Key Issues: **Social Policy – TUPE – Collective Agreement - Period of Notice and Length of Service**

Case: **Unionen v Almega Tjänsteförbunden & ISS Facility Services AB**

Reference: **Case C-336/15, CJEU (Tenth Chamber), 6 April 2017**

Legislation: **Directive 2001/23/EC**

This request for a preliminary ruling concerns the interpretation of Council Directive 2001/23/EC (the "Acquired Rights Directive"). The request was made in proceedings between Unionen, a trade union, and Almega Tjänsteförbunden, an employers' association ('Almega'), and ISS Facility Services AB, a company incorporated under Swedish law ('ISS'), concerning the failure to take into account, following a transfer of undertakings, the length of service acquired by four employees with transferors.

The employees BSA, JAH, JH and BL are members of Unionen. BSA was employed by Apoteket AB, and JAH, JH and BL were employed by AstraZeneca AB, before ISS became their employer following a transfer of undertakings.

On 27 July 2011, ISS dismissed BSA on economic grounds, on the expiry of a six-month period of notice. At the time of her dismissal, BSA was over 55 years of age. Her length of service with Apoteket and ISS exceeded ten years.

On 31 October 2011, ISS dismissed the other three employees, JAH, JH and BL, also on economic grounds and with six months' notice, later extended by an additional five months. Those employees were also 55 years of age or older at the time of their dismissal and each had a length of service of over ten years through their employment with AstraZeneca AB and subsequently with ISS.

When the posts of the four employees were transferred to ISS, the transferors, in the present case Apoteket and AstraZeneca, were bound by collective agreements. Under those agreements, where an employee who is dismissed on economic grounds is, at the time of his or her dismissal, aged between 55 and 64 years inclusive and has a continuous period of service of 10 years, the period of notice in the event of dismissal is to be extended by six months.

ISS was also bound by a collective agreement, in the present case that entered into between the employers' association Almega and the trade union Unionen. Pursuant to that agreement, an employee who is dismissed on economic grounds is entitled to a period of notice identical to that provided for, under the same conditions, by the collective agreements binding on the transferors.

When they were dismissed, ISS did not grant the employees BSA, JAH, JH and BL a period of notice extended by six months. According to ISS, the employees in question did not have a continuous period of service of 10 years with the transferee and, for that reason, did not satisfy the conditions to which the grant of an extension of that notice was subject.

Unionen takes the view that that approach infringes the rights of its members. ISS, it submits, ought to have taken into account the length of service of BSA, JAH, JH and BL with the transferors.

In those circumstances, the Arbetsdomstolen (Labour Court, Sweden) decided to stay the proceedings and to refer a question to the Court of Justice of the EU (CJEU) for a preliminary ruling on the interpretation of the Acquired Rights Directive.

Consideration by CJEU

As the CJEU has consistently held, the Acquired Rights Directive is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the transferee employer on the same conditions as those agreed with the transferor. The purpose of that directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned from being placed in a less favourable position solely as a result of the transfer.

With regard to Article 3 of the Acquired Rights Directive, the CJEU has stated that the objective of that directive is also to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other. It follows from this that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations.

More specifically, the CJEU has previously ruled on questions of the recognition of length of service in the case of a transfer of an undertaking for the purposes of calculating financial rights of transferred employees within the meaning of that directive. In those judgments, the Court held that, while length of service with the transferors is not in itself a right that the transferred employees may assert against the transferee, the fact nonetheless remains that, in certain cases, it is used to determine certain financial rights of employees, and that those rights must then, in principle, continue to be observed by the transferee in the same way as they were observed by the transferor.

In the case in the main proceedings, it is common ground that the extended period of notice of six months claimed by Unionen confers entitlement to six months of wages. It follows that that right to an extended period of notice, determined by the conditions laid down in the collective agreements applicable to the transferor’s employees during the transfer of undertakings, is to be classified as a right of a financial nature.

It is apparent from the file submitted to the CJEU that the Swedish legislature, when transposing Article 3(3) of the Acquired Rights Directive into national law, made use of the option set out in the second subparagraph of that provision. Thus, when the transferee is, at the time of the transfer, already bound by another collective agreement, which will therefore apply to the transferred employees, its obligation to continue to observe the terms and conditions set out in to the collective agreement which bound the transferor, from which the transferred employees benefit, is limited to a period of one year from the date of the transfer of undertakings.

However, although ISS, bound at the dates of the transfers of undertakings by a separate collective agreement, was entitled, after the expiry of the one-year period, for economic reasons and thus on a ground other than the transfer of undertakings, to no longer continue to observe the terms and conditions set out in the collective agreement applicable to the transferred employees, it is not, however, apparent from the file available to the CJEU that the transferee made any adjustment to those terms and conditions in a manner unfavourable to the transferred employees.

According to the information available to the CJEU, which it is for the national court to verify, the collective agreement applicable to the transferred employees from the date of their transfer had been neither terminated nor renegotiated. Furthermore, that collective agreement had neither expired nor been replaced by any other collective agreement.

Consequently, where, after the one-year period has elapsed, no adjustment to the terms and conditions has been carried out by the transferee and the terms of the collective agreement by which the transferor was bound are worded identically to the collective agreement by which the transferee is bound, the employees cannot be made subject to less favourable working conditions than those which were applicable prior to the transfer.

The CJEU held that:

Article 3 of the Acquired Rights Directive must be interpreted as meaning that the transferee must, when dismissing an employee more than one year after the transfer of the undertaking, include, in the calculation of that employee's length of service, which is relevant for determining the period of notice to which that employee is entitled, the length of service which that employee acquired with the transferor.

Why is this decision important?

When an undertaking is to be transferred, the transferee should consider carefully the terms of any collective agreement applicable to the transferring employees and any right it may have, after the expiry of a relevant period and for economic reasons, to cease to observe the terms and conditions set out in the collective agreement. In this case the transferee appears to have omitted to take advantage of a statutory provision which may have enabled it to vary the terms of the collective agreement and reduce the notice period and, therefore, the payments to the relevant employees.

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