SUPREME COURT'S
DECISION

Case no.
Ö 5731-18

delivered in Stockholm on 27 February 2020

PARTIES

Applicant

Unionen, company registration no. 802001-5759
105 32 Stockholm

Counsel: Chief Legal Adviser MW and Legal Adviser DH
Same address

Respondents

1. Almega Tjänsteförbunden, company registration no. 802004-7505
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2. ISS Facility Services AB, company registration no. 556410-3280
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THE MATTER

Relief for a substantive defect

PREVIOUS RULING

Judgment of the Labour Court of 30 May 2018 in cases A 40-12 and A 100-12

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THE SUPREME COURT'S RULING

The Supreme Court rejects Unionen's application for relief for a substantive defect.

Unionen shall reimburse Almega Tjänsteförbunden and ISS Facility Services AB for their costs of litigation in the Supreme Court in the amount of SEK 45,500 pertaining to counsel fees plus interest in accordance with Section 6 of the Interest Act from the date of this decision.

CLAIMS IN THE SUPREME COURT

Unionen has applied for relief for a substantive defect in the Labour Court cases A 40-12 and A 100-12 (case AD 2018 no. 35).

Almega Tjänsteförbunden and ISS Facility Services AB have opposed the granting of relief for a substantive defect. Almega and ISS have requested payment of their costs of litigation incurred in the Supreme Court.

REASONS FOR THE DECISION

Background

1. On 30 May 2018, the Labour Court decided a case between Unionen, on one side and Almega and ISS on the other. A collective agreement, the Agreement Regarding General Employment Terms and Conditions for Security Companies and Service Contracts and Special Service Companies, the "Cleaning and Security Agreement" (*Avtal om allmänna anställningsvillkor för säkerhetsföretagen samt serviceentreprenad- och specialserviceföretag, "städ- och bevakningsavtalet"*), applied between the parties. The agreement contained a rule regarding an extended period of notice of dismissal. The dispute before the Labour Court pertained to whether damages for breaches of the collective agreement were payable as a consequence of the fact that ISS, pursuant to said rule, should have applied an extended period of notice of dismissal for four employees.

2. The posts of the four employees had been transferred from Apoteket AB and AstraZeneca AB to ISS through transfers of businesses in accordance with Section 6 b of the Employment Protection Act (1982:80). The two first-mentioned companies were bound by two other collective agreements entered into with Unionen. The collective agreements contained rules regarding extended periods of notice of dismissal which, in relevant respects, were worded identically to the one in the Cleaning and Security Agreement.

3. More than one year following the respective business transfer,[1] the employees were dismissed by ISS on the basis of redundancy. The issue in the case was whether the four employees, in calculating the extended period of notice of dismissal in accordance with the rule in the Cleaning and Security Agreement, could be credited, over and above the period of employment at ISS, also with such time as pertained to employment with the previous employers.

4. According to Unionen, the employment period for the four employees at the previous employers was to be credited to them when ISS terminated their employment.

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[1] *Cf.* Section 28, third paragraph of the Employment (Co-Determination in the Workplace) Act (1976:580).

This was contested by ISS and Almega. As regards each of the four employees, a possibility to be credited also the period of employment from previous employers would entail an extension of the period of notice of dismissal by six months. In the absence of such possibility, there was also no right to an extended period of notice of dismissal.

5. The Labour Court decided on 22 October 2014 to obtain a preliminary ruling from the Court of Justice of the European Union (case AD 2014 no. 69). The question presented by the Labour Court was whether it is compatible with Directive 2001/23,[2] after a year has elapsed following the transfer of a business, on application of a provision in the transferee's collective agreement which means that, where a certain continuous length of service with a single employer is a condition for an extended period of notice of dismissal to be granted, not to take account of the length of service with the transferor, when the employees, under an identically worded provision in the collective agreement which applied to the transferor, had the right to have that length of service taken into account.

6. The Court of Justice of the European Union issued a preliminary ruling in the case on 6 April 2017 (Unionen, C-336/15, EU:C:2017:276). The response of the Court of Justice of the European Union in the preliminary ruling was that Article 3 of Directive 2001/23 was to be interpreted as meaning that, in circumstances such as those in the case in the main proceedings, the transferee must, when dismissing an employee more than one year after the transfer of the undertaking, include, in the calculation of that employee's length of service, which is relevant for determining the period of notice to which that employee is entitled, the length of service which that employee acquired with the transferor.

7. The Labour Court then decided the case and rejected Unionen's action. According to the Labour Court, the employees, on application of the rule regarding an extended period of notice of dismissal in the Cleaning and Security Agreement, could not be credited with such time as related to the employment with the transferor in the

[2] Council Directive 2001/23/EC of 12 March 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 undertakings or businesses.

calculation of their employment period. The reasons therefor were stated to be that the terms and conditions in the transferors' collective agreements had been replaced by the transferee's collective agreement. In addition, it was stated that the period of validity of the transferee's collective agreement had, on two occasions, expired and that the terms and conditions of the collective agreement had in conjunction with this been negotiated. According to the Labour Court, the conditions no longer existed to apply the terms and conditions of the transferors' collective agreements or to calculate the period of employment in the manner asserted by Unionen.

The application for relief for a substantive defect

8. As grounds for its motion for relief for a substantive defect, Unionen has invoked that the application of law forming the basis of the judgment of the Labour Court is manifestly inconsistent with a statutory provision. According to Unionen, the application of law carried out by the Labour Court is manifestly inconsistent with the preliminary ruling obtained in the case, Directive 2001/23 and the statutory provisions through which the Directive has been implemented in Swedish law. According to Unionen, the Labour Court has also disregarded Section 3 of the Employment Protection Act. These erroneous assessments have, according to Unionen, led to an incorrect outcome in the case.

Relief for a substantive defect in conjunction with application of law manifestly inconsistent with a statutory provision

9. An application for relief for a substantive defect relating to a judgment from the Labour Court is determined in accordance with the rules of the Code of Judicial Procedure regarding relief for substantive defects relating to judgments in civil cases. A case in which relief for a substantive defect may be granted is when the application of law forming the basis of the judgment is manifestly inconsistent with a statutory provision. The provision is intended, *inter alia*, for situations in which the court has overlooked or clearly misinterpreted an applicable statutory provision, when the court has applied expired law in lieu of applicable new law, or when the application of law at the time of the determination of the relief for a substantive defect appears to clearly and incontestably be incorrect. (See Chapter 58, Section 1, first paragraph, sub-section 4 and

NJA II 1940, pp. 156 f. and 172.)

10. It is not necessary that the erroneous application of law pertains to a statute in the constitutional sense. It may involve norms at a lower level. It may also be sufficient that the application of law is contrary to of the foundations of a certain statute. The provision aims exclusively at the assessment by the court of legal issues. (*Cf.* Peter Fitger, *et al.*, *Rättegångsbalken*, suppl. 87, October 2019, p. 58:21 ff. and Lars Welamson and Johan Munck, *Processen i hovrätt och Högsta domstolen, Rättegång VI*, 5th ed. 2016, p. 210 f.)

11. The requirement of "manifestly" is not an evidentiary requirement but, rather, a characteristic of the inconsistency with a statutory provision. The inconsistency with a statutory provision must be clear and incontestable. The application of law in a manner inconsistent with a precedent from the Supreme Court is not deemed to per se entail that the application of law is manifestly inconsistent with a statutory provision. As an explanation therefor, it has been stated that the Supreme Court's decisions are not binding and that the precedents, by nature, pertains more or less to difficult issues and thereby does not normally involve something which is manifestly incompatible with a statutory provision. (See, *inter alia*, "Swefilmer", case NJA 2019 p. 501, para. 11; *cf.* Fitger, *ibid.*, p. 58:23 f. and Welamson and Munck, *ibid.*, p. 211 f.)

Application of law in a manner inconsistent with subsequent precedents from the Court of Justice of the European Union

12. The starting point is the same when a decision is inconsistent with subsequent precedents from the Court of Justice of the European Union. Such an approach has support in EU law, which grants the member states extensive procedural autonomy. Furthermore, the principle of legal force is ascribed great weight both in EU law and in national procedural regimes. In this light, a national court is not obliged under EU law to omit in all cases the application of domestic rules regarding conferring finality on a judgment even where reinstatement of a case would allow remediation of an incompatibility with EU law. (See, *inter alia*, "De uppsagda piloterna", case NJA 2013 p. 42, paras. 4 and 5 and "Spelannonsen i Nerikes Allehanda", case NJA 2016 p. 320, paras. 11 and 12 and the judgment of the Court of Justice of the European Union of

11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paras. 26–28.)

Application of law inconsistent with a preliminary ruling obtained from the Court of Justice of the European Union relevant in the case

13. The competence of the Court of Justice of the European Union to issue preliminary rulings follows from Article 19.3 (b) of the Treaty on European Union and Article 267 of the Treaty on the Functioning of the European Union. A judgment in which the Court of Justice of the European Union has issued a preliminary ruling entails that a decision with *res judicata* effect has been reached in respect of one or several EU law questions which are binding on the national court in conjunction with its determination of the case (see, *inter alia*, the decision of 5 March 1986, *Wünsche v Germany*, C-69/85 EU:C:1986:104, para. 13).

14. If follows, however, from the separation of functions on which Article 267 of the Treaty on the Functioning of the European Union is based that the competence of the Court of Justice of the European Union does not include making an assessment of the factual circumstances in the case before the national court or to apply the rules of the Community law which it has interpreted to national measures or situations. These issues instead fall within the framework of the exclusive jurisdiction of the national court. (See, *inter alia*, the judgment of 22 June 2000, *Fornasar et al.*, C-318/98, EU:C:2000:337, paras. 31 and 32.)

15. The national case is not decided by means of the preliminary ruling. It is for the national court to apply the same and reach a judgment in the national case. When the court finally decides the case, it is bound by the preliminary ruling in so far as applies to the EU law legal issue. The legal principles adopted by the Court of Justice of the European Union govern the national court requesting the decision in so far as pertains to EU law in the same manner as a statutory rule governs an issue of national law. If it is clear and incontestable that the national court, in the application of EU law in the relevant case, has adjudicated the EU law legal issue inconsistently with the manner in which it has been resolved by the Court of Justice of the European Union, the court's action must therefore – in the sense referred to in the relief provision – be deemed to be

an application of law manifestly inconsistent with a statutory provision.

16. However, legal rules may be ambiguous and lend themselves to various interpretations. The same may be the case in respect of the matter on which the Court of Justice of the European Union expresses itself regarding EU law in the preliminary ruling.

17. When the law lends itself to several alternative interpretations, it is normally not an erroneous application of law if the court chooses one of them provided that the court, in its reasons for the judgment, offers a reasonably adequate analysis of the legal position (see “Kezban”, case NJA 2013 p. 842, para. 37). Even less is it a matter of concluding in such a case that the application of law was manifestly inconsistent with a statutory provision. The national court’s room for interpretation must be perceived in a comparable way where a preliminary ruling is unclear. Thus, it is usually not apposite to conclude that the application of law by the court forms the basis for relief from a substantive defect.

18. In addition, it happens that the Court of Justice of the European Union also expresses itself in respect of the actual application of the legal rules to the case pending before the national court. As stated, that aspect of the preliminary ruling is not binding on the national court. In the event the national court makes an assessment of the factual circumstances other than that made by the Court of Justice of the European Union, the now discussed basis for relief is not applicable. The same applies where the national court assesses a purely national, i.e. non-harmonised, legal issue differently than the Court of Justice of the European Union.

The assessment in this case

19. The Court of Justice of the European Union has observed in the relevant preliminary ruling that Article 3.1, first paragraph of Directive 2001/23 must be interpreted as meaning that, in conjunction with the dismissal of an employee who has been transferred to an employer as a consequence of a transfer of an undertaking, the transferee must take into account the employee's period of employment with the transferor in the calculation of the employment period relevant to determine the period of notice to which the employee is entitled. The transferee may, however – to ensure a fair balance between, on the one hand, the employees' interests and, on the other those of the transferee – on a ground other than the transfer of the undertaking and in so far as national law so allows, make the adjustment and changes necessary to carry on its operations. (See paras. 19–27 of the preliminary ruling.)

20. In light of the formulation of the Swedish legislation in comparison with the Directive, the Court of Justice of the European Union has found that ISS had the right, after a period of one year, for economic reasons and thus on a ground other than the transfer of the undertaking to no longer continue to preserve the terms and conditions set out in the collective agreement applicable to the transferred employees (see paras. 28 and 29 of the preliminary ruling).

21. Based upon the information to which the Court of Justice of the European Union had access, the court reached the conclusion that the transferee, following the transfer, had made no adjustment to the terms and conditions and that the wording of the transferor's collective agreement were identical to the wording of the transferee's collective agreement. In light thereof, the court reached the conclusion that the employees could not be made subject to less favourable working conditions than those which were applicable prior to the transfer. However, the Court of Justice of the European Union pointed out that it was for the Labour Court to verify if the collective agreement applicable to the transferred employees from the date of their transfer had been terminated or renegotiated, expired and/or been replaced by another collective agreement. (See paras. 30 and 31 of the preliminary ruling.)

22. In its assessment, the Labour Court has observed that the period of validity of the Cleaning and Security Agreement had expired on two occasions following the transfers of businesses but prior to the dismissals and that the parties to the collective agreements had negotiated the terms and conditions of the collective agreement on these occasions. In this regard, the Labour Court has stated that it may be presumed that Unionen and Almega agreed during these negotiations in respect of the amendments to the terms and conditions which would be implemented and which collective agreement terms and conditions would be transferred unchanged to the new collective agreement. By transferring the rule regarding an extended period of notice of dismissal – the purport of which was incontestably that only the period of employment at the most recent employer was relevant – to the new collective agreements, the parties must, according to the Labour Court, have considered whether such a rule would apply to these contractual periods.

23. Against this background, the Labour Court has reached the conclusion that the collective agreement which, at the time of the dismissals, was applicable to the employees was another than the collective agreement to which ISS was bound at the time of the transfer.

24. The Labour Court's assessment has pertained to the actual conditions and the interpretation of the purport thereof according to national law. That assessment falls within the framework of the exclusive jurisdiction of the national court (*cf.*, also, para. 21 in the preceding). It cannot be seen that the assessment of the EU legal issue by the Labour Court departed from that of the Court of Justice of the European Union. Accordingly, the assessment of the Labour Court does not contravene the preliminary ruling in any respect relevant to the examination of the application for relief.

25. The Labour Court is the highest instance for the statutory rules through which Directive 2001/23 has been implemented in Swedish law. There is no basis for the Supreme Court to conclude that the application of law by the Labour Court regarding whether another collective agreement was at issue was manifestly inconsistent with a statutory provision.

26. Also as regards the issue of whether the Labour Court, in its application of law, has disregarded Section 3 of the Swedish Employment Protection Act and the issue of whether the provision is compulsory, the Supreme Court has no grounds to conclude that the application of law by the Labour Court is manifestly inconsistent with a statutory provision.

27. Accordingly, Unionen's application for relief for a substantive defect cannot be granted.

Costs of litigation

28. In light of this outcome, Unionen shall reimburse Almega and ISS for their costs of litigation incurred in the Supreme Court. The claimed amount is reasonable.

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Justices of the Supreme Court Gudmund Toijer, Johnny Herre, Malin Bonthron (reporting Justice), Eric M. Runesson and Stefan Reimer participated in the ruling.
Judge referee: Elin Dalenius