

Transfers of undertakings between group undertakings

Lourdes López Cumbre

Professor of Employment and Social Security Law, Universidad de Cantabria
Academic Counsel, Gómez-Acebo & Pombo

Acceptance of a single-employer group of undertakings within another commercial group of undertakings does not preclude the application of the rules on the transfers of contracts of employment when the requirements for the same are met. If property and/or persons are transferred between group undertakings and the business - sole or joint - carried on by the group undertakings is maintained, now in a single undertaking, there is a transfer of undertakings for employment purposes.

1. In a complex business structure it is discussed whether there is a transfer of undertakings when organisations related to the business network decide to transfer assets and then workers from one undertaking to another. The undertaking receiving the workers argues that there is no such transfer because “*an economic entity organized and functionally connected throughout, under a common organisation...(because what there is is) a plurality of business activities, without there being a common organizational structure between them or an inexorably connected operation among them all*”. The judgement given, which tends to admit transfers of undertakings for employment purposes, has only established, in the opinion of those affected, the contribution of workers and certain assets (irrelevant, such as tables or chairs) from one undertaking to another in order for the latter to constitute a new business unit for the entire commercial group, the existence of which is not called into question.

To settle the issue, the Judgment of the Supreme Court of 10 January 2019, Ar. 45434, recalls its legal doctrine on transfers. And, among other statements, it indicates that the application of Art. 44 of the Workers' Statute Act ('LET') imposes on the new employer the taking over of the employment and social security rights that the previous employer had with his workers. This is an *ope legis* transfer that does not require the existence of an express agreement between the parties, without prejudice to the liabilities arising for the transferor and transferee from Art. 44(e) LET (Judgment of the Supreme Court of 28 April 2009, Ar. 2997). Furthermore, this interpretation requires the application of Directive 2001/23 and, in this regard, taking into account the diction of the Spanish rule, "*the events constituting the change of ownership of the undertaking or of any of its elements endowed with productive autonomy must be, following the wording of the Spanish law itself, "inter vivos" acts determining a "transfer" of the subject matter concerned (the "undertaking" as a whole, a "workplace", or an "autonomous production unit") by a "transferor", which is the previous employer, to a "transferee", which is the succeeding employer*" (Judgment of the Supreme Court of 12 December 2002, Ar. 1962, 3rd Point of Law).

Specifying the terms of the European legislation, it should be noted that: (a) the concept of transfer of undertaking refers to acts of transfer of undertaking falling within the scope of EU law, which may be a "contractual transfer" or a "merger"; (b) the transfer covers, in principle, any "economic entity which retains its identity" after the transfer, meaning "an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary"; and (c) the transfer may be applicable to state-owned enterprises and public authorities. However, although EU legislation refers to the "transfer of undertaking, business or part of undertaking or business" (Art. 1(a) of Directive 2001/23/EC), Art. 44(1) LET refers to a "change of ownership of undertaking, workplace or autonomous production unit", Art. 44(2) using the expression "transfer" and providing in which cases a transfer of undertaking is considered to exist in a manner similar to the regulation contained in Art. 1(b) of the Directive.

2. With this approximation, the Judgment of the Supreme Court of 10 January 2019, Ar. 45434, insists in its 11th Point of Law that the relevant element for determining the existence of a transfer is whether the entity in question retains its identity, which can be deduced from the fact that it actually continues to operate or that its operations are resumed (Judgments of the CJEU of 18 March 1986, Case C-24/85, *Spijkens*, of 20 November 2003, Case C-340/01, *Abler and Others*, of 15 December 2005, *Joined Cases C-232/04 and C-233/04, Guney Gorres*). Moreover, the transfer must relate to an economic entity organised on a stable basis, whose activity is not limited to the execution of a specific work (Judgment of the CJEU of 19 September 1995, Case C-4888/94, *Rygaard*), the concept of an entity being inferred from an organised group of persons and elements allowing the carrying on of an economic activity that pursues an objective of its own.

In addition, and as is well known, it is necessary to check whether the conditions necessary for the transfer of an entity are satisfied, taking into account all the factual circumstances characteristic of the operation in question, including in particular the type of undertaking

or business concerned, whether or not material elements such as buildings and movable property have been transferred, the value of the intangible assets at the time of transfer, whether or not the majority of employees are taken over by the new employer, whether or not the clientele is transferred, and the degree of analogy of the activities carried on before and after the transfer and of the duration of any suspension of those activities. However, these elements are only partial aspects of the overall assessment to be made and cannot, therefore, be assessed in isolation (Judgment of the CJEU of 11 March 1997, Case C-13/95, *Süzen*).

Finally, whether or not it is necessary for the transferee to acquire ownership of the material elements in order for there to be a transfer of undertaking, European case law has indicated that the scope of the Directive covers all cases of a change, within the framework of contractual relations, of the natural or legal person who is responsible for the operation of the undertaking which, therefore, undertakes the employer's obligations towards the undertaking's employees, irrespective of whether the ownership of the material elements has been transferred (Judgments of the CJEU of 17 December 1987, Case C-287/86, *My Molle Kiro*, and of 12 November 1992, Case C-209/91, *Watson Rask and Christensen*). Nor does the absence of a contractual relationship between the transferor and the acquirer preclude the conclusion that there is a transfer, even if it might constitute an indication to the contrary (Judgments of the CJEU of 7 March 1996, *Joined Cases C-171/94 and C-72/94, Mercks and Neuhyus*, of 15 October 1996, Case C-298/94, *Merke*, and of 6 March 2014, Case C-458/12, *Amatori*).

3. With this background, the Supreme Court does not hesitate to consider that there has been a transfer of undertakings within the group (for employment and commercial purposes). Although the structure of the latter is still complex (a single-employer group - *Prisa Radio* - included within a commercial group - *Prisa Group* -), the Court admits the application of the rules on transfer of contracts of employment between undertakings. Business reasons led the principal of the commercial group to enter into a sales contract with one of the undertakings in the group in order to centralise the provision of administrative and financial services common to all the undertakings in the group. It is in the process of transferring personnel from one undertaking to another that the collective dispute is situated, giving rise, firstly, to a ruling of the *Audiencia Nacional* (Judgment of 19 May 2017, Ar. 1271) and now this Judgment of the Supreme Court of 10 January 2019, Ar. 45434, which resolves the appeal on the grounds of a breach of the rules governing the determination of disputes ('cassation') lodged against it. And, in this context, the Court understands, in its 11th Point of Law, that: (a) there has been a transfer by the undertakings in the commercial group to the newly incorporated undertaking, with a global transfer price and through a sales agreement; (b) a series of services have been transferred, which were being carried out in a decentralized manner in each of the group undertakings - human resources (personnel selection, selection planning, recruitment of candidates, training...), management supervision (budget and strategic planning, financial and analytical profit and loss account, etc.), administration and finance/traffic functions (SAP vendor master management, creation/change of vendor master data, invoice receipt, etc.); (c) material (tables, chairs, drawers, filing cabinets) and immaterial elements have been transferred (internship contracts, temporary staffing contracts, administrative services contracts, etc.); (d) personal elements have been

transferred, namely the workers who had been working in the services transferred, with the transferee having approximately three hundred workers, half of whom come from one of the undertakings in the group; and, finally, (e) the personal elements endowed with an organization have been transferred, since the workers who occupied managerial positions in those services have been transferred. Even so, the Judgment of the Supreme Court of 10 January 2019, Ar. 45434, favours the undertaking insofar as it considers that the reasons for which contractual termination measures are adopted on the occasion of the transfer have been proven, the latter being admitted.

It is important to highlight three important facts in relation to the solution pointed out on the transfer of undertakings in this case. One, that the new undertaking continued to carry out the same activities as previously carried out by the transferor group of undertakings. Secondly, that the activities affected by the transfer, while requiring certain material and non-material elements, relied primarily on labour (management, human resources, administration, etc. activities). And, finally, the fact that the new employer took on most of the workers, carrying out activities similar to those carried out by group undertakings before and after the transfer. Elements that lead, if not inevitably at least mostly, to the consequences of a transfer of undertakings.