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 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, first-

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ly, 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 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 22 April 2020, case C-692/19 (Yodel Delivery Network), Working Time, Employment Status

B – v – Yodel Delivery Network Ltd, UK case

Summary

Directive 2003/88/EC precludes a self-employed independent contractor from being classified as a 'worker' under the Directive if they are afforded discretion on the use of subcontractors, acceptance of tasks, providing services to third parties and fixing their own hours of work, provided that the independence does not appear to be fictitious and no relationship of subordination between them and their putative employer can be established.

Legal background

Directive 2003/88 (the Working Time Directive) provides minimum safety and health requirements for the organisation of working time. This Directive sets minimum periods of daily and weekly rest as well as annual leave, breaks and maximum weekly working time.

Facts and initial proceedings

B was a neighbourhood parcel delivery courier for the undertaking Yodel Delivery Network Ltd (Yodel). He carried on his business activities exclusively for Yodel. He took training sessions to familiarise himself with the handheld delivery device provided by Yodel.

These neighbourhood parcel delivery couriers were hired as 'self-employed independent contractors'. They used their own vehicles for delivery and communicated with Yodel using their own mobile phones.

The courier service agreement entailed that couriers were not required to perform the delivery personally. They could appoint a subcontractor or a substitute for the whole or part of the service provided. Yodel could veto that substitution if the person chosen did not have a level of skills and qualification equal to the requirements of a courier engaged by Yodel. The courier would remain personally liable for acts or omissions of any appointed subcontractor or substitute.

In addition, the service agreement provided that couriers could work for third parties, even for competitors of Yodel. Yodel was not required to hire the couriers, while the couriers could choose not to accept any parcels

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