

SUMMARY

2020/39 Termination of franchise arrangement and entering into subsequent arrangement constitute a transfer of undertaking (IR)

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Legal background

The Acquired Rights Directive 2001/23/EC was implemented in Ireland by the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (the 'Regulations'). The Regulations apply to the transfer of an undertaking, business, or part of a business or undertaking, from one employer to another. A 'transfer' is defined as the "transfer of an economic entity which retains its identity".

In Ireland, in very general terms, in order for the Regulations to be triggered there must be the transfer of significant tangible or intangible assets or the transfer of the major part of the workforce (whether in terms of numbers or skills).

Facts

An Post is a State company and the national postal service provider in Ireland and provides other State services such as passport applications, social welfare services and the collection of television licences.

Many of An Post's regional post offices are operated and managed by individual retail partners – similar to a franchise arrangement. In this instance the complainant worked for one of these retail partners ('employer A'). Employer A retired and another retail partner (the 'respondent') entered into an arrangement with An Post to provide post office services in the same town. The respondent failed to offer employment to any of the employees of employer A, including the complainant whose employment terminated as a result.

Whilst the complainant in this case filed a myriad of claims in relation to the termination of her employment, the focus of this case report is on the alleged application of the Regulations to her employment and the termination thereof.

Here we look at the various factors which the adjudication officer of the Workplace Relations Commission considered when analysing whether the Regulations had been triggered in this instance.

The complainant commenced employment with employer A in 2017. On 12 April 2019, employer A ceased providing a post office service. Employer A issued a letter to the complainant advising that her employment would transfer to the respondent under the Regulations. On 15 April 2019, the respondent took over the operation of a post office in the same town albeit in a different location. The respondent operated the post office from its premises where it operated a supermarket.

Ultimately the respondent did not offer the complainant employment on the basis that, it alleged, the Regulations did not apply given the following:

– No assets or employees transferred from employer A to the respondent.

– There was no transfer of premises or lease from employer A to the respondent.

– Much of the assets and equipment required to operate the post office were provided by the respondent. However, the respondent did accept that the use of certain equipment previously used by employer A was provided to it, i.e. computer screens, electronic weighing scales, electronic keypads, signing pads and the working safe – however

the use of this equipment was supplied by An Post and not transferred by employer A.

– Account records for each customer were not transferred from employer A as this information can only be accessed in a post office once the customer presents themselves and are not the property of one particular post office.

– The manner in which the respondent operated the post office differed significantly from employer A. The respondent stated that it was operating from different premises, the management and staff were different, the opening hours were different, and the business model was different with the respondent relying on a significant level of cross purchasing between the supermarket and the post office.

Decision

When reviewing the evidence, the adjudication officer focused on the following factors when deciding whether there had been a transfer of an undertaking.

1. *Was the undertaking a stable undertaking, with an ongoing life of its own?*

Yes. It was accepted that the structure of the post office arrangement (i.e. similar to a franchise) allowed individual post office operators to have access to An Post's proprietary knowledge, processes and trademarks. That being the case, once the respondent and An Post entered into an arrangement, the respondent benefited from An Post's stability, a stability which stems from a large State corporation, notwithstanding the cessation of employer A's operation. The adjudication officer also took into account the fact that An Post engaged the respondent in 2019 when it was publicly known that An Post was not renewing contracts with other post offices in different locations throughout Ireland where the operation was no longer viable on the basis of reduced footfall.

2. *Has the entity retained its identity?*

Yes. The identity of the services provided by employer A and the respondent were identical.

3. *Have some or all of the staff been taken over by the new employer?*

No. No staff were taken over by the respondent.

4. *Has the customer base transferred?*

Although a customer base is not tied to any particular post office, the adjudication officer held that it is well recognised that the main customer base for any post office lies within its geographical area and there was no reason to believe that the overwhelming majority of those who availed of the post office service provided by employer A on a Friday did not then follow the service to the respondent from the following Monday. It is reasonable to conclude that a significant proportion of the customer base transferred and, in arriving at this conclusion, it is understood that the post office operated by the respondent is the only post office in the particular geographical location.

5. *Are the activities post-transfer similar to those carried out before the transfer?*

Yes.

6. *Has there been an interruption of the activity?*

No.

7. *Has there been a transfer of assets?*

Although there may not have been the transfer of material assets directly from employer A to the respondent, the adjudication officer held that the respondent was provided with access to An Post's proprietary knowledge, processes and trademarks as well as logos, assets in the form of stamps, licences and all of the paraphernalia which is required to provide the postal and ancillary services delivered through the An Post retail network.

The adjudication officer held that the fact that the premises did not transfer was not fatal to the operation of the Regulations as the premises in individual contracted post offices does not form part of the An Post business and is not part of the asset base of that business. The operator is required to provide the building and therefore there was no physical asset of this nature to transfer.

It was accepted that hard customer files did not transfer between employer A and the respondent. However, the adjudication officer held that the asset in any situation where a private operator is contracted to provide a service on behalf of a State company such as An Post, is access to the central server and system of An Post through which most of the services operate and without which the range of services operated by An Post cannot be provided.

Whilst accepting the case at hand did not perfectly meet all of

the tests set out in applicable case law, the adjudication officer concluded there was a transfer of an undertaking from employer A to the respondent.

That being the case, the adjudication officer held that the employment of the complainant did, or ought to have, transferred from employer A to the respondent. Instead the complainant was dismissed by the respondent based on its erroneous interpretation of the Regulations. The complainant was awarded €4,000 in compensation.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Lukas Wieser, Zeiler Floyd Zadkovich): Austrian courts would apply similar tests as the adjudication officer did and also those established in the ECJ case law in assessing whether a situation qualifies as a transfer of undertaking. (cf. Austrian Supreme Court 9 ObA 55/98y). However, not all tests or a specific number of them must be met for a situation to qualify as a transfer of undertaking. Such an assessment must be done on the overall facts and outcomes of the tests applied. In particular, if there is no direct contractual relationship between the transferor and the transferee this may not prevent a situation as qualifying as a transfer of undertaking under Austrian law.

As far as can be seen the Austrian Supreme Court has not as yet had to decide if the change of a franchisee may qualify as a transfer of undertaking. However, in line with Austrian case law in relation to other cases of a change of contractor (e.g. Austrian Supreme Court 8 ObA 122/03d) Austrian courts may have come to a similar assessment as the adjudication officer and qualify the situation as a transfer of undertaking.

Greece (Effie Mitsopoulou, Effie Mitsopoulou Law Office): As we have already mentioned in our case report 2020/23 the Greek courts, following the Supreme Court guidelines, proceed to a substantial control when ruling on the existence or not of a transfer of undertaking. It is not sufficient to simply proceed to an identification of the several factors and/or indications, to draw in other words a list of those factors – as the adjudication officer focused in the case at hand – but they must seek to establish that indeed the functional link of interdependence between the business factors transferred exists so that the business transferred forms an independent autonomous economic entity. It is essential that the transferred assets must constitute an organized totality retaining its functional and organizational link in order to pursue an identical or analogous activity.

In line with the above, the Greek Supreme Court had recently refrained from ruling on a relevant case and submitted a preliminary ruling to the ECJ. The famous *Ellinika Nafpigeia AE* case (C-664/17) accepted that Council Directive 2001/23/EC must be interpreted as applying to the transfer of a production unit where, first, the transferor,

the transferee, or both those persons jointly, act with a view to the transferee pursuing the economic activity engaged in by the transferor, but also with a view to the transferee itself subsequently ceasing to exist, in the context of a liquidation. Secondly, the unit at issue, lacking the ability to attain its economic object without having recourse to factors of production from third parties, is not totally autonomous, provided that – matters which are for the referring court to establish – first, the general principle of EU law requiring the transferor and transferee not to seek to obtain fraudulently or wrongfully the advantages that they might derive from Directive 2001/23 is observed and, second, the production unit concerned has sufficient safeguards ensuring it access to the factors of production of a third party so as not to be dependent upon the economic choices unilaterally made by the latter.

We consider that in the case at hand the Greek courts would have established the existence of a transfer given that the transferred business retained its identity.

Subject: Transfer of Undertakings

Parties: Anonymous – A Post Office Worker – v – A Post Officer Operator

Court: Workplace Relations Commission

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