SUMMARY

2011/27 Pregnancy protection despite collective redundancy (HU)

<p>A civil servant in a public hospital was informed that she was to be dismissed in the context of a collective redundancy. As she was pregnant at the time, she had dismissal protection and could not be dismissed. Subsequently, the hospital’s activities were privatised. Even though the Hungarian transfer of undertaking legislation does not apply fully to civil servants, the entity that took over the hospital had to offer her employment.</p>

Summary

A civil servant in a public hospital was informed that she was to be dismissed in the context of a collective redundancy. As she was pregnant at the time, she had dismissal protection and could not be dismissed. Subsequently, the hospital's activities were privatised. Even though the Hungarian transfer of undertaking legislation does not apply fully to civil servants, the entity that took over the hospital had to offer her employment.

Facts

A doctor was employed as a civil servant by a public hospital, owned and operated by a county. On 1 February 2007 the hospital's relevant staff were informed that there would be a collective redundancy as a result of which approximately 10% of the staff, including the plaintiff, would be dismissed. At the time of this "pre-notification"[1], the plaintiff was pregnant. This fact is relevant because under Hungarian law, if an employee has the benefit of dismissal protection at the time of a pre-notification, for example because she is pregnant, the employee cannot be dismissed until after the protection period has expired. Accordingly, the plaintiff could not be dismissed at the time her redundant colleagues lost their jobs.

Meanwhile, the county had established a limited liability company, of which it was the sole

owner. On 1 December 2007 this company ("Newco") took over the hospital's activities as well as those members of its staff who were still employed on 30 November 2007.

Had the hospital been a private institution prior to 1 December 2007, the transfer of activities and staff would have qualified as a transfer of undertaking as provided in the Hungarian Labour Code's provisions transposing Directive 2001/23. However, the Labour Code does not apply fully in the public sector. Instead, the Civil Servants Act provides that when a public service is "outsourced" to a private entity (privatisation), that entity must offer employment, on equivalent terms, to all the civil servants employed at the time of the transfer. Those civil servants who accept the offer lose their status of civil servant and become ordinary employees of the private entity. Those who reject the offer are, as a rule, terminated. In other words, there is no automatic transfer of employment.

The approximately 200 civil servants who had become redundant were no longer employed in the hospital on 30 November 2007, the day before the transfer to Newco. Therefore, Newco was not under an obligation to offer them employment. The plaintiff was not one of them, as she was still employed on that date. She therefore argued that Newco should have offered her employment.

Judgment

The court of first instance and, on appeal, the Court of Appeal found in favour of the plaintiff. They held that her status as a civil servant could not have been terminated validly until after her dismissal protection period had ended, which was after the date of the transfer. Therefore, at the time the hospital transferred from the county to Newco, the plaintiff was in the same position as the other (non-redundant) civil servants. It follows that Newco should have offered her employment.

Newco was granted leave to appeal to the Supreme Court. It argued that, in the event of a transfer of a business, the dismissal protection granted by Directive 2001/23 does not extend to dismissals for economic, technical or organisational (ETO) reasons entailing changes in the workforce. The collective redundancy carried out before the hospital was transferred was done for an ETO reason. Thus, there was no possibility to employ the plaintiff in the hospital and Newco was not obliged to continue employing her.

The Supreme Court agreed with Newco that the plaintiff's position was, without doubt, affected by the collective redundancy. However, the fact remained that she had continued to be a civil servant until the transfer took place, and so her status was similar to that of her non-redundant colleagues. Therefore, Newco should have offered her a job. Accordingly, the Supreme Court affirmed the lower courts' judgments.

Commentary

Under Hungarian law, whilst the Labour Code governs the key issues of transfer of a business, the Civil Servants Act regulates the scenario where a public sector activity is transferred to a private company. Whereas in the former case the transfer of rights and obligations of an employment relationship takes place automatically, under the Civil Servants Act the private company must make an offer to the civil servants to conclude an employment relationship on the same terms. The difference is that the latter scenario is not automatic. Had the privatisation qualified as a transfer of undertaking, the plaintiff would also have transferred into the employment of Newco on her existing terms.

This case raises interesting questions. For example, when are we dealing with an employer's legal succession? In this case, there is no doubt that Newco was the county's successor as owner and operator of the hospital. In other cases, however, it is not always clear whether the transfer of resources constitutes a transfer of undertaking or a legal succession as provided in the Labour Code. Another question is: which employees are affected? For example, where an activity is transferred and there are employees who work partly on that activity and partly on other activities that are not transferred, it is not always clear which employees go across to the transferee and which remain with the transferor. There is no "black or white" answer to such questions, so the circumstances always need to be considered on a case-by-case basis.

Comments from other jurisdictions

Germany (Eva RŸtz): The privatisation of a public enterprise is considered to constitute a transfer of undertaking, if the requirements of section 613a of the German Civil Code (BGB) are met. This is usually the case, but may not be in cases of privatisation by law. If a transfer of business has occurred, the relevant employment relationships are transferred automatically to the new employer in the form in which they existed at the time of the transfer. If notice of termination was served before the date of the transfer but the notice period had not expired at that time, the employment relationship is transferred with the notice remaining effective.

If an employment relationship cannot be terminated because special protection provisions against dismissals apply (e.g. maternity protection) the employment is transferred and the dismissal protection remains effective. However, the new employer will be entitled to terminate the employment once the special protection against the dismissal has expired. According to section 613a (4) (first sentence) BGB, only a dismissal relating to the transfer of the business is invalid. Dismissals based on other reasons (e.g. on conduct or for operational reasons) are always legitimate (cf. section 613a (4) (second sentence) BGB).

Please note that section 613a (1) BGB does not apply to civil service agreements

("Beamtenverhältnisse"). Thus, civil service agreements are not transferred to the new owner of the business in the case of a transfer of the business (e.g. the privatisation of a public enterprise). Given that the new owner of the business has no obligation to offer employment to the civil servants, the civil service relationship remains between the civil servant and his or her public employer. The public employer is entitled to assign a new task to the civil servant, consistent with his or her public function (cf. Article 20 Beamtenstatusgesetz).

Footnote

1 Hungarian law provides, in accordance with Article 4(1) of Directive 98/59, that employees cannot be collectively dismissed until 30 days following notice of intent to dismiss.

Subject: transfer of employee rights

Parties: not known

Court: Supreme Court (Legfelsőbb Bír"ság)

Date: 2010 (date not known)

Case number: EBH2010.2165

Hardcopy publication: BH 2010/1

Internet publication: not available

Creator: Kuria (Hungarian Supreme Court)
Verdict at:
Case number: EBH2010.2165