SUMMARY

2014/40 Nature of activity, including asset/labour intensiveness, determines existence of transfer (HU)

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Facts

The defendant employer in this case had entered into an open-ended contract of employment with the claimant in 2008. The claimant was employed as the Head of Secretariat. The Secretariat had three employees altogether and was charged with providing secretarial support. On or about 31 August 2009, the defendant offered to terminate the employment relationships of all three employees at the Secretariat with a mutually agreed compromise agreement. The claimant refused the offer. On the same day, the defendant terminated the claimant's employment relationship with regular notice, the termination date being 30 September 2009. The notice letter stated as the reason for the termination that the defendant had decided to close the Secretariat, to cancel the positions of all employees in the Secretariat for economic reasons and to engage a subcontractor to perform the tasks carried out by the Secretariat. The defendant engaged a third party subcontractor (MPH) based on a service agreement to carry out the tasks of the Secretariat by providing professional staff, while the infrastructure was provided by the defendant.[1]

The claimant submitted a claim at court arguing that the notice of termination was unlawful

because there had been a transfer between the defendant employer and MPH as subcontractor.

Judgments

The court of first instance found that the defendant employer had transferred an organised group of resources to MPH which – on its own – was sufficient to continue the activities of the Secretariat and maintain its identity. Although the service contract between the defendant and MPH determined that the services of the Secretariat were to be engaged on the basis of a subcontracting arrangement, rather than employment, this did not necessarily mean that there was no transfer. The main element of a transfer in this case would be the transfer of an activity from the transferor to the transferee based on an agreement between the defendant and MPH - which itself constituted a transfer of the undertaking. For this reason, the notice of termination was unlawful, since the real reason for the notice was the transfer. Therefore, the employment termination breached the Labour Code. The defendant appealed to the court of second instance.

The court of second instance reversed the decision of the court of first instance and rejected the claim. Its view was that whether a transaction should be treated as a transfer should be primarily based on the nature of the transaction and the terms and conditions of the contract between the parties to the transaction (in this case, the defendant and MPH). According to the court of second instance, the essence of the service agreement between the defendant and MPH was that the defendant was engaging a subcontractor to provide an all-inclusive secretarial service. The court was not in a position to second-guess the legal basis or change this. In the present case, the defendant had decided to engage a subcontractor to perform the Secretariat's tasks. As a result, it ceased to have a secretariat of its own, it got rid of the relevant jobs and terminated the affected employees. From October 2009 onwards, the defendant received services from a subcontractor and its activity of maintaining a secretariat with three employees ceased. The court's view was that the decision of the court of first instance had been incorrect, since the defendant did not transfer the Secretariat to MPH as an intangible asset. It had shut down the Secretariat and outsourced its functions. This business decision could not be amended by a court.

There is a difference between the transfer of an undertaking and a subcontractor becoming the employer. Based on court practice, if the employees continue their work at the same place under the same conditions it is assumed that a transfer has taken place. This was not, however, what happened in the present case. When determining whether a transaction should be treated as a transfer, the terms and conditions of the service contract and the intention of the parties must also be considered. Based on Directive 2001/23/EC, the requirement to

maintain the employment relationships following a transfer is a consequence, not a condition of the transfer. Therefore, it is not necessary for staff to have been moved across for the arrangement to be considered a transfer.

In spite of the above, the court of first instance failed to consider how the defendant and MPH had agreed on the employment of the three employees and incorrectly concluded that the service contract acted as a transfer of the undertaking.

According to the opinion of the court of second instance, the court of first instance revised the contractual basis between the defendant and MPH without either being asked to do so, or indeed having the authority to do so. It found that treating MPH as the transferee would go against the parties' contractual intentions. A court does not have the power to intervene in managerial decisions that are not the subject of the court case.

Based on the above, the notice of termination was in compliance with the applicable laws.

The claimant submitted a claim for extraordinary review by the Supreme Court. The Supreme Court confirmed the decision of the court of second instance that there was no transfer of undertaking in the given case. It highlighted that the court of second instance was correct in stating that how the defendant arranges for tasks to be completed is a matter for its own discretion, but also said that the claimant was correct to say that whether the conditions of transfer are met must be considered based on the arrangement chosen. As was highlighted by the court of second instance, the agreement between the defendant and the subcontractor did not require the further employment of the affected employees. In other words, it did not stipulate that the subcontractor would step into the shoes of the employer.

The case law of the ECJ developed based on Directive 2001/23/EC indicates that the rules on transfers of undertakings apply where there is a transfer of an economic entity which retains its identity. The further employment of staff is not a condition of this, but it may indicate that the identity of the entity remains the same. The criteria set by the ECJ must be considered in order to decide whether the economic entity has retained its identity. These are as follows: (i) the transfer of movable and immovable assets; (ii) the transfer of intangible assets; (iii) the similarity of the activities carried out by the economic entity before and after the transfer; (iv) the (possible) continuation of the activity carried out before the transfer; (v) the transfer of clients. However, the presence of these criteria alone does not necessarily lead to a transfer. The nature of the activity transferred has an impact on whether the conditions for the transfer rules to apply are fulfilled. Based on the practice of the ECJ, whether the business is asset- or labour-intensive is important. In order to establish whether a business has retained its identity, it is necessary to work out what the 'core' assets of the business are and establish

whether these assets have been transferred. If the core assets are transferred, then the transaction triggers the rules of transfer of undertakings, with the result that the affected employees automatically transfer as well.

In this case, however, the 'core' assets (i.e. staff and intangible assets[2]) were not transferred. The fact that the activity carried out after the transaction was the same or similar to the one before the transaction does, on its own, mean that the economic entity retained its identity. Therefore, the transaction did not constitute a transfer of undertaking.

Commentary

Cases on transfer of undertakings are rare in Hungarian employment tribunals and this can be seen by the fact that the three courts reasoned the case very differently. It is interesting that only the Supreme Court made express reference to ECJ case law and applied the correct test, using arguments based on the nature of the business affected. This decision will be of significant guidance in interpreting Hungarian law on transfers of undertakings. We expect more court cases in this field because of an increasing awareness among employees of the rules and their consequences for them.

Comments from other jurisdictions

Austria (Manuel Schallar): In Austria transfers of undertakings and their legal effects are regulated in the Act Adapting Employment Contract Law (*Arbeitsvertragsrechts-Anpassungsgesetz*, the 'AVRAG'). According to §3 AVRAG, the transferee must take over all rights and duties arising from contracts of the transferor. In deciding whether the transfer of an economic entity has actually taken place, the Austrian courts consider whether a business is asset- or labour-intensive. In the case of a transfer of a labour-intensive function, whether a substantial number of employment relationships in the part of the business transferred cross over and/or whether the managerial staff of the unit cross over are significant factors.

The Netherlands (Peter Vas Nunes): My understanding of this case is, in essence, the following:

Court of first instance: the activities of the Secretariat remained the same, therefore there was a transfer of undertaking (TOU);
Court of Appeal: there was no TOU because the defendant and MPH had agreed that the work would be performed on the basis of a (sub)contract, and if one were to accept a TOU, that would effectively amount to a change to the nature of the contractual relationship between the parties involved from one of employment to one of subcontract;
Supreme Court: a secretariat is a labour-intensive activity and as MPH did not take on any of

the three employees, there was no TOU. In other words, the Supreme Court upheld the Court of Appeal's decision, but on totally different grounds.

If this understanding is correct, then, in my view, the court of first instance's decision was wrong, because whether or not there is a TOU is not determined solely by activity going across. The court of appeal's decision was wrong, because the parties cannot avoid a transfer of activity being a TOU merely by changing the legal nature on the basis of which the activity is carried out. The Supreme Court's judgment strikes me as correct.

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