

## SUMMARY

# 2011/37 Cypriot court applies Acquired Rights Directive (CY)

***&lt;p&gt;One company closed down a restaurant in November and another company reopened the restaurant in April, using the same name and the same equipment, offering identical services and being owned partly by the same owner. The court found this to constitute the transfer of an undertaking.&lt;/p&gt;***

### Summary

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### Facts

Kyriakoulla Polycarpou (the plaintiff) was employed in a restaurant called 'Marcos Tavern'. The restaurant was owned by a company named Frigg Restaurant Ltd. This company was owned by three shareholders. Let us call them A, B and Z. The company rented premises from Z and his sister, who jointly owned the building in which the restaurant was established. The three shareholders had numerous disagreements. On 20 June 2007 they settled their differences. The settlement provided that A and B would continue to run the restaurant for their own account until 30 November 2007 and that on 1 December 2007 they would transfer their shares to Z (who would thereby become the sole owner of Frigg Restaurant Ltd), that the rental agreement between Frigg Restaurant Ltd and Z and his sister would terminate on that date and that Z and his sister would take over the inventory of the restaurant (furniture, kitchen equipment, etc.), the stock and a valuable cheque.

Accordingly, A and B ran the restaurant for five more months (20 June - 30 November 2007).

During this period a representative of Z visited the restaurant on a daily basis to inspect the premises, the equipment and the way the restaurant was being run.

On 27 September 2007 Frigg Restaurant Ltd dismissed all of its employees, including the plaintiff, observing a notice period of two months. Therefore, as of 1 December 2007, the plaintiff was out of a job (as were the other employees). She applied to the Redundancy Fund, which is the organisation responsible in Cyprus for awarding unemployment benefits in the event of redundancy.

As per the said agreement, Z became the sole shareholder of Frigg Restaurant Ltd on 1 December 2007. He and his sister tried hard to find a new tenant, but they did not succeed. The restaurant was closed during this period and Frigg Restaurant Ltd ceased doing business.

In late December 2007, a company called Sonoro Trading Ltd, the shares of which were owned by Z and a relative, decided to reopen Marcos Tavern on 1 February 2008. Sonoro Trading took over the restaurant's equipment, stock, etc. and hired all of Frigg Restaurant Ltd's former employees except the plaintiff. The reason Sonoro Trading did not hire the plaintiff was that she had found new employment in a new restaurant nearby, which was partly owned by one of Frigg Restaurant Ltd's former shareholders, with whom Z had negative relations. Marcus Tavern provided the same services as it had done until 30 November 2007.

Meanwhile, the Redundancy Fund had turned down the plaintiff's application for unemployment benefits, the reason being that the events described above did not qualify as redundancy but as a transfer of undertaking and that therefore the case was effectively one of unfair dismissal. The plaintiff brought legal proceedings against both Frigg Restaurant Ltd and the Redundancy Fund. She sought compensation for unfair dismissal against Frigg Restaurant Ltd or, alternatively, unemployment benefits from the Redundancy Fund for the period between 1 December 2007 and 1 April 2008 (from which date the said other restaurant hired her).

### **Judgment**

The court found that the plaintiff's dismissal had been unlawful and unfair and awarded her just over € 9,000. It dismissed the claim against the Redundancy Fund. The court reasoned as follows.

As of 1 December 2007, Z was the owner of a company that owned a fully equipped and stocked restaurant. Z could have continued to operate the restaurant. Instead, he decided to

dismiss the staff and to keep the restaurant closed. However, it is clear from the facts that his intention all along was to reopen the restaurant when the tourist season began in April.

When Sonoro Trading Ltd opened the restaurant in April 2008, it did so in the same building, using the same equipment, under the old name, Marcos Tavern, and provided identical services.

Given that all the restaurants in the area closed down for the winter season (December-March) Z had not suffered any significant loss by keeping the restaurant closed during this period.

Based on these three sets of facts, the court found that Marcos Tavern had retained its identity despite the brief cessation of business and that therefore there had been a transfer of undertaking within the meaning of the Cypriot law transposing Directive 2001/23, Law 104(1)/2000. The court rejected the argument that the plaintiff had been dismissed for economic, technical or organisational (ETO) reasons.

### **Commentary**

This judgment may not seem spectacular to lawyers in other European jurisdictions but it is revolutionary by Cypriot standards, even though there had previously been a handful of cases where Law 104(1)/2000 had been applied. The importance of this judgment is that the court proceeded with a systematic analysis of EU law in relation to Cypriot law. I concur with this judgment, which I expect to have a profound effect on Cypriot business.

### **Comments from other jurisdictions**

*Germany (Paul Schreiner):* In Germany this case would have been treated quite differently.

On 27 September all employment relationships were terminated. In Germany this would require an operational reason (assuming that the restaurant had more than ten employees). The reason can, in principle, result from a decision to close the shop. Yet it seems that the decision to do so had not been taken by 27 September, because Frigg Restaurant Ltd was apparently searching for a new tenant to run the restaurant. A termination for operational reasons, however, requires that the shop will not be run by someone else in the future, but will actually be closed. Therefore, in the situation at hand, termination would have been considered invalid and void, given that it was not based on a definitive decision to close the shop.

Later on the shop was taken over by Sonoro Trading Ltd and at that point a transfer of undertaking did occur. Since the prior termination of employment had been invalid and void, all of the former employees would have become employees of Sonoro Trading Ltd.

**Subject:** Transfer

**Parties:** Kyriakoulla Polycarpou - v - Frigg Restaurant Ltd and Redundancy Fund

**Court:** ||| ||| ||| ||| ||| - ||| (Employment Tribunal of Larnaka)

**Date:** 30 November 2009

**Case Number:** 1/2008

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**Creator:** Employment Tribunal of Larnaka

**Verdict at:** 2009-11-30

**Case number:** 1/2008