

SUMMARY

# ECJ 7 August 2018, C-472/16 (*Sigüenza*), Transfer of undertakings, Dismissal/severance payment

***Jorge Luís Colino Sigüenza &ndash; v &ndash;&nbsp; Ayuntamiento de Valladolid, In-pulso Musical SC, Miguel del Real Llorente, Administrador Concursal M&uacute;sicos y Escuela SL, M&uacute;sicos y Escuela SL, Fondo de Garant&iacute;a Salarial (Fogasa), Spanish case.</i>***

***A suspension of operations for five months does not preclude a transfer of undertaking. Moreover, the impossibility to pay staff may constitute an ETO reason for dismissal, provided that this is not caused by deliberate measures to deprive employees from the scope of the directive.</i>***

## Legal background

Article 1(1)(b) of Directive 2001/23/EC (Acquired Rights Directive) defines a transfer of undertaking as 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. While Article 3(1) defines the main rule that all employee rights and obligations are transferred, Article 4(1) provides that dismissals may take place for economic, technical or organisational reasons ('ETO reasons') entailing changes in the workforce. These provisions have been implemented accordingly into Spanish legislation.

## Facts

Mr Sigüenza was employed at the Municipal Music School of Valladolid (Spain). Originally, it had been operated by the municipality, but since 1997, Músicos y Escuela operated it after it had won the tender bid. It managed the premises, facilities and instruments necessary to provide the service (which were owned by the municipality) and had taken over the employees, including Mr Sigüenza.

As the number of students declined in the year 2012-2013, revenues decreased. The municipality was contractually obliged to provide additional funds, but refused to do so. (There were various proceedings, but not directly relevant to the outcome of this case.) Músicos y Escuela found it necessary to cease activities and to execute a collective dismissal. In early March 2013, it started consultations with the unions. It could not reach agreement and decided to terminate all employment contracts at the end of March 2013. At 1 April 2013, it returned all of the municipality's belongings. On 30 July 2013, it became insolvent.

The union appealed (twice) to the collective redundancies, but without any success. Meanwhile, in August 2013, after another tender, the Municipality of Valladolid had assigned the management of the music school to In-Pulso Musical. In-Pulso Musical did not hire any former employees of Músicos y Escuela, but used all of the municipality's belongings which were also used by Músicos y Escuela before.

Mr Sigüenza claimed that there had been a transfer of business and that he therefore was an employee of In-Pulso Musical, and that his dismissal therefore had to be annulled. The referring court doubted that the suspension of five months of operations could preclude a transfer and whether the reasons for dismissal could be qualified as ETO reasons. It therefore decided to stay proceedings and ask preliminary questions.

## **Questions**

Must Article 1(1) of Directive 2001/23 be interpreted as meaning that a situation, such as that at issue in the main proceedings, where the successful tenderer for a service contract for the management of a Municipal School of Music, to which the municipal administration had supplied all the resources necessary for the exercise of that activity, ceased that activity two months before the end of the current academic year, dismissing staff and returning those material resources to that municipal administration, which proceeds with a new award solely for the following school year and provides the new contractor with the same material resources, is capable of coming within the scope of that directive?

Must Article 4(1) of Directive 2001/23 be interpreted as meaning that, in circumstances such

as those at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff, the new contractor taking over the activity at the beginning of the next academic year, the dismissal of the employees must be regarded as having been made for ‘economic, technical or organisational reasons entailing changes in the workforce’ or that the reason for that dismissal was ‘the transfer of an undertaking, business, or part of an undertaking or business’?

### **Consideration**

As regards the first question, the Acquired Rights Directive applies where, in the context of contractual relations, there is a change in the legal or natural person responsible for carrying the undertaking, regardless of whether or not ownership over tangible assets is transferred. It is decisive that the entity retains its identity, as indicated *inter alia* by the fact that its operation is actually continued or resumed.

While all factors must be considered, the economic activity in this case requires a significant amount of equipment. It is not relevant who owns these assets; not owning the assets cannot preclude a transfer.

As regards the suspension of operations, temporary closure of an undertaking does not preclude the possibility of a transfer. This conclusion applies in particular to a situation such as that at issue, where the five-month period included three months of school holidays. It should also be stressed that all factual circumstances must be taken into account.

As regards the second question, although the scope of the Directive is limited to workers who have any employment contract at the date of transfer, the transfer must not in itself constitute grounds for dismissal. Consequently, dismissals contrary to Article 4(1) do not prevent such workers to transfer. In order to determine whether the transfer was the sole reason for the dismissals, the objective circumstances must be taken into account.

It appears that the reason for termination was the impossibility to pay the staff, after the municipality had breached the contract with the employer. Those circumstances may be ‘economic, technical or organisational reasons’, provided that the circumstances causing the dismissals and the delayed appointment of a new service provided are no deliberate measures intended to deprive the employees from their rights under the Acquired Rights Directive. It is for the referring court to ascertain this.

### **Ruling**

Article 1(1) of Council Directive 2001/23/EC 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 a situation, such as that at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music, to which the municipal administration had supplied all the means necessary for the exercise of that activity, ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff and returning those material resources to that municipal administration, which conducts a new tendering procedure solely for the following academic year and provides the new contractor with the same material resources, is capable of coming within the scope of that directive.

Article 4(1) of Directive 2001/23 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, where the successful tenderer for a service contract for the management of a municipal school of music ceases that activity two months before the end of the current academic year, proceeding to dismiss the staff, the new contractor taking over the activity at the beginning of the next academic year, it appears that the dismissal of the employees was made for 'economic, technical or organisational reasons entailing changes in the workforce', within the meaning of that provision, provided that the circumstances which gave rise to the dismissal of all the employees and the delayed appointment of a new service provider are not a deliberate measure intended to deprive those employees of the rights conferred on them by Directive 2001/23, which it will be for the referring court to ascertain.

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**Creator:** European Court of Justice (ECJ)

**Verdict at:** 2018-08-07

**Case number:** C-472/16