

Principle of flexicurity in legal regulation of transfer of rights and obligations from the employment-law relations

Abstract

In her PhD thesis, the author deals with the legal regulation of transfer of rights and obligations arising from employment-law relations in the Czech Republic, in the context of the European union law, from the point of view of the concept of *flexicurity* in the employment-law relations. This concept includes, on the one hand, elements of flexibility in the realization of employment-law relations, and, on the other hand, security (protection) of employees in these relations which is manifested in particular by the transfer of rights and obligations from their employment-law relations to the new employer itself.

At present, when changes in the employers' organizational structure, transfers of activities or tasks, mergers, the purchase of a business or a business lease, but also so called outsourcing, insourcing, and change of suppliers are becoming more and more common in companies, the issue of change of the employer, and consequently, safeguarding and protection of the rights of employees, in particular safeguarding of their employment-law relations, is becoming more up to date. Protection of employees' rights during the transfers of undertakings and businesses is one of the pillars of the European labour law. In this context, the question of the transfer of the rights and obligations arising from the employment-law relations of the employees concerned to another employer arises.

The consequences of the abovementioned changes on the part of the employer are dealt with in our legal system by *the Act No. 262/2006 Coll., the Labour Code, as further amended* (hereinafter referred to as „the Labour Code“), using the institute of transfer of rights and obligations arising from employment-law relations. This institute is based on the principle of safeguarding of employees' rights and ensures the protection of these rights. Its purpose is to ensure that the rights of the employees concerned, as a result of the change of the employer, are not reduced as a result of that change and ensure that these employees are not exposed to the risk of dismissal or change of their working conditions. It means that the employer (the transferor) does not terminate the employment-law relations of the employees, but these relationships will automatically transfer by law to the new employer (the transferee) if the statutory conditions have been fulfilled. The new employer (the transferee) enters into the legal position of the former employer (the transferor).

The fundamental law in the Czech Republic for the transfer of rights and obligations is the Labour Code, which defines a transfer of the employer's activities or tasks or parts thereof to another employer as the most important legal reason for the transfer of rights and obligations arising from the employment-law relations. Such a concept of transfer is rather broad and may involve many situations and forms of change of internal structures at employers. As a result of such a concept, problems in employment law practice often lies mainly in the difficulty of identifying the factual nature of the transfer (the legal reason for the transfer), further, for example, in the unwanted increase in the number of employees of the new employer due to the transfer and the consequent need to dismiss original employees due to organizational changes.

The aim of the thesis is also to outline the possible solutions of this situation. The transfer of rights and obligations may occur, in addition to the Labour Code, also under other laws, such as the Civil Code¹ or *the Act No. 125/2008 Coll., on Transformations of Business Companies and Co-operatives, as further amended*, which deals with the transformation of business corporations.

In the Czech Republic, the legal regulation of the transfer is harmonized with the *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* (hereinafter referred to as „the Directive on the Transfer“) which regulates on the level of the European Union the institute of transfer of rights and obligations. However, it is necessary to point out a certain inconsistency between the European Union law and the legal regulation in the Labour Code of the Czech Republic as regards the issue in question.

Contrary to the Czech legal regulation of the transfer of rights and obligations, where the transfer condition is merely the transfer of the employer's activities or tasks, for the transfer of rights and obligations in the European Union law (in particular in the Directive on the Transfer) and in the law of many of the Member States of the European Union the key component is the transfer of an integrated economic entity that retains its identity. The legal regulation of the Directive on the Transfer, to a greater extent than in any other area of law, is complemented by the Court of Justice of the European Union through its extensive decision-making activities in this field (e. g. judgement of CJEU in case *Spijkers* of 18 March 1986, C-24/85).

¹ *The Act No 89/2012 Coll., the Civil Code, as further amended.*

The transfer takes place when there is a change of the subject of the basic employment-law relationship, on the part of the employer.

The rights and obligations arising from employment-law relations are the subject of the transfer. It does not only transfer the rights and obligations arising from the contract of employment and contracts of work performed out of an employment relationship and from the relevant provisions of the Labour Code and other laws, but also from collective bargaining agreements and internal regulations. As a result of the transfer, the employees bring with them to the new employer (transferee) essentially all rights and obligations, in unchanged form. The receiving employer (transferee) is therefore obliged to safeguard the rights and obligations of the transferred employees to the full extent as they had at the transferor before the realization of the transfer. As part of this obligation the Labour Code provides the employee with the possibility to submit a notice of termination of the employment relationship within a certain limitation period if he claims that his working conditions have deteriorated substantially as a result of the transfer. If the court confirms such a conclusion, the employer is then considered to be the person on whose behalf the employment relationship was terminated and the employee is entitled to severance pay.

Recently, we have been increasingly confronted with certain forms of changes in employers' organizational structures, which, however, are not separate legal reasons for the transfer of rights and obligations, but the transfer of rights and obligations under certain conditions nevertheless takes place in these cases. These are the so-called *insourcing*, *outsourcing* and *second generation contracting* (it means supplier switching – the change of the supplier). These forms, despite the fact that they are often difficult to recognize as the legal reasons for transfer, are becoming more topical and important not only outside the Czech Republic but still more in the conditions of our country as well.

The legal regulation of the transfer of rights and obligations is governed by the principle of legality, according to which the transfer can only take place on the basis of the law, and the principle of automatic transfer. The transfer of rights and obligations takes place automatically by the law (*ex lege*) in compliance with legally defined conditions, regardless of the will of the parties concerned, without the need for any further act or action. The automatic transfer is also a manifestation of flexibility in employment-law relations. The elements of flexibility are also seen by the author, for example, in the possibility of flexible (operative) change of employers or the possibility of the employee to use a special type of dismissal, including a shorter notice period within it, if he does not agree with his transfer to the new employer.

The Labour Code also provides employees with a degree of protection (security). It can be seen, for example, in providing the employee with the same (equivalent) working conditions at the new employer (the transferee), in the obligation of employers to provide information on the circumstances of the transfer and its consequences, in the possibility of termination of the employment relationship because of substantial deterioration of working conditions after the realization of the transfer, in providing the protection of the employee to whom the transferor terminated the employment relationship shortly before the realization of the transfer, etc.

It is necessary to point out the often contradictory decisions of the Supreme Court of the Czech Republic on the termination of an employment relationship in connection with the transfer and the subsequent arrangement of the contract of employment with the new employer, often accompanied by the arrangement of a probationary period contrary to the principle of good morals.

An important element of the employee protection before the realization of the transfer of rights and obligations lies in the employer's obligations to inform the employees about and consult with them the facts related to the transfer. Failure to comply with these obligations creates a misdemeanour or an administrative offense under *the Act No. 251/2005 Coll., on Labour Inspection, as further amended*. In her thesis, the author also introduces some aspects of legal regulation of non-compliance with obligations to inform and consult in selected European countries. Foreign legislation seems to be a possible source of inspiration for future legislative proposals to amend the legal regulation of the Czech Republic in this area, in order to improve the enforceability of the fulfilment of the obligations in question.

In connection with the transfer, the issue of equal treatment of employees may arise, also in connection with so-called *plurality of collective bargaining agreements* (where the transferred employees bring with them to the new employer "their collective agreement" applicable on them at the former employer). In the case of the transfer, the new employer (the transferee) must keep working and other conditions (in particular wage conditions) for transferred employees not changed in the same way as these employees had at the former employer. As a consequence, such a situation may occur at the transferee, that transferred employees may have different working conditions than the current employees have, which may cause an unequal treatment. The author concludes that, in the case of a better position of transferred employees than current employees, this situation cannot be considered as discrimination and the principle of equal treatment of employees and equal pay for equal work is not infringed.

The author expresses a positive opinion on the proposal to change the legal regulation of the factual nature of the transfer of rights and obligations (the legal reason for the transfer) in the Labour Code in the form of approximation to the legal regulation of the transfer of an economic entity with its own identity, as defined by the European Union law. In the proposed amendment of the Labour Code (but the hearing of which was interrupted), the influence of the legal regulation of Great Britain is also evident in the issue of transfer. The author also deals with the issue of transfer in the legislation of this country, especially with regard to the possible use of this legal regulation *de lege ferenda* in conditions of the Czech Republic.

Within the *de lege ferenda* considerations, the possible legislative solutions of some problematic aspects of the national legal regulation of the transfer in the Czech Republic are outlined. In particular, proposals are made in the area of transfer of rights from collective bargaining agreements, in the regulation of the period for submitting a notice of termination of the employment relationship by the employee according to § 51a of the Labour Code, including the extension of the possibility to submit such a notice of termination, in the regulation of termination of the employment relationship in case of substantial deterioration of the working conditions after the transfer under § 339a of the Labour Code, as regards the obligations of the employer to inform employees about and to discuss with them the circumstances of the transfer, in particular it is proposed to introduce direct compensation to the employees concerned or otherwise to tighten the enforcement of fulfilment of these obligations by the employer, in relation to the obligation of the former employer to cooperate with the new employer as regards important matters relating to the transfer, in particular the obligation to provide the new employer with information on transferred employees or to transmit important documents, also in the area of equal treatment of employees and, last but not least, in the regulation of the factual nature of the transfer (the legal reason for the transfer) in the Labour Code, where the author prefers keeping the transfer of the employer's activities or tasks as a precondition for the transfer of rights and obligations, but with the parallel introduction of conditions for such a transfer, so that the range of cases, to which the legal regulation of the transfer of rights and obligations will apply, narrows. The inspiration here may be the legal regulation of the transfer of an economic entity in the European Union law or the legislation of some foreign countries.

The author comes out of the legal regulation in the Czech Republic, especially the Labour Code, the European Union law (especially the relevant directive and judgements of the Court of the European Union) and judgements of the courts of the Czech Republic

(especially judgements of the Supreme Court of the Czech republic). Conclusions made in the thesis are also based on relevant literature and monographs.

Key words:

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Labour Code

flexicurity

directive on the transfer

transfer of rights and obligations

safeguarding of rights

transfer of activity

transfer of undertaking

economic entity