Expert Opinion

Transfer of establishment. STJ Ruling of 8.3.2023 Case Nº 445/19: a return to the past?

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The transfer of establishment regime (Art. 285 of the Labor Code) has an important function in safeguarding jobs contracts, particularly in cases of contractors providing services to the same client.
The right granted to the employee is an exception to the intuito personae nature of the employment contract, since its maintenance is imposed on the transferee regardless of the will of the transferee or the transferor, or any criteria of personal trust.
These modeling prerogatives embody a power of subjection of the employee over the other party. And this potestative nature of the employee's right is, or should be, relevant when interpreting the concept of economic unity and applying the regime, otherwise its purpose will be invalidated.
And this is relevant in this regime's evolution especially with regard to the concept of economic unit on which it is based, insofar as it now covers certain sectors which often in practice had not, or had but with much controversy, been included.
This evolution has been particularly significant in the so-called "labor-intensive activities" (cleaning, the operation of canteens, private security). In the past, these have been somewhat excluded from the application of this regime because of some legal difficulty in viewing them in the light of the concept of economic unit.
The aforementioned evolution of the regime and its interpretation, in particular by the CJEU, has made it possible to identify the existence of an economic unit in these labor-intensive activities, whenever the new provider takes on a significant part of the previous provider's workforce, OR regardless of this, maintains a set of specific equipment which are necessary, if not essential, for its provision .
Using this last evidence, there were several cases in which it was possible to identify the existence of an economic unit and discern the maintenance of its identity.
Suddenly, the STJ's Ruling of 8.3.2023, after a preliminary ruling which it referred to the CJEU and its interpretation ruling of 16.2.2023, established that in these labor-intensive sectors there is no economic

unit which can be subject to the transfer regime, as long as the new operator does not take over the bulk of the workforce in terms of their number or skills. And this regardless of the existence of other evidence previously considered relevant, such as the existence and maintenance of tangible assets essential for providing the service.
Somewhat paradoxically, this decision is unsupported by the response given by the CJEU ruling which preceded it - and on which it should have been based (see Art. 267 and 288 of the TFEU), as a way of ensuring the useful effect of EU law -, and is also reversing the order of the factors by enshrining a solution that is against the system aims.
In fact, when the STJ referred the case for interpretation of the concept of economic entity, it conditioned the CJEU's assessment from the outset by not revealing the assets on which the surveillance service provided was based (and which were relevant) . On the contrary, it neglected their relative weight in the operation in question by the unnecessary and perniciously adjectival way ("some") in which it referred to them in its summary of the facts. All of this is contrary to the provisions of Article 94 of the CJEU's Rules of Procedure regarding questions for preliminary ruling.
In fact, in view of the facts of the case, formulating the referred question by denoting "an activity (...), in which the new provider has taken responsibility for only one of the four workers who were part of the economic unit (and, therefore, has not taken responsibility for the majority)", and neglecting and compromising, from the outset, the relevance of the various equipment affected, is not correct.
In its ruling of 8.3.2023, the STJ stating in a preclusive or exclusionary manner that in these sectors there is no economic unit, if and when the new provider does not take on the bulk of the previous provider's workforce, forgets that the CJEU in its previous ruling of 16.2.2023 has always stressed that the Directive must be interpreted as meaning that it is not likely to fall within its scope if neither of these two factual situations occurs: "on the one hand", the new provider does not reintegrate most of the workers, or the main ones in terms of skills, and "on the other hand", there is no "transfer to the new provider of tangible or intangible assets necessary for the continuity of the services".
In other words, even in these labor-intensive sectors, it is possible to discern the existence of an economic unit, even when the new operator does not take on the bulk of the workforce. In particular, when a set of equipment is maintained at the service of the new operator which, due to their importance, is necessary for provision. None of this was considered or expressed by the STJ, unlike the response given by the CJEU ruling of 16.2.2023.
Furthermore, this STJ ruling given its excluding nature in the applicability of the transfer of the establishment, ends up subverting the potestative nature of the workers' right. It is now up to the transferee, the putative subject of the duty to employ, to decide whether or not to remain as the workers' employer. From a situation which should be one of subjection, the transferee moves to a position where he has the power to choose whether or not to maintain the employment contracts.
Of course, this opens the door to all kinds of exploitation. Starting, obviously, with the incumbent imposing the acceptance of contracts that do not account for employees' previous time of service. In few words: seniority will no longer matter. This reversion in favor of the one who should be the obliged subject, subverts the regime's purpose.

If this is not a case of manifest disregard by a national court for the principle of the consistent interpretation and application of EU law (Art. 4, Nº 3 and 267 of the EU Treaty), as we believe it is - and as such should be denounced and fought - then we are facing a clear step backwards in terms of protection and a return to the past in terms of (reductive) application of the regime.
We will see what comes after, but it's a bad sign if this type of decision crystallizes and is adopted, more or less uncritically by the other courts.