



Key Issues: Transfer of Undertaking – employee rights – tenders

Case: Securitas v ICTS Portugal

Reference: Case C-200/16, CJEU (Tenth Chamber), 19 October 2017

Legislation: Directive 2001/23/EC

Mr Resendes and 16 other persons, in their capacity as employees of ICTS, performed security guard duties until 14 July 2013 in the facilities (marina, port, dock) of Portos dos Açores SA located in Ponta Delgada (Portugal), under a contract between Portos dos Açores and ICTS. They were, inter alia, responsible for monitoring the entry and exit of persons and goods, by means of video surveillance devices, in accordance with rules laid down for them by ICTS. Their employer also provided them with uniforms and radio equipment.

On 17 January 2013, Portos dos Açores launched a call for tenders for the provision of security guard and preventive security services in its facilities in Ponta Delgada. On 17 April 2013, that contract was awarded to Securitas. The employees of ICTS maintain before the referring court that, on 17 June 2013, ICTS informed them in writing that, following the award of the contract to Securitas with effect from 15 July 2013, their employment contracts would, from that date, be transferred to Securitas.

On 14 July 2013, an employee of ICTS surrendered to an employee of Securitas the radio equipment used by the employees of ICTS in the facilities of Portos dos Açores, having received instructions from his employer to that effect. Securitas then surrendered that equipment to Portos dos Açores. Securitas began performing its security guard services on 15 July 2013. It provided the security guards assigned to the performance of those services with radio equipment belonging to it and identical uniforms featuring the logo of the undertaking. Securitas also informed Mr Resendes and the other 16 persons concerned that they were not part of its staff and that ICTS remained their employer.

Consequently, they brought actions before the Tribunal do Trabalho de Ponta Delgada (Labour Court, Ponta Delgada, Portugal) against Securitas and ICTS requesting that Securitas or, in the alternative, ICTS be ordered to acknowledge that they are part of its staff and to pay their salaries plus interest for late payment from 15 July 2013 or, for three of them, compensation for wrongful dismissal. That court upheld the actions. It held that there had been a transfer of a business between the two companies and that the employment contracts of the former employees of ICTS had been transferred to Securitas. As a result, it classified their dismissal by Securitas as '*wrongful*' and ordered that company to reinstate the majority of the persons concerned and pay them various salary claims and compensation.

Securitas brought an appeal against that judgment before the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon), which upheld the judgment given

at first instance. Securitas consequently brought an exceptional appeal on a point of law before the Supremo Tribunal de Justiça (Supreme Court, Portugal). That court has doubts, in essence, as to whether the replacement of ICTS by Securitas for the provision of security guard services in the facilities of Portos dos Açores, following the award to Securitas of a service contract, falls within the notion of a '*transfer of an undertaking [or] business*' within the meaning of Article 1(1)(a) of Directive 2001/23. In those circumstances, the Supreme Court decided to stay the proceedings and to refer a number of questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

Consideration by CJEU

Directive 2001/23 (known as the Acquired Rights Directive) is applicable whenever, in the context of contractual relations, there is a change in the natural or legal person responsible for carrying on the undertaking and entering into the obligations of an employer towards employees of the undertaking. There is no need, in order for the Directive to be applicable, for there to be any direct contractual relationship between the transferor and the transferee: the transfer may take place through the intermediary of a third party. It follows that the lack of a contractual link between the two undertakings successively entrusted with managing the surveillance and security of port facilities has no bearing on the question as to whether or not the Directive is applicable to a situation such as that at issue in the main proceedings.

Where, however, the activity is based essentially on equipment, the fact that the former employees of an undertaking are not taken over by the new contractor to perform that activity, as in the case in the main proceedings, is not sufficient to preclude the existence of a transfer of an economic entity which retains its identity, within the meaning of the Directive. Any other conclusion would run counter to the principal objective of the Directive, which is to ensure the continuity, even against the wishes of the transferee, of the employment contracts of the employees of the transferor.

The referring court will have to determine whether such assets were made available to ICTS and Securitas by Portos dos Açores. In that regard, it should be recalled that the fact that the tangible assets essential to the performance of the activity at issue in the main proceedings and taken over by the new contractor did not belong to its predecessor but were merely provided by the contracting entity cannot preclude the existence of a transfer of an undertaking within the meaning of the Directive 2001/23. However, only the equipment that is actually used in order to provide the security guard services, excluding the facilities that are the subject of those services, must, where appropriate, be taken into consideration for the purpose of establishing the existence of a transfer of an entity which retains its identity within the meaning of the Directive.

The CJEU held that:

Article 1(1)(a) of Council Directive 2001/23/EC 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.

Why is this decision important?

The Acquired Rights Directive is implemented in the UK by the TUPE Regulations. Over the years, the Directive (and the TUPE Regulations) has been held by various courts and tribunals to apply to the transfer of almost every employment arrangement. Outsourcing and the replacement of service providers following competitive tender procedures is a situation which has been the subject to of much jurisprudence. This judgment helpfully clarifies the extent to which the Directive applies when equipment necessary for the provision of services is taken over by the transferee.

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