SUMMARY

2014/15 Court interprets ETO exception narrowly (NL)

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Facts

The plaintiff was originally employed in The Netherlands by the American company Syncsort Inc. His employer was satisfied with his performance and in 2013 awarded him a bonus of € 38,000.

On 4 October 2013 Syncsort sold the department in which the plaintiff worked (the 'Department') to another American company, the private equity firm SS DP Acquisition Corp. ('SS DP'). The sale qualified as a transfer of the undertaking.

On 13 November 2013 the shareholder of SS DP informed the plaintiff that he was to be dismissed. One month later, SS DP applied to the UWV (the Dutch authority responsible for issuing dismissal permits) for a permit to dismiss him, as required under Dutch law. The reasons given in the permit application were (i) reduced amount of client work and (ii) new management structure, as a result of which the plaintiff's position would become redundant as of 1 January 2014. The plaintiff contested the application but was unsuccessful, and on 28 January 2014, the UWV issued a dismissal permit. It reasoned that SS DP had decided to reduce one management layer, which was its prerogative as an employer, and that there was no alternative suitable position for the plaintiff. Accordingly, on

30 January 2014, SS DP gave notice of termination of the plaintiff's contract, giving two months' notice, so that the plaintiff's last day of employment would be 31 March 2014. SS DP offered the plaintiff a severance payment of € 16,500 gross (under the circumstances, a meagre amount by Dutch standards). Meanwhile, the plaintiff was put on (involuntary) garden leave.

On 3 February 2014, the plaintiff sent SS DP an email, claiming that his dismissal was invalid, given that the reason for his dismissal was the sale of the Department and that Dutch law prohibits - and declares voidable - dismissal 'on account of' (the Dutch word is *wegens*) the transfer of an undertaking. The relevant provision of Dutch law is Article 7:670(8) of the Civil Code ('Article 670(8)'). It transposes Article 4(1) of Directive 2001/23 as follows:

"The transfer of the undertaking […] shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce."

SS DP replied that the dismissal was perfectly valid, having been given for an economic, technical or organisational (ETO) reason.

The plaintiff applied to the court for injunctive relief in the form of an order (i) to allow him to continue performing his work, (ii) for him to continue to be paid his salary of € 14,386 per month (plus all other benefits) and (iii) informing staff that a previous announcement regarding his departure from the company was erroneous.

SS DP did two things. It raised a defence in the injunction proceedings and it applied to the (same) court for conditional termination. By way of explanation: under current Dutch law, in the event an employee refuses to leave voluntarily, an employer can terminate his employment contract in either of two ways. It can apply for a dismissal permit and then, if and when the permit has been granted, give notice of termination. This is what SS DP did. Alternatively, an employer can apply to the court for termination. This can, and frequently is,

done conditionally, the condition being that a previous termination was invalid.

In summary, there were now two court cases pending more or less simultaneously: one in which the plaintiff applied for a provisional order for continuation of his terms of employment despite having been given notice, and one in which SS DP asked the court to terminate the plaintiff's contract in case its termination dated 30 January 2014 was invalid.

In the injunction proceedings, the plaintiff argued that the real reason for his dismissal was not that there was insufficient work, nor that the shareholder had decided to remove one management layer as alleged, but the acquisition of the Department, i.e. the transfer of the undertaking. The plaintiff provided *prima facie* evidence in support of this argument by pointing out that SS DP had not done a proper investigation into the existing management structure, that there was no written reorganisation plan and that there was no formal board resolution to restructure the company. Moreover, prior to the acquisition by SS DP, the plaintiff had never received any indication of a need to restructure the Department, but almost immediately after the acquisition he was told that he was "overqualified" and would need to leave.

SS DP, as the defendant in the injunction proceedings, argued that Article 670(8) should be interpreted as meaning that dismissal is only prohibited where the sole reason for dismissal is the transfer. If there is any other or any additional reason, the dismissal is covered by the exception for dismissal for an ETO reason. That exception applied in this case, so the defendant argued, given that prior to the acquisition of the Department, the management of Syncsort had already considered a restructuring and a change in the reporting lines. Had the Department not been sold, the plaintiff would also have been dismissed. The defendant submitted to the court a statement to this effect, signed by a manager of Syncsort in the U.S.

Judgment

An employee who is dismissed shortly after a transfer of undertaking can invoke the protection of Article 670(8), except where (i) the dismissal would have taken place even in the absence of a transfer and (ii) there is an ETO reason. Given the far-reaching protection Directive 2001/23 aims to give employees, courts must be very critical when examining whether the reason for a dismissal is in actual fact the transfer of an undertaking. The court is in no way bound by the opinion of the UWV but must form its own, independent opinion.

It is common ground in this case (i) that the plaintiff was told soon after the acquisition of the Department that he would have to leave the company; (ii) that before that transfer there was never any mention of a need to restructure management (the statement to the contrary by US management was drawn up after the transfer and therefore does not carry much evidentiary

weight); (iii) that the decision to dismiss the plaintiff was linked to the size of his salary; (iv) that no investigation was done into the organisation or into the plaintiff's duties and responsibilities; (v) that there is no restructuring plan; and (vi) that SS DP has not investigated whether there was a possibility of offering the plaintiff an alternative job within the company. Admittedly, the number of employees reporting to the plaintiff had been reduced, but that in itself was insufficient to yield an ETO reason.

In view of the foregoing, SS DP was ordered (i) to allow the plaintiff to return to his work within 48 hours following the service of the judgment on SS DP, on pain of a penalty of € 1,000 for every day that SS DP failed to comply, to a maximum of € 150,000 and (ii) to continue paying the plaintiff € 14,386 gross per month, and to continue his other employment benefits, beyond 1 April 2014 for as long as his contract of employment continued in force.

Commentary

Judgments on ETO are scarce. This judge made a courageous, but risky decision. Courageous, because there is almost no precedent in Dutch case law of a serious ETO defence being rejected and it would have been easier for the judge to rule in favour of the defendant. Risky, because these were injunction proceedings, where the court was asked to provide temporary, provisional relief pending a more thorough investigation of the facts and the arguments in the 'main' proceedings. What if, for example, in nine months' time, the outcome of a 'main' case is that the plaintiff's dismissal was indeed for an ETO reason, and therefore valid? The damage done to SS DP's business will be hard to undo.

Comments from other jurisdictions

Austria (Daniela Krömer): Given the facts of the case, the Austrian Courts would likely have come to the same conclusion - and in their rare decisions on ETO reasons, sometimes do, albeit in a different procedural setting. Austrian employers are free to terminate employment contracts without having to seek the permission of the courts (except in the case of specifically protected employees, such as pregnant mothers, or works council representatives). In general, employees then challenge their termination in court - hence there are no injunction proceedings.

If a termination based on ETO reasons has taken place despite a transfer of undertaking, Austrian courts accept the ETO argument. ETO arguments have to be sufficiently based on facts, e.g. plans and reasons for restructuring, such as loss of clients, etc. (OGH, 9 Ob A 206/98d). ETO arguments are successful if the restructuring takes places after the transfer in order to reduce an unnecessarily large workforce (that argument cannot be used by the transferor, following OGH 9 ObA 97/02, et al). The cost of the workforce is not a valid ETO

argument in that respect (OGH, 9 ObA 97/02h). Taking the facts of the case - the timely link to the transfer of the undertaking, the lack of a substantial plan or sufficient reason for the need to restructure both before and after the transfer, and the link between the decision to terminate and the size of the plaintiff's salary - the ETO argument would not have been accepted by Austrian Courts either.

Croatia (Dina Vlahov): According to Croatian law, the transfer of an undertaking, business or part thereof does not in itself constitute grounds for dismissal. An employee whose employment agreement has been transferred retains rights in relation to, *inter alia*, dismissal protection, the notice period, severance pay, etc. unaltered in form and scope from what existed prior to the transfer date. Nevertheless, nothing in the law prohibits a dismissal if the employer can justify this on the basis of economic, technical or organisational reasons which arose in connection with the business transfer. Whether there are ETO grounds for dismissal will depend on the facts of each case.

However, this does not guarantee that there is no abuse in practice. Croatian employers have a habit of persuading employees to agree to termination prior to a transfer, arguing that the employees will in any case, after the transfer, lose their right to severance pay, notice period and other benefits. Employees generally accept these offers, as they are uninformed about the legal provisions regulating employment transfers. That said, in line with the rules, the courts have the ultimate responsibility for making sure that employees have been treated justly.

Nevertheless, even though the courts in Croatia tend to favour employees in their rulings, they generally take the view that it is the right of each employer to decide upon the structure and schedule of employment and that neither the courts nor the employees are entitled to interfere with this. In line with this, it is very likely that a Croatian court would have applied the same reasoning as the Dutch court – however, it would only have done so if there was sufficiently strong evidence to support the notion that the dismissals were the result of an abuse of the employer's right to rationalise its business.

Germany (Elisabeth Höller): According to German labour law, a dismissal by reason of a business transfer is invalid. This is provided in the first sentence of section 613a(4) of the German Civil Code (BGB). This provision establishes an autonomous prohibition against dismissal within the meaning of the Law on Protection against Unfair Dismissal (KSchG). It is not limited to situations in which the dismissal is found unfair. Therefore, even employees who are not protected by the KSchG may invoke this prohibition against dismissal. However, the right of the employer to dismiss an employee for other reasons remains unaffected. The prohibition against dismissal contained in section 613a(4) BGB is not relevant if there is an operational reason besides the transfer that in itself justifies a dismissal. In such cases, the

transfer is simply a surrounding, external event but not the main reason for the dismissal. Section 613a BGB does not protect against risks that are independent from transfers of undertakings, but does allow organisations to take necessary rationalisation measures.

In cases of this kind, the employer must provide evidence of its restructuring plans, in a similar way to the Dutch case. However, the employee must also provide evidence to support the allegation that the dismissal took place by reason of the transfer.

Latvia (Andis Burkevics): Latvian law basically copies Article 4(1) of Directive 2001/23 and so far there have been no relevant cases before the Latvian Supreme Court in which a dismissed employee has successfully argued that a termination that took place shortly after a business transfer was in fact connected to the transfer.

However, if my understanding of the case report is correct, where there is a dispute, the employer must prove both that (i) the dismissal would have taken place even in the absence of a transfer and (ii) there is an ETO reason for it. In Latvia it is quite common for the transferor's managers to be terminated a few months after a transfer because of the introduction of a new management structure. If in this kind of case the Latvian courts were to follow the approach of the Dutch court in the case reported above, it seems to me that it would be very difficult for the employer to prove that the dismissal would have taken place even in the absence of the transfer.

Luxembourg (Michel Molitor): In general, employees' rights are safeguarded in the event of a business transfer. However, after the transfer, the employer may dismiss its employees for ETO reasons provided that these reasons are justified, i.e. real and serious (Labour Court of Luxembourg, 9 March 2012, n° 1107/2012). But these reasons should not be merely an excuse to terminate the employment contract following the transfer. Some collective agreements, for example in the banking sector, even exclude dismissal for ETO reasons for two years after a transfer of undertaking takes place.

In relation to ETO reasons, Luxembourg case law considers that the employer has a margin of discretion to take measures to reorganise its business. ETO reasons should be based on objective criteria and should not constitute a pretext to dismiss employees. If the dismissal results directly from the transfer, it will be declared unfair.

In October 2013, the Court of Appeal of Luxembourg tried to overturn the traditional case law on ETO by imposing an obligation to reclassify roles prior to dismissal (Court of Appeal, 7 November 2013, n° 38.931). But this was a solitary case and the courts have not followed this precedent. Quite the reverse: they have reaffirmed their prior judicial self-restraint in matters of ETO (Labour Court of Esch/Alzette, 29 November 2013; Court of Appeal, 12 December 2013).

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Subject: Transfer of undertaking, Employees who transfer/refuse to transfer, ETO

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