

SUMMARY

2014/14 Distinction asset-intensive/labour intensive not decisive; all Spijkers criteria relevant (NL)

The transfer of part of a business under the transfers of undertakings rules can occur without assets being transferred from one party to the other. The Dutch Supreme Court recently found such a transfer to have occurred without assessing whether the business in question was asset-reliant or labour-reliant. The other ‘Spijkers criteria’ took precedence.

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Facts

This case involves a family of entrepreneurs: siblings X and Y and their parents. The parents own a piece of land. This land accommodated three businesses: a garden centre, a shop selling fishing gear and a camera security shop. A third party operated the garden centre. The garden centre also sold pet supplies. The garden centre went bankrupt in 2007. The fishing shop was originally run by the father, but in January 2008 was taken over by X. Upon taking over this business, X decided also to sell pet supplies in the fishing shop. To that end, he hired an employee, previously employed by the garden centre, where she was in charge of the sale of

pet supplies. X decided to discontinue selling pet supplies in 2009. Shortly thereafter, the employee fell ill., X gave the employee notice of termination of her employment contract, ending on 1 May 2010. In the meantime, Y decided that besides running a camera security shop, he also saw opportunities in running a garden centre. The greenhouses on the land where the bankrupt garden centre had formerly been were demolished and a new garden centre was built. This new garden centre, named “Welkoop ‘t Rijpje” and operated by Y, started its business as of October 2009. Welkoop ‘t Rijpje was part of a bigger garden centre organisation, applying its own Welkoop business formula. Welkoop ‘t Rijpje also sold pet supplies. The employee took the view that Welkoop ‘t Rijpje should be regarded as the transferee of the “pet supply business” previously run by X and that, in consequence, her employment agreement had been transferred to Y as a result of a transfer of undertaking.

The Appellate Court assumed for the sake of argument that the pet supply business could be regarded an economic entity. According to the Appellate Court, that entity could not have retained its identity due to the fact that the operation of the business had been discontinued. The Appellate Court substantiated this by pointing out that (i) Y had not bought any of the pet supplies (assets) from X, (ii) Y operated its business from different premises than X, and (iii) Y used, as being part of the larger Welkoop organisation, a different business strategy (“formula”) than X.

Judgment

The Supreme Court took a different view and held that the Appellate Court should have taken into consideration all the relevant facts and circumstances at hand. The mere fact that no pet supplies were bought by Y; the business was operated from a different building and a different business strategy was used, did not of themselves warrant the conclusion that there was no transfer. After all, according to the Supreme Court, these elements considered in isolation, could not support the conclusion that the entity had lost its identity. Following the *Spijkers* case, (ECJ 18 March 1986, C-24/85) the question of whether or not the identity was retained should be decided by assessing whether the operation of the entity was continued or resumed by another party. Other factors should be taken into consideration as well when making that assessment. These include the fact that the businesses of X and Y were situated on the same piece of land; the new garden centre of Y had been portrayed by the family in the local media as a continuation of the previous garden centre; the employee had been introduced in the past as a future employee of the new garden centre and other employees had been taken over by Y from X. The case was referred by the Supreme Court to another Appellate Court in order to decide, based on all the facts, whether or not the employment agreement of the employee had been transferred from X to Y as a result of a transfer.

Commentary

It is noteworthy that the Supreme Court, when judging whether the entity retained its identity, did not assess whether the business involved was asset or labour intensive. If the business involved was regarded as (fully) asset intensive, the fact that no assets at all were transferred from X to Y, should have led the court to decide that there cannot have been a transfer of the undertaking (ECJ 25 January 2001, C-172/999, *Oy Liikenne*). It seems that the Supreme Court may have regarded the business as neither genuinely asset nor labour reliant, but somewhere in between. Alternatively, it might have felt that the distinction should not be overemphasized. In any event, the issue was not decisive. The advocate general took a similar, though more explicit approach. He said he found the ECJ's rulings inconsistent as to when a business should be regarded asset or labour reliant. He held that the distinction between the two would not provide a valuable contribution to the matter, and continued assessing the case based on the other criteria set out in *Spijkers*.

In my view, two points can be drawn from this case. First, the difference between asset-intensive companies and labour-intensive companies is not black and white. There are many shades of grey that can cause the other criteria put forward in the *Spijkers* case to take precedence. The Advocate General's criticism of ECJ's case law on this point is noteworthy and does impede companies in practice. The emphasis that is laid on the type of business in cases such as *Oy Liikenne* and *Süzen* (ECJ 11 March 1997, C-13/95) is difficult to reconcile with the remark made by the ECJ in *Spijker* that all factors (including the type of business) should be taken into consideration in order to assess whether a business has retained its identity and that they are: "*merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation*". Second, it seems that in some cases very little is needed to tip the Supreme Court towards the conclusion that a transfer has occurred, given the emphasis it places on protecting employees. Both lower instance courts in this case had found insufficient grounds to establish a transfer had taken place, but they were overruled by the Supreme Court.

Comments from other jurisdictions

Austria (Daniela Krömer): The Austrian High Court takes into account all factors, including but not limited to the type of business transferred. The discontinuity of a business, even if it lasts for a couple of weeks or months, does not affect the transfer of undertaking if the same or a similar business activity is then resumed. Also, if no material assets are transferred, that does not in itself rule out a transfer. That said, it is likely but by no means sure that the Austrian High Court would have come to the same conclusion on the transfer as the Hoge Raad.

Germany (Elisabeth Höller): European case law regarding the concept of ‘independent business unit’ has fundamentally influenced German High Court jurisprudence. The ECJ defines ‘economic entity’ as an organised grouping of persons and assets. In its judgment of 22 May 1997, the German Federal Labour Court (BAG), fundamentally changing its former case law regarding the terms ‘business’ and ‘business unit’, followed ECJ case law. Since that time, German labour law no longer provides a definition of ‘business’ and ‘business unit’.

As in the Netherlands, the unclear expression ‘economic entity’ causes substantial legal uncertainty. The ECJ has, of course, set out certain criteria to be used to assess the existence of a transfer. Following this, German jurisprudence holds that an overall analysis must be made to evaluate whether or not the identity of the business unit has been retained. The following items must be assessed:

- type of business;
- transfer of material assets, such as commercial property and mobile assets;
- value of intangible assets at the time of transfer;
- takeover of the majority of employees by the transferee;
- takeover of the customers;
- degree of similarity between the work before and after the transfer;
- duration of a potential break in the activities.

The Dutch case reported above again shows that in order to assess whether the entity has lost its identity, each of the above items should be considered, rather than concentrating on a specific item.

Ireland (Orla O’Leary): A recent Irish case mirrors the methods used by the Dutch Supreme Court in *Employee - v - Welkoop ‘t Rippje* to assess whether a transfer of undertakings took place.

In the case of *Paul Winters and Veronica Bagnall – v - Strategic Arts Management Company Limited and Riverbank Arts Centre Limited* 2012 23 ELR 286 the Employment Appeals Tribunal considered whether a transfer of undertakings had taken place where a theatre underwent a change of management. The first respondent management company of the theatre made the two applicant employees redundant and subsequently wound up, paving the way for a new company, the second respondent, to take over the management of the theatre. The employees claimed that a transfer of undertakings had occurred and they were unfairly dismissed.

The Tribunal echoed the Dutch Supreme Court’s application of *Spijkers*, in particular the Dutch Supreme Court’s assertion that an “overall assessment” of the circumstances must be

made. The Tribunal ruled that it “must look at the circumstances of the case in their totality and not make a decision based on one single factor.” The Tribunal found that the theatre was the economic entity in question, and that it retained its economic identity throughout the changeover period, despite the theatre not being used for a few months during the changeover. The Tribunal found that the essential function of the theatre remained the same and the same assets were used to run it. The two employees were found to have been unfairly dismissed.

It would appear that the Dutch Supreme Court’s expansive assessment of whether a transfer of undertakings took place, which went beyond considering individual factors under *Spijkers*, is echoed in this Irish case where the Tribunal looked to the totality of circumstances in making its assessment.

The Netherlands (Peter Vas Nunes): Several Dutch authors adhere to the theory that the sharp distinction between asset-heavy and labour-heavy business only comes into play in “loss of contract” situations, i.e. where one contractor loses a contract to another contractor, and that in all other situations – such as in this case – the ECJ never departed from its “all *Spijkers* criteria” doctrine. It is interesting to have a view from other jurisdictions.

United Kingdom (Lucy Lewis): The Acquired Rights Directive is implemented in the UK by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Those Regulations provide that there will be a qualifying transfer in the following situations:

- a business transfer (which requires there to be an economic entity which transfers and retains its identity following the transfer);
- a service provision change (which applies when a client outsources/insources a service or changes a service provider).

If the *Welkoop ‘t Rippje* case had been heard in the UK, it would have been necessary to determine whether the “pet supply business” was an “economic activity”. That is defined in the UK Regulations as an “*organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*”. It is certainly possible that the “pet supply business” could be an “economic activity” and the use of the word “resources” means that a UK Tribunal is not expected to assess whether the business was *either* asset or labour intensive. In fact, it is usual for questions of “economic entity” to be considered assessing all the facts, as the court in the Netherlands proposes in this case.

Assuming the UK Tribunal found that there was an “economic entity”, it would then need to satisfy itself that the economic entity transferred and retained its identity. As in the Netherlands, these are fact sensitive questions, but the UK Regulations are clear that a transfer

may take place whether or not any property is transferred.

In assessing whether there was a qualifying transfer, a UK Tribunal is likely to want to understand exactly what led X to discontinue pet supplies and Y to start selling them and would certainly be influenced by the factors identified as important by the court in the Netherlands. A UK Tribunal may also want to explore the reasons for the employee's dismissal by X to determine whether it was an attempt by the family to avoid TUPE.

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Subject: Transfer of undertaking

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