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Judgment in Case E-10/14

Enes Deveci and Others v Scandinavian Airlines System Denmark-Norway-Sweden

TRANSFER OF UNDERTAKING - APPLICATION OF TERMS AND CONDITIONS LAID DOWN IN A COLLECTIVE AGREEMENT

In a judgment delivered today, the Court answered questions referred to it by Eidsivating Court of Appeal (*Eidsivating lagmannsrett*) concerning the interpretation of Council Directive 2001/23/EC 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 undertakings or businesses ("the Directive").

The case at hand concerns the transfer of the business of Spirit Air Cargo Handling Norway AS ("Spirit Air Cargo") that was active in terminal operations and cargo handling. After a failed attempt to sell the Spirit Group of which Spirit Air Cargo was a member, it was decided to transfer the business of Spirit Air Cargo to Scandinavian Airlines System Denmark-Norway-Sweden ("the defendant"). The transfer of undertaking became effective on 1 March 2012. The SAS consortium informed the transferred employees that they would be covered by the third-tier special agreement applying to the defendant from 1 May 2012.

The appellants, former employees of Spirit Air Cargo, did not accept the pay reduction which resulted from the transfer to the new collective agreement. They sought an order before Øvre Romerike District Court (Øvre Romerike tingrett), requiring the defendant to, *inter alia*, continue to apply the higher pay rates, in accordance with the special agreement entered into by Spirit Air Cargo. By judgment of 18 November 2013, the District Court found in favour of the defendant. That judgment was appealed to Eidsivating Court of Appeal which decided to make a reference to the Court.

The Court held in answer to the first and third questions referred that it is consistent with Article 3(3) of the Directive if conditions of pay enjoyed by the transferred employees under the collective agreement with the transferor are replaced, in conformity with national law, by conditions of pay laid down in the collective agreement in force with the transferee after the expiry of the former collective agreement. In such a case, the loss of the entitlement to a particular salary is not linked to the transfer, but to the expiry of the collective agreement.

The Court found further that in a situation such as in the present case, the national court must assess whether the applicable national law provides for continuing effects. Terms and conditions laid down in a collective agreement to which such continuing effects apply constitute "terms and conditions agreed in any collective agreement" under Article 3(3) of the Directive so long as those employment relationships are not subject to a new collective agreement or new individual agreements are not concluded with the employees concerned.

It must also be assessed by the national court whether such national law complies with the main objective of the Directive that is to ensure a fair balance between the interests of the employees and those of the transferee. The transferee must be in a position to make adjustments and changes necessary to carry on its operations. Since continued effects applicable after the expiry of a collective agreement limit the freedom of action of the transferee, a national rule introducing such effects must be limited in its duration in order not to bind the transferee indefinitely.

Should the national court find that the collective agreement applicable in the transferor's undertaking had not expired, the Court found in its reply to the second question that it is not contrary to Article 3(3) of the Directive for the transferee to apply two months after the transfer, the terms and conditions laid down by the collective agreement in force in the transferee's undertaking, including those concerning pay. However, Article 3 of the Directive precludes the possibility that transferred employees suffer a substantial loss of income, in comparison with their situation immediately prior to the transfer, because the duration of their service with the transferor is not sufficiently taken into account when their starting salary position at the transferee is determined and where the conditions for remuneration under the newly applicable collective agreement have regard *inter alia* to length of service. In that determination the equivalent duration of service of those employees already in the service of the transferee shall be considered.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.