EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/33 Is hiring of employees of a former service provider subject to transfer of undertaking legislation? (IT)

The Italian Court of Cassation has interpreted a new provision referring to the obligations of the new service provider towards the employees of the former provider.

Legal background

Originally, the clause on transfer of service providers was formulated in a way that the European Commission held as not complying with EU law (in particular Directive 2001/23/EC on transfers of undertakings). It was therefore changed. Originally, the clause provided that hiring by the new service provider of former employees did not constitute a transfer of undertaking. The most recent provision states that such change is no transfer of undertaking *if* the new service provision is clearly different in its organisation and has elements of discontinuity in respect to the former one.

Facts

An employee of the (first) service provider had been dismissed, after which he challenged the termination. The judge who decided on his termination had held that the termination was unlawful and had therefore ordered the reinstatement of the employee.

However, in the meantime, the service provider had lost the service contract to another provider. As his employer was no longer in charge of the service provision, the employee tried to enforce the reinstatement decision against the new service provider.

The employee asserted that the decision by which his termination had been cancelled and reinstatement order granted should apply to the new service provider, notwithstanding the

latter was not a party to the proceedings when the decision had been taken, since the new provider was a 'successor in title' in respect to the position of the new service provider.

The employee also asserted that the Court in second instance had wrongfully distinguished between changes of service providers and transfers of undertakings, as these changes can be transfers of undertakings as well.

Judgment

The Court of Cassation rejected the employee's claim.

It held that the reinstatement order could not be enforced against the new provider, as it had not been a party to the reinstatement procedure, and as the change in the service provider in this case was no transfer of undertaking.

Regarding the employee's assertion that the Court in second instance had wrongfully distinguished between changes of service providers and transfers of undertakings, the Court of Cassation held that a service provision change *might result in (but not necessarily is)* a transfer of undertaking provided that the relevant requirements are met. There is however no automatic transfer just because of a change in the service provider.

The Court of Cassation highlighted that the alleged transfer had not been established. As the new service provider had hired employees of the former service provider *ex novo*, and without a probationary period based on a provision in the applicable collective agreement, the employment had not been continued.

The Court of Cassation also deemed irrelevant that, when the service provider changed, the proceedings against the termination were still pending, since – differently from the case of transfer of undertaking – the decision by which a termination is held as void and the consequent reinstatement does not have any retroactive effect.

Commentary

This appears to be the first direct interpretation by the Court of Cassation of the most recent changes to an Italian provision regarding changes of service providers. In its original wording, the statutory provision plainly excluded from the rules concerning transfers of undertakings any service provision change where the new provider had hired employees of the former provider. This provision was changed as it was non-compliant with EU law. The most recent change provides that there is no transfer of undertaking if the change in service provider

contains so-called "elements of discontinuity" (whatever this means) in the activity carried out by the new service provider.

The term "discontinuity" is a quite generic one, with no clear legal or factual meaning. It is therefore easy to imagine that it will not be difficult for a new service provider to allege and create *ad hoc* "elements of discontinuity". These could be created either in (i) the way they will provide services, (ii) the way employees of the former provider are hired *ex novo* (as the applicable CBA seems to provide for at least in the industry involved in this case), and/or (iii) by limiting the transfer of goods or know-how from the former provider.

The applicable CBA is in fact very important since it applies most often in very poor and under-protected industries, such as cleaning services and canteen cooking activities, which are also mainly labour-intensive ones and where service provider changes occur frequently.

The point is that when this provision was changed the idea was to avoid obliging the new service provider to hire people it no longer needed due to a different organisation of the service provision. It is however easy to understand that trying not to force the new service provider might easily result in them refusing to hire employees on a basis of their choosing, since it is the new service provider who organises the work in the new service provision, and creating elements of discontinuity seems quite easy for the entity that will, from then on, organise the new service provision.

In other words, the most recent change in this provision does not look to be the most appropriate one to satisfy the requirements of the Directive on transfers of undertakings nor the case law of the ECJ, as it seems too easy to avoid its applicability.

Comments from other jurisdiction

Germany (Johanna Schobeß, Luther Rechtsanwaltsgesellschaft mbH): The core statements of the decision are in line with German labour law and the jurisdiction of the German Federal Labour Court (Bundesarbeitsgericht).

Similar to the decision of the Italian Court of Cassation, according to German jurisdiction, a change in the provision of services by another service provider can also constitute a transfer of an undertaking, if the conditions for a transfer of an undertaking pursuant to Section 613a of the German Civil Code (Bürgerliches Gesetzbuch, 'BGB') are met.

However, there is no 'automatic transfer' under German jurisdiction just because of a change

in the service provider, too. As in the present decision, the German courts examine whether the conditions for a transfer of an undertaking under Section 613a BGB have been fulfilled. This would be the case if an existing economic unit in the sense of an established work organisation, i.e. a sufficiently structured and independent totality of persons and property, had been transferred for the exercise of an economic activity with its own purpose. For this, it is necessary after the jurisdiction of the German Federal Labour Court that the contractor takes over the core of the function necessary for the creation of value and continues this essentially unchanged and identity-preserving (BAG, judgment of 25 August 2016 – 8 AZR 53/15; BAG, judgement of 6 April 2006 – 8 AZR 222/04.

As an orientation for the question of whether the core of the functional relationship required for value creation has been transferred, the distinction between so-called resource-influenced activities and resource-poor activities (more precisely: activities influenced by human labour) can be used. Whereas in the case of activities characterised by operating resources the transfer of essential operating resources can already trigger a (partial) transfer of an undertaking, this is only conceivable in the case of activities with little operating resources if the contractor, successor to the contract etc. takes over a significant part of the employees in terms of number and expertise.

For example, if the new service provider only takes over the staff but no operating resources, it depends on how important the staff is compared to operating resources. If the resources are similarly important, there is usually no transfer of business (e.g. takeover of a rescue service with the staff, but not the ambulance vehicles).

If the staff is more important than the operating resources, there is a transfer of business if:

the new service provider takes over significant parts of the old staff;
this staff forms an operational unit; and
no significant changes take place in the nature or organisation of the work.

For example, outsourcing of the entire cleaning staff of a hospital to a service provider, whereby the cleaning for the hospital is now the responsibility of the service provider. The staff of the service provider has the same tasks in the clinic as before. Ultimately, however, it is not always easy in German law to determine when activities are to be classified as resource-influenced and when as labour-intensive.

Subject: Transfer of undertakings

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Parties: Sabbatini – v – De Vitia

Court: Italian Court of Cassation, Employment Law Section

Date: 29 March 2019

Case number: Decision no. 8922

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