

SUMMARY

2013/1 No special right to object to transfer (Widerspruchsrecht) for disabled employees (AT)

In February 2011, the Austrian Supreme Court had confirmed that Austrian law generally does not give employees the right to retain their employment with the transferor in the case of a business transfer. However, the court did broaden the scope of the exceptions to the rule, where employees do have a *Widerspruch* right.

In this more recent case, the court held that, unlike members of a works council, disabled employees enjoying special protection against dismissal did not have a privileged right to object to being employed by the transferee.

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Facts

In 2008, the defendant (company A) lost a facility management contract to a competitor (company B). The contract included the operation of the mail-processing centre, where the incoming and outgoing mail, as well as the internal mail, was processed. The plaintiff, a disabled employee subject to special statutory protection against dismissal, worked in this unit. As a result of the change of service providers, company A transferred substantial material assets (e.g. furniture, office equipment, enveloping machines, phones, computers, trolleys etc.) to company B. Six out of eight employees including the plaintiff continued to work in the mailroom. One employee retired and one employee objected to the transfer of his employment based on his special right to object (*Widerspruchsrecht*) as a works council member.

Shortly before the transfer, company B informed all the employees concerned that upon transfer, it would not honour their pension commitments. On the day of the transfer (1 July 2008) the plaintiff raised his objection to it. In his letter he reasoned that his rights as a disabled employee would be at risk if there was a change of employer. A few days later he was asked by company B to leave the workplace. The plaintiff then sued company A for his wages for the time following the transfer.

The court of first instance rejected the claim, ruling that the change of service providers qualified as a business transfer. As the plaintiff did not meet the statutory conditions for the right to object, he could not prevent the transfer of his employment relationship. In the view of the court, his status as a disabled employee did not confer on him any special right to object. The Court of Appeal (*Oberlandesgericht Wien*) confirmed this ruling and the plaintiff appealed the decision to the Supreme Court (*Oberster Gerichtshof*).

Judgment

The Supreme Court upheld the Court of Appeal's judgment. It began by pointing out that the transferee was bound by the statutory protection against dismissal afforded to disabled employees in the same way as the transferor. Moreover, the business transfer itself did not constitute a reason to dismiss the plaintiff.

The Supreme Court then referred to the argument that the new employer might not find a suitable job for the disabled employee and in those circumstances it could ask the court for approval to dismiss the employee. The Court hinted that in such a situation there might be grounds for applying the special statutory right to object by way of analogy. However, this would require the employee explaining in detail why there would be a higher risk of losing his job at the new employer – and in this case, the plaintiff had not done so.

Finally, the Supreme Court examined the plaintiff's argument that the transferee had rejected

the transferor's pension commitments. Article 3(4) of the Austrian law transposing the Acquired Rights Directive, which is known as the AVRAG, grants employees a right to object to a transfer where the transferee fails to honour a promise in respect of pension. However, this right is limited to situations where the pension scheme is based on an individual agreement, not a works agreement. In the latter situation, the new employer must, in principle, maintain the terms and conditions laid down in the works agreements of its predecessor. In the current case the pension scheme was regulated by a works agreement and the transferee was therefore not entitled to reject the transferor's pension commitments. Nevertheless, as the pension was not based on an individual agreement, the plaintiff did not have the right to object to the transfer of employment.

Commentary

This is the first case following the landmark decision of the Supreme Court of 22 February 2011 (reported in EELC 2011/18, Issue 2) regarding the employee's right to object to the transfer of employment and retain his employment relationship with the transferor (Widerspruchsrecht). In that case, the Supreme Court had held that, in principle, the right to object is limited to the two specific situations provided for by Art 3(4) AVRAG, namely (i) where the transfer would cause the employee to lose dismissal protection derived from a collective agreement and (ii) where the transferee fails to honour pension rights derived from an individual (not collective) agreement. However, the Court had also made clear that there could be similar situations that justified a right to object, even though not explicitly set out in statute. By way of example, the Court referred to works council members, who may oppose a transfer and remain with the transferor in order to maintain their functions as employee representatives.

In the present case, the question was whether a disabled employee enjoying special statutory protection against dismissal was similarly privileged in the context of a business transfer. The Supreme Court did not find that the plaintiff's job security was put at risk as a result of the change of employer. However, the Court avoided nailing the matter down too strongly for the future and left a 'back door' open. It hinted that where a disabled person's risk of becoming redundant (with the approval of the competent authority) was higher at the transferee than it was at the transferor, he or she could oppose the transfer of employment. In the future therefore, lawyers representing disabled employees will need to focus on any possible risks to their client's job security resulting from the transfer of their employment.

Comments from other jurisdictions

Germany (Klaus Thönißen): This case would have been decided in the opposite way under

German law because every employee, not merely special categories of employees, has a right to object to a transfer. The German Civil Code provides the following wording in section 613a(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.”

Under this rule every employee has the right to object to a transfer of business and therefore maintain his employment relationship with his previous employer.

United Kingdom (Bethan Carney): In the UK, no employees employed in the transferring undertaking have a right to remain employed by the transferor after the transfer and no classes of employees (such as disabled employees or members of a works council) have this kind of special protection in a transfer situation. Employees employed in the undertaking immediately before the transfer will transfer with it, unless they are dismissed or choose to object to the transfer. If they are dismissed, they may (depending upon their length of service) have an unfair dismissal claim – usually against the transferee. If they object to the transfer, they will not transfer but neither will they remain employed by the transferor, instead their employment will end. If they objected to the transfer because the transfer would involve a substantial detrimental change in their working conditions, this is treated as a dismissal (with corresponding unfair dismissal rights). But where there is no substantial detrimental change, an objection is more akin to a resignation and the objecting employees have no rights to claim unfair dismissal or obtain a notice payment.

Subject: Employees who transfer/refuse to transfer

Parties: K (employee) – v – V*** GmbH & Co KG (employer)

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