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Pay can only be modified with transferred workers' consent (BE)

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Summary

After the transfer of an undertaking (or part of one) the new employer cannot modify the transferred workers' wages without their consent. This decision of the Belgian Supreme Court of 14 November 2016 leaves no leeway to the transferee to unilaterally substitute certain contractual elements with new ones, even if the new salary scheme is more advantageous overall.

Facts

Mr B entered into the service of S.A. Siemens on 14 January 1985. On 1 October 2003, his division was transferred to S.A. Maquet Belgium in accordance with the Belgian rules on transfers of undertakings. On 6 October 2005, Mr B's contract was terminated for serious cause. In the course of the proceedings he initiated against S.A. Maquet, he claimed "frequency premiums" and variable pay for 2003-2005 on the basis of S.A. Siemens' bonus scheme. Mr B maintained that he remained fully entitled to these additional benefits as part of his employment contract with the transferor (S.A. Siemens) and that they were therefore wrongfully denied by the transferee (S.A. Maquet).

According to S.A. Maquet, the loss of these frequency premiums was a minor inevitable change as a result of the transfer of the undertaking. As compensation for being available on standby duty, paid annually on the basis of the number of days the worker had been available, these frequency premiums had been replaced with a daily compensation of EUR 120 for being on duty, paid weekly. With regards to the variable pay scheme, S.A. Maquet maintained that Mr B had not taken into account "the bigger picture" of his remuneration and in particular the fact that he had received an even more advantageous one-time bonus of EUR 1,000.

Judgment

Under Belgian law, the Transfer of Undertakings Acquired Rights Directive (2001/23/EC) is mainly implemented by the Collective Bargaining Agreement No. 32bis of 7 June 1985, concluded in the National Labour Council. Essentially, this case concerns the interpretation of Article 7 of CBA No. 32bis, which provides that the rights and obligations of the transferor from the existing employment contracts are transferred to the transferee by virtue of the transfer.

The Labour Court of Appeal of Mons ruled against Mr B, on the basis that the benefits claimed had been replaced by a more advantageous pay scheme and that he could not have the best of both worlds. Further, the Court considered that the transferee was entitled to make adjustments to the transferred workers' pay, as long as the changes were at least as advantageous.

Following the appeal lodged by Mr B, this decision was quashed by the Belgian Supreme Court: the Court held that the Labour Court of Appeal could not lawfully decide that the transferee was entitled to replace the existing pay conditions with new ones, even if these were more advantageous, without the worker's consent.

Commentary

In this decision, the Supreme Court explicitly confirmed that Article 7 did not allow for the transferee to change employees' pay without their consent.

This decision has been criticised[1] as it leaves the transferee without any *ius variandi*, i.e. the (albeit limited) right to modify wages and working conditions as a result of the transfer. It is argued that this disrupts the fair balance that Directive 2001/23 sought to ensure between the safeguarding of workers' rights in the event of the transfer of an undertaking and the rights of the

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1. PELTZER, L. "*Ius variandi* et transfert d'entreprise: quelques réflexions (critiques) autour de l'arrêt de la Cour de cassation du 14 novembre 2016", *JTT* 2017, p. 69-73.

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transferee to make the adjustments and changes necessary to carry on its operations (on this fair balance: C-426/11, *Alemo-Herron* [2013], paragraph 25). This seems contrary to the fundamental right of freedom to conduct a business, as protected by Article 16 of the Charter of Fundamental Rights of the European Union.

A legal basis for the transferee's *ius variandi* can be found in both Article 4§2 of Directive 2001/23 as well as in Article 10 of CBA No. 32bis, which state in similar terms that the employer shall be regarded as having been responsible for termination of the contract, if the contract is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee. Hence, it follows that the transferee can change working conditions, provided the changes are not substantial.

In the case of *Delahaye* of 11 November 2004 (C-425/02, paragraph 35) the Court of Justice ruled that if a post-transfer recalculation of an employee's pay leads to a substantial reduction of wages, this would constitute a substantial change to working conditions, tantamount to the termination of the contract as a result of the employer's action. Again, it follows that the transferee should be allowed to make changes as a result of a transfer, as long as these do not substantially affect workers' pay.

In *Scattolon* (6 September 2011, C-108/10, paragraph 75) the Court considered that the Directive allowed for a "margin of manoeuvre", allowing the transferee and the other contracting parties to arrange the salary integration of transferred workers in a way that is adapted to the circumstances of the transfer, provided this conforms with the aim of the Directive, namely to prevent workers from being placed in a less favourable position solely as a result of the transfer. By stating that the Directive prohibits less favourable conditions "overall", the Court seemed to imply that one should look at the broader picture, taking into account all elements of pay prior to and after the transfer and then check whether the workers are in a less favourable position overall after the transfer (paragraph 76). Moreover, the Court ruled that the Directive cannot usefully be invoked to obtain an improvement in pay or other working conditions as a result of a transfer (paragraph 77).

The Belgian Supreme Court seems to adhere to the point of view that "a contract is a contract" and that, even in the event of a transfer, its terms can only be modified with the worker's consent. As a result of the Belgian Supreme Court's interpretation of Article 7 of CBA No. 32bis, transferred workers may well find themselves in a more advantageous position as a result of the transfer.

Although the Directive does not affect the right of Member States to introduce laws or permit collective agreements that are more favourable to employees (Article 8), there is no indication that Article 7, which is phrased in nearly exactly the same terms as Article 3 of the Directive, was intended to enhance workers' rights beyond the scope of the Directive. The question is therefore whether the Belgian Supreme Court should have referred the case to the ECJ for a preliminary ruling on Article 7 (as required by Article 267 TFEU), in order to ensure it was interpreted in light of the wording and purpose of the Directive (C-106/89, *Marleasing*, paragraph 8), in other words, in a way that strikes a fair balance between workers' rights and the employer's fundamental freedom to conduct its business.

In practice, most employers have their own pay policies and seek to ensure these also apply to transferred workers, with adjustments where needed to safeguard their rights. In view of the Supreme Court's decision, a prudent employer should now make sure that matters are explicitly agreed, either on an individual or collective basis.

Comments from other jurisdictions

Bulgaria (Rusalena Angelova, Djingov, Gouginski, Kyutchukov & Velichkov): Based on Bulgarian law and court practice, in the event of a transfer, the employment relationships transfer from the transferor to the transferee under the same terms and conditions. The transferee is not entitled to make the new conditions of work worse than before and cannot change the amount of wages without the consent of the transferred employees – if the change is a decrease.

There is no case law about whether a transferee can unilaterally make changes that more advantageous to employees, but in Bulgaria, any provision of an employment agreement may be subject to amendment or supplement upon the mutual agreement of the parties. The opportunity for any kind of unilateral modification is extremely narrow, except for a few exemptions specifically set out in law – but one of those gives the employer the right to unilaterally increase an employee's pay. Therefore, if, for example, a bonus has been agreed in an individual employment agreement the employer will be bound by this and only allowed to modify it unilaterally by increasing it.

Thus, in Bulgaria the transferee is allowed to modify transferred employees' wages without their consent provided it raises them.

Finland (Kaj Swanljung and Janne Nurminen, Roschier Attorneys Ltd): In Finland, the transferee's obligation to stick to the employee benefits the transferred employees were entitled to while employed by the transferor depends on the instrument used by the transferor when granting the benefit.

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Under the Employment Contracts Act (55/2001, as amended) in a transfer of undertaking situation, rights, obligations and current employment benefits transfer to the new owner. Following the transfer, the transferee must also continue to observe the terms and conditions of the collective bargaining agreement ("CBA") applicable to the transferor until the date of its termination or expiry or the entry into force or application of another CBA. This is a mandatory provision and cannot be avoided by agreement.

In Finland, CBAs typically include provisions concerning, for example, pay, allowances and other benefits. After the expiry of the CBA, the transferee may immediately start to apply the CBA it applies to its own employees to the transferred employees. In effect, the transferred employees will no longer be entitled to the rights and benefits available under the expired CBA but will be entitled to those set out in the transferee's CBA.

The terms and conditions of the transferred employees' employment contracts may not be derogated from to their detriment. Employee consent is needed before altering the terms and conditions of an individual employment contract. The same applies to harmonising the terms and conditions of the transferring and existing workforce, unless the changes are unambiguously better than before. Thus, if a benefit or bonus has been agreed in the employment contract, this will pass to the transferee, unless it is impossible for the transferee to enforce, in which case, it will not transfer, but if the benefit is regarded as an essential part of the employee's salary, the transferee should strive to make compensatory arrangements.

Employee benefits may also derive from company policy or a unilateral decision by the company. It is open to interpretation whether employee benefits or entitlement to bonuses that deriving solely from company policy transfer. If the benefits are so well-established that they can be regarded as terms of employment (established practice), those benefits will, as a rule, transfer to the transferee. But, even an annual bonus does not qualify as a term of employment if the way it is distributed or its amount is decided on afresh each year.

Therefore, it is possible that a Finnish court would have ended up making a different decision in the case at hand. In practice, in the Finnish market, transferees usually strive to reach a consensus with transferred employees on any changes to their pay and benefits.

Cyprus (Panayiota Papakyriacou, George Z. Georgiou & Associates LLC): In the recent case of *Nikos Nikolaou – v – G.A.P Akis Express Ltd and Redundancy Fund*, issued on 29 April 2016, the employee had been employed since 2004 as a driver transporting mail and parcels, by G.A.P Akis Express Ltd (the 'Employer Company'), a local courier company which is a subsidiary of a logistics group in Cyprus (the 'Group').

In 2011, the Employer Company informed the employee that its transport and distribution department would transfer to G.A.P Vassilopoulos Express Logistic Ltd ('Logistic'), another subsidiary of the Group, and asked him whether he wished to continue being employed by Logistic. The employee refused to transfer to Logistic and remained with the Employer Company. Shortly afterwards, the Employer Company served notice of termination on the employee, stating that he was redundant because of a reorganisation of the business. The employee brought proceedings before the Industrial Disputes Court, claiming damages for unlawful dismissal or compensation by the Redundancy Fund if his dismissal was found to be due to redundancy.

In its defence, the Employer Company argued that the transport and distribution department in which the employee had been employed as a driver, had been taken over by Logistic and thus the employee had been dismissed for redundancy. The Redundancy Fund on the other hand, argued that no redundancy had arisen because the transport and distribution department of the Employer Company had wholly transferred to Logistic, which had carried on its operations.

In making its decision, the Court examined the three following issues:

1. Whether the employee's dismissal could be attributed to redundancy;
2. Whether the Employer Company's transport and distribution department was an organised and autonomous entity; and
3. Whether the employee's consent to the transfer was grounds to validate the transfer of his employment.

In considering whether the employee's dismissal could be attributed to redundancy, the Court found that the law providing for the Preservation and Safeguard of the Rights of Employees on the Transfer of Business, Facilities or Parts of Businesses (Law 104/(I)/2000), which implements EU Directive 2001/23/EC into Cypriot national law, applied to the case.

The Court observed that the Employer Company's transport and distribution department was an organised and autonomous entity that had been transferred to Logistic together with its vehicles and a substantial number of its employees, and had continued to operate and retain its identity even after the transfer. On this reasoning, and due to insufficient evidence as to any economic, technical or organisational alterations being carried out by the Employer Company, the Court held that no redundancy grounds arose to justify the employee's dismissal.

The Court noted that according to Law 104/(I)/2000, upon the transfer of a business, the transferor is released from its employer obligations, as those automatically transfer to the transferee irrespective of the employee's wishes, and any dismissal served by the transferor is taken over by the transferee. Thus, the consent of the

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employee is not needed and the transfer takes place automatically. Having regard to this, the Court held that the employee should have pursued his claim for unfair dismissal against Logistic and not against the Employer Company. It therefore dismissed his claim.

Greece (Elena Schiza, KG Law Firm): According to Presidential Degree 178/2002, which implements Directive 2001/23/EC in Greece, in the case of a transfer, the affected employees automatically transfer to the new employer under the same employment terms and conditions. One of the main questions about transfers concerns whether pay and benefits granted by the transferor can be changed by the transferee.

In principle, pay and benefits are part of the essential terms of the employment agreement, which automatically transfer to the new employer. Hence, the transferee is obliged to respect them. The consent of each employee is needed to avoid any unilateral detrimental changes to the employees' terms and conditions. Consent is also needed if a change suggested by the transferee is disadvantageous for employees compared to what they had before.

In the case at hand, the new employer replaced a particular benefit with a daily amount to retain employees on call, which proved more advantageous to the employees, as they were also given a one-off bonus of EUR 1,000. If a new employer provides better benefits than the ones they received under their old agreement, their consent is not required.

We fully agree that the Belgian Supreme Court should have referred the case to the ECJ for a preliminary ruling on Article 7. We consider that the Belgian Supreme Court decision was a departure from the scope of Directive 2001/23/EC, given that the Directive's aim is to protect affected employees against detrimental changes to their employment conditions, including all pay and benefits. In our view, the decision made in Belgium overlooks the fact that the employee was actually left in a better position than before and will affect the fundamental right of employers to conduct their business.

Italy (Caterina Rucci, Bird and Bird): Under Italian law, including general civil law principles, the unilateral modification of any agreement is prohibited, since the parties' consent is required. If, however, part of a business is transferred, the rules in Italy allow for an immediate change of the applicable national collective bargaining agreement (NCBA), under certain conditions – but even in this case, the employee has the right to maintain all pre-existing rights and entitlements, with the only exception being cases of insolvency.

In practice, a change of CBA always requires a harmonisation process of some kind (e.g. one CBA might have eight levels, whilst another has six). The trade unions have to be involved if more than 15 employees are transferring and the harmonisation will normally be done in a way that allows for changes, provided the right to maintain the level of the former working conditions (contained in Section 2112 of the Italian Civil Code) is respected.

Denmark (Christian Clasen, Norrbom Vinding): The issue at stake in this case report gives rise to a somewhat similar, yet different issue.

From early 2000 and before Directive 2001/23 entered into force, there was debate in Denmark about whether the exception in the old Directive (Article 3(3) of Directive 1977/187) regarding rights to pension benefits only covered payments out of a pension scheme or also covered the employer's and employee's pension contributions. If pension contributions were not covered, what would a transferee do when, as part of a transfer, it took over the obligations arising out of a collective bargaining agreement that the transferor was party to? Although a collective bargaining agreement might require the employer to be a member of a certain pension scheme, the transferee might not necessarily be able to join that scheme.

The EFTA Court decided on this matter in an Opinion in 1996 (Case no. E-3/95), holding that pension contributions were also covered under the exception in the Directive. However, the Danish legislator did not agree with the EFTA Court when implementing Directive 2001/23 and based its implementation legislation on the view that pension contributions were not covered by the exception in the Directive. This opinion also corresponded to the ECJ's judgments in the *Katia Beckmann* case (C-164/00) and the *Serene Martin* case (C-4/01).

In the Belgian case report, the issue was whether the transferee could replace one right with a right that was better in view of the transferee. The issue we are describing here was: what if the transferee wants to give the same rights but this is not legally possible?

In Danish the legal literature, the view generally held is that if a collective bargaining agreement requires employers to join a certain pension scheme and the transferee is not subject to that collective bargaining agreement, the transferee can move the pension schemes of the transferred employees to the transferee's own pension scheme, provided the contributions remain at the same level.

If the composition of the funds in the scheme changes, the transferee may have to obtain consent from the employees to the change, depending on whether the new arrangement will diminish the benefits employees are entitled to under the scheme. The deciding factor is whether the transferee can refer to justifiable reasons for not offering an identical pension scheme. If it can demonstrate that it has offered the best alternative to an identical pension scheme, this might amount to a justifiable reason.

Another related question is what the legal position of a transferee is after acquiring part of a company where

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key transferred employees have a stock option plan. If the Directive is interpreted strictly, the transferee might have to offer a stock option plan that provides equal benefits to that offered by the transferor. However, in most situations, the transferee will not be able to offer, what would amount to a stock option plan granting shares in another company (i.e. the transferor or the transferor's parent company). What happens in this situation is addressed neither in the Danish Act implementing Directive 2001/23 nor the explanatory works to the Act – nor is there any Danish case law on this subject.

In most cases, the stock option plan will specify what happens to the plan if there is a transfer of the company. Otherwise, if it is apparent from the plan that the employees must be employed by the company, they may very well be entitled to compensation, as the plan will terminate in this situation. Calculating their compensation is likely to be difficult, however, especially if the plan does not provide sufficient guidance, for example if it does not take into account potential increases in the value of shares.

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