EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/9 The right to object against a transfer in case of incorrect information is not unlimited (GE)

According to German law, every employee has the right to object to the transfer of their employment relationship to the transferee in the case of a transfer of business. However, the right to object is not unlimited. The Federal Labour Court (Bundesarbeitsgericht ('BAG')) held that an employee who had worked for the transferee for seven years had lost this right if they had been informed about the transfer.

Summary

According to German law, every employee has the right to object to the transfer of their employment relationship to the transferee in the case of a transfer of business. However, the right to object is not unlimited. The Federal Labour Court (*Bundesarbeitsgericht* ('BAG')) held that an employee who had worked for the transferee for seven years had lost this right if they had been informed about the transfer.

Legal background

The requirements for transfers of businesses in the Transfers of Undertakings Directive 2001/23/EC are implemented in Section 613a of the German Civil Code (*Bürgerliches Gesetzbuch* ('BGB')). Section 613a para. 5 and para. 6 BGB contains the obligation to inform employees about the transfer. Accordingly, the previous employer or the transferee must inform employees affected by the transfer of business in written form about the following points as a minimum before the transfer of their employment relationships:

the date or planned date of transfer;

the reason for the transfer;
the legal, economic and social consequences of the transfer for workers; and
the measures that are being considered with regard to employees.

After receiving the information, an employee has the right to object to the transfer of their employment relationship in written form within one month (Section 613a para. 6 BGB). The employee must also be informed about the period for objection as well as the required form of objection. If the employee objects to the transfer, they will remain employed with the transferor. According to settled case law, the objection period starts when the employee has been duly informed.

Facts

The employee worked for the defendant (the transferor) in one of its divisions in the city H. Effective 1 January 2006, the operating part in H. was sold and consequently transferred to DPTS GmbH (the transferee).
The (old) employer informed the employee in writing on 14 November 2005 about the transfer and stated that his employment would continue with DPTS GmbH. However, the letter lacked information on the registered office of the company, its address, the competent registration court and the registration number. Moreover, it did not contain any indication that the employee had the right to object to the transfer of his employment relationship to both the previous employer and the new owner.
The employee initially did not object to the transfer of his employment relationship to DPTS GmbH and continued working for that company from 1 January 2006 until September 2015. By letter dated 1 September 2015, i.e. more than nine years later, the employee objected to the transfer of his employment relationship and claimed that he was still employed by the transferor (his old employer). He asserted that the legally regulated one-month objection period had not been triggered due to incorrect information. The Labour Court upheld the complaint. On the appeal of the defendant, the Regional Labour Court set aside the Labour Court's ruling and dismissed the complaint.

Judgment

The BAG dismissed the plaintiff's appeal. It held that the employee had forfeited his right of objection, notwithstanding whether the information had been incorrect and incomplete or not, as he had worked without any objection for seven years. It did not matter whether the objection period had technically started or not.
It left open whether the objection period technically had never started (as the requirements were not met) and argued that any right of objection may only be exercised with due regard to

the principles of good faith and was therefore forfeited. Forfeiture is a special case of inadmissible exercise of rights. It excludes a claim made in bad faith and a delayed claim of rights. It is based on the idea of protection of trust and serves the necessity for legal certainty and legal clarity. According to the BAG, a precondition for the acceptance of forfeiture is first that the employee has not exercised his rights for a long period of time (element of time). Secondly, the employee must give the impression that he no longer intends to claim his right, so that the (former) employer can expect not to be called upon again (element of circumstance).
In the view of the BAG, the unopposed further work of the employee with the transferee alone did not result in forfeiture of the right of objection. However, the fact that the employee had been informed about the transfer, his new employer and the subject of the transfer (the date or planned date of transfer, the reason for the transfer, the legal, economic and social consequences of the transfer for workers, and the measures that were being considered with regard to employees), albeit not fully and completely (the information on the address and registered office of the acquirer was missing, as well as information on the competent registration court), and had worked for DPTS GmbH for seven years, qualified as circumstances resulting in losing the right of objection, taking into account the interests of all parties. Further, in the opinion of the BAG the statutory limitation periods (usually three years) were not applicable. They could only be seen as a guideline.

Commentary

In August 2017, the BAG had already decided that the right of objection had been forfeited after seven years of unopposed further work (8 AZR 265/16). With this present decision, the BAG confirms its previous line in case law. The decision should also be consistent with European requirements. While it follows from Directive 2001/23/EC and Article 15(1) of the EU Charter of Fundamental Rights that everyone has the right to choose their profession as well as their employer and thus, upon a transfer of business, whether the employment relationship with the transferee should be continued, the European legislator in the Directive has not specified how this should be realized.
The ECJ (in *Temco*, C-51/00) has considered that the possibility of an objection, as found in German law, is in principle permissible and appropriate. Nevertheless, the ECJ has made it clear that both the content of the right of objection and its conditions as well as its legal consequences require national regulation. This has been adequately implemented by the German legislature and has now been specified in the case law. However, it is questionable whether 'a time limit on the right of objection' in the event of formal errors can clarify the law for the (former) employer or the employee. On the one hand, the period is very long and on the other hand, the seven-year period will probably continue to be decided on a case-by-case

basis and not seen as a rigid period that excludes rights over time.

Comments from other jurisdictions

United Kingdom (Bethan Carney, Lewis Silkin LLP): As this case report makes clear, the Acquired Rights Directive does not specify how the employee's right to object to a transfer should be effected. In the UK, the wording of the statutory instrument that implements the Directive suggests that the objection must be made before (or at the latest, on) the transfer date. There is case law, however, which says that in exceptional circumstances an employee may be able to object after the transfer date. In *New ISG Ltd – v – Vernon* [2008] ICR 319 the High Court held that where an employee who had been kept ignorant of the identity of the transferee and the date of transfer (there had been no consultation or information given), resigned two days after the transfer on learning the identity of the transferee, he had objected to the transfer. This meant that his contract of employment had not transferred and the restrictive covenants within it were not effective. He could therefore go and work for a competitor. In another Employment Appeal Tribunal decision, this case was held to be exceptional. In Capita Health Solutions Ltd v McLean and Anor [2008] IRLR 595 an occupational health nurse raised a grievance when it was proposed that the health service in which she worked should be transferred. The grievance alleged that the transfer would involve a significant change to the employee's role. But, following discussions, the employee agreed to go and work for the transferee for six weeks on secondment following the transfer date, whilst still being paid by the transferor. At the end of this period she resigned and claimed constructive dismissal against both transferor and transferee. The EAT held that the individual had not validly objected to the transfer and therefore that the transferor was not a proper respondent to the proceedings. The act of going to work for the transferee under a secondment arrangement whilst she was aware of its identity was incompatible with objecting. The fact that the transferor had continued to pay the employee during the secondment was irrelevant, as was the fact that the employee was working notice given before the transfer date.

Italy (Caterina Rucci, Katariina Gild): Italian law does not recognize any right to object to a transfer of undertaking, with the exception of "fake" transfers, i.e. cases in which the transferor pretended to make a transfer of (part) of an undertaking, while it basically put together different not rentable parts of the business, and transferred them to a third party, which would go bankrupt in a short time, and/or apply worse conditions and/or continue the employment relationship only with a part of the employees of the pretended part of business. Under Italian law, however, the employee is always free to resign from his employment, and – in the case of a transfer – is allowed a special kind of resignation if his working conditions change in a relevant way *in the three months after the transfer*: this resignation is actually a

constructive dismissal. Not only is no notice required by the employee in this case, but they will receive the notice period indemnity.
Also, some collective bargaining agreements include similar provisions, for example there is a special one for journalists if they are requested to go on working after relevant changes in the newspaper line, and others for employees of executive level.
It should be noted that since Italy had in the past and until 2015 the highest level of protection against unlawful termination, topics such as constructive dismissal or the right to resign in certain cases where not considered particularly relevant or interesting, since the effective and financial protection given were of a very high level. Nowadays, after the Forner law (with changes applying to everybody starting at the end of 2012) and the Renzi law (the so-called Jobs Act) which have enacted a considerably reduced degree of protection in cases of dismissal for all those hired after 7 March 7 2015, it is possible that cases of constructive dismissal might become more relevant again.

Bulgaria (Ivan Punev, DGKV): The regulation of the employment-related aspects of transfers of undertaking in Bulgaria is not very detailed. Article 123 of the Bulgarian Labour Code (the 'LC') lists the situations which constitute a transfer of undertaking for employment purposes and thus lead to automatic transfer of employment, and it also makes provision for the employment-related liabilities borne by the transferor and for the liabilities borne by the transferee. Other than Article 123, there is only one other article of the LC dedicated to the transfer of undertaking – Article 130b, which regulates the information and consultation obligations and procedures related to a transfer of undertaking.
Article 130b of the LC follows Council Directive 2001/23/EC and thus the requirement for provision of information to a large extent is similar to the one under German law, as described in the summary of the German case. However, in Bulgaria the transfer of undertaking would not require the consent of the respective employees, and Bulgarian law does not provide for an option for an employee to object to the transfer of their employment to the transferee. Notwithstanding the foregoing, the LC enables employees to terminate their employment agreement at any time, without stating any reasons, by furnishing a prior written notice to the employer. Thus, even if automatically transferred, the transferred employees could always avail of such right conferred on them by the Bulgarian labour law. In addition, employees are entitled to terminate their employment with immediate effect, should, as a result of a transfer of undertaking, the working conditions substantially change to the detriment of the employees. However, these options relate to termination of the relevant employee's employment relationship, not to that employee remaining employed with the transferor.

Hungary (Gabriella Ormai, CMS Cameron McKenna Nabarro Olswang LLP): In Hungary, the legislator implemented the rules of Directive 2001/23/EC with a different solution. The

Hungarian Labour Code provides the employee with – instead of the right of objection – the right to terminate the employment relationship. However, in such a case, the employee is obliged to provide proper reasoning for such termination, and the reasoning can only be that the transfer of business involves a substantial change with respect to the working conditions to the detriment of the employee and, because of it, maintaining the employment relationship would entail unreasonable disadvantage or would be impossible. Employees may exercise the right of termination within thirty days from the date of transfer of employment upon the transfer of business, thus in contrast to a long objection period, in Hungary, there is a short thirty-day period to terminate the employment relationship. In a case where the employee terminates the employment with such a reasoning in a lawful manner, the employer shall pay for the notice period and the severance payment and must exempt the employee from work for half of the notice period.

Finland (Janne Nurminen, Roschier, Attorneys Ltd): In Finland, the Transfers of Undertakings Directive (2001/23/EC) has been implemented in the Employment Contracts Act (55/2001, as amended). According to the Act (Chapter 7, Section 5), the employees are entitled to terminate their employment contracts as from the date of transfer regardless of the otherwise applicable notice period or of the duration of the employment. However, the employees have this right only if they have been informed of the transfer at least one month before. If they have been informed later, the employment contract can be terminated by the employees as from the date of transfer or later, however, at the latest within one month after receiving information of the transfer.
The Employment Contracts Act does not give the employees the possibility to object to the transfer itself. As such, in this situation, the employee would have had the right to terminate the employment contract if the employee was informed of the transfer within the time limits provided by law. The law does not regulate a situation where the employer completely neglects the obligation to inform the employees of the transfer. However, often a transfer of undertaking is clearly observable to the employees at the latest on the date of transfer. Therefore, it can be concluded that the employees should terminate the employment contract within one month after the date of transfer if they want to use this right.

Greece (Elena Schiza, Kyriakides Georgopoulos Law Firm): European Directive 2001/23/EC implemented in Greece through Presidential Decree 178/2002 provides for the obligations of the transferee in the case of a transfer. Such main obligations concern the formal procedures of provision of information and consultation with the affected employees (or their representatives, if any); non-compliance with those procedures results in the imposition of high administrative fines. Hence, both the Greek Presidential Decree and Section 613a of the German Civil Code (BGB) are in compliance with Article 7 of the European Directive as far as

the information provided to affected employees regarding the transfer is concerned, which should take place before the realization of the transfer and refer to (a) the date or planned date of transfer, (b) the reason for the transfer, (c) the legal, economic and social consequences of the transfer for workers, and (d) the measures that are being considered with regard to employees.
In that context, the employment relationships of the affected employees are automatically transferred to the new employer upon the information and consultation procedure being completed. The only consequences that the former employer may face due to its failure to inform and consult with the affected employees is the imposition of administrative fines. This is in contrast to the German Civil Code, where the affected employees are entitled to object in writing, either to the former or to the new employer, and express their opposition to the business transfer (*Das Recht des Widerspruchs*). In such legal context, the consequences that the former employer (transferor) may face, once the right to object is exercised, is to continue to employ the employees who have objected to the transfer.
Due to the absence of such similar provisions in the Greek legal system, the Greek courts cannot rule on any objection to the transfer eventually expressed by the employees; such an objection does not impact on the automatic transfer of the employment relationships to the transferee. Therefore, the exercise of the right to object would not affect the validity of the transferred employment relationship and would not be taken into consideration.

Subject: Transfer of undertaking, Employees who transfer/refuse to transfer
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