2019/48

Transfer of undertaking applicable in case of delegation of a public service (RO)

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Summary

The delegation of a public service to a new operator after the revocation of the previous operator's licence amounts to a transfer of undertaking, even though Romanian law requires a transfer to be based on contractual relationships.

Legal background

The Acquired Rights Directive (2001/23/EC) (the 'Directive') was transposed into Romanian law by Law no. 67/2006 on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts thereof.

Pursuant to Law no. 67/2006, the transfer of an undertaking is defined as the transfer from the transferor's ownership to the ownership of the transferee of an undertaking, business or part thereof, having as its scope of business the pursuit of the same main or ancillary activity, whether or not for profit, in the event of an assignment or of a merger.

Law no. 67/2006 does *not*, therefore, recognise that a transfer of undertaking may arise in the absence of an assignment or of a merger, hence excluding *ipso facto* circumstances where no direct contractual relationship exists between the transferor and the transferee.

Law no. 67/2006 also does not properly transpose the provisions of Article 1(1)(c), which provides that an administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of the Directive. The said national law only mentions that it applies to undertakings irrespective of the nature of their share capital.

Law no. 67/2006 provides that, by way of exception to the general rule, the rules on transfers of undertakings do not apply in a case where the transferor is subject to a judicial reorganisation or bankruptcy procedure.

Facts

P.V. had been employed as a plumber by the former State-owned company *Întreprinderea Județeană de Gospodărie Comunală și Locativă* ('IJCLB') since 1973. His employer underwent a series of legal transformations, becoming a joint-stock company and changing its name to Apagrup SA in 2005.

Until 1 October 2010, when its licence was revoked by Botoșani County Council, Apagrup SA was the holder of the licence to operate the water and sewage public service in Botoșani county.

On the same date, Botoșani County Council delegated the operation of that public service and issued a new licence to another operator, N Apaserv SA. The new licence was conditional upon the continuity of the services rendered to the users.

Similar to 86 other employees of Apagrup SA, P.V. amicably ended his employment contract with Apagrup SA on 31 October 2010 and entered into a new employment contract with N Apaserv SA on 1 November 2010 for the same position.

On 21 March 2018, P.V. brought a claim against N Apaserv SA requesting the acknowledgment of the fact that, between 1980 and 2001, while an employee of IJCLB/Apagrup SA, he worked in harmful working conditions and the issuance of a certificate in that regard for the purpose of obtaining higher retirement benefits.

N Apaserv SA disputed the claim, invoking a plea of lack of standing on account of becoming the plaintiff's employer only in 2010.

The Tribunal ruled in favour of the plaintiff, on the following main grounds:

- the 86 former colleagues of P.V., who had jointly filed a similar claim against N Apaserv SA, received a favourable verdict from the Tribunal;
- N Apaserv SA started to operate the water and sewage public service on the basis of the licence issued upon revocation of the licence previously held by Apagrup SA; and

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doi: 10.5553/EELC/187791072019004004011

– N Apaserv SA and Apagrup SA had the same scope of business.

Judgment

N Apaserv SA appealed the decision of the Tribunal and reasserted its plea on lack of standing, putting forward the following main arguments which it based on Law no. 67/2006:

– it had not taken over all Apagrup SA employees;
– on 16 November 2010, shortly after the revocation of the licence, an insolvency procedure was opened against Apagrup SA (pending on the date of the current litigation), meaning that the provisions of Law no. 67/2006 did not apply on the grounds of an existing judicial reorganisation procedure;
– no assignment agreement was signed between Apagrup SA and N Apaserv SA and there was no transfer of ownership from the transferor to the transferee regarding an undertaking, a business or part thereof; and
– N Apaserv SA did not take over any activity from Apagrup SA.

Suceava Court of Appeal dismissed the appeal as being groundless and upheld the decision of the Tribunal. In substantiating its judgment, the Court relied exclusively on the Directive and on ECJ rulings, namely: Case C-175/99 (*Didier Mayeur*), Joint Cases C-171/94 (*Merckx*) and C-172/94 (*Neuhuys*), Case C-173/96 (*Hidalgo*), Case C-247/96 (*Ziemann*), Case C-172/99 (*Oy Liikenne*) and Case C-319/94 (*Jules Dethier Équipement*).
In essence, the reasoning of the Court of Appeal was that the delegation of the public service to N Apaserv SA subsequent to the revocation of Apagrup SA's licence generated a transfer of undertaking because it entailed the transfer of the most important elements associated with the operation of that public service, namely the clientele, the exploitation rights over the water and sewage systems and the majority of Apagrup SA's employees.

Commentary

The Suceava Court of Appeal has correctly qualified the delegation of a public service from one company to another as a transfer of undertaking, in line with the Directive and with ECJ case law. This approach is consistent with a clear trend by the Romanian employment courts in recent years to interpret the national law on transfers of undertakings in keeping with the relevant ECJ practice.
Unfortunately, however, there are still cases where our local courts rely exclusively on national law that they interpret in a narrow fashion, disregarding the Directive and the ECJ practice. In a recent case (Decision no. 656 of 25 May 2019), ruling on facts substantially similar to those in the commented decision by Suceava Court of Appeal, Alba Iulia Court of Appeal appears to have incorrectly ruled that the facts did not fall under the definition of a transfer of undertaking on the grounds of not being the result of a transfer of ownership as required under the national law. No reference to the Directive or to the ECJ practice appears in the text of the judgment.

Comment from other jurisdiction

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The core statements of the decision are in line with German labour law and the jurisdiction of the German Federal Labour Court (*Bundesarbeitsgericht*, the '*BAG*'). Similar to Romanian law, according to German law a transfer of an undertaking requires a change of ownership through a legal transaction (Section 613a of the German Civil Code, *Bürgerliches Gesetzbuch*, '*BGB*'). However, the BAG interprets the term 'legal transaction' very extensively in order to comply with the case law of the ECJ concerning Directive 2001/23/EC on transfers of undertakings. Hence, in accordance with the jurisdiction a direct contractual relationship between the purchaser and the transferor is not necessary. Instead, legal transactions with third parties may also constitute a legal transaction within the meaning of Section 613a BGB. For example, the takeover of all or a large part of the staff by a new service provider may lead to a transfer of an undertaking (BAG, judgment of 21 June 2012 – 8 AZR 181/11).
However, the takeover of the staff does not necessarily lead to a transfer of undertakings. If, as in the present case, there is only a change in the provision of services by another service provider, the transfer of an undertaking must be distinguished from a simple functional succession. A simple functional succession cannot be considered differently from a subsequent assignment that itself cannot trigger a transfer of undertaking. In accordance with the case law of the BAG, whether a transfer of an undertaking or a simple functional succession exists depends on the fact of whether only the service is continued (without takeover of operating resources or the employees) or – in addition to the takeover of the service – there is also a takeover of operating resources and/or parts of the workforce (BAG, judgment of 19 March 2015 – 8 AZR 150/14).
In order to determine whether an economic entity has been transferred, the character of the undertaking must be determined. A difference can be made between businesses with many assets and business with few assets (the focus here is mainly on the workforce). In the case of a business with many assets, the transfer of essential operating resources can trigger a transfer of an under-

doi: 10.5553/EELC/187791072019004004011

taking. If, as in the present case, the business is mainly based on the workforce the transfer of undertaking depends on whether a significant part of the staff is taken over.

Subject: Transfer of undertakings

Parties: P.V. – v – N Apaserv SA

Court: Suceava Court of Appeal (*Curtea de Apel Suceava*)

Date: 14 February 2019

Case number: Decision no. 164/2019

Internet publication: http://rolii.ro/hotarari/5ca01ccee490093c150000c6

doi: 10.5553/EELC/187791072019004004011