for repayment.

The Supreme Court's judgment does not reveal why the court saw no need to apply the rules on transfers of undertakings, although it is probably not for lack of knowledge of those rules. The same cannot be said of many Czech employment lawyers. The Czech Republic implemented Directive 2001/23 more than ten years ago and its implementation is a standard part of the Czech Labour Code, which is the main statute regulating employment law in the Czech Republic. Nevertheless, although both employment lawyers and others regularly engage in human resources work under the Labour Code, knowledge of transfers of undertakings is limited to employment lawyers working in large firms or boutique employment firms, and to those lawyers and HR specialists working in international companies, which deal with such issues on a regular basis. Nevertheless, it is true that knowledge of this topic has increased in the Czech Republic in the last a few years.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The outcome of this case seems logical and fair. Technically, the Czech courts could perhaps have reasoned as follows:

the transfer of the Consolidation Agency's rights and obligations to the Ministry of Finance constituted a transfer of undertaking;
therefore, the defendant continued to be employed and there was no reason for paying him severance compensation on 31 December 1997;
therefore, the defendant was unjustly enriched and was obligated to repay (not 3/5th but all of) the € 190,000;
however, that would have been in breach of the assurance that he would be paid this amount and, hence, contrary to good practice;
therefore, the claim for repayment should be rejected.

Most likely, applying the transfer of undertakings doctrine would not have altered the outcome. The Czech Supreme Court seems to have skipped steps 1-5 and to have gone directly to step 4.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Transfer of undertaking, Employees who transfer/refuse to transfer

Parties: Ministry of Finance – v – Z.Č.

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

Date: 22 May 2014

Case number: 21 Cdo 2071/2013

Publication: http://www.nsoud.cz | *ECLI* | *ECLI:CZ:NS:2014:.....*

Creator: Nejvyšší soud (Czech Supreme Court)
Verdict at: 2014-05-22
Case number: 21 Cdo 2071/2013