CALCULATING THE NOTICE PERIOD WHEN THE EMPLOYMENT CONTRACT IS TERMINATED AFTER A TRANSFER OF UNDERTAKING UNDER CBA NO. 32*BIS* OF THE NATIONAL LABOUR COUNCIL

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I. INTRODUCTION & THE ISSUES DEFINED

After the law harmonizing the status between blue- and white-collar workers (Unified Status Act) entered into force, the question arises as to how should the notice period be calculated when an employment contract is terminated after a transfer of undertaking under CBA No. 32*bis*[1], especially if the transferee and the worker conclude a new employment contract after the transfer whereby the acquisition falls under CBA No. *32bis* and whereby the length of service completed by the worker is recognized.

The question is how should the notice period be calculated for an employee who was hired by the transferor before 1 January 2014 and who was transferred in the context of CBA No. 32*bis* after 1 January 2014 and is then fired by the transferee.

Should the calculation of this worker's notice period be made in two steps, using the transfer rules under the Unified Status Act,

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1 CBA No. 32*bis* of 7 June 1985 on safeguarding employees' rights when the employer changes as a result of a transfer of undertakings pursuant to an agreement and on governing the rights of the employees who are transferred as a result of an acquisition of assets after bankruptcy.

or does the application of Directive 2001/23/EC[2] and CBA No. 32*bis* result in the safeguarding of the length of service transferred, and can the employer that concluded a new employment contract with the worker terminate the employment contract taking into account the new notice periods as if the employment contract had been concluded after 1 January 2014, whilst recognizing the length of service completed earlier by the worker?

At the same time, there is the question whether the Directive and CBA No. 32*bis*, besides safeguarding the length of service, also give rise to the right to safeguard the original hiring date. The author examines how the length of service should be calculated in such situation and whether, in this regard, a parallel method can be applied when calculating the length of service in successive employments with "the same employer." Or is the length of service completed in such situation considered a "conventional length of service"?

In conclusion, the questions whether concluding a new employment contract results in a novation of debt, or whether the new employment contract is null because it contravenes a higher legal standard, will be examined.

II. CALCULATING THE NOTICE PERIOD AFTER THE UNIFIED STATUS ACT ENTERED INTO FORCE[3]

Since the Unified Status Act entered into force, the length of service completed at the time of the employment contract's termination is the only criterion for calculating the termination notice period, at least for workers who were hired *after* 1 January 2014. For workers who were hired *before* 1 January 2014, the notice period is calculated in two steps: first, based on the worker's capacity as a blue- or white-collar worker, his or her wage, and the length of service that he or she completed on 31 December 2013; and second, based on the length of service completed starting from 1 January 2014. The result from each of the two steps are added together and then becomes the total termination notice period.

From that perspective, it is important to know whether only the step-two calculation should be applied to the worker who was transferred under CBA No.

[2] 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, *Pb.L.* 82/16. Originally: Council Directive 77/187/EEC of 14 February 1977 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 businesses.

[3] For an overview of the dismissal rules under the Unified Status Act and an overview of 5 years of case-law on the matter, see: O. WOUTERS and A. CRAUWELS, "Vijf jaar toepassing van de ontslagregels onder de Wet Eenheidsstatuut (WES)" [Five years of application of the dismissal rules under the Unified Status Act], *Or.* 2019, 214-248.

32*bis* and who concludes a new employment contract with the transferee in which the length of service that he or she has completed is taken over (i.e., the hiring is after 1 January 2014 and the length of service is consequently increased by the length of service completed earlier), or whether the calculation must be done in two steps, whereby the original date when the transferor first hired the worker is the starting point.

The result is essentially different depending on the calculation method used. The worker is detrimentally affected if the date of the new employment contract with the transferee is used as starting point for the calculation.[4]

III. SAFEGUARDING EMPLOYEES' RIGHTS IN A TRANSFER OF UNDERTAKING

A. GENERAL PRINCIPLES

Directive 2001/23/EC and CBA No. 32*bis* govern the transfer of undertaking and the safeguarding of employees' rights and obligations. Article 3(1) of the Directive states that the transferor's rights and obligations arising from an employment contract or employment relationship existing on the date of the transfer will, by reason of such transfer, be transferred to the transferee. CBA No. 32*bis* contains an identical provision.

The aim of the Directive is to make it possible for employees who are faced with a change of employer to be able to remain employed with the new employer under the same conditions as those that he or she had agreed upon with the transferor. The purpose of the Directive is to ensure, as far as possible, that the employment contract or the employment continues unchanged with the transferee so that the employees affected by the transfer of the undertaking are not placed in a less favourable position solely as a result of the transfer.[5]

The Court of Justice has repeatedly held that the transfer of undertaking may not cause the existing situation of the employees to become worsened. Advocate

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4 An example: the white-collar worker mentioned above, who started working at the transferor on 1 March 1997, is transferred on 1 December 2018 in the context of CBA No. 32*bis*, signs a new employment contract at this occasion, and is dismissed on 1 February 2021. He is entitled to a notice period of 45 weeks if the starting point is the date when a new employment contract was created whereby the notice period is calculated taking into account the length of service transferred.
The same worker is entitled to a notice period of 17 months and 24 weeks, however, if the notice period is calculated based on the original start date of employment.

5 CJEU 10 February 1988, *Daddy's Dance Hall*, no. 324/86, *JTT* 1988, 229, commentary; CJEU 14 September 2000, *Collino*, C-343/98 *Jur.* 2000, I-6659; CJEU 26 May 2005, *Celtec*, C-478-03, *JTT* 2005, 360.

General Bot expressed this in his opinion in the *Scattolon* judgment as follows: "*The purpose of the directive is to prevent the transfer as such from being treated as a pretext to worsen the employee's existing position, by reducing or ceasing to grant entitlements already acquired.*"[6]

In its judgment of 16 November 2016, the Court of Cassation held that it follows from Article 7 of CBA No. 32*bis* that the transferee may not change the wage conditions that existed in the transferred undertaking without the employee's consent. The fact that the transferee had replaced certain wage conditions with equivalent or possibly even more advantageous benefits for the employee was irrelevant in that regard.[7]

The Court of Cassation held in its judgment of 19 May 2003 that the transfer of obligations encompasses the transfer of the transferor's obligations in the employment relationship between the employer and the employee and also its obligations towards the transferred employees that arise from the employment contract or the employment relationship and that exist before the date of the transfer.[8] This ruling was confirmed by the Court of Cassation in its judgment of 13 September 2010: when the transfer is aimed at part of the undertaking, the transferor's rights and obligations that arise from the employment contracts existing on the date of the transfer are transferred automatically by operation of law, and this, despite the conflicting intention of the transferor or the transferee.[9]

B. TRANSFER OF THE EMPLOYMENT CONTRACT IN THE STATE IT IS IN

The employment contract is transferred in the state it is in. If the employment contract was suspended by the transferor or terminated by the transferor, it is transferred in that state to the transferee. It is important to note that the transferee and the transferred employee do not have to conclude a new employment contract: therefore, the transfer does not lead to the dissolution or the termination of the employment contract. Neither is the employment contract that originally existed with the transferor replaced by a new contract.[10] In a transfer of undertaking, the

Met opmerkingen [EE1]: Note that the case no. you cited in the footnote is wrong (typo in the Dutch file). It should be C-108/10 (and *not* C-109).

6 Opinion of Adv. Gen. Y. Bot of 5 April 2011 before the CJEU 6 September 2011, *Scattolon*, no. C-108/10.

7 Cass. 16 November 2016, *JTT* 2017, 74. Regarding this, see: L. Peltzer, "Ius variandi et transfert d'entreprise: quelques réflexions (critiques) autour de l'arrêt de la cour de cassation du 16 novembre 2016" [*Ius variandi* and transfer of undertaking: some reflections (criticisms) about the Court of Cassation judgment of 16 November 2016], *JTT* 2017, 69.

8 Cass. 19 May 2003, *JTT* 2013, 287.

9 Cass. 13 September 2010, *JTT* 2010, 438 and *Pas.* 2010, 2252.

10 N. THOELEN, *Conventionele overgang van ondernemingen* [Conventional transfer of undertakings], Brussels, Larcier, 2015, 118, with reference to case-law.

employment contract does not terminate, and the rights that arise from the existing employment contract are transferred to the transferee at the time of the transfer.[11]

The Labour Court of Appeal of Ghent confirmed that, because of Article 7 of CBA No. 32*bis*, the transferor's rights and duties that arise from the employment contract existing at the time of the transfer is transferred to the transferee automatically by operation of law for the sole reason of this transfer.[12]

C. SAFEGUARDING THE LENGTH OF SERVICE IN A TRANSFER OF UNDERTAKING

The Court of Justice held repeatedly that under Article 3(1) of the Directive (and thus also Art. 7 CBA No. 32*bis*), the rights that are attached to the length of service rights are transferred to the transferee. In the *Collino* judgment, the Court held that Article 3(1), first para. of Directive 77/187, [predecessor of Directive 2001/23/EC], must consequently be interpreted as meaning that "*in calculating the rights of a financial nature attached, in the transferee's business, to employees' length of service, such as a termination payment or salary increases, the transferee must take into account the entire length of service of the employees transferred, both in his employment and that of the transferor, in so far as his obligation to do so derives from the employment relationship between those employees and the transferor, and in accordance with the terms agreed in that relationship.*"[13]

The principle of safeguarding the length of service with the transferor derives also from the later *Scattolon* judgment in which the Court held that Article 3 of Directive 77/187 even precludes the transferred workers from suffering, in comparison with their situation immediately before the transfer, a substantial loss of salary by reason of the fact that their length of service with the transferor, equivalent to that completed by workers in the service of the transferee, is not taken into account when determining their starting salary position with the latter.[14]

THOELEN notes rightly that taking over the length of service based on CBA No. 32*bis* draws heavily on the notion of "the same undertaking" under Article 37/4 of the Employment Contracts Act. That article stipulates that the termination notice periods are calculated by taking into account the length of service completed at the time when the notice period starts to run, whereby the term "length of service" is to be understood as the period during which the employee remains in the service of "the same undertaking" without interruption. THOELEN notes that the Directive and CBA No. 32*bis* do not contain any actual update

11 N. THOELEN, *Conventionele overgang van ondernemingen* [Conventional transfer of undertakings], Brussels, Larcier, 2015, 120.

12 Labour Court of Appeal Ghent, 14 February 2005, *Soc.Kron.* 2005, 321.

13 CJEU 14 September 2000, *Collino*, no. C-343/98, *Jur.* 2000, I-6659.

14 CJEU 6 September 2011, no. C-108/10, *Scatallon*.

regarding the rule in the Employment Contracts Act. According to THOELEN, the advantage, if CBA No. 32*bis* applies, is that the employee, when considering the length of service he completed with the transferor, must not rely on the concept of "the same length of service" to estimate the termination notice period partly based on the length of service completed with the transferor.[15]

IV. THE POSSIBILITY TO ALTER THE EMPLOYMENT CONTRACT AFTER A TRANSFER OF UNDERTAKING[16]

Although the Directive and CBA No. 32*bis* provides for the safeguarding of the transferred workers' employment conditions, the transferee can change the employment conditions of the transferred workers and harmonize them with those of its own workers. Various judgments of the Court of Justice draw the lines within which this possibility to change can be utilized. In the *Daddy's Dance Hall* judgment, the Court of Justice held that an employee cannot waive the rights conferred on him by the mandatory provisions of Directive 77/187 even if the disadvantages resulting from his waiver are offset by such benefits that, taking the matter as a whole, he is not placed in a worse position. Nevertheless, the Directive does not preclude him from agreeing with the new employer on altering the employment relationship, in so far as such national law permits that in situations other that the transfer of undertakings.[17]

In the *Celtec* judgment, the Court of Justice held that, for the purpose of applying Article 3(1) of Directive 77/187, employment contracts and employment relationships existing on the date of the transfer between the transferor and the workers assigned to the undertaking transferred are deemed to be handed over, on that date, from the transferor to the transferee, regardless of what has been agreed between the parties in that respect.[18]

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15 N. THOELEN, *Conventionele overgang van ondernemingen* [Conventional transfer of undertakings], Brussels, Larcier, 2015, 120.

16 For an analysis on the safeguarding and the harmonization of employment conditions after a transfer of undertaking, see S. RAETS and N. THOELEN, "Het belang van de verkrijger bij overgang van onderneming volgens Cao nr. 32*bis*" [The transferee's interest in the event of a transfer of undertaking under CBA No. 32*bis*], *JTT* 2015, no. 1214, 145-152 and N. THOELEN, "Arbeidsvoorwaarden bij overgang van onderneming: beton of rubber?" [Employment conditions in the event of a transfer of undertaking: concrete or rubber?] in *Arbeidsovereenkomstenwet na 40 jaar … opnieuw anders bekeken* [Employment Contracts Act 40 years later … through another perspective], Brussels, Larcier, 2018, 317327.

17 CJEU 10 February 1988, *Daddy's Dance Hall*, no. 324/86, *JTT* 1988, 229, opinion.

18 CJEU 26 May 2005, *Celtec*, C-478-03, *JTT* 2005, 360.

The workers therefore cannot waive the rights that the Directive has conferred on them and their rights may not be diminished, even if the workers had agreed on their being diminished. Even if the worker receives new benefits as compensation for the disadvantages and, taking the matter as a whole, he is not placed in a worse position, he cannot validly agree on this diminishing. If the transferor itself was able to change the employment conditions of the transferred workers, the transferee has the same possibilities to do so. The Directive does not preclude that the transferee and the transferred worker agree on altered employment conditions, but only in so far as the national law permits such alteration in situations other than a transfer of undertaking.[19]

This case-law of the Court of Justice was confirmed later in the *Watson Rask*[20], *Collino*[21], *Martin*[22], and *Scattolon*[23] judgments. The opinion of Advocate General Alber in the *Martin* judgment is clear: "*A distinction must be made between the fact that the possibility of waiving rights arising under a contract of employment or employment relationship is generally ruled out — whether or not there is a transfer — and the possibility of agreeing to vary terms of employment. Such agreement is permissible in so far as such an alteration is permitted by the national law applicable to the employment relationship.*"[24] As noted above, the Court in the *Scattolon* judgment held that the only effect of the applicability of the Directive is to prevent transferred workers from being placed, "*by reason only of the transfer*," in a less favourable position than they were in before the transfer.[25]

The transferee and the transferred worker can therefore agree mutually after the transfer to alter certain employment conditions. Such alteration is possible in so far as the hierarchy of the sources of law is respected.[26]

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19 CJEU 10 February 1988, *Daddy's Dance Hall*, no. 324/86, *JTT* 1988, 229, opinion.

20 CJEU 12 November 1992, *Watson Rask*, C-209/91, *Jur.* 1992, I-5755.

21 CJEU 14 September 2000, *Collino*, C-343/98 *Jur.* 2000, I-6659.

22 CJEU 6 November 2003, *Martin*, C-4/01 xxx. This judgment dealt with the harmonizing of conditions offered regarding early retirement. Since the transfer was the reason that caused the employees' position to become worsened, any approval of this change from the employees is in principle invalid.

23 CJEU 6 September 2011, *Scatallon*, C-108/10.

24 Opinion of Adv. Gen. S. Alber before the CJEU 6 November 2003, *Martin*, C-4/01.

25 CJEU 6 September 2011, *Scatallon*, C-108/10.

26 N. THOELEN, "Arbeidsvoorwaarden bij overgang van onderneming: beton of rubber?" [Employment conditions in the event of a transfer of undertaking: concrete or rubber?] in *Arbeidsovereenkomstenwet na 40 jaar … opnieuw anders bekeken* [Employment Contracts Act 40 years later … through another perspective], Brussels, Larcier, 2018, 322.

V. THE TERM 'LENGTH OF SERVICE' FOR CALCULATING THE NOTICE PERIOD[27]

A. GENERAL PRINCIPLES

Article 37/4 of the Employment Contracts Act stipulates that the notice period must be calculated taking into account the length of service completed at the time when the notice period starts to run. The term 'length of service' is understood as the period in which the worker remains in service with the same company without interruption. This concept, introduced by the Unified Status Act, was actually not new and basically confirmed established case-law and legal doctrine.[28]

B. THE TERM 'THE SAME EMPLOYER' IN DETERMINING THE LENGTH OF SERVICE

It has been held repeatedly in case-law that if multiple employers are considered 'the same employer', the length of service completed without interruption at multiple employers must be added up for the purpose of determining the termination notice period.[29]

The Court of Cassation concluded that the words 'the same employer' mean "*the economic unit of operation that makes up the company, regardless of the changes to its governance or legal personality*."[30] The fact that the legal structure was changed[31] or the company's governance changes during employment is irrelevant.[32] In the judgment of 18 May 1992, the Court of Cassation held that the white-collar worker is considered to be working for the same employer if he has

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27 For thorough research on how the length of service affects the length of the notice period, see: A. WITTERS, "Anciënniteit en het einde van de arbeidsovereenkomst" [Length of service and the end of the employment contract], *Or*. 2000, 87-98; A. DESMADRYL, "Anciënniteit en opzeggingstermijnen: over de vlag en de lading" [Length of service and notice periods] in *Arbeidsovereenkomstenwet na 40 jaar … opnieuw anders bekeken* [Employment Contracts Act 40 years later … through another perspective], Brussels, Larcier, 2018, 475-488 and B. PATERNOSTRE, "L'ancienneté servant de base au calcul du délai de préavis" [The length of service as basis for calculating the notice period], *Ors*. 2016/9, 2-29.

28 Explanatory memorandum of the Draft Bill on introducing a unified status between blue- and white-collar workers as regards termination notice periods and *carens* day (first day of sick leave) and accompanying measures, *Parl. St.* Chamber 2013-14, no. 3144/001, 15-16.

29 For a recent overview of the case-law on the term "the same employer" in the context of Article 37/4 Employment Contracts Act, see A. DESMADRYL, "Anciënniteit en opzeggingstermijnen: over de vlag en de lading" [Length of service and the end of the employment contract] in *Arbeidsovereenkomstenwet na 40 jaar … opnieuw anders bekeken* [Employment Contracts Act 40 years later … through another perspective], Brussels, Larcier, 2018, 483-487.

30 Cass. 8 October 2018, AR S.14.0006.N-S.14.0059.N.

31 Cass. 15 April 1985, *JTT* 1985, 356, commentary.

32 Cass. 9 March 1992, *RW* 1992-93, 291, commentary.

performed the same work successively without interruption for two employers that have agreed on the principle that one takes over a certain business activity of the other.[33]

Changing the legal status of the company as a result of solely changing the company type or as a result of a merger with another company, a transfer to another company, a demerger, etc. does not result in a change of the worker's employer.[34] WITTERS notes rightly that in applying Article 7 of CBA No. 32*bis*, all of the transferor's staff must be transferred to work for the transferee, while safeguarding the individual employment conditions. These individual employment conditions, which must be adhered to mandatorily, cover the worker's length of service also. In the event of a conventional business transfer, all workers of the transferor consequently work for the transferee while the length of service they have completed at the transferor are preserved.[35] [36]

The Labour Court of Appeal of Liege, Namur Division, held that the worker who was employed without interruption by two companies whereby the second company continued the business activities of the first, even in absence of a conventional transfer of undertaking, is entitled to a termination notice period that is calculated based on the combined lengths of service completed at the two companies.[37]

VI. NO CONVENTIONAL LENGTH OF SERVICE ALLOCATED WHEN CALCULATING THE NOTICE PERIOD AFTER ACQUISITION UNDER CBA NO. 32*BIS*

Parties can have a conventional length of service clause stipulated when they conclude an employment contract with each other. They can also agree that this conventional length of service must be taken into account when calculating the

33 Cass. 18 May 1992, *RW* 1992-93, 293, opinion of PG H. LENAERTS.

34 A. WITTERS, "Anciënniteit en het einde van de arbeidsovereenkomst" [Length of service and the end of the employment contract], *Or*. 2000, 89.

35 A. WITTERS, "Anciënniteit en het einde van de arbeidsovereenkomst" [Length of service and the end of the employment contract], *Or*. 2000, 90.

36 WITTERS notes correctly that even in the event of a transfer of assets of a bankrupt company or of an undertaking that forms the object of a judicial composition through cession under Art. 14 CBA No. 32*bis*, the length of service that the employee has completed at his previous employer, as well as any period before the acquisition during which his activity was uninterrupted as a result of bankruptcy or judicial composition with cession, is taken into account in determining the notice period or severance pay. As regards the employees who are transferred, the length of service completed must consequently be kept for the purpose of terminating the employment contract. See: A. WITTERS, "Anciënniteit en het einde van de arbeidsovereenkomst" [Length of service and the end of the employment contract], *Or*. 2000, 90.

37 Labour Court of Appeal of Liege (Namur Division) 14 December 2000 *JTT* 2001, 256.

termination notice period. The Labour Court of Appeal of Liege held on 20 November 2018 that the clause in an employment contract that entered into force after 1 January 2014, whereby a length of service that started from 18 April 1989 must be taken into account when calculating the notice period in the event of contract termination, must be interpreted to mean that the notice period must be calculated in accordance with the law that applies to a contract concluded after 1 January 2014, without taking into account the transfer provisions that apply to contracts that entered into force before that date.[38]

This ruling is logical: the worker effectively entered into service after 1 January 2014 and his termination notice period must be calculated by taking into account the length of service he completed at the employer that dismissed him and increased by the conventional length of service that was agreed upon in the employment contract. Naturally, the original start date of work does not get changed to the fictitious start date that was agreed upon between the parties for the purpose of calculating the notice period.

The Labour Court of Ghent, Kortrijk Division, held that the transfer scheme did not apply if the start date of the employment contract was after 1 January 2014 and was preceded by employment as a temporary agency worker through which the employment period as temporary agency worker must also be counted as part of the length of service for determining the notice period. The Labour Court held that the latter employer's takeover of the length of service completed as a temporary agency worker (whereby the latter employer was previously the user of the temporary agency worker) does not mean that an employment contract would be created retrospectively or would be presumed to exist between the former temporary agency worker and his former user. The Labour Court held correctly that the employment contract between employer and employee that entered into effect after 31 December 2013 and that provides for the transfer scheme stipulated in the Unified Status Act therefore does not apply.[39, 40]

However, the situation is entirely different to the one in which the worker is transferred as part of a transfer of undertaking in the sense of CBA No. 32*bis*. In

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38 Labour Court of Appeal of Liege, 20 November 2018, *Soc.Kron.* 2020, 60 and *JTT* 2019, 457.

39 Labour Court of Ghent (Courtrai) 15 November 2017, no. 16/716/A, unpublished, cited by O. WOUTERS and A. CRAUWELS, "Vijf jaar toepassing van de ontslagregels onder de Wet Eenheidsstatuut (WES)" [Five years of application of the dismissal rules under the Unified Status Act], *Or.* 2019, 224.

40 The question regarding the start date of the employment contract that is preceded by a period of temporary agency work is also discussed in the judgment of 6 February 2020 rendered by the Constitutional Court regarding workers' results payout (Constitutional Court, 6 Februari 2020, *RABG* 2020/14, 1141). In response to this ruling, VAN HOORDE gave his opinion correctly by stating that it cannot be inferred from the judgment of the Constitutional Court that moving the start date of the employment contract is a new general principle. (E. VAN HOORDE, "Verschuift anciënniteit als uitzendkracht de begindatum van de arbeidsovereenkomst?" [Does the length of service completed as a temporary agency worker move the start date of the employment contract?] (commentary under Constitutional Court, 6 February), *RABG* 2020/14, 1147-1151).

such scenario, there will surely be no debate about it if parties do not conclude a new employment contract after the transfer.

Nor can there be any debate about it if the parties did conclude a new employment contract, for example, to harmonize the employment conditions. First of all, it must be noted that the concluding of such employment contract is not necessary from a legal perspective: the employment contract and employment conditions are transferred to the transferee even if no new contract is concluded.

According to the Court of Justice case-law cited above, such contract can be concluded though, but only in so far as the national law permits such alteration in situations other than a transfer of undertaking. Since the provisions on the length of the notice period under the Employment Contracts Act are mandatory law, the transferor will not be able to agree with its workers on terms that deviate from these provisions. Therefore, after the transfer of undertaking, the transferee will not be able to do this either.

Moreover, the question arises as to whether there is any difference in treatment between, on the one hand, the worker who *did not* conclude a new employment contract after a transfer in the context of CBA No. *32bis*, and, on the other hand, the worker who *did* conclude one after the transfer. The same difference in treatment would be created anyway between the worker who was part of the object of the transfer and the worker who was not. After all, for the latter worker, the employer does not even have the possibility to reduce the termination notice period.

The transferee cannot invoke the fact that the transferred worker, with whom it has concluded a new contract, would have validly waived the rights he acquired when he worked for the transferor, as this would contravene a public policy rule, as laid down in Article 5 of CBA No. 32*bis*.[41]

VII. CONCLUSION

After a transfer of undertaking in the context of CBA No. 32*bis*, the termination notice period must be calculated taking into account the original start date of employment.

If the original employment contract was concluded before 1 January 2014, the notice period must be calculated in two steps, taking into account the system introduced by the Unified Status Act.

[41] Labour Court of Appeal, Liege, 8 September 1986, *JTT* 1987, 318. The Court of Appeal probably meant that the rules were mandatory law.

The fact that the transferor and transferee might have possibly concluded a new employment contract in which the length of service of the transferred worker is recognized does not change anything.

Directive 2001/23/EC, CBA No. 32*bis* and case-law of the Court of Justice preclude the fact that the transfer of undertaking would result in the workers' position being worse than their existing situation. In any event, in a transfer of undertaking, the employment contract is transferred in the state in which it is in.

Although the transferee has the possibility to alter the employment conditions after the transfer and to harmonize them, case-law of the Court of Justice precludes by all means that the workers transferred, for reason solely of the transfer, are placed in a less favourable position than they were before the transfer. Since the transferor does not have the possibility to reduce the notice period, the transferee does not have this possibility either.

Moreover, such stance is no more than a mere expansion of earlier case-law in which it was held that if multiple employers are considered "the same employer", the length of service that have been completed at multiple employers without interruption must be added up for the purpose of determining the notice period.