SUMMARY

2016/2 Transfer of undertaking requires overall assessment (DK)

<p>The Danish Supreme Court recently affirmed that the transfer of a canteen contract to another operator following a tender process did not fall within the scope of the Danish Transfer of Undertakings Act.<lb/>The Danish Transfer of Undertakings Act applies to the transfer of an undertaking or part of an undertaking, meaning an economic entity which retains its identity. In the test of whether a transfer is a transfer within the meaning of the Act, an overall assessment of all facts surrounding the transfer must be made. This was the issue in this case before the Supreme Court.</p>

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Facts

The case concerned a large accountancy firm with a lunch canteen operated by an external canteen operator. The canteen was primarily meant for the 600-700 employees of the accounting firm, but it was also used by the employees of the other firms located in the same

building.

In connection with relocating to a new domicile, the accountancy firm invited tenders for the canteen contract. A new canteen operator won the contract to operate the canteen at the new premises with effect from the date of the accountancy firm's relocation.

However, the original canteen operator continued operating the canteen at the accountancy firm's former address without any changes, a canteen that also served other businesses with hungry employees and customers. The original canteen operator used the same kitchen and the same facilities – only a mixer and a vending machine were brought along to the new domicile.

The accountancy firm's relocation resulted in an 80% loss of revenue for the original canteen operator at the former address. The original canteen operator therefore had to dismiss a number of employees. This resulted in discussion about whether dismissing the employees was in conflict with the Danish Transfer of Undertakings Act.

One of the affected employees believed that the situation constituted a transfer within the meaning of the Danish Transfer of Undertakings Act, given the fact that the regular customers, the operation of the canteen and the task of serving lunch to 600-700 people had transferred to the new canteen operator. According to the employee, this made it a case of unfair dismissal. The employee brought proceedings against the original canteen operator as well as the new canteen operator.

The original and the new canteen operator did not agree that the employee was protected under the Danish Transfer of Undertakings Act, since there had been no transfer of operating equipment or employees. Instead, it argued, the deciding factor should be the fact that the canteen as such had relocated and that the former canteen kitchen was still being used by the former canteen operator.

Judgment

The Supreme Court sided with the two canteen operators, thus affirming the judgment of the Danish Maritime and Commercial High Court. The Supreme Court first stated that the Danish Transfer of Undertakings Act must be interpreted in accordance with the Transfer of Undertaking Directive (2001/23/EC).

Further, the Supreme Court noted that the test of whether or not the Act applies must be based on well-established case law from the ECJ, including the ECJ's ruling of 9 September 2015 in case C-160/14 (Da Silva e Brito), paragraphs 26-27, which provides that all facts surrounding

the transfer must be taken into account.

Paragraph 26 of the ruling in C-160/14 states:

"In order to determine whether that condition is met, it is necessary to consider all the facts characterising the transaction concerned, including in particular the type of undertaking or business concerned, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (...)"

The Supreme Court emphasised that the original canteen operator had continued providing its canteen services without any changes, using the same operating equipment as before, and that there had been no transfer of assets or employees (except for an employee who had now become a waiter). Accordingly, the Supreme Court found that there was no transfer within the meaning of the Danish Transfer of Undertakings Act.

Commentary

With this judgment, the Supreme Court has emphasised that the test of whether a transfer is within the meaning of the Danish Transfer of Undertakings Act must include an overall assessment of all facts surrounding the transfer.

As has already been established under Danish case law, the judgment once again confirms that the transfer of a contract is not in itself sufficient to qualify as a transfer within the meaning of the Danish Transfer of Undertakings Act.

Comments from other jurisdictions

Belgium (Isabel Plets): In order to determine whether a transfer of undertaking has taken place, Belgian Courts will also assess all concrete facts characterizing the transaction in question. No single factor is decisive.

Elements that are taken into account are:

the type of undertaking or business;
whether or not the business's tangible assets are transferred;
the value of its intangible assets at the time of the transfer;
whether or not the majority of its employees are taken over by the new employer;
whether or not its customers are transferred;
the degree of similarity between the activities carried on before and after the transfer;
the period, if any, during which those activities were suspended.

Belgian courts tend to give a very broad interpretation to the concept of transfer of undertaking. Therefore, a large number of operations are qualified as transfer of undertaking.

Subject: transfer of undertakings

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