SUMMARY

2012/1: Cross-border transfer of undertaking from Germany to Switzerland (GE)

<p>The cross-border relocation of a German establishment to a foreign country can constitute a transfer of undertaking according to section 613a of the German Civil Code.</p>

Facts

The plaintiff was employed with the defendant, a German subsidiary of an international company. He worked in an establishment consisting of two separate, organizationally independent departments. On 22 October the defendant's managing director informed the employees that one of these departments - the one in which the plaintiff worked - was being closed and the employees' contracts would therefore be terminated. On 24 October the employer terminated the contracts of the plaintiff and 19 other employees working in that department. On the same day the plaintiff and ten of his colleagues received an offer to enter into an employment contract with another company in the group, in Switzerland, located about 60 kilometers from the German company's premises. Six employees accepted the offer, but the plaintiff and four other employees rejected it.

Subsequently, the defendant sold the department's equipment, machinery and inventory to the Swiss company, which also took over the customer lists and continued the production of existing orders. The customers were informed that their contracts had been taken over by the Swiss company.

The plaintiff contested his dismissal with the argument that the department in which he was employed had not been closed but was the subject of a transfer of undertaking, that this transfer constituted the grounds for his dismissal and that therefore his dismissal was invalid and void pursuant to section 613a of the German Civil Code, which is the German

transposition of the Acquired Rights Directive. The local labour court and the Higher Labour Court followed this argument and decided that the termination was invalid.

Judgment

The German Federal Labour Court (*Bundesarbeitsgericht*, the "BAG") upheld the decisions of the lower instance courts and decided that the termination was invalid. It began by rejecting the defendant's argument that the termination of the plaintiff's employment was justified by operational reasons, namely the closure of the department in which the plaintiff worked. The BAG, in accordance with its own longstanding case law, agreed that the closure of a business can be a valid reason for terminating an employment contract, but it noted that not every discontinuation of production qualifies as a closure. The closure of an establishment is defined as the termination of the productive collaboration between the employee and the employer by reason of a final and binding decision of the employer to cease the economic activity. A decision to cease an activity does not exist if the employer simply wants to sell the economic activity. Such a situation is considered to constitute the transfer of an undertaking, not the closure of an establishment - provided the entity's identity is retained.

The court found that the situation at hand qualified as a transfer of undertaking and not as a closure, mainly based on the reasoning that the main tangible and intangible assets had been sold and that the customer relations and production methods were continuing.

The next step in the court's reasoning was that the distance between the transferor's premises in Germany and those in Switzerland was approximately 60 kilometers. Thus, the employees were able to reach the new location by car within an hour. The court held that this relatively short distance between both facilities did not prevent there being a transfer of undertaking.

Finally, the court had to decide whether or not these arguments were applicable to the case at hand, given that a cross-border transfer occurred. The court answered this question affirmatively, holding that a transfer of undertaking can also occur in a cross-border situation. The court reasoned that the decisive question, namely whether the transaction qualified as a closure or as a transfer of undertaking, should be decided by applying German law. Since the place of work, as provided in the employment contract, was Germany and the work had actually been performed in Germany, the relationship between employer and employee was governed by German law. The fact that the assets were sold to a company outside Germany has no influence on the legal position in this respect even if it causes a transfer of undertaking, because a transfer, of itself, does not cause a change in the place of work. The sole consequence of a transfer of undertaking is a change to the employer: in all other respects the employment contract remains as it is. Consequently the question of whether the termination

was a valid closure - or invalid because it was in fact a transfer of undertaking Ð was a matter that should properly be determined under German law.

Since from a German point of view the employer could not demonstrate that a closure of the establishment had occurred, the termination was declared void. The court did not decide whether the plaintiff also had a salary claim against his new Swiss employer, since the plaintiff had not brought such a claim.

Commentary

With this judgment, the BAG continues in the same vein as previous case law, essentially ruling that a discontinuation of production and the sale of all tangible and intangible assets to another entity leads to a transfer of undertaking and not to the closure of an establishment.

I concur with the BAG that the question 'transfer of undertakings – v – closure' needed to be answered on the basis of German law, since all of the decisive facts took place in Germany. The fact that the employer did not take a final and binding decision to give up the economic activity, but chose instead to sell the assets, was correctly Ð the decisive factor in determining that the dismissal was invalid.

The BAG did not put much emphasis on whether a cross-border transfer of undertaking is possible. It merely addressed the issue of whether the distance between the locations prevented it from qualifying as a transfer of undertaking (as it had done in older case law, e.g. in case 8 AZR 335/99, where a distance of one hundred kilometers was found to be too far).

Unfortunately, the BAG did not have to explain the consequences of this decision as regards to possible claims against the Swiss transferee, because the latter was not the subject of legal action. As already mentioned, the plaintiff did not want to work in Switzerland and he rejected the Swiss transferee's offer to work there. In *obiter dicta* however, the BAG did explain that the transfer of undertaking could lead to Swiss law becoming applicable, in which case the plaintiff could face a reduction of his rights as an employee.

I think this is only partly true, because the decisive factor for the governing law is that of the *locus labori*: the place of work. The mere transfer of an undertaking does not change the place of work, merely the identity of the employer. Only if the employee chooses to follow the assets or is forced to do so by a so-called *Änderungskündigung* (a German legal concept under which an employer can force an employee to choose between accepting a change in his terms of employment or losing his job), does the place of work change, in which case, as the BAG rightly stated, the foreign law becomes exclusively applicable and the consequences of the transfer of undertaking become subject to that foreign law.

Further, my view is that the governing law and the rights usually derived from the applicability of a certain law do not transfer as a result of a TOU. In addition, in non-cross-border cases a TOU might lead to a situation in which different legal rules apply to the employment. Take the following example. Let us assume that a company is split up into different entities and establishments. Before the TOU the establishment had 15 employees, whereas after the split one establishment has eight and the other seven employees. In such a situation it is undisputed in Germany that the Dismissal Protection Act (*Kündigungsschutzgesetz*) only applies before the TOU, because there need to be at least ten employees working in an establishment for the Act to become applicable. After the transfer this minimum of employees would no longer be reached by either establishment.

In a cross-border situation, the consequences would be the same in terms of the applicability of any given law: the rights under that law would not transfer with the employment but would terminate at the moment the transfer takes place.

Editorial note

See EELC 2011/3 for an English case of cross-border TUPE.

Comments from other jurisdictions

Austria (Martin Risak): Cross-border transfers often involve a change in the place of work of the employees concerned and therefore result in a change to the applicable law, i.e. the law governing the employment relationship. Though no jurisprudence exists in Austria on this point, the prevailing opinion holds that the law of the country of the transferor governs the question of whether a transfer takes place and the law of the country of the transferee governs the effects of the transfer. They should not differ too much within the EU as the national legal provisions are all based on Directive 2001/23/EC, but it becomes more complicated if one of the countries involved is not a member state. If no change to the place of work takes place (especially if the applicable law and/or employment contract does not provide for such a change) the law of the transferor continues to apply.

Czech Republic (Nataa Randlova): In our opinion the case at hand is important, because in the Czech Republic we do not have any judgments on cross-border transfers of undertakings. Moreover, cross-border transfers of undertakings are not expressly regulated in the applicable law of the Czech Republic. So, for the moment, we can only be guided by judgments of other jurisdictions.

We agree with the opinion from the Netherlands given below that the importance of this judgment is also to do with the fact that it considers the distance between the transferor's

place of business and that of the transferee to be one of the decisive factors in determining whether or not a transfer of undertaking has occurred.

The Netherlands (Peter Vas Nunes): Judgments on cross-border transfers of undertakings ("TOUs") are rare. Judgments by the highest courts are rarer. For this reason alone, this judgment by the BAG is important. There are also other reasons. One is that the BAG seems to hold the view that if the distance between the transferor's place of business and that of the transferee exceeds a certain number of kilometers (100?), there is no TOU. Paul Schreiner tells me that the reasoning behind this is that the further away a business relocates the more likely it is to lose its identity. I find this reasoning strange and heartily concur with Paul Schreiner's observation that a mere TOU does not alter the employee's place of work - only the identity of the employer. What this means is that, according to EU/German law, the plaintiff in this case became an employee of the Swiss transferee, retaining his place of work in Germany. Obviously, if the Swiss company had no use for an employee in Germany, it might well have dismissed the plaintiff for an ETO reason. That, however, does not alter the fact that the Swiss transferee had become the plaintiff's employer.

United Kingdom (Bethan Carney): A recent UK case reported in issue 2011/1 of EELC also found that there could be a cross-border transfer of undertaking (*Holis Metal Industries Ltd – v - (1) GMB (2) Newell Ltd* UKEAT/0171/07). In this case, part of a UK business was sold to a company based in Israel. Employees working in the affected part of the business brought claims for a failure by the transferor and transferee to consult them about the transfer. The transferee (Holis) applied for the claims to be struck out on the grounds that they had no reasonable prospect of success because TUPE did not apply where a business was being transferred outside the UK. The Employment Tribunal refused to strike out the claims and the Employment Appeal Tribunal (EAT) dismissed Holis's appeal. The EAT held that, as a matter of principle, there could be a transfer of an undertaking where a business situated immediately before the transfer in the UK is transferred overseas. It also held that it would make no difference if the business was transferred to within or outside the European Union. Unlike the BAG, the EAT did not see the distance between the transferor's and transferee's locations as having any bearing on the issue of whether or not there would be a transfer of an undertaking.

If this case had happened in the UK, the dismissal would still have been effective because there is no real concept of an invalid dismissal in the UK (although it is sometimes possible for an employee to obtain an order for re-instatement or reengagement following a dismissal). However, the employee would have had a potential claim for unfair dismissal. Dismissals for a reason connected with a transfer of an undertaking are automatically unfair unless there is an economic, technical or organisational reason entailing a change in the workforce (ETO

reason). If the employee was automatically unfairly dismissed by the transferor, liability for the claim would transfer to the transferee. There is some debate about whether or not a relocation, such as this one, can amount to an ETO reason entailing a change in the workforce. A "change in the workforce" has been held to mean a change in the number or the function of the employees. In one first instance decision, an Employment Tribunal held that a change in location on its own was not an ETO reason because it did not "entail a change in the workforce". (*Tapere – v – South London and Maudsley NHS Trust ET/2329562/07*). There have not been any higher court decisions on this issue. In any event, the reason for the dismissal was the transferee's reason (because it wanted production to take place in Switzerland rather than Germany). Therefore, in order to be able to rely on the ETO exception in the UK, the transferee should have carried out the dismissals instead of the transferor.

Subject: Transfer of undertaking

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