SUMMARY

2014/41 employee forfeits right to object to transfer (GE)

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Facts

The plaintiff had been employed by the defendant, a catering company, which had operated a staff cafeteria since 2006. The plaintiff had worked in the cafeteria since 1985. In 2010, the defendant lost the contract to operate the cafeteria, which, from January 2011 on, was operated by a third party (the 'new caterer'). The defendant informed the plaintiff of the transfer to the new caterer. However, the information letter did not fulfil the statutory requirements, in that it named the wrong recipient for any objections to the transfer.

The plaintiff offered his services to the new caterer in January 2011. However, the new caterer denied that a transfer had taken place and declined the plaintiff's offer. The plaintiff brought action against the new caterer, claiming an employment relationship with it. In the course of the lawsuit, it became apparent that a transfer of the undertaking had indeed taken place. Nevertheless, the parties concluded the lawsuit with a settlement agreement in April 2011, in which they established that a transfer had not taken place and that there had never been an employment relationship between them. They explicitly included a clause stating that the plaintiff retained his right to object to the transfer of undertaking vis-a-vis the defendant.

They also agreed on a severance payment amounting to € 45,000.

In May 2011, the plaintiff objected to the transfer of the undertaking on the basis of the German doctrine of *Widerspruchsrecht* as laid down in section 613a of the Civil Code (BGB). This doctrine allows an employee to object to transferring into the employment of the transferee. In such cases, the employee remains in the transferor's employment. The defendant, however, had no job to offer the plaintiff. Accordingly, the plaintiff brought an action against the defendant. He asked the court to establish the continued employment relationship between him and the defendant. He also claimed outstanding salary.

The *Arbeitsgericht* held that the plaintiff was indeed still an employee of the defendant and had to be employed by the defendant. The defendant appealed to the *Landesarbeitsgericht* (LAG) of Hessen. The LAG rejected the claims. The plaintiff then appealed to the *Bundesarbeitsgericht*(BAG).

Judgment

The BAG rejected the plaintiff's appeal. It held that in a situation such as this, where the plaintiff had first sued the transferee in order to establish an employment relationship with that party and then entered into a settlement agreement according to which a transfer of the employment relationship had never taken place, he had forfeited his right to subsequently object to the transfer and claim continued employment with the transferor.

Section 613a BGB provides that an employee may object in writing to the transfer of his or her employment relationship within one month of receipt of notification. However, this deadline does not apply if the notification given by the transferee does not comply with legal requirements, a situation that occurs quite often in Germany – as it did in this case, where the defendant had failed to provide the correct information.

Normally, the plaintiff would have been able to enforce his right to object to the transfer of undertaking, as it had only been five months since the transfer had taken place. The Court nevertheless held that, in this case, his right to object had been forfeited, even if the statutory deadline for the objection had not expired.

Usually, the forfeiture of a right under German Law requires that the employee has not exercised this right for a certain time (element of time) and has given the impression that he will not exercise this right in the future (element of circumstance). Although only five months had passed and the plaintiff had included a clause in his settlement agreement with the new caterer that he retained the right to object to the transfer of undertaking vis-a-vis the transferor (his former employer), the Court held that he had forfeited his right by his

behaviour, given that the transfer had actually taken place and had become undisputed in the course of a lawsuit.

By settling his lawsuit (with a large severance payment), the plaintiff had disposed (*disponieren*) of his employment relationship with the transferee. This gave his former employer the right to assume that the plaintiff would not exercise his *Widerspruch* right. Exercising that right constituted contradictory behaviour and this was a violation of the obligation of good faith set out in section 242 BGB, according to which a party that has an obligation must discharge that obligation according to the requirements of good faith, taking customary practice into consideration. Moreover, allowing the plaintiff to exercise his *Widerspruch* right would lead to him retain his original employment contract with the transferor, in which case he would have been able to enter into a termination agreement with the transferor, thereby disposing of one and the same employment contract twice.

Commentary

This judgment increases legal certainty. Given the fact that information letters concerning transfers of undertakings rarely comply with all legal requirements in Germany, transferors are often faced with a long period during which the employee can claim a continuing employment relationship. Forfeiture of the right to object the transfer is one of the few defences the transferor can use. “You can’t have it both ways” is the message sent to the plaintiff in this case. He cannot dispose of his employment relationship with the transferee, then object to the transfer and claim the same employment relationship with the transferor, possibly getting severance payments from both possible employers.

Comments from other jurisdictions

Austria(Daniela Krömer): The problem of long periods of uncertainty for the transferor following a transfer, does not arise very often in Austria, as the right to object to a transfer is limited to certain, legally defined situations. Employees can only object if either the transferee does not continue with its contractual agreement in relation to a company pension, or if the transferee does not take on board the protection against termination contained in the collective agreement applicable at the transferor. In addition, in just a very few other situations, the Supreme Court has granted additional rights to object to a transfer (e.g. where a works council representative would have lost his position as a works council representative). In the cases defined in law, employees can object within a month after they have been informed of the facts of the transfer or have otherwise acquired that knowledge.

As the right to object depends on very specific circumstances, not many transferors are faced with situations in which employees can claim a continuing employment relationship. The

period of time to object in Austria is, however, only triggered by knowledge of the transfer. It can be assumed that the courts would expect employees to obtain the necessary information in a timely way so that they can exercise their right to object to the transfer, although to the author's knowledge, no case law exists on this.

In addition, under Austrian law it seems unlikely that a transferee and an employer could contractually agree that no transfer has taken place. In any event, a contract at the expense of a third party (*Vertrag zu Lasten Dritter*), does not bind that third party, namely the transferor.

United Kingdom (Bethan Carney): The normal outcome in the UK if an employee objects to a transfer in advance is that the transfer operates to terminate their contract of employment but they are not treated as dismissed. From this point they are not employed by either transferor or transferee and have no claims against either – it is the equivalent of a resignation. This is in accordance with the ECJ decision of *Katsikas v Konstantinidis 1993 IRLR 179*which held that an employee could not be compelled to work for a transferee but neither were Member States obliged to provide for the employment contract to continue with the transferor in the event of the employee objecting to the transfer. What happens to the employment contract in this situation has been left to the discretion of the Member States.

There is an exception, however, where the transfer would involve a substantial and detrimental change to the working conditions of the individual. In these circumstances, the employee may object in anticipation of the proposed change, their employment terminates on the date of the transfer and they retain the right to claim for unfair dismissal against the transferor. Liability in these circumstances will not transfer to the transferee.

There is no provision in the UK transfer of undertakings legislation for employees to object after the date of the transfer. However, where an employee does not know about the prospective change of employer or the identity of the new employer and they resign as soon as they become aware of the facts, this has been held by the High Court to constitute an objection to the transfer even when it occurs after the date of the transfer (*New ISG Ltd v Vernon 2008 ICR 319*). It would not be possible in the UK for an employee to wait as long as one month after the transfer before objecting. The employee in the case of New ISG Ltd resigned two days after the transfer.

Subject: Transfer of undertakings

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Parties: unknown

Court: Bundesarbeitsgericht (Federal Labour Court)

Date: 17 October 2013

Case number: 8 AZR 974/12

Hardcopy publication: NZA 2014, p. 774

Internet-publication: www.bundesarbeitsgericht.de |Entscheidungen|type case number in "Aktenzeichen"

Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2013-10-17
Case number: 8 AZR 974/12