SUMMARY

2013/15 Which employer to sue in the event an invalid dismissal is followed by a transfer of undertaking? (CZ)

<p>A hotel employee was dismissed in 2001. Twelve days later the hotel was sold. The employee sued the former owner and the court declared the dismissal to have been invalid. The old owner then refused to pay salary because he was no longer the plaintiff’s employer, given that the sale of the hotel constituted a transfer of undertaking. The new owner denied that he was bound by the judgment, as he was not a party to the proceedings. The plaintiff brought an action against both the old and new owner jointly. After almost twelve years of litigation the Supreme Court denied the claim, because the plaintiff sued the wrong party in 2001. However, both the old and the new owner may be liable after all, if they failed to inform the plaintiff adequately of the transfer of undertaking.</p>

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adequately of the transfer of undertaking.

Facts

The plaintiff was employed in a hotel owned by 'Defendant 1'. On 4 June 2001 he was dismissed without notice. Twelve days later, on 16 June 2001, the hotel was sold. The sale qualified as a transfer of undertaking and all of the staff transferred into the employment of the new owner ('Defendant 2'), with the exception of the plaintiff.

Some time after the transfer, the plaintiff brought proceedings against Defendant 1 and the court of first instance ruled in his favour. For reasons that are not relevant here, Defendant 1 appealed and the proceedings regarding the status of the 2001 dismissal continued until 2006, when the Supreme Court finally confirmed that the dismissal was invalid.

The result appeared to be that on 16 June 2001 the plaintiff had become an employee of Defendant 2. He therefore brought proceedings against both defendants, seeking payment of salary for the period from 4 June 2001. He was successful in the court of first instance (2009) and again on appeal (2011). These courts ordered both defendants jointly to pay the plaintiff salary for said period. The defendants appealed to the Su- preme Court. Defendant 1 argued that it had ceased to be the plaintiff's employer since 16 June 2001, and that it could therefore not be liable for salary from that date. Defendant 2 argued that it was not a party to the proceedings concerning the (in)validity of the dismissal, and that it therefore could not be said to be the plaintiff's employer.

Judgment

The Supreme Court began by noting that its 2006 ruling, in which it had held the 2001 dismissal to have been invalid, was irreversible. Czech law on civil procedure does not allow reconsideration of an irreversible judgment. Therefore, the invalidity of the dismissal was an established fact. This made the plaintiff conclude that he had transferred into the employment of Defendant 2 on 16 June 2001.

An employee who has been invalidly dismissed and who informs his employer that he insists on performing his contractual work may claim salary for a period in which he has not worked on account of the breach by his employer of its duty to provide the employee with work. In this case, the duty to provide the plaintiff with work had transferred to Defendant 2 before the plaintiff had raised any claim against Defendant

1.Therefore, given that this defendant had not breached any duty, the claim against Defendant 1 was dismissed (even for the period 4 -16 June 2001).

A court ruling is binding only on the parties to the proceedings. Therefore, the 2006 ruling that the dismissal by Defendant 1 was invalid was not binding on Defendant 2. In relation to Defendant 2, the dismissal must be deemed to have been valid and the claim against this defendant was also dismissed.

Thus, the plaintiff remained empty-handed. However, the Supreme Court did not close the door on him entirely. Both defendants had a duty to inform the hotel's staff, or their representatives, of the transfer of undertaking. In the event, the defendants failed to comply with this obligation and thus committed a tort against the plaintiff, giving rise to a claim for damages.

Commentary

This ruling is important for both employees and employers. Employees who want to challenge the termination of their employment must, according to this ruling, be aware which employer should be sued in relation to a transfer of rights and obligations. In this case, the plaintiff made the mistake of not claiming invalidity of his dismissal against Defendant 2. Employers, on the other hand, can find in this judgment a manual for an effective defence. Based on this decision, transferees need not fear that they may be sued in the future by former employees for lost wages based on rulings issued in court proceedings they were not party to.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, the situation is slightly different but the conclusion would be similar. The German system differentiates between the invalidity of the dismissal (Defendant 1) and the continued employment and claim for salary (Defendant 1 for the period 4-16June 2001 and Defendant 2 for the period after transfer of undertaking). Considering the dismissal, the defendant would be the one who terminated the employment relationship, in this case Defendant

1.The transfer of undertaking does not make Defendant 1 the wrong defendant, since the ruling on the dismissal would extend to the legal successor. By section 325(1) of the German Code of Civil Procedure: "A judgment that has entered into force shall take effect for and against the parties to the dispute and the persons who have become successors in title of the parties after the matter has become pending, or who have obtained possession of the disputed object such that one of the parties or its successor in title has become the constructive possessor."

However, the judgment concerning the (in)validity of the termination does not extend to determining whether or not a transfer of undertaking has taken place. In other words, the

invalidity of the termination does not automatically make the plaintiff an employee of the transferee (i.e. Defendant 2). If the plaintiff wants to establish the continued employment with the transferee, he must sue him for a ruling that the employment relationship transferred to the transferee after the transfer of undertaking and that the transferee is therefore liable for payment of salary. Under German law the plaintiff can sue both the transferor and transferee, creating joint legal effect with regard to the continued employment relationship.

The conclusion remains similar to the Czech one: Be careful whom you sue!

Ireland (Georgina Kabemba): Whilst the Transfer of Undertakings Regulations contain a provision confirming that liability (if any) to the dismissed employee transfers to the transferee, very often, in Ireland, the employee will choose to sue both parties. This is sometimes done as a 'belt and braces' approach and sometimes on the basis that there may be more interest in the transferor and transferee settling the claim if they are both going to have to spend time and money defending it. It is intriguing why the lawyer for the plaintiff did not bring a claim against Defendant 2.

The Netherlands (Peter Vas Nunes): What lessons can employers learn from this sad case? First, that they do well to perform a careful due diligence exercise before making an acquisition. Secondly, that transferors and transferees should inform not only their actively employed staff of the transfer, but should also inform any others who might later appear to be their employee. As for the lawyer who acted for the plaintiff in this case, is he liable for professional negligence? Why did he not bring a claim against Defendant 2 as soon as he knew about the transfer? Surely, that could not have been long after 16 June 2001.

Under Dutch law, if the plaintiff had informed Defendant 1 before 16 June 2001, not only that he contested his dismissal, but also that he was willing to continue to perform his work and that he wished to be paid salary (a standard response following a summary dismissal), he would have been awarded salary from the date of the dismissal.

Poland (Marek Wandzel): This case is interesting from a procedural point of view. I gather that the employee was demanding reinstatement. Irrespective of whether under Czech law the reinstatement has onward (*ex nunc*) or backward (*ex tunc*) effect, it was crucial for the plaintiff to identify who his employer was in the case of a transfer of the undertaking (i.e. Defendant 2). It is not clear if Defendant 1 told the plaintiff that Defendant 2 was his employer. If the employee thought so he should have asked Defendant 2 to be joined into the action so as to avoid the argument eventually raised, namely that Defendant 2 had not had the opportunity to defend himself.

One has to bear in mind that at that time (2001) the Czech Republic was not yet a member of

the EU, but even so, the information obligations in cases of transfers may well have existed at that time - as they did in Poland.

Subject: Employees who transfer/refuse to transfer, miscellaneous

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