SUMMARY

2012/2: One company cannot transfer staff to another against their will in the absence of a transfer of undertaking (CZ)

<p>An employment transfer may only take place if there is a legal basis for it. Provision for a transfer of tasks or activities (or part of them) from one employer to another — which is a legal basis for employment transfer under the Labour Code — must be made in the contract or in another legal act, or it must consist of another legal fact. In this case, a contract between two employers stating that employees would be transferred was held not to be sufficient legal grounds for a transfer and, as such, the transfer was invalid.</p>

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Facts

Employer A was a joint-stock company providing communication and technical services. Employer B was also a joint-stock company in the technical services market, providing

services to the building industry relating to security systems and health and safety at work.

Employer A concluded an agreement on providing activities and services (the "Agreement") with Employer B. The Agreement concerned the operation of security systems and the protection of the health and safety of staff and property. One part of the Agreement made provision for the transfer of rights and obligations arising from employment relationships from Employer A to Employer B. Essentially, they agreed that the employment rights and obligations of specified employees would be transferred to the provider of the services (Employer B). However, the Agreement provided that the specific services to be provided by Employer B to Employer A would be specified in individual orders.

After the transfer, the employment relationships of those who transferred from Employer A were either altered to the detriment of the employees or terminated by Employer B by reason of redundancy. The employees considered the employment transfer to have been invalid because of their diminished rights and, on 21 January 2008, they filed a claim against Employer A for having transferred them. They argued that the Agreement did not specify the activities and services to be transferred from Employer A to Employer B. Hence, the employees should not have transferred to Employer B. They claimed for reinstatement with Employer A.

The court of first instance found in favour of Employer A, on the basis that the employment transfer had been carried out pursuant to the Agreement, which contained certain provisions relating to the transfer of part of the services. The court found the Agreement was valid and therefore that the transfer of the employees to Employer B was also valid. In consequence, the employees had no entitlement vis-a-vis Employer A arising from the original employment relationship.

The court of second instance upheld the decision. It found that the crucial element was that not only were some of the tasks and activities being transferred but, simultaneously, the employees who performed them were also transferred. The Agreement remained operative and Employer B continued to perform the activities transferred to it. Therefore, the employees had been transferred to Employer B. If the employment relationships of these employees with Employer B were terminated, the court would have no power to impose on Employer A an obligation to re-employ the employees in their original jobs.

One of the employees filed an extraordinary appeal to the Supreme Court arguing that under the Agreement it was not possible to conclude which activities had been transferred.

Judgment

The transfer of undertakings in the Czech Republic is subject to Directive 2001/23, as

transposed by the Czech Labour Code.

The Supreme Court's starting point was that the transfer of tasks and/or activities from one employer to another constitutes a legal basis for the transfer of rights and obligations of employees. Indeed, in accordance with the Directive, where the conditions for a transfer are satisfied, the transfer of rights and obligations is automatic under Czech law. Czech law provides for broader conditions for a transfer than the Directive, i.e. transfer occurs in any case involving the transfer of tasks and activities to another employer. Thus, for these purposes, the tasks or activities of the employer means, in particular, tasks performed on behalf of the employer and for which it was responsible, related to provision for production and the provision of services, along with similar activities performed either on the premises intended for them or where they were usually performed . As explained below, the Supreme Court considered that it was not proven that these conditions had been fulfilled in the case at hand.

In accordance with applicable law, rights and obligations arising from employment relationships may transfer only where there is a legal act (contract) or other legal fact providing for transfer to another employer. Any legal fact which, in effect, transfers production, services or similar activities (whether or not ownership changes) to another employer, provides legal grounds for a transfer of the employer's tasks or activities to another employer. In addition, for a transfer to be effective, the employer to which the production, services or similar activities are transferred must have the capacity as an employer to continue to perform those tasks and/or activities (or similar ones) that were performed by the original employer. If the conditions stipulated by the Labour Code are met, the consent of the transferred employees is not required.

No transfer of rights and obligations other than those provided for by the Labour Code or other legal regulations is possible. Any agreement between two employers concerning the transfer of rights and obligations arising from the employment relationships which does not constitute a legal basis for transfer is invalid according to the Supreme Court's decision.

In the Supreme Court«s view, the purpose of the Agreement was to define the process by which services could be ordered and provided between the contractual parties, and not to transfer tasks and/or activities from one employer to another. Even though the Agreement made mention of the transfer of certain tasks and activities connected with the provision of services, none of the individual clauses of the Agreement referred to the transfer of tasks and activities in the way that was subsequently argued by the employers.

Unfortunately, the way in which the Supreme Court arrived at this decision was not explained in any more detail, but it concluded that the Agreement did not constitute legal grounds for

the transfer of tasks and activities and it reversed the lower courts' decisions, stating that the decisions had been based on an incorrect legal assessment of the case. The case will now be heard afresh in a lower court.

Commentary

The Supreme Court's ruling was that the Agreement did not specifically provide for a transfer of tasks and/or activities and did not constitute sufficient legal basis for the transfer of employees. It will now be for the lower courts to assess whether any other legal basis that Employer A and Employer B claim existed for the transfer of tasks and activities, did, in fact, exist. In doing so, it should be noted that the lower courts will be bound by the legal opinion of the Supreme Court. If they find no grounds, they must rule that the employees should continue to be employed by Employer A.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): What this judgment seems to say is simply (and to my mind logically) that employees cannot transfer against their will as a result of an agreement between their employer and a third party unless the requirements for a transfer of undertaking, in this case a transfer of activities, have been satisfied.

Subject: Transfer of rights and obligations from an employment relationship

Parties: S.D. and others — v — Telefonica Czech Republic, a.s.

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