

SUMMARY

2020/38 Supreme Court rules on the principle of continuity of civil service law in connection with a transfer of undertaking (FI)

The Finnish Supreme Court has overturned a Court of Appeal decision regarding a transfer of a municipal civil servant to a company during the privatization of a public utility company. The Supreme Court held that an employment relationship had not been established between the transferee and the unlawfully dismissed municipal civil servant despite the principle of continuity of civil service law. The concrete actions of the transferee had an important role in defining that no employment relationship had been constituted between the dismissed municipal civil servant and the private company.

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Legal background

According to Section 25 of the Municipal Civil Servants Act

(304/2003, as amended), when an undertaking is transferred from a public utility company to a private company, i.e. privatized, the rights and obligations of the employer arising from a civil servant's service relationship (the 'civil service') valid at the time of the transfer devolve to the transferee. This, however, excludes the rights and obligations resulting specifically from the civil servant status that are not typical of an employment relationship.

The above Act also establishes a *principle of continuity* of civil service law (Section 44). According to the principle, the civil service is considered to continue uninterrupted if the termination is later found unlawful by a non-appealable judgment. The civil service is then to be restored as if no termination had taken place. This concept of restoring a service relationship is not applicable to employment relationships in Finland – rather it is specifically related to the status of a civil servant.

Facts

The municipal civil servant had worked as a lecturer in a public utility company that had terminated the service due to production-related and reorganizational grounds on 7 February 2013. After a decision rejecting her administrative review concerning the unlawfulness of the termination, the former municipal civil servant had then appealed the decision to the Administrative Court and after that to the Supreme Administrative Court. On 30 December 2016, the Supreme Administrative Court ruled that the dismissal of the civil servant did not have sufficient grounds and was thus unlawful.

During the appeal process the public utility company, from where the municipal civil servant was dismissed from, was transferred to a private company. This transfer of undertaking took place on 1 January 2014. The remaining municipal civil servant positions had been abolished prior to the transfer and these former civil servants were transferred to the receiving company as employees whilst retaining the terms and conditions of employment as they were.

The previously dismissed municipal civil servant had after the transfer been employed by the transferee as a part-time teacher and librarian for the transferee company (from 1 January 2014 to 31 December 2014 and from 1 January 2014 to 31 March 2014, respectively).

Proceedings

After the Supreme Administrative Court's decision regarding the unlawfulness of the termination, the former municipal civil servant initiated proceedings at the Kainuu District Court, primarily demanding that the Court obliged the company, as a

transferee, to pay compensation for unearned salary as a civil servant for the period of 1 January 2014 until 31 December 2016 and secondarily that the Court obliged the company to pay the same amount as salary according to the Employment Contracts Act (55/2001, as amended) as well as compensation for unlawful termination of the employment relationship. The claimant argued that due to the continuity principle, her illegal dismissal prior to the transfer should be deemed ineffective and thus she should be treated as if she had transferred to the private company as an employee. She had been at the disposal of the employer since 1 January 2014 and was therefore entitled to salary and ultimately to compensation for unlawful dismissal.

The company contested all claims. Both parties then jointly pleaded the District Court to give an interlocutory judgment. In the interlocutory judgment, the District Court accepted the municipal civil servant's claims that her service relationship had been in force at the time of the transfer in accordance with the continuity principle and that an employment relationship had thus been established between the company as a transferee and the former municipal civil servant. Therefore, the civil servant had the right to the salary from 1 January 2014 onwards and was entitled to compensation due to unlawful termination of employment.

The company appealed the judgment. The Court of Appeal did not overturn the outcome of District Court's judgment on interlocutory judgment. The company received a leave to appeal and appealed the Court of Appeal's decision on the establishment of an employment relationship between the dismissed municipal civil servant and the transferee to the Supreme Court.

Judgment

In its judgment, the Supreme Court had to assess whether an employment relationship had been constituted between the transferee and the previously dismissed municipal civil servant on the date of the transfer due to the continuity principle and, if so, was the former civil servant entitled to the unpaid salary under the Employment Contracts Act as from the day of the transfer.

The Supreme Court referred to the ECJ's judgment *Collino and Chiappero* (14 September 2000, C-343/98) in which the ECJ stated that the directive (at the time 77/187/EEC) can be applied when a public utility company is transferred to a private company. However, the directive does not apply to persons who are not protected as employees under national employment law, regardless of the nature of the tasks those persons perform. In this preliminary judgment, the ECJ had concluded that civil servants are not

employees within the meaning of the directive. The Supreme Court noted that the codified directive (2001/23/EC) has not extended the concept of employee and therefore the prior ECJ case law should still be observed.

According to the legislative preamble regarding Section 25 of the Municipal Civil Servants Act, the transfer of rights and obligations does not include rights specifically linked to civil service, for example the continuity principle set out in Section 44 of that Act. The continuity of civil service falls within the scope of national derogations. The Supreme Court considered that there was no reason to interpret the restrictive provisions regarding the rights and obligations transferring during privatization restrictively so that the transferee would be obliged to foresee taking on civil servants, formerly dismissed by the transferor, due to the continuity principle. However, in assessing the transferee's conduct in the present case, the Supreme Court was bound by the fact that the civil service was deemed to have been in force at the time of the transfer of the undertaking on 1 January 2014.

The Supreme Court then went on to evaluate what meaning should be given to the conduct of the transferee after the transfer. The Supreme Court had ruled in previous precedents concerning transfer of undertaking (KKO 2000:7 and KKO 2008:88) that the employment relationship, not terminated prior to transfer, had de facto been terminated due to the fact that the transferee had not taken the employees on. The Court stated that in this case the company's understanding had been that the municipal civil servant had been dismissed prior to transfer and that she was not in fact one of the civil servants who transferred as employees. The municipal civil servant had not argued at the time of transfer that she should also transfer. On the other hand, the private company as a transferee had not informed her about the company's understanding on the possibility to transfer. The fact that the former municipal civil servant had worked as part-time teacher and librarian indicated that her employment was not based on the transferred rights and obligations. When the company had not taken her on due to transfer, it can be concluded that the company had de facto prevented her from transferring.

Taking all the circumstances into consideration, the Supreme Court concluded that no employment relationship could be considered as having been established between the former municipal civil servant and the transferee. Therefore, the former municipal civil servant was not entitled to salary from the transferee as from the date of the transfer.

Commentary

In this judgment, the Supreme Court has held that the principle

of continuity does not automatically oblige the transferee to foresee taking on previously dismissed municipal civil servants who have contested the legality of their dismissal but rather that the concrete actions of the transferee have an important role on the possible establishment of an employment relationship.

The Supreme Court emphasized the actual circumstances of the case in which the conduct of the transferee was significant in preventing the employment relationship from being established. This further strengthens the Supreme Court's interpretation made already in the judgment KKO 2000:7. Only this time the Supreme Court extended the interpretation to also include privatization situations.

The Supreme Court's decision needs to be considered in light of the fact that the Employment Contracts Act does not recognize a situation where a termination could be overturned due to unlawfulness of the termination. In fact, no such construction where a dismissed employee's employment could be reinstated due to unlawfulness of the dismissal exists in Finnish employment legislation (except in civil service law). Since the principle of continuity is not applicable to employment relationships, the only possible remedy for a termination of employment in connection with a transfer of undertaking is compensation for an unlawful dismissal. Under the Employment Contracts Act, a court cannot reinstate an employment relationship.

Comment from other jurisdiction

Austria (Hans Georg Laimer and Lukas Wieser, Zeiler Floyd Zadkovich): Austrian legal scholars, based on the ECJ's judgment in *Collino and Chiappero* (14 September 2000, C-343/98), also take the view that civil servants are excluded from the scope of the Austrian transfer of undertaking provisions (*cf. Gahleitnerin Neumayr/Reissner, ZellKomm3 § 3 AVRAG Rz 37*). Thus, in the case where an actual civil servant relationship in respect of the alleged transferor is found, Austrian courts may also not assume a transfer of the employment relationship under the transfer of undertaking provisions. This may in our view also hold true in the case where an employment commences in respect of the alleged transferee after the transfer took place. Such an employment then may only qualify as a new relationship, without considering the previous relationship as a civil servant. However, whether the civil servant relationship in respect of the alleged transferor was terminated may have to be assessed based on the specific facts and laws applicable. Nevertheless, no Austrian Supreme Court case law currently exists regarding similar cases. Thus, an Austrian court may follow the Finnish District Court's decision and qualify such a situation as a transfer of undertaking.

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