

SUMMARY

2010/56: Claim for invalid dismissal crosses over to transferee (CZ)

<p>The rights and obligations of an employee who was dismissed invalidly prior to a transfer of undertaking cross over to the transferee. In this particular case, however, they remain with the transferor on account of a judicial error.</p>

Summary

The rights and obligations of an employee who was dismissed invalidly prior to a transfer of undertaking cross over to the transferee. In this particular case, however, they remain with the transferor on account of a judicial error.

Facts

This case consists of five judgments. The facts are simple: Employer A terminated the employment of an employee for cause, with immediate effect. It did so by means of a letter dated 16 November, which the employee received on 21 November. Meanwhile, Employer A sold its business to Employer B with effect from 18 November. On 20 December, the employee sued Employer A.

Judgments

Lower Court I: Employer A argued that, as there had been a transfer of undertaking, the employee sued the wrong employer. In response, the employee got Employer B involved in the proceedings. From then on, there were two defendants, Employer A and Employer B. The court found (i) that the termination was invalid and (ii) that the agreement to sell the business had been antedated and was therefore invalid. As a consequence, the employee had remained in the employment of Employer A.

Court of Appeal I: The Court of Appeal affirmed the Lower Court's judgment, though for

different reasons. It agreed that the termination for cause was invalid, but in contrast to the Lower Court, it found that there had been a transfer of undertaking on 18 November. However, as this transfer occurred two days after the termination but over a month before the court proceedings were initiated, Employer A's rights and obligations *vis-a-vis* the employee had not transferred to Employer B. In other words, there had been a transfer of undertaking but the employee's rights did not follow the business. Thus, the employee had a claim against Employer A.

Lower Court II: it now having been established that the dismissal was invalid and that therefore the employee's employment continued, the employee initiated a second action against Employer A, seeking compensation for invalid dismissal for the period from 21 November. The Lower Court denied the claim, arguing that, as there had been a transfer of undertaking (see Court of Appeal I), the employee had no claim against Employer A (i.e. he should have sued Employer B). In other words, the Lower Court agreed with the Court of Appeal's assessment that there had been a transfer of undertaking, but disagreed with its view that despite this transfer the employee's rights had not transferred.

Court of Appeal II: the Court of Appeal overturned the Lower Court's judgment, basically repeating what it had said before. This time, it awarded the employee's claim for compensation and ordered Employer A to pay him compensation for invalid dismissal for the period from 21 November.

Supreme Court: Employer A appealed to the Supreme Court ("extraordinary" appeal), arguing that where there is a transfer of undertaking, all rights and obligations transfer from the transferor (Employer A) to the transferee (Employer B), including salary claims based on invalid pre-transfer dismissal. The Supreme Court accepted this argument. Even when it is unclear at the time of the transfer whether or not an employment contract has been validly terminated, the (disputed) claim for salary (as it were, a potential claim) goes across to the transferee. Therefore, the employee should have sued Employer B rather than Employer A and the Court of Appeal was mistaken in holding that despite the transfer of undertaking, the employee's rights and obligations, including his claim, had not transferred to Employer B. However, given that there had been a final and conclusive judgment declaring the invalidity of the termination against Employer A, the doctrine of *res iudicata* stands in the way of a court order against Employer B. Accordingly, the Supreme Court upheld the Court of Appeal's judgment even though it was based on incorrect reasoning.

Commentary

Even though the Supreme Court did not have to consider the transfer of undertaking since it

had to respect the doctrine of *res iudicata*, the Supreme Court gave in its reasons an explanation of what rights must be transferred within the transfer of undertaking, and in which cases. It stated that all rights and obligations between the transferor and the employee pass to the transferee, including a claim for compensation resulting from an invalid dismissal.

In the end, the employee was awarded his claim (albeit against the wrong party) after five court proceedings.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): it is undisputed in The Netherlands that a transfer of undertaking causes more or less all rights and obligations to cross over to the transferee. This includes pending court cases, claims that have not yet been brought to court, for example a claim for unfair dismissal, and even potential future liability, for example in connection with asbestos. In the same way, a claim by the employer against the employee, for example on account of overpayment, theft or illegal competition, also crosses over to the transferee. An employee who was given notice before the transfer with effect from a later date transfers into the employment of the transferee in 'noticed' status.

United Kingdom (Richard Lister): The principle of 'automatic transfer' under the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006 (known as 'TUPE') applies to employees who were employed 'immediately before the transfer'; and employees who would have been so employed if they had not been dismissed because of the transfer or a reason connected with the transfer, which is not an 'economic, technical or organisational reason entailing changes in the workforce'.

The above position is set out in regulation 4(3) of TUPE, which codified the ruling of the House of Lords in *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 54. The upshot is that employees who are unfairly dismissed by the transferor before the transfer are treated as if they were employed up to the point of transfer. Accordingly, the liability for their dismissals will automatically pass over to the transferee. However, this does not apply to pre-transfer dismissals that are entirely unconnected to the transfer, or connected to the transfer but for an 'economic, technical or organisational' reason. In that scenario, the employees are not be deemed to be employed immediately before the transfer and liability for their dismissals remains with the transferor.

Subject: Transfer of undertaking, employment terms, transfer

Parties: B.B. (employee) D v D J.K. (transferor) and P.N. (transferee)

Court: Nejvyší soud ČeskŽ republiky (Supreme Court of the Czech Republic)

Date: 24 February 2010

Case number: 21 Cdo 4780/2008

Hardcopy publication: not available

Internet publication: <http://www.nsoud.cz>

Creator: Nejvyšší soud (Czech Supreme Court)

Verdict at: 2010-02-24

Case number: 21 Cdo 4780/2008