SUMMARY

# 2013/16 Bundesarbeitsgericht, applying Süzen, holds that only actual takeover of staff, not an offer to do so, is relevant (GE)

***<p>A security company lost its contract to a competitor. The competitor offered employment to all of the employees involved, albeit at a lower salary. Half of the employees accepted the offer and were hired by the competitor. One of the remaining employees claimed that the service provision change constituted a transfer of undertaking and that he had therefore become an employee of the competitor at his former salary level. The court found that the service provision change did not constitute a transfer of undertaking, given that the activity in question was labour-intensive and that only half of the employees involved in that activity went across to the competitor. Interestingly, the <i>Bundesarbeitsgericht </i>considered the fact that the competitor offered employment to all of the employees involved in the activity to be irrelevant.</p>***

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provision change did not constitute a transfer of undertaking, given that the activity in question was labour-intensive and that only half of the employees involved in that activity went across to the competitor. Interestingly, the *Bundesarbeitsgericht* considered the fact that the competitor offered employment to all of the employees involved in the activity to be irrelevant.

**Facts**

The plaintiff was employed as a Supervisor by a company (the 'Employer') that provided security guards. His work consisted of supervising a team of guards at the premises of one of the Employer's clients (the 'Client'). The Client had several buildings, where a total of 28 of the Employer's staff worked, of which 23 were guards and five were supervisors. Of these 28 employees, seven worked in the building to which the plaintiff was assigned.

With effect from 1 April 2009, the Employer lost its contract with the Client, which entered into a similar contract with a competing security company (the 'Competitor'). The Employer dismissed the 28 employees, including the plaintiff. The plaintiff did not make (timely) use of his right to contest his termination.

The Competitor offered employment, albeit at a lower salary, to all or most of the 28 employees.[1] According to the plaintiff, 14 of them, one supervisor and 13 guards, accepted the offer.[2] Of these guards, four were employed at the building to which the plaintiff was assigned.

The plaintiff took the position that the Employer's replacement by the Competitor as the Client's security services provider constituted a transfer of undertaking within the meaning of the German transposition of the Acquired Rights Directive (i.e. section 613a 'BGB'), and that, therefore, he had become an employee of the competitor at his former salary level. He brought proceedings before the local Arbeitsgericht. Both this court and, on appeal to the *Landesarbeitsgericht*, his claim was turned down, following which he appealed to the highest court for labour matters, the *Bundesarbeitsgericht (BAG)*.

**Judgment**

It was common ground that the activity in question was labour- intensive, the few assets that the guards used, such as scanners and computers, having been provided by the Client. Referring to the ECJ's ruling in the *Süzen* case (ECJ 11 March 1997, case C-13/95), the BAG held that, in businesses that depend mainly on manpower, in order for the transfer of an economic entity that retains its identity to qualify as a transfer of undertaking, it is necessary not only that the entity's activity continues to be performed but also that "a major part of the workforce, in terms of their numbers and skills" crosses over to the transferee. The transfer of 14 out of 28

employees, including one out of five supervisors, was not a major part of the workforce.

The BAG added that it was irrelevant that the Competitor had - according to the plaintiff - offered employment to all 28 of the Employer's staff working for the Client, the only relevant factor being the number of employees that actually crossed over.

**Commentary**

There are two interesting aspects to this case:

1.How many employees in a labour-intensive entity must cross over to an (alleged) transferee in order to be able to hold that "a major part of the workforce, in terms of their numbers and skills" has transferred?

2.Is it relevant that the (alleged) transferee offers employment to employees of the (alleged) transferor, who decline to cross over?

As for the first aspect, this judgment is a consistent continuation of earlier judicial opinions rendered by the BAG. It shows that no clear line can be drawn when it comes to the determination of a transfer of undertaking, especially where the transfer of unskilled workers is concerned. In the end, a transfer of undertaking involving just a few assets, must be decided on an individual basis, taking into consideration the workforce's value to the business.

Previously, the BAG had held that a transfer of 60% of the unskilled workforce in a cleaning business was insufficient to trigger a transfer of undertaking (case no. 8 AZR 333/04) and that the transfer of 75% of the unskilled workforce in a pick-up and delivery business was similarly insufficient (case no. 8 AZR 676/97). In addition, in a case similar to the one at hand, the BAG found that a transfer of 61% of the unskilled workforce in a business providing security guards did not constitute a transfer of business (case no. 8 AZR 418/96). On the other hand, the BAG decided that the transfer of 85% of the unskilled workforce plus the only skilled worker in a cleaning business was sufficient to establish a transfer of undertaking (case no. 8 AZR 729/96).

As to the second aspect, the determination that a transfer of undertaking has taken place depends solely on the actual transfer of workers, as opposed to the number who have been made job offers. In other words, it does not matter how many workers of the former employer are offered jobs by the new employer. The BAG acknowledges that in 1994 the ECJ held that even unsuccessful job offers counted (case no. C-392/92, "*Christel Schmidt*"). However, the BAG also noted that since the ruling in "*Ayse Süzen*" (case C-13/95), the ECJ has consistently held that there needs to be an actual takeover of a major part of the workforce in terms of

numbers and skills. That ruling was recently upheld by the ECJ in the *Clece* case (case no. C-463/09):

*"In particular, the identity of an economic entity, such as that forming the subject of the dispute in the main proceedings, which is essentially based on manpower, cannot be retained if the majority of its employees are not taken on by the alleged transferee."*

**Comments from other jurisdictions**

*United Kingdom (Hazel Oliver)*: The United Kingdom has chosen to implement the Directive on transfers of undertakings in a way that means the result in this case might be decided differently. As in Germany, the transfer of a labour-intensive activity may occur where there is an actual takeover of a major part of the workforce. However, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'), there are also separate provisions on 'service provision change' which may have applied in this situation.

A service provision change occurs where an organised grouping of em- ployees has as its principal purpose the carrying out of an activity for a client, and this activity is then taken over by a new contractor. If the activity continues in a recognisable way after the change of contractor (involving the same type of service being provided in a similar way), TUPE will operate to transfer the employees to the new contractor. This applies irrespective of whether any actual employees or assets are taken on by the new contractor. It also applies where a service is contracted-out for the first time, or taken back in-house.

If this case had been decided in the UK, it is quite possible that the ser- vice provision change provisions in TUPE would have applied to trans- fer the employment of the security guards who worked at the client's premises to the new contractor. This would depend on the security guards being an organised grouping whose main purpose was carrying out this work for the client. However, it would not matter how many (if any) of those security guards were actually taken on by the new con- tractor – TUPE would still operate to transfer their employment.

The current UK government is considering whether to remove the rules on service provision change from the law, on the basis that this represents 'gold-plating' of the Directive and goes further than is actu- ally required by EU law. We do not as yet have a proposed date for this change. However, if these provisions are removed, this would mean that the UK reverts to the basic position under the Directive in deter- mining whether there has been a transfer – meaning that we will once again have to address arguments about how many assets and/or em- ployees have actually been taken on by a new contractor.

**Footnotes**

1. It was disputed whether the offer was made to all or only to some of the 28 employees.

2. The defendant alleged that only ten employees accepted the offer.

**Subject**: Transfer

**Parties**: Not identified

**Court**: Bundesarbeitsgericht (Federal Labour Court)

**Date**: 15 December 2011

**Case number**: 8 AZR 197/11

**Hard copy publication:** NZA-RR 2013, 179-185 and EzA § 613a BGB 2002 Nr 130

**Internet publication:** www.bundesarbeitsgericht>Entscheidungen >case number

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**Creator**: Bundesarbeitsgericht (Federal Labour Court)
**Verdict at**: 2011-12-15
**Case number**: 8 AZR 197/11