

SUMMARY

ECJ 11 July 2018, C-60/17 (Somoza Hermo), Transfer of undertakings

***<p>&Aacute;ngel Somoza Hermo, Iluni&oacute;n Seguridad SA – v – Esabe Vigilancia SA, Fondo de Garantía Salarial (Fogasa), Spanish case</p>
CBA-led transfer may constitute transfer of undertaking.***

Legal Background

In line with Article 3(1) of Directive 2001/23/EG on transfers of undertakings (Acquired Rights Directive), Article 44(3) of the Spanish Worker's Statute stipulates that a transferor and transferee are in principle jointly and severally liable for pre-transfer obligations of the transferor for a period of three years.

Article 14 of the Spanish Collective State Agreement for Security Firms (collective agreement) provides that a new acquirer of a contract for services (for a security project) must take over the contacts of the employees assigned to that contract and workplace, if they have been assigned to it for at least seven months. However, pursuant to that same article, the new acquirer is not liable for payments and fees payable for work prior to the date on which the contract was taken over.

Facts and proceedings

Mr Somoza Hermo worked as a security guard for Esabe Vigilancia. He was assigned to work under its contract for the security service of a museum in Santiago de Compostela. On 16 October 2012, Vigilancia Integrada SA (VINSAs) acquired Esabe Vigilancia's contract. In accordance with the collective agreement, VINSAs took over the employment contracts, including that of Mr Somoza Hermo. VINSAs informed him that it would not pay his outstanding claims for pay and social benefits from 2010-2012, as they arose before the

transfer and thus should be paid by Esabe Vigilancia.

Mr Somoza Hermo claimed for these payments in court from both Esabe Vigilancia and VINCA, based on Article 44 of the Worker's Statute. His claim was awarded – at least to the extent relevant for this summary – and VINSA appealed to the High Court of Justice of Galicia, based on the exemption in Article 14 of the Collective State Agreement for Security Firms.

The High Court of Justice of Galicia pointed out that the Spanish Supreme Court had held that 'CBA-led transfers' do not fall within the scope of the Acquired Rights Directive.¹ In addition, in the Court's view, the *Temco* case (C-51/00) did not preclude provisions from both the Worker's Statute and the CBA to coexisting. The High Court of Justice of Galicia wondered if this interpretation applied in the context of, essentially, labour-based activity, as the obligations in the collective agreement could trigger the transfer of an undertaking.

Questions

Must Article 1(1) of Directive 2001/23 be interpreted as meaning that that directive applies to a situation in which a contracting entity has terminated the contract for the provision of services relating to the security of buildings concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority, in terms of their number and skills, of the staff whom the first undertaking had assigned to the performance of those services, when the activity concerned is essentially labour-based?

Must the second subparagraph of Article 3(1) of Directive 2001/23 be interpreted as precluding, under a collective agreement, the transferor and transferee of the economic entity concerned from being exempt from the obligation to assume joint and several liability for obligations, including those relating to wages, which arose from employment contracts before that entity was transferred?

Consideration

First question

The concept of legal transfer has been interpreted flexibly in order to provide employee protection. Consequently, the Acquired Rights Directive also applies to transfers without a direct contractual relation between the transferor and transferee.

As for the retention of identity, all facts must be considered, including the type of undertaking

or business, whether or not its tangible assets, such as buildings and movable property are transferred; the value of its intangible assets at the time of the transfer; whether or not the majority of its employees are taken over by the new employer; whether or not its customers transfer; the degree of similarity between the activities carried out before and after the transfer; and the period, if any, for which those activities were suspended. Those circumstances must be considered as part of the overall assessment of the circumstances of the case and cannot therefore be examined in isolation.

In particular, the type of business must be taken into account. In labour-intensive sectors, such as in the case at hand, a group of workers engaged in a joint activity on a permanent basis may constitute an economic activity. It can retain its identity if a new employer does not merely pursue the activity in question but also takes over a major part of the employees specially assigned by its predecessor to that task, in terms of number and skills. It is not important whether the transfer of employees has been imposed by a collective agreement.

Second question

As the Spanish government has rightly argued, the ECJ is confined to considering provisions of EU law alone. The question concerns the examination of the consistency of a collective agreement with a provisions of national law, which falls outside the ECJ's competence.

Ruling

Article 1(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, must be interpreted as meaning that that directive applies to a situation in which a contracting entity has terminated the contract for the provision of services relating to the security of buildings concluded with one undertaking and has, for the purposes of the provision of those services, concluded a new contract with another undertaking, which takes on, pursuant to a collective agreement, the majority, in terms of their number and skills, of the staff whom the first undertaking had assigned to the performance of those services, insofar as the operation is accompanied by the transfer of an economic entity between the two undertakings concerned. The Court of Justice of the European Union does not have jurisdiction to answer the second question referred by the Tribunal Superior de Justicia de Galicia (High Court of Justice of Galicia, Spain).

¹ For this judgment, see: L. Aguilar, 'Limitation on pre-transfer liabilities for transferee under CBA-led transfer deemed valid (SP)', EELC 2018/21.

Creator: European Court of Justice (ECJ)

Verdict at: 2018-07-11

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