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Municipalities' repatriation of home care services did not constitute a transfer of undertaking (DK)

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Summary

The Danish Western High Court recently ruled that the Danish Act on Employees' Rights on Transfers of Undertakings did not apply to two municipalities' repatriation of home care services after a private-sector service provider went bankrupt.

Legal background

In Denmark, if an employer goes bankrupt and its employees have not received outstanding salary at the time of bankruptcy, the employees will normally be entitled to compensation from the Danish Employees' Guarantee Fund ('LG'). If, however, a business transfer has taken place, LG may refuse to cover the employees' outstanding salary.

In the case at hand, the question before the Danish Western High Court was whether or not the Danish Act on Employees' Rights on Transfers of Undertakings (the 'Act'), which implements the Transfers of Undertakings Directive (2001/23/EC), applied to two municipalities' repatriation of home care services after a private-sector service provider went bankrupt.

The High Court's decision would determine who should pay after the bankruptcy: LG (if the Act would not apply) or the municipalities (if this would be the case).

Facts

A number of Danish municipalities had outsourced a part of their home care services to a private-sector provider, Kærkommen. The municipalities' obligation to provide these home care services derives from a statutory obligation.

However, in March 2015 Kærkommen went bankrupt. Some of the municipalities had to hire new employees to be able to repatriate the care services. These employees, who became integrated into the municipalities' operating organisation, were hired for a fixed term and included former employees of Kærkommen.

After that, a dispute arose as to whether LG or the municipalities were liable to pay the outstanding salary of the former Kærkommen employees. The Danish Nurses Organization and the Danish Union of Public Employees (FOA) issued proceedings on behalf of a number of former Kærkommen employees.

During the proceedings, LG asserted that because the municipalities had hired former Kærkommen employees, a business transfer had taken place. Additionally, LG argued that the number of hours that the transferred employees had been hired to perform or had actually performed at Kærkommen should be taken into account by the High Court in its assessment of whether or not a business transfer had taken place. Furthermore, the number of transferred employees who used to work a high fixed number of hours should, according to LG, be taken into account.

Following this line of thinking, LG estimated that the number of employees taken over by the municipalities constituted less than 50% of the workforce. Then LG noted that if the assessment were instead based on the total number of hours worked, the amount would in regards to one of the municipalities constitute more than 50%. Lastly, if the number of employees with more than 28 working hours a week was taken into account, the number of employees for both municipalities would, according to LG, amount to 50% or more of the workforce.

The municipalities, on the other hand, argued that they had not taken over an economic entity which had retained its identity. For that reason, they stated that the Act did not apply. In support of this claim, the municipalities stated that they had only taken over a limited number of former Kærkommen employees. The former Kærkommen employees had not been employed by the municipalities until the bankruptcy order had been issued. Furthermore, the employees had only been hired for a fixed term to fulfil the municipalities' statutory

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service obligation. The municipalities further noted that no tangible or intangible assets of Kærkommen had transferred to them.
The municipalities also argued that they did not intend to take over a business or a part thereof from Kærkommen, a point which they had continuously expressed.

Judgment

The High Court stated that in cases concerning home care services, which are mainly based on manpower, a business transfer may – according to the circumstances – have occurred even though no tangible or intangible assets have transferred.
In order for a business transfer to have occurred, it is a condition, however, that the transferee has carried on the economic activity and has taken over "*a considerable part of the workforce which, based on numbers and skills, carried on the activity in question at the former employer*".
According to the High Court, it must in each case be decided on a discretionary basis whether or not this condition is met, and the decisive factor is whether the transferred employees make it possible to continue the relevant activity in a stable manner.
The High Court noted that there was no basis for taking into account the number of hours that the transferred employees had been hired to perform or actually performed at their former employer when determining if a business transfer had taken place.
Accordingly, the High Court took into account that the municipalities had hired less than 50% of the former Kærkommen employees and that they had not hired any managers or coordinators from Kærkommen. Furthermore, the municipalities had hired a considerable number of employees who were not former Kærkommen employees. Due to these circumstances, the High Court found that the municipalities had not taken over a considerable part of the workforce which, based on numbers and skills, carried on the activity in question at the former employer.
The High Court subsequently stated that no other circumstances had been established according to which the identities of the two local Kærkommen entities in question could be considered retained. Further, the High Court found no basis for holding that there had been an attempt to bypass the Act.
Consequently, the High Court found that no business transfer had taken place and that, therefore, LG was liable to pay outstanding salary to the former Kærkommen employees.
It should be noted that the services provided by Kærkommen arose from a statutory obligation for the municipalities to provide care services. Therefore, one of the questions in the case was if the assessment of whether or not a business transfer had occurred in any way would be affected by the fact that the services in question pertained to a statutory obligation. The High Court did not, however, address this particular aspect of the case.

Commentary

The High Court judgment first of all illustrates that, according to the circumstances, the Act may apply to cases where municipalities repatriate previously outsourced care services due to a private-sector operator's bankruptcy. The application of the Act does, however, obviously require that the normal conditions for applying the Act are fulfilled.
Moreover, the judgment emphasises the well-established principle to be applied when determining the scope of application of the Act. Thus, the assessment of whether or not a transfer falls within the scope of the Act should always be based on the facts of each individual case.
Yet, with this judgment, the High Court has furthermore made it clear that in the assessment of whether or not a business transfer has occurred, there is no basis for attaching importance to the number of hours the employees were hired to perform or actually performed at their previous employer, as no alternative calculation should be applied. On the contrary, according to the High Court the assessment of whether or not the transferee has taken over a considerable part of the transferor's workforce must be based on the actual number of employees taken over by the transferee.

Subject: Transfer of undertakings, Transfer

Parties: Danish Nurses Organization for A, B and C against Aalborg Municipality, KL intervening (B-0836-16) and the Danish Union of Public Employees (FOA) for 77 plaintiffs against the Danish Employees' Guarantee Fund (LG), Municipality of Aalborg and Municipality of Hjørring, KL intervening (B-0837-16)

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