SUMMARY

2014/36 Plaintiffs were de facto still employed on transfer date (DK)

<p>The Confederation of Danish Employers on behalf of Employers’ Association A on behalf of Employer B – v – The Danish Confederation of Trade Unions on behalf of Trade Union C</p>

Summary

In cases where an acquisition is a transfer of an undertaking, the transferee takes over the transferor's rights and obligations regarding employees with effect from the takeover. This principle is set out in section 2 of the Danish Transfer of Undertakings Act, which is based on the Acquired Rights Directive (Directive 2001/23).

Whether or not an acquisition is a transfer of an undertaking within the meaning of the Danish Transfer of Undertakings Act has to be established on a case-by-case basis by the courts if the parties disagree.

If the Danish Labour Court finds that a transfer has taken place, the employees will be entitled to bring certain claims originating from their employment relationship with the transferor against the transferee (e.g. for holiday and overtime pay)

Facts

The employees in this case were employed by a small company that was owned by its director (the 'former employer'). On Friday 30 November 2012, because of the former employer's financial problems, a contract it had with one of its customers was transferred to another company (the 'competitor'). On Monday 3 December 2012, the former employer laid off all of its employees and on 11 December 2012 it went into receivership.

The former employer and the competitor agreed that the latter would offer employment to the employees and the former employer provided the competitor with information regarding those employees.

On 3 December 2012 – the same day that the former employer dismissed the employees – the competitor interviewed each of the employees individually and hired all of them, including the former employer's director. They began working for the competitor the next day, 4 December 2012. Their terms and conditions of employment were largely similar to what they were before and most of them continued to perform the same work with the same equipment as before. The bankrupt estate of the former employer offered equipment and supplies for sale to the highest bidder. The competitor was the highest bidder, so it acquired the equipment and supplies.

A trade union approached the competitor on behalf of the employees, claiming that there had been a transfer of undertaking within the meaning of the Danish law transposing Directive 2001/23, the Transfer of Undertakings Act, and that the competitor was therefore liable to pay the employees their salary for the period up until 3 December 2012, as well as holiday pay arrears. The competitor denied that there had been a transfer of undertaking, arguing, mainly, that: (i) it had only acquired some, not all of the former employer's contracts; (ii) it had hired the employees, who had been laid off by the former employer, not collectively but following individual interviews, and (iii) it had purchased the former employer's equipment and supplies, but only because it was the highest bidder among other interested parties.

The union brought proceedings before the Labour Court.

Judgment

The court noted that, when determining whether there has been a transfer of an undertaking, it is necessary to make an overall assessment of all the facts. In this case, there were two issues:

Had the employment relationship between the employees and the former employer been terminated with permanent effect?
Had the competitor acquired the contract merely in order to complete it? If so, based on the ECJ's ruling in the Rygaard case (C-84/94), the acquisition of the contract did not trigger the transfer of undertakings rules.

The court rejected the first argument because (i) the former employer and the competitor had discussed the possibility of the competitor interviewing and hiring the employees; (ii) the

former employer had provided the competitor with information regarding those employees; (iii) the competitor had hired all of the employees immediately after they had been laid off; and (iv) most of the employees performed the same type of work, for the same clients and with the same tools and materials as before. Based on these facts, the court concluded that the employment relationships between the former employer and the employees had, in actual fact, not been permanently terminated.

The Court also rejected the second argument, holding that the acquisition had not been limited to the completion of a single contract.

Accordingly, the Court held that a transfer had taken place and that, therefore, the competitor was liable for the salary and the holiday pay left unpaid by the former employer.

Commentary

As the above case report illustrates, the courts will make an overall assessment as to whether a transfer of contracts, goods, tools and employees is in fact a transfer of an undertaking subject to the rules on transfers.

If so, the new employer will take over the obligations of the former employer vis-à-vis the employees, which means that if they were dismissed by the former employer on grounds of the transfer, the new employer will be liable for any damages and compensation awarded to the employees if the dismissal is deemed unfair by the courts under the Danish Transfer of Undertakings Act – regardless of whether the new employer was at fault or even aware of the dismissals.

Further, it is explicitly prohibited under the Danish Transfer of Undertakings Act to dismiss employees solely because of the transfer of an undertaking.

Practices such as “pre-pack” do not exist in Denmark. This is mainly because, in the Danish “flexicurity” model (which provides employees with little dismissal protection but with generous unemployment benefits, and which provides employees with the benefit of an active labour market policy), employers are allowed a considerable margin of discretion in deciding which employees to retain and which of them to dismiss in a case of redundancy. [Note editor: pre-pack is where a company contemplating starting afresh makes an informal arrangement with the court to appoint a receiver for its existing company – which will later be declared insolvent. Once the insolvency has been declared, the receiver will move swiftly to dismiss the employees and rehire the desirable ones – all under the exemption from the transfers of undertakings rules for insolvent companies].

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): This Danish case report elicits two remarks. The first is that it surprises me that the defendant, who was represented by the Confederation of Danish Employers, seriously denied the existence of a transfer of undertaking. The competitor had taken over: (1) most of the former employer's work, not merely for the purpose of completing one unfinished contract; (2) all of its employees; and (3) all of its material assets. How could one seriously dispute that there was a transfer of undertaking? Denmark has been an EU Member State since 1973.

My second remark is that, if this had been a Dutch case, and if the agreements regarding the acquisition of equipment, supplies and employees had been made with the former employer's receiver following the declaration of receivership, i.e. on or after 11 December 2012, the rules regarding transfers of undertakings would not have applied and the competitor would not have been liable for the arrears of salary and holiday pay. This is because, contrary to The Netherlands, Denmark has not made use of Article 5(1) of the Directive. As a result, the transfer of undertaking rules apply in Denmark regardless whether the transferor is insolvent.

Parties: The Confederation of Danish Employers on behalf of Employers' Association A on behalf of Employer B - v - The Danish Confederation of Trade Unions on behalf of Trade Union C

Court: The Danish Labour Court

Date: 1 July 2014

Case number: AR2013.0518

Hard Copy publication: Not yet available

Internet publication: available from info@norrbomvinding.com

Creator: Arbejdsretten (the Danish Labour Court)
Verdict at: 2014-07-01
Case number: AR2013.0518