SUMMARY

2014/10 All-in wages for small part-timers not prohibited (NL)

<p>The defendant in this case stopped paying its “small” part-time employees (those with contracts not exceeding 12 hours per week) their salary during paid annual leave, instead of paying them a higher “all-in” (or “rolled up”) hourly wage. Two unions challenged this change as being at odds with the law, but the court found in favour of the defendant. </p>

Summary

The defendant in this case stopped paying its "small" part-time employees (those with contracts not exceeding 12 hours per week) their salary during paid annual leave, instead of paying them a higher "all-in" (or "rolled up") hourly wage. Two unions challenged this change as being at odds with the law, but the court found in favour of the defendant.

Facts

This case involves a long-standing dispute between the largest Dutch group of retail stores, Albert Heijn ('AH'), and the two largest trade unions. The dispute centres around the collective agreements governing the parties' relationship inasmuch as they relate to paid annual leave, the mandatory 8% holiday bonus under Dutch law and certain other benefits that are not relevant for the purpose of this case report.

In The Netherlands, the standard procedure in respect of paid leave is for employees to take off time from work (holiday), during which time they continue to receive their salary and other benefits. The standard procedure in respect of the holiday bonus is for employees to receive, in the month of May, a sum equal to 8% of their annual base salary, the idea being that this bonus covers the extra expense usually associated with summer holidays. This system

works well for full-time employees, but many employers with a large number of employees who only work a few hours per week consider the system to be administratively burdensome.

In January 2009 AH, following the example of its main competitors, introduced a change in the way it remunerates its approximately 63,500 employees with a contract for 12 or less hours per week, also known as "small part-timers". Instead of (i) continuing to pay salary during their leave and (ii) paying an 8% holiday bonus in May, AH now pays its small part-timers an all-in hourly wage equal to their former base hourly wage plus a certain percentage in lieu of payment during leave plus the 8% holiday bonus.

The average small part-timer at AH is aged 19, works for seven hours per week and has been in AH's employment for 25 months.

On 18 February 2009 the unions applied for an injunctive court order requiring AH to refrain from paying its small part-timers all-in hourly wages and to revert to the former system of remuneration. The application was rejected in two instances (in March 2009 and, on appeal, in October 2009: see EELC 2010/21). In 2011 the unions brought regular (i.e. non-injunctive) proceedings. They asked the court to order AH to revert to the pre-2009 system of paying its small part-timers their salary during leaves as well as the 8% holiday bonus once each year. They argued that paying all-in hourly wages is age-discriminatory, violates Dutch law and is in breach of the relevant collective agreement.

Judgment

Dutch law, in line with Directive 2003/88, provides that employees shall continue to receive their salary during leave and that they may not substitute this right with monetary compensation except upon termination of their employment and except for leave in excess of the statutory minimum. The rationale is that this allows employees to actually take time off work. Paying employees all-in salaries creates a risk that they will not go on holiday and will therefore not enjoy the periodic time off work that is necessary to work safely. However, this does not mean that all-in wages are prohibited under all circumstances. In fact, the government has declared several collective agreements that expressly provide for all-in wages to be universally binding (i.e. giving them *erga omnes* effect), which it surely would not have done had that been unlawful.

The court followed AH's argument that paying small part-timers all-in hourly wages does not amount to a waiver of a right, but merely separates in time the worker's absence from work and the continued payment of salary. AH's new remuneration system does not prevent its small part-timers from taking up their annual leave, and in fact AH encourages them to do so. The fact that they have already received in advance the pay that they would have continued to

receive during their leave is unlikely to deter them from actually taking time off work, given that most of them are students for whom their job is no more than a source of supplementary income and given that for the average small part-timer the value of three weeks' paid leave is no more than € 91 gross. Moreover, there is no evidence that any of AH's small part-timers have complained about the new remuneration system since it was introduced four years ago.

As for the holiday bonus, the court held that including an 8% add-on in the hourly wage in lieu of an annual payment violates neither Dutch law nor the collective agreements in force between the parties.

Commentary

Remarkably, this judgment in this normal, non-injunctive procedure is shorter and less reasoned than the judgments in the preceding injunction proceedings that were reported on in EELC 2010/21. In those judgments the court considered the parties' arguments relating to the ECJ's ruling in *Robinson-Steele* (C-131/04 and C-257/04), where the ECJ held that Directive 93/104 (now Directive 2002/88):

"precludes part of the remuneration payable to a worker for work done from being attributed to payment for annual leave without the worker receiving, in that respect, a payment additional to that for work done. There can be no derogation from that entitlement by contractual arrangement"

but at the same time also held that that directive:

"does not preclude, as a rule, sums paid, transparently and comprehensibly, in respect of minimum annual leave [...] in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker".

I am told that the unions asked the court to refer questions to the ECJ. It is disappointing that the court saw no need to do this and, in fact, did not even refer in its judgment to this request. It remains to be seen whether the unions appeal the judgment.

The court also declined to address the argument that rolled-up paid leave discriminates (indirectly) on the basis of age and possibly on other bases as well.

The 2010 case report received comments from the Czech Republic and the UK. In the Czech Republic, employers are not permitted to pay employees 'rolled-up' holiday pay, but casual workers employed for no more than a few hours per week are not considered to be employees and are therefore not eligible to any holiday pay at all. In the UK, there has been much confusion about the implications of *Robinson-Steele*, with many employers wanting to

continue to pay rolled-up holiday pay and wages, particularly for shift workers, and anxious to rely upon the 'set-off' argument.

One may wonder why the unions in this case made the effort to challenge AH's practice. There seems to have been no urge by any of AH's employees to challenge that practice. In fact, the majority of AH's small part-timers might have preferred receiving a higher hourly salary rather than a lower one plus pay during leave. The unions' position strikes one as somewhat paternalistic and smacks of "we know better than our members what is good for them". However, I am told that the unions in this case were and are sincerely concerned that certain vulnerable groups of part-time workers - not only young workers, but also, for example, single mothers with little other income - may be financially forced to work years on end without taking up holiday.

Comments from other jurisdictions

Austria (Manuel Schallar): All Austrian collective bargaining agreements include a stipulation to pay a 13th and a 14th monthly salary ("holiday pay" and "Christmas remuneration"). If such extra payments are paid Austrian tax law applies a lower rate of tax of only 6% on them (in comparison to progressive income tax up to 50%). Therefore it is very uncommon but legally possible to include these extra payments into the monthly salary – as long as the employees are not less well off than in the case of a monthly salary plus the two additional monthly wages. In total they must earn the same salary, including the tax difference. The compensation for the latter would lead to a higher financial burden on the employer.

Payments in lieu of leave though are explicitly illegal during the employment relationship. Therefore such a rolled up holiday pay would not pay off the right to annual leave and the employee would be still entitled to take such leave in natura.

Denmark (Mariann Norrbom): Compared to Dutch law and UK law, Danish law seems very simple regarding the matter of rolled-up holiday pay.

Under the Danish Holiday Act, hourly paid employees are entitled to holiday pay amounting to 12.5% of the employee's pay. Monthly paid employees are generally entitled to pay during holiday and an annual holiday bonus of 1% of the employee's pay, but may opt out of this rule and receive holiday pay instead. In that case, the holiday pay will amount to 12% of the employee's pay. In both cases, the percentage may be changed by collective agreement.

The holiday pay is paid to the employee at the beginning of the holiday or – if the employment has been terminated – at the effective date of termination if this is earlier than the beginning of the holiday.

Under no condition – not even through a collective agreement – does an employer have the option of including holiday pay in the wages. Consequently, an arrangement like the one in the Dutch case reported above would be unlawful in Denmark – even if it had been endorsed by the trade unions.

Norway (Hans Jørgen Bender): The Norwegian Holiday Act states that rolled up holiday pay is unlawful, unless such arrangement is agreed in a collective agreement. An agreement between the employee and the employer with rolled up holiday pay will be deemed unlawful, and the employer will as a main rule be obliged to pay holiday pay in accordance with the Holiday Act, i.e. when the employee takes holiday, even if this means that the employer will in effect be paying twice.

United Kingdom (Bethan Carney): The legal position in the UK on rolled up holiday pay has not become significantly clearer since the case of *Robinson-Steele*.

Non-statutory guidance from the Government seems to indicate that it believes rolled up holiday pay to be unlawful. It initially advised employers to change their pay arrangements (if they used rolled up holiday pay) but said that whilst employers were in the process of changing their arrangements they might be able to set off pay from sufficiently "transparent and comprehensible" rolled up holiday pay arrangements against claims. It later changed that guidance to simply say that rolled up holiday pay arrangements were unlawful and that payment for annual leave should be made when the leave is taken.

In *Lyddon - v - Englefield Brickwork Ltd* [2008] IRLR 198, the EAT held that an employer was entitled to set off rolled up holiday pay against a worker's entitlement under the Working Time Regulations 1998. The court said in this case that whilst it was desirable that the sum attributable to holiday pay (or formula for calculating it) be set out in writing before a worker starts work, there was no exhaustive set of criteria which had to be satisfied before a tribunal could properly reach a conclusion on whether there was a clear and transparent contract term. In this case, the pay slip showed how much "holiday pay" was being paid each month.

The ca*se of Lyddon - v - Englefield Brickwork was heard after the ECJ's decision in* Robinson-Steele but the *Lyddon* case does not analyse the ECJ case particularly, or do anything other than refer to it and say that the conditions in *Robinson-Steel*e for set off had been met. In particular, the EAT decision did not give any consideration as to whether the right to set off might be time barred after companies had had a reasonable time to change their pay arrangements and stop using rolled-up holiday pay. Government guidance did not address this issue either and said little more than I have set out above.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Working time and leave, paid leave

Parties: CNV Dienstenbond and FNV Bondgenoten - v - Gall & Gall B.V., Etos B.V. and Albert Heijn B.V.

Court: kantonrechter (Lower Court) in Zaandam

Date: 21 November 2013

Case number: 526207/CV EXPL 11-7552

Publication: JAR 2014/29

Creator: Kantongerecht Zaandam (Cantonal judge Zaandam)
Verdict at: 2013-11-21
Case number: 526207/CV EXPL 11-7552