EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/52 Transferee may reduce salaries to the level of its collective agreement (NO)

<p>The Court of the European Free Trade Association (EFTA) has ruled that a reduction in salary following the transfer of an undertaking based on the terms of the collective bargaining agreement that applies to the transferee, does not violate the Acquired Rights Directive (2001/23/EC). The court rejected the employees’ argument that the ECJ’s ruling in the <i>Scattolon </i>case (C-108/10, summarised in EELC 2011-3) precludes the transferee from applying a collective bargaining agreement with lower pay, even after expiry of the transferor’s collective bargaining agreement with higher pay.</p>

Summary

The Court of the European Free Trade Association (EFTA) has ruled that a reduction in salary following the transfer of an undertaking based on the terms of the collective bargaining agreement that applies to the transferee, does not violate the Acquired Rights Directive (2001/23/EC). The court rejected the employees' argument that the ECJ's ruling in the *Scattolon* case (C-108/10, summarised in EELC 2011-3) precludes the transferee from applying a collective bargaining agreement with lower pay, even after expiry of the transferor's collective bargaining agreement with higher pay.

Facts

This case concerns the Norwegian branch of Scandinavian Airlines System (SAS). SAS is a consortium between Denmark, Norway and Sweden and is owned by limited liability companies in these countries, which are in turn wholly owned by SAS AB in Sweden and are part of the SAS Group. The main activities of the SAS consortium are the operation of passenger plane services and the provision of air cargo and other aviation-related services.

Cargo services were operated as a separate business area in the SAS consortium under the name of SAS Cargo until 2001, when the business was made a separate legal entity named SAS Cargo Group. Terminal operations and cargo handling in the SAS Cargo Group were later handled by the wholly owned subsidiary Spirit Air Cargo Handling AB, to become a sub-group within the SAS Group named the Spirit Group. The Spirit Group's activities were run by national subsidiaries, such as Spirit Air Cargo Handling Norway AS ("**Spirit Norway**").

After an unsuccessful attempt to sell the Spirit Group, the business of Spirit Norway was transferred back to the SAS consortium (hereafter only referred to as "**SAS**") with effect from 1 March 2012. This was considered a transfer of the undertaking by the parties, and the employees were transferred the same day.

Both Spirit Norway and SAS were subject to a number of collective bargaining agreements ("**CBA**"s). The Norwegian system of CBAs within this area is a three-level hierarchy with basic agreements on top, nationwide agreements applying for certain industries or occupations thereunder and special agreements entered into by each undertaking at the lowest level. Both the basic and the nationwide agreements were the same for the transferor and transferee, but there were different third-tier agreements with pay tables (hereafter referred to as the "**Spirit CBA**" and the "**SAS CBA**"), as shown in the following simplified diagram:

The pay level with SAS was on average between 4 and 8% lower than in Spirit Norway, even though the employees were fully credited for their seniority and qualifications under their former employment relationship in the new pay table.

The nationwide CBAs were terminated with timely notice by the trade unions, with the expiry date being 31 March 2012. New second tier CBAs entered into force on 1 April 2012, including for the transferred employees in SAS. However, SAS, as the transferee used the option it had under Norwegian law to notify the relevant trade unions on 16 March 2012 that it did not wish to be subject to the transferor's third- tier Spirit CBA, with its applicable pay table. It is disputed between the parties whether the third-tier Spirit CBA was correctly terminated according to Norwegian law. If it was, it would expire no later than one month after termination, cf. below. Until its expiry (or until the application or entering into force of a new CBA, if sooner) its terms and conditions would have to be respected according to the

Norwegian implementation of Article 3(3) of the Directive.

On 30 March 2012, SAS informed the transferred employees that they would be covered by the pay table in the SAS CBA, and would have lower pay from 1 May 2012. SAS considered the Spirit CBA to have expired together with the second tier CBAs on 31 March, because the third-tier CBA is an intrinsic part of the CBA-hierarchy. However, to leave a margin, and with an alternative view being that the Spirit CBA would have to be terminated with one month's notice, the new pay table in the SAS CBA came into effect only on 1 May. Until then, the previous pay table in the Spirit CBA was adhered to.

The 129 employees transferred did not accept the pay reduction and sought a judgment that SAS was under an obligation to apply the pay rates contained in the Spirit CBA. The court of first instance ruled in favour of SAS as the new employer, and when the case was appealed, the court of appeal referred two questions to the EFTA Court:

1.Is it consistent with the Directive that the transferee applies a CBA with lower pay rates for transferred employees after the transferor's CBA has expired - and does it matter whether the reduction in pay is significant or not?

2.Does the first question depend on whether the transferor's CBA was still in force when the transferee's new CBA became applicable?

Judgment

As for the first question, the EFTA Court noted that the Directive is intended to achieve partial harmonisation and not to establish a uniform level of protection throughout the EEA. Following from Article 3(3) of the Directive, the transferee must observe the terms and conditions of CBAs applicable with the transferor until the date of their termination or expiry or the entry into force or application of another CBA. The Court also noted that Norway had not availed itself of the opportunity to limit the period to (not less than) one year in accordance with the second paragraph of Article 3(3).

The EFTA Court found that if the SAS CBA with the lower pay table was not made applicable for the transferred employees until after the expiry of the Spirit CBA, the loss in salary was not linked to the transfer, but to the expiry of the previous CBA. Whether the pay reduction was significant or not does not influence the assessment.

Under Norwegian law, CBAs (or the terms and conditions contained in them) may have a continuing effect after their expiry as a result of general principles of collective labour law. The EFTA Court acknowledged that such continued effects fall within Article 3(3) of the

directive, given that they follow from a CBA and effectively bind the transferor and the transferred employees: see the ECJ's ruling in *Österreicher Gewerkschaftsbund* (C-328/13, paragraph 25, summarised in EELC 2014-3). Such continued effects are defined by national law and it was for the national court to assess whether they applied in this case. However, the EFTA Court stated that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations, in line with the objective of the Directive to ensure a fair balance between the interests of the employees and those of the transferee. Consequently, the EFTA Court stated that such continued effects must be limited in duration, so as to avoid the transferee being bound indefinitely. In these findings, the EFTA Court relied on *Alemo- Herron* and Others (C-426/11) in which the ECJ held:

"25. However, Directive 77/187 does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other. More particularly, it makes clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations (see, to that effect, Werhof, paragraph 31). [...]

31.[...] However, the interpretation of Article 3 of Directive 2001/23 must in any event comply with Article 16 of the Charter, laying down the freedom to conduct a business.

32.That fundamental right covers, inter alia, freedom of contract [...]".

The EFTA Court found no reason to address Article 16 of the Charter of Fundamental Rights of the European Union (the "**Charter**") on the freedom to conduct business, which SAS had referred to, but which is not part of the EEA Agreement. Here, the EFTA Court referred to the freedom to conduct business as lying at the heart of the EEA Agreement, to be recognised in accordance with EEA law and national law and practices. Hence, this principle was found to be part of the EEA Agreement and there was no need to rely on the Charter.

The EFTA Court hence answered the first question as follows:

"It is consistent with Article 3(3) of Directive 2001/23/EC when terms and conditions of pay enjoyed by the transferred employees under the collective agreement with the transferor are replaced, in conformity with national law, by conditions of pay laid down in the collective agreement in force with the transferee after the expiry of the former collective agreement.

A pay reduction – whether significant or otherwise – cannot influence this assessment.

However, the national court must assess whether the applicable national law provides for continuing effects in a situation such as the present one. Article 3(3) of Directive 2001/23/EC

has to be interpreted as meaning that terms and conditions laid down in a collective agreement to which such continuing effects apply constitute "terms and conditions agreed in any collective agreement", so long as those employment relationships are not subject to a new collective agreement and new individual agreements are not concluded with the employees concerned."

As to the second question, the EFTA Court noted that it was disputed between the parties whether the pay table of the Spirit CBA was still in force when the pay table of SAS CBA was made applicable. Taking as a hypothesis that the Spirit CBA had not expired, the EFTA Court stated that there were two factors to consider: 1) the conditions for the application of a different CBA according to Article 3(3) of the Directive and 2) the conditions of application of the CBA two months after the transfer, when this would lead to a pay reduction for transferred employees.

On the first point, the EFTA Court noted that Article 3(3) of the Directive refers to either (i) termination or expiry of a CBA or (ii) the entry into force or application of a new CBA, where those alternatives are equal in value and effect. Hence, the Directive was not found to preclude the application of the SAS CBA for the transferred employees, even if that happened immediately after the transfer. The EFTA Court stated that it was for national law to determine at what point the SAS CBA was made applicable to the transferred employees.

On the second aspect, the EFTA Court referred to the Directive leaving a margin of manoeuvre for the transferee, which allows it to arrange for integration of the transferred employees in terms of salary, as long as this respects the aim of the Directive. The Directive does not permit transferred employees to suffer a substantial loss of income on the basis that their length of service with the transferor is not sufficiently taken into account. Based on the Norwegian court's referral and the parties' submissions, it would appear that the transferred employees were fully credited for their competence and length of service. This assessment, however, was for the national court to make.

The EFTA Court hence answered the second question as follows: *"Article 3(3) of Directive 2001/23/EC does not prevent the transferee from applying to the transferred employees the transferee's collective agreement two months after the transfer, if that collective agreement is made applicable in accordance with national law.*

However, Article 3 of Directive 2001/23/EC precludes the possibility that transferred employees suffer a substantial loss of income, in comparison with their situation immediately prior to the transfer, because the duration of their service with the transferor is not sufficiently taken into account when their starting salary position at the transferee is determined and

where the conditions for remuneration under the newly applicable collective agreement have regard inter alia to length of service. In that determination the equivalent duration of service of those employees already in service of the transferee must be taken into consideration.

It is for the national court to examine whether the conditions of pay under the transferee's collective agreement take due account of length of service."

Commentary

This case shows an unsuccessful attempt by the employees' trade unions to invoke *Scattolon* as the legal basis to hinder the application of the transferee's CBA with reduced pay for the transferred employees after expiry of the transferor's CBA, which provided for higher pay.

The EFTA Court's interpretation of *Scattolon* is one where there is no general rule with an overall assessment of whether the new CBA leads to less favourable pay for the transferred employees. The employees were thus not heard when they relied on paragraph 76 in *Scattolon*:

"Implementation of the option to replace, with immediate effect, the conditions which the transferred workers enjoy under the collective agreement with the transferor with those laid down by the collective agreement in force with the transferee cannot therefore have the aim or effect of imposing on those workers conditions which are, overall, less favourable than those applicable before the transfer."

The relevant assessment according to the EFTA Court is merely whether the transferee respects the duration of the employees' service with the transferor, which is in line with the answer to the relevant questions referred in *Scattolon* (paragraph 82 and 83). Further, this is also in line with more general remarks on the understanding of the Directive in paragraphs 73 and 74 in *Scattolon* and the judgment in *Juuri* (C-396/07). The EFTA Court's interpretation of *Scattolon* is further in line with written submissions from the Swedish government, the EFTA Surveillance Authority and the European Commission on the case.

It seems decisive for the reasoning of the EFTA Court in answering the first question that the loss in salary was not linked to the transfer, but to the expiry of the Spirit CBA. Hence, the interpretation is in line with the objective of the Directive of ensuring employees are not placed in an unfavourable position solely by reason of a transfer to another employer. On the second question, the EFTA Court equates the entry into force or application of a new CBA with its expiry or termination, without the timing in relation to the transfer affecting the assessment.

For countries having collective labour law under which CBAs can continue in effect, as Norway does, it is worth noting the statements made in the various judgments on time limitations. In *Österreicher Gewerkschaftsbund*, the only restriction referred to was that the existing CBA would apply until a new CBA came into effect, or a new individual agreement was concluded.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): In Germany, CBAs are not in themselves part of the individual employment relationship, or more accurately: they do not form part of the employment contract. They only have a peripheral impact on the employment relationship. Hence, their provisions cannot transfer to a new owner.

The particular problem of the application of CBAs is governed by section 613a(1) of the Civil Code, which regulates how collective provisions apply in the case of a transfer of undertaking having regard to the relationship between the (transferred) employee and the transferee. This section says that: "If a business or part of a business passes to another owner by legal transaction, then the latter succeeds to the rights and duties under the employment relationships existing at the time of transfer. If these rights and duties are governed by the legal provisions of a collective agreement or by a works agreement, they become part of the employment relationship between the new owner and the employee and may not be changed to the detriment of the employee before the end of a

year after the date of transfer. Sentence 2 does not apply if the rights and duties of the new owner are governed by the legal provisions of another collective agreement or by another works agreement." The CBA itself cannot transfer to the transferee and therefore its collective provisions become part of the individual contractual employment relationship between the transferee and the (new) employee, which forces the transferee to apply the conditions of the CBA as part of the individual contractual relationship.

However, this does not apply if the rights and duties with the new owner are governed by the legal provisions of another collective agreement or by another works agreement. This would be comparable to the first- and second tier CBAs described in this Norwegian case report. The application of third-tier company-level collective agreements is still controversial in Germany. The prevailing view is that these remain applicable only in cases of the universal succession of companies where there is no pre-existing legal body with its own separate company-level CBA.

Greece (Nassia Kelveridou): According to P.D. 178/2002, which implemented the ARD Directive in Greece, in the case of a transfer of undertaking, the affected employees should transfer

automatically to the new employer, with the same terms and conditions. In addition, PD 178/2002 provides that "*after the transfer, the transferee continues to apply the employment terms as provided by the collective bargaining agreement, plus any arbitration decision, internal labour regulation and the employment agreement*".

Therefore, the transferee must conserve the terms and conditions set out in the transferor's CBA. There are, however, situations where, after the transfer, the employees find themselves working in a business in a different sector, belonging to a different CBA (e.g. accountants working in a petroleum company, under the Petroleum Companies CBA, are transferred to an auditing company which falls under the umbrella of the Services Providers CBA). In this latter case, although the CBA itself can no longer be applicable, the transferee preserves its terms and conditions and all provided benefits are evaluated and added to the total remuneration of the transferred employees.

In practice, many employers propose full or partial harmonisation of salaries and benefits to the transferred employees, in order to avoid having to process different terms and conditions for different categories of employees. This needs to be shared and discussed with the employee representatives, and, as the terms of employment are individual, the consent of each and every employee needs to be obtained. If the employees or some of them turn down the proposal, the transferee, will have no choice but to administer the terms for these employees separately.

According to Greek law, after three months following the termination or expiry of a CBA, and provided no new CBA has been executed in the meantime, the employer may unilaterally amend the terms of the CBA except those that refer to: (a) basic salary or the basic daily wages and

(b)the basic four allowances in relation to seniority, caring for children, studies and dangerous occupations.

If the employer continues to apply the terms of the expired or terminated CBA, these become part of the employees' employment terms and conditions and, therefore, the employer should obtain their consent before changing them.

In light of the above, the employer may proceed with a reduction in salary following a transfer, only if it has obtained the written consent of the affected employees.

Greek Courts would most probably rule that unilateral change of the applicable CBA which would impact on employees' salaries is void if a unilateral detrimental change to the employment terms and conditions has been carried out by the employer.

The Netherlands (Zef Even): This case seems to fit comfortably in, what seems to be, a shift in case law where it regards the objective of the Directive. The case law used to emphasise that the purpose of the Directive is to protect the rights of employees in the event of a change of employer. See for instance the ECJ in the case Ny Moelle Kro, C-287/86: 'It follows from the preamble and from those provisions that the purpose of the Directive is to ensure, so far as possible, that the rights of employees are safeguarded in the event of a change of employer by enabling them to remain in employment with the new employer on the terms and conditions agreed with the transferor.' Since the Werhof case (C-499/04), however, there seems more room for the rights of the transferee as well when defining the goal of the Directive: 'although in accordance with the objective of the Directive the interests of the employees concerned by the transfer must be protected, those of the transferee, who must be in a position to make the adjustments and changes necessary to carry on his operations, cannot be disregarded'. This phrase seems to say that the rights of the employees still take precedence over other interests, such as the interests of the transferee, but the latter should not be forgotten. This has been reaffirmed and strengthened by the ECJ in the case Alemo-Herron and Others (C-426/11): 'the Directive does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other'. Again, the rights of the employees are mentioned first, but the interests of the transferee follow straight away. In the case Österreichischer Gewerkschaftsbund (C-328/13) we see that both interests seems to be put on a par by the ECJ: 'In addition, that interpretation complies with the objective of Directive 2001/23, which is to ensure a fair balance between the interests of the employees, on the one hand, and those of the transferee, on the other and from which it is clear that the transferee must be in a position to make the adjustments and changes necessary to carry on its operations'. The same can be observed in this case when the objective of the Directive is discussed, where the EFTA Court simply states: 'that objective is to ensure a fair balance between the interests of the employees ad those of the transferee'. In other words, both rights and interests now seem to be regarded fully equally and seem to have equal weight. All these cases in which the interests of the transferee are involved concern questions regarding collective agreements. However, that does not per se mean that this shift in objective is solely applicable to situations involving collective agreements. The EFTA Court's reasoning when the transferee's interests in changing employment condition are discussed is, for instance, rather general and not necessarily linked to collective agreements: 'the transferee must be in a position to make adjustments and changes necessary to carry on its operations'.

Does, therefore, the same rule apply when *individual* employment terms and conditions are at stake? The Czech Supreme Court seems to give quite some room to the employee and the transferee when altering individual employment conditions is at stake, given case 2014/53.

The Dutch commentator Peter Vas Nunes rightfully remarks that this room seems to sit uncomfortably with the cases *Martin and other – v*

–South Bank University (C-4/01) and Daddy's Dance Hall (C-324/86). In these cases, after all, the ECJ leaves the parties involved little room for changing individual employment conditions, in a successful effort to protect the position of the employee. But are these cases still up to date? In Daddy's Dance Hall the ECJ said the following about the purpose of the Directive, which is: 'to ensure, so far as possible, that the rights of employees are safeguarded in the event of a possible change of employer by allowing them to remain in the employment with the new employer on the terms and conditions agreed with the transferor.' More or less the same was ruled by the ECJ in the Martin case, where the objective of the Directive was summarized as 'safeguarding the rights of employees in the event of transfer of undertakings'. An interesting question – to which I do not know the answer – is whether both cases are 'outdated' as regard to objective of the Directive and must be replaced taking into consideration the – seemingly - shift in objective of the Directive. If so, they may perhaps also be outdated as regard to result.

Subject: Transfer of undertakings

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