EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2010/40: Supreme Court, shunning distinction between capital and labour intensive, applies “Spijkers criteria” comprehensively (NO)

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Summary

Rather than assessing an undertaking as capital-intensive or labour-intensive the Norwegian Supreme Court considers a comprehensive assessment of the "*Spijkers* criteria".[1] In the present case the Supreme Court found that there had been a transfer of an undertaking even if there was no contract between the former and new supplier and no equipment or other assets were transferred.

Facts

The case concerned a contract to provide ground services at Bardufoss airport in Northern Norway.

The principal user of Bardufoss airport is the Norwegian army. When SAS lost out to its competitor "Norwegian" in a competitive tender for the transportation of military personnel,

SAS terminated its route between Oslo and Bardufoss.

SAS had previously contracted with its subsidiary, Scandinavian Ground Services AS ("SGS") to take care of the ground services at Bardufoss airport. Norwegian held a competitive tender for ground services. SGS participated in the tender but lost the bid to a parent company of Bardufoss Flyservice AS ("BF").

Thus, the switch from one airline (SAS) to another (Norwegian) led to a switch from one ground services operator (SGS) to another (BF).

BF hired 12 new employees, ten of whom had been employed by SGS. The terms of employment offered by BF were less favourable than those appertaining to the employees at SGS prior to the transfer. Nine out of the ten former SGS employees now employed by BF initiated proceedings against BF claiming they were entitled to terms of employment similar to those they had had with SGS.

Chapter 16 of the Norwegian Working Environment Act[2] implements Directive 2001/23/EC. A transfer of undertaking is defined as the "transfer of an autonomous unit that retains its identity after the transferÓ. In accordance with the directive, three requirements must be met in order for a transfer to constitute a transfer of an undertaking: (i) the transfer must concern an "independent economic entity"; (ii) it must be the result of a "legal transfer or merger"; and (iii) the economic entity must retain its "identity". In the present case it was common ground that the SGS operation constituted an "independent economic entity". The case addressed the latter two requirements.

Judgment

The Supreme Court first addressed whether the transfer was a result of a "legal transfer or merger". Referring to the ECJ's ruling in *Liikenne*[3], the Court reiterated that a change of supplier may constitute the transfer of an undertaking even if there is no contractual relationship between the former and the new supplier.

Pointing in particular to the ECJ's ruling in *Temco*,[4] the Supreme Court stated that a subcontract establishes an indirect contractual relationship between the principal contractor (the Norwegian army in our case) and the subcontractor producing the services. This indirect contractual relationship is sufficient, in the Court's view, for the business of the subcontractor (SGS in this case) to be considered transferred when the principal contractor transfers the principal contract to a new supplier. The Court held that this principle applied even if the subcontract for ground services included only a part of what was needed to supply the transportation service to the Norwegian army.

The Court did not deem it to be decisive that the underlying contract with the Norwegian army only represented approximately 50% of the passenger basis at the airport, considering that the army contract was, presumably, an absolutely essential prerequisite to establishing a regular air service to Bardufoss, in that otherwise there would not be a viable commercial basis on which to maintain operations. In addition, and in line with *Temco*, it was emphasised that there was, in some aspects, a direct relationship between the Norwegian army and the supplier of the ground services, with the latter borrowing, *inter alia*, some equipment from the army and providing de-icing of the army's airplanes and cleaning of the airport.

Based on these arguments the Supreme Court concluded that the transfer from SGS to BF was sufficient to constitute a "legal transfer or merger".

The Supreme Court then addressed the issue of an economic entity retaining its identity.

The Court initially referred to the ECJ's ruling in *Spijkers*, characterizing it as the basic decision pertaining to the construction of the identity requirement. Further, the Court referred to its own ruling in Rt. 2006 p. 71 (*SAS Braathens*), where it was held that ground handling services cannot be identified by any specific factor. Hence, in order to decide whether the business had retained its identity after the transfer, an overall and comprehensive assessment of all the "Spijkers criteria" was requisite. The Court found that the same approach must be applied in the present case. Proceeding from this point of departure, the Supreme Court found that several elements spoke in favour of the identity being retained.

First, the Supreme Court emphasised that BF operated essentially the same business as SGS did and that ground services are relatively standardised and based on an industry-wide standard contract.

Second, the activity was operated in the same premises and with the same infrastructure, including the baggage belts. It was not considered to be of particular importance that the premises and the infrastructure were provided by a third party, the Norwegian Airport Authority. Likewise, it was not regarded as important that BF itself acquired other equipment necessary for the provision of the services, such as mobile steps, equipment for handling and transporting luggage, and IT equipment. The Supreme Court deemed BF's own equipment to form only a minor part of the total physical framework necessary for the ground handling services.

Third, the Supreme Court held that the significant number of former SGS employees hired by

BF (70% were former SGS employees), making up the major part of its workforce (10 out of 12), was an argument in favour of considering identity to be retained. The Court did not consider as decisive that the employees in question were not transferred on the basis of an agreement with SGS but were hired by BF pursuant to a public recruitment procedure. The Court noted in this regard that if the use of public recruitment procedures by a transferee should render the number of employees taken over an irrelevant criterion in the identity assessment, it would be easy to circumvent the rules and override their social objective.

Further, the Supreme Court emphasised that the customer base was substantially the same as prior to transfer. For both SGS and BF the basis for operating ground services at the airport was the army's need for air transport. Accordingly, the identity question could not be decided merely based on the fact that the supplier's paying customer was no longer SAS but Norwegian.

Moreover, the Supreme Court referred to the ECJ's ruling in *Süzen*[5], according to which "the way in which the work is organised" was emphasised in the identity assessment. However, the Supreme Court did not find it decisive that BF had a different market concept from SGS, which adjusted to Norwegian's budget carrier profile, even if this concept resulted, *inter alia*, in lower qualification requirements for employees, more work across occupational groups and, a reduced need for local administration and modifications to the IT systems used for passenger check-in. In the Court's view it is normal that a new supplier uses different distinctive features from the former for its services, and a "classical change" like this cannot be decisive for the application of the rules on transfer of undertakings.

Last, BF unsuccessfully argued that competition considerations should be taken into account in the assessment of whether the employment law rules applied. The Supreme Court dismissed this, stating that such considerations are not relevant to the application of rules that have as their objective to protect employees' rights. In this regard the Supreme Court found it sufficient to refer to the *Liikenne* case.

The Supreme Court consequently held that there had been a transfer of an undertaking according to Norwegian law. The preceding decisions of the court of first instance and the Court of Appeal were thus upheld, awarding the applicant employees the right to the terms and conditions of employment they previously had with SGS in their employment relations with the successor, BF.

Commentary

While ECJ case law seems to suggest that an undertaking is either capital-intensive or labour-intensive for the assessment of whether the identity is retained after transfer, the Supreme

Court, both in our case and in the *SAS Braathens* case, has employed an overall assessment test of all the "*Spijkers* criteria". Referring to the latter, the Court in the present case noted that ground handling services are not characterized by any single factor. Hence the question of identity must rely on a comprehensive assessment of all factors that are relevant according to ECJ case law.

In the present case the Supreme Court held that there was a transfer of an undertaking even if no equipment or other assets were transferred to the new supplier. The court emphasised that the same premises and the same infrastructure were used, even though these were provided by a third party and BF itself provided other equipment for the service.

In my opinion, one could ask whether the court has taken proper account of the extent to which the decisive physical framework was transferred, or rather, not transferred. In contrast to the *SAS Braathens* case, no equipment was transferred. Further, the Supreme Court made no comparison of the value of the infrastructure as compared to the value of BF's own equipment.

Regarding the transfer of employees, the Supreme Court stated that it was not of particular importance that the employees were hired by BF pursuant to a public recruitment procedure. This seems to be contrary to case law from the EFTA Court, which has held that the procedure and basis for hiring employees may be of significance for the assessment of identity.[6]

In the ECJ's *Süzen* decision it was emphasised that the new employer took over a "major part, in terms of their numbers and skills, of the employees". The Supreme Court emphasised that 70% of SGS' employees were employed by BF but it did not comment on the employees' qualifications.

In the *SAS Braathens* case, which concerned a similar business identified both by its employees and its assets, the Supreme Court held that the transfer of an undertaking had taken place in that both assets, with an "essential" value, and a "not-insignificant" part of the employees were transferred.

One may argue that the Supreme Court in our case put too much emphasis on the transfer of employees, in a case where the business rightly should be deemed to be identified by both employees and assets.

Comments from other jurisdictions

Austria (Martin Risak): The ruling seems to be very much in accordance with the jurisprudence of the ECJ as understood by the Austrian Supreme Court, although the emphasis placed on certain arguments might be a little bit different. The cases that come to

mind in this context are the Austrian case of *Abler* (C 340/01 Ð catering service provision change in a hospital) and the German cases of *Güney-Görres* and *Gul Demir* (C-232/04 and C-233/04 Ð changes of service providers at an airport). In the first case the ECJ stressed that the relevant tangible assets needed for the activity in question may not only consist of the small and large equipment but also the premises and utilities. I would therefore assume that an Austrian court would have decided the case mainly by stressing this point and by noting that the fact that tangible assets taken over by the new contractor did not belong to its predecessor but were provided by the contracting authority, cannot preclude the existence of a transfer of a business.

United Kingdom (Hannah Vertigen): The Transfer of Undertakings (Protection of Employment) Regulations 2006 go beyond the scope of Directive 2001/23/EC expressly providing that they apply where there is a "service provision change". There will be a service provision change where one contractor ceases to provide a service, another starts providing that service and (before the change) there was an organised grouping of employees whose principal purpose was to provide the services. This is significantly broader than the test in *Süzen*, which requires not only a change in service provider but also a transfer of assets or a major part of the workforce.

The decision of the Supreme Court in this case is therefore in line with the wider test that applies in the UK. However, that is not to say that the *Süzen* test, with its emphasis on an undertaking being either asset-reliant or labour-intensive, is no longer relevant in the UK. Where the definition of a service provision change is not met, the *Süzen* test is still relevant in determining whether there has been a transfer of an undertaking.

Footnotes

1 Cf. case 24/85 *Jozef Maria Antonius Spijkers – v – Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV.*

2 Act relating to Working Environment, Working Hours and Employment Protection, etc., of 17 June 2005 No. 62.

3 Case C-172/99 *Oy Liikenne Ab – v – Pekka Liskojärvi and Pentti Juntunen.*

4 Case C-51/00 *Temco Service Industries SA – v – Samir Imzilyen and others.*

5 C-13/95 section 15.

6 Cf the EFTA Court's case E-2/95 *Eilert Eidesund – v – Stavanger Catering.*

Subject: Transfer

Parties: Bardufoss Flyservice AS - v - Jostein Holmebukt and others

Court: Norwegian Supreme Court

Date: 16 March 2010

Case number: HR-2010-00473-A

Creator: Høyesteret (Supreme Court)
Verdict at: 2010-03-16
Case number: HR-2010-00473-A