EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/36 Transferor’s duty to inform employees: Dutch court sets the bar high (NL)

<p>In an outsourcing situation that would have qualified as a transfer of undertaking, the transferor requested an employee to transfer, not to the transferee, but to a subsidiary of the transferor, on unchanged terms of employment. The employee, unaware of his options and the consequences, accepted. Despite this, several years later, the employee claimed under the transfer of undertakings rules. The court held that in such a situation, the employee can indeed claim that there had been a transfer of undertaking, unless the transferor demonstrates that it informed the employee clearly of his options and the consequences of his choice at the time of the transfer.</p>

Summary

In an outsourcing situation that would have qualified as a transfer of undertaking, the transferor requested an employee to transfer, not to the transferee, but to a subsidiary of the transferor, on unchanged terms of employment. The employee, unaware of his options and the consequences, accepted. Despite this, several years later, the employee claimed under the transfer of undertakings rules. The court held that in such a situation, the employee can indeed claim that there had been a transfer of undertaking, unless the transferor demonstrates that it informed the employee clearly of his options and the consequences of his choice at the time of the transfer.

Facts

This judgment is a sequel to the Supreme Court case reported in EELC 2009/43.

Mr Bos had been employed by Sarah Lee/DE (SL/DE) since 1980. He worked in a department within the company named Detrex International Forwarding that dealt with SL/DE's logistical affairs. SL/DE decided to outsource its logistics to Pax Integrated Logistics BV ('Pax') as of 28 September 2003.

Mr Bos was presented a letter by SL/DE dated 24 September 2003 informing him that the activities of Detrex International Forwarding were to be terminated in view of the outsourcing to Pax. The letter stated that Mr Bos would become an employee, not of Pax as would normally have been the case, but of Detrex BV ('Detrex'), a subsidiary of SL/DE. The personnel of Detrex, including Mr Bos, would from then on, although being employees of Detrex, work for Pax. SL/DE confirmed that all employment conditions would remain the same. Mr Bos signed the letter as evidence of his approval. This act of signing the letter was later to become the subject of a debate about his rights under the Dutch Transfer of Undertakings Act.

In June 2005 Detrex informed its employees that it would terminate its activities on 1 January 2006. Mr Bos was informed that Pax would become his new employer. Pax would pay the employees compensation to level the difference in the employment benefit package, which was, on average, on inferior terms.

Mr Bos was on sick leave on 1 January 2006 and upon his return he got into an argument with his supervisor because he refused to accept that he had become an employee of Pax. The situation escalated and Mr Bos was put on gardening leave. He did not return to work again. Detrex continued to pay Mr Bos from January until August 2006. Meanwhile Detrex had the employment contract terminated with effect from 1 August 2006 and Pax had its contract with Mr Bos terminated conditionally (namely, on the assumption that it existed) with effect from 8 March 2007.

Mr Bos commenced injunction proceedings, claiming that in September 2003 or, in the alternative, in January 2006 there had been a transfer of undertaking to Pax (which both Detrex and Pax had denied). He took the position that the mere fact that he had signed the letter of September 2003 containing his approval was insufficient proof that he had waived the protection provided under the transfer of undertaking rules. He stated that he had been ill-informed. Because of the inferior employment benefits Mr Bos claimed that Pax owed him for loss of salary and other benefits for the period 1 August 2006 to 8 March 2007, plus statutory interest for overdue payment.

Mr Bos lost the case in two instances. He appealed to the Supreme Court.

The Supreme Court found that SL/DE had an obligation, at the time it outsourced its logistical

department to Pax, to inform Mr Bos fully of his options, namely to transfer to Pax on his existing terms of employment or to become an employee of Detrex, also on his existing terms of employment but not pursuant to a transfer of undertaking (see EELC 2009/43). The Supreme Court overturned the Court of Appeal's judgment and remitted the case to another court of appeal, which was instructed to investigate whether SL/DE had informed Mr Bos adequately of his rights at the time it outsourced its logistics department.[1]

The Court of Appeal took the criteria of the Supreme Court into consideration and ruled that, based on lack of evidence, Pax had failed to show that SL/DE had provided Mr Bos with the required information. The fact that Bos had mentioned that he did not want to work for Pax was insufficient for the court to find otherwise. Furthermore, Bos had given a sufficient explanation for his outburst, saying that it had occurred as a result of insecurity regarding his employment situation. The court found Pax responsible for putting Bos on gardening leave and for the fact that he had not worked ever since.

Meanwhile, Mr Bos had filed his claim again, this time not in injunction proceedings but in regular proceedings. He lost again and appealed. By the time the Court of Appeal had to decide a second time, the Supreme Court had delivered its judgment in the injunction proceedings.

Judgment

The High Court of Appeal took the criteria of the Supreme court into consideration and ruled that, based on lack of evidence, Pax had failed to show that SL/DE had provided Mr Bos with the required information. The fact that Bos had mentioned that he did not want to work for Pax was insufficient for the court to find otherwise. Furthermore, Bos had given a sufficient explanation for his outburst, saying that it had occurred as a result of insecurity regarding his employment situation. The court found Pax responsible for putting Bos on gardening leave and for the fact that he had not worked since.

Commentary

The judgment gives teeth to the transferor's and transferee's obligation to inform their employees in accordance with Article 7 of Directive 2001/23, although the underlying matter is not judged by the transfer of undertaking rules. The criteria used to arrive at the decision derive from general rules of good conduct in the context of employment.[2]

The general rule is that an employee can voluntarily waive his or her right to protection under the transfer of undertaking rules if he or she does not want to accept the transferee as the new employer. The employee will then no longer be employed by the transferor, unless they decide to continue their relationship on the conditions agreed upon.

In the case of a dispute about the waiver, the question is whether or not the employee knew what he or she was doing (including the consequences of his or her actions) and whether or not his or her approval was expressed clearly and without hint of doubt.

SL/DE would have acted as a 'good employer', as required under Dutch law, if it had given Mr Bos the choice between either transferring into the employment of Pax on the existing SL/DE terms or transferring into the employment of Detrex under terms agreed upon.

Although I concur with the general outcome of this case as regards the employee, it is notable that it was the transferor that failed to abide by the applicable rules Ð but the transferee that was held responsible for the consequences.

In any event, the Dutch Supreme Court has set the bar high in protecting employees, which is in line with the bar set by the ECJ, and this seems to reflect the general trend. When considering some of the recent decisions regarding transfers of undertakings it appears that the scope of Directive 2001/23 is influenced by evolving views on some of the basic elements of the Directive, such as the definition of 'employee'. In this respect the protection of employees is still growing and the obligations of the employer as regards the right to information are increasing.[3]

I am happy for Mr Bos, that Pax has not appealled to the Supreme Court and that, therefore, the Leeuwarden High Court decision is the end of the matter.

Comments from other jurisdictions

Germany (Simona Markert): The German situation is similar to the situation in the Netherlands. In terms of employees« rights to be informed about a transfer of undertaking the German Federal Labour Court (the 'BAG') has also set the bar high (8 AZR 382/05).

In the case of a transfer of undertaking the employment relationships existing at the time of the transfer pass to the transferee. Section 613a (5) of the German Civil Code obligates either the transferor or the transferee to notify employees affected by the transfer in writing prior to the transfer of its date or planned date, the reason for it, its legal, economic and social consequences for employees, and the measures being considered with regard to the employees. The affected employees may object in writing to the transfer of the employment relationship within one month of receipt of the notification. The legal consequence is that the employment relationship stays firmly with the transferor. The one month period only starts once either the transferor or the transferee has fully informed affected employees of their right to transfer to the acquiring company under the same employment terms and conditions.

The German requirements regarding full and correct notification about transfer are more onerous than those required by Directive 2001/23/EC, which only requires information about the transfer to be given if there are no employee representatives.

United Kingdom (Joe Beeston): In the UK, both the transferor and transferee have a duty to inform and consult with appropriate representatives of the employees who will be affected by a transfer of an undertaking. Although there is no minimum prescribed time limit on when this consultation must occur, it should take place 'in good time' to allow employees to consider their options before it is too late, i.e. not after the transfer has taken place.

The information that must be provided is about the fact of the transfer, the reasons for it and its legal, economic and social implications. The fact that an employee can object to a transfer and what the implications of that objection would be do not have to be specified. There is no requirement in the UK that an employee intending to object to a transfer should be informed of the consequences of his or her actions. An objecting employee will not transfer, but his or her employment with the transferor is treated as terminating automatically. (This is unless the transferor relocates the employee to another part of its business, which it is under no obligation to do.) Employees who object are therefore deemed to have resigned and will not have a claim for damages or any other remedy, unless the reason for the objection was linked to a proposed detrimental change to employment conditions.

There is no particular form in which an employee must state an objection to transferring and an objection can be communicated either in word or deed. Because the consequences of objecting to a transfer can be so harsh, a tribunal or court in the UK is likely to find that an employee did not object unless the employee used very clear words or actions to indicate an objection. Any ambiguity is likely to be resolved in the employee's favour. However, unlike the Dutch case of Mr Bos, an employee would not have to understand the consequences in order validly to object.

Footnotes

1 The proceedings with this other court of appeal have been withdrawn.

2 Article 7:611 Dutch Civil Code.

3 E.g. ECJ 10 September 2009 case C-44/08 Akavan - v - Fujitsu and ECJ 21 October 2010, case C-242/09 Albron - v - FNV Bondgenoten.

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