EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/16: ETO defence fails (NL)

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Facts

The plaintiff in this case was a 61 year-old chef. He was formerly employed by a catering company called Avenance. He worked in the staff restaurant of a company called PPG, which had contracted out its catering services to Avenance. In 2010 PPG terminated its contract with Avenance and entered into a similar contract with the latter's competitor Prorest. It was common ground between all parties concerned that the service provision change qualified as the transfer of an undertaking within the meaning of Directive 2001/23 and the Dutch law transposing it.

The plaintiff's employment contract, both before and after the transfer from Avenance to Prorest, was governed by a collective agreement. It provided that in the event of a transfer, the transferee had the right to reduce (in steps) any benefits in excess of the minimum provided by the collective agreement. Accordingly, Prorest informed the plaintiff that two of his above-minimum terms of employment, totalling almost € 500 gross per month, would be reduced gradually over a period of 30 months, starting on the date of the transfer.

The plaintiff complained to a joint committee established pursuant to the collective agreement, but it found in favour of Prorest, noting that the latter had applied the collective agreement correctly. The plaintiff then brought legal proceedings. He asked the court to deliver a declaratory judgment that the unilateral reduction of his terms of employment violated the law and the Directive, which clearly provides that "*the transferor's rights and obligations arising from a contract of employment […] shall, by reason of such transfer, be*

transferred to the transferee" (Article 3(1) of the Directive).

The defendant countered that the reduction in the plaintiff's benefits was not caused by the transfer itself, but (1) by the fact that Prorest had had to quote a very low price to get the contract, that (2) this necessitated a reduction in staffing costs and that (3) the collective agreement provided that a service provision change can give rise to a change in terms of employment, such circumstances qualifying as economic, technical or organisational (ETO) reasons.

Judgment

The court began by noting that the Dutch law regarding transfer of undertakings must be construed in line with the Acquired Rights Directive 2001/23 and the ECJ's case law on that directive. It went on to hold that whether or not there are ETO reasons depends on the circumstances of the case and cannot be determined by a collective agreement, as that would undermine the directive's effectiveness. In the case at hand, the reduction in the plaintiff's benefits was clearly a direct result of the transfer of the undertaking and therefore unlawful.

The court also observed that Prorest had failed to make a convincing case for the need to reduce staffing costs and to do so by reducing the plaintiff's income, over time, by almost € 500 per month, which amounted to 15% of his earnings.

Commentary

The ETO doctrine is based on Article 4(1) of the Acquired Rights Directive 2001/23, which in the first sentence provides that "*the transfer of the undertaking […] shall not in itself constitute grounds for dismissal by the transferor or the transferee*" (emphasis added). The second sentence goes on to provide that "*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*". Although the concept of ETO is limited to dismissals, Dutch courts and authors also apply it to terms of employment.

The problem is that nobody can tell whether a dismissal, or a change in terms of employment, is for an ETO reason. Lawyers tend to advise their transferee clients to wait a few months, typically six months at least, before attempting any dismissals or changes of terms.

In this case, the fact that the court found it necessary to observe that the transferee had failed to make a convincing case for the need to cut costs suggests that the court may have been uncertain whether, if that need had been demonstrated, it would have qualified as an ETO reason.

Comments from other jurisdictions

Austria (Martin Risak): The Austrian law on the transfer of undertakings does not include any explicit provision prohibiting dismissals based on the transfer. The courts see such dismissals as *contra bonos mores* but allow dismissals based on ETO reasons as provided for in Article 4 of Directive 2001/23. So far the Austrian courts have only had to deal with dismissals before the transfer but not with dismissals afterwards. For this reason, legal literature on post-transfer dismissal is diverse and no clear guidance exists for employers on how to deal with this issue. After the transfer many ETO reasons would not have arisen had there not been a transfer, e.g. the need to adapt the wages of the transferred employees to the new cost structure of the transferee or redundancy dismissals based on over-capacity because of the transfer. In any event, mainstream opinion has it that the time elapsed since the transfer is relevant and generally, after a year the special protection against dismissal as a result of a transfer ceases to apply.

United Kingdom (Hester Briant): The UK legislation implementing the Acquired Rights Directive 2001/23 ("ARD") is the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). TUPE provides that variations in employees' terms and conditions will be void if the reason for the variation is the transfer itself or a reason connected with the transfer which is not an ETO reason. In this, UK legislation is arguably more stringent than the ARD requires.

The ARD merely says that a transferor's rights and obligations arising from a contract of employment shall be transferred to the transferee. It does not say that in order to vary terms the employer needs an ETO reason: in fact the concept of ETO reasons is limited to dismissals. However, ECJ caselaw has suggested that the ETO concept could be relevant to changing terms. In the ECJ decision of *Foreningen af Arbejdsledere i Danmark - v - Daddy's Dance Hall A/S* the court held that a transferee had the same power to change a transferred employee's terms and conditions of employment as the transferor, provided that the reason for the change was not the transfer itself. This was supported by the case of *Martin and ors - v - South Bank University* in which the ECJ held that the transferee could vary terms provided the transfer was not the reason for the change, as might be the case where the transferee had an ETO reason.

So, to the extent that TUPE says changes for reasons *connected* with the transfer that are not ETOs, are void, it seems to go further than the ECJ decisions in two respects. Firstly, by saying that changes in terms for "transfer-connected" reasons are void, rather than limiting this solely to where the reason for the change is the transfer itself. Secondly, by limiting reasons that are not related to the transfer solely to ETO reasons, rather than making ETO reasons an example

of the type of reasons that might be unconnected to the transfer.

There is an additional reason why the position in the UK may be more restrictive than in Holland. Various UK court decisions have interpreted the meaning of an "ETO reason" very narrowly. In particular, the 1985 Court of Appeal case of *Berriman - v - Delabole* held that there can only be an ETO reason where there are changes to the numbers or functions of employees. This means that various reasons for changing terms, which would seem to be reasonable, may not be lawful. For example, it may not be possible to vary the employee's place of work, because this would not involve a change to the numbers or functions of employees.

As the transferee in the case above had no need to change numbers or functions of employees, the transferee's stated reasons for its changes to the plaintiff's terms and conditions would not have qualified as ETO reasons in the UK. There does not seem to be any suggestion in this case report that the concept of an ETO reason is interpreted as narrowly in the Netherlands as it is in the UK.

The UK position is widely viewed to be unsatisfactory. The government is currently undertaking a public consultation exercise about TUPE, in which we understand that both (a) the use of ETO reasons for changes in terms and conditions and (b) the very restrictive interpretation of an ETO reason in Berriman have been widely criticised by those responding to the consultation. We anticipate that following this consultation, the position in the UK will be reviewed.

Subject: transfer of undertaking - ETO reason

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