

SUMMARY

2011/19 Austrian Supreme Court more friendly to employee claims following transferor's insolvency (AT)

Following a transfer of undertaking, the plaintiff's new employer became insolvent. At that time, the plaintiff had a claim for unpaid wages against his former employer, the transferor. Under previous case law he could not have been compensated for this claim by the national guarantee institution. The Supreme Court reversed this heavily criticised doctrine.

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Facts

In 2006 a business activity transferred. As a result, the plaintiff went across from the transferor (the "old employer") to the transferee (the "new employer"). On the date of the transfer he had a claim for two months of unpaid wages (the "two-month claim").

Three months after the transfer, the new employer went into insolvency. Its obligations towards the plaintiff were paid by the Austrian guarantee institution pursuant to the Insolvency Directive 80/987, IEF-Service GmbH (IEF).

The plaintiff did not apply to the IEF for payment of the two-month claim because he assumed that such a claim would have been rejected. This assumption was based on the following reasoning. The Austrian law transposing the Acquired Rights Directive 2001/23 provides that

the transferor and the transferee are jointly liable in respect of obligations of the transferor that arose before the transfer. The Austrian law transposing the Insolvency Directive (Insolvenz-Entgeltsicherungs-gesetz) provides that the IEF will not compensate employees for claims for which a third party, such as a former employer, is liable. This caused him to assume that an application to the IEF to compensate him for the two-month claim stood no chance of success. Based on this assumption, the plaintiff limited his IEF application to the sums that the new insolvent employer had left unpaid. He brought a claim against the old employer in respect of the two months of salary it had left unpaid.

While the claim was pending, the old employer also became insolvent. The plaintiff turned to the IEF again, this time asking it to settle the two-month claim. The IEF turned down the application, arguing that the plaintiff could and should have included the two-month claim in the application he submitted at the time the new employer went into insolvency.

The plaintiff took legal action against the IEF. Both the court of first instance and the court of appeal ruled in his favour. The IEF appealed to the Supreme Court.

Judgment

Had it applied its prior case law, the Supreme Court would have affirmed the lower courts' judgments. This case law originated from cases where the transferor had become insolvent and where the IEF had turned down claims for unpaid wages on the grounds that the employee could claim against the transferee. In one decision in 2002¹ the Supreme Court extended its reasoning to the opposite situation, where the transferee became insolvent and a transferor existed who was jointly and severally liable.

This previous case law had been heavily criticised as being incompatible with the Insolvency Directive. Article 3 of this directive provides that the Member States shall take the measures necessary to ensure the payment of employees' outstanding claims resulting from contracts of employment against their insolvent employers. The Supreme Court deduced from the ECJ's judgments in *Caballero* (C-442/00) and *Núñez* (C-498/06) that where an employee's claim is based on clear legal grounds, a guarantee institution has no right to make payment conditional on additional investigation. This implies that an employee cannot be obligated to sue his former employer in order to collect wages the latter has left unpaid.

In another 2002 decision, heeding the criticism of its previous legal position, the Supreme Court had indicated that it was uncertain whether that case law was compatible with the Insolvency Directive². Now, in 2011, the court has decided it is time to reverse its case law. For the plaintiff this has meant that, in hindsight, following the insolvency of his new employer, he

could have claimed from the IEF not only what this new employer owed him but also the two months of salary he was owed by the old employer. The only relevant fact at that time was that the new employer owed him money. The fact that this obligation was one the new employer had inherited from its predecessor was not relevant. Therefore, the plaintiff could and should have asked the IEF to pay his two-month claim. Had he done so, the IEF would have had to pay him. On the other hand, the IEF is not under an obligation to compensate an employee in respect of an obligation of a non-employer, such as the old employer.

Commentary

The unfortunate plaintiff paid a heavy price for relying on existing case law. To him, the Supreme Court's decision must have come as an unpleasant surprise, all the more so as, ironically, his loss of the case was the result of a more employee-friendly approach by the Supreme Court. To employment law specialists the decision was less surprising, given the critical reception of the Supreme Court's earlier doctrine and the court's repeated hints that it was unsure of the compatibility of that doctrine with EU law.

Under the new doctrine, an employee whose employer becomes insolvent following a transfer of undertaking is relieved of the burden of pursuing his claim against his former employer. He can have his wage arrears paid by the IEF even if those arrears arose before the transfer.

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