

## SUMMARY

# **2011/1: What happens to the contract of an employee who works only partially for the transferred business? (FR)**

***&lt;p&gt;When the employment contract of the employee is &ldquo;mainly&rdquo; performed in the transferred business activity, the entire contract is transferred to the transferee.&lt;/p&gt;***

### **Summary**

When the employment contract of the employee is “mainly” performed in the transferred business activity, the entire contract is transferred to the transferee.

### **Facts**

Mr Lescail was employed by Thomson Multimedia as its Finance & Administration Director. The business carried on by Thomson Multimedia related partially to television and partially to video/audio/ accessories. On 1 September 2003, Mr Lescail was temporarily transferred to Thomson Multimedia’s office in Hong Kong, where he worked as the Finance Director for Asia. In Hong Kong his work consisted of activities both in the field of television and in the field of video/audio/accessories. While he was in Hong Kong, Thomson Multimedia and TLC Electronics decided to merge their television business, creating for this purpose a new company named Thomson Electronics Europe (“TTE”), which took over their respective television businesses. Thomson Multimedia informed Mr Lescail that pursuant to the French law transposing the Acquired Rights Directive 2001/23 (Article L. 1224- 1 of the "Code du travail"), his employment contract was transferred to TTE in its entirety as of 1 July 2004. Mr Lescail contested such a transfer and brought an action against both Thomson Multimedia and TTE before the Industrial Tribunal (“conseil de prud’hommes”). He applied for judicial termination of his employment contract (“résiliation judiciaire”). This doctrine allows an

employee whose employer fails to comply with its elementary duties to ask the court to terminate his or her contract and to award damages. Mr Lescaïl claimed approximately € 200,000 arguing that it was artificial to pretend that his employment contract related in its totality to the transferred activity, i.e. the television business, given that he also worked in other activities in the realm of video/audio/accessories, which had not transferred to TTE. He also argued that, in any case, TTE had failed to ensure the continuation of his employment contract, leaving him without any work or instructions from July 2004, the date of the transfer. In the meantime, TTE ended Mr Lescaïl's assignment in Hong Kong and asked him to join its headquarters in France as of January 2005, where a redeployment job was waiting for him. Thomson Multimedia paid for his repatriation to France. TTE had taken over the payment of his monthly salary as of 1 July 2004. On 6 February 2006, the Industrial Tribunal dismissed Mr Lescaïl's application for "résiliation judiciaire". The result was that his employment with Thomson Multimedia and/or with TTE continued (the issue of who employed him being left undecided). A few days later, TTE dismissed him for prolonged insubordination, alleging that he had failed to perform his assignments and had systematically turned down all of the redeployment positions proposed to him. Mr Lescaïl appealed, asking the appellate court to reconsider his claim of "résiliation judiciaire" and, alternatively, to rule that his dismissal was unfair. A few months later TTE went into liquidation and a liquidator was appointed who joined the appeal against Thomson Multimedia, claiming that Mr Lescaïl's employment contract had transferred to TTE only in part, namely for that part of his employment that related to the television business. In the liquidator's reasoning, TTE should only have paid a proportional part of Mr Lescaïl's salary instead of paying him his full salary and Thomson Multimedia should have paid the remaining part of his salary (i.e. the portion relating to his responsibility for the video/audio/accessories business). The Court of Appeal, in a judgment dated 28 February 2008, rejected Mr Lescaïl and the receiver's claims, ruling that "the transfer of the total television business of Thomson Multimedia to TTE had entailed the transfer of all contracts related to this activity" and that, as Mr Lescaïl was assigned "mainly" to that activity, he could not object to the transfer of his employment contract. However, the Appeal Court held that the employee's dismissal was without real and serious cause.

## **Judgment**

The Supreme Court affirmed the Court of Appeal's judgment by holding that "the employment contract of the employee was performed mainly in the business sector transferred to TTE, therefore the Court of Appeal had correctly ruled that his whole employment contract had been transferred to TTE, even though he had continued to carry out duties in a sector still managed by Thomson Multimedia".

## **Commentary and comments from other jurisdictions**

See case report 2011/2.

**Subject:** Transfer of undertaking (miscellaneous)

**Parties:** Lescaïl – v – Thomson Electronics Europe

**Court:** Cour de cassation (French Supreme Court)

**Date:** 10 March 2010

**Case number:** Cass. Soc. no 08-42065

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**Creator:** Cour de cassation (French Supreme Court)

**Verdict at:** 2010-03-10

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