characterising the transaction must be considered. The degree of importance to be attached to each criterion will necessarily vary with the activity and the production or operating methods employed (*Ferreira da Silva e Brito and Others*, C-160/14, paras. 25-27 and the case law cited).

The specific question of the court is whether the approach adopted in case C-172/99 (*Oy Liikenne*), which concerned a contract for the provision of a bus transport service covering seven regional routes for three years, is applicable in the present case. In that case, the Court held that bus transport cannot be regarded as an activity based essentially on manpower. As the tangible assets contributed significantly to the activity and as they were not transferred, the entity did not retain its identity.

However, it cannot be inferred that the takeover of the buses must be regarded in the abstract as the sole determining factor of whether an undertaking was transferred or not. The referring court must take account of the particular circumstances of the case. In this case, it is apparent that in order to comply with the new technical and environmental standards required it would not have made sense to take over the existing bus fleet as they could not be operated. In other words, the decision not to take over the resources was dictated by external constraints, which appears not to have been the situation in the *Oy Liikenne* case.

It is also clear that the original contractor would have had to replace its bus fleet, if it had submitted a tender for a new contract. In that context, the fact that there is no transfer of operating resources, insofar as it results from legal, environmental or technical constraints, does not therefore necessarily preclude the taking over of the activity concerned from being classified as a 'transfer of an undertaking'. The referring court must therefore determine whether other factual circumstances support the conclusion that the identity of the entity has been retained and that there has been a transfer of an undertaking.

In this respect, the order for reference suggests that the bus transport service is essentially similar to that provided by the previous undertaking. It was not interrupted and has probably been operated for many of the same routes for many of the same passengers. The presence of experienced bus drivers in a rural area is crucial for the purpose of ensuring the quality of the public transport service concerned. Since a group of workers may constitute an economic entity, this can maintain its identity if the activity is continued but also where a major part, in terms of numbers and skills, of the employees is taken over. To the extent that not taking over the operating resources does not necessarily preclude the entity from retaining its identity, the taking-over of the majority of the drivers must be regarded as a factual circumstance to be taken into account.

Ruling

Article 1(1) 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 undertakings or businesses must be interpreted as meaning that, in the context of the takeover by an economic entity of an activity the pursuit of which requires substantial operating resources, under a procedure for the award of a public contract, the fact that that entity does not take over those resources, which are the property of the economic entity previously engaged in that activity, on account of legal, environmental and technical constraints imposed by the contracting authority, cannot necessarily preclude the classification of that takeover of activity as a transfer of an undertaking, since other factual circumstances, such as the taking-over of the majority of the employees and the pursuit, without interruption, of that activity, make it possible to establish that the identity of the economic entity concerned has been retained, this being a matter for the referring court to assess.

ECJ 26 March 2020, Case C-344/18 (ISS Facility Services), Transfer of undertakings, transfer, employment terms

ISS Facility Services NV – v – Sonia Govaerts and Atalian NV (formerly Euroclean NV), Belgian case

Summary

In case of a transfer of undertaking involving multiple transferees, the rights and obligations arising from an employment contract may be divided between various transferees, if this is possible. If not (or if it is to the detriment of the employee), the transferees would be regarded as being responsible for any consequent termination under Article 4 of Directive 2001/23, even if this were to be initiated by the worker.

Legal background

Directive 2001/23/EC aims to safeguard employee rights in case of a transfer of undertaking. To that end, Article 3(1) provides that the transferor's rights and

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obligations arising from an employment contract shall be transferred to the transferee.

Facts

Ms Govaerts had been employed by a predecessor of ISS since 16 November 1992. As of 1 September 2004, she had an employment contract for an indefinite period, lately as a project manager. ISS was responsible for the cleaning and maintenance of various buildings in the city of Ghent. These buildings were divided into three lots.
In 2013, ISS lost the tender of these three lots. Two of them were awarded to Atalian, and one to Cleaning Masters NV. ISS then asserted that Ms Govaerts would transfer to Atalian, which had taken on the large majority of the tender. During the subsequent proceedings, the question arose whether it would be possible that Ms Govaerts transferred to both Atalian and Cleaning Masters.

Question

When there occurs a transfer of an undertaking, within the meaning of Article 1(1) of Directive 2001/23, involving a number of transferees, must the first paragraph of Article 3(1) of that Directive be interpreted as meaning that the rights and obligations arising from a contract of employment existing at the time of that transfer are transferred to each of the transferees, in proportion to tasks performed by that worker, or only to the transferee for whom the worker will perform his or her principal tasks. In the alternative, the referring court asks whether that provision must be interpreted as meaning that the rights and obligations arising from the contract of employment cannot be asserted against either of the transferees?

Consideration

Article 3(1) does not envisage a situation where a transfer involves a number of transferees. The Directive aims to safeguard employees' rights by ensuring, as far as possible, the employment continues unchanged so that employees do not end up in a worse position (but also not better). Also, the transferees' interests must be protected, by being able to make adjustments and changes necessary to carry on its business. The Directive seeks to ensure a fair balance.
That being the case, the fact that a transfer takes place to multiple transferees has no effect on the transfer of rights and obligations. The alternative offered by the referring court must be rejected, as it would deprive the Directive of any effectiveness. Consequently, the other two possibilities must be examined.
As regards the first possibility of transferring the contract of employment solely to the transferee with whom the worker is to perform his or her principal tasks, while this safeguards the employee's rights, it disregards the transferee's interests, who gets a full-time employment contract although the transferred tasks are only part-time.
The second possibility is that the rights and obligations are transferred to each of the transferees, in proportion to the tasks performed by the worker. In that case, firstly, pursuant to Article 2(2), the Directive is to be without prejudice to national law as regards the definition of an employment contract or relationship. Accordingly, it is for the referring court to determine how to distribute the employment contract. It may consider the economic value of the lots, or the time that the worker actually devotes to each lot. Secondly, to the extent that one full-time contract could be split up into a number of part-time contracts, Article 2(2)(a) forbids that employment contracts are excluded from the Directive's scope solely because of the number of working hours performed. Further, such transfer to multiple employees can ensure a fair balance between the protection of interests of both workers and transferees, as the employee retains their rights and the transferee takes on no more rights than the part of the undertaking it takes on.
However, the referring court must take account of the practical implications. The Directive cannot be a basis for the working conditions to worsen. In that regard, Article 4(1) of the Directive does not preclude dismissals for economic, technical or organisational reasons. Pursuant to Article 4(2), an employment contract that is terminated because of a substantial change in working conditions to the detriment of the employee, the employer, in this case the transferee, is regarded as having been responsible, even if the termination has been initiated by the employee.

Judgment

Where there is a transfer of undertaking involving a number of transferees, Article 3(1) 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 undertakings or businesses must be interpreted as meaning that the rights and obligations arising from a contract of employment are transferred to each of the transferees, in proportion to the tasks performed by the worker concerned, provided that the division of the contract of employment as a result of the transfer is possible and neither causes a worsening of working conditions nor adversely affects the safeguarding of the rights of workers guaranteed by that Directive, which it is for the referring court to determine. If such a division were to be impossible to carry out or would adversely affect the rights of that worker, the transferee(s) would be regarded as being

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responsible for any consequent termination of the employment relationship, under Article 4 of that Directive, even if that termination were to be initiated by the worker.

ECJ 4 December 2019, case C-413/18 P (H – v – Council), Miscellaneous

H – v – Council of the European Union, EU case

Appeal

Appeal to General Court of the European Union of 11 April 2018, H v Council (T-271/10 RENV, EU:T:2018:180).

By her appeal, the appellant claims that the Court should:

– set aside the judgment under appeal in so far as the General Court dismissed her action for annulment of the decisions at issue and the claim for damages;
– give a decision on the case and, if appropriate, refer the case back to the General Court for judgment; and
– order the Council to pay the appellant's costs in the proceedings which gave rise to the judgment of 19 July 2016, H v Council and Commission (C-455/14 P, EU:C:2016:569), and the costs of the present appeal.

Decision

The Court (Fifth Chamber):

1. Sets aside the judgment of the General Court of the European Union of 11 April 2018, H v Council (T-271/10 RENV, EU:T:2018:180);
2. Refers the case back to the General Court of the European Union for a ruling on the third, fourth and fifth pleas of the action for annulment and on the claim for compensation;
3. Orders that the costs be reserved.

ECJ 5 December 2019, joined cases C-398/18 and C-428/18 (Bocero Torrico), Social Insurance

Antonio Bocero Torrico (C-398/18), Jörg Paul Konrad Fritz Bode (C-428/18) – v – Instituto Nacional de la Seguridad Social, Tesorería General de la Seguridad Social, Spanish cases

Questions

Must the provisions of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State which requires, as a condition for a worker to be eligible for an early retirement pension, that the amount of the pension to be received must be higher than the minimum pension that would be due to that worker upon reaching the statutory retirement age under that legislation, the term 'pension to be received' being interpreted as referring only to the pension payable by that Member State, and not including any pension which that worker may receive through equivalent benefits payable by one or more other Member States?

Ruling

Article 5(a) of Regulation No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems must be interpreted as precluding legislation of a Member State which requires, as a condition for a worker to be eligible for an early retirement pension, that the amount of the pension to be received must be higher than the minimum pension that would be due to that worker upon reaching the statutory retirement age under that legislation, where the term 'pension to be received' is interpreted as referring only to the pension from that Member State, and not including the pension which that worker may receive through equivalent benefits payable by one or more other Member States.

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