SUMMARY

2011/4: One-month deadline for exercising Widerspruchsrecht does not start to run if information to staff on impending transfer is misleading (GE)

<p>Failure by an employer to inform the relevant employees correctly about an impending transfer of undertaking can be very costly.</p>

Summary

Failure by an employer to inform the relevant employees correctly about an impending transfer of undertaking can be very costly.

Facts

The plaintiff was a Human Resources Manager in Siemens' mobile phone division. In the course of 2005, Siemens entered into an agreement with the Taiwanese company BenQ under which the latter took over the mobile phone division worldwide. In Germany, the transferee was BenQ Mobile GmbH & Co OHG. It acquired the German part of the division, including its workforce of approximately 3,300 employees. The plaintiff was closely involved in the drafting of the information letter that was issued to the employees who were to transfer to BenQ. He helped to draw up the initial draft of the letter and was instrumental in amending this draft. However, he was not responsible for the contents of the letter. The final say on those contents lay in the hands of management, three hierarchical levels above the plaintiff. The 3,300 (approximately) employees, including the plaintiff himself, transferred into the employment of BenQ on 1 October 2005. Less than one year later, on 29 September 2006, BenQ applied for insolvency and shortly afterwards it was declared insolvent, as of 1 January 2007. Its employees received no salary for the months of November and December 2006 and instead received (lesser) insolvency benefits. Not long after BenQ became insolvent, it was discovered

that the information letter had been misleading and inaccurate in a number of ways. It had incorrectly given the employees the impression that they would transfer into the employment of BenQ's ultimate parent company, whereas in reality their employer became a subsidiary that did not yet exist on the date of the transfer. Furthermore, the letter failed to mention that the purchase price for its mobile phone division was negative, Siemens having paid BenQ no less than € 350 million in consideration of it taking over the loss-making and heavilyindebted mobile phone division. The letter contained a number of other inaccuracies and misleading statements. In brief, the letter did not meet the requirements of Article 613(a)(5) of the German Civil Code, which is the German transposition of Article 7 of Directive 2001/23. This provision requires the transferor to inform the employees affected by a transfer of undertaking of, among other things, the reasons for the transfer and its legal, economic and social implications for them. On 7 November 2006, approximately 1,500 out of the said 3,300 employees, including the plaintiff, notified Siemens that they opposed the transfer. They took the position that they had remained Siemens' employees, that they offered to work for Siemens and that they were therefore entitled to payment by Siemens of (i) their full salaries for the months of October 2005 to December 2006 (minus the salaries BenQ had paid them and the insolvency benefits they had received) and (ii) salary as of 1 January 2007. Siemens countered that the information letter, although not wholly accurate, was legally correct and that therefore the time limit of one month for opposing the transfer to BenQ as per section 613(a)(6) of the Civil Code had expired over one year previously. The employees did not accept this argument and brought a claim against Siemens. In the case of the plaintiff, Siemens had an additional defence, as they argued that he had been actively involved in the drafting of the information letter. Therefore, even if its contents were in error, he had forfeited his right to rely on the letter's inaccuracies. The court of first instance agreed with the plaintiff that he had retained his contract of employment with Siemens, but it denied his claim for compensation. Both parties appealed. On appeal, the "Landesarbeitsgericht" in Munich partially overruled the lower court's judgment and awarded the plaintiff compensation for the period from 17 November to 31 December 2006. Again, both parties appealed, this time to the "Bundesarbeitsgericht" ("BAG").

Judgment

The BAG ruled in favour of the plaintiff, reasoning as follows.

1. The one-month time limit for opposing a transfer into the employment of the transferee does not start to run until the transferor has informed the employee fully and accurately. As the information letter did not satisfy this requirement (a fact which the BAG had already determined in other cases arising out of the same Siemens-BenQ transaction), the plaintiff's

notice of opposition on 7 November 2006 was timely.

2. There are circumstances in which an opposition to a transfer is in bad faith and the right to oppose the transfer is therefore forfeited. However, the circumstances in this case did not warrant such a loss of right, given that the plaintiff, when drafting the information letter, had acted on the instructions of his superior and was not responsible for the letter's final wording.

3. The plaintiff was entitled to payments from Siemens, although he had not performed any work for Siemens since 1 October 2005. Under German law, such a claim can be made in the event that the employer fails to offer employment. Therefore, usually the employee needs to offer to work, if he or she wants to bring a claim for compensation without actually rendering services. In the case at hand, however, Siemens had informed the employees in the information letter that their positions would cease to exist following the transfer. Therefore, the BAG held that the plaintiff had not been required to offer to work, since Siemens had already declared that it was not willing to accept his services any more. Therefore, the plaintiff was entitled to compensation for lost earnings for the entire period from 1 October 2005 to 31 December 20061. The case was remanded back to the Court of Appeal to determine the exact quantum of the claim.

Commentary

In passing this judgment, the BAG confirmed its previous case law – that there are circumstances in which an employee forfeits his or her right to oppose a transfer. I concur with the BAG's view that such a loss of right should be limited to situations where the transferor was reasonably entitled to rely on the employee's acceptance of his or her transfer and where a certain period of time has elapsed without him or her indicating any intention to oppose the transfer. In accordance with German case law, the party not acting in good faith must somehow have given the wrong impression to the other party. This, however, was clearly not the case in the situation at hand, since the plaintiff ultimately had no influence on the wording of the information letter and probably was not even privy to any further details than those he drafted. Therefore, the defendant could not rely on the fact that the plaintiff had not made use of his right to oppose the transfer. This judgment also confirms the BAG's strict approach (similar to that of the Dutch Supreme Court as reported in EELC 2009/43), to the requirement that the transferor inform the relevant employees fully, correctly and honestly and that failure to do so can be very costly indeed. Siemens' misleading letter cost it millions. An employee must be able to make an informed decision as to whether or not to oppose a transfer. Clearly the employee can only do so if he or she knows all the relevant facts and is informed honestly.

Comments from other jurisdictions

Czech Republic (Nataša Randlová): Under the Czech Labour Code, the transferor must inform those employees directly affected and consult with them about a planned transfer. If there is a trade union or works council within the transferor, they must also be informed and consulted. The same information and consultation procedure should be undertaken by the transferee in relation to any employees directly affected by the transfer. However, under Czech law, a breach of these information and consultation duties does not have such serious consequences. First of all, employees cannot oppose a transfer. Secondly, a breach would not cause the invalidity of the transfer itself. Thirdly, the transferor and/ or transferee could only be penalised by the State Labour Inspection Office where such information and consultation duties were breached in respect of a trade union or works council. The fine could amount to up to approximately € 8,000 (CZK 200,000). Where no trade union or works council exists, no fine could be imposed. On account of these facts, Czech employers very often breach their information and consultation duties in order for the transfer to take less time. Hopefully, the next amendment of the Labour Code and the Act on Labour Inspection will change this situation and employers will be more motivated to inform employees about the transfer fully, correctly and honestly.

Denmark: (Mariann Norrbom): Ordering Siemens to pay salary to the transferred employees one year after the actual transfer of its mobile phone division seems to be a result of very far-reaching implications. It is highly unlikely that a Danish court would reach the same conclusion in a similar case. In Denmark, Directive 2001/23 is implemented by the Danish Act on Employees' Rights on Transfer of Undertakings. If the transferor does not comply with the requirements of the Act to inform employees in connection with a business transfer, the consequence will in most cases be a fine, and not an award of the calibre that Siemens was faced with in this case.

France (Claire Toumieux and Susan Ekrami): Contrary to German law, French law has not transposed Article 7 of the European Directive of 12 March 2001, which stipulates a duty to inform and consult. In a recent decision dated 18 November 2009 (Cass. Soc no 08-43.397 commented in EELC 3-2010), the French Supreme Court held that Article 7 of the European Directive had no horizontal effect. Therefore, the employer was not bound by any duty to inform and consult and consequently the employees affected by the transfer could not bring a claim for compensation for not having been informed and consulted.

Footnote

1 The plaintiff only claimed this sum, but technically he was also entitled to salary as of 1 January 2007.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Employees who transfer/refuse to transfer

Parties: Unknown plaintiff – v – Siemens AG (defendant)

Court: Bundesarbeitsgericht (Federal Labour Court)

Date: 20 May 2010 Case number: 8 AZR 734/08

Hardcopy publication: NZA 2010, 1295

Internet publication: Not yet available

Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2010-05-20
Case number: 8 AZR 734/08