SUMMARY

2014/39 Supreme Court fails to identify transfer, Constitutional Court corrects error (SK)

<p>A state-owned company was privatised. The transaction was clearly the transfer of an undertaking. However, the Social Insurance Agency, applying social insurance legislation, did not see it that way, with the result that a former employee of the company received lower pension benefits than he would have done, had the privatisation been treated as a transfer of undertaking. The issue in three instances was whether the private company had ‘arisen’ out of the state company within the meaning of the social insurance legislation and, if not, whether there was discrimination of private company employees as compared with employees of state-owned companies. It was not until subsequent proceedings in the Constitutional Court that the issue of the transfer came up. </p>

Summary

A state-owned company was privatised. The transaction was clearly the transfer of an undertaking. However, the Social Insurance Agency, applying social insurance legislation, did not see it that way, with the result that a former employee of the company received lower pension benefits than he would have done, had the privatisation been treated as a transfer of undertaking. The issue in three instances was whether the private company had 'arisen' out of the state company within the meaning of the social insurance legislation and, if not, whether

there was discrimination of private company employees as compared with employees of state-owned companies. It was not until subsequent proceedings in the Constitutional Court that the issue of the transfer came up.

Facts

The plaintiff was a blue collar worker in a state-owned mining company. In 1993, a number of senior employees set up a private limited liability company (the 'private company') which took over part of the mining operations, leased the premises from the State, purchased equipment and other assets from the state-owned company and hired some of the employees. Following this transaction (the 'privatisation'), those employees continued to perform the same work under the same conditions as before.

Upon the plaintiff's retirement, the Social Insurance Agency awarded him retirement benefits. However, these benefits were less than the plaintiff believed he was entitled to. This had to do with a distinction that Slovak social insurance made (until the year 2000) between three categories of employee: employees who perform physically or mentally strenuous or dangerous work (Categories I and II) and others (Category III). Employees in categories I and II ('favoured employees') accrued higher retirement benefits than those in Category III. Prior to the privatisation, the plaintiff had been categorised as a favoured employee. Following the privatisation, the Social Insurance Agency categorised him as a Category III employee, as a result of which his retirement benefits accrued in the period following the privatisation were lower than what they would have been had he continued to be classified as a favoured employee.

The Social Insurance Agency, applying social insurance legislation, took the position that the private company had not 'arisen' out of the state-owned company. Had the private company arisen out of the state owned company, the plaintiff would have retained his status as a favoured employee. In the Social Insurance Agency's view, there were only three situations where one company is deemed to 'arise' out of another company: legal merger, acquisition and split-up as provided in the Commercial Code. Given that none of these situations had occurred, the Agency turned down the plaintiff's request for reclassification.

In 2004, the plaintiff brought legal proceedings against the Social Insurance Agency, seeking reclassification as a favoured employee. In 2005, the court of first instance ruled in his favour, but the next year this ruling was overturned on appeal. The plaintiff appealed to the Supreme Court. It upheld the appellate court's ruling, holding that the private company had not arisen out of the state-owned company. The Supreme Court affirmed the Social Insurance Agency's position that, according to the wording of the Social Security Act, merger, acquisition and

split-up within the meaning of the Commercial Code are the only three ways in which one company can arise out of another.

Judgment

The plaintiff filed a complaint with the Constitutional Court, alleging violation of his constitutional right to protection by the State against discrimination. In his opinion, there was a discriminatory distinction between, on the one hand, employees of companies that were formerly state-owned but had later been privatised and, on the other hand, employees of companies that have remained the property of the state. The plaintiff argued that, when determining the relevant criteria, the type of work performed should also have been considered. If an employee was accurately classified as a favoured employee before the privatisaiton, and if he continued to perform the same work afterwards, then surely there could be no reason to change his classification. The legal basis of the plaintiff's complaint was that, by interpreting the Social Secuirty Act in a restrictive, grammatical manner, thereby ignoring the purpose, the origin and the historical context of the Act and its successive amendments, the Supreme Court had created a situation where employees such as the plaintiff were unconstitutionally discriminated.

For technical legal reasons, besides dealing with the discrimination issue, the Constitutional Court focused on the concept of one company 'arising out of' another. The Constitutional Court emphasized that public authorities and courts should not interpret statutory provisions in an excessively formalistic manner if that leads to injustice. Courts are not always bound by the literal wording of a law. They may, and sometimes must, depart from that wording if that is required by the purpose of the law, the history of its origin or any constitutional principle. When interpreting and applying laws, their purpose and meaning - which are not only derived from their wording but also from fundamental principles of law - should be taken into account.

Given the need to interpret the Social Security Act purposively, the Social Insurance Agency should have looked to the Labour Code, which contains provisions on transfers of undertakings. It defines a transfer of undertaking as the transfer of an economic activity which retains its identity as an organised grouping of resources. This definition must be interpreted in accordance with the case law of the Court of Justice of the EU (the ECJ), including its judgments in the cases *Wendelboe* (C-19/83), *Ny Mølle Kro* (C-287/86), *Hidalgo* (C-173/96), *Ziemann* (C-247/96), *Sodexho* (C-340/01) and *Mayeur* (C-175/99). If the privatisation of the plaintiff's former employer qualifies as a transfer of undertaking and his work remained unchanged afterwards, then there was no reason to change the plaintiff's classification as a favoured employee.

On these grounds, the Constitutional Court repealed the Supreme Court's judgment and referred the case back to the Supreme Court for further proceedings.

Commentary

In the decision reported above, the courts judged whether the plaintiff fulfilled the prescribed requirements for being granted higher retirement pension on the basis of whether there was a transfer of undertaking from the state-owned enterprise to the commercial company.

The Supreme Court dealt only with what the Social Security Act actually said. In its view the employer of the plaintiff did not arise from the state-owned enterprise because it was not its legal successor and not even part of the employer's property was state owned. The Supreme Court summed up that the work performed by the plaintiff in the company had not been performed in a company created from the state-owned enterprise and therefore he could not have been assessed to be in a favoured category for higher retirement pension.

We fully agree with the findings and the opinion of the Slovak Constitutional Court, as they respect the purpose and objective of statutory provisions. The Constitutional Court had regard to all the rights of employees under the Labour Code and the Constitution of the Slovak Republic, in light of the ECJ's case law. In our opinion the Constitutional Court assessed the facts and found that there was a de facto transfer of the undertaking and therefore the employment rights and obligations transferred, even though there was no legal succession within the meaning of the Commercial Code.

Subject: transfer of undertaking

Parties: Z – v – S

Court: Ústavný súd Slovenskej republiky (Constitutional Court of the Slovak Republic)

Date: 8 December 2010

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Case number: I. ÚS 306/2010

Internet publication:www.concourt.sk| *Vyhľadávanie rozhodnutí* | *Spisová značka* | *case number*

Creator: Ústavný súd (Constitutional Court)
Verdict at: 2010-12-08
Case number: I. ÚS 306/2010