SUMMARY

2013/17 Presumption that dismissal was on account of transfer and not for an ETO reason not rebutted (AT)

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Facts

The plaintiff was employed by a town council. He was the manager of the municipal music school and also taught violin there.

On 29 June 2006 the town council decided to close down the municipal music school and join a regional association of music schools with effect from 1 September 2006. On paper, the school ceased to exist, its activities were taken over by the regional association and the business of teaching music was transferred to the association. However, in practice, not much changed. The pupils continued to be taught in the same building and with the same instruments, the teaching was given in most cases by the same teachers, those teachers having entered into new employment contracts with the regional association. Although this was initially disputed, it soon became common ground that the 'closing' of the municipal school

and the transfer of its business to the regional association constituted a transfer of undertaking within the meaning of the Austrian legislation transposing the Acquired Rights Directive. Given that the regional association (the plaintiff's new employer) had no need for a manager, the plaintiff's management position became redundant.

In the course of June 2006, just before the town council had finalised its decision regarding the transfer of the music school, the regional association hired a new violin teacher with effect from 1 September 2006. As a result, a job vacancy that would have been available for the plaintiff disappeared. The regional association therefore dismissed him almost immediately after becoming his employer, effective 1 December 2006.

The plaintiff brought proceedings against the regional association, arguing that his dismissal was invalid, as it was directly as a result of the transfer of undertaking. In 2009, the *Landesgericht Wiener Neustadt* rejected the plaintiff's claim but, on appeal, in 2010, the *Oberlandesgericht Wien* upheld the claim. The regional association appealed to the Supreme Court.

Judgment

The Supreme Court began by noting that the Austrian legislature has failed to transpose the Acquired Rights Directly fully and that the Directive has direct effect in a situation such as the one at hand, where the transferor and the transferee are governmental organisations. Article 4(1) of the Directive provides that the transfer of an undertaking shall not in itself constitute grounds for dismissal, but that this provision shall not stand in the way of dismissals that may take place for economic, technical or organisational (ETO) reasons entailing changes in the workforce. The issue in this case was whether the plaintiff had been dismissed on the grounds of the transfer and, if so, whether it took place for ETO reasons.

The court observed that the regional association (the transferee) had dismissed the plaintiff "in close temporal proximity" (*in engen zeitlichen Naheverhältnis*) to the transfer. Although this proximity does not exclude the possibility that the dismissal was for ETO reasons, it is an indication (*Indiz*) to the contrary. In such a situation there is a presumption that the dismissal is connected to the transfer and the employer, in this case the transferee, bears the burden of rebutting this presumption. The regional association therefore needed to provide evidence that it did what it reasonably could to integrate the plaintiff into the new organisation, but that this was not possible. The arguments that the new violin teacher was unaware of the impending transfer of undertaking at the time he was hired and that at the time of the plaintiff's dismissal the position of violin teacher had already been filled, were insufficient to rebut the presumption. In an interim judgment dated 27 April 2011, the court remanded the

case to the *Landesgericht* in order to allow the regional association the opportunity to present better arguments.

The lower court again found in favour of the regional association, but on appeal this judgment was overturned, following which the case returned to the Supreme Court for a second time. The Supreme Court began by addressing the regional association's argument that the plaintiff had made no effort to integrate himself into the new organisation. The court rejected this argument. As the plaintiff's new employer, the regional association had a duty to discuss his future career with him, before dismissing him, with which duty it failed to comply. The lack of integration of a worker into a new working environment constitutes an ETO reason only if a transferee undertakes efforts in this respect.

In addition, the transferee claimed that the dismissal was also based on uncertainty as to whether the violin teacher would be able to bring his existing pupils into the new amalgamated music school and, therefore, whether there would be enough work for him. The Court pointed out that circumstances that take effect only after a dismissal cannot be the objective basis for the dismissal. A transferee must await the relevant developments before dismissing a transferred employee. It did not do so in this case.

Having regard to these circumstances, the court, in its final judgment dated 21 February 2013, found that the regional association had failed to rebut the presumption that it had dismissed the plaintiff on account of the transfer of undertaking. Thus, the plaintiff won his case after over six years of litigation.

Commentary

This case is a good example of the problems parties face with dismissals in connection with transfers of enterprises, especially under Austrian law. The Austrian legislator has not explicitly transposed the prohibition of dismissals based on transfers for reasons other than ETO reasons. In my view, this is a breach of the duty to transpose Directive 2001/23. It means that the courts have had to find a way to resolve the lack of explicit protection of employees upon transfers of enterprises and so they have argued that dismissals in these circumstances are void as being *contra bones mores* under general notions of civil law. However, this puts the burden of proof on the worker and so the courts have tried to introduce some alleviation, in this case, that there is a presumption that a dismissal 'in close temporal proximity' to the transfer is connected to the transfer. The employer (transferor or transferee, depending on whether the employee was dismissed before or after the transfer) then bears the burden of rebutting this presumption with ETO reasons. The case at hand mainly deals with two arguments raised by the transferee (i.e. the lack of will of the employee to integrate and

uncertainty about whether there would be enough work for the employee after the transfer). The reasoning of the Supreme Court is convincing and in line with Directive 2001/23 in preventing dismissals caused solely by the transfer of an undertaking.

Music schools seem to play an important role in Austrian jurisprudence, as this is the second decision by the Supreme Court dealing with this industry, the first one being the famous 1999 decision 8 Ob A 221/98b which dealt with the question of direct applicability of Directive 77/87/ EEC to cases of insourcing of formerly private music schools into the (federal) state administration.

Comments from other jurisdictions

Germany (Dagmar Hellenkemper): Section 613a of the German Civil Code provides that the termination of an employment relationship by the previous employer or by the new owner because of the transfer of a business or a part of one, is ineffective. The right to terminate the employment relationship for other reasons is unaffected. In a similar way to this Austrian judgment, the German Courts have in the past found the fact that a termination happened in close temporal proximity to the transfer of business to be a reasonable indication of its connection to the transfer, although, in most cases, the dismissal took place before the transfer of business and not afterwards. There is, as yet, no ruling by the courts on what is considered to be 'close temporal proximity'. In this case, however, given that the employer had just filled a position the manager would have been able to do, it is likely that a German court would have rendered the same judgment.

Poland (Marek Wandzel): In my opinion, distinguishing between ETO dismissals and dismissals resulting from a transfer, is always extremely difficult. Quite often a transferee will have to dismiss employees for ETO reasons, but the dismissed employees will often assume their dismissals were a consequence of the transfer itself. In Poland the minimum timelapse between a transfer and ETO dismissal is, in practice, six months, although this does not guarantee rejection of an employee's claim. From this perspective the dismissal of the plaintiff in the case at hand was too quick.

Subject: Transfer, unfair dismissal

Parties: E**** S**** - v - **** Musikschulverband ****

Court: Oberste Gerichtshof (Supreme Court)

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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