SUMMARY

2011/2: What happens to the contract of an employee who works only partially for the transferred business? (FR)

<p>When the application of Article L. 1224-1 of the Labour Code results in a change of the employment contract for the transferred employee, other than a change of employer, he or she is entitled to object to such a change. It is then the transferee’s duty, if it cannot maintain the employee’s previous working terms and conditions, to either formulate new proposals, or if the employee refuses to accept those proposals, initiate a dismissal proceeding. Failing to do so will entitle the employee to file for the judicial termination of his or her employment contract, which will have the same consequences as a dismissal without real and serious cause.</p>

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Facts

Mr Zubiarrain was employed by Carbones Bel Printer ("Carbones") as a sales person ("VRP") whose duty it was to sell office equipment and printing services, with exclusive rights in respect of the company's customers. On 1 October 2002, the company's printing activity was transferred to a company named "Printer". Presumably[1], Mr Zubiarrain continued to work for Carbones. A few months later, however, its office equipment activity was transferred to another company named "Office Depot" and Mr Zubiarrain was informed that from then on Office Depot would be his employer. Claiming that the transfer of his employment contract to Office Depot had resulted in a unilateral change of his employment contract, Mr Zubiarrain applied to the Industrial Tribunal, seeking judicial termination of his employment contract ("résiliation judiciaire"). He pointed out that he no longer had the status of an exclusive VRP in respect of Office Depot's customers, given that Office Depot had its own network of sales persons within the stationery sector. In its defence, Office Depot claimed that Mr Zubiarrain's employment contract had only transferred to Office Depot in part. In its view, Mr Zubiarrain had transferred partially to Printer (to the extent that his work related to the printing business) and partially to Office Depot (to the extent that his work related to the office equipment business). Given this split in his employment contract, he could not claim to be an exclusive VRP, since his activity no longer depended on one employer but two. Finally, if new terms and conditions needed to be discussed with the employee, it was the duty of both employers, not only Office Depot, to revise the terms of his employment contract. The Industrial Tribunal ruled in favour of "résiliation judiciaire", attributing the fault for the dispute entirely to Office Depot. The Court of Appeal, in its decision dated 2 July 2008, confirmed the decision of the Industrial Tribunal, holding that "since various agreements between Carbones Bel Printer, Printer and Office Depot would inevitably lead to substantial changes in the employee's initial employment contract (exclusivity and terms of payment), Office Depot should have responded to the employee's requests to review the conditions of his employment contract that had become unsuitable in the new economic framework. Therefore, by not responding to his repeated requests, the company had committed a breach of its duties sufficiently seriously to warrant judicial termination of the contract, in a way which was exclusively the employer's fault and produced the same effects as a dismissal without real and serious cause".

Judgment

The Court of Appeal's decision was confirmed by the Supreme Court, which held "When the application of Article L. 1224-1 of the Labour'Code results in a change of employment contract other than a change of employer, the employee is entitled to object. In such a case, the

transferee, which is unable to maintain the employee's previous terms and conditions, must either formulate new proposals or, if the employee refuses those proposals, initiate dismissal proceedings; if the transferee fails to do so, the employee may file for the judicial termination of the contract, which then produces the effect of a dismissal without real and serious cause, without prejudice to any recourse between successive employers". The Supreme Court finally held that "Since the partial transfer of the employment contract to Office Depot had resulted in the employee losing his status as exclusive VRP and the exclusivity he previously enjoyed with the customers, the employer should have made new proposals to the employee or have initiated a dismissal procedure if he refused those proposals. Failing to do so gave the employee the right to ask for the judicial termination of his employment contract with the same consequences as an unfair dismissal".

Commentary

What happens to the employment contract of an employee who is only "partially" assigned to the transferred business? The answer was already given in a decision dated 2 May 2001[2], where the Supreme Court held that in such a case "the employment contract is transferred in part to the transferee". However, that ruling had the disadvantage of leading to the fragmentation of one full-time employment contract into two part-time employment contracts with two distinct employers who could even be classed as competitors with divergent interests. Two rulings made on 30 March 2010 bring new answers to the problem. The first decision offers a very pragmatic solution by providing for the "indivisibility" of the employment contract, whereas the second decision does not call into question the divisibility of the employment contract, but instead provides for how to deal with its consequences. In the first case, the Supreme Court offers a radical yet practical solution by distinguishing between the employee's main activity and his or her accessory activity. In accordance with the Supreme Court's reasoning, if the employee's "main" activity transfers, his or her contract goes across to the transferee in its totality. We can only approve of such a solution. A previous (but overlooked) decision of the Supreme Court had already found that an employee "substantially assigned" to the transferred business must be totally transferred to the transferee, hence the concept is not new. The fragmentation of an employment contract, apart from the inconvenience for the employee whose employment contract is divided into two part-time contracts with two distinct employers, seems to be inconsistent with Article L. 1224-1 of the Labour Code, which by its very nature provides for a total transfer of the employment contract. The Supreme Court's position is commendable, since it avoids the fragmentation of the employment contract and therefore its dire consequences. Finally, the Supreme Court's new approach seems to be consistent with that of the ECJ. Indeed, in 1985 the ECJ declined to accept the transfer of employees who are assigned to a service that has not been subject to

transfer, even though they perform certain tasks for the transferred service3. In the second decision, the Supreme Court does not refute the partial transfer of the employment contract to the transferee, but comments on the options open to the employee when such a transfer entails a change in his or her employment contract. In accordance with the Supreme Court's ruling, if the employee cannot object to his or her transfer, which is automatic under Article L. 1224-1, he or she may object to other contractual changes resulting from the transfer (here for instance, the loss of exclusivity for Mr Zubiarrain). In such a case, the transferee must obtain the employee's consent to such changes by renegotiating his or her employment conditions and, if the employee refuses, should initiate a dismissal procedure. Failing to do so will entitle the employee to apply for the judicial termination of his or her employment contract, which will have the same consequences as an unfair dismissal. If this decision provides a guarantee for the transferred employee without jeopardising the partial transfer of the employment contract, the Supreme Court has left unanswered one obvious question: on what grounds should the transferee dismiss the employee, given that by refusing to accept changed circumstances, he or she is not at fault? Should the employee's refusal be deemed as sui generis grounds for termination? This point remains to be clarified by the Supreme Court. Finally, there remains the issue of the transitional period between the time the employee is transferred and the time the transferee starts renegotiating the employment terms and conditions. What if the transferred employee applies for judicial termination of his or her employment contract without giving the transferee enough time to reopen negotiations? In any case, implementation of the Supreme Court's ruling will remain difficult and is likely to be a source of future litigation.

Comments from other jurisdictions

Austria (Andreas Tinhofer): Under Austrian law, it is common that the transfer of only part of a business cannot result in a split of the employment contract. In such a situation the courts regularly apply the Botzen doctrine of the ECJ. In Austria this means that employees who work in an "administrative department" (e.g. finance, HR or IT) providing services to all or several other departments, do not transfer unless their unit is transferred to another employer. If, however, an employee is employed in several departments, the question of in which department the focus of his or her activities lies, must be addressed. The employee will only transfer if the owner of this specific department changes. A number of authors of legal literature advocate a more functional approach, although the specific details are still controversial. I assume that in the Lescail case an Austrian court would have held that the employee, being the Finance Director, did not transfer to TTE as a result of the hiving-off of his employer's television business. Based on the facts provided, it is not clear to me why the French Court of Appeal decided that the employee had contributed largely to the transferred

activity. In Austria, the outcome of the Zubiarrain case would depend on various facts that are not mentioned in the report. In essence, the judge would need to assess all the relevant factors of a business transfer by applying the relevant ECJ case law. Only then would it be possible to decide whether there has been a business transfer (or two of them) at all (the transfer of one activity only would not qualify as a business transfer). If the employee has not been "substantially assigned" to one of these two "economic entities" (i.e. printing and office equipment), legal literature maintains that he or she has the right to choose to which new employer he or she will transfer.

Finland (Karoliina Koistila): under Finnish law, the transfer of an employee's employment under a transfer of business will depend on whether he or she performs tasks predominantly in the unit being transferred (e.g. as addressed in the Finnish Supreme Court case of KKO:1994:3). That the employee also performs other tasks is not relevant. The transfer of his or her employment would occur automatically on the date of the transfer of business. The employee could not insist on remaining with the old employer (although the parties could agree otherwise). If an employee has temporarily been performing tasks other than his or her normal ones (such as being "on loan" to another department), it is the normal ones that will be taken into account in evaluating whether the employee should transfer. A partial transfer would nonetheless seem alien under Finnish law. Instead, it has been suggested in legal literature that in exceptionally complex cases, where the employee's work is divided evenly between the transferring unit and other parts of the company, he or she might be permitted to choose whether to transfer or stay. However, in a transfer of business the general rule is that an employee's choice would be limited to accepting a transfer or terminating the employment.

Germany (Paul Schreiner): As a general rule, the situation in Germany differs in two main aspects from the French one. Firstly, in Germany every employee has the right to oppose the transfer of his or her employment to another employer. The basic reason for this is that the right to conclude and maintain an employment relationship is part of an individual's personal rights, as provided by the German Constitution. This principle is found expressly in s613(a) of the German Civil Code, which reads as follows: "(6) The employee may object in writing to the transfer of the employment relationship within one month of receipt of notification under subsection 5. The objection may be addressed to the previous employer or to the new owner." The employee does not need to show any valid reason for the opposition. Secondly, under German law the employer does not need to make redundancy payments, unless a social plan has been concluded with the works council. Such a social plan does not need to be established, unless more than a few contracts of employment need to be terminated. Therefore, termination of the employment contract is less attractive for an employee in Germany because of the lack of redundancy payments. Nevertheless, the principal question of how an

employment contract that relates to two different parts of the company must be treated in the course of a transfer of undertaking, is still relevant in Germany. If the tasks the employee originally performed relate to two different parts of the establishment and are then transferred to different new employers, the existing employment relationship will be transferred as it is, but it will not be split up. To determine which transferee will become the new employer, it must be decided which part of the establishment the employment contract belonged to (in the sense that the employee was integrated into the transferred part of the establishment), if any. A typical example would be the so-called overhead functions, such as HR or payroll departments, which typically render their services for various other departments. If one of the other departments is transferred to a different employer, the overhead functions will typically not transfer, since the employees are not integrated into these departments (this is one requirement for a transfer of undertaking). However, in the cases concerned the employees apparently did not work in such overhead functions, but still rendered their services for more than one part of the business. In such a scenario, German case law examines what the main focus of the employment was, comparable to the situation in Lescail. If this cannot be determined, the situation remains unclear. Opinion is split, ranging from the employee having the right to make a choice, to the employer making the choice unilaterally.

Luxembourg (Michel Molitor): Luxembourg's case law has applied a similar approach to the French Supreme Court in the case of Lescail. An employee of a catering company ("Caterer A") claimed to be part of a business that had been transferred to a new Caterer ("Caterer B") and applied to be reinstated as an employee of Caterer B. Caterer B made reference to the Botzen doctrine, claiming that this employee was not employed in the transferred part of the undertaking, although he carried out certain duties for the benefit of the part transferred. Therefore, Caterer B refused to consider this employee among the transferred employees. The employee and Caterer A disagreed and claimed that his activities were mainly performed in the framework of the transferred activities. To settle the dispute, the Luxembourg Labour Tribunal ("Tribunal de travail de et à Luxembourg") ruled that it was necessary to examine whether or not the activities of the employee were mainly ("à titre principal") carried out in the scope of the business transferred to Caterer B. The Luxembourg Labour Tribunal then held that the employee had indeed mainly provided his activities in the field of the transferred business and that Caterer B therefore had a duty to reinstate him (Luxembourg Labour Tribunal, 3 March 2006, no 1123/2006). The Luxembourg Labour Tribunal only took into account the main activities of the employee to determine whether that employee should or should not be included among the transferred employees.

The Netherlands (Peter Vas Nunes): In the Lescail case, the French Supreme Court seems to adopt the theory that an employment contract is indivisible and therefore either goes across to

the transferee in its entirety, or not at all. However, it does not say so explicitly. In the Zubiarrain case, the court did not need to rule on the issue of (in) divisibility, but it seems to leave open the possibility that an employee's contract is split into two parts. I would be surprised if a Dutch court accepted such a split, with the possible exception that this might be allowable in the event all parties concerned are explicitly agreed to the split. In all other circumstances a Dutch court will almost certainly see the employment contract as being indivisible. The "Cour de cassation" applies as a decisive criterion the sector of activity in which the employee's contract is "mainly" performed. The French expression for this is "l'essentiel". Clearly, this criterion raises questions. For example, does the court essentially reason that if, for example, an employee in a company's head office (e.g. a corporate lawyer or HR Director) spends on average fifty one per cent of his or her working time on a certain activity and that activity is transferred, he or she will go across to the transferee? Alternatively, if it is forty nine per cent, does it reason that he or she will remain with the transferor? Unfortunately, the ECJ's 1985 ruling in the Botzen case remains the only guideline for Dutch courts, and that ruling is unclear. As chance would have it, a Dutch court recently ruled on this issue for the first time since Botzen (Lower Court of Amsterdam 14 October 2010 LJN: BP6114). A catering firm had a contract under which it managed all 11 canteens of a company. These canteens served a total of over 14,000 employees. The catering firm lost the contract in respect of five locations (serving almost 6,000 employees), retaining the contract in respect of the remaining six locations (serving over 9,000 employees). The plaintiff was the manager in charge of all 11 canteens. The court held, wrongly in my view, that there was no transfer of an undertaking, as the original business of managing 11 canteens had lost its identity. Normally speaking this would have been the end of the case. However, the collective agreement that governed the parties' contract provided that in the event a contract is lost, the party winning the contract must offer the relevant employees a contract. Did this obligation rest on the plaintiff's original employer (which retained six canteens), on its competitor (which acquired five canteens), on neither or on both? The court found that neither company had this obligation.

United Kingdom (Bethan Carney): There have been several UK cases considering what should happen when: - an employee works in different parts of a business and only one part is transferred; or - different parts of a business are transferred to separate transferees, essentially splitting the employment contract. The approach the UK courts have taken is similar to the decision in Lescail: the employment contract is never divided between two employers, even if the employee's duties relate to parts of the business that end up in different hands. Instead, the UK courts have tried to apply the ECJ's judgment in Botzen, which said that an employee will transfer if he or she is "assigned" to the undertaking that transfers. The question of whether or not an employee is "assigned" to a particular part of a business is a difficult one

and Botzen gives little guidance. According to UK case law, the test is not only about how much time the employee spends in each part of the business. So, an employee who spends less than fifty per cent of his or her time in the undertaking may still transfer and an employee who spends the majority of his or her time working for it may not. One of the key authorities is Duncan Webb Offset (Maidstone) Ltd v Cooper [1995] IRLR 633, in which a company owned three subsidiaries at Maidstone, Basildon and St Albans. When the Maidstone business was sold, three employees of the company who worked about eighty per cent of the time for that business (the rest of their time being spent on the other operations) were found to transfer. The Employment Appeal Tribunal ("EAT") held that when deciding whether an employee is "assigned" to the undertaking being transferred, various factors may be relevant: the amount of time spent on the different parts of the business; the amount of value given to different parts of the business by the employee; the terms of the contract of employment showing what the employee could be required to do; and how the cost of the employee had been allocated to different parts of the business. However, the EAT emphasised this is not necessarily an exhaustive list and other factors may be relevant. The case of CPL Distribution Ltd v Todd [2003] IRLR 28 illustrates how an employee will not necessarily transfer, even if he or she spends the majority of his or her time working for the undertaking transferred. CPL had lost a major contract from the British Coal Corporation and most of the employees transferred to the business that won the contract. The claimant (Todd) was a PA who, at the time of the transfer, was spending the majority of her time working on the contract that was lost. However, the Court of Appeal decided that she did not transfer since she had not been "assigned" to that contract. Rather, she had been assigned to work for a particular manager who was also not assigned to the contract but whose duties had varied and, at the time of the transfer, encompassed work on that contract and on other matters. Another instructive case is Kimberley Group Housing Ltd v Hambley and others [2008] IRLR 682, in which an employment tribunal tried to find that liability for a contract of employment could be split between two different transferees on a percentage basis. However, the EAT dismissed this as a possibility. In this case, a company called "Leena" had a contract from the Home Office to provide accommodation to asylum seekers. It lost the contract in 2006 and the Home Office contracted instead with two new providers, Kimberley and Angel, and employees of Leena who had been engaged in providing the services lost their jobs. Six of those employees brought claims for unfair dismissal and the first instance decision was that liability for those claims passed on a percentage basis to both Angel and Kimberley. The tribunal considered that it could make this decision because the employees had been dismissed, so the question was how to allocate liability for paying compensation rather than which organisations the employees would work for. However, the EAT held that in neither case could liability be split between transferees and the tribunal should have applied the principles derived from Botzen and

recognised in Duncan Webb (see above). The correct issue was whether the employees were assigned to the undertaking that passed to one of the transferees. If so, that undertaking would have complete liability for their future employment or to pay any unfair dismissal compensation.

Footnotes

1 The judgment is not specific on this point.

2 Cass. soc. 2 May 2001,no 2083 FS-P, Evenas-Baro c/ SA Sonauto and Cass. soc. 8 July 2009, no 08-42.912. 3 ECJ 7 February 1985, case 186/83 (Botzen).

Subject: Unfair dismissal, transfer of undertaking (miscellaneous)

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