SUMMARY

2016/59 The Supreme Court confirms that the transferee should pay pension premiums left unpaid by the transferor (NL)

<p>This case confirms that if both the transferor and transferee are affiliated to the same mandatory industry-level pension scheme, following the transfer, the transferee is liable for due but unpaid <italic>pension contributions dating from before the date of the transfer</italic>.</p>

Summary

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Facts

The facts of this case originally appeared in EELC in 2013/35. The case has since been appealed. It concerns the following:

The cleaning company GOM was obliged by law to participate in a specific industry-level pension scheme. On 21 May 2008 a transfer of undertaking took place between GOM, as the transferee and VBG as the transferor. VBG, also a cleaning company and likewise obliged to participate in the same pension scheme, had failed to pay all pension premiums: there was an overdue payment amounting to nearly two million Euros.

It was agreed between GOM and VBG that all claims of pension providers regarding periods predating the transfer of undertaking, would remain at the risk and expense of VBG and these

were excluded from the purchase. Following the transfer, the pension scheme, however, demanded full payment from GOM of almost two million Euros.

GOM countered this claim with two arguments. It firstly argued that in the case at hand payment of pension contributions is based on statute (the Act on compulsory affiliation to an industry-level pension scheme – which does not require an agreement between employer and employee) rather than on an agreement between the employer and employee. Therefore, payment of pension contributions does not constitute a right that transfers upon a transfer of undertaking. Secondly it stated that, even if there is a right at stake that does transfer, the pension provider is not entitled to autonomously collect contributions that predate the transfer, as the transfer of undertakings legislation provides rights to employees rather than third parties, such as pension providers.

Judgment of the Court of Appeal

The Court of Appeal addressed three issues: (i) Does a pension based on affiliation to an industry-level pension scheme qualify as a "right or obligation arising from a contract of employment" as referred to in the Dutch Act implementing the Acquired Rights Directive?. If so (ii) does the obligation incumbent on VBG to pay pension premiums predating the transfer of undertaking transfer to GOM? And if so (iii) does the pension fund, as a third party, have the right to claim payment of the overdue pension premiums from GOM?

After extensively quoting Parliamentary history, the Court of Appeal drew the conclusion that pension is an employment condition, arising from the employment agreement, regardless whether this occurs due to mandatory affiliation to an industry-level pension or from an individual contract. It therefore is a right that transfers. The Court was not persuaded by GOM's argument that such a pension needs to be treated like income tax and social insurance contributions – which according to Dutch practice do not transfer. The Court found that unlike pension, income tax and social insurance contributions cannot be regarded as employment conditions, but rather as obligations deriving directly law.

The Court of Appeal also held that unpaid premiums that predated the date of the transfer should transfer across. It found that the transferor and transferee were jointly and severally liable for all obligations relating to the employment agreement before the transfer and for a period of one year afterwards. This meant that GOM was also liable. This view came not only from statute, but from a purposive construction of Parliamentary history. In addition, the fact that the transferor failed to pay its contributions to the pension fund had not resulted in the employees losing their pension entitlements, did not affect that conclusion.

With regard to the final issue, the Court of Appeal held that prior to the transfer, the pension

scheme had been entitled to claim overdue pension premiums from VBG. The obligation incumbent on VBG to pay these premiums transferred to GOM, which included the 'linked' right of the pension scheme to collect them. The Court of Appeal further noted that according to the statutes of the pension scheme both VBG and GOM were obliged to pay these premiums. The transfers of undertakings legislation entitled the pension scheme to collect pension premiums not paid by the transferor from the transferee.

GOM appealed to the Supreme Court, still arguing that (i) unpaid premiums predating the date of the transfer did not transfer; (ii) the pension scheme was not entitled to collect the premiums under transfers of undertakings law; and (iii) a pension based on affiliation to an industry-level pension scheme does not qualify as a "right or obligation arising from a contract of employment" as referred to in the Dutch Act implementing the Acquired Rights Directive.

Judgment

Starting with the last issue, the Supreme Court ruled that pension entitlements do transfer under Dutch law – certainly where both the transferee and transferor are obliged by law to participate in the same industry-level pension scheme. For this reason, a pension based on affiliation to an industry-level pension scheme should be regarded as a right or obligation that transfers. That conclusion is also in line with the system set out in the Dutch Pension Act.

The Supreme Court held that the transferee was liable for unpaid premiums predating the date of transfer. The Court followed the line of argument used by the Court of Appeal in full in this regard.

The Supreme Court then noted that the obligations arising from the pension involve three parties: the employee, the employer and the pension provider. The employer is obliged to pay the premiums it owes on behalf of the employee to the pension provider. The pension provider has its own separate right to collect those premiums. In the Dutch Act implementing the Acquired Rights Directive, there is no distinction between the obligation on the employer to pay the pension premiums it owes in respect of the employee and the obligation it has towards the pension scheme. Parliamentary history on the transfer of pension rights and obligations upon the transfer of an undertaking has it that the transferee is liable to pay any pension premiums owed before the date of the transfer. Parliamentary history also reveals that the transferee should take this into consideration when negotiating the transfer of a business.

Moreover, although the employees do not have a direct interest in claiming payment of the pension premiums, as the pension scheme is obliged by law to pay pension to employees regardless whether the premiums have been paid, in practice, if the pension scheme had no right to collect the pension premiums, it is likely that it would become underfunded and might

need to decrease its pension payments – and that would affect the employees. Against that backdrop, and given the aim of effective protection of employees' rights, a reasonable interpretation of Dutch implementation law leads to the conclusion that the pension fund has its own right vis-à-vis the transferee to collect pension premiums due based on transfers of undertakings legislation, even though the obligation predated the actual transfer. The Acquired Rights Directive does not preclude that conclusion, as Article 8 of that Directive allows Member States to introduce laws which are more favourable to employees than the provisions of the Directive.

Commentary

This ruling is in line with the ruling of the Court of Appeal judgment. It makes sense that pension entitlements deriving from a mandatory industry-level pension scheme should be considered rights as referred to in Article 3(1) of the Acquired Rights Directive. It also makes sense that the transferee should be liable for overdue pension premiums. The fact that obligations of the transferor under a contract of employment and arising before the date of the transfer transfer to the transferee has already been decided by the European Court of Justice in the case of Abels (ECJ 7 February 1985, case C-135/83). The Supreme Court does not refer to this case – or any other cases from the ECJ for that matter – but bases its ruling on the Dutch implementation law and Dutch Parliamentary history. However, the conclusion that the Supreme Court draws is the same.

The remaining question – can a third party, a pension scheme, autonomously claim payment of overdue pension premiums from the transferee that should have been paid by the transferor – is the thorny one. The Acquired Rights Directive itself appears not to grant a separate right to third parties upon a transfer of undertaking. Yet, the Supreme Court ruled that the law implementing the Acquired Rights Directive provides that a pension scheme does have an autonomous right to collect pension premiums. In doing so, the Court makes reference to Article 8 of the Acquired Rights Directive (additional rights for employees) – but this is not necessarily convincing. If an autonomous right arose from the Directive, it would be superfluous to refer to this Article. Indeed, Article 8 concerns additional rights for employees – not necessarily third parties. The fact that employees could be indirectly affected if a pension scheme was underfunded seems to have been the decisive factor.

The ruling may be a pragmatic one, based on the facts of the case, but some uncertainty remains. How far does the ruling extend? Do third parties other than pension schemes now have the right, based on the law on transfers of undertakings, to collect money from the transferee relating to other obligations predating a transfer?

Comments from other jurisdictions

Greece (Anastasia Kelveridou, KG Law Firm): According to Presidential Decree 178/2002, if the activity of an employer is continued by a new employer, then the transfer rules apply. Greek law provides that the transferor and transferee both remain jointly and severally liable for all claims arising from the employment relationship up to the date of the transfer (Article 4(1) Presidential Decree178/2002).

The majority of employees in Greece are required to be insured with the National Social Security Fund ('IKA'). In the case of the transfer of a business, the transferee becomes liable for any overdue social security contributions. The IKA may claim payment of overdue social security contributions directly from the transferee.

In our view, the Greek courts would rule that pension entitlements deriving from a mandatory pension fund should also be considered 'rights' as referred to in Article 3 of the Acquired Rights Directive and therefore the transferee would be liable to pay any overdue pensions contributions.

Austria (Christina Hiesll, Yonsei University): The question of the transferee's liability for 'old debts' that the transferor failed to pay has given rise to considerable litigation also in Austria. This is notably due to the seeming contradiction in the wording of the provisions transposing the Acquired Rights Directive: while section 3 of the law in question (AVRAG) stipulates that the transferee assumes the role of the employer for all employment relationships existing at the point of transfer "with all rights and duties", section 6 of the same law provides for the joint and several liability of transferor and transferee "for obligations stemming from an employment relationship with the transferor". Whereas both provisions do not contain any specifications as to who should be the addressee of these employer's obligations or the recipient of payments, section 6 refers to the applicability of a general rule of Austrian civil law according to which the acquirer of an undertaking assumes only those liabilities which he or she knew or should have known, and only up to an amount corresponding to the value of the undertaking.

This implies that, at any rate, the transferee is liable also for payment obligations stemming from an employment relationship which are not made directly to the employee but to a pension fund. Yet, it might be questioned whether this liability is unlimited and exclusive, as implied by section 3, or subject to the important limitations of the shared liability under section 6 AVRAG. The Austrian Supreme Court has repeatedly stressed the necessity to resolve the relationship between sections 3 and 6 in a way that is compatible with the Acquired Rights Directive. And since the limitations of section 6 AVRAG would not be

compatible with article 3(1) of the Directive ('The transferor's rights and obligations arising from a contract of employment [...] shall [...] be transferred to the transferee'), its application must be interpreted as covering only cases not falling under section 3 – i.e. notably obligations from employment relationships not existing any more at the point of transfer.

In a case like the one at issue before the Hoge Raad, a transferee might now argue that the mentioned case law of the Austrian Supreme Court does not apply, because pension schemes are exempt from the Directive's stipulations according to its Article 4(a), so that an interpretation in conformity with EU law is not necessary. Yet, I would assume that, for reasons of consistency alone, the priority rule stipulated by the Supreme Court applies also in cases outside the ambit of EU law, and where the employee is not the claimant of the contribution payment but the beneficiary of the pension entitlement. As a result, the transferee has to assume the full responsibility for payments related to existing employment relationships, i.e. also contributions to a pension fund.

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