Transfer of employees is not always automatic

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A Polish company, part of an international capital group, experienced a period of internal changes. One department that had previously carried out certain business processes was divided between different entities—two newly established Polish subsidiaries. These entities will continue to provide services to the parent company under an intragroup transition service agreement (of a long-term or short-term nature). During the preparations for this manoeuvre, it turned out that the only "asset" the client wanted to transfer to the newly established company was employees. Is this solution possible at all?

Clients often want to transfer employees automatically to a new entity. But this effect occurs only when the change in structure entails the transfer of all or part of the workplace to another employer within the meaning of Art. 23[1] of the Labour Code. Verifying that this is actually the case can be very difficult, and an incorrect assessment of the situation can generate numerous problems—particularly when the group includes a complex structure of entities that are employers operating in various locations, and under the contracts between the employers work is *de facto* performed for a different company in the group than the one that is formally the person's employer, or cross-employment is involved.

Transfer of workplace independent of the parties' intent

In practice, the transfer of a workplace (or part of a workplace) need not be connected exclusively with the sale by the prior employer of its enterprise or an organised part of its enterprise (or other transaction generating a comparable effect, such as lease of an enterprise). The list of activities that result in transfer of a workplace (i.e., actions causing "automatic" transfer of employees) is much broader. But it does not necessarily include a bilateral contract between the existing employer and an entity that would like to take over its employees. This is because the effect provided for in Labour Code Art. 23[1] is independent of the parties' intention, and cannot be caused by submission of mutual declarations by these entities with the intention of transferring the employees. Under Polish law an employment contract is binding on the parties who concluded the contract, and a change in the contract (including a change to the parties) should also reflect the wishes of the employee.

The assessment of whether there can be an "automatic" transfer of employees in a specific case is also difficult because the concept of transfer of a workplace or part of a workplace is not defined in the Polish Labour Code (Art. 23[1]), nor in its EU "original," Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (the Transfer of Undertakings Directive).

Thus in such cases all the factual circumstances must be considered, in accordance with the test formulated by the Court of Justice in its judgment of 18 March 1986 in 24/85, *Spijkers* (and supplemented and expanded in a series of later rulings). There the court held that in determining whether there has been a transfer of an undertaking, it is necessary to consider "the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred," and—perhaps above all—"the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended."

Key role of supervisors

In our many years of practice, we have dealt with numerous cases involving HR-based sectors, where a group of employees can in itself constitute an autonomous economic unit subject to transfer. We can see from this perspective that in assessing whether a given situation may result in transfer of a workplace or part of a workplace, it is increasingly important to examine the extent to which the management structures and roles of the old (and new) supervisors are preserved.

For example, according to the judgment of the Court of Justice of 29 July 2010 in C-151/09, *UGT-FSP*, which is important in practice, a transferred economic entity preserves its autonomy within the meaning of Art. 6(1) of Directive 2001/23/EC if the powers granted to those in charge of the entity within the organisational structures of the transferor remain essentially unchanged within the organisational structures of the transferee. This refers to "the power to organise, relatively freely and independently, the work within that entity in the pursuit of its specific economic activity and, more particularly, the powers to give orders and instructions, to allocate tasks to employees of the entity concerned and to determine the use of assets available to the entity, all without direct intervention from other organisational structures of the employer."

As the court explained, "The mere change of those ultimately in charge cannot in itself be detrimental to the autonomy of the entity transferred, except where those who have become ultimately in charge have available to them powers which enable them to organise directly the activities of the employees of that entity and therefore to substitute their decision making within that entity for that of those immediately in charge of the employees."

Risk of erroneous determination

If the employer erroneously assumes that employees have been "automatically" transferred to another entity, it can have far-reaching consequences. In one aspect, this involves social insurance contributions and advances against personal income tax, which the old employer continues to be responsible for if there has not been a transfer under Labour Code Art. 23[1]. In addition, if the new employer terminates the employment contract of an "acquired" employee, it is very

likely that the employee will challenge the correctness of the termination in the labour court. This is because if the employee was never actually "acquired" by the new employer, the new employer also cannot terminate that employee, and any notice to this effect can be disputed before the court.

Difficult and costly individual transfers

So what should the employer do when there cannot be an "automatic" transfer of employees in the given situation? In that case, the transfer of employees may be achieved by dissolving the employment contract with the old employer and concluding a new employment contract with the new employer. But this solution also has its drawbacks.

First, it requires a great amount of administrative effort. Documents must be prepared for each employee in connection with the end of his employment (e.g. agreement dissolving the employment, final accounting, employment certificate), as well as documents required for commencement of the new employment (e.g. new employment contract, notice of terms of employment, notice on processing of personal data).

Second, if the restructuring covers a larger number of staff, it may meet the conditions requiring compliance with the burdensome procedure for group layoffs. This applies to an employer employing at least 20 people which in a period of 30 days or less delivers a notice of termination of employment contracts to 10 employees (if total employment is less than 100), 10% of employees (if total employment is 100 to 299), or 30 employees (if total employment is 300 or more). Significantly, employees whose employment is dissolved by mutual agreement, at the employer's initiative, as part of a group layoff, are also counted towards these limits if this affects at least five employees. Therefore, in a change of employers through dissolution of the old employment relationships and formation of new employment relationships, it is essential to plan and schedule the entire process, properly and in great detail, and to include appropriate provisions in the agreements signed with the employees, to ensure that if there is a labour inspection the employer is not exposed to an allegation of failure to comply with the Group Layoffs Act.

Third, apart from the risk of non-compliance with the group layoff procedure, there is also a risk associated with the obligation to pay severance benefits. Regardless of whether the employer is required to follow the formal procedure for group layoffs, if it employs at least 20 people there is a risk that it will have to pay severance benefits even if it has concluded an agreement with the departing employee. The amount of the severance pay ranges from one month's to three months' salary, depending on seniority (those employed less than 2 years are entitled to one month's salary; from 2 to 8 years, two months' salary; 8 years and up, three months' salary). However, the severance pay may not be higher than 15 times the minimum monthly wage (thus the maximum severance in 2020 is PLN 39,000). This risk can be minimised, however, by including appropriate provisions in the agreements concluded with employees dissolving their employment contracts.

Fourth, it should be borne in mind that departing employees will also be entitled to receive an equivalent for accrued but unused annual leave, which in some cases can greatly increase the cost of the entire operation. An equivalent for unused leave is a benefit treated the same as salary, meaning that the employee cannot waive the equivalent he is entitled to. This also applies where the new employer undertakes to provide the employee additional leave in an amount corresponding to the leave accrued under the old employer.

Conclusions

In short, when planning internal restructuring and division of business units, it must be borne in mind that the transfer of employees to another entity doesn't always depend solely on the intention of the employer. "Automatic" transfer of employees occurs as a result of transactions causing the transfer of the workplace or part of the workplace. If it appears from the circumstances of the case that the continuity of the operations and identity of the workplace will not be preserved after the planned restructuring, the employees will not be automatically transferred. In that case, transfer may be achieved by dissolving the existing employment contracts and concluding new ones with the new employer, but that may prove a more complicated and costly solution.

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