EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/47 Transfer of undertakings does not include temporary agency workers (AT)

In a series of rulings the Austrian Supreme Court has made it clear that temporary agency workers are transferred to the transferee only if they are assigned to the transferor on a permanent basis. According to the Court, the facts of the cases at hand are not comparable to those of the ECJ ruling in Albron Catering BV (C-242/09). Hence the temporary agency workers remain with their original employer. However, some aspects of the Court's reasoning seem unclear if not contradictory with regard to other recent judgments.

Background

Pursuant to Article 3(1) of the Directive on the Transfers of Undertakings (2001/23/EC), the transferor's rights and obligations arising from a contract of employment or from an employment relationship shall be transferred to the transferee. In a much-discussed decision the ECJ ruled that a transfer of undertakings may have legal effect on temporary agency workers if the work agency and the user undertaking (i.e. the transferor) belong to the same group of companies and if the temporary agency workers are assigned to the transferor on a permanent basis (*Albron Catering BV*, C-242/09). Recently the Austrian Supreme Court on several occasions had to assess under which circumstances this decision is applicable.

Facts

The plaintiffs in the two proceedings discussed here were employees of Do & Co AG, a corporation providing catering services. The employment contracts were concluded in 2006 and 2007 respectively. In 2012 Henry am Zug GmbH, a subsidiary of Do & Co, was awarded a

contract to provide food catering on the trains run by the Austrian Federal Railways. From 2012 until 2018 both plaintiffs were assigned to work for Henry am Zug. The above-mentioned contract ended on 31 March 2018. Subsequently the Austrian Federal Railways chose DoN travel railcatering GmbH as their caterer whereby a transfer of undertakings took place between Henry am Zug and DoN travel railcatering.

The plaintiff in case A (9 ObA 50/19x) requested a declaratory judgment that her employment contract had transferred to DoN travel railcatering.

The plaintiff in case B (9 ObA 32/19z) requested a declaratory judgment that her employment contract remained with Do & Co. In this case the plaintiff had been working part-time after returning from parental leave in 2017 and thus enjoyed rather strong protection against dismissal.

Judgment

The Supreme Court upheld the judgments of the court of first instance and the appellate court and decided that the plaintiffs' employment contracts were not affected by the transfer of undertakings between Henry am Zug and DoN travel railcatering. The plaintiffs remained employees of Do & Co. In the opinion of the Supreme Court the cases at hand were not comparable with the *Albron* case that the ECJ decided upon. In this context the Supreme Court put forward the following reasoning:

The assignment to Henry am Zug was not permanent, the plaintiffs had been working directly for their contractual employer (Do & Co) for five and six years respectively before being assigned to Henry am Zug.
In case B the assignment to Henry am Zug was interrupted for three months during which the plaintiff worked for her contractual employer (Do & Co).
The plaintiffs were required to file reports to Do & Co while being assigned to Henry am Zug.
Unlike in the Albron case Do & Co was not acting as a central work agency for Henry am Zug.
Henry am Zug also concluded employment contracts itself and employed its own permanent staff.

Commentary

The present judgments concern the main legal consequence of a transfer of undertakings as laid down in Article 3(1) of Directive 2001/23/EC. According to the prevailing opinion, the transfer in general does not legally affect temporary agency workers, because they have no

employment contract with the transferor. However, the ECJ has found that under certain circumstances temporary agency workers may be included in the transfer since Article 3(1) refers to "a contract of employment or an employment relationship" and the relationship between a temporary agency worker and a user undertaking (i.e. transferor) could be identified as an “employment relationship” (*Albron Catering BV*, C-242/09, paragraph 24 onwards). The common view in legal literature is that the *Albron* judgment can be applied only in atypical cases of temporary agency work. This seems reasonable because in typical constellations temporary agency workers are not part of the transferred ”economic entity” (c.f. Article 1(1)(b) of Directive 2001/23/EC).

So, the question that needs to be answered is: under what circumstances are temporary agency workers part of the transferor's economic entity? In the *Albron* case it was rather clear. The work agency and the user undertaking belonged to the same group of companies and the plaintiff had been assigned to the user undertaking (i.e. the transferor) for twenty years. Furthermore, the work agency acted as a central employer for the entire group. It was clear that if Article 3(1) of Directive 2001/23/EC was not applied, groups of companies could just avoid applying the Directive by selecting one company to act as a central employer (AG Bot, C-242/09 paragraph 49).

The present cases are somewhat more difficult. After all the plaintiffs had been assigned to the transferor for approximately six years. Further, the work agency (Do & Co) and the user undertaking (Henry am Zug) belonged to the same group of companies. There are, however, certain aspects that indicate another view (see point 4 of the Judgment, above).

At this point it seems useful to refocus on the question: were the plaintiffs part of the transferor's economic entity? In order to assess this one has to consider the case from an overall perspective. In this respect, the present judgments are positive because recently the Austrian Supreme Court has put too much emphasis on certain separate criteria. In case 9 ObA 19/18m the Supreme Court focused only on the duration of the assignment which is certainly a crucial but not the only relevant criterion. In case 8 ObA 13/18x on the other hand the Supreme Court abandoned the plaintiffs’ lawsuit because there was no group relationship between the work agency and the user undertaking. The correct approach is to take all these characteristics into account and that is why the present judgments can be seen as a positive advancement of the relevant case law.

Comments from other jurisdictions

Germany (Andre Schüttauf, Luther Rechtsanwaltsgesellschaft mbH): The European Directive on

the Transfers of Undertakings 2001/23/EC was implemented into German law as Section 613a of the German Civil Code (Bürgerliches Gesetzbuch).

The question of whether the employment relationships of temporary workers are transferred from the transferor ('non-contractual employer') to the transferee in the context of a transfer of an undertaking has not yet been fully clarified in Germany either. To this question there is – as far as is evident – nine years after the ruling in *Albron Catering BV* no published case law of German labour courts. Up to *Albron Catering BV* it was, as in Austria, the prevailing opinion that the transfer in general does not legally affect temporary agency workers due to the lack of an employment contract with the transferor.

Since the ECJ ruling the effects of a transfer of undertaking relating to temporary workers have been controversial. Some voices in German literature see the decision merely as an exceptional ruling that the regulations concerning transfers of undertakings do only apply to temporary workers in the case where the temporary work agency and the transferor belong to the same group of companies. According to this view, the ECJ had only in this atypical case recognised the constellation of the 'non-contractual employer'. The opposing view does not consider the ECJ decision to be an exception in cases of intra-group constellations. This opinion is based on the view that the principles of the ruling shall be applied to all cases of temporary employment. According to this understanding, temporary workers are transferred to the transferee in the same way 'normal' employees of the transferor do in the case of a transfer of undertaking.

Apart from this, however, the reasonings the Austrian Supreme Court made in the two cases at hand have not yet found any significant mention in German rulings or literature. It is therefore not clear to what extent (1) the temporary worker's bond with a company, (2) the length of the temporary worker's assignment and (3) the fact whether the contractual employer serves as a central work agency, must be taken into account.

Initially, it will therefore be the work of the German labour courts to specify more precisely the basic requirements for a transfer of temporary workers. Future cases can then be judged against these criteria.

Greece (Elina Schiza, KG Law Firm): European Directive 2001/23/EU implemented in Greece through Presidential Decree 178/2002 provides that in case of a transfer of business the rights and obligations arising from employment agreements or employment relationships of the transferee – in its capacity as employer – are automatically transferred to the transferor (i.e. the new employer). In the strict sense of the 'employment agreement/relationship', the job

positions of the affected employees are protected only in a case where the employment agreements/relationships exist and have not been lawfully terminated at the time the transfer takes place.

Furthermore, part-time or full-time employment agreements, as well as employment agreements of indefinite time or fixed term contracts, are considered as employment agreements and/or relationships for the purposes of implementation of the Presidential Decree. On the contrary, contractual agreements which are not characterized as employment agreements are not covered by such legal provisions unless such contractual relationships are proved to hide an employment relationship.

The Greek courts have not – up until now – ruled on whether the temporary agency workers are mandatorily transferred to the transferee; it is though largely accepted by scholars that in the case of a transfer of the user undertaking, where the temporary agency workers provide their work temporarily, the employment agreements of the same are not automatically transferred to the transferor, since the user undertaking does not constitute their employer. Such approach is in line with the case law of the ECJ.

Italy (Caterina Rucci, Katariina's Guild): Also in Italy – as well as already indicated by the ECJ – agency workers are not employees of the company using them, instead they are and remain the agency's employees. As a consequence a transfer of (part of an) undertaking should not affect them, according to the Directive.

This Austrian case has however some specific characteristics since the two employees concerned, who brought partially different claims, had in the past worked for the transferor as a consequence of a former partial transfer of undertaking affecting the services company. This led to a different situation by the time of transfer of undertaking: employee B, in fact, had in the past been working for a subject that was merged into the new service provider chosen by the agency.

The case looks quite complicated from an Italian perspective, due to more restrictive rules affecting agency work in Italy. Agencies, in fact, need a quite specific authorization, with strict requirements: this makes the facts of this case almost impossible to happen in Italy.

In any case, no agency worker may transfer automatically in Italy, for the very simple reason that – as an agency worker – they are not included within the category of transferor employee. In order for them to transfer, an agreement of three parties would be required, including his/her specific consent. And in any case he/she would not transfer as a consequence of

transfer of undertaking, but due to an assignment needing his/her consent. As a result, the employment with the transferee would be the consequence of a fully accepted assignment, and thus the subject would not enjoy rights as a transferred employee (sect. 2112 Civil Code on transfers of undertakings), but as merely an assigned employee, entitled to go on enjoying all their former terms and conditions.

The Netherlands (Jimmy van Hulst): This case illustrates the complexities surrounding the question of applicability of Article 3(1) of Directive 2001/23/EC in respect to a transfer of undertakings in triangular employment law relationships. In principle, the legal consequence of the above-mentioned Article does not apply to temporary agency workers. The absence of an employment contract with the transferor implies that the temporary agency worker does not transfer to the transferee in the event of a transfer of undertaking. However, the *Albron* judgment of the ECJ has taught us that a transfer of undertakings may have legal effect on temporary agency workers if the work agency and the transferor belong to the same group of companies and if the temporary agency workers are assigned to the transferor on a permanent basis.

In Dutch legal literature an interesting discussion in recent years concerns the question of whether or not the *Albron* judgment can be interpreted broadly and can therefore also be applied to other types of triangular employment law relationships, such as payrolling. In the case of payrolling, the user undertaking recruits and selects the employees, these employees sign an employment contract with the payroll company (work agency) and are assigned to the user undertaking. Basically, the payroll company does no more than the administrative and financial obligations only of the user undertaking. The payroll employees are working on a permanent and exclusive basis at the user undertaking. Except for the fact that, in case of payrolling, the work agency and the user undertaking do not belong to the same group of companies, these constructions are very similar to the situation in the *Albron* judgment. It has therefore been argued that payroll employees are also legally affected by a transfer of undertaking at the user company and in such event thus transfer to the transferee, which has been confirmed in case law as well (ECLI:NL:RBMNE:2018:1476). Given the interests at stake, it seems likely that the Supreme Court will rule on this issue at some point.

United Kingdom (Richard Lister, Lewis Silkin LLP): The question has also arisen in the context of the UK's TUPE regulations – the Transfer of Undertakings (Protection of Employment) Regulations 2006 – as to whether the ECJ's judgment in *Albron* might apply to temporary agency workers assigned to work for the transferor. Although there does not appear to be a case directly on the point, such workers will probably fall outside the scope of TUPE, because of the absence of a direct contractual relationship with the transferor: the only express

agreement the worker is likely to have will be with the agency. As a result, the worker would not have a contract of employment with the transferor, which is a prerequisite for TUPE to apply.

The ECJ's judgment in *Albron* suggests there does not necessarily have to be a contractual link between the transferor and the worker concerned for the latter to be protected under the Transfer of Undertakings Directive, but that was in the context of an employee employed under a contract of employment with one company in a group who was permanently assigned to work for another company within the same group. The consensus in the UK is that courts and tribunals are unlikely to interpret *Albron* as requiring that agency workers, who lack any contract of employment with the transferor (or indeed another company within the same group), should nonetheless be regarded as in an 'employment relationship' with the transferor to whom they are assigned by the agency to work.

Subject: Transfer of undertakings

Parties: Anonymous plaintiffs – v – Do & Co AG (9 ObA 32/19z) resp. DoN travel railcatering GmbH (9 ObA 50/19x)

Court: Supreme Court (*Oberster Gerichtshof*)

Date: 15 May 2019

Case numbers: 9 ObA 50/19x; 9 ObA 32/19z

Internet publication: www.ris.bka.gv.at/jus

Creator: Oberster Gerichtshof (Austrian Supreme Court)
Verdict at: 2019-05-15
Case number: 9 ObA 50/19x; 9 ObA 32/19z