SUMMARY

2011/18 No general “Widerspruch” right in Austria (AT)

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Facts

In 2008 the defendant, an insurance company (“A”), contracted out one of its business units, which dealt with the assessment of damage to cars, to an affiliate (“B”). It transferred to B not only the activities of the business unit, but also its furniture, office equipment, financial assets, contracts with clients and suppliers, documentation, electronic data, etc. A notified the

business unit's employees that as of 1 January 2009 their employment relationship would transfer to B with the retention of all their existing terms of employment including those set out in the collective agreement to which A was subject, as that agreement would read from time to time. Given that B was under an obligation to apply another collective agreement, this meant that, in contrast to normal Austrian practice, the employees in question would benefit from two collective agreements simultaneously, in effect cherry picking from both agreements. By way of explanation, Austrian law provides that the transferee's collective agreement replaces that of the transferor. In other words, what happened in this case was a voluntary departure from the law in favour of the transferred employees.

Despite this favourable arrangement, a group of 33 employees objected to the transfer. They did in fact begin to work for B, but only under protest and with reservation of rights. Their case was supported by A's works council, which took its management to court, seeking a declaratory judgment that the said 33 employees had remained in the employment of A. This claim was based on the argument that the contracting out of the damage assessment activities did not qualify as a transfer of undertaking within the meaning of (the Austrian law transposing) the Acquired Rights Directive 2001/23 (the ARD). In the alternative, the works council asked the court to declare that the 33 employees' terms of employment had deteriorated as a result of the transfer to B within the meaning of (the Austrian transposition of) Article 4(2) of the ARD, which provides that if the contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment. This alternative argument rested on the fact that the continued application of the "old" collective agreement was merely on a voluntary basis, thus affording the transferred employees a lower level of protection than would have been the case had the collective agreement continued to apply by law.

The court of first instance rejected the works council's claim, ruling that the contracting out of the damage assessment unit qualified as a transfer of undertaking and that the employees' terms of employment had not changed to their detriment. It is noteworthy that in these first instance proceedings, the issue of whether employees have the right to resist going across to the transferee and to remain in the transferor's employment (this right to be referred to below by the German expression "Widerspruchsrecht") was not addressed. This issue came up for the first time in the appeal proceedings. However, the Court of Appeal (the Oberlandesgericht Wien) denied the existence of such a right. The works council appealed this decision to the Supreme Court (Oberster Gerichtshof).

Judgment

The Supreme Court upheld the Court of Appeal's judgment. The interesting part of its judgment is not that it confirmed that the contracting out of the car damage assessment unit qualified as a transfer of undertaking within the meaning of the ARD: this was a foregone conclusion. The interesting element is that the court went in depth into the works council's assertion that there is a general Widerspruchsrecht under Austrian law.

The Supreme Court began by referencing the ECJ's judgments in the cases of Berg and Busschers (ECJ 5 May 1988, cases 144 and 145/87), Katsikas (ECJ 16 December 1992, cases C-132, 138 and 139/91) and Merckx and Neuhuys (ECJ 7 March 1996, cases C-171 and 172/94). In Berg and Busschers the ECJ held that a transfer of undertaking causes the employment contract with the transferor to end automatically and that there is no universal principle of law outlawing such an automatic replacement of one employer by another against the employee's will. In Katsikas the ECJ held that an employee cannot be compelled to cross over to the transferee and may therefore refuse to go across, and that Member States are free to provide that in such a case the employment with the transferor continues. The court mentioned that an obligation for the employees to work for an employer they have not freely chosen would in effect violate their "fundamental rights". In Merckx and Neuhuys the ECJ held that if an employee, in a jurisdiction where there is no right to remain in the transferor's employment, refuses to go across to the transferee on account of inferior terms of employment at the transferee, he shall be deemed to have been constructively dismissed by the transferor. The Austrian Supreme Court concluded from these ECJ judgments that the ARD does not obligate Member States to provide for a Widerspruch right in their domestic law.

The Supreme Court went on to find that Articles 3(4) and 3(5) of the Austrian law transposing the ARD, which is known as the AVRAG, are in compliance with the ARD. Article 3(4) AVRAG grants employees a Widerspruch right in two specific situations, neither of which applied in the case at hand, namely (i) where the transfer would cause an employee to lose dismissal protection derived from a collective agreement and (ii) where the transferee fails to honour a promise in respect of pension. Article 3(5) AVRAG allows an employee to resign and to claim the same benefits as if he had been dismissed (i.e. constructively dismissed) because a transfer of undertaking had resulted in a deterioration of his terms of employment as a result of the application of the transferee's collective agreements. Articles 3(4) and 3(5) both indicate that the Austrian legislator, when transposing the ARD, had no intention to provide for a Widerspruch right beyond these specific circumstances.

The works council also argued that a compulsory transfer of an employee from one employer to another is at odds with the Austrian constitution. The Supreme Court rejected this argument. It began by noting that Parliament has a wide measure of discretion in matters of social policy. The court went on to point out that there are other situations where an employee

is faced with an involuntary change of employer which are perfectly accepted, such as where the employer dies and his business is taken over by his heirs and where one company merges with another. In most cases the employer's identity is of no relevance to the employee. Moreover, ever since the ARD was transposed into Austrian law in 1992, employees know that they may one day end up being employed by another employing entity. Finally, the interests of the other employees must be taken into account, in that their jobs could be put at risk if a potential purchaser of their business has no certainty that he will be taking over that business' key employees.

In summary, the Supreme Court confirmed the view that Austrian law lacks a "general" right of Widerspruch. However, surprisingly, the court went on to effectively open three "back doors" for employees who wish to remain in the employment of the transferor:

1. there are situations comparable to those provided in Article 3(4) AVRAG which the Austrian legislator seems to have "forgotten" to exempt from the main rule that employees transfer automatically, whether they like it or not. By way of illustration, the court referred to its 1997 decision, in which it had allowed a works council member to oppose a transfer and to remain in the transferor's employment, the reason being that the absence of such a right would allow employers to circumvent the statutory dismissal protection afforded to works council members by hiving off the relevant part of the business.

2. there may be exceptional situations in which an employer's identity is relevant, such as where a person is employed by a well-known artist and involuntary transfer to another employer would frustrate the objective of the employment.

3. intentional curtailing of the employee's rights, such as transferring him to an insolvent transferee in order to get rid of him cheaply, should not be allowed.

Comments from other jurisdictions

Germany: (Paul Schreiner, Simona Markert): The German situation is quite different to the situation in Austria regarding the right to oppose against a transfer. Section 613a VI BGB (Bürgerliches Gesetzbuch) gives employees a general right to oppose a transfer of undertaking with the effect of retaining their employment with the transferor. It stipulates the following:

"The employee may object in writing to the transfer of the employment relationship within one month of receipt of notification under subsection 5.[1] The objection may be addressed to the previous employer or the new owner."

German case-law acknowledged this general right to object to the transfer to another

employer before Section 613a BGB was amended in this regard. In contrast to the Austrian decision reported above, the courts held that forcing an employee to continue his service with another employer, without his having a right to oppose the transfer, would violate the German constitution.

As to the rights and obligations of the transferee vis-a-vis the employees affected by the transfer, the German situation corresponds to that in Austria. If the rights and obligations in force between the transferor and the transferred employees immediately before the transfer date were governed by the provisions of a collective agreement (or of a "works agreement"), then those provisions become part of the employment relationship between the transferee and the transferred employees, unless there is a collective agreement in force at the transferee with binding effect on those employees. Such binding effect exists if the employees are members of the trade union that concluded the agreement. However, even if the provisions of a collective bargaining agreement have been incorporated into the employment contract, they may not be altered to the disadvantage of the employee before the end of the year following the transfer date.

In the situation at hand, the employment contracts apparently referred to a collective agreement that was different from the transferee's collective agreement. In such a situation the collective agreement applicable at the transferor is not automatically replaced by the one at the transferee. Section 613a BGB only regulates the situation in respect of two applicable collective bargaining agreements, but not of employment contracts which contradict an existing collective agreement at the transferee.

In principle the parties to an employment contract are free to have different regulations in the employment contract than those contained in the applicable collective agreement. To assess which provision prevails, German law provides that a comparison to decide which regulation would be more favourable to the employee must be performed, and the one chosen is then considered to be effective. This seems to be comparable to the cherry-picking effect in Austria.

There is one important exception to this rule in Germany. In the past, clauses in employment contracts incorporating a collective agreement were treated differently. The courts held that the purpose of such clauses was to treat all employees equally and therefore to extend the scope of the collective agreements to all employees, including those who are not members of a trade union. Since this is still the purpose following a transfer of undertaking, the clause incorporating the collective agreement was deemed to refer henceforth to the transferee's collective agreement. In 2002 the German Civil Code was changed. One of the changes led to employment contracts being qualified as "form contracts". This, however, led to the conclusion that most reference clauses used at that time had to be read as referring to the

collective bargaining agreement effective at the transferor. As a result of this difference in treatment the courts treat reference clauses differently depending on whether they were concluded before or after 2002. For cases in which the contract was concluded after the change to the Civil Code, courts regularly tend to read the employment agreements as referring to the collective bargaining agreement applicable at the transferee, whereas for cases prior to the change, the courts tend to read such agreements as referring to the collective bargaining agreements at the transferor.

United Kingdom (Julian Parry): Employees in the UK do not have the right to refuse to transfer and to remain in their original employment. If employees object to the transfer, their employment ends at the point of transfer without entitlement to any compensation. However, if the transfer will involve a substantial change to their working conditions to their material detriment, then they may resign and claim constructive dismissal Ð liability for which will attach to the transferee.

Footnote

1 Subsection 5 requires the previous employer or the new employer to notify the employees affected by the transfer in text form prior to the (planned) transfer date, of the reason for the transfer, of the legal, economic and social consequences of the transfer for the employees, and of measures that are being considered with regard to employees.

Subject: Employees who transfer/refuse to transfer

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