SUMMARY

2015/2 Economic identity of a petrol station (GE)

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Facts

The plaintiff had been employed full-time by the second defendant (defendant 2), who was the leaseholder of a petrol station in an international port, since 1994. The petrol station (building, pumps, equipment, etc.) was owned by an oil company that also supplied the petrol. The station included a shop. Most of the customers of the petrol station were regulars. With some of them, special contracts existed, allowing them to purchase petrol on credit and with special discounts. About 80% of the customer base were treated in this way.

The oil company terminated the contract with defendant 2 with effect from September 2011.

Defendant 2 left the petrol station business. He issued termination letters to all 16 employees (eight full-time and eight temporary employees) "in case no transfer of undertaking had taken place". The petrol station was subsequently turned into an (unleased) automatic petrol station without a shop, allowing for payment by credit card only.

Sometime before the oil company terminated its contract with defendant 2, it had built a new petrol station at about 800m from the automatic petrol station and leased it to defendant 1, who took up business end of September or beginning of October 2011.

All 16 employees applied as a group and offered their services to defendant 1, who did not take up their offer, but later employed three or four full-time employees and three or four temporary employees. He did not take over any of the equipment of the first petrol station, except for several cooking pots. The building, the contracts with the oil company and the organisation of the petrol station were similar to the original ones. However, defendant 1 did not take over any of the special contracts with regular customers of defendant 2, nor did he make any contracts of this kind himself.

One of the full-time employees not offered employment by defendant 1 brought legal proceedings against him. She argued that her employment relationship had been transferred to defendant 1 as a result of a transfer of the undertaking. She argued that, as the core business of a petrol station was the sale of petrol on behalf of the same delivering oil company, it did not matter that the (old) equipment from the first station had not been taken down and reused at the new station. Had the oil company continued to supply the first petrol station, she said this equipment would have been replaced in the near future.

The *Arbeitsgericht* in Rostock ruled that no transfer of the undertaking had taken place. The plaintiff and defendant 2 appealed to the *Landesarbeitsgericht* (LAG) of Mecklenburg-Vorpommern. The LAG rejected the claims. The plaintiff then appealed to the *Bundesarbeitsgericht* (BAG) where defendant 2 intervened on behalf of the plaintiff.

Judgment

The BAG rejected the plaintiff's appeal. It held that the economic identity of a petrol station consisted mainly in a particular location, equipment, customer base and employees. The circumstances in question did not indicate the transfer of an undertaking.

In its reasoning, the Court relied on the argumentation of the ECJ in the cases "Amatori" (C-458/12) and "Günney-Görres and Demir" (C- 232/04). It held that there is a transfer of an undertaking in cases where there is the 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 that activity is central or ancillary does not change the assessment of the situation.

The decisive criterion for establishing the existence of a transfer within the meaning of Section 613a of the German Civil Code is, therefore, whether the entity in question retains its identity and is either continued or resumed.

In order to determine whether the conditions for the transfer of an organised economic entity are met, the Court deemed it necessary to consider all the facts characterizing the transaction, including the type of undertaking concerned; whether or not its tangible assets, such as buildings and movable property, transferred; the value of its intangible assets at the time of the transfer; whether the majority of its employees were taken over by the new employer; whether its customers transferred and the degree of similarity between the activities carried on before and after the transfer.

In the case at hand, the BAG first established that the petrol station was indeed a separate and independent economic entity. The buildings and assets of the petrol station were characterised as an organized grouping of persons and assets consisting of the petrol station equipment, with underground tanks, eight petrol pumps, a special carriageway, roofing, a pillar indicating petrol prices and a shop. All of these were used to serve a particular purpose: the sale of petrol on behalf of the supplying oil company and the sale of its own products in the shop. Over 80% of the customers were regulars, which the BAG concluded would be an asset in the form of a customer base.

The method of operation of the new petrol station did not differ much from that of the original one. Also, the location of the new petrol station was no more than 800m from the old one. However, these facts alone did not offer sufficient indication that there had been a transfer, as most of the petrol stations supplied by the same oil company were structured in a similar way.

As to the assets of the petrol station (tanks, pumps, roofing etc.), the BAG held that the fact that those had not been taken over by defendant 1 presented a strong argument against a transfer. It continued its reasoning by rejecting the assumption made by the plaintiff that a change of leaseholder and the purchase of new equipment in the original location would have been treated as a transfer. For the BAG, in order to determine whether there had been a transfer, it was necessary to assess the circumstances as a whole.

In addition, the majority of the employees had not been taken over by the new employer. Only half (or less) of the personnel were employed at the new petrol station. It did not matter to the court that the other staff had not applied to defendant 1 again after the group application because defendant 1 provided less favourable working conditions.

The Court also considered the fact that the customer base had not been taken over, as the special contracts allowing customers to purchase petrol on account with discounts had not been continued by defendant 1. The court also took into account the fact that this case was not similar to Merckx and Neuhuys (ECJ C-171/94 and C-172/94), as it held that brand loyalty did not exist in the same way with petrol as it does with car brands. Hence, the Court concluded that no transfer had taken place.

The Court also denied the plaintiffs' request for a referral for a preliminary ruling to the ECJ, as it found that it was for the national court to establish on the facts whether there had been a transfer.

Commentary

The Court based its judgment on the European guidelines on transfer of undertakings and emphasised that employing half or less of the original staff is not sufficient indication of a transfer of an undertaking. In an earlier decision, the BAG had held that the "majority of the personnel" meant more than half of the head-count of the staff (58% in that case). In order to determine whether the economic entity had been preserved and important assets had transferred, it was crucial to establish the core business of the entity in question. In this case, the assets belonging to the petrol station (petrol tank, pumps etc.) had not been transferred. The hypothetical replacement of equipment for maintenance reasons was irrelevant. This factor weighed even more heavily in this case, as the petrol station remained as an automatic outlet in its old location and the hypothetical transferee was a different and newly-opened business.

Comments from other jurisdictions

Croatia (Dina Vlahov): The case at hand would most probably be decided by the Croatian courts in the same way as the German Bundesarbeitsgericht. The transfer of an undertaking is deemed to have taken place if the undertaking (or part of one), or a business activity (or part of one) is transferred to a new employer based on a legal agreement or by operation of law, whilst retaining its economic integrity. 'Economic integrity' consists of objective factors (i.e. the means to do the work), subjective factors (i.e. business activity, knowledge and experience of employees) and organisational components. It follows that in order to transfer an undertaking, all three elements must be transferred.

The Croatian Supreme Court has also determined that an undertaking must transfer in its entirety and the mere transfer of its assets may not constitute a transfer (Vrhovni sud, Revr-592/07, 12 September 2007). This might have applied to the case reported above. As the assets and established business practices of the first petrol station had not been transferred to the

second one, it could not be concluded that the economic integrity was retained and therefore a transfer did not occur. However, bearing in mind that the petrol stations were owned by the oil company and that defendant 2 was simply a leaseholder, the question arises as to what the nature of the undertaking actually was. In our view, defendant 2's undertaking consisted mainly in its know-how, its employees and its established customer base and it is not important that assets were not transferred. More significant factors were whether defendant 1 had employed the majority of defendant 2's employees and whether it continued to work with its regular customers. As this was not the case, our view is that there was no transfer of the undertaking.

Please note that Croatian case law about this is scarce and our conclusions are mainly based on our interpretation of statute.

One further thought - if the oil company had not leased the petrol station purely in the form of petrol station infrastructure, but as an existing undertaking with an ongoing business activity composed of the elements we have described, defendant 2's employment agreements would have transferred back to the oil company after the expiry of the lease. This would have been a transfer of the undertaking from defendant 1 as transferor to the oil company as transferee. Then, in order to turn the petrol station into an automatic one, the oil company would have had to terminate the employment agreements.

The Netherlands (Peter Vas Nunes): Let us assume that the original petrol station was in operation until the date on which the contract between the oil company and defendant 2 ended. Could the plaintiff not have argued that she transferred to the oil company on that date? It only after taking over the operation of the petrol station from defendant 2 (even if only one second later) that the oil company proceeded to convert it into an automatic, unmanned station. In this reasoning, it is the oil company that should have dismissed the employees.

Subject: Transfer of undertakings

Parties: unknown

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