EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2010/75: Not all collective terms cross over to Austrian transferee (AU)

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Facts

The plaintiff was formerly employed by the Austrian national railway company ÖBB (*Österreichische Bundesbahnen*). This company was privatised in the course of the 1990s. As a result, the plaintiff transferred into the employment of, first, one of ÖBB's legal successors and, then, the defendant. Both transfers qualified as transfers in the meaning of the Acquired Rights Directive 2001/23 and the Austrian law transposing this directive.

The employment agreements between the plaintiff and ÖBB and its successor were governed by a collective labour agreement (CLA). Among other things, this CLA providedthat "Workers who work between 10pm and 5am are credited with a full hour of working time for every 54 minutes of actual work" (Article 8 of the CLA; hereafter "the 60/54 minute rule"). The defendant's CLA lacked such a night shift privilege.

Normally, in Austria, the transferee's CLA applies immediately after a transfer, except that remuneration for regular working time may not drop below what it was for one year following

the transfer. Other terms of employment, including remuneration for overtime and shift allowances, may go down immediately following the transfer. However, at the time the railways were privatised, the relevant social parties concluded a special CLA, which effectively provided that all terms of employment existing before the privatisation would continue in force following a transfer of undertaking. This special CLA (the "special ÖBB-CLA") was binding on all potential transferees.

The special ÖBB-CLA contained one exception to the principle that the existing terms of employment could not deteriorate. This exception related to working time. Thus, the special ÖBB-CLA allowed transferees to apply less favourable working times. The defendant took the position that the 60/54 minute rule related to working time and that, therefore, this rule had ceased to exist. The plaintiff disputed this, arguing that the 60/54 minute rule was not a provision in respect of working time but one in respect of remuneration. Accordingly, he claimed compensation equal to six minutes of salary for every hour worked in the employment of the transferee.

Judgment

Both the Court of First Instance Graz (*Landesgericht Graz*) and the Appellate Court of Graz (*Oberlandesgericht Graz)* decided in favour of the transferee. The Supreme Court (*Oberster Gerichtshof*) upheld these decisions.

The Supreme Court found that the 60/54 minute rule related to working *time* and not to remuneration and that, therefore, the transferee was not under an obligation to apply said rule. The Court's reasoning was based on the Austrian legislator's intention. As already mentioned, Austrian law allows transferees to offer transferred staff terms of employment that are inferior to the terms they enjoyed prior to the transfer, with the sole exception that, for a period of one year, remuneration for regular working time may not be inferior. The fact that the employee now had to work more for the same amount of money did not violate the legislator's intention. The Court added that changes in working time and other working conditions occur regularly in the event of a change of collective agreement following the transfer of a business.

The Supreme Court was silent on whether this aspect of Austrian law is in compliance with the Acquired Rights Directive 2001/23/EC.

Commentary

This decision illustrates rather well how Austria deals with privatisations. Since, in the 1990s, not only the Austrian Railway Services (ÖBB) but several other major economic players (for example the Postal Services, Telekom etc) were privatised, the traditionally strong unions in these sectors have tried to attenuate the consequences of these privatisations for the workers involved, who, to all intents and purposes, were formerly government employees. In this case, the Austrian version of "Social Partnership" provided for a "general collective agreement", legally binding also on future employers of former ÖBB workers. Its sole purpose was to secure that the working conditions as regulated in the existing collective agreements were continued irrespective of what might happen to the former government-owned companies. This was especially important to the unions, as the respective ÖBB collective agreements were basically more favourable to workers and works representation (the latter's representatives generally being identical to those of the union) than most of the collective agreements in the private sector.

The fact that the unions had such a strong impact on the privatisations may seem surprising to some but is understandable when one considers the Austrian political context. The Austrian version of "social partnership" is very consent-oriented and provides for social harmony. The major players in social partnership: the Chamber of the Economy ("*Wirtschaftskammer*") and the Austrian Trade Union Federation ("*Österreichischer Gewerkschaftsbund*") are very well connected to the most influential political parties (the Conservatives and the Social Democrats, who together often form the so-called "grand coalition") and they therefore have a major impact on the political process. Although their views on labour conditions naturally differ, consent (in the form of collective agreements as well as legislative measures) is usually found quickly, avoiding strikes and thus perpetuating the influence of the social partners.

In light of this it is not surprising that the parties and the courts did not raise the question of compliance with European law. The fact that the Austrian provision protecting the collective minimum wage for standard working time exceeds the standards of Directive 2001/23/EC explains why the issue of the compliance of Austrian law with Directive 2001/23/EC was not discussed. It can however be seen as a reason why the Supreme Court interpreted the respective Austrian provisions rather strictly. The Austrian legislator apparently intended to protect workers' collective minimum wages in the case of transfers of businesses exceeding the scope of protection of the Directive for at least one year after the transfer. However the Austrian legislator seems to not have wanted to protect all working conditions in the case of transfers of businesses, in particular by not keeping a "balance" between working time and

minimum wage.

The Supreme Courts' ruling that § 8 of the working time collective agreement relates strictly to working time (but not money) seems a bit apodictic. If workers have to work more for the same amount of money this is clearly money-related as well. The arguments in legal literature to the contrary (i.e. what is money-related is only that which reduces the actual amount of money paid to the employee) are a bit artificial as the intimate connection between working time and remuneration is undeniable. Given the background however, one can only agree with the Austrian Supreme Court's decision as it clearly follows the legislators' intentions.

Comments from other jurisdictions

United Kingdom (Bethan Carney): In the UK, it is very difficult to change any terms and conditions of employment after a transfer of an undertaking if the reason for the change is the transfer or a reason connected to the transfer. An employee cannot normally agree to such a change and it would be void. There is no time limit on this prohibition, so such a change would be void even if it happened many years after the transfer date. However, the more time that has elapsed since the transfer date the more likely a court is to deem that the change was not connected to the transfer.

The exception to this rule is where the change is for a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce (an "ETO reason"). The phrase "entailing changes in the workforce" requires a change in the numbers or job functions of employees. For example, an employer who, following a transfer, is no longer selling the same products or services will not need employees to perform the same roles as they did before the transfer and may have to change employees' terms and conditions as a result. This would probably be for an ETO reason. In contrast, an employer who merely wanted to harmonise the terms and conditions of transferred staff with those of its original staff would probably not be able to establish an ETO reason for the change.

Subject: Employees who transfer/refuse to transfer

Parties: Anton G*** – v – M***

Court: Austrian Supreme Court (Oberster Gerichtshof)

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Date: 26 May 2010

Case number: 9 Ob A 8/10g

Hardcopy Publication: ZAS-Judikatur 2010/118; ecolex 2010/334

Internet publication: http://www.ris.bka.gv.at/Jus

Creator: Oberster Gerichtshof (Austrian Supreme Court)
Verdict at: 2010-05-26
Case number: 9 Ob A 8/10g