SUMMARY

ECJ 6 September 2011, case C-108/10 (Ivana Scattolon - v - Ministerio dell’ Instruzione, dell’ Università et della Ricerca), Employees who transfer/refuse to transfer, collective agreements

<p>The takeover by a public authority of a Member State of staff employed by another public authority and entrusted with the supply to schools of auxiliary services including, in particular, tasks of maintenance and administrative assistance constitutes a transfer of an undertaking falling within Council Directive 77/187/EEC [...], where the staff consist in a structured group of employees who are protected as workers by virtue of the domestic law of that Member State.</p>

Facts

Ms Scattolon was a cleaner in a state-run school in the Italian town Scorzè. Her employment started in 1980. Until 31 December 1999 she was employed by the Scorzè town council, not as a civil servant but as an ordinary employee. Her terms of employment were based on the collective agreement for employees of town councils and other local authorities (the 'Collective Agreement for Local Government'). This collective agreement made salary dependent on (i) the employee's position and (ii) certain supplements. Salary was not influenced by seniority, i.e. employees did not earn more by being employed for a longer period of time.

In Italy, state schools are operated and financed by central government. However, until 2000, certain support services, such as cleaning, maintenance and concierge supervision ('ATA services') were not always performed by employees in the service of central government. In some schools, the 'ATA staff' were employed by central government, but in other schools, such as the one Ms Scattolon worked in, central government had outsourced these services to the local or provincial council. The terms of employment of the ATA staff in the employment of central government were governed by a collective agreement for schools (the 'Collective Agreement for Schools'). Their salary was largely dependent on seniority. In other words, until 2000 there were two groups of ATA staff in Italian State schools: one group whose terms of employment were governed by the Collective Agreement for Local Government and whose salaries were not determined by reference to seniority and another group whose terms of employment were governed by the Collective Agreement for Schools and whose salaries were determined by reference to their seniority.

In 1999 Parliament passed a law ('Law 123/99') pursuant to which all ATA staff employed by local government transferred into the employment of central government with effect from 1 January 2000. Secondary legislation specified the details of this transfer, one of which was that henceforth the ATA staff who were transferred pursuant to Law 123/99 were governed by the Collective Agreement for Schools. How to calculate their salary under that collective agreement? This was done, not by reference to their actual seniority (which would in Ms Scattolon's case have been 20 years, yielding a higher salary than she previously earned), but by placing them on the salary level that corresponded most closely to their former salary. This led to a great deal of litigation. In 2005, in a dispute not involving Ms Scattolon, the Supreme Court interpreted Law 124/99 in favour of the plaintiffs in that case, which meant that they had to be paid the same salary as their equally senior colleagues who had always been employees of central government. Simply put: they got a salary increase. This was apparently not what Parliament had intended. In December 2005 it passed an Act, Article 1(218) of which provided that Law 123/99 was to be interpreted as meaning that the ATA staff who had come across from local government were not entitled to more salary than they earned on 31 December 1999. The Constitutional Court initially found this to be illegal retro-active legislation, but in 2009 it reversed this finding and declared Article 1(218) to be constitutional.

National proceedings

In 2005, following the said Supreme Court judgment, Ms Scattolon applied to the local court in Venice demanding to be paid according to the Collective Agreement for Schools on the basis of her full seniority of 20 years, i.e. her seniority accrued in the service of both local and central government. The court referred four questions to the ECJ. Question 1 essentially asked whether the transfer of staff from local government to central government qualifies as a

transfer of undertaking within the meaning of Directive 77/187 (currently Directive 2001/23) (the 'Directive'). Questions 2 and 3 essentially asked whether employees who transfer within the meaning of that Directive retain their seniority. Question 4 essentially asked whether Article 1(218) is compatible with the European Convention on Human Rights and the EU's Charter of Fundamental Rights.

ECJ's findings

Question 1

1. The term 'undertaking' covers any grouping of persons and assets enabling the exercise of an economic activity pursuing a specific objective which is sufficiently structured and independent. Whether or not the ATA staff constitute an undertaking therefore depends on (i) whether the ATA activities (cleaning, maintenance, etc.) are of an economic nature, (ii) if so, whether this is despite the absence of physical assets, (iii) whether the ATA workers are organised sufficiently independently and (iv) whether the fact that those workers form part of the public administration has any influence (§ 42 and § 48).

2. The ATA services were in some cases subcontracted to private operators. Those services do not fall within the exercise of public powers. Therefore, the ATA services are of an economic nature (§ 43-47).

3. The fact that an economic activity is essentially based on manpower does not prevent a structured group of workers from corresponding to an economic entity for the purposes of the Directive. The ATA workers are such an entity (§ 49-50).

4. In the context of the Directive 'the concept of independence refers to the powers, granted to those in charge of the group of workers concerned, to organise, relatively freely and independently, the work within that group and, more particularly, to give instructions and allocate tasks to subordinates within that group'. The ATA staff satisfy this requirement (§ 51-52).

5. The transfer of administrative functions between public administrative authorities is excluded from the scope of the Directive. However, this exception is limited to cases where the transfer concerns activities within the exercise of public powers. ATA activities are not such activities (§ 53-59).

6. It follows from the above that the ATA staff constitute an 'undertaking'. The fact that their

activities were transferred by a unilateral decision (Law 123/99) does not render the Directive inapplicable. The undertaking was 'transferred' within the meaning of the Directive (§ 60-65).

Questions 2 and 3

7. In Collino and Chiappero (C-343/98) the ECJ held that, whilst the transferred employees' length of service with their former employer does not as such constitute a right which they may assert against the new employer, the fact remains that, in certain cases, it is used to determine certain financial rights of employees, and those rights must, in principle, be maintained by the transferee in the same way as by the transferor. However, the obligation to take into account the transferred employees' entire length of service exists only insofar as it derives from the employment relationship between those employees and the transferor (§ 69-70).

8. In the present case, unlike Collino, account must be taken not only of Article 3(1) of the Directive (transfer of individual rights and obligations) but also of Article 3(2), which provides that the transferee must continue to observe the terms and conditions agreed in any collective agreement on the same terms as those applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement. The second subparagraph of Article 3(2) provides that Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year. This second paragraph does not prevent the terms of employment from ceasing to apply on the date of the transfer if that is the date on which the transferor's collective agreement terminates or another collective agreement enters into force. Therefore, insofar as national law allows, it is lawful for the transferor to apply the new collective agreement from the date of the transfer, provided that this does not place the transferred workers in a less favourable position solely as a result of the transfer (§ 71-75).

9. The Directive cannot be invoked to obtain improved terms of employment. Moreover, the Directive does not outlaw differences in treatment between the transferred workers and the transferee's existing workforce (§ 77).

10. Given the above, the State had the right to classify the length of service completed by ATA staff with local contracts as equivalent to that completed by ATA staff with former state contracts of the same profile (§ 78-81).

Question 4

11. There is no need to answer this question (§ 84).

Ruling

The takeover by a public authority of a Member State of staff employed by another public authority and entrusted with the supply to schools of auxiliary services including, in particular, tasks of maintenance and administrative assistance constitutes a transfer of an undertaking falling within Council Directive 77/187/EEC [...], where the staff consist in a structured group of employees who are protected as workers by virtue of the domestic law of that Member State.

Where a transfer within the meaning of Directive 77/187 leads to the immediate application of the collective agreement in force with the transferee to the transferred workers, and where the conditions for remuneration are particularly linked to length of service, Article 3 of that Directive serves to prevent the transferred workers from suffering a substantial loss of salary compared to their situation immediately before the transfer, on the basis that their length of service with the transferor (which is equivalent to workers in the service of the transferee), is not taken into account when determining their starting salary with the transferee. It is for the national court to examine whether, at the time of the transfer at issue in the main proceedings, there was such a loss of salary.

Creator: European Court of Justice (ECJ)
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