



Update

Momentum



Labour

10 de Novembro de 2017

RENDERING OF SERVICES OR TRANSFER OF UNDERTAKING?

The Court of Justice European Union ruling of 19 October, 2017¹

*Securitas — Serviços e Tecnologia de Segurança SA, ICTS Portugal — Consultadoria de Aviação Comercial SA, Arthur George Resendes and Others*²

In this decision, several employees of ICTS Portugal claimed to have been unfairly dismissed by «Securitas» when it replaced «ICTS» in the provision of security services to «Portos dos Açores S.A.» at the latter's facilities (marina, port, dock), located in Ponta Delgada (Portugal).

In particular, the employees claimed that the dismissal did not comply with the legal protection recognized by the Portuguese Labour Code in case of **transfer of undertaking** (Articles 285 et seq.) and that the collective bargaining agreement clause which stated that: «*[t]he loss of a customer by an operator following the award of a service contract to another operator shall not fall within the concept of a transfer of an undertaking or business*» was not in accordance with the protection granted by Council Directive 2001/23/EC of March 12, 2001 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.

¹ Case No. C-200/16.

² Available on

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=195740&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1175409> (English version).

In its ruling, the CJEU decided that:

- (i) Article 1 (1) (a) of Council Directive 2001/23/EC must be interpreted as meaning that, **where a contracting entity has terminated the contract** concluded with one undertaking for the provision of security services at its facilities, **then concluded a new contract for the supply of those same services with another undertaking**, which refuses to take on the employees of the first undertaking, **that situation falls within the concept of a ‘transfer of an undertaking [or] business’** within the meaning of that provision, when the equipment essential to the performance of those services has been taken over by the second undertaking.
- (ii) Article 1 (1) of Directive 2001/23 must be interpreted **as precluding a provision of national law**, such as that at issue in the main proceedings, which provides that **the loss of a customer** by an operator following the award of a service contract to another operator **does not fall within the concept of a ‘transfer of an undertaking [or] business’** within the meaning of Article 1(1).

Therefore, companies which render services to clients on a similar basis – i.e., by providing employees to the customers’ facilities – should carefully assess the risks of their *modus operandi* being qualified as a transfer of undertaking. And in this assessment, it is worth noticing the irrelevance of collective regulation clauses which exclude the rendering of these services from the legal scope of a transfer of undertaking.

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