

Case Reports

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Failure of the transferor of a business to fully inform the transferee about employees' rights (CR)

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Summary

The transferee dismissed the plaintiff immediately upon the transfer, for business reasons. The plaintiff claimed the dismissal was invalid because the transferee did not consult the union representatives who were transferred. The Supreme Court held that, in the absence of a works council, the union representative has, by law, all rights and obligations with regard to information and consultation. Failure to abide by the information and consultation rules rendered the decision to dismiss invalid.

Facts

The plaintiff in this case was an employee working under an indefinite term employment contract as a journalist associate with the first defendant, which was a transferee and a newspaper company. The transferee acquired the business from the second defendant, the transferor, including the plaintiff's employment contract. The plaintiff was dismissed for business reasons (i.e. necessary cost reduction) by the transferee immediately after the business was transferred from the transferor.

The plaintiff brought an action before the first instance court claiming that the dismissal was invalid. The plaintiff argued that the transferee did not comply with the mandatory rules of the Croatian Labour Act relating to the transfer of employees. In particular, the transferee did not consult the works council, or in the absence of one, the union representative, regarding the proposal to

dismiss, prior to doing so. At the time of the transfer, there was no works council at the transferor. However, two of its employees had been assigned as union representatives of the Trade Union of Croatian Journalists and the Trade Union for the Printing and Publishing Industry. The court noted that the transferee did not consult these union representatives about the dismissal. The transferee claimed it did not know that there were union representatives in place, as the transferor had never divulged that information. The transferee was, however, properly informed about the financial obligations arising from the transferred employment contracts as well as the full financial situation of the business subject to the transfer.

The first instance court held for the plaintiff, ruling that the dismissal was invalid because the consultation obligations had not been met. The court found that transferee was obliged to consult the union representatives, in absence of a works council, regarding the proposed dismissal.

The Court of Appeal upheld the lower court's judgment.

Judgment

The Supreme Court upheld the lower courts' judgments, stating that one of the main principles of labour law is that employees whose employment contracts are transferred to a new employer, retain all rights arising from the employment relationship. The court emphasized that one of those rights, as enshrined by the Labour Act, relates to the existence and activity of the works council. The Act also states that if there is a works council in the undertaking being transferred, it shall continue with its activities until the expiry of its mandate. The Act further provides that if there is no works council, the union representative, if any, shall take on the rights and obligations of the works council.

The main question that arose in the proceedings was what the transferor was obliged to tell the transferee about the 'rights of the employees'. Did this include information about union representative(s), and if the transferor failed to provide it, would this affect the status of the union representative within the transferee after the transfer?

The Supreme Court held that the existence and the activity of the union representative did represent one of

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the rights of the employees whose contracts transferred and it was necessary for the transferor to inform the transferee about this. The Supreme Court based its opinion on the provision of law which reads that – in absence of a works council – the union representative takes on all of its rights and obligations. Thus, the union representative would continue to operate within the transferee after the transfer in the same way as the works council would have done, irrespective of any failure by the transferor to inform the transferee of his or her existence.

The plaintiff should not lose any of his or her rights arising from the employment relationship upon transfer. One of the rights of transferred employees is the employer's obligation to consult with the works council (or union representative) about a plan to dismiss. The works council (or union representative) may then provide an opinion about the dismissal. Although the employer is not bound by the opinion, failure to offer the works council or union representative the chance to comment makes any decision to dismiss invalid.

Commentary

Transfer law was introduced in Croatia by transposing the provisions of EU Regulation 2001/23 into the Croatian Labour Act. Both the Directive and the Labour Act are clear as concerns employees' rights in cases of transfers of undertakings. Croatia adopted the obligation on the transferor to notify the transferee about all rights and obligations which would transfer to the transferee, but failure to transfer a right or obligation would not affect its transfer. The Croatian Labour Act stipulates that the unions must inform employers in writing of the appointment of union representatives. If they fail to do so, the representatives would have no such role within the employer, and therefore no consultation obligation would exist. However, this was unlikely to have been the case here, as if it had been, the transferor and transferee would have won the case.

In my view, the Supreme Court correctly determined that the existence and activity of the union representative equates to the existence and the activity of a works council and therefore represents one of the employees' rights, of which the transferee should have been informed. Although it was not the transferee's fault that it was not informed, the plaintiff should not be deprived of a right to which he is entitled. Consequently, the transferee was responsible for making an invalid dismissal. It is open to the transferee to claim damages from the transferor.

One question that was not dealt with in the proceedings but could potentially have been raised by the transferee was whether the transferor consulted the union representatives on the transfer of the business prior to the transfer, and whether the union representatives gave

their opinion on it. The works council, or if none, the union representatives, are entitled to comment on the transfer and the impact it may have on employees. If the transferor failed to consult (which is likely, given that it also failed to inform the transferee about the activities of the union representatives), the decision on transfer of the business could have been declared invalid. If so, the transfer would not have happened and would have been deemed, from a legal point of view, not to have occurred. However, in order to achieve this, a transfer back would be required (as well as other steps to return to the state of affairs before the transfer) and the responsibility for the plaintiff's employment contract would then be entirely with the transferor.

Comments from other jurisdictions

Greece (Elena Schiza, KG Law Firm): The transfer of businesses is regulated in Greece by Presidential Degree 178/2002, which transposed Directive 98/50/EU into Greek law. Both the Directive and the Presidential Degree ensure that a transfer *per se* cannot be the reason for either the transferor or transferee to dismiss employees or amend their terms and conditions. The Decree aims to protect and maintain rights and obligations arising from the employment relationships.

Under the Decree, both the transferor and transferee must inform and consult with employees representatives before the transfer, regarding the proposed date of the transfer, the reasons for it, the financial and social effects on the employment relationships, and any measures that may be taken by the new employer. The same obligations are also imposed in cases in which either the transferor or transferee intends to amend or terminate employees for restructuring reasons. The 'employee representatives' usually means the work council, but if there is none or the business has fewer than 50 employees, the employees themselves should be informed in writing.

The Croatian Supreme Court has ruled that a transferee's decision to dismiss was invalid because the consultation requirements were not met. By contrast, under Greek law, the failure of the transferor or transferee to comply with the information and consultation obligations does not result in the invalidity of a decision to dismiss. If the transferor and transferee do not comply with the provisions on information and consultation, this is an administrative offence giving rise to fines in Greece.

We wonder whether the approach taken by the Croatian court was not contrary to the spirit of the Directive, as the Directive does not provide that a transfer could be invalidated as a penalty for breach of information and consultation requirements.

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): In Finland, according to the Act on Cooperation within Undertakings, a transferor and transferee must inform the staff representatives of the groups of employees affected by the transfer at the time or intended time of the transfer; the reasons for transfer; the legal, economic and social consequences to the employees of the transfer; and any measures planned for the employees. After having explained this to the staff representatives, the transferee must provide them with an opportunity to ask further questions and answer to any questions posed.

If the transfer will affect employees in other significant ways, such as redundancy, there must be a consultancy process. There are strict rules about how to go about this. If the employer deliberately or negligently fails to comply with its duty to consult before deciding who to make redundant, it could be liable to pay to every affected employee compensation, the maximum amount of which is € 34 519. Nevertheless, under Finnish law, failure to observe the consultation procedure properly does not result in the redundancies being unlawful, as the lawful grounds for redundancy are judged independently from the consultation procedure.

Subject: Transfer of undertakings, Employment terms

Parties: A.D. – v – G.I.n. d.o.o.

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