SUMMARY

2018/21 Limitation on pre-transfer liabilities for transferee under CBA-led transfer deemed valid (SP)

<p>The Spanish Supreme Court has again ruled on the highly controversial question of whether limitations to the liability of a transferee established in a collective bargaining agreement (‘CBA’) in the context of a CBA-led transfer are valid, or whether they contravene the Spanish implementation of the Acquired Rights Directive.</p>

Legal background

In Spain, employees can transfer in the following ways:

When there is a transfer of assets in accordance with the terms and conditions of Article 44 of the Statute of Workers ('Asset Transfer'), i.e. where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity. In practice, case law has traditionally considered that the relevant provisions shall apply when both subjective and objective elements concur:

the subjective element means whether the transferee has taken over the transferor's position; and
the objective element means that essential assets of the company, which ensure the continuity of the business, are transferred.

The mere change of ownership does not necessarily imply a transfer in Spain. However, based

on established case law, an 'Article 44' transfer can also take place if both relevant assets and a significant portion of the staff (in terms of their skills and number) employed by the previous owner are assigned to the new activity ('Non-Asset Based Transfer').
Lastly, a transfer can take place when the applicable CBA obliges the new owner (under certain conditions) to take employees from the former one ('CBA-led Transfer'). A CBA-led Transfer implies that the transferee will take a substantial portion of the employees.

In the case of a legal transfer under Article 44, the liabilities are divided as follows:

As regards pre-transfer liabilities, Spanish law assumes joint and several liability for both the transferor and transferee for liabilities (such as salaries, dismissal compensation/severance and social security payments) up to three years after the transfer took place.
Post-transfer liabilities are borne by the transferee and transferor is only liable if the transfer is declared a crime by criminal courts, which would be very exceptional.

In Spain, it is not unusual for CBAs for service-based activities (rather than asset-based activities) to contain provisions securing the continuity of employment relationships. These oblige the transferee to hire the employees assigned to the business and may contain provisions on liability that deviate from the legal provisions set out in the previous paragraph. In these cases, it is common for the transferee to be excluded from pre-transfer liabilities, in other words, giving them a more limited liability than the joint and several liability set forth in Article 44. In the case at hand, the Supreme Court had to consider the validity of such a clause.

Facts

The employment contract of an employee of a cleaning services company providing services for the City Hall of A Coruña (Spain) was terminated by reason of redundancy by his employer (Servicur). This company had failed to pay the employee around EUR 10,000 in accrued salary. Servicur subsequently lost the cleaning contract to a new contractor called Samyl, which lost the contract to Ingesan. The changes of contractor did not involve any transfers of assets. Both Samyl and Ingesan took the employees assigned to the cleaning services, in accordance with the provisions of the CBA for cleaning services. The CBA excluded the new contractor from any pre-transfer liabilities. The employee filed a claim against all three companies on a joint and several liability basis, asking for the amount that Servicur should have paid him.

Judgment

In its ruling, the Supreme Court did not consider the transfer to be an 'Article 44' transfer but a

CBA-led transfer, which meant that liability regime should be that provided in the CBA, rather than that of Article 44. Consequently, it considered the new contractor to be obliged to take on the employees, respecting their terms and conditions of employment as at the transfer date, but not obliged to bear any pre-transfer liability.

Commentary

This ruling clarifies (at least for the moment) a situation that has been the subject of heated debate amongst employment law professionals, following two ground-breaking rulings of the Supreme Court of 7 April 2016 and 10 May 2016. These two rulings were in line with the conclusions drawn by this new ruling but contained dissenting opinions from a minority of the Supreme Court magistrates. These judges were of the view that in cases where a CBA-led transfer should imply the transfer of relevant staff, the transfer becomes a 'non-asset based transfer' (following, amongst others, the ECJ judgment in *Temco*, C-51/00) and, as such, the legal provisions (including liability) of Article 44 of the Statute of Workers apply.

It is interesting to see that the Supreme Court, when reviewing whether *Temco* should apply to a situation like the one at hand, found that the effects and consequences of a CBA-led transfer (amongst other, the obligation to take employees) did not come from Directive 2001/23 but from the autonomous, free bargaining of the parties to the CBA. In other words, the Supreme Court defends the notion that, as a CBA regulates a scenario not covered by Directive 2001/23 – and hence, seeks to agree more favourable provisions than the minimum provided by the Directive – it should be able to establish whatever conditions, limitations and liabilities the parties think fit. The Supreme Court also did not consider that the effects of a CBA-led transfer (that is, the transfer of a relevant portion of the employees, in terms of their skills and number) gave rise to a non-asset-based transfer. The Supreme Court acknowledged the importance of the social agents and the collective bargaining process, in that without their agreement under the CBA, continuity of employment would not be protected by law.

Regardless of this ruling, all employment law practitioners are strongly advised to take a prudent approach. They should, for one thing, wait and see how the ECJ rules on some preliminary questions referred to it by the Superior Court of Justice of Galicia in December 2016. That case essentially mirrors the one at hand, though relates to the CBA of surveillance companies. It is still pending before the ECJ (*Somoza Hermo – v – Ilunion Seguridad*, C-60/17).

Comments from other jurisdictions

Italy (Caterina Rucci, Fieldfisher): The impression that this case gives, at least from an Italian perspective, is one of reversal of cause and effect: it seems as though the CBA 'causes' something to be a transfer. Italy has a similar legal provision, but it starts from deciding if and

when, under statute, the change of ownership might or might not be a transfer for ARD purposes and when, conversely, it is possible to exclude the application of the ARD and the Italian section 2112 of the Civil Code.

CBAs may only limit the liabilities set by law in cases such as bankruptcy – and only then because the law explicitly allows it. In any other case, the question of whether a transaction is a transfer under the ARD and the Italian section 2112 of the Civil Code is resolved by law rather than by CBAs. However, this case does show how important a specific sector might be to the reduction of protection, especially if the sector is a labour-intensive one.

Subjects: Transfer of undertaking (transfer)
Parties: Servicios Insegan SA and Samyl SL – v –[employee]
Court: Supreme Court
Date: 20 December 2017
Case Number: No. 1037/2017
Internet Publication:
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Creator: Tribunal Supremo de España (Spanish Supreme Court)
Verdict at: 2017-12-20
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