Sham outsourcing of employees

Businesses optimising their operations often cease employing some of their staff in favour of outsourcing services. Sometimes, for this purpose, they transfer their employees based on Art. 23[1] of the Labour Code to an outsourcer, most often without transferring any other assets. The main economic motive for such measures is savings on social security and health insurance contributions. However, in the opinion of courts ruling on cases in similar factual circumstances, often at the request of tax or social insurance authorities, this may be only a sham transfer of the workplace, and as a consequence Art. 23[1] of the Labour Code does not apply. What does this mean for the original employer?

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From the perspective of the developing case law, a model example of a sham transfer of a workplace is a situation where the employer enters into an agreement on the transfer of its employees under Art. 23[1] of the Labour Code to an outsourcing company, which becomes the new employer on the same terms and conditions for work and pay as at the former employer. It is also important that the subject matter of the contract is not the transfer of any tangible or intangible assets of the company. On the basis of such an agreement, the outsourcing company undertakes to provide the same services to the former employer which were previously performed by the transferred employees. The agreement also usually stipulates that the activities will be performed by specific employees, who in practice are former employees of the previous employer.

Thus in practice almost nothing changes. Such "contractors," when providing services, are obliged to comply with the former employer's internal rules and regulations, including work organisation, occupational health and safety, protection of trade secrets, and protection of personal data and IT systems. And it may happen that the former employer also provides access free of charge to property which will be used to perform the services. Often, temporary employment agencies, authorised to conduct regulated activities, play the role of such outsourcers and formally act as the staff's new employer.

A court ruling on such a case must determine whether what is being transferred constitutes a "workplace" or "part of a workplace" in accordance with Art. 23[1] of the Labour Code. Considering the factual circumstances, the basic question is whether such a workplace can be made up of employees alone, if nothing else, in particular assets, is transferred along with them.

The EU's Transfer of Undertakings Directive (2001/23/EC), which is the source of implementation of the rules on the transfer of a workplace in the Polish Labour Code, uses a broader term than a workplace, namely an "economic entity." The directive applies to "any transfer of an undertaking, business, or part of an undertaking or business to another employer," and a transfer occurs for purposes of the directive "where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary." Taking into account the EU origin of national rules on the transfer of a workplace, it is legitimate to refer to EU case law in this area when interpreting the national rules.

EU case law

The Court of Justice of the European Union has repeatedly addressed the question of whether the transfer of tasks (functions) of one undertaking to another undertaking constitutes a transfer of a business or part of a business. It was originally accepted that an activity itself, as an autonomous function (task), might by equated to a business or part of a business, so that the transfer of tasks alone could be considered the transfer of a business. This view was rather radically revised, however, and finally it was accepted that the notion of a transferable unit refers to an organised group of persons and means facilitating the pursuit of an economic activity aimed at achieving a certain objective.

The nature of an economic entity's activities must also be taken into account when assessing the entity: whether it is an activity based on tangible components, or whether people are its main "asset." In the first case, the takeover of material resources is decisive, while in the second situation, it has been accepted that a team of employees who are permanently engaged in joint activities may form an economic unit. These views were crystallised in the now-famous decision by the Court of Justice in *Spijkers* (Case 24/85). That judgment sets forth a list of factors that need to be taken into account when assessing whether part of a business has actually been taken over in a given factual situation.

Polish case law

Polish courts are equally often confronted with the problem of an illusory transfer of a workplace—especially recently. The case law of the Supreme Court of Poland has so far followed the current approach presented by the CJEU.

In the judgment of 27 January 2016 (Case I PK 21/15), the Supreme Court examined a factual situation in which two companies orally agreed that there would be a transfer of employees between them. The acquiring company was to provide the other company with primarily HR and payroll tasks. Immediately after the transfer of employees, it delegated those employees to service the company from which they had been acquired. In other words, the same employees performed the same work at the same place for the same entity, and only the identity of the employer formally paying their salaries changed. The only purpose of this measure was to save money by reducing social insurance contributions.

In its justification of this ruling, the Supreme Court also made a difficult attempt to define "outsourcing." It said outsourcing is an undertaking consisting of separating from the organisational structure of the parent enterprise functions performed by it and transferring them to other economic entities for implementation. The main difference between employee outsourcing and employment of one's own employees or performance of work by temporary employees is the lack of direct and permanent subordination of contractors to the entity where their work or services are performed.

Ultimately, the Supreme Court held that there was no transfer of a workplace or part of a workplace in that case.

The Supreme Court took a similar view in the judgment of 8 February 2017 (Case I PK 72/16). In that case, the court had to assess whether, in the given state of facts, the takeover of employees only, without taking over tasks and assets, constituted the transfer of a workplace or was merely sham outsourcing. The case concerned a situation in which a sewing plant (operated by a natural person conducting economic activity) transferred all its employees to a limited-liability company under Art. 23^1 of the Labour Code. For its part, the company committed itself to provide sewing services through the delegated employees (the same ones who were "transferred"). Moreover, the employees were to work on the equipment owned by the sewing plant.

In this case, the court also held that there had been no transfer of a workplace, but only sham outsourcing of the employees. In the justification of the ruling, the court explicitly pointed out that the key issue is the transfer of a workplace, understood also to mean an organised part of a workplace, which also includes assets and never employees only. The court also drew attention to the nature of the activity of the sewing plant, which cannot function without specialised equipment—so it is not a workplace whose main "asset" is people.

Consequence of the sham transfer of a workplace

A finding by the court that the transfer of a workplace was illusory, and therefore did not really take place at all, has specific, often very severe consequences. First of all, the contract between the entities which was the basis of the transfer of a part of the workplace is invalid. Therefore, there is no real change of employer. In such situation, the Social Insurance Institution will issue a decision finding that the previous employer is the payer of contributions, and will order it to make up unpaid contributions. This means that the most common goal of transferring employees "outside"—i.e. savings on social insurance contributions—will be defeated.

Summary

The outsourcing services market is growing rapidly, and this trend is likely to continue. Reasonable use of such solutions results in measurable savings for employers. However, plans to make changes based on Art. 23^1 of the Labour Code should be approached with caution to avoid falling into the trap of the illusory appearance of a transfer of a workplace—especially if the acquiring party is a temporary employment agency. The case law of Polish and European courts, and a risk analysis, will certainly help in this respect, which should show whether the costs in the event of an unfavourable court ruling will outweigh the (apparent) benefits.

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