



Key Issues: **Transfer of Undertakings – Preliminary Ruling**

Case: **Catia Correia Moreira v Municipio de Portimao**

Reference: **Case C-317/18, CJEU (Eighth Chamber), 13 June 2019**

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

Background

On 19 April 2005, Ms Correia Moreira entered into a training contract with Expo Arade, Animação e Gestão do Parque de Feiras e Exposições de Portimão EM. On 2 January 2006, Ms Correia Moreira entered into a fixed-term contract of employment with that company for one year to perform duties as a member of the human resources staff.

On 1 November 2008, Ms Correia Moreira and Portimão Urbis EM SA ('Portimão Urbis') entered into a contract for a position of trust to perform the duties of head of the administrative management and human resources unit. That contract lasted until 30 June 2010.

On 1 July 2010, Ms Correia Moreira entered into a new contract for a position of trust with Portimão Urbis to perform the same duties. The parties terminated that contract on 1 July 2013. On the same date, she entered into a new contract for a position of trust with Portimão Urbis to perform the duties of manager of the administrative management and human resources unit, but with a reduction in her gross pay.

On 15 October 2014, the Municipality of Portimão approved the winding up and liquidation of Portimão Urbis as part of a plan to in-source some of the activities of that undertaking to the municipality and to outsource other activities to another municipal undertaking, that is to say, Empresa Municipal de Águas e Resíduos de Portimão EM SA ('EMARP'). The Municipality of Portimão and EMARP maintained in force all rights under the employment contracts concluded by Portimão Urbis.

Ms Correia Moreira was included on the list of 'in-sourced' employees of the Municipality of Portimão, who entered into a public-interest transfer agreement with Portimão Urbis, and she was assigned to administrative and human resources management services. Between 1 January 2015 and 20 April 2017, she performed the duties of a senior member of staff in human resources operations within the Municipality of Portimão.

In July 2015, the employees who came under the in-sourcing plan, which included Ms Correia Moreira, were informed by the Municipality of Portimão that their applications to the proposed competition would, assuming they were successful, result in their recruitment to the first rung of the civil service, where they would be required to remain for at least 10 years. The employees who were 'outsourced' to EMARP were not subject to such a competitive selection procedure.

A competition was initiated to which Ms Correia Moreira applied. At the conclusion of the competition, and even though she had been ranked in first place on the list, she was informed that her remuneration would be lower than what she received at Portimão Urbis, which she did not accept. On 26 April 2017, Portimão Urbis gave Ms Correia Moreira notice of the termination of her contract of employment due to the closure of the undertaking. On 2 January 2018, the conclusion of the liquidation procedure for Portimão Urbis was registered in the commercial registry.

Ms Correia Moreira applied to the District Court, Faro, Portugal for a declaration that her contract of employment with Portimão Urbis was transferred to the Municipality of Portimão from 1 January 2015, as a result of the transfer of the establishment where she worked. In view of the transfer of Portimão Urbis, she is asking the referring court to declare that the subsequent termination of the contract of employment is unlawful and that she must be brought into the workforce of the Municipality of Portimão under the same conditions as those applied to her by Portimão Urbis since 1 January 2015.

In addition, she is seeking an order that the Municipality of Portimão pay her the differences in salary between the salary which the municipality was required to pay her after that transfer and the salary which was actually paid to her. Finally, she is seeking an order that the Municipality of Portimão pay her compensation for non-material harm.

The Municipality of Portimão disputes the claims of Ms Correia Moreira arguing, first, that there was no transfer of an establishment, since the municipal undertaking was wound up in accordance with the law and the municipality merely took back the responsibilities with which it was originally entrusted, secondly, that Ms Correia Moreira performed her duties in connection with a position of trust and therefore she was not an employee of Portimão Urbis and, thirdly, that the Municipality of Portimão merely complied with the legal rules according to which all municipal officials are recruited following specific rules and are subject to the principle of equal treatment with regard to access to the civil service.

In those circumstances, the District Court, Faro decided to stay the proceedings and to refer a number of questions to the Court of Justice of the EU (CJEU) for a preliminary ruling.

Consideration by CJEU

Directive 2001/23 codified Council Directive 77/187/EEC 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 businesses. The CJEU noted that the national court, in its order for reference, expressly refers to the judgment of 20 July 2017, *Piscarreta Ricardo* (C-416/16), in which the CJEU held that Article 1(1) of Directive 2001/23 must be interpreted as meaning that a situation in which the activities of a municipal undertaking are transferred to a municipality falls within the scope of that directive, provided that the identity of that undertaking is preserved after the transfer, which is a matter for the national court to determine.

Although the CJEU does not have jurisdiction to interpret national law, as that is a matter for the referring court, it should be observed that, in the present case, the contract for a position of trust concluded with a person who is already an employee or who has no other previous employment relationship is classified as a contract of employment. Thus, it appears that a person such as the applicant in the main proceedings may be regarded as an 'employee' within the meaning of Article 2(1)(d) of Directive 2001/23 and her contract for a position of trust may be regarded as a contract of employment, for the purposes of the first subparagraph of Article 2(2) of that directive. That being so, it is apparent from the order for reference that the protection afforded to that type of employee differs from that afforded to other employees in so far as the national legislation concerned makes it possible to terminate a contract for a position of trust merely by giving notice in writing within a relatively short period and without the requirement for a legitimate reason.

The CJEU held that:

- 1. Council Directive 2001/23/EC must be interpreted as meaning that a person who has entered into a contract for a position of trust, within the meaning of the national legislation at issue in the main proceedings, with the transferor may be regarded as an 'employee' and thus benefit from the protection which that directive affords, provided, however, that that person is protected as an employee by that legislation and has a contract of employment at the date of transfer, which is a matter for the referring court to determine.**
- 2. Directive 2001/23, read in conjunction with Article 4(2) TEU, must be interpreted as meaning that it precludes national legislation which provides that, in the event of a transfer within the meaning of that directive and where the transferee is a municipality, the employees concerned must, first, undergo a public competitive selection procedure and, secondly, have a new relationship with the transferee.**

Why is this decision important?

The out-sourcing of activities by public bodies and the subsequent in-sourcing of the same activities is fraught with difficulties under EU law, in particular Directive 2001/23 on the Transfer of Undertakings. As noted in this judgment, a court can look through an arrangement, such as a “position of trust”, and decide that it is, in fact, an employment contract and that the employee is entitled to protection in accordance with the terms of the Directive.

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CLfE (7/2019)

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