

Case Reports

2017/23

Suspension of a recovery plan is not a transfer-triggering event (BU)

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Summary

The Bulgarian Supreme Court ruled to the effect that the Bulgarian Labour Code ('BLC') provides for the automatic transfer of employees only in the circumstances set out in the BLC. The employment protection given by the BLC cannot either be broadened or narrowed. The suspension of a recovery plan which leads to the restoration of insolvency proceedings (and therefore the return of the company from the transferee that had been executing the failed recovery plan back into the hands of the transferor) did not lead to the automatic transfer of employment.

Facts

The provisions of Article 123 and Article 123a of the BLC set out exhaustively which types of events lead to the automatic transfer of employees. Article 123 was originally introduced in 1986 and has been amended several times in order to make it compliant with Directive 2001/23. It provides that employees transfer from the transferor to the transferee if the business (or part of it) is sold or otherwise transferred permanently. Article 123a was introduced in 2006 to regulate the employment effects of other types of changes, such as when a business is leased, rented out or a concession granted, or when such an agreement ends.

The plaintiff filed claims under Article 213(2) of the BLC, stating that the employer – a company undergoing insolvency proceedings – had unlawfully refused to let him work. He sought compensation of BGN 10,108

plus interest of BGN 1,102. The defendant challenged these claims and stated that it was not in fact the employer of the plaintiff.

The first instance court rejected the claims as groundless. It was ascertained that the plaintiff had entered into an employment agreement with the defendant as employer on 28 July 1999. By a court resolution dated 7 December 2004 the defendant had been declared insolvent and insolvency proceedings had commenced. In 2007 the court had approved a recovery plan and the insolvency proceedings were terminated. The recovery plan provided for the sale of the company as a 'going concern'. Later in 2007, the company executing the recovery plan became the legal successor of the defendant, when a 'transfer of going concern agreement' entered into effect. By virtue of Article 123, paragraph 1 of the BLC, the employment relationship between the plaintiff and defendant (i.e. the transferor) automatically transferred to the company executing the recovery plan (the transferee). In 2012 the competent court suspended the recovery plan, restored the insolvency proceedings with respect to the defendant, declared the latter bankrupt and terminated its activities.

The plaintiff claimed that as a result of the restored insolvency proceedings the automatic transfer of employment had ended and the employment relationship had been restored. The plaintiff wanted to work at the defendant but was not allowed. He claimed this was unlawful.

Although the first instance court rejected this claim, the second instance court ruled that the defendant and its trustee were jointly liable to pay the claimed compensation. It held that the restored insolvency proceedings had nullified the transfer of going concern agreement and the original employment relationship was back in place.

The defendant filed an appeal presented the following questions to the Supreme Court:

1. *Does Article 123, paragraph 1 of the BLC apply and is an employment relationship automatically restored to the previous employer in a situation where a recovery plan has been suspended and this results in the termination of the agreement for transfer of the business as a going concern?*
2. *If a company stops its activities because of insolvency proceedings, does this mean that it is not possible to admit employees to perform their employment duties?*

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Judgment

With respect to the first question, the Bulgarian Supreme Court ruled as follows:

The provisions of the BLC guarantee the rights of employees, as they are considered to be the weaker party in employment relationships. However, the protection is limited by mandatory provisions of Bulgarian law. In European law, protection in the case of transfers of undertakings is limited by explicitly listing the events to which Directive 2001/23 applies. This approach takes into account the interests of both parties to the employment relationship.

Article 123 and Article 123a of the BLC are set out individually in order to highlight their different scope and legal consequences. The protection offered by these provisions is mandatory and can neither be expanded, nor narrowed.

The Supreme Court held that Article 123, paragraph 1 of the BLC did not apply to the suspension of recovery plan. Article 123 of the BLC lists the situations to which transfer of employment applies exhaustively and the current case did not fall within it. In other words, the legislator has not provided for a situation in which a recovery plan is suspended because the recovery company has failed to fulfil its obligations and this leads to a change to the employment relationship – from the transferee back to the transferor. Thus, there was no valid employment relationship between the plaintiff and the transferor employer.

The Court did not address the second question because it was irrelevant, given the lack of an employment relationship between the plaintiff and the defendant.

The Supreme Court rejected the claims of the plaintiff as groundless.

recovery plan in the course of insolvency proceedings) is not regulated by Article 123a but by Article 123 of the BLC and thus the suspension of the recovery plan does not lead to a transfer of the employment relationships back to the transferor. This position is compliant with Directive 2001/23.

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Commentary

The legislator has separated Articles 123 and 123a of BLC in order to stress that they are different in scope and have different legal consequences, in that upon the events set out in Article 123(1), the ownership of the enterprise is transferred to another employer. By contrast, the events listed in Article 123a(1) concern only temporary changes in ownership of the enterprise.

Article 123a is implemented in accordance with Article 8 of Directive 2001/23, which entitles Member States to introduce laws which are more favourable to employees. Only the events listed in Article 123a concerning temporary changes in ownership, result in restoring the employment relationship from the transferee to the transferor once the term of the rental, lease or concession expires. Transfers of a going concern (as a part of a