

SUMMARY

2019/8 Supreme Court rules on transfer of undertaking (FI)

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Legal background

Under Chapter 1, Section 10 of the Finnish Employment Contracts Act (55/2001, as amended), a transfer of undertaking refers to a transfer of an undertaking, business, corporate body, foundation or an operative part thereof to another employer, if the undertaking or part thereof to be transferred, irrespective of whether it is a central or ancillary activity, remains the same or similar after the transfer. When an undertaking is transferred, rights and obligations and employment benefits related to them under employment relationships valid at the time of the assignment devolve to the new owner or proprietor.

Facts

The claimant worked as an instructor at an after-school club for elementary school pupils. The club was organized by a non-profit association pursuant to a fixed-term agreement between the association and the municipal administration. Near the end of the term of the agreement, which was due to expire at the end of May 2014, the association informed the municipal administration that it was unwilling to continue the arrangement. On the municipal administration's initiative, the municipality concluded an agreement with a new contracting party, which was also a non-profit association, at the end of April 2014. Under the new agreement, the new contractor commenced organizing after-school club activities at the beginning of August 2014.

The claimant's employment contract was terminated by the old contractor with a notice period ending at the beginning of June 2014. The new contractor employed one of the previous contractor's employees, however the three other employees, including the claimant, were left unemployed. Whereas the claimant's employment contract had been in force until further notice, the other three employees, including the employee hired by the new contractor, had been employed with fixed-term contracts, which expired at the end of May 2014.

Proceedings

The claimant instituted proceedings at the Eastern Uusimaa District Court, claiming that the new contractor had violated the rules on transfers of undertakings by not employing the claimant, and demanding compensation for unlawful termination of the employment contract. The association denied the claims and claimed that no transfer of undertaking had taken place.

The District Court held that, assessing the situation as a whole, a transfer of undertaking had taken place, even though no assets had been transferred, only one employee had been employed by the new contractor and the activities had ceased for the duration of the summer break of the pupils. The fact that the activities continued in a substantially similar manner in the same premises as before and the customer base had not changed with the transfer, in addition to the fact that the new contractor had recruited new personnel for the activities in the spring of 2014, contributed to the District Court's decision.

The new contractor appealed the judgment. The Court of Appeal held that organizing after-school club activities may be classified as a labour-intensive business. As such, the decisive factor on whether or not a transfer of undertaking has taken place is whether the new employer has recruited an essential part of the personnel. As the only employee recruited was employed part-time, the identity of the undertaking did not remain the same and the requirement that the undertaking remains the same or at least similar after the transfer was not fulfilled. The case was then further appealed to the Supreme Court.

Judgment

The Supreme Court first found that the elements constituting a transfer of undertaking under the Employment Contracts Act correspond to those under the Transfers of Undertakings Directive (2001/23/EC). The Supreme Court then went on to cite the established case law of the Court of Justice of the European Union ('CJEU'), which provides that when assessing whether a transfer of undertaking has taken place, all relevant facts concerning the possible

transaction have to be taken into account. Under the established CJEU case law, these facts are weighed differently depending on whether the business in question is labour-intensive or asset-reliant.

The Supreme Court referred, among others, to the CJEU case C-509/14 *Aira Pascual*, in which a transfer of undertaking had taken place with regard to an asset-reliant business even though the majority of the employees had not transferred and the assets in question were owned by the client and not the employer. Another case referred to was C-463/09 *CLECE*, in which the CJEU held that the transfer of the activity in question could not by itself constitute a transfer of undertakings but, in a labour-intensive business, a group of employees permanently working in the same domain may constitute an identity that is retained so that a transfer of undertaking is held to have taken place.

The Supreme Court also referred to its earlier decision from 2008, in which it held that a transfer of undertaking had taken place when a provider of municipal kindergarten services had changed after a competitive tendering process and four out of six employees were employed by the new service provider as a result.

With regard to the case in question, the Supreme Court held, first, that the target group of the after-school club, i.e. the children using the service, are the customers of that service within the meaning provided under CJEU case law. This group was held to remain the same disregarding the provider of the service. Moreover, the Supreme Court held that the fact that the service was discontinued for the duration of summer 2014 due to the school summer break is not relevant to the assessment of the case.

The Supreme Court held that the after-school club activities in question were primarily reliant on workforce but also required appropriate premises and furniture. The Supreme Court went on to hold that the situation in question was not comparable to the situations covered under CJEU case law and, as such, the after-school club activities could not be regarded as purely a labour-intensive or an asset-reliant business. Assessing the facts of the case as a whole and taking into account the nature of the activity in question, the Supreme Court concluded that a transfer of undertaking had taken place. However, as the fixed-term employment contracts expired at the end of May 2014, only the claimant's employment contract should have transferred to the new contractor. The new contractor was liable to pay the claimant compensation corresponding to seven months' salary.

Commentary

The Supreme Court had to vote on this judgment, and the judgment passed on a vote of three to two. The dissenting opinion firstly stated that the after-school club activities in question differ somewhat from the kindergarten activities which were the subject of the earlier Supreme Court judgment discussed above. According to the dissenting opinion, the fact that the activities had been carried out in the same premises was not as decisive a factor as the majority held. Instead, the dissenting Justices held that even though the after-school club activities were not a labour-intensive business as defined under CJEU case law, whether or not a transfer of personnel had taken place had more significance than the majority held. As such, and as the new service provider could not carry on organizing the activity in question in the state the activity was transferred, but instead had to bring in its own personnel and familiarize them with their duties, the dissenting Justices held that a transfer of undertaking had not taken place.

The judgment discussed here was published at the same time as two other cases concerning transfers of undertakings. In both of these cases, as in the judgment discussed here, the Supreme Court did not rely on the division between labour-intensive and asset-reliant businesses as established under CJEU case law, and found that a transfer had taken place on the basis of an assessment of the situation as a whole.

Comments from other jurisdictions

Denmark (Christian K. Clasen, Norrbom Vinding): This case report from Finland illustrates some of the essential issues involved when the national courts assess whether or not a business transfer has occurred.

The different decisions by the three Finnish courts indicate that there may be very different views as to how the facts of a specific case should be assessed in cases regarding a potential business transfer.

The Finnish case exemplifies that the courts may have varying views as to when the nature of an activity should be classified as purely or primarily labour or asset-intensive, which ultimately determines how the facts of the specific case must be considered.

Another aspect where the three Finnish courts seem to have different approaches to assessing the facts of the case is the weight given to the fact that only one of the four employees of the former contractor was employed by the new contractor.

Furthermore, it is interesting that the Court of Appeal took into account that the only

employee recruited was employed on a part-time basis, whereas the Supreme Court does not appear to have attached any importance to this fact in its decision.

From a Danish point of view, the reasoning by the Finnish Court of Appeal is quite interesting.

In a recent judgment, the Danish Western High Court held that two municipalities' repatriation of home care services did not constitute a business transfer. A report on this case is published in this edition.

During the High Court proceedings, the plaintiff argued that the High Court should take into account the number of hours that the employees were hired to perform or actually performed at their previous employer when assessing whether the transferee had taken over a considerable part of the transferor's workforce.

The High Court did not, however, agree with this argument and held that the assessment must be based on the actual number of employees taken over by the transferee.

Accordingly, the reasoning of the Danish High Court seems to be in conflict with the reasoning of the Finnish Court of Appeal mentioned above. The case report does not contain information as to whether or not the Finnish Supreme Court somehow addressed this aspect of the facts which had been a determining factor for the Court of Appeal when holding that no business transfer had occurred. However, it would be interesting to know if the Supreme Court commented on this issue.

Moreover, the fact that the judgment of the Finnish Supreme Court was passed on a vote of three to two also reflects just how difficult it may be for the courts to assess the facts of a case regarding a potential business transfer.

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