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Dismissals anticipating a transfer of undertaking validated (HU)

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Summary

The Hungarian Supreme Court has held that within the context of the transfer of an undertaking, the transferee can terminate employment relationships immediately after the transfer for operational reasons and can commence preparations to that effect before the transfer.

Background

The Hungarian Labour Code defines the meaning of a transfer as follows: "*Rights and obligations arising from employment relationships existing at the time of transfer of an economic entity (organized grouping of material or other resources) by way of a legal transaction are transferred to the transferee employer*". Hungarian legislation follows the rules set out in Council Directive 2001/23/EC on transfers of undertakings (known as the Acquired Rights Directive). All affected employees working in those units transfer automatically to the transferee, with the same rights and obligations as they had before, on the effective date of the transfer.

However, an important rule is that by Section 36(1) of the Labour Code the transfer itself cannot be valid grounds to terminate employment relationships. This rule is designed to protect the employees against dismissal based solely on the transfer. This means that employees may claim any dismissal close to the date of the transfer is unlawful, on the basis that it was caused by the transfer itself.

Therefore, it was established practice that employers restructured their operations only after a certain time, so mitigating their risk. The transferee would ensure that it took some time to work out how the business functioned before identifying which jobs, if any, needed to be cut to improve efficiency and, in this way, it disconnected any dismissals from the transfer.

Note also that the transferee is obliged under Section 38(1) of the Labour Code to inform all employees affected, about the transfer in writing, within 15 days following such transfer, as well as about any changes to their working conditions.

Facts

The employee in this case had been employed as an administrator on a permanent basis at the transferor for over 20 years. At some point in 2014, it became clear that the business would be transferred to the transferee. It later became apparent that – from the start – the organizational chart produced by the transferee had not included the employee. rior to the transfer, in the second half of 2014, the transferee tried to offer the employee a different role (position) twice. First, it offered him a job with filing duties for four hours a day, and later, another administrative role for six hours a day.

The transfer took place on 31 December 2014 by merger. On 18 December 2014, the transferee gave the employee written information under the Labour Code about the transfer and changes to his working conditions, including the offer of part time work and the tasks related to that work. On 14 January 2015, the transferee terminated the employee's employment contract by ordinary notice, as of 15 April 2015. The claimant was exempted from turning up to work as from 16 January 2015.

The transferee deemed the dismissal necessary for the proper restructuring of the company and therefore it was effected as a redundancy. The employee had rejected the transferee's previous offers.[1]

The employee filed a claim stating that the notice was unlawful, as he had only been employed by the transferee for 14 days at the point of dismissal on 14 January

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1. While an employer may inform the employee that he will terminate the employment relationship unless the employee accepts the offer, this is not a legal requirement. It is not clear if this happened in this case.

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2015. Therefore, the dismissal was being made by reason of the transfer – which is prohibited under the Labour Code – rather than restructuring, as the transferee claimed. This point was made all the clearer by the fact that the transferee had already informed him that it had no intention of continuing his employment on the same conditions as before.

Both the court of first instance and the Court of Appeal upheld the employee's claim. While restructuring would have been a valid reason for dismissal, the fact that it was done only 15 days after the transfer – and was not included in its organizational chart from the beginning – made it a dismissal by reason of the transfer and hence unlawful.

Judgment

The Supreme Court reversed the decision of the appeal court, concluding that the dismissal had been lawful. It could see that the merger had impacted on the operational and the organizational structure of the transferee and resulted in the change to the employee's employment relationship bearing in mind the altered conditions of employment and the economic necessities of the transferee. However, according to the Supreme Court, this did not mean that the transferee could only employ the employee on the same terms as before.

The Court found also that there was no abuse of rights, since before the transfer, the employees were consulted about what their employment conditions would be after the transfer

The Supreme Court also highlighted that the claimant had not accepted the offer of changes to the terms of his employment contract, and that it was for that reason that the contract of employment had not been modified. The information provided to him under Section 38(1) of the Labour Code was therefore correct, based as it was, on his role at the transferee.

In line with the above, the Supreme Court stated that the lower courts had erred in holding that the dismissal had been unlawful. The fact that the operational reasons for the dismissal were already known prior to the transfer did not necessarily mean that they related to the transfer itself, which means in this case that the reason for dismissal was not the transfer itself, but operational reasons triggered before its being conducted. The employer is not prevented from changing the terms of the contract to reflect changes in the operation of the business that might happen following the transfer, since it is not an obligation of the transferee to uphold employment terms after the transfer in accordance with the above provisions of the Labour Code. Therefore, the offer of part-time employment prior to or following the transfer should not be considered unlawful or abusive.[2] This also means that offering part time or less preferential employment conditions in general after the transfer may not be regarded as unequal – and therefore unlawful – if the operation of business of the transferee and the new conditions of employment so necessitate.

The employee is entitled to decide whether he or she wishes to continue to be employed under the changed conditions. If the employee does not respond, the transferee may terminate the employment relationship by notice for operational reasons under Section 66(2) of the Labour Code.

In summary, the Supreme Court ruled that the fact that there was a transfer did not necessarily mean that the transferee could only employ the employees affected by the transfer and was required to do so under unchanged conditions. It could make certain employees redundant if there were genuine changes in the operating conditions of the business. In other words, the transferee could terminate employees employment relationship if it considered there was a need to restructure to improve efficiency, irrespective of the length of time since the transfer.

Commentary

The decision of the Supreme Court is very surprising as it removes the protective effect of Section 36(1) of the Labour Code that the transfer itself may not serve as a lawful reason for termination. As previously described, established practice was that any restructuring of an operation had to be made after a transfer, rather than in preparation for it, as actions taken close to the transfer date were deemed 'connected' with the transfer and were therefore unlawful.

In fact, even after a transfer, the practice was only to restructure the business once the transferee had had the chance to gain some experience of the transferred company so that it could genuinely understand what kind of organizational changes were necessary.

This is a groundbreaking decision, which seems to contradict the basic findings of the continuity of employment relationships and the organizational autonomy of business laid down in cases *Spijkers* (C-24/85) and *Klarenberg* (C-466/07). It is still unknown whether future transferees will be confident enough to rely on this decision when deciding whether to make employees redundant immediately before or after a transfer.

2. It is not a legal requirement to offer a new position. However, doing so can strengthen an employer's position in litigation.

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Comments from other jurisdictions

United Kingdom (Bethan Carney, Lewis Silkin LLP): Although it would be possible to terminate employment fairly under these circumstances in the UK, an employer would be well-advised to follow a slightly different procedure. The transferee is not the employer until after the point of transfer, so the transferee does not have standing to try to vary the terms of employment prior to the transfer. If an employee's existing role is disappearing as a result of restructuring caused by a transfer, we would advise that the transferor and transferee together consult employee representatives about the proposed changes before the transfer date, as part of their information and consultation obligations under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Then, once the transfer has happened, the transferee is the employer and can inform the employee that his or her role is disappearing and offer the available alternative employment. If the employee rejects the offer, it would be possible for the transferee to make the employee redundant (a potentially fair reason for dismissal). Although the transferor would have standing to dismiss the employee before the transfer date, it is likely that the liability for the dismissal would transfer to the transferee under TUPE, so this would not be in the transferee's interests unless it is done very carefully and the employee signs a settlement agreement waiving claims. This position would be complicated if there were proposed to be at least twenty dismissals, which would engage the obligation to consult about collective redundancies.

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