EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2018/8 Insourcing of fitness services by hotel constitutes a transfer of undertaking (IT)

<p>A change of service provider may amount to the transfer of an undertaking. While this should not be surprising in itself, the authors discuss recent changes in Italian law in this case report.</p>

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Facts

This Italian Court of Cassation decision concerns the various changes of service provider that took place in a fitness centre located within a Hilton hotel. Initially, the fitness centre had been operated by the Hilton. Later on, the service was assigned by the Hilton to an external provider, Eschilo 1, and it was then assigned on (either by the Hilton or Eschilo 1) to another provider, Caldolo Fitness. It appears from the judgment that the assignments were made by means of 'service assignment agreements' from one service provider to the next. No 'transfer of business agreement' or anything similar was made between any of the parties. Some time later, Hilton decided to take the fitness centre back in again and operate it itself.

Initially, one of the employees successfully claimed reinstatement with Caldolo, his employer at the time of the claim (2008). In the meantime, however, the Hilton had insourced the fitness centre again and so the employee asked for an injunction against the Hilton, based on the reinstatement order obtained against Caldolo. The Hilton opposed the injunction and this led to the employee bringing full cognition proceedings against the Hilton.

At the time, Italian law contained an express provision to the effect that the termination of a contract for services did not constitute the transfer of an undertaking. The Court of Appeal of Rome, without specifically noting this provision, held that the insourcing by Hilton did not constitute a transfer, as the parties had only signed services agreements, rather than transfer of business agreements.

Judgment

On appeal to the Court of Cassation, the employee argued that the existence of an assignment of services agreement did not exclude the possibility that a transfer of business had taken place. In fact, the employee asserted that a transfer had taken place, as the premises, equipment and overall organisation of the fitness centre and almost all of its employees had transferred to the Hilton.

The Court of Cassation upheld the employee's claim, holding that a transfer can take place even in the absence of a 'transfer of business' agreement, provided relevant assets, sufficient to carry out the services, transfer at the same time and that the business retains its identity. It also held that the Court of Appeal of Rome had been wrong to concentrate only on the contract for services and not on other relevant facts, such as the transfer both of assets and the majority of the employees. The Court of Appeal had also neglected to consider the characteristics or 'identity' of the business activity carried out by the various providers, and to what extent that identity had continued in place when the service reverted to the Hilton. It therefore referred the case back to the Court of Appeal of Rome to decide whether there had been a transfer on the facts.

Commentary

The Court of Cassation confirmed in this case that the absence of a transfer of business agreement is not sufficient to decide whether a transfer has taken place.

Recently, there have been certain changes in Italian law connected to transfers of undertakings and the assignment of services. These have not been applied to the case at hand, but they provide an indication of the direction of travel in Italian law. They include a provision that when an indemnity for unlawful termination is calculated, an employee's entire length of service, including time under several different service providers, will be taken into account. Changes in service providers will therefore not reduce entitlement to a full indemnity. Having said that, this provision comes against a background of certain significant Italian reforms effective since 7 March 2015, which made reinstatement with an employer exceptional, and unlawful termination only subject to an indemnity based on length of service.

Another new provision stipulates that hiring personnel who have previously carried out the same job for a different service provider should not be considered as the 'transfer of (part of) an undertaking' if there are 'discontinuity elements' causing a change in the identity of the undertaking. This clause is included in the legislation on service contracts and therefore is somewhat 'hidden' with respect to transfers of undertakings. It replaces a previous provision that essentially stipulated that a change in services contracts did not constitute the transfer of an undertaking. This last provision had been subject of an EU infraction procedure, although it remains to be seen if the new provision ensures compliance with EU law.

These new provisions have been put in place against a backdrop of declining legal protection of employees. Originally, Italian trade unions and also Italian case law – unlike ECJ case law – were quite reluctant to find that a transfer had taken place, as many transfers concerned larger companies with higher degrees of employee protection transferring to smaller employees with a lesser degree of employee protection.

As some recent law has tended to lessen employee protection, the courts seem to be moving in the opposite direction, producing a wider definition of transfers of undertakings, as a way to better protect employees. Recent legislation has also strengthened the position of employees in sectors like the one in this case, where the unions are typically are less well-organised and weaker.

Concluding, the provision which makes changes of the service provider irrelevant for calculation of the new indemnity for unlawful termination offers the employee more protection. However, as the new provision on (excluding situations from) transfer of undertakings is unclear, we doubt that it may result in a wider workers' protection

Comments from other jurisdictions

Germany (Daniel Zintl, Luther Rechtsanwaltsgesellschaft mbH): The core statements of the decision are in line with German Labour Law and the jurisdiction of the Federal Labour Court ('Bundesarbeitsgericht').

A transfer of business agreement or similar between the acting parties is not necessary to establish the transfer of a business in the sense of section 613a of the German Civil Code. The relevant provision ('Übertragung durch Rechtsgeschäft') only excludes universal succession and transactions by operation of law. Transfer by legal transaction can cover any cases where an operating unit continues to function within the framework of either a contractual or other lawful transaction, without there being any direct contractual relationship between the previous owner and the transferee. This means that even an indirect transfer could suffice, for example the re-leasing of a restaurant to a second tenant after the property was returned to

the landlord by the first tenant.

As in the reported case, the German courts would also have analysed the facts and assessed the different factors at play, particularly that all the equipment was taken over, the fitness centre was organised by the Hilton and nearly all the employees were taken on. In addition, it would have checked that the business had continued without a break (German case law tends to use 4 to 6 months as a threshold).

Another important factor in the case and also under the German Labour Law is whether operating unit continues to work in a way that retains its identity. For example, it could have led to a different outcome if the fitness studio had changed its concept from a women's only to a men's only studio with different equipment, services and programmes. The jurisdiction of the Federal Labour Court in Germany requires that the relevant functional correlations leading to the creation of value must be preserved for there to be a transfer of the undertaking. Mere support functions do not characterise the identity of an operating unit.

Subject: Transfers of undertaking, transfer

Parties: A.I. – v – Hilton Italiana s.r.l.

Court: Court of Cassation

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