

Federal Labour Court: New Developments regarding Notification Duties and the Right to Object Where a Business Changes Owners

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Cologne, 10.08.2017

Introduction

Where a business is sold, the letter that must be sent to employees informing them of the transfer of business and their correlative right to object to the transfer of their employment contracts to the purchaser of the business, presents significant challenges for employers in practice. The case law applies such strict standards to the necessary content of such letters at the factual level that there is often legal uncertainty as to the information which has to be provided in a particular case.

If it later emerges that the notice informing the employees of the transfer was defective, this will mean that the employee's one-month time limit for an objection to the transfer of his or her employment contract will not have begun to run. Instead, the employee will acquire an "eternal right of objection", which he or she will be able to successfully exercise even years after the transfer and which will only be restricted by the doctrine of laches. Decisions on this topic are thus always particularly highly charged.

Headnotes

1. Failure to give notice of the new owner's privileged treatment as regards the social compensation plan pursuant to § 112a (2), first sentence, of the Works Constitution Act (Betriebsverfassungsgesetz – BetrVG) will prevent the time limit for lodging an objection pursuant to § 613a (6), first sentence, of the German Civil Code (Bürgerliches Gesetzbuch – BGB) from beginning to run.

2. The defect in the notice will be cured by operation of law after the expiry of a privileged period of four years from the date that the new owner's business is established. As from the time of the establishment, a one-month time limit for lodging an objection begins to run according to § 613a (6), first sentence, of the German Civil Code in respect of the defective notice of transfer.

(Federal Labour Court, judgment of 15 December 2016 – 8 AZR 612/15)

Decision

As part of the execution of a contract for the sale of a business, the plaintiff's employment contract was transferred to the purchaser pursuant to § 613a (1), first sentence, of the German Civil Code with effect from 1 January 2008. The acquisition agreement was concluded between the seller-defendant and its legal successor (the plaintiff's previous employer) on the one hand and the purchaser and its parent company (plaintiff's future employer) on the other hand. The purchaser was a newly established company, which was possibly eligible for privileged treatment in respect of its social compensation plan pursuant to § 112a (2), first sentence, of the Works Constitution Act.

According to this provision, a social compensation plan cannot be imposed on a newly established company during the first four years of its existence. Under the terms of the acquisition agreement, the previous employers had agreed to make a restructuring and loss compensation payment in the amount of EUR 280 million ("negative purchase price") to the purchaser as part of a comprehensive package of measures. In addition, the parties had agreed to a moratorium on staff redundancies for a fixed period of time and, also for a fixed period of time, a similar moratorium on closing down the transferred business.

This was supplemented by the issue by the purchaser's parent company of a hard letter of comfort in its favour. The employees, including the plaintiff, were not informed of all of the above circumstances in the letter notifying them of the transfer of the business. The plaintiff did not at first object to the transfer of his employment contract and worked for the purchaser from 1 January 2008 with-

out lodging any objections. It was not until spring 2013 when the purchaser informed its employees that it intended to discontinue its business at the end of the same year that the plaintiff belatedly exercised his right of objection.

The plaintiff sought a declaration that there was an employment relationship between the parties that would remain in force over and beyond 31 December 2007, due to the fact that he had lodged a valid objection to the transfer of business. The Federal Labour Court rejected the claim.

It left open the question of whether the failure to inform the employees about the new owner's privileged treatment as regards the social compensation plan pursuant to § 112a (2), first sentence, of the Works Constitution Act made the notice defective because the exception provided for in § 112a (2), second sentence, of the Works Constitution Act did not apply. In any case, any defect in the notice had in the meantime been cured. The expiry of the four-year period of privileged treatment constituted a "legal turning point". The court found that as a result of this, the one-month time limit for lodging an objection pursuant to § 613a (6) of the German Civil Code had begun to run and that this time limit had already expired at the time that the plaintiff exercised his right of objection.

Furthermore, the court did not regard failure to mention the above-mentioned circumstances surrounding the acquisition agreement as grounds for considering the notice defective. These were merely components of the acquisition agreement which did not constitute the "reason" for the transfer of business within the meaning of § 613a (5) No. 2 of the German Civil Code or belong to "its economic consequences" pursuant to § 613a (5) No. 3 of the German Civil Code. In particular, it could not be inferred from the package of measures that the purchaser was in a precarious economic or financial situation. Instead, it indicated that the parties were seeking to avoid a drain on liquidity and wished to ensure that there were adequate recoverable assets. The court also held that § 613a of the German Civil Code does not provide a guarantee of ongoing employment.

Comments

The decision is welcome. On the one hand, the Senate refines the definition of the necessary content for proper notice to employees and, on the other hand, it restricts their "eternal right of objection".

Practitioners may now finally assume that it will always be necessary to inform employees that the purchaser may be entitled to privileged treatment as regards a social compensation plan pursuant to § 112a (2), first sentence, of the Works Constitution Act. The fact that the legal situation is unclear in this respect because the exception in § 112a (2), second sentence, of the Works Constitution Act could apply, will not relieve the employer of this burden.

Unlike the lower court, the Federal Labour Court did not examine the question of whether the plaintiff was prevented from asserting his objection by the doctrine of laches since more than five years had elapsed since the transfer of business and his right of objection had expired. Instead, the court ruled on a second set of circumstances in this decision in which a right of objection can extinguish entirely independently of the doctrine of laches, even if a notice informing employees of the transfer of a business is defective.

The Senate (Federal Labour Court decision of 19 November 2015 – 8 AZR 773/14, NZA 2016, 647) had already adopted a similar approach in a recent decision on multiple transfers of businesses. It held in that decision that an employee's right to object to the transfer of his employment contract to a previous (second) employer in the case of a subsequent transfer of the business from such second employer to a third employer could extinguish at a later time although the first notice informing the employee of the transfer was formally defective. Whether the Federal Labour Court will continue along this path and thus gradually water down what has been until now a very strict approach in the case law, will be awaited with a certain degree of suspense. In the meantime, sellers will need to apply the utmost of care in drafting notices to their employees informing them of a transfer of business, if for no other reason than that the sale of a business involves an unpredictable staff situation and is thus associated with considerable economic risks for both parties to such a transaction.

Legal Update

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Daniel Grünewald on +49 221 33660-508 or by email to dgruenewald@goerg.de. For further information about the author visit our website www.goerg.com.

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