SUMMARY

2010/74: A public employer can invoke the vertical direct effect of Directive 2001/23 to the detriment of its employees (BE)

<p>A public entity that transfers its waste collection activities to another public entity can rely directly on Article 3(1) of the Acquired Rights Directive 2001/23/EC to automatically transfer the employment contracts of the workers concerned, without their consent.</p>

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Facts

To provide waste collection, the municipal government of Andenne (a town in the South of Belgium) employed a number of workers. These workers were not civil servants, but were employed on the basis of an ordinary employment agreement. D was one of them.

In late 2007 the municipal government decided to transfer waste collection activities to the provincial *Bureau économique de la province de Namur* (BEP), an inter-municipal utility company for environmental services. The decision was that seven workers were to be transferred to BEP, that their employment contracts would terminate by mutual agreement and that the employees renounced their right to a severance payment.

Five employees consented to the terms of the transaction. D refused the transaction terms, but

nevertheless started working for BEP on 1 January 2008. He initiated proceedings against the city of Andenne and claimed a severance payment for wrongful termination of his employment agreement.

The city government argued that the transaction qualified as a transfer of undertaking as defined in Directive 2001/23/EC ("the ARD"). The ARD aims to maintain employees' acquired rights when there is a change of employer as a result of the transfer of (part of) the undertaking. Consequently, no severance pay is due because of the continuity of the employment contract. The city relied directly on the ARD because of the limited scope of the national collective bargaining agreement 32*bis* ("*CBA 32bis*"), the Directive's transposition in Belgian law (see: EELC 2009/1 No. 6). Whereas CBA32*bis* only applies to companies in the private sector, the Directive's scope extends to the public sector as well.

Judgment

The Labour Court began by confirming the ECJ's case law to the effect that individuals are entitled to rely on provisions of a directive that are unconditional and sufficiently precise. This means that individuals who are employed by a public entity may rely on the vertical direct effect of directives, so the court concluded. The court added that this applies to workers employed by a city.

Secondly, the Court declared CBA 32bis not to be applicable to contractual employees working for a public entity, given that Belgian law (by the Act of 5 December 1968 on CBAs) explicitly excludes the public sector from the scope of application of CBAs.

However, the court established that the ARD satisfies the conditions for direct effect. Workers employed by a public entity are thus entitled to invoke the ARD with direct effect.

The Court continued by qualifying the transaction between the City of Andenne and BEP as a transfer of undertaking. Consequently, there was an automatic transfer of the employment contracts of the workers concerned to BEP. Their employment contracts were therefore continued by BEP, which took over the obligation to employ them with the same employment conditions as before.

Thus, as there was no termination, let alone wrongful termination of employment, the Court ruled that there were no grounds for a severance payment.

Commentary

Even though a directive leaves the Member States with the opportunity to choose freely the

means by which they implement it in national law, Belgium failed to fulfil its obligations when it transposed the ARD into CBA 32bis, because CBA 32bis excludes the public sector completely from its scope of application, whereas the ARD applies both to the private and the public sector. Workers with a public employer therefore lack protection in the case of a transfer of undertaking. This is why in Belgium the question arises as to whether or not workers with a public employer can invoke the principles of the ARD. This judgment is interesting in that respect, because for the first time this debate was brought before a court.

The theory of vertical direct effect of a directive means that workers with a public employer can indeed invoke the protection of the ARD. They can therefore claim an automatic transfer to the new employer, retaining their existing employment rights at the time of transfer.

Of course the transaction must qualify as a transfer in the meaning of the ARD. The scope of application of *ratione materiae* only excludes activities involving the exercise of a public authority. Public entities engaging in purely economic activities, such as waste collection, fall within the scope of the Directive.

Not all personnel working for a public employer will benefit from the protection. According to the ARD "*every person who, in the Member State concerned, is protected as an employee under national employment law*" is protected. This means that only contractual workers (i.e. those working on the basis of an employment contract) are included. Indeed, the concept of an employee under Belgian law is related to the existence of an employment contract. Civil servants remain out in the cold.

Another question is whether an employer – in this case a public employer – can invoke the ARD to claim the automatic and compulsory transfer of employees without their individual consent. We believe this is not the case: the principle of direct effect must protect the employee, not the employer, in this case the public authority. Furthermore, public authorities (whether a city, a region or any other public entity) cannot invoke their own failure to transpose EU law properly in their national legislation. As the ECJ stated in its ruling in *Faccini Dori*[1],"the case law on the possibility of relying on directives against State entities is based on the fact that under Article 189 a directive is binding only in relation to 'each Member State to which it is addressed'. That case law seeks to prevent 'a State from taking advantage of its own failure to comply with Community law'. It would be unacceptable if a State, when required by the Community legislature to adopt certain rules intended to govern the State's relations – or those of State entities – with individuals and to confer certain rights on individuals, were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights".

The outcome of the judgment is therefore very surprising and leaves a bitter taste for the person who introduced the case, claiming a severance payment from the city of Andenne. The court applied the principles of the ARD stating that there is indeed an automatic transfer of the employment contract, hence there is no termination, and that therefore no severance pay is due. Coming to this conclusion, the court in fact accepted that not only the worker, but also the (public) employer is entitled to invoke the ARD for its convenience. By this, and contrary to ECJ case law, the court gave a reverse vertical (the court mistakenly uses the term horizontal) direct effect to the ARD.

Let us hope this is only the beginning of a case law debate in Belgium.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Isabel Plets and Astrid Herremans are taking a daring, but in my view erroneous position. If I understand them correctly, they argue (i) that Directive 2001/23/EC can only be invoked by employees, for whose benefit the directive was designed, and not by employers, and (ii) that a Member State that has failed to transpose a directive properly cannot make use of that failure to the detriment of its citizens.

It is true that the Acquired Rights Directive, which is a product of the 1970s, was designed to protect employees against losing their job in the event of a transfer of undertaking. However, as time went by and the ECJ's case law expanded the Directive's scope well beyond what its designers intended, the ARD increasingly became an instrument used by employers, not infrequently against the will of their staff. Germany has limited the possibility to do this, by allowing employees to remain in the employment of the transferor, but most other EU countries have not given employees this so-called Widerspruch right. If the ECJ were to follow Isabel Plets and Astrid Herremans, that would be no less than a revolution. It would also create enormous complications, for example where some employees wish to see a transaction as a transfer of undertaking and others do not.

I also take issue with Isabel Plets and Astrid Herremans on their reading of *Faccini Dori*, which they quote out of context and incompletely. That case concerned failure by Italy to transpose a directive that was designed to protect consumers against certain types of contracts. A consumer claimed protection under the directive. The ECJ reaffirmed its ruling in the Marshall case (C-152/84) to the effect that although directives lack direct horizontal effect, they do have direct vertical effect. They have direct vertical effect because "it would be unacceptable if a State [...] were able to rely on its own failure to discharge its obligations so as to deprive individuals of the benefits of those rights. Thus the Court has recognised that certain provisions of directives [...] may be relied on against the State (or State entities)". I do

not read this passage as meaning that a State entity cannot invoke a directive that it has failed to implement.

Having said this, however, I must admit that it feels a bit strange that a State entity should benefit from a directive which it has failed to implement. But was the outcome unfair in this case? Is there not some hypocrisy in an employee arguing that his employer acts unfairly because it has not dismissed him? Isabel Plets and Astrid Herremans rightly point out that the Acquired Rights Directive was designed to protect employees, but is that not precisely what happened in this case? The plaintiffs kept their job.

United Kingdom (Bethan Carney): It does not appear that in this case the State benefited from its own wrongdoing as the employee's position would have been exactly the same if the EC Acquired Rights Directive had been properly implemented into national law. However, the State's failure to implement the Directive did result in a lack of clarity about the employee's legal position which was to his detriment in that he engaged in no doubt lengthy legal proceedings for a severance payment to which he was not entitled.

Incidentally, in the UK civil servants are employees, although I note from the report that this is not the case in Belgium.

Footnote

1 ECJ 14 July 1994, C-91/92, *Jur.* 1994, I-3325 (*FacciniDori*), par. 22 and 23.

Subject: Transfer, employees who transfer/refuse to transfer

Parties: D - v - City of Andenne

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