

Transfer of undertaking: employee can waive his rights

7 July 2009

Introduction

The question of whether it is possible to deviate from the Transfer of Undertakings Act (*Wet Overgang van ondernemingen*) is as old as the Act itself. In practice, situations occur in which an employer or employee wants to choose to deviate from what the Act prescribes. A customised solution is sought, even though the Act does not appear to leave a lot of room for this. However, in the [Bos/Pax ruling of 26 June 2009](#), the Netherlands Supreme Court held that an employee can waive the protection the Act offers him, albeit only under stringent conditions. This Legal Alert sets out the conditions stipulated by the Netherlands Supreme Court and how these conditions can be addressed in practice.

Main points regarding a transfer of undertaking

Protection of employees

If an undertaking is transferred, the employees of this undertaking at the time of the transfer enter into the service of the acquiring company by operation of law. In addition, these employees retain the rights and obligations resulting from the employment contract with the transferring

company.¹ This protection derives from mandatory law and may not be departed from to the detriment of the employees. Employees cannot waive the rights they are granted by the doctrine of transfer of undertakings. Moreover, their rights may not be reduced, not even with their consent.²

However, there are situations in which an employee does not need the protection offered by the Transfer of Undertakings Act. This is the case if an employee voluntarily ends his employment contract, or if the employment contract is terminated by virtue of an agreement that is freely concluded between the employee and the transferring company and/or the acquiring company.³

Right to information

An employer who intends to transfer all or part of his undertaking by virtue of Section 7:662 of the Dutch Civil Code will have to fully inform the employees involved in this transfer of their right to transfer to the acquiring company under the same employment terms and conditions; this follows

¹ Section 7:663 of the Dutch Civil Code (*Burgerlijk Wetboek*), which is the essence of the Transfer of Undertakings Act set forth in Sections 7:662-666 Dutch Civil Code. The Netherlands has implemented EC Directives 77/187 and 98/50 in this Act.

² ECJ 10 February 1988, NJ 1990, 423 (*Daddy's Dance Hall*), see further, inter alia: ECJ 25 July 1991, NJ 1994, 168.

³ ECJ 11 July 1985, NJ 1988, 907.

Transfer of undertaking: employee can waive his rights

from the *Rabobank* ruling (HR 27 October 2007, JAR 2007/285).

HR 26 June 2009, LJN: BH4043 (*Bos/Pax*)

Facts

Bos had been employed by Douwe Egberts – DE – since 1980. He worked in a department that handled DE's logistics operations. In September 2003, DE and Pax concluded an agreement by virtue of which DE contracted out its logistics work to Pax, which had been incorporated specifically for this purpose. The employees, including Bos, received a letter from DE confirming that as of September 2003 they would be in the employ of Detrex, a subsidiary of DE. Bos signed this letter in evidence of his approval. He continued to perform his work based on a secondment agreement concluded between Detrex and Pax. More than two years later, Detrex decided to dismiss all employees, including Bos. The employees could enter into the service of Pax as of the date of dismissal; Detrex and Pax believe that no transfer of undertaking was involved.

At that point Bos still took the position that he transferred to Pax by operation of law as of September 2003 as a result of a transfer of undertaking. The Sub-District Court judge hearing the case dismissed this point of view, and this interpretation was upheld by the Court of Appeal. The Court of Appeal *inter alia* held that it could be set aside whether or not a transfer of undertaking was involved in September 2003, because at that time Bos explicitly agreed to enter into the service of Detrex.

Bos, assisted by De Brauw, appealed to the Netherlands Supreme Court and – in brief – took the position that the sole fact that he signed the letter from September 2003 indicating his approval was insufficient to assume that he waived the protection he is offered by the Transfer of Undertakings Act. The Netherlands Supreme Court upheld this position.

Key findings of the Netherlands Supreme Court

Given that DE invited Bos to terminate his employment and enter into the service of Detrex, which was to actually perform the work to be contracted out to Pax, it appeared that no transfer of undertaking was involved. However, the Netherlands Supreme Court held that the course of events most certainly constituted a transfer of

undertaking. The fact that Bos relinquished the employment contract with DE and at the same time entered into the service of Detrex is an essential link in this transfer, according to the Netherlands Supreme Court. In this light, the Court of Appeal wrongfully concluded, based on the mere fact that Bos explicitly agreed to enter into the service of Detrex that in September 2003, that Bos had not entered into the service of Pax by operation of law by virtue of the effect of Section 7:663 of the Dutch Civil Code.

What requirements must a statement indicating approval satisfy in order to conclude that the employee waived the protection of Section 7:663 of the Dutch Civil Code?

According to the Netherlands Supreme Court, the statement indicating approval must satisfy the requirement that Bos voluntarily ended the employment contract with DE and in this way unequivocally waived the protection he is offered by Section 7:663 of the Dutch Civil Code.

DE should have done the following to ensure that Bos' statement indicating approval satisfied the above requirements.

First, DE should have given Bos the option to:

- i) remain in DE's service; this has the legal effect that as a result of the transfer of the part of DE's business in question to Pax, he would enter into the service of Pax by operation of law, or
- ii) enter into the service of Detrex, whether or not under compensatory terms and conditions of employment.

In addition – in conformance with the *Rabobank* ruling discussed above – DE should have sufficiently disclosed and explained the available choices to Bos and should have informed him fully regarding his legal position. According to the Netherlands Supreme Court, this would have been to ensure that Bos, who was confronted with a transfer of the business where he worked, if applicable could take an informed decision to waive the protection he had under the Transfer of Undertakings Act.

Comments

Even though solutions like the one DE and Pax chose have frequently occurred in practice, to date it was not clear to what extent these are permitted. It was not clear in particular how such agreements compare with the ECJ's clear point of view that an employee cannot waive the protection of mandatory law he is offered. The Netherlands Supreme Court has now confirmed that this main rule also applies in this type of situation, but also has indicated how this main rule can be departed from.

In its ruling, the Netherlands Supreme Court formulated stringent conditions. An employer will have to inform employees of their rights, not just of the main points, but inform them of all the details. He may not leave this up to the employee representation organisations involved in the transfer. The condition that employees must be offered the possibility to claim a transfer of undertaking may also lead to complications. After all, if this possibility is offered, an employee may still opt to enter into the service of the acquiring company, even though this is not the solution desired by the transferring company or the acquiring company.

However, it remains to be seen whether the risk that a transfer of undertaking will be invoked has increased as a result of this ruling. We do not feel this is very likely. The risk that an employee will not opt for the construction offered by the transferring company and the acquiring company already certainly existed before this ruling. In the past few years in particular, employees and trade unions have increasingly invoked rights under the Transfer of Undertakings Act and by doing so have rejected the wish of the transferring company and the acquiring company to deviate from this Act. Recent examples can be found in the *Heineken* and *ING* rulings.⁴

In addition, until the *Bos/Pax* ruling, it was not clear whether a construction like the one DE and Pax offered Bos was possible at all. This fact alone

entailed the necessary risks and uncertainty.

Thus, the *Bos/Pax* ruling also heralds good news for employers: at least there is clarity. If the conditions mentioned by the Netherlands Supreme Court are satisfied, a legally valid agreement can be made with an employee that he waives the protection he is offered by Section 7:663 of the Dutch Civil Code.

A practical application will chiefly have to comprise giving the employees involved clear information followed by a clear choice: either invoking the Transfer of Undertakings Act without any additional (transitional) measures or offering a different arrangement (agreed with the trade unions), which – as in the case heard by the Netherlands Supreme Court – has elements that are favourable to the employee. This will prevent, as in the *Bos/Pax* case, these favourable (transitional) measures from being chosen first, after which – once these measures have been “worked out” – the rights in the event of a transfer of undertaking can still be invoked nonetheless.

⁴ District Court of The Hague 22 February 2005, JAR 2005/63; Sub-District Court of Utrecht 15 March 2006, JAR 2006/80; Amsterdam Court of Appeal 29 May 2008, JAR 2008/218; and 's-Hertogenbosch Court of Appeal 17 July 2007, JAR 2007/211; Sub-District Court of Amsterdam 10 November 2008, JAR 2008/302.

Transfer of undertaking: employee can waive his rights

Contact information

If you have any questions on the subject of this Legal Alert, please get in touch with:

Stefan Sagel

T +31 88 888 1755

E stefan.sagel@debrauw.com

Amsterdam

Tripolis

Burgerweeshuispad 301

P.O. Box 75084

1070 AB Amsterdam

The Netherlands

T +31 88 888 1888

F +31 88 888 1889

London

5th Floor, East Wing

10 King William Street

London EC4N 7TW

United Kingdom

T +44 20 7337 3510

F +44 20 7337 3520

New York

650 Fifth Avenue, 4th floor

New York, NY 10019-6108

United States

T +1 212 259 4100

F +1 212 259 4111

This publication is intended to highlight issues.

It does not intend to be comprehensive or to provide legal advice.

If you no longer wish to receive our newsletter, please inform our Communications Department in Amsterdam or send an e-mail to: unsubscribe@debrauw.com