pursuant to a decision of the executive body of the municipality. However, this should not, in itself, prevent there being a transfer within the meaning of the ARD, as the result was a change of employer.

Finally, for the ARD to apply, the transfer must involve an economic entity which retains its identity after being taken over by the new employer. This must be considered on the facts, by looking, for example, at the type of business in question; whether or not its tangible assets, such as buildings and movable property, transfer; 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 transfer; the degree of similarity between the activities carried on before and after the transfer; and the period, if any, during which those activities were suspended. But, all those factors should be considered as a whole and not in isolation. The degree of importance to be attached to any one factor will also vary on the facts (e.g. *Aira Pascual and Algeposa Terminales Ferroviarios*, C-509/14).

The Court also pointed out that the mere fact that one economic entity takes over the economic activity of another is not grounds for concluding that the latter has retained its identity. Identity cannot be reduced to the activity itself. Identity emerges from several factors taken together, such as the workforce, management, the way the work is organised, the operating methods and possibly also the resources available to it (e.g. *CLECE*, C-463/09). The Court has also held that, where identity is concerned, the most important element is retention of a functional link of interdependence and complementarity between all the various factors. This means, that, for example, the transferee could use the various elements transferred in a new and different organisational structure — but to pursue an identical or analogous economic activity (e.g. *Klarenberg*, C-466/07, and *Ferreira da Silva e Brito and Others*, C-160/14).

Question (2)

In terms of whether someone whose contract is suspended because he is on long term leave transfers, the Court noted that everyone who is protected as an employee under national employment law is considered to be an 'employee'. However, the protection that the ARD gives only extends to workers who have an employment contract or employment relationship existing at the date of the transfer (*Briot*, C-386/09). Whether or not such a contract or relationship exists at that time must be assessed on the basis of national law, subject, to compliance with the mandatory provisions of Directive 77/187 (*Briot*, C-386/09).

In the case at hand, although at the date of dissolution of Portimão Urbis Mr Piscarreta Ricardo was linked to that organisation by an employment contract of indefinite duration, he was not actually working at that point because he was on unpaid leave and, under Portuguese law, this had the effect of suspending his employment contract. However, the referring court had explained the law provided that while an employment contract is suspended, all rights, obligations and safeguards are maintained. This would seem to protect Mr Piscarreta Ricardo, although this was a matter for the referring court to verify. Subject to that, the Court's view was that Mr Piscarreta Ricardo should have been treated as transferring to the transferee in accordance with Article 3(1) of the ARD.

Ruling

1. Article 1(1) of the ARD must be interpreted to the effect that, where a municipal undertaking, whose sole shareholder is a municipality, is wound up by a decision of the municipality's executive body and its activities are transferred in part to the municipality to be carried on directly by it and in part to another municipal undertaking re-formed for that purpose, whose sole shareholder is also that same municipality, that situation falls within the scope of the directive, provided that the identity of the undertaking in question is preserved after the transfer, which is a matter for the referring court to determine.
2. A person such as the applicant in the main proceedings who, because his employment contract is suspended, is not actually performing his duties, is covered by the concept of 'employee' within the meaning of Article 2(1)(d) of the ARD insofar as that person is protected as an employee under the national law concerned, which is, however, a matter for the referring court to verify. Subject to that verification, in circumstances such as those at issue in the main proceedings, the rights and obligations arising from that person's employment contract must be considered to have been transferred to the transferee, in accordance with Article 3(1) of the directive.

ECJ 19 July 2017, case C-143/16 (Abercrombie & Fitch Italia Srl), Age discrimination

Abercrombie & Fitch Italia Srl – v – Antonino Bordonaro, Italian case

Summary

A provision which authorises an employer to make an on-call contract with a worker of under 25 years of age and to dismiss that worker as soon as he or she reaches 25, pursues a legitimate aim of employment and labour

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market policy and the means to attain that objective were appropriate and necessary.

Facts

Mr Bordonaro was employed by Abercrombie from 14 December 2010 as a night warehouseman on an on-call, fixed-term employment contract. The contract provided that he must assist customers and operate a till. Mr Bordonaro worked at night four to five times per week for the first few months of his employment then, from 2011, between three and four times a week. The shifts were worked out for all the staff for each two-month period.

On 16 July 2012 – after realising that his name was no longer included in the work schedule and not having received any requests to carry out work – Mr Bordonaro contacted Abercrombie. By an email of 30 July 2012, the head HR informed him that his employment contract with Abercrombie had terminated on 26 July 2012 – his 25th birthday – and that the reason for his dismissal was that the age requirement was no longer satisfied. Abercrombie argued that Article 34(2) of Legislative Decree No 276/2003 provided the legal basis for this. It states that: *"an on-call employment contract may, in all circumstances, be concluded in respect of services provided by persons under 25 years of age or by workers over 45 years of age, including pensioners."*

National proceedings

Mr Bordonaro brought an action before the District Court of Milan (*Tribunale di Milano*) seeking a ruling that his on-call, fixed-term contract and dismissal were unlawful as a result of age discrimination. The District Court of Milan declared his action inadmissible. Mr Bordonaro then appealed to the Court of Appeal in Milan (*Corte d'appello di Milano*), which, by judgment of 3 July 2014, held that there was an employment relationship of an unlimited duration and ordered Abercrombie to reinstate him in his post and to compensate him for the loss suffered. Abercrombie appealed on a point of law against this judgment to the Supreme Court of Cassation (*Corte suprema di cassazione*). Mr Bordonaro lodged a cross-appeal. The Supreme Court of Cassation (*Corte suprema di cassazione*) had doubts as to the compatibility of Article 34(2) of Legislative Decree No 276/2003 with Directive 2000/78 and the principle of non-discrimination on grounds of age and it therefore referred a question to the ECJ.

Question referred to the ICJ

Is the rule of national law set out in Article 34 of Legislative Decree No 276/2003, according to which an on-call employment contract may be concluded in respect of services provided by persons under 25 years of age, contrary to the principle of non-discrimination on grounds of age referred to in Directive 2000/78 and Article 21(1) of the Charter?

ECJ's findings

The concept of 'worker'

The first question was whether Mr Bordonaro classified as a 'worker' within the meaning of Article 45 TFEU. As he was employed on an on-call fixed-term employment contract and worked at night four to five times per week, and as from 2011, three or four times per week, the Court found it probable that Mr Bordonaro was a 'worker', but this was a matter for the national court to assess on the facts.

Age discrimination

The Court found that the situation of a worker dismissed simply because he has reached 25, creates a difference of treatment on grounds of age and is objectively comparable to that of workers in other age categories. Therefore, it was necessary to examine whether the difference in treatment was justified.

Article 6(1) of the Directive provides that Member States may determine in which cases differences in treatment on grounds of age do not constitute discrimination, provided the differences are objectively and reasonably justified by a legitimate aim. This can include a legitimate employment policy, labour market or vocational training objective – and the means of achieving the aim are appropriate and necessary. Member States not only enjoy broad discretion in their choice to pursue a particular aim in the field of social and employment policy, but also in the definition of measures capable of achieving it (*Schmitzer, C-530/13*).

Legitimate aim

The Italian Government argued that the aim of the provision in question was to make the employment market more flexible and increase employment levels. According to the Italian Government, the fact that employers can make and terminate on-call contracts when a worker reaches 25 *"in all circumstances"*, is intended to facilitate the entry of young people into the labour market. The aim of the provision is not to give young people stable access to the labour market, but merely to give them an initial opportunity to enter it.

The Court noted that by Article 6(1) of the Directive, differences in treatment may include: *"the setting of special conditions on access to employment and vocational training, employment and occupation, including dismissal and remuneration conditions, for young people, older workers and persons with caring responsibilities in order to promote their vocational integration or ensure their protection."*

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Further, the encouragement of recruitment undoubtedly constitutes a legitimate aim of Member States' social and employment policies, in particular where access by young people to a profession is involved (*Fuchs and Köhler, C-159/10 and C-160/10*). Similarly, the Court has held that the objective of giving access to young people to the labour market in order to promote their integration or ensure their protection can be regarded as legitimate for the purposes of Article 6(1) of the Directive (*de Lange, C-548/15*).

In view of these precedents, the Court decided that facilitating the recruitment of younger workers by increasing flexibility in staff management constituted a legitimate aim (see also *Kücükdeveci, C-555/07*).

Appropriate and necessary means

As regards the appropriateness of the Italian provision, the Court found that a measure enabling employers to make flexible contracts can be considered appropriate, as this supports the overall flexibility of the labour market. Employers will find this less onerous and costly than the usual kind of contract and this should encourage them to respond favourably to job applications from young workers. The court felt that in tough economic times, it was preferable for workers under 25 to have access at some level to the labour market than to be unemployed. Therefore, it was reasonable for the Italian legislature to have adopted a provision such as Article 34(2) of Legislative Decree No 276/2003.

Ruling

Article 21 of the Charter of Fundamental Rights of the EU and Articles 2(1), 2(2)(a) and 6(1) of Council Directive 2000/78/EC must be interpreted as not precluding a provision, such as that at issue in the main proceedings, which authorises an employer to conclude an on-call contract with a worker of under 25 years of age, whatever the nature of the services to be provided, and to dismiss that worker as soon as he reaches the age of 25 years, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down for the attainment of that objective are appropriate and necessary.

ECJ 18 July 2017, case C 566/15 (Erzberger), Free movement of workers

Konrad Erzberger – v – TUI AG, German case

Summary

The exclusion of employees of a group, employed outside of Germany, from the right to vote and stand as candidates in elections of employee representatives on the supervisory board of the German parent company, is not contrary to the free movement of workers.

Facts

Mr Erzberger is a shareholder of TUI, which is the parent company of a group of companies (the 'TUI group'), operating in the tourist sector. Within the EU, the TUI group employs around 50 000 people, of whom slightly more than 10,000 work in Germany. TUI falls within the scope of the German Law on employee participation (the Gesetz über die Mitbestimmung der Arbeitnehmer, 'MitbestG'). In accordance with this law, TUI is managed by two boards, namely the management board, responsible for running the company, and the supervisory board, whose task is to oversee the management board, with the participation of workers. The supervisory board has 20 members. Half of it consists of shareholder representatives and the other half of representatives appointed by the workers.

Mr Erzberger felt that TUI's supervisory board was not properly constituted and infringed Article 18 TFEU because it discriminated on grounds of nationality, as those located outside Germany were unlikely to be German citizens. Moreover, as a person's membership of the supervisory board was lost if he or she transferred to another Member State, this tended to dissuade workers from exercising their right to free movement throughout the EU, provided for by Article 45 TFEU. Since TUI disputed Mr Erzberger's view, he brought an action before the courts.

Note that most legal advisers were of the view that the concept of 'worker' for the purposes of the MitbestG, only covers those working in organisations located in Germany. According to that view, workers in a subsidiary of a group located outside Germany, including in another EU Member State, have no right to vote or stand as candidates in elections for representatives to the supervisory board. Thus, any worker in the TUI group who is on the supervisory board must give that up if he or she takes a job in a subsidiary outside Germany. That

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