SUMMARY

2016/47 Transferor's undocumented practice of paying retirees more than required by law crosses to transferee, even though the transferee was unaware of the practice (GR)

<p>A company's unofficial practice of providing an extra amount on top of the statutory severance payable upon retirement is considered an acquired right which binds the new employer in the case of a transfer of the undertaking. This applies whether or not the transferee was aware of it.</p>

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Facts

The plaintiff in this case was a former crane truck operator for a construction company, EMMY. He was employed in 1985. In February 2004, his employer merged with another company, ALFAMIX and he became an employee of that company. He was informed that all of his rights and obligations, as agreed with EMMY, would continue unchanged. Subsequently, in November 2004, ALFAMIX merged with another company, DIONYSSOMARBLE. The plaintiff was again notified that all his rights and obligations arising out of his employment agreement had automatically transferred to his new employer. In October 2005, DIONYSSOMARBLE

terminated the plaintiff's contract on account of his retirement.

Greek law provides that if an employee fulfils the conditions of full retirement, he is entitled to receive an amount equal to 40% of the statutory severance pay. Accordingly, DIONYSSOMARBLE paid the plaintiff € 16,546, which was 40% of his statutory severance pay.

The plaintiff claimed before the Labour Authorities that that he was entitled to a payment equal to the full statutory severance pay, as this was provided in EMMY's collective bargaining agreement. However, investigation revealed that that agreement did not contain any such provision.

The plaintiff brought a claim before the Athens First Instance Court, now claiming that an unofficial practice existed at both EMMY and ALFAMIX to pay retiring employees an amount equal to 100% of the statutory severance pay. He claimed that this practice had existed in a uniform and continuous way, not related to specific individuals, for a long period of time – at least since 1983 and continuously thereafter. In other words, for 22 years prior to his retirement. The First Instance Court rejected the plaintiff's claim (decision 1433/2008).

The Athens Court of Appeal accepted the plaintiff's appeal, holding that the company did in fact have such a practice. It reversed the Athens First Instance Court decision, ruling that the plaintiff was entitled to an amount equal to 100% of the statutory severance pay.

The case reached the Supreme Court, which rejected the company's appeal and confirmed the Court of Appeal's decision, reasoning that a company practice to pay an additional amount equal to 100% of the legal severance pay had indeed existed. The plaintiff had implicitly accepted this and therefore the practice had become a term of his employment agreement. DIONYSSOMARBLE was bound by the practices of the plaintiff's former employer EMMY, which continued in force after the mergers with ALFAMIX and DIONYSSOMARBLE, since by law (Presidential Decree 178/2002, transposing Directive 98/50/EC) a transferee takes over all obligations arising out of the employment agreements of the transferor by operation of law. This obligation does not depend on the transferee being aware of the practice, as the Presidential Decree does not impose any conditions on its applicability and the defendant had not reserved its right to amend the practice.

Commentary

The interesting aspect of this case lies in the Supreme Court's express ruling that, in the case of a transfer, the new employer is bound by law by all obligations arising out of the existing employment agreements of the former employer irrespective of whether the new employer

knew about them. As it could be shown that the practice of providing an extra monetary benefit to retiring employees had existed at the time of the transfer, the new employer was bound by it.

Comments from other jurisdictions

The Netherlands (Ronalt Beltzer, University of Amsterdam): The Greek Supreme Court follows the rules set out by the ECJ in the Abels case (1986): all rights and obligations are transferred, regardless of their source. The term "rights and obligations" may not be interpreted restrictively. The only requirement is that the specific right exists – the employee need not be able to claim the right at the time of transfer. This is especially important in this case, in which the employee had been promised a surplus to his severance payment when he fulfilled the conditions for full pension. Under Dutch law, the outcome would have been the same.

Had the promise been based on a collective labour agreement, the outcome might have been different, since the transferee is not bound by the provisions laid down in such an agreement – see Article 3(3) of Directive 2001/23 and the Werhof (2006) and Parkwood (2016) cases. In this case, however, the promise had been made on an individual basis.

It should be noted that Directive 2001/23 contains an obligation on the employer regarding information and consultation, but this seems to exist only vis-à-vis the employees and, in particular, their representatives. Article 7 of the Directive does not, therefore, oblige the transferor to inform the transferee about specific arrangements (such as, in this case, the terms and conditions existing between the employee and EMMY and, later ALFAMIX) existing at the time of transfer. It is for the national legislator to address this issue.

The Netherlands (Peter Vas Nunes, BarentsKrans): This case is reminiscent of the Finnish Supreme Court's judgment of 26 October 2009 reported in EELC 2010/2 No 25. That case involved a supplementary pension scheme that had not been agreed in writing but was based on the transferor's usual practice. The judgment in that case, as well as the author's commentary and those from several other jurisdictions, turned around the fact that the term of employment in question related to pension. The fact that the term was based on practice rather than being explicit was not at issue.

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): According to the Finnish Employment Contracts Act (55/2001, as amended), the rights and obligations under employment relationships and the employment benefits related to them that are valid at the time of a transfer, pass to the transferee. Under Finnish law, any unknown or unrecorded obligations would transfer as part of this, since the Act does not contain any additional

conditions regarding the transfer of obligations.

Acquired rights are also transferred to the transferee. There is settled case law in Finland to the effect that employment benefits are considered as established rights. The Finnish Supreme Court gave a ruling in 1995 (KKO 1995:52) in which a Christmas bonus that had been paid annually for decades had established itself as a contractual term of the employment agreement – which the employer could not change unilaterally. This, regardless of the fact that a new decision was made each year to pay the bonus.

That said, not all benefits that employees receive become established as contractual terms of employment agreements. The nature of a benefit should be assessed on a case-by-case basis, taking into consideration the form and duration of the benefit, as well as any reservations made about it when the benefit was granted. For example, in a ruling by the Supreme Court in 1989 (KKO 1989:92), the employer's practice of rewarding long-term employees with monetary gifts had not become an established practice that the employer could not change.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): Unlike the situation in Greece, German law does not recognise statutory severance compensation upon retirement. However, there is one thing they have in common: By section 613a(1) of the German Civil Code, the new owner takes on the rights and duties under the employment relationships where a business passes to another owner by means of a lawful transaction. This applies to known rights and duties as well as to unknown. Moreover, it is irrelevant whether the promise made by the transferor was a standard or unusual one.

Subject: Transfers of undertakings, acquired rights

Parties: DIONYSSOMARBLE – v – D.R.

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