

SUMMARY

2019/21 – Supreme Court rules on liability distribution between transferor and transferee (FI)

An insourcing following an earlier outsourcing is a transfer of undertaking.

Summary

A municipal federation took back a nursing home operation it had previously outsourced to a contractor. The Finnish Supreme Court held that a transfer of undertaking had taken place and the municipal federation (transferee) was liable to pay the employee compensation for the unlawful termination of the employment contract. Further, the Supreme Court held that the employee had also without a justifiable reason directed the claim for compensation towards the employer company (transferor/the old contractor) and for that reason was liable to pay the legal costs of the employer company.

Legal background

Under Chapter 1 Section 10 of the 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.

According to Chapter 21 Section 1 of the Code of Judicial Procedure (7/1734, as amended), a party to proceedings who loses the case is liable for all reasonable legal costs incurred by the opposing party, unless otherwise provided for by legislation. Under Section 8a, if the legal issues in the case have been so unclear that the losing party has had a justifiable reason to

pursue the proceedings, the court may order that the parties are liable for their own legal costs in full or in part.

Facts

The employee worked as a nurse and a deputy manager at a nursing home for the elderly. Under a service purchasing agreement, the employer provided nursing home services to the municipal federation. The municipal federation terminated the agreement and informed the employer it would start providing the nursing home services itself. The old contractor terminated the employee's employment due to the expiry of its operations.

Proceedings

The employee instituted proceedings at the South Karelia District Court, claiming compensation for unlawful termination of the employment contract from both the municipal federation and the old contractor under joint and several liability. The municipal federation denied the claims and asserted that no transfer of undertaking had taken place. The old contractor denied the claims directed against it and demanded that the employee pay its legal costs with interest. The old contractor had several times urged the municipal federation to take over the employees, claiming that a transfer of undertaking would take place. Thus, the employee should have directed the claim only against the municipal federation.

The District Court held, when assessing the situation as a whole, that a transfer of undertaking had taken place, even though no employees had been hired by the municipal federation. The District Court stated that the old contractor had terminated all the employment contracts and the municipal federation had not agreed to hire the employee. The District Court held that both the municipal federation and the old contractor were responsible for the unlawful termination of the employment contract.

Both the municipal federation and the old contractor appealed the judgment. The Court of Appeal held that the object of the service purchasing agreement was the nursing home service as a whole, not only employee leasing as argued by the municipal federation. Considering that the aim of regulating the transfer of undertaking is to protect the positions of the employees, the Court of Appeal held that a transfer of undertaking had taken place. The Court of Appeal found that under Chapter 1 Section 10 of the Employment Contracts Act, the transferor is liable towards the transferee for employee receivables that have fallen due before the transfer, unless otherwise agreed. The employee did not have any outstanding receivables which the old contractor would have been liable to pay. Further, the municipal federation was aware of the employees it should have hired due to the transfer of undertaking. As a result, only the municipal federation was liable to pay the employee compensation for unlawful termination.

However, due to the lack of clarity concerning the legal issues in the case, the employee was considered to have had a justifiable reason to pursue the proceedings against the employer and the employer company had to bear its own legal costs. The case was then further appealed to the Supreme Court.

Judgment

The judgment discussed here was published at the same time with two other cases concerning transfer of undertaking [We have presented the case KKO 2018:64 in EELC Issue 1/2019]. 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 referred to the concurrent cases KKO 2018:64 and KKO 2018:66 as well as the established case law of the CJEU and held that a transfer of undertaking had taken place.

The Supreme Court also had to assess whether the employee was liable for the legal costs of the old contractor. The Supreme Court found that under Chapter 1 Section 10 of the Employment Contracts Act and precedent KKO 2008:88 there was no lack of clarity concerning the legal issues in the case when it came to the liability distribution between a transferor and a transferee. The transferor was only liable for the rights and obligations as well as the employment benefits if it had unlawfully terminated the employment contract or the receivables had fallen due before the transfer. Since the old contractor had urged the municipal federation to take over the employees based on the transfer of undertaking, the Supreme Court found that the old contractor could not have had, even in retrospect, an opportunity to act differently. Therefore, the old contractor was not liable for the unlawful termination. The Supreme Court held that the employee had not had a justifiable reason to pursue the proceedings against the old contractor and ordered the employee to pay the employer company's reasonable legal costs.

Commentary

According to the Code of Judicial Procedure, the losing party is liable to pay the counterparty's legal costs unless it has had a justifiable reason to pursue the proceedings. The Supreme Court referred to the precedent KKO 2008:88 when it stated that there was no lack of clarity concerning the legal issues in the case that would have established a justifiable reason for the employee to raise a claim against the old contractor. In regard to the distribution of liability between the transferor and transferee, the Supreme Court stated that the legal situation is clear.

The judgment states that the old contractor had complied with the provisions of the

Employment Contracts Act when it had urged the new contractor to hire the employees. From its own point of view, the old contractor had had the right to terminate the employment contracts based on the fact that its own operations at the nursing home ended. It was also mentioned in the judgment that the employer company had tried to relocate the impacted employees to other locations. However, the Supreme Court could also have questioned why the employer company terminated the employment contracts when the employees should, due to the transfer of undertaking, have been taken over by the municipal federation. After all, it was the employer company that argued that a transfer of undertaking was taking place. Therefore, one could ask whether the old contractor should have implemented the termination of the employment contracts at all. We believe that the Supreme Court's idea is that a transferor must be able to inform the employees explicitly enough that their employment will not continue in its service.

With this judgment, the Supreme Court seems to confirm that a transferor may implement the termination of employment contracts to be on the safe side and avoid any false impression that they could remain in his service. In the case at hand, the transfer of undertaking was insourcing (taking back an operation) and naturally the same principle can be applied also to second generation outsourcing and other similar situations. It remains debatable whether the principle can be generally applied to other types of transfers of undertakings such as a sale of a business to a new business operator. In any event, we feel that in order to benefit from the principle laid down in the judgment, a transferor must act in good faith in relation to all parties and thus its actions should illustrate that it considers the situation to be a statutory transfer of undertaking.

Comments from other jurisdictions

United Kingdom (Richard Lister, Lewis Silkin LLP): It would be extremely unusual for a UK Employment Tribunal ('ET') to make an award of costs against a losing claimant in a case brought under the Transfer of Employment (Protection of Employment) Regulations 2006 ('TUPE'). In general terms, ETs have always been reluctant to make such orders – the philosophy underlying the UK system is that employees should not be deterred from pursuing their rights through fear of having to pay their employer's legal costs in the event of defeat.

This is reflected in the ET Rules of Procedure, which provide various grounds for making a costs order that are quite different from the test under Finland's Code of Judicial Procedure. For present purposes, the relevant grounds are: that a party (or their representative) has acted 'vexatiously, abusively, disruptively or otherwise unreasonably' in the bringing or conducting of proceedings; or that a claim (or response) has 'no reasonable prospect of success'.

In cases brought under TUPE, it is commonplace for employees to name both the putative transferor and the putative transferee as respondents to the claim. Most obviously, this will occur where there is an issue as to whether there has been a transfer of undertaking to which TUPE applies. But even if that is not in dispute, there may still be uncertainty as to which party should properly be held liable for the claims (if successful). Given the complexity of TUPE and EU law on transfer of undertakings, such cases invariably give rise to complex legal and factual arguments. Accordingly, there would have to be quite exceptional circumstances for an ET to find sufficient grounds (as described above) for the claimant to be penalised by having to pay costs to the 'wrong' respondent.

Subject: Transfer of Undertakings, Dismissal/Severance Payment

Court: Supreme Court of Finland

Date: 18 October 2018

Case number: KKO 2018:65

Internet publication: <http://www.finlex.fi/fi/oikeus/kko/kko/2018/20180065>

Creator: Korkein oikeus (Supreme Court of Finland)

Verdict at: 2018-10-18

Case number: KKO 2018:65