EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/52: The Albron case following the ECJ's ruling (NL)

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Summary

Following the ECJ's 2010 ruling in the Albron case, the Dutch referring court has now rendered a decision that is likely to affect legal practice in the Netherlands hugely, by which employees who have been working on a permanent basis for a company that transfers its business are protected by the transfer of undertaking rules even though they were not contractually employed by the company.

Facts

This case is a sequel to the Amsterdam Court of Appeal judgment of 29 May 2008 reported in EELC 2009/2, in which that court referred questions to the ECJ, and to the ECJ's judgment of 21 October 2010 (case C-242/09).

The 'Heineken' conglomerate employs over 5,000 people in The Netherlands. All of them are employed by a legal entity called Heineken Nederland Beheer B.V. ('HNB'). The sole purpose of this company is to employ staff and to assign them to other Heineken entities. One of these entities is Heineken Nederland B.V. ('HN').

John Roest was one of approximately 70 catering attendants who worked in a number of

Heineken staff restaurants. They were employed by HNB, which assigned them to HN, which in turn put them to work in the said restaurants. At the time the present dispute arose, Mr Roest had been employed by HNB for 20 years, but it is unclear from the facts how long he had been working for HN. In 2005 HN contracted out the operation of its staff restaurants to a professional catering company, Albron. Although both HN and Albron took the position that this transaction did not constitute a transfer of undertaking within the meaning of the Dutch law transposing Directive 77/187 (now Directive 2001/23), Albron did offer HN's catering attendants employment, albeit on less favourable terms, including significantly lower salaries. John Roest and his union FNV Bondgenoten took Albron to court, claiming that the outsourcing of the staff restaurants' operations constituted a transfer of undertaking and that he was therefore entitled to retain his terms of employment.

Albron defended its position by referring to the relevant provision of Dutch law, Article 7:663 of the Civil Code, which states that:

"by virtue of a transfer of undertaking, the employer's rights and obligations, exiting at the time of the transfer, under an employment contract concluded between the latter and an employee in that undertaking are automatically transferred to the transferee"(emphasis added).

Given that HNB, not HN, was John Roest's contractual employer, and that HN's undertaking, not that of HNB, had transferred to Albron, Dutch law led to the conclusion that there was no transfer of undertaking within the meaning of Article 7:663.

The court of first instance awarded Mr Roest's claim in a judgment that was widely criticised for contradicting existing doctrine.

The court looked, amongst other things, at the ECJ's 1985 judgment in the Botzen case (C-186/83), in which the ECJ held:

'An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive No 77/187 by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.' (paragraphs 14 and 15.)

The court of first instance referred to Botzen in concluding that the lack of a contractual employment relationship between the employee and the transferor should not be decisive. Albron appealed. The appellate court referred two questions to the ECJ, which the ECJ rephrased as follows:

'(...) in essence, whether, in the case of a transfer, within the meaning of Directive 2001/23, of an undertaking belonging to a group to an undertaking outside that group, it is possible to regard as a 'transferor', within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment (the 'non-contractual employer'), given that there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment (the 'contractual employer').'

The ECJ emphasized that a contractual link with the transferor is not required in all circumstances for employees to be able to benefit from the protection conferred by the Directive. However, according to the ECJ it is not apparent that the relationship between the employment contract and the employment relationship is one of subsidiarity and that, therefore, where there is a plurality of employers, the contractual employer must systematically be given greater weight. A non-contractual employer to which the employees are assigned on a permanent basis is likewise capable of being regarded as 'transferor' within the meaning of Directive 2001/23.

The ECJ stressed that a transfer of an undertaking presupposes a change in the legal or natural person responsible for the economic entity transferred and who, in that capacity, establishes working relationships as employer with the staff of that entity, in some cases despite the absence of contractual relations with those employees. It follows that the position of a contractual employer who is not responsible for the economic activity of the economic entity transferred, cannot systematically take precedence, for the purposes of determining the identity of the transferor, over the position of the non-contractual employer responsible for that activity.

This reasoning led to the ECJ's decision that *'(...) in the event of a transfer, within the meaning of Directive 2001/23, of an undertaking belonging to a group to an undertaking outside the group, it is also possible to regard as a 'transferor' within the meaning of Article 2(1)(a) of that directive, the group company to which the employees were assigned on a permanent basis without however being linked to the latter by a contract of employment, even though there exists within that group an undertaking with which the employees concerned were linked by such a contract of employment.'*

Judgment

Following the ECJ's decision, the case returned to the Dutch Court of Appeal. It had to ascertain how the ECJ's decision should be interpreted in accordance with the rules of the Directive, taking national law into account. The Court of Appeal came to regard the

contracting out of HN's activities to Albron as a transfer of undertaking, without reflecting on the remarks made by the ECJ as to who was responsible for the economic activity of the entity transferred.

The Court of Appeal took the position that Dutch national law on transfers of undertakings (Article 7:663 Civil Code) can be interpreted in line with Directive 2001/23 without contravening Dutch law. It ruled that although Article 7:663 explicitly refers to 'employment contract', hence referring to a 'contractual' employer, that does not exclude a non-contractual employment relationship. Albron's argument that under Dutch law the concept of plurality of employers does not exist was put aside and by doing so the court went against earlier case law. According to the court it is possible to accept the concept of employer-plurality within the context of transfers of undertakings, without affecting the remainder of the of the Dutch employment law system. In other words, it is possible under Dutch law for an employee to have two employers simultaneously, a 'contractual' one and a 'non-contractual' one, for the purpose of transfers of undertakings, but not for other purposes.

Whilst the decision of the court of first instance caused a major stir, the Appellate Court's judgment seems to have been accepted as an indisputable fait accompli. This is surprising because both the ECJ decision and the Appellate Court's decision raise enough questions, it seems to me, for an ongoing debate.

Besides this, one aspect that continues to surprise me is that Mr Roest agreed to the termination of his employment contract with HNB and collected a severance payment on the basis of a social plan focused on the consequences of the transfer of undertaking and the termination of the employment contract. The social plan in question was negotiated by the trade union that represented Mr Roest in court at the time. Neither the court of first instance nor the Appellate Court investigated whether or not Mr Roest had freely made a decision in relation to the termination, in which case the rules on transfers of undertakings should not have been applied in the first place.

Commentary

The ECJ ruling seems to touch uncharted territory. Earlier ECJ case law referred to situations where the transferor was the contractual employer, e.g. Botzen and d'Urso and others. The focus was on the definition of 'employee' when looking at the transfer of an undertaking where only a part of the business was transferred. That focus led, for example, to questions as to which employees transferred.

In *Albron* the focus is on the definition of 'transferor'. The ECJ concluded that it was clear from the facts at issue that the non-contractual employer lost its capacity as non-contractual

employer following the transfer. It states: *'Therefore, one cannot exclude the possibility that it might be regarded as 'transferor', within the meaning of Article 2(1)(a) of Directive 2011/23.'* (underlining added, DS).

The ECJ has extended the scope of the definition of 'transferor' by including a non-contractual employer. It did not rule on the scope of the 'employee', which remains unchanged, namely: *'any person who, in the Member State concerned, is protected as an employee under national employment law'*. Moreover, according to the ECJ the directive shall be without prejudice to national law as regards the definitions of contract of employment or employment relationship.

In *d'Urso and others* the ECJ ruled that in the event of a transfer of an undertaking, the contract of employment or employment relationship between the undertaking transferred may not be maintained with the transferor and is automatically continued with the transferee: the question as to whether or not a contract or relationship of employment exists at the date of the transfer must however be assessed on the basis of national law.

The *Albron* case, I dare say, does not fit all sizes, given that the following issues still need further clarification:

1. Intra-group concerns / rights and obligations

2. Assignment on a permanent basis.

1. *Intra-group concerns*

The ECJ case specifically deals with an intra-group concern and the question remains as to whether the decision is also applicable outside the scope of that, and if so, in what situations.

Within a group it seems quite understandable that the group itself should be held responsible for providing its employees with the protection of the transfer of undertaking rules when a number of decisions can be attributed to a single source. In this context one of my distinguished colleagues in the past referred to an ECJ ruling in A.G. Lawrence and others. The ECJ had looked at an equal pay issue by comparing pay for comparable work for different employers following a transfer of undertaking situation.[1] The ECJ held that regarding equal pay nothing in the wording of the Directive suggests that the applicability of the provisions are limited to situations in which men and women work for the same employer. The ECJ however stated that where differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is

responsible for the inequality and which could restore equal treatment. This reasoning in Lawrence could perhaps be applied to the Albron situation. That would mean that the company deciding on the transfer (in this case, HN) could be held responsible for safeguarding the rights and obligations arising from the transfer notwithstanding the fact that the employees involved are not employed by that company.

But what if the companies involved are not related to each other? Will the company that officially qualifies as a transferor, i.e. the 'non-contractual employer', be held responsible for transferring rights and obligations that do not belong to it? Take, for example, a temporary agency employee (a 'temp') who works in a factory. His or her employer is the temporary agency but he or she receives day-to-day instructions from the owner of the factory. If the factory is sold, and if, as a result, the temp transfers into the employment of the new factory owner, the former owner will be transferring rights and obligations belonging to a third party, namely the temporary agency. In this respect the rephrasing done by the ECJ is interesting, given that the Court of Appeal had explicitly asked the ECJ whether the rights 'pertaining to the employees working for that undertaking are transferred to the transferee'. However, the ECJ did not opine on this. A reasoning along the lines of Lawrence would exclude from the scope of the Albron ruling companies that do business with one another without being group-related. The question is of particular interest in The Netherlands because under Dutch law the transferor and the transferee remain jointly liable for one year after the transfer so as to safeguard the rights and obligations that are transferred. What does this mean in the current context? Will only the non-contractual employer be held liable or the contractual employer as well? Or only the latter? And how far does the liability go? The transfer of undertaking relationship could turn into a complicated threesome or maybe even a foursome.

One thing is certain and that is that these liabilities will need to be identified by mergers and acquisitions lawyers and covered contractually. In tandem, the scope of the employment due diligence will need to be extended.

2. *Permanent assignment*

The ECJ refers to 1) assignment on 2) a permanent basis. What does this mean?

In terms of what constitutes an assignment, could we replace HNB by, let us say, a temporary agency or a secondment company that provides for workers who are contractually employed by them? Or a payroll company? Will they be considered to be an employer-transferor?

In *Briot – v – Randstad* the ECJ was asked for a preliminary ruling on this question, but the underlying matter did not require the ECJ to give an explicit ruling because the contract of the

employee involved was with the temporary agency (Randstad Interim) for a definite period and that contract expired and was not renewed before the transfer date, meaning that the transfer did not influence the contract.[2] In that case the work to which the employee was assigned (a restaurant) was transferred to Sodexho. The employee nevertheless claimed a renewal of the contract for a fixed-term with Sodexho. The ECJ ruled in this situation that the temporary worker must not be regarded as still being available to the user company on the date of the transfer given the expiration of the contract before the date of transfer.

This would indicate that if the employee were available under a contract at the date of the transfer, the employee would transfer to the user company, notwithstanding the fact that he has a contract with the temporary agency. This would probably also apply for a payroll company: I see no material difference.

In the Netherlands that would create another complicated situation given the fact that temporary agencies generally apply collective bargaining agreements containing specific provisions that create a more flexible relationship between the temporary agency and the temporary worker (less protection and more contracts for a fixed term). Those rules present a legitimate exception to strict statutory law, but only when agreed upon in a collective bargaining agreement where the parties involved are supposed to safeguard the overall position of the employees involved. It is common understanding that these special provisions (so-called '3/4 binding law') cannot be transported to a third party, who would then be able to benefit from its lenient character without having been a party to the collective agreement concerned. The other side of the coin is that the employees who have deliberately chosen to work on a more flexible basis are limited in their way of working and their freedom of movement. How is the user-company going to safeguard the rights and obligations arising from a collective bargaining agreement that are supposed to be transferred as they exist on the date of transfer?[3] Brainteasers for the parties involved. And then there is the following difficult question. In terms of permanence, is whether or not the parties intend to create a permanent employment relationship between the employee and the non-contractual employer relevant? And what if their intentions have changed along the way? I would say it is relevant, given what the ECJ says:

'The transfer of an undertaking presupposes a change in the legal or natural person who is responsible for the economic entity of the entity transferred ***and who, in that capacity, establishes working relationships as employer with the staff of that entity****, in some cases despite the absence of contractual relations with those employees.'*

However, what is the applicable framework? Are we talking about several months, one year, five years or even longer? The facts in the Albron case only state that the employee had been

employed by HNB for more than 20 years. No information is given as to the years the employee worked for HN, so the decision itself does not provide a reference.

When looking beyond the scope of a transfer of undertaking, maybe a comparison could be made with assignments under the Posting Directive 96/71 and the existing case law in this field. That directive does not include a time frame either and therefore no hard and fast rule applies, but there are indications that suggest a three year period is considered to fall within the scope of that directive. Would that be an appropriate number of years?

Concluding remarks

What if the employee has deliberately chosen a flexible working environment? He then is forced into a situation where he has little choice but to transfer. If he objects he is deemed to have given notice, which can leave him exposed, because Dutch law does not have the equivalent of the 'Widerspruchsrecht' under German law that gives the employee the option to continue working for the transferor. The employee really only has one option and that is to go to court and ask for the employment contract to be terminated and severance paid, but in order to be successful the employee must convince the judge that the transfer affects his position in such an unreasonable way that the employer could not expect him to agree to it. Such a strategy would be effective, for example, if there was a transfer from Amsterdam to Frankfurt.

It was argued in d'Urso that preventing surplus employees in the undertaking from being maintained in the transferor's service could be less favourable to those employees either because a potential transferee might be dissuaded from acquiring the undertaking if it is obliged to retain the surplus personnel or because the surplus personnel would be dismissed and thus lose the advantage which they might have derived from continuing their employment relationships with the transferor.[4]

The ECJ pointed out that although the transfer must not in itself constitute grounds for dismissal by the transferor or the transferee, it goes on to provide that this provision must not 'stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce'. It must be added that if, in order as far as possible to prevent dismissals, national legislation makes provisions that favour transferors by allowing the burdens connected with the employment of surplus employees to be alleviated or removed, the Directive likewise does not stand in the way of the application of those provisions to the transferee's advantage after the transfer.[5] In a case where the undertaking facing a surplus of employees could apply ETO reasons to dismiss staff, it must apply national rules regarding dismissals. With reference to Albron that could mean that it would be forced to

dismiss (some of) its own employees instead of former Heineken employees, whereas the Heineken group might well have had more options for the employees transferred than Albron. In such a scenario any supposed employee protection to be gained from the transfer rules would be illusory.

I can only hope that the ECJ will shed some light on these issues soon.

Footnotes

1 ECJ 17 September 2002, C-320/00 (*Lawrence and others*); F.B.J. Grapperhaus, *Ondernemingsrecht* 2006, Issue 7, no. 87, p. 290-292.

2 ECJ 15 September 2010, C-386/09 (Briot).

3 As the ECJ ruled on 9 March 2006, C-499/04,(Werhof).

4 *D'Urso and others*, C-362/89 (25 July 1991), paragraph 18.

5 *D'Urso and others*, paragraph 19.

Subject: Transfer of undertaking, employees who transfer/refuse to transfer

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