Translation from Norwegian

[Coat-of-arms of the Kingdom of Norway]

SUPREME COURT OF NORWAY

On 22 December 2011, the Supreme Court handed down a judgment in
HR-2011-02393-A (case no. 2011/539), civil action, appeal against a judgment,

Gate Gourmet Norway AS (Counsel Lars Holo)

vs.

Nguyen Thi Ha
Inge Andre Østhagen
Rune Teigen
Wanphen Saengsawang
Terje Vigstad
Hon Van Trinh
Marayart Stordalen
Arne Kristian Stensby
Wannarat Botilsrud
Per Amundsen
Steinar Trebekk
Thor Birger Lunden
Lars Jørn Aas
Geir Thorstensen
Melva Tion Isaksen
Kjetil Gunnarsrud
Fatima Payamuzd
Marianne Sivertsen
Thao Thi Dang
Emil Høgberg
Rhoar Lerberg
Eric Holm
Brede Aarlien
Marius Midtlyng Witsø
Elicet Medina Valencia
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Elizabeth Aguilar Grønberg (Counsel Sigurd-Øyvind Kambestad)

V O T I N G :

(1) Justice **Kallerud**: The case concerns the application of the rules on the transfer of undertaking in chapter 16 of the Working Environment Act and the discrimination provisions in chapter 13.

(2) Until 30 April 2009, LSG Sky Chefs Norge AS (LSG) had an agreement with SAS on the provision of catering services at Gardermoen and Flesland airports. After a tender procedure, LSG lost the contract, which was instead awarded to Gate Gourmet Norway AS (Gate Gourmet), with effect from 1 May 2009. The main issue in the case is whether this change of contractual party represented a "transfer of … a part of a business" pursuant to section 16-1 of the Working Environment Act. In this case, the consequence will be that Gate Gourmet is obliged to take over the contracts of employment of the employees who lost their work in LSG, with the same rights and obligations as in their previous employment relationship, see section 16-2 of the Working Environment Act.

(3) In recent decades, airlines have customarily engaged catering companies to provide for example food, drink and tax-free goods on board planes. Meals and goods are prepared in the catering company's premises, which are purpose-built and equipped for this purpose. Before delivery, each order is placed in the airline's own trolleys and containers and

transported in special vehicles to the planes. The catering company picks up used equipment in the planes and takes care of dishwashing and other preparations before a new delivery. The Court has been informed that LSG and Gate Gourmet are the world's two largest airline caterers.

(4) Gate Gourmet had an airline catering contract with SAS until 2000, when LSG won the contract following a tender procedure. In connection with this change of supplier, LSG and the relevant trade unions agreed, in a protocol of 3 March 2000, that LSG should exclusively cover its increased need for manpower through recruitment among Gate Gourmet's employees. Although the agreement had been entered into with the trade unions, it included all employees in Gate Gourmet, regardless of union membership.

(5) When the contractual relationship reverted to Gate Gourmet in 2009, there were talks between the company and the two major trade unions – Parat and Luftfartens funksjonærforening (LFF) *[an independent aviation trade union]* – concerning the recruitment of new employees in Gate Gourmet. Parat presented the protocol of 2000, with a view to entering into a corresponding agreement. Gate Gourmet prepared a draft agreement, patterned on the 2000 agreement, but with the change that the company undertook to cover its recruitment needs "primarily" - not "exclusively as in the previous agreement – by offering employment to applicants from LSG. According to the draft agreement, newly employed staff in Gate Gourmet would not retain the seniority they had in their positions in LSG. Parat rejected the draft proposal following a vote among its members. LFF accepted the proposal, on the other hand, and on 13 January 2009, an agreement was entered into between this trade union and Gate Gourmet. The first clause of the agreement reads as follows:

> **"In connection with the need for a staff increase due to a change of supplier of catering services to SAS, Gate Gourmet undertakes to cover its recruitment needs primarily by offering employment to applicants employed or previously employed in LSG who are covered by a collective wage agreement with LFF."**

(6) It was also established that the union would not claim that there had been a transfer of undertaking and it was made clear that the agreement "is not itself an expression that the parties consider that the criteria for a transfer of undertaking in the sense of the Working Environment Act are present".

(7) The SAS contract represented around 85% of LSG's sales. The company continued its operations after losing the contract, but had to dismiss many employees. According to the annual reports, the company had 267 employees at the end of the 2008 accounting year while the number was 74 at the end of 2009.

(8) The contract with SAS represented an important part also of Gate Gourmet's operations, but was not as dominant as it had been in LSG. After Gate Gourmet had been awarded the contract, the company appointed 184 new employees, of which 62 from LSG. Most of the persons recruited from LSG were members of LFF, but also Parat members were employed.

(9) A number of the applicants to the new positions in Gate Gourmet were asked questions about their union affiliation during an interview, so as to clear up who were covered by the recruitment agreement with LFF. For the same purpose, Gate Gourmet was also given a list of LFF members in LSG.

(10) On 27 May 2009, Parat brought a Writ of Summons against Gate Gourmet before Øvre Romerike District Court, with a claim that the members' employment relationships had been continued in Gate Gourmet. A claim for compensation for unlawful discrimination was also submitted. On 17 June 2009, Elizabeth Aguilar Grønberg,

who was a member of a union in LO *[the Norwegian Confederation of Trade Unions,]* filed a Writ of Summons against Gate Gourmet on the same basis as that of the members of Parat. The two actions were consolidated pursuant to section 15-6 of the Disputes Act.

(11) On 25 February 2010, Øvre Romerike District Court pronounced a judgment with the following conclusion– items 1 and 2:

> **"1. The Court finds for Gate Gourmet Norway AS with respect to the claim that the claimants are employed in Gate Gourmet.**
>
> **2. Gate Gourmet Norway AS is ordered to pay aggravated damages, within two weeks of the pronouncement of the judgment, in the amount of NOK 5,000, with the addition of the statutory interest on overdue payment from the due date until payment is made, to each of Sakahawat Hussein (32), Goran Jaza (36), Yuvarajah Mariyapillai (51), Wanphen Saengsawang (70), Roger Åstad, (99), An Huynh (33)."**

(12) Also Elizabeth Aguilar Grønberg was awarded NOK 5,000 in aggravated damages. The claimants were ordered to pay legal costs in the amount of NOK 497,656.

(13) With respect to the question of a transfer of undertaking, the judgment was passed with dissenting votes. The majority came to the conclusion that there had been no transfer of undertaking as it had not retained its identity after the transfer. In this assessment, weight was given, inter alia, to the fact that Gate Gourmet had its own premises and production equipment, its own logistics system and its own purpose-built vehicles. The minority – one judge – emphasised in particular that Gate Gourmet took over some key personnel from LSG and some equipment from SAS.

(14) In the District Court's opinion, Gate Gourmet had not unfairly discriminated against LSG employees. But the Court concluded that it had been proved that seven employees had been asked during the interviews about their trade union affiliation, in breach of section 13-4 of the Working Environment Act.

(15) The employees appealed the District Court's judgment to Eidsivating Court of Appeal. The Court of Appeal's majority – all except a lay judge - concluded that Gate Gourmet's takeover of the SAS contract constituted a transfer of undertaking. The majority emphasised, inter alia, that Gate Gourmet performed the same tasks as LSG, took over a considerable quantity of SAS equipment, which LSG had previously used, and that a considerable number of former employees in LSG were given work in Gate Gourmet. The minority underlined in particular that the issue involved a service provider that had won a contract following a tender procedure and that the SAS contract was not the only assignment of either LSG or Gate Gourmet. Furthermore, the minority pointed out that there had been no separation of any individual division or of employees working solely with deliveries to SAS, and also emphasised that Gate Gourmet's input of assets was markedly greater than the assets SAS had made available.

(16) The whole Court of Appeal was of the view that unfair discrimination had occurred on the basis of union affiliation, but was divided into the same majority and minority with respect to part of the justification for this. Moreover, the Court of Appeal concluded that the unfair discrimination included a considerably higher number of persons than the seven who had been awarded aggravated damages in the District Court.

(17) The Court of Appeal's judgment of 21 December 2010 has the following conclusion of judgment:

> **"1. The appellants' rights and obligations under their contracts of employment with LSG Sky Chefs AS have been transferred to Gate Gourmet Norway AS.**

> **2. Gate Gourmet is ordered to pay, within two – 2 – weeks from the pronouncement of judgment, to each and every one of the claimants Per Amundsen, Roger Amundsen, Anne Synnøve Bakken, Stig V. Bergan, Phetcharee Malapathee, Wannarat Botilsrud, Anura Chandradasa, Thao Thi Dang, Tu Houng Thi Dang, Ganeshamoorthy Nadarajah, Asbjørn Grønli, Erik Grønlien, Kjetil Gunnarsrud, Anita Gustafson, Nguyen Thi Ha, Glenn B. Hansen, Sakhawat Hussain, An Hynh, Goran Jaza, Suchada Karlsen, Antonia Kristensen, Trond Kristiansen, Kim Le, Tor Birger Lunden, Yuvarajah Mariyapillai, Roar Myrhaug, Ana Paula Ottesen, Fatima Payamuzd, Sanh Van Phan, Pirabakran Shanmugalingham, Dragana Polovina, Shanmuganathan Rajaratnam, Ronny Rustad, Wanphen Saengsawang, Odd Skåråsberget, Stein Stensvold, Per Stjernstrøm, Marayart Stordalen, Haci Sutcu, Helge Søvik, Rune Teigen, Christer Torp, Milan Tovarloza, Hon Van Trinh, Elicet M. Valencia, Morgan Wahlquist, Pål Westengen, Roger Åstad, Hege Opås and Elisabeth A. Grønberg, aggravated damages in the amount of five thousand – 5,000 – kroner, with the addition of the statutory interest on overdue payment from the due date until payment is made.**
>
> **3. Gate Gourmet Norway AS is ordered to pay the appellants' costs of the case before the District Court in the amount of three hundred and ninety-four thousand one hundred and ninety-four - 394,194 – kroner, within two – 2 – weeks from the pronouncement of judgment.**
>
> **4. Gate Gourmet Norway AS is ordered to pay the appellants' costs of the case before the Court of Appeal in the amount of five hundred and twenty-seven thousand two hundred and fifty-seven – 527,257 – kroner, within two – 2 – weeks from the pronouncement of judgment."**

(18) The parties appealed the Court of Appeal's judgment to the Supreme Court. Gate Gourmet appealed against the Court of Appeal's judgment in its entirety, and the appeal concerns both the assessment of evidence and the application of law. The employees' appeal concerns the amount of aggravated damages.

(19) The Supreme Court Appeals Committee decided on 4 May 2011, item 1:

> **"Gate Gourmet Norway AS' appeal is allowed with respect to item 1 of the Court of Appeal's conclusion of judgment and the application of law in the question of whether it was in breach of chapter 13 of the Working Environment Act to ask questions about union affiliation in connection with the appointment of new employees. Leave to file the appeals is otherwise refused."**

(20) The Appeals Committee decided on 1 July 2011 not to allow the petition for a reversal. Following a further petition for a reversal, the Appeals Committee adopted on 1 September 2011 the following decision:

> **"Gate Gourmet Norway AS' appeal is allowed with respect to item 1 of the Court of Appeal's conclusion of judgment and the application of law in the question of whether it was in breach of chapter 13 of the Working Environment Act to ask questions about union affiliation, including obtaining and receiving a list of names concerning membership in LFF in connection with the appointment of new employees. The Court of Appeal's application of law concerning section 13-1 of the Working Environment Act will also be allowed. Leave to file the appeals is otherwise refused."**

(21) By its decision of 26 September 2011, the Appeals Committee rejected a further petition for a broadening of the referral decision.

(22) Some new documents and statements have been submitted to the Supreme Court. Nevertheless, the case stands essentially in the same position as regards the facts of the case as it did before the lower courts.

(23) In its main submission to the Supreme Court, Gate Gourmet argued in particular that the condition of section 16-1 (1) second sentence of the Working Environment Act, that there must be "an autonomous entity", has not been met. Within the framework of the referral decision, the case otherwise raises the same legal issues as before the District Court and the Court of Appeal.

(24) There have been some minor changes to the parties involved during the proceedings before the lower courts. There are total of 102 respondents before the Supreme Court, of which 20 are now said to be employed in Gate Gourmet. The practical significance of the case for the latter is that they will retain their seniority in LSG if they are supported in their claim that there has been a transfer of undertaking covered by chapter 16 of the Working Environment Act.

(25) The appellant – *Gate Gourmet Norway AS* – has essentially submitted the following:

(26) The requirement of section 16-1 (1) that the subject-matter of transfer must be "an autonomous entity" has not been met. According to EU Court practice, this requirement must be understood to mean that it must be possible to identify an autonomous entity in the transferor. This is not the case here. LSG had no "SAS division", and the company also had customers other than SAS both before and after losing the contract to Gate Gourmet. Although LSG lost a large customer, both its tangible and intangible assets remained intact and the company continued with an adequate staff.

(27) Even if an "entity" within the meaning of the Act should be present, a material part of the input factors characterising the entity and its activity must have been taken over by a new employer for the rules on the transfer of undertaking to be applicable. The only thing Gate Gourmet took over from LSG was some of the employees and some equipment owned by SAS. This is not sufficient for the entity to have retained its identity. Under any circumstances, the respondents do not have a sufficient connection with any entity, as they cannot prove that they only worked with the SAS contract.

(28) Gate Gourmet has not contravened the prohibitions against discrimination of sections 13-1 and 13-4 of the Working Environment Act. The exception provisions in section 13-3 are not applicable, because it was fair and necessary, due to the agreement with LFF, to give LFF members a preferential right to employment. The initiative for the negotiations with the trade unions was taken by Parat, and Parat's members could have been given the same preferential rights, but chose not to enter into an agreement on this. Any discrimination is in any case covered by the exception in section 13-2 (4), because the agreement between Gate Gourmet and LFF must be regarded as a collective agreement. Gate Gourmet had good cause to ask the job applicants questions about their union affiliation, so as to ensure that Gate Gourmet fulfilled its obligations under the agreement with LFF. Also the absolute prohibition in section 13-4 of the Working Environment Act must be interpreted in the light of the purpose of the provisions in chapter 13. The provision should not be applied when the company's purpose in clarifying the question of union affiliation was the loyal performance of a practical agreement with one of the unions.

(29) Gate Gourmet submitted the following claim for relief:

> **"With respect to item 1 of the Court of Appeal's conclusion of judgment:**
>
> 1. **The Court to find in favour of Gate Gourmet Norway AS.**
>
> 2. **The respondents to be ordered to pay, jointly and severally, the costs of the case before the District Court, the Court of Appeal and the Supreme Court of Gate**

Gourmet Norway AS.

With respect to item two of the Court of Appeal's conclusion of judgment:

1. **The Court to find in favour of Gate Gourmet Norway AS.**

2. **The respondents covered by item two of the Court of Appeal's judgment to be ordered to pay, jointly and severally, the costs of the case before the District Court, the Court of Appeal and the Supreme Court to Gate Gourmet Norway AS."**

(30) The respondents – *the former employees of LSG* – have essentially submitted the following:

(31) The transfer of the SAS contract from LSG to Gate Gourmet constituted the transfer of an undertaking, which is covered by section 16-1 of the Working Environment Act. The case is virtually parallel to Rt. *[Supreme Court law reports]* 2006 page 71 (SAS), and the solution must be the same unless we reverse the evolution of the law, which would result in the reduced protection of employees. If no transfer of undertaking has taken place here, it would open up the possibility for employees to be "sifted out" every time a supplier is changed following a tender procedure. This would be in breach of the purpose of the rules, to which great weight must be given under Norwegian law as well as under EU law.

(32) The SAS contract is very detailed and defines a material part of LSG's operations. When the contract was transferred, an autonomous entity was in reality transferred to Gate Gourmet at the same time. There is no basis in EU law for establishing a requirement that an absolutely independent and identifiable entity must be transferred from the transferor company. The central issue is that the primary connection of the activity – based on an assessment of all relevant aspects – was with the SAS contract.

(33) The SAS contract was of decisive importance to LSG. It was the SAS contract of 2000 that led to LSG's establishment in Norway, and LSG was at the time staffed primarily with employees from Gate Gourmet. Work in LSG was adapted to and chiefly governed by the SAS contract. After LSG lost the contract in 2009, the company's sales were reduced by close to 90 per cent, and most employees had to be dismissed. The SAS contract was in reality the very substance of LSG, and the catering operations relating to the performance of this contract was an autonomous economic entity in the company.

(34) The entity that was transferred from LSG to Gate Gourmet retained its identity. Also Gate Gourmet's activity is characterised by the SAS contract. A considerable quantity of equipment and goods that identify the activity were transferred, particularly trolleys, etc. owned by SAS and tax-free goods. It is not of great importance that the activity is moved to other premises in a case such as the present, which only involves rather simple means of production, where the work effort is substantial and the client base the same. Furthermore, both companies operate within the same geographic area and use the infrastructure of the airport.

(35) The activity is labour-intensive and requires employees with competence, who were selected to a great extent from among the former LSG employees. If Gate Gourmet had not been busy trying to prevent triggering the rules on the transfer of undertakings, even more former LSG employees would have been recruited. There is a legal basis for attaching importance to Gate Gourmet's intention of circumventing the rules.

(36) Based on an overall assessment, in which legislative purpose has a central place, it is clear that a transfer of undertaking took place, the consequence of which was that the employment relationships of all respondents were transferred to Gate Gourmet with the rights they had in LSG.

(37) The employment relationship of employees working with dispatch and tax-free goods must under any circumstances be regarded as having been transferred, as these persons were particularly closely associated with the SAS contract. The parties covered by this alternative submission are indicated in item 1 of the claim for relief.

(38) The question of discrimination in conflict with section 13-1 (1) of the Working Environment Act was decided with final and enforceable effect by the Appeals Committee's first decision of 4 May 2011, as the Committee did not refer this part of Gate Gourmet's appeal. The Appeals Committee was not entitled to extend the referral to the detriment of the respondents, who had acted in reliance on the first decision.

(39) If section 13-1 of the Working Environment Act is also to be reviewed, the respondents still argue that Gate Gourmet acted in breach of the provision and that none of the exception provisions in chapter 13 are applicable. The respondents were subject to discrimination because they were not members of LFF, and this discrimination was not necessary for any just cause. Furthermore, that Gate Gourmet obtained information about union affiliation was in direct conflict with the full prohibition in section 13-4 of the Working Environment Act.

(40) The respondents have submitted the following claim for relief:

> **"1. Item 1 of the Court of Appeal's conclusion of judgment:**
>
> **The appeal to be rejected.**
>
> **Alternatively:**
>
> **The appeal to be rejected for the respondents Per Amundsen, Anne Synnøve Bakken, Elin Bitonius, Ståle Bjørkheim, Gunhild Enersen, Anita Gustafson, Nguyen Thi Ha, Nils Henjum, Eric Holm, Lars Jørgen Kallevåg, Morten Kopperud, Trond Kristiansen, Kim Le, Anita Mumford, Wanphen Saengsawang, Frode Simonsen, Rune Teigen, Milan Tovarloza, Stian André Tyse, Brede Aarlien and Elizabeth A. Grønberg.**
>
> **2. Item 2 of the Court of Appeal's conclusion of judgment:**
>
> **The appeal to be rejected.**
>
> **In all cases:**
>
> **3. Gate Gourmet Norway AS to be ordered to pay the respondents' costs in the case before the District Court, the Court of Appeal and the Supreme Court".**

(41) *I have come to the conclusion* that the appeal must be allowed as regards the question of a transfer of undertaking, but must be rejected as regards the question of discrimination.

(42) I will first review the question of whether *a transfer of undertaking* took place when Gate Gourmet was awarded the catering contract with SAS in 2009.

(43) Section 16-1 (1) of the Working Environment Act reads as follows:

> **"This chapter shall apply on transfer of an undertaking or part of an undertaking to another employer. For the purposes of this Act, transfer shall mean transfer of an autonomous unit that retains its identity after the transfer."**

(44) Chapter 16 of the Working Environment Act implements the consolidated EU Directive 2001/23/EC on the rights of employees in the event of transfers of undertakings. Of particular importance is Article 1 a) and b), which has the following wording:

> **"a) This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.**
>
> **b) Subject to subparagraph a) and the following provisions of this Article, there is a transfer within the meaning of this 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."**

(45) According to item 3 of the Directive's preamble, its purpose is to provide for the protection of employees and safeguard their rights in the event of a change of employer. The EU Court has adopted an interpretation of the Directive in favour of employees, focusing on its purpose, see for example the judgment of 6 September 2011 C-108/10 (Scattolon) paragraph 58. Considerations of purpose are also emphasised in the Norwegian preparatory works, see for example Ot.prp. *[Proposition to the Odelsting]* no. 49 (2004–2005) pages 256 and 259

(46) Legislative history, the central place of the EU Court's decisions as sources of law and the conditions developed by this Court for application of the Directive were reviewed in Rt. 2001 page 248 (Olderdalen Ambulanse), Rt. 2006 page 71 (SAS) and Rt. 2010 page 330 (Bardufoss). As these judgments show, three criteria have been established in EU Court practice for when a transfer of undertaking has taken place. In brief, and in relation to the relevant issues in the present case, these criteria can be summed up as follows:

(47) First, the transfer must concern an autonomous economic entity.

(48) Second, the activity must have been transferred to a new owner on the basis of a contract or by the merger of undertakings.

(49) Third, the activity that has been transferred must in all essentials be the same as before the transfer, so that its identity has been retained.

(50) I agree with the parties that the second criterion has been met, even if the transfer occurred in a tripartite relationship. The dispute concerns the two remaining criteria: whether an *autonomous economic entity* is involved and whether the activity *retained its identity* after the transfer. The question of what is to be regarded as an autonomous economic entity has not previously been reviewed by the Supreme Court. However, I would mention already here that some of the same factors will be relevant in the assessment of both the entity criterion and the identity criterion. It is therefore difficult to draw a sharp line between them, something which is also shown in EU Court practice.

(51) The EU Court has reviewed the question of a transfer of undertaking in a number of decisions. The counsels have referred to decisions from 1985 (Botzen, case C-186/83)

onward. The Court's decision of 11 March 1997 in case C-13/95 (Süzen) is, in my opinion of special interest to our understanding of the requirement that an autonomous economic entity must be transferred. The central criteria have here been formulated as follows:

> **"13 For the directive to be applicable, however, the transfer must relate to a stable economic entity whose activity is not limited to performing one specific works contract. … The term entity thus refers to an organized grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective.**
> **14 In order to determine whether the conditions for the transfer of an entity are met, it is necessary to consider all the facts characterizing the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation. …**
> **15 … the mere fact that the service provided by the old and the new awardees of a contract is similar does not therefore support the conclusion that an economic entity has been transferred. An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organized, its operating methods or indeed, where appropriate, the operational resources available to it.**
> **16 The mere loss of a service contract to a competitor cannot therefore by itself indicate the existence of a transfer within the meaning of the directive. In those circumstances, the service undertaking previously entrusted with the contract does not, on losing a customer, thereby cease fully to exist, and a business or part of a business belonging to it cannot be considered to have been transferred to the new awardee of the contract.**
> **17 It must also be noted that, although the transfer of assets is one of the criteria to be taken into account by the national court in deciding whether an undertaking has in fact been transferred, the absence of such assets does not necessarily preclude the existence of such a transfer. …**
> **18 As pointed out in paragraph 14 of this judgment, the national court, in assessing the facts characterizing the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets."**

(52) Subsequent EU Court practice has confirmed, modified and completed the situation as regards sources of law. I refer in particular to the judgment of 13 September 2007 in case C-458/05 (Jouini), in which the question of what constitutes an economic entity became a focal point. In paragraph 34, the Court states the following:

> **"As a result, in the absence of an identifiable organisational structure of the temporary employment business, an analysis should take account of its special characteristics rather than aim to establish whether an economic entity exists at the level of its organisational structure. In that context, the assessment of the existence of an economic entity for the purposes of Article 1(1) of Directive 2001/23 requires an assessment of whether the assets transferred by the transferor constituted for its purposes an operational grouping sufficient in itself to provide services**

characterising the business's economic activity, without recourse to other significant assets or to other parts of the business."

(53) According to EU Court practice, we must, when examining whether the transfer concerns an autonomous economic unit – in cases where what is taken over is not an entire enterprise or a clearly identifiable and independent division – make an overall evaluation of what characterises the undertaking that is transferred. It is not necessary for a specific division or entity that corresponds to the organisation of the transferor enterprise to be found again in the transferee. But I understand EU Court practice to be that what is transferred must constitute a stable and operational entity, which is itself in a position to provide the services that are characteristic of the undertaking's economic activity. In the overall assessment we must make, the weight of the different factors will vary according to the undertaking's nature and operating methods.

(54) The decisions that in particular shed light on the identity criterion were thoroughly reviewed in the SAS judgment. It is particularly the criteria indicated in the EU Court's judgment of 18 March 1986 in case C-24/85 (Spijkers) – as developed and further defined by subsequent practice – that form the starting point for an assessment of whether the undertaking's identity has been retained after the transfer, see paragraphs 78 to 84 in the SAS judgment. It is emphasised in paragraph 86, by way of summary, that where an undertaking has been characterised chiefly by one individual input factor – typically manpower or physical operating assets – decisive weight has often been given to this in the evaluation of identity. If the undertaking cannot be characterised by any individual factor, the question of whether the undertaking's identity has been retained must "…be decided based on an overall assessment of all the factors that are relevant pursuant to EC Court practice".

(55) I will now take a closer look at *whether an economic entity that retained its identity after the transfer was transferred in the present case.*

(56) The transferor company – LSG – had no separate division that exclusively worked with the SAS contract. Nor had other well-defined entities been established that only worked with this contract. Certainly, many employees worked a lot with deliveries to SAS, but it had not been decided that they should work exclusively on this. The situation was the same in Gate Gourmet after the transfer, albeit with the difference that a greater part of Gate Gourmet's activity was directed at customers other than SAS.

(57) Against this background, we must consider whether the activity relating to the SAS contract, though not separated organisationally, was nevertheless of such a nature that it established a stable and operational entity for the performance of the contractual requirements.

(58) Gate Gourmet's contract with SAS was produced in the Supreme Court. It is for example stipulated in the detailed contract that Gate Gourmet is to treat SAS as the company's "most favoured customer", and that SAS is in principle to decide which subcontractors are to be used. The contract was entered into for five years and entitles SAS to renew the contract for a further two periods of two years' duration.

(59) However, in the assessment of whether the conditions for the transfer of an entity have been met, we must take into consideration all factual circumstances around the transfer, as shown by the precedents. The form of the undertaking involved is significant. Furthermore, it is important whether there has been a transfer of tangible and any

intangible assets and employees and whether the activity and the client base are the same. The importance to be attached to the various factors will depend on the type of activity, the production methods and the operating methods.

(60) That the activity and the customer are the same after the transfer is not sufficient to establish that an economic entity has been transferred. The EU Court's statement in paragraph 16 of the Süzen judgment, from which I quoted earlier, shows that a loss of a contract after a round of competitive bidding does not by itself indicate that a transfer of undertaking has taken place. This is shown particularly clearly in the English text, which reads that the loss of a contract to a competitor cannot "by itself indicate the existence of a transfer…".

(61) The type of activity in question – airline catering – is characterised by a mixture of input factors. Thus, considerable physical operating assets are required and the activity is labour-intensive.

(62) What suggests that an entity retaining its identity has been transferred is that the economic activity following from the SAS contract was continued, and that around one third of LSG's workforce was employed in Gate Gourmet, of which some persons with key functions. Furthermore, it followed directly from the transfer of the contract that the end customers would be the same, namely the passengers traveling with SAS at any time. Gate Gourmet did not buy any equipment from LSG, but was given some trolleys, etc. belonging to SAS. Also some tax-free goods, etc. were transferred, which have a relatively high rate of turnover and which represented modest values compared with the physical operating assets.

(63) Upon transfer of the contract, on the other hand, the undertaking was moved in its entirety from LSG's premises to Gate Gourmet's own building, which is of approximately 7000 sq. m. The premises are purpose-fitted, have their own production equipment and represent all told considerable values. Moreover, airline catering requires special-purpose vehicles, which the catering companies themselves acquire to carry deliveries to the planes.

(64) In this type of activity, the premises and the transport units are indispensable and important input factors. The equipment in the form of trolleys, etc. from SAS is certainly a relevant input factor, but in my opinion, it is secondary to the aforementioned. On this point, the present case differs clearly from the facts of the case in Rt. 2006 page 71 (SAS) and Rt. 2010 page 330 (Bardufoss), where the activity continued in the same premises and with the same infrastructure.

(65) According to my view, our case has quite a few points of resemblance with the case decided by the EU Court on 25 January 2001, case C-172/99 (Liikenne). According to this judgment, and in spite of the fact that most of the drivers were transferred to a transferee bus company, a transfer of undertaking had not taken place when no vehicles or other assets had been transferred. The central paragraphs of the judgment read as follows:

> **"37 The Court has indeed held that an economic entity may, in certain sectors, be able to function without any significant tangible or intangible assets, so that the maintenance of the identity of such an entity following the transaction affecting it cannot, logically, depend on the transfer of such assets….**
>
> **38 The Court thus held that, since in certain sectors in which activities are based essentially on manpower a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity, it must be recognised that such an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and**

> **skills, of the employees specially assigned by his predecessor to that task. In those circumstances, the new employer takes over an organised body of assets enabling him to carry on the activities or certain activities of the transferor undertaking on a regular basis. …**
>
> **…**
>
> **42 However, in a sector such as scheduled public transport by bus, where the tangible assets contribute significantly to the performance of the activity, the absence of a transfer to a significant extent from the old to the new contractor of such assets, which are necessary for the proper functioning of the entity, must lead to the conclusion that the entity does not retain its identity."**

(66) I also refer to the EU Court's judgment of 20 November 2003 in case C-340/01 (Abler). Here the Court concluded that use of the same assets (particularly premises and equipment) – not the non-transfer of employees – was a decisive factor in the transfer of the operations of a large-scale catering service.

(67) Following an overall assessment, I have come to the conclusion that no transfer of undertaking occurred from LSG to Gate Gourmet under section 16-1 of the Working Environment Act.

(68) I would add that after the takeover of a major contract, the acquiring company will in some cases – based on the criteria established so far by the EU Court – be in a position to exert considerable influence on assessments under labour law through the employer's choices concerning the recruitment of employees and the take-over of premises and other operating assets. I therefore find it difficult to attach any independent importance to whether Gate Gourmet could have sought to make arrangements with a view to circumventing the provisions of chapter 16 of the Working Environment Act by avoiding the appointment of more persons from LSG, see also Rt. 2001 page 248 (Olderdalen Ambulanse).

(69) In my view, there is no basis for concluding that a transfer of undertaking took place with respect to the employees working with dispatch and tax-free goods, as submitted alternatively by the respondents. It is clear that these employees did not represent an autonomous, stable and operational entity that retained its identity after being transferred to Gate Gourmet.

(70) I shall pass on to *the question of discrimination* and will first look at the respondents' procedural objection.

(71) In the Appeals Committee's first decision, reproduced above, a Supreme Court review was only allowed for parts of the appellant's appeal– the application of law to an item concerning the claim for compensation on grounds of discrimination. There is no doubt that the Appeals Committee could have extended the referral with respect to this claim, without prejudice to its first decision, as I have discussed above. I concur with the Appeals Committee's justification in the decision of 1 September 2011:

> **"Pursuant to section 19-10 of the Disputes Act, a decision may be reversed "if the reversal is justified by the purpose of the Act and reversal is not disproportionately onerous for a party who has acted in reliance on the ruling". The Appeals Committee observes that any reversal in this case would apply to the same claims as those that are being reviewed in the appeal. This claim has not been decided with final and enforceable effect. Both section 13-1 and section 13-4 of the Working Environment Act have been invoked as basis for the claim, and no legal effect is associated with each item in the Court's justification.**

> **The Appeals Committee cannot see that a reversal would be "disproportionately onerous" to the respondents. This one question – whether it was unlawful to obtain and receive the relevant lists of names – is largely the same question as the one that has already been allowed. The same applies largely to the application of law relating to section 13-1 of the Working Environment Act, where we must ask, in connection with the specific assessment, whether there might be unfair discrimination if questions about union affiliation were allowed. After a new assessment, the Appeals Committee has come to the conclusion that the petition for a reversal should be allowed."**

(72) As opposed to the agreement between the trade unions and LSG of 2000, the agreement which Gate Gourmet chose to enter into with LFF only concerned the members of this union. LFF members were given, according to the agreement I have earlier referred to, a preferential right to employment. When job applicants who were not members of LFF were not granted – for this reason – the same right, it is in my opinion clear that they were subject to discrimination in breach of the main rule of section 13-1 (1) of the Working Environment Act. To discriminate because an employee is *not* a member of a specific trade union is also covered by the provision.

(73) I cannot see that any of the exceptions in chapter 13 can be applicable. It is not necessary to come to a decision on whether the agreement can be regarded as a collective agreement, as it concerned recruitment in any case, not "pay and working conditions", see section 13-2 (4). The exception provision in section 13-3 (1) is not applicable because this case does not concern discrimination that "is necessary for the performance of work or a profession". When there has been direct discrimination, as in the present case, the exception for indirect discrimination in section 13-3 (2) is not applicable either.

(74) We mentioned in the beginning that it is clear that a number of job applicants were asked questions about their union affiliation in order to clarify who was covered by the LFF agreement. For this purpose, Gate Gourmet also received a list of LFF members who had been employed in LSG. This is in direct breach of the provision in section 13-4 (1) against asking applicants for "information ... of whether they are members of employee organisations".

(75) I cannot see that there is reason in our case to make a strict interpretation of sections 13-1 or 13-4 based on considerations of purpose, as claimed by the appellant. Even if good reasons can be cited to seek an amicable arrangement with the unions, it is a decisive objection that the agreement in this case did not include all previous employees in LSG.

(76) Consequently, I conclude that Gate Gourmet has breached sections 13-1 and 13-4 of the Working Environment Act. The amount of the aggravated damages has not been referred, as mentioned above, and according to the District Court's judgment, the parties agreed that the question of compensation should be postponed.

(77) Gate Gourmet has been supported in its claim that no transfer of undertaking took place, while the appeal against the application of law in the question of discrimination did not succeed. The question of a transfer of undertaking was the most central issue in the appeal and Gate Gourmet can therefore be said to have succeeded to a significant extent. However, the case raised a question of principle concerning the interpretation of section 16-1 (1) second sentence of the Working Environment Act, and the employees had good cause to have this matter heard.

(78) I have come to the conclusion that legal costs should not be awarded before any court. This applies both to the action of Nguyen Thi Ha et al. and the action of Elizabeth Aguilar Grønberg.

(79) I vote for the following

J U D G M E N T:

1. The Court finds for Gate Gourmet Norway in the claim that the respondents' rights and obligations following from their contracts of employment with LSG Sky Chefs Norge AS have been transferred to Gate Gourmet Norway AS.

2. The appeal is rejected with respect to item 2 of the Court of Appeal's conclusion of judgment.

3. Legal costs are not awarded before any court.

(80) Justice **Normann**: I agree with the first-voting judge, both as to the essentials and the outcome.

(81) Justice **Utgård:** Likewise.

(82) Justice **Matheson:** Likewise.

(83) Justice **Gjølstad**: Likewise.

(84) After voting, the Supreme Court handed down the following judgment

J U D G M E N T :

1. The Court finds for Gate Gourmet Norway in the claim that the respondents' rights and obligations following from their contracts of employment with LSG Sky Chefs Norge AS were transferred to Gate Gourmet Norway AS.

2. The appeal is rejected with respect to item 2 of the Court of Appeal's conclusion of judgment.

3. Legal costs are not awarded before any court.

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