SUMMARY

2012/14: Airline catering company is capitalintensive (NO)

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Facts

An announcement for tenders to provide catering services to the airline SAS in Norway's two largest airports, Oslo and Bergen, resulted in a company called LSG losing its contract to Gate Gourmet. The SAS contract represented approximately 85% of LSG's domestic revenue and 193 of its 267 employees were made redundant following the loss of the SAS contract. Gate Gourmet hired 184 employees after being awarded the contract, of whom 74 were formerly

employed by LSG.

In the process of transferring the contracts, Gate Gourmet offered the relevant trade unions an agreement under which their members would be given a preferential right to be rehired, but with no guarantee of employment. In return, the trade unions were to agree that no transfer of undertaking had taken place. Only one of the trade unions accepted the offer. A number of unsuccessful candidates affiliated with the other trade unions brought claims based both on the law relating to transfer of undertakings and on discrimination on grounds of their trade union membership. Norwegian law prohibits discrimination on the basis of (non-)union membership.

In terms of the claim in respect of the transfer, the plaintiffs, consisting of a number of former LSG employees who had not been offered employment, claimed that they should be regarded as employees of Gate Gourmet. The Supreme Court turned down this claim following an overall assessment, the conclusion of which was that the identity of the business that had been transferred had not been retained.

Judgment

The Supreme Court began by recalling the three requirements for a transaction to qualify as the transfer of an undertaking within the meaning of Directive 2001/23, namely (1) that there is an economic entity, meaning an organised grouping of resources with the objective of pursuing an economic activity; (2) that this entity is transferred; and (3) that it retains its identity.

Pointing particularly to the ECJ's ruling in *Süzen* (C-13/95), the Supreme Court re-iterated that a pre-condition for the Directive to apply is that "*the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract […]. The term entity thus refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective*". With reference to Süzen and Jouini (C-458/05), the Supreme Court emphasized the requirement that the part of the business that is subject to transfer must constitute a stable and operational unit, which in itself is capable of delivering services characteristic of the business' economic activity. Applying the ECJ's case law to the facts, however, the Supreme Court stated that the process of identifying an economic entity closely resembles the assessment of the *Spijkers* criteria. Not surprisingly, therefore, the focus of the debate was on which of the *Spijkers* criteria were relevant.

In the overall assessment, the Supreme Court found no need to make a finding on whether the activity under the SAS-contract constituted an economic entity. The Court did, however, point to typically relevant factors, one of which was that no employees were fully engaged in the

performance of the SAS-contract.

The Court decided as its starting point that the airline catering industry was both labour-intensive and asset-dependent. Despite this point of departure, the Supreme Court, referencing the *Liikenne* case (C-172/99) on bus transportation in Helsinki, stressed the airline catering business' dependence on designated vehicles, which were not transferred. The court also referred to the *Abler* case (C-340/01), where premises and equipment were taken over, but no employees. Applying these decisions to the facts at hand, the Supreme Court found the fact that premises and equipment were not taken over as persuasive. (This was because the premises needed to be close to the airline to enable the contractor to perform the contract.)

The overall conclusion, based on the ECJ's case law, was that no transfer of undertaking had taken place between LSG and Gate Gourmet. The Supreme Court did not find the fact that some former LSG employees had been offered employment by Gate Gourmet persuasive, as neither premises nor equipment had been transferred. One might therefore ask whether the Supreme Court remained loyal to its own starting point, namely that the business was both dependent on tangible assets and labour intensive.

Interestingly, the (unanimous) Supreme Court, in an *obiter dictum*, added that in situations such as this, the new service provider can make choices which affect the assessment of whether a transfer of undertaking has taken place. To make the point even clearer, the Supreme Court explicitly stated that whether Gate Gourmet had sought to evade the rules on transfer of undertaking by avoiding the transfer of more LSG employees, was not important to the decision.

As for the discrimination claim, the law prohibiting employers from distinguishing between members and non-members of a union does not apply to different treatment in relation to pay and working conditions provided for in collective bargaining agreements. However, as the agreement in this case governed recruitment and not pay or working conditions, it fell beyond the scope of a collective bargaining agreement under domestic law. Thus, the Supreme Court found that the prohibition applied and that the candidates had been discriminated against "*because of non-membership of a certain trade union*". The Supreme Court further found that the discriminatory action could not be justified and declined to apply a restrictive interpretation based on the background of the agreement.

Commentary

In this case, the Supreme Court, following up on recent case law on the transfer of undertakings, discussed the interplay between (i) the precondition that the subject matter transferred constitutes an economic entity, and (ii) the requirement for its identity to be

retained. It is said that the first step in analysing whether there is a transfer of undertaking is to identify the subject matter of the transfer. Only if the business being "transferred" constitutes a stable and operational entity, may one proceed to an assessment of the *Spijkers* criteria. The Gulating Appellate Court followed this line of reasoning in an earlier case, concluding that no transfer of undertaking had taken place, because there was no economic entity. In that case the plaintiffs alleged that a team of oil workers represented an economic entity, but they did not succeed. Decisive for rejecting the plaintiffs' claim was the fact that the functions carried out by the work team were not sufficiently separate from the company's other operations. The employees were not precluded from carrying out other additional activities under their employment agreements.

Instead of following the judgment of the Gulating Appellate Court, the Supreme Court in the Gate Gourmet case merely stated that the same factors would be relevant when assessing whether an economic entity had been transferred and its identity was retained.

A more robust stance from the Supreme Court in Gate Gourmet, particularly on the question of what constitutes an economic entity would have been welcomed. Rather than linking the conclusion to an overall assessment of the applicable facts, the Supreme Court could have seized the opportunity to clarify this. As it refrained from providing a clear statement on the connection between the conditions for the existence of an economic entity and the retention of identity, the debate on this topic will no doubt continue.

However, the Court's unanimous *obiter dictum* that whether the acquirer has sought, or made arrangements, to evade the rules on transfer of undertakings has no effect on the assessment will certainly be of interest to advisers involved in mergers and acquisitions.

In terms of the successful discrimination claim, the Supreme Court found that asking candidates which trade union they were affiliated with amounted to direct discrimination to which no exceptions apply. Nevertheless, despite the Supreme Court's robust stance on discrimination, the redress awarded to affected employees amounted to no more than approximately € 400 each.

Subject: Transfer of undertaking

Parties: Gate Gourmet Norway AS - v - Nguyen Thi Ha and others

Court: Norges Høyesterett (Supreme Court)

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Date: 22 December 2011

Case number: HR 2011-2393-A

Hardcopy publication: Rettens Gang 2011 p. 1755

Internet publication: http:// websir.lovdata.no (subscription needed)

Creator: Hojesteret (Supreme Court)
Verdict at: 2011-12-22
Case number: HR 2011-2393-A