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women – and crucially, for all of them the minimum height for women was 1.60m.

Therefore, the DCJ found that the aim pursued by the law could have been achieved by measures that were less disadvantageous to women, such as preselection tests of physical ability. Subject to the assessment that the national court would make on the facts, the ECJ felt the law in question was not justified.

Ruling

Directives 76/207 and 2006/54 must be interpreted as precluding a law of a Member State, such as that at issue in the main proceedings, which makes candidates' admission to a competition for entry to a police school of that Member State subject, whichever their sex, to a requirement that they be of a physical height of at least 1.70m, since that law works to the disadvantage of a far greater number of women than with men and does not appear either to be appropriate or necessary to achieve the legitimate objective that it pursues, which it is for the national court to determine.

ECJ 19 October 2017, case C-200/16 (Securitas), Transfer of undertaking, Transfer

Securitas-Serviços e Tecnologia de Segurança SA – v – ICTS Portugal – Consultadoria de Aviação Comercial SA and Others, Portuguese case

Summary

If a company terminates its contract with one business for the provision of security guard services at its facilities and then makes a new contract for the supply of the same services with another business – but that second business refuses to take on the employees of the first – the situation may be an transfer of an undertaking if the equipment essential to the performance of those services has been taken over by the second business. Further, under the Acquired Rights Directive Member States must ensure that if a business loses a service contract to another operator, this can be treated as a transfer.

Facts

Resendes and sixteen others were employed by ICTS and performed security guard services – mainly consisting of video surveillance services – for Portos dos Açores SA, based on a contract between ICTS and Portos dos Açores. Whilst performing the security services, Resendes and others wore uniforms and radio equipment, which were provided by ICTS and belonged to them. On 17 January 2013, Portos dos Açores SA issued a public tender for security guard services, which was awarded to Serviços e Tecnologia de Segurança SA (Securitas) on 17 April 2013 and would be effective 15 July 2013. When Resendes and others began performing their security guard activities, they did not use uniforms and radio equipment from ICTS, but instead, Securitas gave them Securitas uniforms and equipment showing its logo. Resendes and others later claimed in court that ICTS had informed them that from that date, their employment contracts would transfer to Securitas. However, Securitas stated that it had previously told Resendes and others that they were not Securitas staff and that ICTS remained their employer. Effectively, the employees did not receive wage from 15 July 2013.

Legal framework

Article 1(1) of Directive 2001/23 (the Acquired Rights Directive, 'ARD') stipulates that the ARD applies to the transfer of any undertaking or part of one, to another employer as a result of a legal transfer or merger. This is the case if the entity being sold or merged etc. is an economic entity which retains its identity – meaning that it is an organised grouping of resources which has the objective of pursuing an economic activity, whether or not the activity is central or ancillary.

Further, Article 3(1) of the ARD stipulates that the transferor's rights and obligations arising from employment contracts or employment relationships existing on the date of transfer must be transferred to the transferee.

The ARD has been implemented by Article 285 of the Labour Code (Codigo do trabalho) in Portugal. Further, there is a collective agreement that applies to employees. It contains a provision to the effect that the loss of a customer by an operator following the award of a service contract to another operator shall not constitute the transfer of undertaking.

National proceedings

Resendes and others requested the Court of Appeal in Lisbon to order Securitas to acknowledge that they were part of its staff and to pay their salaries plus interest for late payment from 15 July 2013. The Court of Appeal upheld their claim. Securitas consequently appealed on a point of law before the Supremo Tribunal de Justiça (Supreme Court).

doi: 10.5553/EELC/187791072018003001014

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Questions put to the ECJ

Must Article 1(1)(a) of Directive 2001/23 be interpreted as meaning that, where a contracting entity has terminated the contract concluded with one undertaking for the provision of security guard services at its facilities, then concluded a new contract for the supply of those services with another undertaking, which refuses to take on the employees of the first undertaking, that situation falls within the concept of a 'transfer of an undertaking or business' within the meaning of that provision?

Must Article 1(1) of Directive 2001/23 be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which provides that the loss of a customer by an operator following the award of a service contract to another operator does not fall within the concept of a 'transfer of an undertaking [or] business' within the meaning of Article 1(1)?

ECJ's findings

Directive 2001/23 applies to a situation in which there is a change to the natural or legal person responsible for carrying on a business and entering into employment obligations towards employees of that business. A direct contractual relationship between the transferor and transferee is not required (Merckx and Neuhuys, C-171/94 and C-172/94, and Abler and others, C-340/01).

In order to determine whether a transfer constitutes the transfer of an undertaking for EU-law purposes, it is necessary to consider the facts, including:

- the type of business involved;
- whether or not tangible assets, such as buildings and movable property, transfer;
- the value of any intangible assets at the time of the transfer;
- whether the majority of the employees are taken over by the new employer;
- whether customers are transferred;
- the degree of similarity between the activities carried on before and after the transfer; and
- the period, if any, during which the activities were suspended.

All those circumstances must be considered together as part of the assessment of the case and none should be considered in isolation. In particular, the Court has held that a national court, in assessing the facts, must take into account the type of business concerned (Aira Pascual and Algeposa Terminales Ferroviarios, C 509/14).

The degree of importance to be attached to each criterion will vary according to the activity carried on and the production or operating methods used. For example, for an activity mainly based on manpower, the identity of the economic entity will not be retained if most of the employees are not taken on by the transferee. Where, as here, the activity is based essentially on equipment, the fact that the former employees are not taken on by the new contractor is a factor, but this is not sufficient in itself to preclude the existence of a transfer within the meaning of the ARD.

It is for the referring court to assess on the facts what equipment and tangible or intangible assets were transferred to Securitas to enable it to carry out security guard activities in the facilities in question – and indeed, whether the assets were in fact made available to ICTS and Securitas by Portos dos Açores. However, it should be noted that even if it turns out that all the assets were provided by Portos dos Açores, this would not necessarily preclude the existence of a transfer (Aira Pascual and Algeposa Terminales Ferroviarios, C-509/14). In the assessment, only the equipment actually used to provide security guard services (excluding the facilities themselves) should be considered.

As to the provision in the collective agreement, the ECJ held that the loss of a service contract to a competitor is not sufficient per se to indicate the existence of a transfer. However, a legal provision that has it that if an operator loses a customer following the award of its service contract to another operator, there is in principle no transfer, does not allow for proper consideration of the facts characterising the transaction. Consequently, the ARD precludes such a provision.

Ruling

Article 1(1)(a) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses must be interpreted as meaning that, where a contracting entity has terminated the contract concluded with one undertaking for the provision of security guard services at its facilities, then concluded a new contract for the supply of those services with another undertaking, which refuses to take on the employees of the first undertaking, that situation falls within the concept of a 'transfer of an undertaking [or] business' within the meaning of that provision, when the equipment essential to the performance of those services has been taken over by the second undertaking.

Article 1(1) of Directive 2001/23 must be interpreted as precluding a provision of national law, such as that at issue in the main proceedings, which provides that the loss of a customer by an operator following the award of a service contract to another operator does not fall within the concept of a 'transfer of an undertaking [or] business' within the meaning of Article 1(1).

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