SUMMARY

2018/29 Continued application of church labour law for secular employer after transfer of undertakings by means of a dynamic referral clause (GE)

In the aftermath of the ECJ's ruling in the Asklepios case (C-680/15), the German Federal Employment Court (Bundesarbeitsgericht, hereinafter: BAG) held a dynamic referral clause valid following a transfer.

Background

The case concerned the business transfer of a rescue service at a deaconry in Saxony to a subsidiary of the German Red Cross, which is not a church organisation.

The German Constitution (*Grundgesetz*) and the Constitution of Weimar (*Weimarer Reichsverfassung*) allow Christian churches to apply their own law to a certain extent. This also applies to employment law, known as the 'third way' (*Dritter Weg*). It limits the right to strike in favour of a consensual process of negotiation on collective terms and conditions. Consequently, the protestant church and its deaconries cannot use collective bargaining agreements. Instead, they use a set of terms and conditions (the '*Arbeitsvertragsrichtlinien des Diakonischen Werks der Evangelischen Kirche in Deutschland*', the 'AVR') which forms the framework of every employment contract with the protestant church and its affiliates. Each employment contract typically includes a dynamic referral clause to these terms. Salaries are negotiated in the same way and form part of the AVR and referral clauses.

In this case, the BAG had to consider whether the case of *Asklepios* should be distinguished from the case at hand, consider the collective bargaining agreements that exist for the public service and think about the effect of the transfer of an undertaking containing a dynamic

clause referring to church law.

Facts

The claimant has been employed since 1991 as an employee in the rescue service in a county in Saxony. Until 31 December 2013 his employer was the Johanniter-Unfall-Hilfe e.V., a registered association of the Johanniter Order (*Johanniterorden*). His contract referred to the AVR, as amended from time to time.

As of 1 January 2014, the rescue service transferred to the German Red Cross, including the Saxon subsidiary. In the first weeks after the transfer, the Red Cross tried to negotiate new terms with the employee, but without success. Then in 2015, the employee claimed a salary increase with retroactive effect from 1 July 2014, based on a new version of the AVR.

The Red Cross rejected the claim, as it did not feel obliged to apply amendments to the AVR, given that it was not a party to the AVR process and had no means of influencing it. It also referred to the principle of freedom to do business and concluded that the dynamic referral clause had converted into a static one at the time of the transfer.

In the subsequent proceedings, both the industrial tribunal and the state labour court found in favour of the employee. The case then came before the BAG.

Judgment

The BAG upheld the prior judgments. First, it agreed with the courts of lower instance that it is not necessary for the transferee to be a church organisation for the AVR to apply. As regards the nature of the 'third way' in terms of employment law, the AVR covers terms and conditions that can also apply after a transfer, even though they have been developed for a specific sector. Further, it was not clear that as part of the transfer, the terms of the AVR would be frozen if the new employer was not a church organisation.

The BAG then came to the main question, namely whether, according to section 613a of the Civil Code (BGB), the dynamic effect of a referral clause remains in place after a transfer. In the first paragraph of that section, it says that a transferee must continue to apply employees' existing terms and conditions. This mirrors Article 3 of the Acquired Rights Directive, Directive 2001/23 and would appear to include the dynamic referral clause to the AVR.

However, Article 3(3) of the Directive, implemented by Section 613a(1), sentence 2-4 of the BGB, which, basically, stipulates that provisions of a collective bargaining agreement (CBA)

remain in force after a business transfer if the previous parties had been bound by a CBA but can be altered by subsequent amendments after a waiting period of one year., does not apply to contractual referral clauses because of the individual character of a contract with an employee. This means that originally, the employer (transferor) was free to decide whether to apply the rules and if so, what terms to apply and to which extent and for which period. In order for the AVR to be applicable it was necessary to implement a contractual referral clause. This meant the transferor and subsequently the transferee were in a different position to employers who are members of an employers' association and bound by a CBA, as collective agreements are effective immediately if the employee is a trade union member and the employee member of its corresponding trade union. Therefore, the basic rule in section 613a(1), sentence 1, of the BGB must be respected.

The Red Cross had argued that the AVR is comparable to a collective bargaining agreement and therefore should be treated as such. The referral clause should be interpreted as enabling the transferor to apply the same version of the AVR to all employees, so ending the dynamic effect. According to the Red Cross the suggested comparability of AVR and collective bargaining agreements within the meaning of Section 613a BGB is based on their nature collective provisions negotiated by third parties. Therefore, the previous jurisdiction of the BAG concerning the transformation of dynamic agreements into static ones should be applicable in the complainant's view. But the BAG rejected this argument. It pointed out that different to collective bargaining agreements, the AVR is *only* applicable if the contract parties agreed on a referral clause. Due to this legal difference between employers bound to collective agreements and those who refer only to a set of rules without being bound to them, the AVR cannot be considered as a collective bargaining agreement nevertheless.

The ECJ judgments in *Österreichischer Gewerkschaftsbund* (C-328/13), *Alemo-Herron* (C-426/11) and *Asklepios* (C-680/15 and C-681/15), not to mention the BAG's decision reported in EELC 2017/2, p. 106-108, all imply that Article 3 of Regulation 2001/23 plus Article 16 Charter of Fundamental Rights of the European Union (freedom to conduct a business) mean that the duty to apply rights and obligations of the transferor arising from employment contracts extends to a clause whereby the transferor and the worker have agreed to amend or replace a collective agreement and its subsequent iterations, if national law allows for the transferee to make adjustments both consensually and unilaterally.

The employer in this case could have tried to alter the conditions unilaterally by giving notice of termination with the option of reemployment with amended conditions according to Section 2 of the Dismissal Protection Act (KSchG), but had not done so. Instead, the employer

argued that it had made the change based on Section 313 of the BGB. This is a way to change core provisions of a contract based on a significant change of circumstances. The BAG replied that this doctrine cannot be used to make a change to terms, though it could be used to bolster an argument in connection with a dismissal. Finally, the BAG found the pay increase in the AVR was valid.

Commentary

This judgment has affirmed the principle that a transferee must respect an employee's existing terms and conditions after a transfer, even if the transferee has no opportunity to influence negotiations on the collective rules that will apply to it. It also makes it clear that when a business is being transferred from a church organisation to an entity bound to civil law only, the same rules apply. The BAG crystalised in the decision that neither European law nor German employment law can set limits to Church labour law, but that the same rules apply to both categories of employers (lay and Christian) in these circumstances. It now becomes clear that *Asklepios* paved the way to maintaining the German principle that dynamic referral clauses remain effective unless they are altered by mutual agreement or unilaterally by notice. As the latter option involves the very high standards that must be met under section 2 of the KSchG, every transferee should be aware during due diligence that it is very difficult to remove referral clauses entirely and it is therefore advisable to ensure the drafting of a referral clause is done meticulously, so as to avoid the kind of pitfalls described above.

Comments from other jurisdictions

Greece (Elena Schiza, KG Law Firm): Presidential Degree 178/2002, which implemented the Acquired Rights Directive (2001/23) in Greece, applies to companies in both the public and private sectors, including not-for-profit organisations.

Church organisations in Greece are public law legal entities which operate in accordance with the provisions of the Greek Ecclesiastical (Church) law, a law governing the Greek Orthodox Church's rules and its relationship with the Greek State and employees engaged under civil law and as civil servants. Employment relationships with church organisations are governed by the Code of Ecclesiastical Servants, as well as by Presidential Degree 410/1988, concerning staff employed under a civil law regime by legal entities governed by public law. Although trade unions are not active in church organisations and collective negotiations and bargaining agreements do not apply, a Collective Agreement concerning personnel employed under the civil law regime by legal entities governed by public law" does exist. If an employment relationship from an institution governed by Ecclesiastical (Church) law is transferred to an entity governed by civil law, the provisions of Presidential Decree 178/2002 apply.

Further, in accordance with Presidential Decree 178/2002, if an activity of the transferor is continued by the transferee, the affected employees automatically transfer by operation of law to the transferee under the same terms and conditions. The transferee must take over all rights and obligations of the existing employment agreements at the date of the transfer.

In addition, Presidential Decree 178/2002 provides that: "*after the transfer, the transferee continues to apply the work terms provided by any collective bargaining agreement, arbitration decision, internal labour regulation or employment agreement.*" Consequently, the transferee must retain the terms and conditions set out in the collective labour agreement applicable at the transferor even if the transferee was not part of the negotiations and could not influence them.

The *Asklepios* case decision would most probably be followed by the Greek courts, applying the same reasoning as the BAG, given that the "collective agreement concerning personnel employed under the civil law regime by legal entities governed by public law" does not apply if the transferee operates only under civil law, in which case, the employees' agreements would be considered contractual. This means that these terms and conditions could be amended or abolished consensually by the parties, or indeed, unilaterally by the new employer giving notice if specific reasons exist to justify a unilateral change to the employment agreement (effectively, the abolition of a job or department).

In practice, most employers would tend to offer the transferred employees full or partial harmonisation of their terms and conditions with their existing workforce in order to avoid having two different categories of employees. But this needs to be shared and discussed with the employee representatives and the consent of each employee will also need to be obtained.

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Parties: Unknown

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