SUMMARY

2011/20 Activity transferred 80/20% to A and B: employee goes across to A for 100% (NL)

<p>A cleaning company had a contract with the owner of two buildings, A and B. The plaintiff, an employee of the cleaning company, spent about 80% of his working time supervising the cleaners in building A and the remaining 20% of his working time cleaning in building B. Following a competitive bid, his employer lost the contract in respect of building A to one competitor and the contract in respect of building B to another competitor. The court found that he transferred fully (100%) into the employment of the competitor that won the contract in respect of building A.</p>

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Facts

A cleaning company (let us call it “the old employer”) had contracted with the owner of two buildings, A and B, to clean those buildings[1]. The old employer employed 11 employees to do this work. One of them was the plaintiff. He had three tasks: (i) to supervise the 10 cleaners

whose duty it was to clean building A, (ii) to clean building B himself and (iii) occasionally, to help out in building A when one of the cleaners there was sick or on leave. He was employed for 38 hours per week. He spent 31.75 hours per week, which was about 80% of his working time, on (i), his supervisory task; and 6,25 hours, which was about 20% of his working time, on (ii), his cleaning task. His employment agreement was governed by the collective agreement for the cleaning industry. This provides that if a cleaning company loses a cleaning contract for a certain building, the company that wins the contract for that building must offer employment Ð on broadly unchanged terms Ð to the cleaners who were employed to clean that building (with certain exceptions that are not relevant in this case). Cleaners who accept the offer become employees of the company that won the contract. Those who reject the offer remain in the employment of the company that lost the contract.

On 1 November 2010 the old employer lost the contract in question. It lost the contract to clean building A to one competitor (the defendant) and it lost the contract to clean building B to another competitor (let us call this "Company X"). The defendant offered to employ the plaintiff for 31.75 hours per week. What happened then was in dispute. The defendant said that the plaintiff rejected its offer, whereas the plaintiff stated that he had merely asked for time to think over the offer. In any event, the defendant did not take over the plaintiff. It did take over eight of the cleaners who were employed in building A. Company X informed the plaintiff that it did not need his services.

Apparently neither the old employer nor the plaintiff were aware that the service provision change constituted a transfer of undertaking. For this reason, the old employer applied for, and obtained, a dismissal licence and then dismissed the plaintiff with effect from 19 February 2011. It paid the plaintiff's salary until that date.

Meanwhile, the plaintiff sought the advice of a lawyer. She informed him that the service provision change of 1 November 2010 constituted a transfer of undertaking and that he had therefore transferred into the defendant's employment. Evidently, the lawyer's intervention did not have the desired effect, because on 18 February 2011, the plaintiff brought injunction proceedings against the defendant. He asked the court to order the defendant to allow him to perform his work in building A and to pay him his salary from 1 November 2010[2].

Judgment

The court found that the service provision change constituted a transfer of undertaking. As for the defendant's contention that the plaintiff had turned down its offer of employment, the court observed that the defendant had not informed the plaintiff of his legal rights under the transfer of undertaking rules and that therefore, even if the plaintiff had rejected the offer, he

had not done so with the intention to waive his legal rights. Based on this reasoning, the court ordered the defendant to employ the plaintiff for 38 hours per week.

Commentary

There are two aspects to this case that elicit an explanation.

The first is that the court made no effort to explain why it ordered the defendant to employ the plaintiff for 38 hours and not for 31.75 hours per week. Perhaps the court felt that it was not necessary to provide a reason for this, given that the proceedings were not ordinary proceedings but merely interlocutory proceedings, in which the plaintiff sought injunctive relief. Another reason could be that the plaintiff, besides working 31.75 hours per week in building A, occasionally worked there for longer to provide cover if one of the cleaners was sick or on leave. Yet another reason for the decision is that the court may have felt that a contract of employment cannot be split into two parts (see EELC 2011/2).

The second point to note relates to the collective agreement for the cleaning industry, which is binding on all cleaning companies in The Netherlands. Although the parties to the agreement Ð an employers' federation and unions Ð are well aware of the law regarding transfers of undertakings, they persist in renewing a collective agreement that seems to disregard the law. Generally, cleaning a building is a labour-intensive activity. Therefore, if the winner of a tender does not offer employment to any of the employees of the party that lost the tender, there is normally no transfer of undertaking (see, for example, the ECJ's recent ruling in the CLECE case). However, in the event that the winner of a cleaning tender offers employment to the majority of the relevant employees, as the collective agreement for the cleaning industry required (see the ECJ's ruling in the famous Süzen case), this creates a transfer of undertaking situation. By compelling the winner of a cleaning tender to offer employment to (almost[3]) all of the cleaners working in the building that is the object of the tender, the collective agreement has the effect of bringing service provision changes that would not normally qualify under Dutch law as a transfer of undertaking within the scope of the transfer of undertaking rules (which is similar to the situation in the UK). The requirement in the collective agreement that the winner of a cleaning contract must offer employment, even if there is a transfer of undertaking involving the automatic transfer of the relevant cleaners' employment contracts, is an anomaly and, as this case shows, can create confusion.

Comments from other jurisdictions

Denmark (Christian Clasen): This decision is interesting because in Denmark there is debate on whether an employee, following the transfer of his main activity, can claim full-time employment with the transferee even though he formerly spent less than 100% of his working

time in the economic entity that was transferred. The general opinion is that this is probably the case, but that it could also result in employees being laid off, because it could risk creating a shortage of work if, for instance, 10 employees working 80% are transferred and all have a claim for full-time work.

It is also interesting that the treatment of the collective agreement under Dutch law can be decisive as to whether a transfer of an undertaking has taken place. In Denmark, the position is that whether or not there is a transfer of undertaking within the meaning of the Acquired Rights Directive the definition of "undertaking or part of an undertaking" does not depend on what any applicable collective agreements states.

Germany (Henning Seel): In German law, the transfer of business is laid down in Section 613a of the Civil Code ("BGB"). The acquirer succeeds to the rights and duties arising from the existing employment relationships. The contractual relationship as a whole passes over to the acquirer. The working conditions, including the working hours, remain unchanged.

The German labour courts, which also have to follow the rulings of the ECJ, do not accept that there is a transfer of undertaking in a labour-intensive industry if the winner of a tender does not offer employment to any of the employees of the previous contractor who lost the tender. There is no "service provision change clause" in German law that would foresee a transfer of undertaking in such a situation. A transfer of undertaking will, however, be created if the winner of a cleaning tender offers continued employment to a relevant number of cleaners who worked in the building(s) subject to the tender. In this event, members of the previous "cleaning-team" who do not get an offer to work for the new contractor can refer to Section 613a BGB: their employment relationships pass over to the new contractor as a legal consequence of the transfer of undertaking.

A collective bargaining agreement obliging the winner of a cleaning contract to offer employment to the previous staff in addition to the automatic transfer of the employment agreements, does not exist. Such an anomaly is not known in German law.

United Kingdom (Julian Parry): Under the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006, service provision changes are specifically included in the definition of a transfer of an undertaking. Therefore, if the scenario in this case were to occur in the UK it would always amount to a transfer, even if the transferee refused to take on any of the staff.

The UK courts have decided that liability for the employment contract of a transferred employee cannot be divided between two transferees on a percentage basis, otherwise an employee could potentially become the servant of two masters. Instead, each employee transfers to one transferee on his or her existing terms (including as to hours), even if he or she had originally done work in different parts of an undertaking which is subsequently divided between transferees. The courts would decide to which aspect of the undertaking the employee was principally "assigned" and the transferee taking on that part of the undertaking would become the new employer, assuming responsibility for all liabilities under the contract of employment (Kimberley Group Housing Ltd v Hambley and others [2008] IRLR 682).

Footnotes

1 In fact, building A was a group of seven buildings. For the sake of simplicity I have called them, jointly, "building A".

2 This was despite the fact that the old employer had continued to pay his salary until 14 February 2011.

3 This requirement is limited to cleaners who have worked no less than 18 months in the building in question.

Subject: Transfer

Parties: not (yet) known

Counsel: D.S. Verkerk (for plaintiff) and M. HofstŽ-Leidekker (for defendant)

Court: Rechtbank 's-Gravenhage sector kanton (Lower Court)

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