

SUMMARY

2013/34 When does time start running for claiming unfair dismissal following a transfer of undertaking? (MT)

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Facts

Mr Alessandro Bruno (the 'plaintiff') was employed for over four years as a Customer Service Administrator with a company licensed to offer e-gaming services (the 'transferor') on an indefinite basis.

On 6 March 2012, the plaintiff was informed by the transferor's human resources department that all the work and licences associated with a particular client were being transferred to another licensed company (the 'transferee'). On 10 and 16 March 2013, the plaintiff was offered employment with the transferee, on less favourable terms and conditions of employment, but the plaintiff did not follow up on this offer.

On 3 April 2012, the transferor and the transferee signed the transfer of business agreement, which was, however, subject to the approval of the Maltese regulator. The regulator's approval came on 4 May 2013.

On 16 May 2012, the plaintiff was informed by the transferor that the Maltese regulator had approved the transfer of business, and was also separately informed by the Government employment agency that his employment with the transferor was terminated as of 30 April 2012.

Strangely enough, the plaintiff continued to report to work at the transferor till 21 May 2012, but then he stopped reporting to work voluntarily because he became unsure whether he was employed by the transferee or the transferor. On 4 August 2012, the plaintiff filed proceedings before the Industrial Tribunal claiming unfair dismissal by both the transferor and the transferee.

Judgment

As a preliminary plea, the transferor argued that the plaintiff's action for unfair dismissal was regulated by the four month prescription period set out in law and therefore filed too late. The relevant legal provision requires unfair dismissal proceedings to be brought "*not later than four months from the effective date of the breach*". What was "the effective date of the breach" in this case? The transferor argued that the time for making a claim started running from 10 March 2012, that is, the day on which the plaintiff was offered employment with the transferee. The transferor argued that the plaintiff should have filed his application by 10 July 2012 and that by 4 August 2012 it was too late.

The issue which had to be considered by the Industrial Tribunal was, therefore, the precise moment when time for making a claim for unfair dismissal started to run.

In its preliminary decision, the Tribunal ignored the transferor's argument that the date of the alleged breach was the date when employment with the transferee was offered. Instead, it considered four possible dates, all less than four months before the proceedings had been brought: the date of termination of the plaintiff's employment (30 April 2013); the date until which he was paid his wages by the transferor (30 April 2013); the date on which the employee received notification of the effective date of the transfer of business (16 May 2013); and the date on which he stopped reporting to work (21 May 2013).

Accordingly, the Tribunal declared that the prescription period for the applicant's claim for unfair dismissal had not lapsed. It ordered the continuation of the case on the merits.

Commentary

We are of the view that the Industrial Tribunal was correct to find that time did not start to run from the date when alternative employment was offered to the plaintiff.

At that stage the plaintiff was unaffected by the prospective transfer: (a) the transferor and the transferee did not sign the transfer of business agreement until 3 April; (b) the regulator had yet to approve the transfer (which it did on 4 May); and (c) the plaintiff remained employed with the transferor, at least, until 30 April.

However, the Industrial Tribunal failed to clarify the date on which time does start to run for claims of unfair dismissal.

Maltese law provides that actions claiming an unfair dismissal must be filed within four months of the “effective date of the alleged breach”. In our view, in a case of an unfair dismissal following a transfer of business, the effective date of the alleged breach is the date on which the employment terminated (in this case, 30 April 2013), and not the date when the transfer of business is completed.

In the case of any other breach of the rules relating to transfer of undertakings, such as failure by the transferee to employ transferred employees on the same terms and conditions, it could be argued that the date of the “alleged breach” is the date on which the transfer of business is completed (in this case, 4 May 2013).

The proceedings in this case are ongoing and a judgment on the merits is not due to be delivered in the foreseeable future.

Comments from other jurisdictions

Austria (Daniela Krömer): Austria has no explicit legal provision dealing with the termination of employment contracts due to transfer of undertakings. If an employment contract is terminated because of the transfer, and not for organisational reasons, the courts consider the termination void as it is contra bonos mores. As there is no explicit provision, the question of how soon an employee needs to challenge his termination and under what circumstances it is time-barred has been considered by the Austrian Supreme Court (Oberster Gerichtshof - OGH) on a number of occasions.

The Austrian Supreme Court holds the view that, in the interests of legal certainty and clarification, a termination needs to be challenged within a reasonable time after the transfer. The employee must make the claim (i.e. there is an ‘obligation to present a claim’, or ‘Aufgriffsobliegenheit’) but there is no fixed period within which the termination must be challenged. The Supreme Court has deemed a claim submitted ten months after the transfer to be time barred (OGH 9 ObA 160/99s); a termination challenged within six months to have been just in time (OGH 8 ObA 48/04 y); and that a claim submitted within a month after the transfer was definitely soon enough (OGH 8 ObA 211/96). The time frame largely depends on

the circumstances of the case, weighing the employer's interest in legal clarity against the employee's difficulties in making his or her claim.

Consequently, there is no explicit time period within which a termination based primarily on a transfer of undertaking can be challenged. The exact point when time begins to run has not been yet been considered by the courts. It would however, never start before the termination has become effective; it is this legal act, as opposed to the transfer itself, that is being challenged by the employee.

Germany (Dagmar Hellenkemper): In Germany, this problem would most likely not arise. After notification of a transfer of business, the employee may object to the transfer within one month of the notification, provided the notification was correct and made in sufficient detail; otherwise the period to oppose the transfer does not even begin. If the employee objects to the transfer, the employment relationship continues with the transferor. The transferor, if not able to employ the employee following the transfer, can terminate the employment relationship on economic grounds. If the employee wishes to contest the dismissal on the grounds of lack of economic or social justification, he or she must bring a claim before the competent local labour court within three weeks of receipt of written notice. This provision also applies in the case of a prior or subsequent transfer of business.

*Slovakia (Beáta Kartíková)**:* According to the relevant provisions of the Slovak Labour Code no later than one month before the transfer of undertaking, the transferor must inform the employee representatives or, if no employee representatives operate at the employer, the employees directly in writing of:

the date of proposed date of the transfer;

the reasons for the transfer;

the employment, economic and social implications of the transfer for the employees;

the planned transfer measures applying to the employees.

The above-mentioned obligations also apply to the transferee.

If the working conditions of employees will undergo a fundamental change as a result of the transfer, and if the employee does not agree to that change, the employment will be deemed terminated by agreement as of the date of the transfer.

The Slovak Labour Code does not define the expression "fundamental change to working conditions". Therefore the question of whether the employment agreement proposed by

the employer-transferee entails a fundamental change to working conditions that is disadvantageous for the employee is left to the discretion of the court. As the working conditions are an essential component of any employment agreement under Slovak law, in my opinion, the less favourable terms and conditions referred to in this case could be considered as a fundamental change to working conditions and the employee would have the right to object.

An employee who objects to continuation of his employment with the employer-transferee must do so explicitly, but the Slovak Labour Code does not prescribe the way this should be done, i.e. verbally or in writing. According to the case law, an objection to continuing the employment, regardless of its form, has retroactive effect to the date of the transfer.

Thus if there is a fundamental change to the working conditions and the employee objects, the employment agreement will cease to exist by law and the parties to it will not be obliged to conclude any separate written agreement. However, the employer must issue the employee with written confirmation that the employment relationship has been terminated by agreement.

The Slovak Labour Code gives employees the right to seek an order of the court to the effect that the termination was invalid no later than two months after the intended date of termination of employment. The question is what that date is, as it is debatable when the effects of an employment termination occur: i.e. (i) at the time of receipt of notification of the employer regarding the transfer of undertaking;

(ii) the date of effectiveness of the transfer of undertaking; or (iii) delivery of the written confirmation of the termination of the employment relationship. In my view, the Slovak Labour Code is clear that the effects of a termination of employment in such a situation begin on the date of effectiveness of the transfer of undertaking, regardless of when written confirmation of termination was delivered to the employee.

Therefore, in this case the employee will have the right to claim unfair dismissal within two months of termination of his or her employment, meaning two months from the effective date of the transfer.

Subject: Transfer of undertaking – time limit on claims

Parties: Bruno Alessandro - v - GVC New Limited and others

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