EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2018/41 Spanish Supreme Court now aligned with ECJ's case law: Limitation to pre-transfer liabilities for new contractor under CBA-led transfers that triggers a non-asset based transfer are not valid (SP)

Following the ECJ's decision in Somoza Hermo – v – Ilunion Seguridad, C-60/17 (Somoza Hermo) of 11 July 2018, all eyes were on the Spanish Supreme Court. Since 2016, the Court has ruled a number of times that limitations to the liability of the new contractor established in a collective bargaining agreement ('CBA') in the context of a CBA-led transfer were valid (see e.g. EELC 2018/21). Somoza Hermo established that a CBA-led transfer that entails a non-asset-based transfer is a transfer within the meaning of the Acquired Rights Directive. Now the Supreme Court (in a decision dated 27 September 2018 taken with one dissenting opinion) is clear that its doctrine must be reviewed and has therefore held that limitations on pre-transfer liability for a new contractor under a CBA-led transfer that trigger a non-asset-based transfer, are not valid.

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Legal background

In Spain, employees can transfer in the following ways:

1. Where there is a transfer of assets in accordance with the terms of Article 44 of the Workers' Statute (an '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 Article 44 applies when both subjective and objective elements are present:

(i) the subjective element is whether the transferee has stepped into the transferor's shoes; and

(ii) the objective element is that essential assets of the company, which ensure the continuity of the business, are transferred.

2. A 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 (a 'Non-asset-based Transfer').

3. Lastly, a transfer can take place when the applicable CBA obliges the new owner (under certain conditions) to take employees from the former one (a 'CBA-led Transfer'). A CBA-led Transfer implies that the transferee will take a substantial portion of the employees.

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

1. 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) for up to three years after the transfer

took place.

2. Post-transfer liabilities are borne by the transferee and the 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 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

An employee of a cleaning company which had been declared insolvent one month before losing its cleaning contract to a new company, filed a claim for salary against the employer and the new cleaning company. The employee held that both companies should be declared liable on a joint and several basis, as this was a Non-asset-based Transfer triggered by the application of the CBA. However, the CBA for cleaning companies excluded the liability of the new cleaning company for pre-transfer matters. Despite the CBA provisions, the joint and several liability of employer and the new cleaning company was confirmed by the first instance court and by the Superior Court of Justice of Castilla León/Valladolid on appeal. This decision was subsequently challenged by the new cleaning company before the Supreme Court. The Supreme Court (which had previously upheld validity of CBA provisions excluding pre-transfer liabilities for transferees on a number of occasions), had to decide this appeal following the ECJ's decision in *Somoza Hermo*. The Supreme Court was therefore bound by the findings included in *Somoza Hermo*. These included that confirmation that a CBA-led transfer that triggers a Non-asset-based Transfer is a transfer within the meaning of the Acquired Rights Directive.

Judgment

In this ruling, the Supreme Court rejected the new cleaning company's appeal and confirmed that both companies are joint and severally liable. It is worth noting that, prior to this decision, the Supreme Court did not consider a CBA-led transfer to be a lawful one (i.e. an Article 44 transfer) and therefore believed that liability in a CBA-led transfer should be restricted to that established in the CBA, without reference to Article 44 of the Statute of Workers. By contrast, the Supreme Court now holds that for labour-intensive activities, if a relevant proportion of

the employees assigned to the contract (in terms of their numbers and skills) transfer, this triggers the application of Article 44, including joint and several liability of the transferor and transferee. As the Statute of Workers prevails (hierarchically) over the provisions of the CBA, any CBA provision limiting or excluding the statutory liability is invalid.

Commentary

This is a landmark decision that represents a major U-turn in the Supreme Court's doctrine, as held continuously since 2016. It is expected to have a significant impact on the interpretation and negotiation of CBAs in relation to labour-intensive activities (as most of them contain similar provisions). It is also expected that incoming transferees will need to strengthen the contractual controls and guarantees that they negotiate regarding any possible pre-transfer liability they might be obliged to assume as a result of this new doctrine. It appears, however, that, by contrast, in cases where, as a consequence of applying CBA rules, the transferee does not take a relevant proportion of the employees (in terms of skills and numbers), meaning that the transfer does not trigger a transfer of undertaking under Article 44, the transfer and its effects would be limited strictly to the provisions of the CBA.

Comment from other jurisdiction

Germany (Paul Schreiner and David Meyer, Luther Rechtsanwaltsgesellschaft mbH): Germany has similar statutory provisions for transfers of undertakings to the ones contained in Spanish law at Article 44 ET. The European directive (2001/23/EC) was implemented into German law as Section 613a Civil Code. This provision seems to be similar to the Spanish one – at least as far as is relevant to this ruling.

Section 613a Civil Code contains provisions concerning the liability of both transferees and transferors. The transferor is liable for every claim that arises before the transfer if that claim becomes due and payable within one year of the transfer. It is not liable for post-transfer claims, which is similar to the legal situation in Spain.

However, the transferee must not exclude its liability – either for pre- or for post-transfer claims . It is liable for every claim that originates from the employment relationship itself. Neither does it matter if its obligation to continue the relationship results from a CBA or from statutory provisions such as section 613a. This is a major difference between German and Spanish practice – at least in the context of this decision.

As we understand it, in the case at hand, the transferee was obliged to offer an employment contract to a certain number of employees of the transferor without the succession of services

being regarded as a transfer of the undertaking in the sense of Article 44. In Germany, such a situation is hard to imagine. If it occurred, a German court would look at the extent to which the transferee had taken over personnel in order to check that the requirements of section 613 a Civil Code had been met. If they had, it would not be possible to deviate from the law. Otherwise, the parties would be free to engage who they wanted and how many, and, of course, they would ascertain extent there was liability in relation to claims from the past.

Subjects: transfer of undertaking, miscellaneous

Parties: Clece S.A., Cleanet Empresarial SL (Grupo Top Quark)

Court: Spanish Supreme Court

Date: 27 September 2018

Case Number: 2747/2016

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