However, by Article 14(5b) of the Basic Regulation, marginal activities should be disregarded for the purposes of determining the applicable law under Article 13. (Thus, as the activity pursued by Mr Szoja in Slovakia was marginal, this would suggest Polish law might apply.)

Further, it followed from Article 14(5b) of the Implementing Regulation that Article 16 of that regulation applies to all the situations laid down in Article 14. Article 16 indicates the procedure to follow in order to determine the law applicable under Article 13 of the Basic Regulation, and must be taken into consideration.

Ruling

Article 13(3) of Regulation (EC) No 883/2004, as amended by Regulation (EU) No 465/2012, must be interpreted as meaning that, in order to determine the national legislation applicable under that provision to a person, such as the applicant in the main proceedings, who normally pursues an activity as an employed person and an activity as a self-employed person in different Member States, the requirements laid down in Article 14(5b) and Article 16 of Regulation (EC) No 987/2009, as amended by Regulation No 465/2012, must be taken into account.

ECJ 6 April 2017, case C 336/15 (Unionen), Transfer of undertakings

Unionen – v – Almega Tjänsteförbunden and ISS Facility Services AB, Swedish case

Summary

A transferee must, when dismissing an employee over a year after a transfer of the undertaking, include the time he or she worked for the transferor in calculating the employee's length of service, as this is relevant for determining the period of notice to which the employee is entitled.

Facts

Employees BSA, JAH, JH and BL are members of Unionen. BSA was employed by Apoteket AB, and JAH, JH and BL were employed by AstraZeneca AB, before ISS became their employer following a transfer of the undertakings.

On 27 July 2011, ISS dismissed BSA on economic grounds, with six months' notice. At the time of her dismissal, BSA was over 55. Her length of service with Apoteket and ISS exceeded ten years. On 31 October 2011, ISS dismissed the other three employees, JAH, JH and BL, also on economic grounds and with six months' notice, later extended by an additional five months. Those employees were also 55 or more at the time of their dismissal and each had a length of service of over ten years through their employment with AstraZeneca AB and subsequently with ISS.

When the four employees were transferred to ISS, the transferors, Apoteket and AstraZeneca, were bound by collective agreements which said that where an employee who is dismissed on economic grounds is, at the time of his or her dismissal, aged between 55 and 64 years inclusive and has service of ten years, the notice period for dismissal must be extended by six months. ISS was also bound by a collective agreement, entered into between the employers' association Almega and the trade union Unionen. Under that agreement, an employee dismissed on economic grounds was entitled to notice identical to that provided by the collective agreements that were binding on the transferors.

When they were dismissed, ISS did not grant the extended period of six months' notice to employees BSA, JAH, JH and BL. ISS said the employees did not have a continuous period of service of ten years with the transferee and, for that reason, did not satisfy the conditions for the extension. Unionen believed that infringed the rights of its members and that ISS should have taken into account the length of service of BSA, JAH, JH and BL with the transferors. The trade union brought an action claiming that ISS should be ordered to provide compensation for the loss suffered by the employees as a result.

National proceedings

The Arbetsdomstolen (Labour Court, Sweden) decided to stay the proceedings and to refer a question to the ECJ for a preliminary ruling.

Questions put to the ECJ

Is it compatible with Directive 2001/23 (Acquired Rights Directive, 'ARD'), that when applying a provision in the transferee's collective agreement a year after the transfer of an undertaking, according to which continuous length of service with a single employer is a condition for the grant of an extended period of notice, length of service with the transferor need not be taken into account, in circumstances where the employees had the right to have that length of service taken into

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account, under an identical provision in the collective agreement which applied to the transferor?

ECJ's findings

By its question, the referring court asks, in essence, whether Article 3 of the ARD must be interpreted as meaning that the transferee must, when dismissing an employee more than one year after the transfer of the undertaking, include, in the calculation of that employee's length of service (which is relevant to determining the period of notice to which that employee is entitled), that employee's length of service with the transferor.

The ARD seeks to protect employees in the event of transfers of undertakings, to ensure that their rights are safeguarded. As the ECJ has consistently held, the ARD is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the transferee employer on the same conditions as those agreed with the transferor (see, e.g. *Juuri*, C-396/07). The purpose of the ARD is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent workers from being placed in a less favourable position solely as a result of the transfer (*Scattolon*, C-108/10). With regard to Article 3 of the ARD, the objective is also to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other. It follows from this that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations (see, to that effect, *Österreichischer Gewerkschaftsbund*, C-328/13).

The ECJ has previously ruled on questions about length of service in cases of transfers of undertakings for the purposes of calculating financial rights of transferred employees (see *Collino and Chiappero*, C-343/98 and *Scattolon*, C-108/10). In those judgments, the ECJ held that, while length of service with the transferors is not in itself a right that the transferred employees may assert against the transferee, in certain cases, it is used to determine financial rights of employees, and those rights must continue to be observed by the transferee in the same way as they were observed by the transferor. Thus, although a transferee is in principle entitled to alter the conditions of pay in a way that is unfavourable to employees on grounds other than the transfer itself, the ECJ has held that Article 3(1) of Council Directive 77/187/EEC, the wording of which is essentially identical to Article 3(1) of the ARD, must be interpreted as meaning that, in calculating rights of a financial nature, the transferee must take into account the entire length of service of the employees transferred, where the obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship (see, *Collino and Chiappero*, C-343/98).

The ECJ therefore found that Article 3(1) of the ARD must be interpreted as meaning that, following the transfer of an undertaking, the transferee must include the employee's length of service with the transferor when dismissing the employee, where that is relevant for determining the notice period the employee is entitled to.

Nonetheless, the ECJ also considered Article 3(3) of the ARD, which says that in order to ensure a fair balance between the employees' interests and those of the transferee, the transferee may, on grounds other than the transfer itself, make any changes necessary to carry on its operations, provided those are permitted by national law.

The Swedish legislature, when transposing Article 3(3) of the ARD into national law, made use of the option set out in the second subparagraph of that provision. Thus, where the transferee is bound by another collective agreement at the time of the transfer and this therefore applies to the transferred employees, its obligation to continue to observe the terms of that agreement is limited to one year from the date of the transfer. However, in this case, although ISS could have altered the terms and conditions set out in the transferor's collective agreement it did not do so in a way that was unfavourable to the transferred employees. It seems the collective agreement had been neither terminated nor renegotiated. Further, it had not expired nor been replaced. The terms of the transferor's collective agreement were worded identically to the transferee's collective agreement and so the employees could not be given less favourable working conditions post transfer. In those circumstances, the ECJ believed it was necessary for the transferee to take account of length of service prior to the transfer.

Ruling

Article 3 of the ARD must be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, the transferee must, when dismissing an employee more than one year after the transfer of the undertaking, include, in the calculation of that employee's length of service, which is relevant for determining the period of notice to which that employee is entitled, the length of service which that employee acquired with the transferor.

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