Employment

Transfer of employment contracts without transfer of undertaking means no liability: a question of proof

The requirement to accept a transfer of staff in accordance with the terms of a collective agreement, without joint and several liability of the incoming undertaking, generated interpretative problems that have been resolved by employment case law. The determination of proof by the claimant and the fixing of the staff’s activity or the taking on of a significant part of the staff are maintained as indicative criteria.

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1. The consequences of the taking on of staff by an incoming undertaking has always been a controversial issue, heightened by the interest in circumventing transfer of undertaking rules in transfers of service agreements. Although the change of view of the Supreme Court in its Judgment of 27 September 2018 seemed clear, understanding that, in the event of a transfer of undertaking and a transfer of employment contracts imposed by a collective agreement, the applicable rules should be those of Article 44 of the Workers’ Statute Act (LET) and not those contained in the collective agreement (in which, as a general rule, the incoming undertaking is exempted from the employment and Social Security debts of the outgoing undertaking), conflicts continue to arise, judging by pronouncements such as those contained in the Supreme Court judgments of the same date of 8 September 2021, Jur. 301761 and 305022.

And this is because, in these cases, the undertaking argues that a mere transfer of staff in accordance by virtue of a collective agreement is not sufficient to apply Article 44 of the Workers’ Statute Act, unless the sequence under that provision applies, i.e., the transfer of an economic entity between the outgoing and incoming undertakings. Only in those cases where the staff is the unit that is transferred and, therefore, is the subject
matter of the transfer between undertakings, would it be acceptable to equate a transfer of employment contracts and a transfer of undertakings because, otherwise, judging by the above, there will be a transfer of employment contracts, but not a transfer of undertakings under the terms of Article 44 of the Workers’ Statute Act and, therefore, the latter will not be applicable.

This seems to be the view that can be deduced from the aforementioned Supreme Court Judgment of 27 September 2018, but it is one that is not followed by either the Employment Court or the High Court of Justice reviewing the former’s decision. Both the one and the other, though basing themselves on the legal doctrine of the Supreme Court Judgment of 25 October 2018, take the view that that a transfer of employment contracts obligation under a collective agreement imposes the full application of Article 44 of the Workers’ Statute Act and, consequently, also joint and several liability between undertakings. Furthermore, it is considered that the transfer of employment contracts in accordance with a collective agreement shows that the activity is based on labour and not on the transfer of material goods because, even though the specific case deals with ambulance service agreements for the transfer of patients, it is considered that not only are the transport vehicles required to carry out the activity, but also the driving employees, as evidenced by the clause that obliges the incoming undertaking to take on the staff of the outgoing undertaking.

But the Judgment of the Supreme Court of 8 September 2021, Jur. 301761 -this one will be considered the baseline, the other being identical in essence-, does not consider it proven that the incoming undertaking has taken on an “essential part (in terms of number and functions) of the employees that the first undertaking assigned to the execution of the service agreement, nor of the material elements”, according to the terms required at the time by the Judgment of the Supreme Court of 27 September 2018, Ar. 4619 (FJ 8), and reproduced now by this new decision (4th Point of Law). Consequently, if the existence of an Article 44 LET transfer of undertaking is not proven, joint and several liability does not follow for the incoming undertaking, resulting in a transfer of employment contracts without a transfer of undertaking.

2. Since the Supreme Court’s legal doctrine seems clear, why do Employment Courts continue to apply Article 44 of the Workers’ Statute Act when there is a transfer of employment contracts by virtue of a collective agreement? Perhaps because the judicial sequence in the employment branch of the judiciary still presents some doubts, although the conclusion - as has been explained - is evident.

If when facing a transfer of employment contracts by virtue of a collective agreement, in order for Article 44 of the Workers’ Statute Act to apply, a transfer of undertaking is also required - insofar as the transfer “affects an economic entity that retain its identity, understood as an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary” - why is a transfer of employment contracts by virtue of a collective agreement necessary? Because, if the aim is to demand that, in addition to the transfer of employment contracts, the requirements for a transfer of undertaking contained in Article 44 of the Workers’ Statute Act are met, then the collective agreement does not add anything. If there is a transfer of undertaking, there is a transfer of employment contracts and, therefore, the aforementioned
Article 44 will apply in all its terms. What the collective agreement seems to add by imposing a transfer of employment contracts is precisely that, even if the requirements for a transfer of undertaking in Article 44 of the Workers’ Statute Act are not met, its consequences are imposed. The collective agreement regime improves on the statutory regime and allows the legal guarantee to be applied even if in the collective agreement case the requirements for the transfer of undertaking are not met because, if they were, the application of Article 44 of the Workers’ Statute Act would be unavoidable.

Before the Supreme Court changed its view on this issue, its rulings (for example, Judgment of the Supreme Court of 7 April 2016, Ar. 1702) had been considering that, in the event of a transfer of employment contracts by virtue of a collective agreement, the application of Article 44 of the Workers’ Statute Act should not apply, unless there had been a transfer of assets or a transfer of staff in sectors in which the activity is essentially labour-intensive [“therefore, the new undertaking awarded the security service, which has the obligation to take on the workers of the previous undertaking by virtue of Article 14 of the collective agreement, must do so with the requirements and limits established therein, in particular, without being liable for the debts incurred by the previous awardee with its workers prior to the taking on of the service agreement by the new undertaking” (4th Point of Law)]. Consequently, the transfer had to take place by virtue of and under the terms provided for in the applicable collective agreement, governed by the collective agreement regime and not by the statutory regime, given that the undertaking’s decision did not respond to its own will, but to an obligation under the applicable collective agreement.

But the Judgment of the Court of Justice of the European Union of 11 July 2018, Somoza case, C-60/17, gave rise to the change of doctrine reflected in the Judgment of the Supreme Court of 27 September 2018, Ar. 4619. The former also questioned the concurrence of Article 44 of the Workers’ Statute Act and a provision of the collective agreement that obliged the incoming undertaking to take on the contracts as of the transfer of undertaking, that is, releasing it from any obligation arising previously. And, as previously expressed in the Judgment of the Court of Justice of the European Union of 24 January 2002, Temco case, C51/00, the court would conclude that the fact that the transfer of employment contracts was imposed by the collective agreement did not imply a limitation of the undertaking’s liability with regard to the obligations derived from Article 44 of the Workers’ Statute Act because Directive 2001/23 of 12 March (OJEU of 22 March), relating to the safeguarding of employees’ rights in the event of transfers of undertakings, should also be applied in these cases.

Now the situation is identical: the collective agreement recognises the transfer of employment contracts, but releasing the incoming undertaking from any liability for previous debts. And the solution is very similar to the previous one.

3. Obviously, when it is considered that the activity of the undertaking relies on the staff and, therefore, the “economic entity” susceptible of transfer is precisely the labour, the application of Article 44 of the Workers’ Statute Act is imposed, regardless of what is established in the collective agreement. It is not in vain that these pronouncements of the European judiciary have so specified when interpreting that the staff can be an economic entity susceptible of transfer [“It follows that the identity of an economic entity, such as that
at issue in the main proceedings, which is essentially labour-intensive, can be retained if the majority of its employees are taken on by the presumed transferee.” (para. 37, CJEU of 11 July 2018, Somoza case, C-60/17). It is true that, following the various rulings of the European courts in this regard, it has been the collective agreements of the sectors whose activity is essentially labour-intensive that have chosen to include this obligation, to a certain extent to prevent the mere selection of workers (the quantum) by the incoming undertaking from allowing the application of the transfer of undertaking regime to be circumvented in the event of a transfer of employment contracts. This regime, by the way, has also been interpreted in a lax manner by the European courts in their understanding of the definition of transfer of undertakings (Judgments of the CJEU of 19 October 2017, Securitas case, C200/16, of 26 November 2015, Aira Pascual case, C509/14, of 20 January 2011, CLECE case, C463/09, among others).

But all these agreements do is to test and identify that labour constitutes an essential element for the continuity of the activity because, otherwise, the employer - party to the agreement - would not limit its entrepreneurial freedom with the obligation to take on the staff of another undertaking. If the collective agreement opts for taking on the staff, it is because it makes it into an “entity” susceptible to transfer that retains its “identity” and, precisely for this reason, the employer takes over and Article 44 of the Workers’ Statute Act applies. In the past, it could be argued that this Article 44 should not be applied and that the regime set out in the collective agreement itself - normally with the release from the liability of the incoming undertaking - should be applied, but not now. Indeed, and as pointed out by the dissenting opinion of the Supreme Court Judgment of 27 September 2018, Ar. 4619, this interpretation may have the perverse effect that the collective agreements do not impose a transfer, the staff does not continue, stability is not guaranteed and workers lose their jobs. A more than likely consequence. But when the sectoral collective agreement opts for the taking on of the staff, the application of Article 44 of the Workers’ Statute Act seems inevitable because, if the transfer of assets is required, the determination by virtue of collective agreement becomes unnecessary.

In the field of employment, the mere transfer of the undertaking has no significance, if it is not for the taking on of staff consequences that it entails. A transfer of employment contracts (a substitution of the role of the employer in the employment contract) may or may not occur, but, if it does occur, the effects that the legislator proposes are those derived from Article 44 of the Workers’ Statute Act. That is the purpose to which this provision responds by transposing Directive 2001/23. Because admitting that a transfer of employment contracts (substitution of the employer) is carried out without further ado would mean applying the provisions of Article 1210 of the Civil Code with no other consequence than the substitution of the previous employer in rights and obligations under the contract as from the date of the transfer. However, this is not the intention of employment legislation which, in Article 44 of the Workers’ Statute Act, provides a specific statutory regime for the placement of one employer in the position of another. It is no coincidence that, in the field of employment, if the employee’s role in the employment contract is changed, the same contract is no longer valid; a different contract must be signed – a cover contract, for example – but with the new employee and without using that of the employee who has been replaced. But if the employer’s role is
replaced, then the statutory regime of Article 44 of the Workers’ Statute Act applies with all its consequences (recognition of seniority, maintenance of the applicable collective agreement, acceptance of voluntary improvements and also the joint and several liability of companies for employment or Social Security defaults). It is a different matter if it is concluded that there is no substitution of one undertaking for another, but rather that there is a new undertaking, new contracting, new conditions. However, if the employer is substituted, then Article 44 of the Workers’ Statute Act must be applied. And, in principle, with full effects, without it being possible to decide that the transfer is only in part: yes for seniority, but not for the applicable collective agreement; yes for the salary, but not for the improvements; yes for the workers’ representatives, but not for the working hours, etc. Therefore, accepting its application without the employer’s liability regime could call into question its fit with European legislation.

Not in vain, that obligation of substitution adopted within the collective bargaining in which the undertaking is represented already constitutes an element of transaction or transfer between the incoming and the outgoing undertaking since, otherwise, the incoming undertaking could operate either with its own workers or with newly hired workers and with new conditions, but it does not do so because it cannot do so, given that it has decided to oblige itself, in the exercise of its right to collective autonomy - and, therefore, voluntarily - to take on the staff of the outgoing undertaking. A different view that would admit that the transfer of employment contracts by virtue of a collective agreement constitutes a mere formal requirement that would imply accepting the workers without any corporate liability beyond that which is strictly contractual from the time the transfer takes place would mean emptying Article 44 of the Workers’ Statute Act of its content and would even generate doubts about compliance with European legislation (in the terms set out above), since, if the intention is to avoid joint and several liability for employment or Social Security obligations, but there is a collective agreement obligation to take on the staff, it will be sufficient not to accept the material resources of the outgoing undertaking and replace them with those of or with new ones acquired by the incoming undertaking. Thus, in the case at hand, if the determining factor for the Supreme Court is the ambulances that transport the patients, the incoming undertaking can acquire new ambulances -even subcontract them-, thus easily avoiding the application of the joint and several liability rules of Article 44 of the Workers’ Statute Act. And, in the hypothesis that the outgoing undertaking “obliges” the incoming undertaking to keep the asset as a condition for the transfer, it would be sufficient for the incoming undertaking to capitalise the cost of this “obligation”, pay it to the outgoing undertaking and replace the material resources. Thus, the incoming undertaking would avoid any joint and several liability, despite taking on the staff of the outgoing undertaking.

4. This is not the interpretation followed by the Supreme Court, at least not in the judgments of 8 September 2021, Jur. 301761 and 305022, and in their reference, the Judgment of the same court of 27 September 2018, Ar. 4619. The Supreme Court thus reaffirms the conclusions of the latter judgment, namely: (a) there is a transfer of undertaking falling under Article 44 of the Workers’ Statute Act if the transfer of a service agreement is accompanied by the transfer of an economic entity between the outgoing and incoming
undertakings; (b) in activities where labour constitutes an essential factor, taking on a relevant part of the personnel assigned to the service agreement (in quantitative or qualitative terms) triggers the application of Article 44 of the Workers’ Statute Act; (c) when (as in this case) the relevant factor is the labour (not the infrastructure), the transfer of employment contracts is only applicable if a significant part of the personnel is taken over (quantitatively or qualitatively), and (d) the fact that the taking on of a significant part of the staff derives from the provisions of the collective agreement does not prevent the application of the above doctrine (8th Point of Law).

Leaving aside the first and last sub-articles - with a logical consequence, i.e., if an economic entity is transferred, there is a transfer of undertaking -, the two central ones deserve special consideration. And this is so because both specify the need to take on a “significant part” of the staff. It is foreseeable that, when a transfer of employment contracts is imposed in the collective agreement sphere - also if it is done in contractual terms, unless the selection of workers is permitted - it is established for the entire staff of the outgoing undertaking (in the present case and in accordance with the applicable collective agreement, “the new awardee or contractor undertaking will be obliged to take on the employment contracts of the workers who have been providing that service”). Hence, the “significant part” of the personnel assigned to the service agreement will be all the personnel, since it is precisely for this reason that the collective agreement includes the taking-on obligation of the incoming undertaking. However, if this is not complied with, if the incoming undertaking considers that it is not affected by the collective agreement, if the collective agreement allows room for manoeuvre or any other vicissitude, then the view that quantifies the number of workers taken on by the incoming undertaking can be taken to determine whether or not there is a transfer of undertaking.

That is why one must highlight the importance of the evidentiary element in any which case, but especially in the one we are dealing with. Because, on previous occasions (Judgment of the Supreme Court of 27 September 2018, Ar. 4619, or of 25 October 2018, Ar. 5324), the finding of joint and several liability was motivated by the failure to state anything “with respect to the transfer of relevant infrastructure to carry out the agreed services (sweeping or cleaning machines, lifting platforms, self-propelled vehicles, disinfectant tanks, etc.) [so] we must work on the understanding that the essence of the case, as is usually the case in the sector, lies in the labour put into play to carry out the cleaning tasks”. Because, unless there is evidence to the contrary, the undertaking “has taken on, in accordance with the collective agreement, a significant part of the staff assigned to the service agreement we have been talking about” (Judgment of the Supreme Court of 27 September 2018, Ar. 4619, 8th Point of Law). And, now, the release from such joint and several liability, despite the existence of a transfer of employment contracts, is imposed because the worker “generically based his claim on the provisions of Article 44(3) of the Workers’ Statute Act, without specifying in his claim whether the activity of the undertaking, engaged in the transport of the sick or injured by ambulance, necessarily required material resources and, if so, whether the resources of the outgoing undertaking were transferred to the incoming undertaking. Nor did he claim that the undertaking’s activity was essentially based on human resources and, if so, whether or not the majority of the staff was taken on. In the
ratification of his claim, he did not clarify any of these points, nor did he attempt to prove them in any way” (5th Point of Law).

Consequently, a transfer of employment contracts by virtue of a collective agreement will not entail liability on the part of the incoming undertaking, irrespective of the terms in which the latter’s legal regime is developed in the collective agreement - or in the transfer of undertaking agreement - if it is proved - in principle, by the claimant, although it would be advisable for the defendant to include it in the defence - that the activity does not fall on the workforce - even if the incoming undertaking is obliged by virtue of an agreement to take it on - “and” (or, perhaps, “or”) it is proven that there has not been a transfer of any essential element for the continuity of the activity while maintaining its identity.