SUMMARY

2014/53 Supreme Court allows new probationary period provided its intent is not to evade the prohibition against dismissal in connection with transfer (CZ)

<p>The transfer of an undertaking occurs when a contract with a franchisee is terminated and the franchisor immediately starts running the same business on the same premises.</p> <p>When the franchisee in this case agrees to the termination of employment of its employees, the franchisor may, in this case, validly agree new employment contracts under new terms even though the employees actually perform their work without interruption. Moreover the new terms may, under some circumstances, also contain a new probationary period.</p>

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Facts

Firstly it must be noted that Czech law on the transfer of undertakings is very similar to the UK's "TUPE" legislation, in that its definition of a transfer is broader than that of Directive 2001/23. As a result, where a transaction qualifies as the transfer of an undertaking within the meaning of the Directive, it is also a transfer under Czech law, but a transaction that does not qualify as a transfer within the meaning of the Directive may nevertheless be considered as a transfer of undertaking under Czech law.

In this case a company, EBELA s. r. o., was a franchisee of Yves Rocher, who was the defendant in this case. EBELA ran a beauty salon in a shopping centre based on a franchise agreement which had been terminated on 16 July 2010. In the termination agreement EBELA agreed to perform stocktaking, to sell the stock to the defendant and hand over the premises with all furnishings and equipment to the defendant.

BELA therefore terminated the employment of the plaintiff by agreement. The agreement was effective as of 15 July 2010. On that same day the plaintiff entered into an employment contract with the defendant, with effect from the next day, and as a result continued to perform the same work on the same premises with the same equipment and colleagues, but for a different employer.

The new employment contract contained a clause on probation, and the defendant relied on this clause about three months later to deliver notice of termination on the plaintiff. This was within the probationary period set out in the agreement. The plaintiff refused to accept the termination and made claim to the effect that the probationary period in the employment contract was invalid by reason of the transfer of the undertaking.

The plaintiff argued that a transfer had occurred in this case. The plaintiff derived from this that the employment contract agreed with the defendant should be considered as an amendment to the employment contract agreed with EBELA and that, as the probationary period must be agreed no later than the day of commencement of work the provision relating to probation was invalid. This in turn meant that the termination of the plaintiff's employment was also invalid.

The courts of first and second instance decided that no transfer of undertaking occurred and that the termination of the plaintiff's employment was therefore valid. Both courts considered the agreement made upon termination was valid and it acted to terminated the plaintiff's employment. In this situation it was, according to the courts, legitimate for the defendant and plaintiff to have concluded a new employment contract under new conditions, including a probationary period.

The appellate court further ruled that an agreement on termination of a franchise agreement

does not cause the transfer of anything to anywhere and therefore cannot be the cause of a transfer of undertaking.

The plaintiff, however, filed an appeal with the Supreme Court in which she repeated her argument that a probationary period could not validly be agreed because there was a transfer of undertaking. She reasoned that this occurred because she continued her work without interruption in the same place with the same equipment and colleagues and for the same clients.

Judgment

Firstly, the Supreme Court overruled the opinion of the appellate court that it was not possible for an agreement on termination of a franchise agreement to cause the transfer of an undertaking. On the contrary, the Supreme Court ruled that based on this agreement, all employees whose employment existed on 16 July 2010 were transferred to the defendant.

At the same time the Supreme Court ruled that it is in accordance with law and with the principle of accepting the will of the parties to a contract that an employee should be entitled to agree to termination of employment with the transferor, in connection with a transfer and to subsequently agree a new employment contract with the transferee under new conditions.

However, in this case, the probationary period could not be used to evade the prohibition against termination of employment by reason of a transfer. As neither of the lower courts had considered whether the probationary period had been genuinely agreed by the defendant in order to test the new employee or simply to evade the prohibition against termination of employment by reason of a transfer, the Supreme Court revoked both decisions of the lower instance courts.

Commentary

The most important aspect of this decision is that the Czech Supreme Court continues in the direction set by its previous rulings by finding that it is possible to change the conditions offered to a transferred employee with his or her consent (using the slightly convoluted procedure of terminating the employment with the transferor and concluding a new agreement with the transferee).

The result of the decision, namely the option to change the conditions of transferred employees with their consent could be viable, in my view, where an employee is in a position to negotiate with the transferee as an equal. This situation, however, arises in practice very rarely. Employees usually need their jobs and their consent to a change to their conditions of

employment after a transfer is usually not the result of an independent decision but of fear of losing their job. This applies especially in the Czech Republic where employees are not very familiar with the law on transfer of undertakings.

Further, this conclusion is in conflict with the Opinion of General Alber delivered on 17 June 2003 in case C-4/01, in which he clearly states that "*an employee may not agree to forego his rights arising from a contract of employment or employment relationshi*p". In my opinion, there is a reason to protect employees even against their expressed will, because when facing the prospect of losing their job, employees may agree to almost anything. It is also a pity that the Supreme Court did not explain why it came to a different conclusion than that of Advocate-General Alber.

Comments from other jurisdictions

Croatia (Dina Vlahov): An agreement between a franchisee and franchisor, as was concluded in this case, would most probably constitute the transfer of an undertaking, according to the Croatian courts. The legal prerequisites for the existence of a transfer are met if an undertaking, business or part of one is transferred, while retaining its economic integrity, to a new employer as a result of a legal agreement or a legal status change. Economic integrity is defined in Croatian legal literature as an integrated whole made up of objective components (i.e. the means of work); subjective components (i.e. business activity, knowledge and experience of employees); and organisational components.

The Croatian Employment Act stipulates that if the transfer of an undertaking has occurred, all existing employment contracts and rights and obligations must be assumed by the new employer unchanged and in full. Therefore, terminating an existing employment contract and then entering into a new employment contract should not, from a legal point of view, be necessary. However, this is common practice in Croatia, mostly as a result of certain complicated requirements in relation to pension and health insurance funds. The newly concluded employment contract must contain the same rights and obligations as the old one, although provisions more favourable to the employee can be agreed. In terms of the probation clause, this could theoretically have been included in the new contract, but only if the employee was transferred to a new position, different from that with the former employer. If the employee remained in the same position, the new employer could not request a probationary period because the employee would have already shown by working successfully for the former employer that he was eligible for that position. But if the employee were transferred to a new, different position, the new employer would have a legitimate interest in testing the employee's abilities for that new position.

Therefore, in the case at hand, in my view, the Croatian courts would not accept the probation clause as valid, as its purpose could not have been to test the employee's abilities, as this had already been done. Consequently, the dismissal of the employee was unlawful.

France (Claire Toumieux): In contrast to the Czech Supreme Court, the French Supreme Court has taken a very clear view as to the ability of a transferee to impose a probationary period. Where the French rules governing transfer of undertakings apply (Article L.1224.1 of the French Labour Code), a probation clause should be deemed void, and no further test may be carried out (Supreme Court, 13 Nov. 2001, n° 99-43016).

Accordingly, if the transferee terminates the employment contract without giving any reason, alleging the existence of a probationary period, the termination will be unfair and the employee entitled to damages (Supreme Court, 31 March 1998, n° 95-44889).

The Supreme Court has even held that if the employee refuses to agree to a probationary period with a transferee and is subsequently dismissed, the dismissal is unfair (Supreme Court, 22 Sept. 1993, n° 91-45103).

This approach is a strict one, but in our view it is in compliance with the purpose of the Acquired Rights Directive, as we cannot see what reason other than the change of employer would justify the need for a probationary period.

Lithuania (Aušra Bagdonait:): Lithuania does not have much case law in the area of transfer of undertakings, but in all relevant decisions the Supreme Court has adhered to the principle of 'automatic transfer' of employment rights of transferred employees to the transferee, in accordance with Directive 2001/23. This means that employment rights set out in employment contracts cannot be terminated or amended.

Although there is no case law relating to a probation clause for transferred employees, it may be presumed that a Lithuanian court would not have taken the same position as the Czech Supreme Court. In my view, the findings of the Czech Supreme Court regarding the possibility of validly imposing a probation clause on a transferred employee is at odds with Directive 2001/23 and its objective of protecting employees in the event of a change of employer by ensuring their rights are safeguarded.

The Netherlands (Peter Vas Nunes): Interestingly, the author references the ECJ's 2003 ruling in *Martin and others* – v – *South Bank University* (C-4/01). In that case, the ECJ repeated its finding in the 1988 *Daddy's Dance Hall* case (324/86) that, although the Acquired Rights Directive makes it impossible for an employee to waive the rights conferred on it by the mandatory provisions of the directive, the directive does not preclude an agreement with the

new employer to alter the employment relationship (i) insofar as such an alteration is permitted by the applicable law in situations other than the transfer of an undertaking and (ii) provided that the transfer of the undertaking itself may never constitute the reason for the alteration. The Advocate- General's opinion in the Martin case mentions the following on the criteria for determining when the transfer of an undertaking is the reason for an alteration:

"It should be possible to answer that question on the basis of the circumstances of the individual case. For instance, the fact that the alteration is made at the same time as the transfer of undertaking may be an indication that the transfer is a reason for the change. The fact, too, that the conditions of employment are brought into line with those applicable to existing staff of the new owner, is a sign that the transfer is a reason for the change. On the other hand, the fact that the offer of early retirement results in a greater financial burden on the transferee because of prospective changes in the law, so that it becomes impossible for him, given his economic position, to offer his employees the possibility of early retirement in future, points to the likelihood that the transfer of the undertaking is not the reason for the variation of the terms of employment that is permissible in national law, but that the economic position of the new employer is. It does not appear possible to make an exhaustive list of the criteria. Rather, the question must be answered on the basis of an assessment of all the circumstances of the individual case.

There will seldom be only one reason for a variation of conditions of employment. As a rule there will be several reasons for varying the employment contracts or employment relationships of the workers transferred. In accordance with the purpose of protection pursued by Article 3 of the Directive, the transfer of the undertaking should in such a case not be the key argument in the reasoning, and thus not the main reason for the change. On the other hand, there should be no cause for criticism where a change that is permissible under national law is dictated by other reasons, such as economic, technical or organisational considerations and is linked merely chronologically and not causally to the transfer of the undertaking."

In the case reported above, the alteration (addition of a probationary clause) was made simultaneously, or almost simultaneously with the transfer. I therefore hesitate to concur with the finding of the Czech Supreme Court that the probationary clause was valid if it had been agreed "to test the new employee". The clause was clearly inserted into the new employment contract in connection with the transfer. Moreover, it is unclear from the facts of this case whether the transferee and the transferor had complied with their information and consultation obligations.

Article 3(1) of Directive 2001/23 is clear: the transferor's rights and obligations arising from a contract of employment existing on the date of the transfer shall, **by reason of such transfer**,

be transferred to the transferee. This means that there is no need for the transferee and the transferred employees to enter into a new contract. Was the plaintiff in this case informed of this fact (and of all other "legal, economic and social implications of the transfer") as required under Article 7(b) of the directive (assuming there were no employee representatives)? If not, I think a Dutch court would not have accepted the new contract as valid, in which case there would not have been a valid (new) probationary period and this dismissal would have been void. A somewhat similar set of facts led to a decision in 1996 (JAR 1996/198), where the transferee and the employer entered into a new contract with a probationary clause that was held to be invalid.

Slovakia (Beáta Kartíková): We consider this case very interesting from the point of view of evasion of legislation - or even violation of good manners. Since the Slovak Labour Code also states that if an employer´s task or activity is transferred to another employer, the rights and obligations from employment relationships towards the transferred employees shall pass to the transferee, we completely agree with the Czech Supreme Court that the fact the beauty salon continued to trade without interruption in combination with the termination of franchising contract, means that it was, without doubt, the transfer of an undertaking.

The Slovak courts would likely decide in the same manner. However, we are not comfortable with the opinion of the Czech Supreme Court that it is acceptable for a transferred employee to agree the employment termination of his employment contract with the transferor and to subsequently agree a new employment contract with a transferee that includes a new probationary period, if the employee is continuing to perform the same tasks, in the same place with the same equipment and colleagues. The fact that an agreement was made for the termination of the employment and then this was followed by a fresh employment contract being made when another party took over the beauty salon was, in our view, contrary to the principles underpinning the law on transfer of undertakings and these documents are redundant.

In addition, we wonder how the Czech courts, following the ruling of the Czech Supreme Court, will handle the question of whether the new probationary period had been agreed to test the plaintiff or to evade the prohibition against termination of employment by reason of the transfer. We are inclined to the view that the agreement upon a fresh probationary period and dismissal during that period, was invalid.

In Slovakia, the Labour Code protects employees in advance against undesirable changes to working conditions, i.e. before a transfer becomes effective. If, by reason of the transfer, the working conditions of an employee will undergo a fundamental change and the employee does not agree to that change, the employment should be deemed terminated by agreement

for organisational reasons at the date of transfer and the employee will be entitled to a severance payment varying according to length of service.

United Kingdom (Bethan Carney): There are a number of interesting similarities and differences in the way a UK court would have decided a case on these facts. The first is that a UK court would almost certainly have agreed that this was the transfer of an undertaking, both under the Acquired Rights Directive (2001/23) ('ARD') definition of a transfer (a "transfer of an economic entity which retains its identity") and under the broader "service provision change" definition which is specific to the UK. In particular, a UK court would have taken account of the fact that the individual continued to work in the same place, with the same equipment and colleagues and for the same clients.

The UK courts have also taken notice of the ECJ decision of *Daddy's Dance Hall* (324/86) which stated that the ARD disbars employees from agreeing to a change in terms on a transfer of an undertaking

if the transfer is itself the reason for the change. Therefore, in the UK (as Peter Vas Nunes states would be the case in the Netherlands) a probationary clause added to a contract of employment on a transfer would not be valid even if it was for the purpose of 'testing' the employee's suitability. However, this is only the case if there is not a valid termination of employment. The UK courts accept that it is possible to have a valid dismissal which ends employment even in the context of a transfer and, if there is such a termination, the employee could accept new employment on completely new terms with the transferee after the point of transfer. These new terms would be effective.

If an employee was dismissed and then offered new employment on new terms, she or he would still be able to bring an unfair dismissal claim, assuming the two years' service normally needed to bring an unfair dismissal claim in the UK had been served. A dismissal for a reason connected with a transfer is unfair unless the dismissal is for "an economic, technical or organisational reason entailing changes in the workforce". So, in the circumstances of this case, the employee could have brought an unfair dismissal claim relating to the termination by EBELA. She could have done this as well as accepting the new offer of employment by Yves Rocher.

Even if she had not chosen to bring unfair dismissal proceedings against EBELA she could have brought them against Yves Rocher when it terminated her employment three months later. Her employment with Yves Rocher would have been deemed continuous with that with EBELA notwithstanding the dismissal (because there had been a transfer and she continued to work without interruption) for the purpose of calculating whether she had sufficient

continuous service to bring an unfair dismissal claim. This second termination would be likely also to be deemed to be 'by reason' of a transfer and therefore unfair.

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