SUMMARY

2011/3: TUPE potentially applies to cross-border transfers (UK)

<p>The United Kingdom legislation on transfer of undertakings (known as “TUPE”) has the potential to apply to a transfer outside the UK’s jurisdiction – and even beyond the European Union (EU).</p>

Summary

The United Kingdom legislation on transfer of undertakings (known as "TUPE") has the potential to apply to a transfer outside the UK's jurisdiction – and even beyond the European Union (EU).

Facts

Newell Ltd had a factory in Tamworth (in the UK) from where it operated a track, pole and blind manufacturing business[1].The plant had 180 workers, 76 of whom were represented by the GMB, a trade union. The company recognised the GMB for the purposes of collective bargaining. In February 2006, the workers were informed that Holis Metal Industries Ltd ("Holis"), a company based in Israel, was interested in acquiring the track and pole parts of the business, but not the blind section. The employees were informed during the consultation process that the 107 staff in the track and pole parts of the business (the "affected employees") would need to transfer to Holis, whose premises were based in Israel. They were told that, if the affected employees refused to move to Israel, they would be made redundant following the transfer. In April 2006, the track and pole business duly transferred from Newell Ltd to Holis. None of the affected employees moved to Israel and they were accordingly dismissed on grounds of redundancy. Under Regulation 13 the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), both the transferor and the transferee of a business must inform and consult with appropriate representatives of the affected employees about the proposed transfer. Failure to comply with these requirements entitles the relevant recognised

trade union or other employee representatives to bring a claim in the Employment Tribunal. The GMB lodged claims against both Holis and Newell Ltd asserting, amongst other things, failure to inform and consult under TUPE. Holis applied for a pre-hearing review, requesting that the claims be struck out on the grounds that they had no reasonable prospect of success, since TUPE did not apply where a business was being transferred overseas. The issue that fell to be determined was whether TUPE would apply to a transfer of a business, which after the transfer would be based outside the UK and even outside the EU. The Employment Tribunal found that, on the information available to it, the transfer and the redundancies had taken place within the jurisdiction and so TUPE might apply. It therefore refused to strike out the claim. Holis appealed on this point to the Employment Appeal Tribunal ("EAT"). The Employment Appeal Tribunal's Decision Although the EAT dismissed Holis's appeal, it did not formulate a view as to whether TUPE applied to the transfer in this case. The EAT did however consider whether, as a matter of general principle, TUPE could apply where businesses are transferred overseas and outside the EU. The EAT considered the wording of both TUPE and the EC Acquired Rights Directive ("ARD"). Regulation 3 of TUPE states that it applies to:

- a transfer of an undertaking where the undertaking is situated in the UK immediately before the transfer; or

- a "service provision change", where there is an organised grouping of employees situated in Great Britain immediately beforehand. The ARD stipulates that it applies where the business transferred is situated within the territorial scope of the EC Treaty. Neither TUPE nor the ARD, however, expressly state whether they apply in circumstances where a business is transferred outside the UK and EU respectively. The EAT noted that the wording of Regulation 3 of TUPE was precise in stating that it applied to undertakings situated immediately before the transfer in the UK. In view of the fact that the legislation was designed to protect the rights of workers on a change of employer, the EAT considered that "a purposeful approach requires that those employees should be protected even if the transfer is to be across borders outside the EU". Accordingly, the EAT's conclusion was that TUPE "has the potential to apply to a transfer from the UK to a non-EU entity in the event that on the transfer the undertaking did not remain in the jurisdiction". The EAT was influenced by the fact that commentators were generally of the view that TUPE and the ARD would potentially apply to a cross-border transfer.

Commentary

This was the first case in the UK to tackle the issue of whether TUPE has cross-border

application, in particular where the business transfers outside the EU. It was disappointing, however, that the EAT did not examine how TUPE principles might operate in practice in this type of scenario. The issue is important throughout Europe with cross-border transfers becoming increasingly common, particularly in the context of international outsourcing. Businesses increasingly look abroad for cost-effective solutions to performing "non-core" operations. The application of the ARD to such transactions remains extremely uncertain. There have been no ECJ judgments offering guidance in this area and very few at national level. The European Commission has been reviewing the position but is understood to have shelved the idea of formulating a legislative proposal. On a practical level, of course, the significance of this issue may be limited. Labour markets tend to be localised and there are relatively few scenarios in which employees would be willing to relocate with their job to another country. But the legal issues are nonetheless worth exploring. The ARD states that it applies where “an undertaking . . . to be transferred is situated within the territorial scope of the [EU]”. This suggests that the ARD does not apply, if an undertaking based outside the EU is transferred into the EU. On the other hand, it might be taken to imply that the ARD does apply, if the undertaking is based in the EU and is transferred either: - within the EU to a different Member State; or - to a country outside the EU. When implementing the ARD, most Member States have limited the application of their transfers legislation to the situation where the undertaking to be transferred is within their own territory. But at least potentially, most national laws implementing the ARD may apply despite the fact that the transferee is abroad, whether inside or outside the EU. It would be sufficient for the entity in question to be situated in the “home” state at the time of the transfer. One possibility is that the ARD does not apply because the relocation of an undertaking to a different country prevents it from “retaining its identity” under the Spijkers test. Most commentators are not persuaded by this argument, preferring the view that a geographical change should not in itself be sufficient to prevent the application of the ARD.

What are the implications of the ARD, if it does apply to the crossborder transfer of an undertaking? One analysis is as follows:

- The rights to information and consultation under the ARD would apply (as in the Holis case).

- Clearly, the ARD does not operate physically to transfer an undertaking or its staff. Its effect is limited to substituting the transferee employer for the transferor employer.

- The transferee employer takes on the staff on their existing terms and in their existing location.

- If the undertaking is moving to another country, the employees are likely to be potentially redundant because of the change of location.

- The transferee employer would be obliged to seek to avoid the redundancies and look for alternative work for the employees in question. Take an outsourcing from the UK to Brazil, for example. If the transferee employer had an operation in the UK, it would be expected to consider alternative work there. If, as will more commonly be the case, the transferee employer had no operation in the UK, it would need to offer alternative work to the staff concerned in Brazil. In the latter situation, a question might arise as to whether the offer of alternative work should be on the employees' existing UK terms of employment or on Brazilian terms. Whilst an offer on local Brazilian terms might appear to conflict with the purpose of the ARD, the reason for the change arguably would not be the transfer itself but the fact that the transferee had no operations in the UK and was relocating. That might constitute a permissible change for an "economic, technical or organisational reason". In practice, it is unlikely that staff would wish to relocate (on whatever terms) and the issue could be avoided. In that scenario, it would be absurd for their employment to transfer to a transferee employer who had no base where they were located. They would be properly redundant, which would qualify as an "economic, technical or organizational reason" for their dismissals. What generally happens in practice is that the transferor implements the necessary dismissals, albeit in some instances with a financial contribution from the transferee. The above example merely provides one possible analysis and is untested in the courts. The practical reality of international transactions is that employees generally do not wish to transfer abroad and are unlikely to envisage making claims against the transferee. Nevertheless, given the uncertain legal position, it is advisable for the parties to cater for these possibilities with suitable provisions in the transfer agreement, such as indemnities and apportionment of liabilities.

Comments from other jurisdictions

Germany (Paul Schreiner): The majority of German courts and authors of legal literature believe that s613(a) of the Civil Code (the German transposition of the Acquired Rights Directive) applies to cross-border transfers. The reason is that at the time of the transfer, German law applies and s613(a) does restrict cross-border scenarios, as long as the facts of the case indicate a transfer of undertaking in principle. The employment agreement does not change as a result of the transfer. The terms and conditions remain as they were before the

transfer and tax and social security must comply with the law in the new location. On the other hand, German case law suggests that a long distance transfer will often lead to significant change in the organisation and for that reason it must not be considered as a transfer of undertaking, but as a closure of the business. German court cases regarding cross-border transfers are hard to find, but some do exist and they relate to transfers both inside and outside the EU (for example, Switzerland). A case involving a possible transfer to Brazil, however, would probably be seen as a closure of the business, and not a transfer of undertaking.

The Netherlands (Peter Vas Nunes):

1. There are, to my knowledge, five Dutch precedents, the most recent being the judgment published in EELC 2009/3. Earlier judgments concerned a relocation from The Netherlands to Belgium (Ktr. Amsterdam 8 August 1995 KG 1995, 339), a relocation from The Netherlands to Belgium (Ktr. Tilburg 26 July 2007 JAR 2007/259), a relocation from The Netherlands to a French parent company (Ktr. Zaandam 26 September 2007 JAR 2008/67) and the sale of a seagoing vessel from a Dutch to a Swiss owner.

2. Let us suppose that on date X a factory, located in the south of a medium-sized town ("the old location") is sold to a company that has a similar factory in the north of town and that the purchaser – the transferee – integrates the machinery, activities, business and staff of the purchased factory into its factory in the north of the town (the "new location"). I suspect that most workers and perhaps also most lawyers would assume that the workers who transferred into the employment of the transferee have a duty to work in the new location as from date X + 1, even if this involves increased commuting time. In my view such an assumption would be mistaken. The workers in this example transferred with all their terms of employment, including their existing location. This means that they would be entitled to continue working in the old location even though there is no work for them there anymore. Under Dutch law, workers who refused to perform their work in the new location would, in principle, retain their right to full salary and benefits. Clearly, the transferee in this example would have the right to demand that the workers accept a change in their terms of employment, namely in the place where they perform their work, either unconditionally or, depending on the circumstances, with compensation for increased commuting time and expenses. In such a scenario, the workers would need to have strong arguments to continue refusing to go to the new location, risking a salary stop or even dismissal.

3. Why should a transfer of undertaking to a transferee located further away than the other side of town, or even in another country, be treated differently? I heartily agree with Hilary

Burgess' analysis that "the transferee employer takes on the staff on their existing terms and in their existing location". To me, it is clear that the ARD and the Dutch legislation transposing it apply to a transfer of an undertaking that is physically located in the EU to any place, whether it is in the same country, within the EU or outside the EU.

4. Hilary Burgess gives the example of a UK company that outsources an activity to Brazil, where the Brazilian transferee has no operation within the UK. The question might arise, so she writes, as to whether the offer of alternative work should be on the employees' existing new terms of employment or on Brazilian terms. In order to be able to answer this question, the first step would surely be to determine which law governs the question. In my view, this would be UK law and the answer to the question would be that the offer of alternative work (in Brazil) should, in principle, be on the employees' existing terms of employment. However, this would obviously lead to practical complications, if only because of the differences between the UK and Brazil as far as social insurance, tax law and other public (and therefore not negotiable) law is concerned. The basic principle, however, must surely be that the Brazilian transferee should offer to retain the employees' existing UK terms of employment, or at least equivalent terms.

Footnote

1 Tracks and poles are, respectively, rails and rods on which to hang curtains. Blinds are horizontally or vertically alligned parallel strips to block out or diffuse sunlight.

Subject: Transfer of undertakings, transfer

Parties: Holis Metal Industries Ltd – v – (1) GMB (2) Newell Ltd

Court: Employment Appeal Tribunal (England & Wales)

Date: 12 December 2007

Case number: UKEAT/0171/07

Hardcopy publication: [2008] IRLR 187

Internet publication: www.employmentappeals.gov.uk

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Creator: Employment Appeal Tribunal
Verdict at: 2007-12-12
Case number: UKEAT/0171/07