

SUMMARY

2010/41: Transfer of undertaking despite termination by the transferor followed by a new contract with the transferee (CZ)

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Facts

This case concerns an employee, the plaintiff, who was employed by an employer ("Company 1") as a "payroll accountant". On 11 May 2005 Company 1 agreed with another company ("Company 2") to outsource its payroll activities to Company 2. The agreement included a provision to the effect that all employees entrusted with payroll activities would transfer from Company 1 to Company 2 as of 1 August 2005, with retention of all their existing terms of employment and that, in order to achieve this, (i) Company 1 would terminate the employment of these employees and (ii) Company 2 would offer them new contracts.

Accordingly, on 29 July 2005 Company 2 and the plaintiff entered into an employment agreement commencing on 1 August 2005. The plaintiff was offered the same position as she previously had and the same terms of employment, and there was no detrimental change of

working conditions. Two days later on 31 July 2005, Company 1 and the plaintiff signed a termination agreement effective that same day. The agreement was silent on the reason for the termination.

The plaintiff filed a suit against Company 1, claiming severance compensation on the basis of the statutory rule that entitles an employee who has been dismissed for an "organisational" reason to compensation in the amount of at least two average monthly earnings (three under the current Labour Code).

The court of first instance awarded the claim and the appellate court confirmed the judgement. Company 1 appealed to the Supreme Court.

Judgment

The Supreme Court cancelled the previous two decisions of the courts of lower instance, finding that the decisions had been based on an incorrect legal assessment of the case. The case will be heard in new proceedings in a court of lower instance. The Supreme Court reasoned in its judgement as follows (the court of lower instance will be bound to this Supreme Court decision during the new procedure):

- Severance pay is a one-off financial contribution aimed at helping the employee overcome the often complicated social situation of loss of employment not caused by the employee. By providing severance pay in the amount of three average months' salary the Labour Code intends that the employee should receive such remuneration as he or she would have earned had his or her employment continued for another three months. Severance pay is designed to compensate for any adverse consequences of organisational changes and provide the employee with appropriate security in the form of a one-off financial contribution to mitigate these effects.

- If organisational changes result from the transfer of rights and obligations to another employer, the employee continues to be financially secure because he or she is not losing his or her employment. From the viewpoint of the employee, the only change is in the person of the employer. The change occurs at the moment of the employment transfer: it is not a termination of employment. Since the employment relationship persists, the complicated social situation of loss of employment does not occur, and there is no reason to provide severance pay.

- A transfer of the rights and obligations from an employment relationship can only occur in the cases specified in the Labour Code or other regulations. It is not possible for a transfer to

occur merely on the basis of a contract between the employer and another employer, if the contract is not considered to be a transfer pursuant to the Labour Code or other regulations. A transfer occurs by operation of law, without the need for consent by the employee and without the need to terminate the employment relationship with the transferor or to conclude a new employment agreement with the transferee. However, if legal acts, which basically imply the consent of the employee with the new situation, are performed (e.g. if the employee signs an agreement with the transferor), this will not entitle the employee to severance pay, as severance pay is only payable when organisational changes are made and not in the case of employment transfers.

- The agreement between Companies 1 and 2 was a "legal fact" that caused a transfer of rights and obligations from Company 1 to Company 2, irrespective of any agreement on employment termination concluded between employees and Company 1. Although the agreement between Company 1 and Company 2 explicitly states that the employment relationship of the affected employees with the transferor will be terminated and new employment contracts concluded with the transferee - and this course of action was followed - it does not affect the employment transfer which would have occurred in any event by operation of law.

- An employee whose rights and obligations from his or her employment relationship are transferred to another employer is not entitled to severance pay, even if he or she terminates the employment agreement with the current employer and enters into an employment relationship with the transferee.

Commentary

None of the three parties in this case (Company 1, Company 2 and the employee), nor the lower instance courts understood the concept of a transfer of undertaking under the EU Directives and Czech law, leading to an automatic transfer of the employee's rights and obligations from the transferor to the transferee.

The Czech regulations on employment transfers were substantially amended in 2001 by the implementation of the EU Directives. The current law is considered to be in compliance with EU law but is quite brief and will require more precise specification. There is still very scarce case law on employment transfers, so this decision is an important step forward. The practical application of the rules for an employment transfer in the Czech Republic is quite a complex issue. Employees are not usually sufficiently aware of their rights to claim breaches of the rules on employment transfers. The present situation in the Czech Republic merits more attention by the state authorities to promote higher awareness of the EU law principles on employment transfers.

Comments from other jurisdictions

Germany (Paul Schreiner): Under German law the transfer of an undertaking cannot be circumvented by means of termination of the old contract - with the transferor - and the conclusion of a new employment contract with the new employer - the transferee. According to § 613a of the BGB (the German Civil Code) a termination due to the transfer of an undertaking is invalid and void, and the affected employee would have to be reinstated. There have been several cases in which employees have been asked to sign termination agreements and, later on, new employment contracts with the transferee excluding rights accrued in the past, such as, a particular length of notice period, no probationary periods and privileged positions in terms of social selection. The BAG (the German Federal Court for Employment Law) has held that any such circumvention of rights provided to employees by the transferor is invalid and that any benefits accrued in the service of the transferor, including seniority, should remain intact. A right to severance pay in case of termination does not exist in Germany, therefore, the question at hand would not have arisen.

The Netherlands (Peter Vas Nunes): In the nineteen nineties there were several Dutch cases where the transferee entered into "new" employment contracts with employees who transferred by operation of law. The courts found that these new contracts were invalid and that the provisions therein that were unfavourable for the employee (fixed term and probationary period) could therefore not be applied («JAR» 1996/2, «JAR» 1996/198 and Pg 1999 p. 108). In at least one ECJ case (*Oy Liikenne*, C-172/99) there was a similar situation, where transferred employees were entitled to retain benefits they had had with the transferee despite having entered into "new" employment contracts.

United Kingdom (Hannah Vertigen): Under UK law, it used to be the case that any change to terms of employment of transferring employees for a reason connected with the transfer was void, even if the employees agreed to the change. Since 2006, the Transfer of Undertakings (Protection of Employment) Regulations - known as 'TUPE' - have been relaxed slightly in this regard. Contractual changes are permitted where the reason is unconnected with the transfer, or where it is connected but there is an economic, technical or organisational reason entailing changes in the workforce (for example, where changes are part of a wider reorganisation which has nothing to do with the transfer). Recent case law and government guidance also suggest that beneficial changes to terms and conditions that are agreed between the parties may be valid.

Footnote

¹ The identity of the parties is not disclosed in published Czech judgements.

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Parties: Information not available

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