SUMMARY

2010/73: Czech Supreme Court accepts broad “transfer” definition (CZ)

<p>The Czech Supreme Court recently ended a long-standing controversy by ruling that any transfer of activities from one employer to another, even if it fails to qualify as a transfer of undertaking in the meaning of the Acquired Rights Directive, leads to a transfer of the relevant employees, along with all their rights and obligations, to the transferee.</p>

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Facts

The employee in this case was employed by FTV Prima ("Prima") as the editor of a magazine. Prima entered into an agreement under which it transferred the magazine's editorial rights as well as some of its employees, as listed in the agreement, to another company indirectly[1], namely Levity Investment ("Levity"). Accordingly, the employee was informed that she was now an employee of Levity, which offered her a new employment contract. The employee refused to sign this new contract, alleging that she had continued to be in Prima's employment. She demanded that Prima offer her work. Levity responded that if the employee did not perform her work for Levity, she would be sacked on the grounds of unlawful absence from work. The employee refused to work for Levity, which proceeded to fire her. The employee brought proceedings against Prima and Levity, claiming compensation.[2]

Both the court of first instance and, on appeal, the appellate court, agreed with the employee that she had not transferred into the employment of Levity. Prima was therefore ordered to pay her compensation. The courts rejected the employee's claim inasmuch as it was directed against Levity, reasoning that the agreement between Prima and (indirectly) Levity did not qualify as a "contract for the sale of a business" as provided in the Commercial Code.[3]

Prima appealed to the Supreme Court.

Judgment

The Supreme Court agreed with the Court of Appeal that the agreement between Prima and Levity did not qualify as a contract for the sale of a business. However, this fact did not prevent the agreement from qualifying as a "transfer of activities" under the provisions of the Labour Code that transposed the Acquired Rights Directive (currently Directive 2001/23/EC). Therefore, the Court of Appeal was in error in not examining whether there was such a transfer of activities. The Supreme Court remanded the case back to a court of first instance, which will now need to pursue the proceedings.

Commentary

Czech law has two separate and different sets of rules that can come into play whenever activities transfer from one company to another:

1 the Commercial Code has a set of rules that deal with a specific type of agreements relating to the sale or lease of an enterprise, whereby one company transfers a "business" to another company, in which case the relevant employees transfer along with the business;

2 the Labour Code has another set of rules, which were introduced by way of transposition of the ARD, according to which the transfer of "activities or duties" (a broad concept - see below) leads to the transfer of the relevant employees.

Prior to the judgment reported above, there were two schools of thought. One held that there

is a transfer of the second type only if it qualifies as a transfer of undertaking in the meaning of the ARD. Thus, if a transaction is neither a contract for the transfer of a business (type 1) nor a transfer of undertaking in the meaning of the ARD, the employees remain in the employment of the transferor. The Supreme Court has now rejected this view in favour of the other school of thought, which holds that any transfer of "activities or duties" leads to the relevant employees going across to the transferee.

As noted above, the concept of a transfer of activities or duties is a broad one. It seems to resemble the United Kingdom's doctrine of "service provision change". In any event, it is broader than the concept of a transfer of undertaking under the ARD. Suppose – by way of example – that a company terminates its contract with cleaning company A for the cleaning of its premises and simultaneously awards a similar contract to cleaning company B, which refuses to employ any of the cleaners who were involved in executing the contract with A. Given that cleaning is, as a rule, a labour-intensive activity and that none of the cleaners go across "voluntarily", there is no transfer of undertaking as provided in the ARD. However, under the Czech Labour Code, there is a transfer of "activities or duties", as a result of which the relevant employees go across to the transferee.[4]

Comments from other jurisdictions

Germany (Henning Seel): Section 613a of the German Civil Code, which is based on Directive 2001/23/EC, governs the rights and obligations in the event of the transfer of a business. Where a business or a part of a business is transferred, the new owner assumes the rights and obligations arising from the employment relationship in existence at the time of transfer. "Business" within the meaning of this provision is defined, according to the ECJ's case law, as an organised grouping of persons and assets for the purpose of carrying out an economic activity with objectives of its own. The determining factor is whether the acquirer has taken over the activities underlying the business.

The sale of a business and the resulting transfer of the employment relationships belonging to the business does not require that the former owner of the business transfers all of the assets of the business to the transferee. Formerly, the Federal Labour Court (the "*BAG*") had decided that the **mere** transfer of, for instance, security or cleaning activities does **not** constitute a transfer of a business within the meaning of said section 613a (see the BAG's judgments dated 29 September 1988, 18 October, 1990 and 9 February 1994). This case law became moot in 1994, when the ECJ ruled, in the *Schmidt* case, that the activities of one single employee (in

that case, a cleaning lady) can constitute a (part of a) business. Hence, if an employee's activity is transferred to a third party, there is a transfer of a business, with the result that his employment relationship will automatically be continued with the third party. Please note that a succession in the mere function ("*Funktionsnachfolge*") still does not constitute a transfer of business according to section 613a (see the BAG's judgment of 16 May 2007).

United Kingdom (Bethan Carney): This concept of a transfer of activities or duties seems quite similar to the concept of "service provision change" under the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006, although possibly even broader. A service provision change occurs when activities cease to be carried out by one person and are instead carried out by someone else. For a service provision change to amount to a transfer of an undertaking under UK law, there must have been an organised grouping of employees immediately before the transfer whose principal purpose was carrying out the activities on behalf of the client.

So, for example, if cleaning company A had assigned five employees to clean the premises of a client and that client terminated the contract with A and awarded it to B, those five employees would transfer to B. However, if A had a pool of 100 employees who were randomly chosen to clean the premises of many different clients and A had not assigned a specific group of employees to clean that client's particular premises, there would not be a transfer of an undertaking when the client terminated the contract with A and awarded it to B.

Footnotes

1 Prima had contracted with a company which in turn contracted with Levity. The legal issue in the case reported here would have been identical had the agreement been directly between Prima and Levity.

2 Czech law provides that an employee who is prevented by his employer from performing his contractual duties, is not entitled to continued payment of salary but, instead, to compensation in lieu of salary, based on his average earnings. Usually the compensation exceeds his salary.

3 The Commercial Code provides that, in the event of a contract for the sale of a business, the employees associated with the business that has been transferred become employees of the transferee, with unchanged terms of employment.

4 In the present case the fact that Czech law has a broader "transfer" concept than the ARD was not decisive, given that the transfer of editorial rights as well as of a number of employees would most likely have qualified as a transfer of undertaking under the ARD in any event.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Transfer

Parties: L.H. (employee) – v – FTV Prima, spol. s.r.o. and Levity Investment a.s.

Court: Nejvyšší soud České republiky (Supreme Court)

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