

SUMMARY

**ECJ 20 January 2011, case C-463/09
(CLECE SA – v –
María Socorro Martín
Valor and Ayuntamiento de Cobisa),
Transfer**

Facts

“CLECE” is a cleaning company that had contracted with the municipality of Cobisa to clean certain municipal buildings. It did not make use of special equipment to carry out the contract. The municipality decided to perform the cleaning services itself (by contracting in) and terminated its contract with CLECE’s cleaners, instead hiring temporary agency workers to perform the cleaning work. CLECE informed its cleaners that they had transferred into the employment of the municipality as of 1 January 2008. The municipality, however, took the opposite view. One of the cleaners, Ms Valor, took legal action against both CLECE and the municipality, claiming that she had been wrongfully dismissed. She based her claim on the collective agreement for the cleaning industry, which contained a provision setting out the consequences of contracting in.

National Proceedings

The court of first instance found that the collective agreement was not binding on the municipality, against which a claim could therefore not be made. It held that Ms Valor had been unlawfully dismissed by CLECE, which was ordered (i) to pay her salary from 1 January 2008 and (ii) to either reinstate her or pay her approximately € 6,500 in compensation. CLECE appealed. The Court of Appeal agreed with the court of first instance that Ms Valor’s claim could not be based on the collective agreement. However, the court considered that the contracting in could perhaps constitute a transfer of undertaking pursuant to (the Spanish law

transposing) the Acquired Rights Directive 2001/23. It asked the ECJ for clarification.

ECJ's findings

1. The fact that the party to whom an activity is transferred is a public law body does not prevent the Directive from applying (§ 25-27).
2. The Directive's scope is to be determined having regard to its objective, which is to safeguard employees in the event that their undertaking is transferred (§ 29).
3. The Directive is capable of applying to a contracting-in situation, provided the economic entity retains its identity (§ 30-33).
4. In order to determine whether such an entity retains its identity one must apply the Spijkers criteria, namely: the type of business; the tangible assets; the value of intangible assets; whether the new employer takes over the majority of the employees; whether customers are transferred; the degree of similarity between the activities pre- and post-transfer; and the period, if any, during which those activities were suspended. Each of these circumstances are merely single factors in the overall assessment, so that they cannot be considered in isolation (§ 34).
5. Inasmuch as, in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, such an entity is capable of maintaining its identity after it has been transferred, where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by its predecessor to that task (§ 35-36).
6. It is not necessary for the transferor and the transferee to have negotiated a contract, a unilateral decision by the former employer being sufficient to trigger a transfer of undertaking (§ 37-38).
7. A group of employees who are permanently assigned to the common task of cleaning may amount to an economic entity (§ 39).
8. Given that the municipality of Cobisa took over neither assets nor staff from CLECE, the only link between CLECE and the municipality is the activity, which is identical. This fact alone does not lead to the conclusion that an economic activity has retained its identity. The identity of an entity that is essentially based on manpower cannot be retained, if the majority

of its employees are not taken on by the alleged transferee (§ 40-41).

Ruling

The Directive does not apply in a situation such as in this case.

Creator: European Court of Justice (ECJ)

Verdict at: 2011-01-20

Case number: C-463/09