EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2015/19 Successfully appealed pre-transfer dismissal revives employment contract retroactively, causing contract to transfer (UK)

<p>An employee’s successful appeal against dismissal meant that her dismissal was overturned and she was, without more, automatically reinstated with retrospective effect. The decision did not have to explicitly refer to reinstatement nor did it need to be communicated to the employee to be effective. This logic applies even where the employer’s business transferred to a new employer after the dismissal but before any appeal hearing. Background The European Acquired Rights Directive on safeguarding employees’ rights in the event of transfers of undertakings has been implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Regulation 4 of TUPE provides that a relevant transfer shall not operate to terminate an employee’s employment contract. In order for their employment to be protected and to transfer to the new employer, however, employees must be employed by the first employer “immediately before the transfer”. Employees who are dismissed prior to the transfer for a reason unconnected to it will not, therefore, become employed by the new employer, unless – as this case shows – the decision to dismiss them is overturned on appeal.</p>

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Facts

Mrs Salmon was employed by Castlebeck Care until she was dismissed for gross misconduct. She exercised her contractual right to appeal this decision. Before any appeal was held, the business undertaken by Castlebeck transferred to another company, Danshell Health. Her appeal against dismissal was heard by employees of Danshell who had transferred from Castlebeck. The appeal panel decided that Mrs Salmon's dismissal was 'unsafe'. But there was no explicit decision to reinstate Mrs Salmon, and the outcome of the appeal was not communicated to her. Instead, Danshell intended to reach a settlement with her – but this did not happen. Mrs Salmon brought a claim against both Castlebeck and Danshell, claiming compensation for unfair dismissal.

Mrs Salmon considered that her successful appeal meant that her dismissal was overturned and, without more, she was automatically reinstated with retrospective effect. This in turn meant that she was employed by Castlebeck "immediately before the transfer" in line with Regulation 4 of TUPE, so that her employment transferred to Danshell; although she was treating herself as dismissed (and seeking compensation) due to their subsequent conduct. She therefore appealed the Tribunal's decision.

Judgment

The Employment Appeal Tribunal (EAT) agreed with Mrs Salmon and overturned the Tribunal's findings. It found that, unless there were contractual provisions to the contrary, the

effect of a successful appeal against dismissal was to revive the employment contract with retrospective effect so as to treat the employee as if they had never been dismissed. The EAT said that, in principle, there was every reason why (and no reason why not) this should be the case. The EAT acknowledged that communication to the employee was needed to effect a dismissal, but this was not the case with a successful appeal against dismissal, where the revival of the contract happened automatically. If it was otherwise, the employer could simply avoid the consequences of any decision in favour of the employee by not telling the employee its decision, which was a situation that was clearly open to abuse. The EAT also held that the right to an appeal necessarily includes the right to be told the result.

Consequently, it was Danshell, not Castlebeck, who was liable to Mrs Salmon for unfair dismissal.

Commentary

This decision, applying established law, is unsurprising in principle and it accords with the spirit of TUPE in terms of the protection to be offered to employees on the transfer of a business. However, it does create an interesting situation in the context of a TUPE transfer because it means that the potential new employer may be put in the position of conducting an enquiry into the dismissal process of the first employer and, if it finds wrongdoing, it (the second employer) will be liable for that. The case highlights that, generally, it is the new employer who will bear the liability for the old employer's failings, subject to contractual terms in which the transferor may agree to reimburse the transferee. This case acts as a reminder about the importance of conducting due diligence on the transfer of a business which includes information about recent 'leavers' from the business, so that the new employer can factor any outstanding risks into its commercial terms with the old employer.

It is also interesting to consider why the employee appealed in this case, when the only practical difference between the two court decisions appears to be who was responsible for paying her compensation. However, as it appears that Castlebeck went into administration, this made all the difference: Denshell was in a position to pay full compensation to the employee, giving her an effective remedy, while Castlebeck was not.

Had the appeal decision (to revoke the dismissal) been acted upon, Mrs Salmon would presumably have continued employment with Danshell, to whom her employment transferred, and been paid back-pay for the time going back to her original dismissal. However, on the facts of the case, in particularly Danshell not communicating the appeal decision to Mrs Salmon and making no attempts to get her back to work, it seems she decided that the employment relationship was at an end. She therefore treated herself as dismissed

and sought compensation. Although reinstatement is a possible remedy for unfair dismissal in the UK, it is rarely ordered by a court or tribunal because compelling specific performance of a personal contract such as an employment contract, particularly where the relationship has broken down, is considered undesirable and contrary to public policy. In any event, in this case it seems that Mrs Salmon did not wish to work for Danshell and so was not seeking reinstatement.

Comments from other jurisdictions

Austria (Martin Risak and Thomas Pfalz): Under Austrian law a dismissal may be contested in workplaces with more than four employees within a week in case of a summary dismissal or two weeks in case of a dismissal with notice (Section 105 et seq. of the Labour Constitution Act – Arbeitsverfassungsgesetz). It will be successful if the dismissal is to be considered "socially unjust" and was not based on reasons attributable to the employee or on the job being made redundant. The ruling of the court will – in case of a successful claim - reinstate him/ her retroactively. If a transfer of an undertaking has taken place before the reinstatement, the employment contract will then be transferred retroactively to the transferee at the time of the transfer.

Croatia (Dina Vlahov Buhin): The case at hand would most probably be decided differently by competent Croatian courts mostly due to procedural differences of the two legal systems. However the underlying legal argumentation of the case could adequately be applied by the Croatian court, but under different procedural circumstances.

First of all, under Croatian law an "appeal" against a dismissal is carried out by filing a claim before the competent court. The respective court primarily decides whether the dismissal has been declared lawfully. If the respective court determines that the decision on dismissal has been rendered unlawfully, the dismissal shall be considered to be null and void and as if it has never been declared, ie employment relationship shall be restituted with retroactive effect (ex tunc). Provided the dismissal is declared unlawful, the court may, depending on the claim of the employee, either (i) reinstate the employee and order the reimbursement of due wages for the period when he/she was not working due to wrongful dismissal or (ii) terminate the employment relationship and order the payment of a compensation. In any case, the court may only render the aforementioned decisions if the latter or the former are explicitly requested in the claim by the employee (the employee may alter its requests of the claim in the course of the proceedings). Namely, according to the Croatian procedural law the court may only decide within the merits of the filed claim, hence, if not explicitly requested by the employee, the court may not decide that the respective employee is automatically reinstated at his former working post.

As to the fact that in the period between the announcement of the dismissal and rendering of the court's decision a transfer of undertaking occurred, the Croatian law generally prescribes that all existing employment agreements are ex lege transferred to the new employer. It is further stipulated, that the former and the new employer are jointly and severally liable for the obligations in regard to the employees which arose before the date of the transfer. It follows that de jure the employment agreement which has been terminated unlawfully should be transferred automatically to the new employer due to a legal presumption that such a dismissal never occurred at all, meaning that it existed during the time of the transfer. However, in order for the aforementioned court decisions to be enforceable in regard to the new employer and not to the former one, the fact that the transfer of undertaking occurred and that it pertains to the respective employee has to be determined and declared by the competent court. Hence, the employee has to request the court to determine that his/ hers employment agreement has been ex lege transferred to the new employer and that he/she may therefore request that he/she continues working for the new employer or that the new employer is jointly and severely liable with the former for the payment of the compensation.

In summary, according to Croatian law the outcome of the commented case would mostly depend on how the relevant employee would structure his/hers claim. Namely, as mentioned, if the dismissal is declared to be unlawful the employee may request to be reinstated or judicially terminate the employment agreement and claim compensation. Further, in order to secure that above mentioned requests of the claim are enforceable in regard either to the new employer or both to the former and the new employer, the employee has to explicitly request the court to determine that the transfer of undertaking occurred, that he/she is encompassed by it or that the new employer is jointly and severally liable with the former for the payment of the compensation.

The Netherlands (Zef Even): This case indeed serves as a reminder to perform a thorough due diligence. It resembles to some extent a Dutch case that was judged by the Supreme Court (26 June 2009, JAR 2009/183, Pax/Bos). The employer, Sara Lee, sourced out its logistic services to another company, Pax. The employees assigned to the logistic services department, however, agreed to enter into service of a daughter company of Sara Lee, Detrex. These employees were subsequently hired by Pax in order to do the logistic work for the benefit of Sara Lee. According to the Supreme Court, the combination of (i) sourcing out the logistic activities to Pax and (ii) having the employees entering into service of Detrex whilst being hired by Pax and performing work for Sara Lee, constitutes a transfer of undertaking. Although the employees signed an employment contract with that daughter company, in fact they automatically entered into service of Pax. Pax was therefore the employer of these employees and had been just that as of the start, without Pax realising that.

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Subject: Transfer of Undertakings; Reinstatement

Parties: Salmon v Castlebeck Care (Teesdale) Ltd and others

Court: Employment Appeal Tribunal

Date: 10 December 2014

Case number: UKEAT/0304/14/DM

Internet publication: www.bailii.org>UK&Commonwealth>UK Employment Appeals Tribunal>2014>December>see under name of parties

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Creator: Employment Appeal Tribunal
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