SUMMARY

2010/42: Directive 2001/23/EC not transposed fully: no horizontal effect (FR)

<p>Article 7 (6) of Directive 2001/23/EC requires employers lacking staff representation within their organisation to inform their employees of an impending transfer of undertaking. Given that this provision has not been transposed into French domestic law, an employer who has failed to inform the relevant employees cannot be held liable for damages resulting from such failure.</p>

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Facts

The employment contracts of two employees of a private company were transferred to another company under Article L. 1224-1 of the Labour Code on transfers of undertakings. The employees concerned, an engineering manager and a senior technician, brought an action before the Industrial Tribunal claiming damages from their former employer on the grounds that the latter had failed to inform them beforehand about the transfer of their employment contracts to the new employer. Although there is no obligation under French law to inform employees of an impending transfer of undertaking, the employees relied upon Article 7(6) of the Acquired Rights Directive 2001/23/EC which provides as follows:

"Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of:

- the date or proposed date of the transfer,

- the reason for the transfer,

- the legal, economic and social implications of the transfer for the employees,

- any measures envisaged in relation to the employees."

The claim was successful. The former employer appealed.

Court of Appeal

The Court of Appeal confirmed the Industrial Tribunal's decision and ordered the employer to pay each of the plaintiffs an amount of EUR 10,000 in damages for not informing them prior to the transfer of their employment contracts. The judges held that according to Article L. 1224-1 of the Labour Code, as interpreted in the light of Directive 2001/23/EC, in the event of changes in the legal status of the employer where, as in this case, there were no staff representatives within the company, the employees affected by the transfer should have been informed in advance of the date or proposed date of the transfer, the reason for such transfer and its economic or social consequences for them.

Supreme Court

In its decision of 18 November 2009, the Supreme Court overruled the Court of Appeal's decision, holding that by ruling as it did the Court of Appeal had disregarded both Article 249 of the Treaty establishing the European Communities[1] (which provides that directives are merely binding as to the result to be achieved, not as to the method of achieving that result) and Article L. 1224-1 of French Labour Code. The Supreme Court held that, since article 7(6) of the said Directive, as invoked by the employees, had not been transposed into French domestic law, it could not impose any obligation on the employer to inform the employees of the transfer beforehand.

Commentary

The position of the French Supreme Court is consistent with the case law of the ECJ, according to which even clear, precise and unconditional provisions of a poorly transposed or

untransposed European directive, conferring rights or imposing obligations on individuals, cannot be applied as such to disputes between individuals, as directives lack "direct horizontal" effect[2]. If European directives directly imposed obligations on individuals this would lead to their having the same force as European regulations, so altering the institutional organisation of the European Union.

Thus, where the ECJ requires national judges to interpret their domestic law in light of European directives, such an obligation is limited, in that it may not lead to the imposition of a specific obligation on an individual and/or introduce or increase penalties[3]. Here, an interpretation in light of Directive 2001/23/EC would have resulted in subjecting the employer to civil penalties which are not provided by French domestic law.

The Supreme Court could perhaps have saved the appellate court's judgement by substituting the grounds for the claim. The Supreme Court has already had occasion to impose an information obligation on the employer where no such obligation was explicitly required by any text. For example, in 2007 the Supreme Court held that when the employer, in a job preservation plan, proposes redeployment measures within another company, it must inform the employees concerned in good faith about the risks that the jobs may entail[4]. In this case, the judges decided not to impose any information obligation on the employer, perhaps because they felt that the obligation of the employer to perform the employment contract in good faith was not a sufficient basis for imposing such an obligation.

It is now up to the French government rapidly to conform its domestic law to Article 7 §6 of Directive 2001/23/EC, as advised by the Supreme Court in its annual report, published in early April 2010. One might then wonder what the consequences of breach of the information obligation would be from a French court's perspective. In our opinion, such a breach should not be punishable either by rendering the transfer invalid or suspending it, as would be the automatic sanction under French law. Damages would, we believe, be the most appropriate sanction and the Court of Appeal's decision in this particular case shows that an award of damages (here, EUR 10,000) could well be more than merely symbolic.

Academic Comments

France (Professor Lhernould): In this judgement the Court of Appeal declined to interpret French law in such a way as to allow employees to benefit from Article 7(6) of Directive 2001/23/EC. Its argument was that doing so would impose on the employer in question an obligation to compensate employees for not informing them of a transfer of undertaking that does not exist under domestic law. The court used the same reasoning as the ECJ in its ruling

in the *Arcaro* case. However, it should be noted that the context of that case was rather different from that of the present case. In the *Arcaro* case an Italian company faced criminal prosecution for polluting a river with cadmium in violation of certain EC directives which Italy had not implemented properly. In brief, what the defendant was accused of doing was not punishable under Italian law. The ECJ held that the obligation of a national court "to refer to the content of the directive when interpreting the relevant rules of its national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions". Until now and to our knowledge, the Court of Appeal has never applied this doctrine and, on the contrary, has often followed a very dynamic interpretation of Directive 2001/23/EC, sometimes even interpreting French law almost *contra legem* in order to comply with the directive.

Many French commentators disagree with this judgement and hold the view that French law should have been interpreted in conformity with the directive in order to protect the useful effect of the latter and the superiority of EU law. Hence, it is not difficult to find other Court of Appeal cases in which the principle of "interpretation in conformity" has been used, even if that has created additional duties for the employer. In fact, this is the goal that an employee tries to reach when he claims indirect application of a labour law directive which has not been transposed: through the directive, he aims at obtaining greater rights. By refusing to interpret French law in conformity with the directive, the Court of Appeal may have considered that the question was too thorny to be ruled on by judges. However, the 2009 annual report of the French Supreme Court recommends amendment of the Labour Code in order to incorporate Article 7(6) of the directive.

Comments from other jurisdictions

Germany (Paul Schreiner): In Germany the employee has the right to oppose a transfer of his or her employment within one month after the correct information. If, on the other hand, the information relating to the transfer is either not issued or not issued properly, the period within which the employee may oppose the transfer is, in principle, unlimited. If the right to oppose is taken up by the employee, the employment will remain with the transferor and all claims arising from the employment relationship will be directed at the transferor. Although breach of the obligation to inform the employees of a transfer could, in theory, be the basis for a claim for damages, there is in fact, rarely any material loss. For this reason, comparable court cases in Germany are hard to find.

Footnotes

1 Now Article 288 of the TFEU.

2 ECJ 26 February 1986, case 152/84 *Marshall*) and ECJ 14 July 2004, case 397/01 (*Pfeiffer*).

3 ECJ 26 September 1996 case 168/95 (*Luciano Arcaro*).

4 Supreme Court, Labour Chamber 6 June 2007, n¡ 06-41001.

Subject: Transfer of undertaking, information and consultation

Parties: X and Y - v - Open Cascade

Court: Supreme Court (Cour de cassation)

Date: 18 November 2009

Case number: 08-43398

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Creator: Cour de cassation (French Supreme Court)
Verdict at: 2009-11-18
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