SUMMARY

2012/15: Transfer of activities that do not form a separate unit at the transferee does not constitute a TOU (GE)

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Summary

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1. BAG 8 AZR 455/10

Facts

The plaintiff had been employed by ET GmbH ("ET") since 1989, working in the field of industrial automation and measuring and control technology in the steel industry. He was head of department for measuring and control technology. The department was divided into three groups, one of which was also managed by the plaintiff. At the end of 2005 ET sold some of the product lines developed by the department to F GmbH ("F"), the legal predecessor of the defendant company. F also acquired the rights to software, patents, patent applications and inventions relating to the transferred product lines, along with the product name and technical knowhow. In addition, F acquired the relevant development hardware, the inventory belonging to the transferred product lines and the client and supplier lists belonging to those

lines. Only the deputy head of department and three engineers were employed by F, whereas the plaintiff's department originally employed 13 people. The three engineers were from the group managed by the plaintiff. The plaintiff claimed that the circumstances constituted a transfer of undertaking and demanded continued employment with F as head of the group he managed. The claim was rejected in the court of first instance.

On appeal, the Higher Labour Court of Düsseldorf submitted to the ECJ the question of whether the transfer of part of an undertaking under Article 1 of the Directive 2001/23/EC only exists if that part continues as an autonomous part of the business of the transferee. On 12 February 2009, in *Klarenberg* (C-466/07), the ECJ ruled that Article 1 of Directive 2001/23/EU can apply in a situation where the part of the undertaking or business transferred does not retain its organisational autonomy if the functional link between the various elements of production is preserved and that link enables the transferee to use those elements to pursue the same or a similar economic activity. The Higher Labour Court of Düsseldorf accordingly approved the existence of a transfer of part of the undertaking and decided in favour of the plaintiff.

Judgment

Unlike the Higher Labour Court of Düsseldorf, the BAG decided in favour of the defendant. According to the BAG a transfer to the defendant of part of the undertaking had not taken place, as there was no single part of the business of ET that dealt exclusively with the product lines sold to F. The BAG argued that the presumption of a transfer of part of an undertaking requires that a separate organisational and economic unit already existed at the transferor. The transferred product lines and operating facilities did not constitute a transferable part of ET, as the product lines were not allocated to any particular organisational unit of the company. Additionally, no separate group of employees in the department managed by the plaintiff was completely transferred to F. The four employees hired and the transferred rights and operating facilities were not assigned only to one of the three groups of the department in ET, but rather to different groups in that department. The BAG additionally argued that the product lines sold had not only been developed and/or manufactured by the transferred employees, but by all employees in the department.

Given that the defendant had employed only four out of 15 employees of ET, the BAG was not persuaded that a transfer had taken place by virtue of the continuation of employment of the majority or a large number of the employees. According to the BAG, the question of whether the product lines were handled in a separate part of the business of the transferee was ultimately not important.

2. BAG 8 AZR 546/10

Facts

In this case too, the parties disputed the existence of a transfer of part of an undertaking pursuant to section 613a of the German Civil Code (the "BGB"). This provision states that in the event of a transfer of a business or part of a business to another employer as a result of a legal transaction, the latter shall assume the rights and obligations arising under employment contracts existing at the time of the transfer.

The facts were as follows: two legal entities handled the interests of a number of towns in the province of Saxony. One of these entities ("A") dealt with the sewage of 42 towns. The other entity ("B") took care of the drinking water provision in 37 of those towns. In 1996, A and B decided to join forces. They incorporated a company ("W"), to which they contracted out their commercial and technical work. Accordingly, W consisted of two divisions, the Commercial division, employing about 30 staff and the Technical division, employing about 60 staff. The Commercial division was subdivided into three departments, namely finance, tax and legal. The plaintiff was head of the tax department.

In November 2006 the provincial parliament decided that A and B should terminate their outsourcing contract with W and take back all commercial and technical work with effect from 1 January 2007. Accordingly, W transferred its activities, as well as significant assets including land and buildings, to A (sewage activities and sewage assets) and to B (drinking water activities and assets). Normally, this could have constituted a transfer of an undertaking within the meaning of (the German rules transposing) Directive 2001/23 (the "Acquired Rights Directive"), with the effect that all of W's employees would transfer into the employment of either A (employees involved in sewage) or B (employees involved in drinking water provision). The problem, however, was that some employees of W, such as the plaintiff, could not be attributed to either sewage or water provision, as they performed work for both.

A and B each took over a number of W's employees but did not offer the plaintiff a job. She claimed that her employment relationship had transferred to the defendant pursuant to section 613a of the BGB and she made a claim against her notice of termination. Both the Local Labour Court and the Higher Labour Court of Saksen-Anhalt dismissed the actions.

Judgment

The BAG decided in favour of the defendant. The BAG argued that the plaintiff did not work in a separate organisational unit at W, which could have been transferred to the transferee. The BAG pointed out that a separate economic unit must already have existed at the

transferor prior to the transfer, even if no equivalent organisational structure exists at the transferee. Whether the facts met this requirement needed to be assessed based on the court's interpretation the principles of established by the ECJ. In addition, the BAG determined that "part of an undertaking" is not simply defined by its activities but rather by features such as its employees, managers, work organisation, operational matters and operating facilities.

In the present case there was no separate organisational unit which exclusively dealt with commercial functions of sewage water disposal.

In particular, there had been no separate classification of "drinking water supply" and "sewage water disposal" in the commercial division.

Finally, the operating facilities were not divided into "sewage water" and "drinking water" sections.

Commentary

Both cases provide sound rulings. The BAG points out that a transferable separate organisational and economic unit at the transferor company is a mandatory requirement for the existence of the transfer of part of an undertaking pursuant to section 613a of the BGB. The *Klarenberg* decision does not conflict with the decisions, since in that case, the ECJ was only ruling on the criteria for the further existence of the transferred part of an undertaking at the transferee. *Klarenberg* did not consider whether a separate organisational and economic unit had already existed at the transferor. In a number of cases, the ECJ has referred to the existence of a separate organisational unit, but it has not relied on this in its decision-making.

Thus, the two decisions can be seen as a development of *Klarenberg*. In fact, in the first case, the preliminary ruling of the ECJ in *Klarenberg* turned out to be unnecessary, as the ruling did not ultimately affect the eventual outcome.

However, whether facilities constitute part of an undertaking at the transferor and whether the functional link between the elements of production is preserved to enable the transferee to pursue the same or a similar activity - remain difficult questions of fact.

Subject: Transfer of undertaking, transfer

Parties: unknown

Court: Federal Labour Court (Bundesarbeitsgericht)

Date: 1.: 13 October 2011; 2.: 10 November 2011

Case number: 1.: 8 AZR 455/10 (NZA 2012, 504); 2.: 8 AZR 546/10 (NZA 2012, 509)

Internet-publication: www.bundesarbeitsgericht > Entscheidungen > case number

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Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2011-11-10
Case number: 8 AZR 455/10 (NZA 2012, 504) and 8 AZR 546/10 (NZA 2012, 509)