SUMMARY

2010/66: Employer may ‘level down’ discriminatory benefits (NL)

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Facts

Five (initially six) employees sued their employer Kaba, seeking a judgment ordering Kaba to add certain numbers of 'seniority days' and 'Payens days' to their balance of paid annual leave. The 'seniority days' were based on the applicable collective labour agreement, which provided (and currently, in 2010, still provides) that all employees are entitled to 25 days of paid leave per annum and that employees who on the first of January of any year are aged over 50, over 52, over 54, over 56 or over 58 are entitled to, respectively, 1, 2, 3, 4, and 5 additional days of leave. The 'Payens days' were also additional days of paid annual leave (coming on top of the seniority days), which Kaba had agreed to grant certain of its employees, depending on a mix of seniority (five years of service or more) and age (from age 55).

On 29 December 2006 management sent all staff a memo in which it noted that the provision in respect of seniority days and Payens days ('the Provision') was incompatible with the Age Discrimination in Employment Act, which is the Dutch transposition of Directive 2000/28, inasmuch as this directive outlaws age discrimination. The memo went on to state that, given this incompatibility, the Provisions were invalid, and that therefore Kaba would no longer apply them. A number of employees protested against this unilateral reduction of their terms

of employment and, when management refused to withdraw its decision, took Kaba to court. They claimed additional paid leave varying between 2 and 20 days each. The court of first instance, in a judgment delivered on 6 February 2009, turned down their claim, essentially reasoning as follows.

The Provisions undeniably distinguish between groups of employees on the basis of age. Therefore, the Provisions are in breach of the law unless they are objectively justified. There is no indication that the Provisions are an integral part of a more encompassing package of arrangements in the field of terms or conditions of employment. The Provisions appear to be unconnected to other terms of employment, standing more or less on their own. Given this fact, it is not possible to determine their aim. The only argument put forward by the plaintiffs as regards the justification of the Provisions is that it is a well-known fact that an individual's capacity to perform work diminishes with age. This is too vague a statement to justify age-discriminatory provisions such as the ones at issue. This means that – as per the Age Discrimination Act – the Provisions are null and void and therefore unenforceable. The court rejected the plaintiff's argument that a discriminatory term of employment is not null and void but merely voidable by the employee.

Judgment

The Court of Appeal began by noting that the plaintiffs' contracts lacked a 'unilateral amendment clause' and that therefore, given the Dutch (case-) law on the unilateral amendment of agreements, Kaba was not entitled to change their terms of employment unfavourably in the absence of a situation where insisting on the unamended terms would be 'unacceptable'. Clearly, it would be unacceptable to insist on the application of provisions that are illegal. Thus, the outcome of the case depended on whether the Provisions were legal, i.e. objectively justified.

The plaintiffs argued that this was the case. Their argument rested mainly on the fact that the collective agreement that had been in force in 2007, on which their claim was based, had meanwhile been replaced by a collective agreement that included a new chapter 16 on 'age awareness policy'. This new chapter called on employers to adopt various 'instruments' aimed at tailoring elderly employees' work to their age-related capabilities and challenges. The principal instruments were (1) annual performance reviews aimed at identifying age-related difficulties and what to do to address those difficulties, (2) job changes and job rotation, (3) changes in working times, job content, furniture, equipment, etc., (4) periodic medical examinations and (5) (re)training. The addition of this new chapter 16, so the plaintiffs contended, indicated that the Provisions, which were included in chapter 9, were part and parcel of a wider set of provisions establishing an overall 'age awareness policy'.

The court rejected this argument, finding that chapters 9 and 16 were not linked in any way and that therefore the Provisions could not be seen as an integral part of an overall age awareness policy. Thus, the appellate court upheld the lower court's judgment.

*[By way of explanation, the Equal Treatment Commission in March 2006 introduced the concept of age awareness policy (*leeftijds(fase)bewust personeelsbeleid*). This was done in response to concern that had arisen following a number of opinions in which the Commission had, rather dogmatically and inflexibly, held benefits awarded to elderly employees solely on the basis of their age or seniority, such as work time reduction without a corresponding drop in salary, exemption from shift duty, generous early retirement schemes and extra paid annual leave, to be in violation of the law. Since 2006, if such an age-related benefit does not stand alone but forms an integral part of a broader policy aimed at encouraging employees to continue working despite age-related physical and mental challenges and encouraging employers to retain such elderly employees, the Commission is willing to assess the legality of these benefits in the broader context of the employer's overall employment policies (including the steps taken to deter the employer from hiring exclusively younger staff).This so-called "contextual" approach has been accepted in a number of court judgments.]*

Commentary

This judgment is innovative for three reasons. This is the first time in published Dutch precedent that an employer was successful in applying the age discrimination rules to its advantage. Although Directive 2000/78 and the Dutch legislation transposing it were undoubtedly designed to operate for the benefit of employees, and were certainly not designed to be used against them, there is nothing in the text to prevent such use. On the contrary, the Dutch Age Discrimination in Employment Act provides explicitly that contractual provisions that are incompatible with the principle of non-discrimination are null and void (nietig). Had the Dutch legislator wished to limit this principle for the benefit of employees, it would surely have legislated that illegal contractual provisions are voidable, not void, as it has done in other pieces of legislation.

A second point to remark is that the appellate court is implicitly condoning 'levelling down'. This touches on the debate as to whether illegally favouring one group of employees over another should lead to levelling down, as the employer did in this case, or to levelling up, which in this case would have led to the younger employees receiving the same benefit as their elderly colleagues. The sex discrimination law, for example, proceeds from the principle

of levelling up. A female employee who is paid less than her male colleague for work of equal value, performed under similar circumstances, can claim the balance, even retro-actively. I expect the same would apply where an employee is treated less favourably in connection with race, religion, disability, etc. Suppose, for example, that the collective agreement in the case reported above had provided that Christian employees are entitled to five more days of paid annual leave than the remaining (majority of) employees, surely the latter would be able to claim the same benefit?

My third observation is that the court could perhaps have compensated the plaintiffs for their sudden loss of a significant benefit, had they asked for such compensation (which they did not). In Dutch practice it is quite common for courts to award such compensation, often in the form of an annually diminishing sum, thereby phasing out the benefit over a period of time.

Comments from other jurisdictions

France (Claire Toumieux and Aude Pellegrin): Negotiators of collective agreements will most certainly be interested by the approach of this decision. To our knowledge no such decision exists in France. So far we have only seen employees requesting that their benefits be levelled up. For instance, on 1 July 2009, the French Supreme Court held that a non-executive employee ('non-Cadre') was entitled to claim the extra days of annual paid leave afforded to executives ('*Cadres*") under a company wide agreement (see our article entitled 'Any benefit granted to a professional category should be based on objective reasons', EELC 2010-3). The question in France today is whether 'illegally' favouring one group of employees over another should lead to levelling down, as the employer did in the Dutch case, or to levelling up.

United Kingdom (Hannah Vertigen): It is likely that a court in the UK would have reached the same result as the Dutch court in this case. The award of additional holiday based on age would be directly discriminatory and, as such, only permissible if objectively justified (by showing that it is a proportionate means of achieving a legitimate aim). However, it is uncertain whether a UK court would adopt a levelling-down approach in circumstances where there was such a clear contractual right to the additional holiday.

Nonetheless, the 'levelling down' aspect of this case does have parallels with recent UK cases in which it has been found not to be unlawful age discrimination to apply a cap or a tapering effect to payments made under contractual enhanced redundancy pay schemes – *Loxley v BAE Systems Land Systems (Munitions & Ordnance)* Ltd [2008] IRLR 853 and *Kraft Foods UK Ltd v Hastie*, EAT0024/10, unreported. In both cases, the purpose of applying the cap or tapering

effect was to ensure that older employees did not get a large redundancy payment as well as the ability to start withdrawing pension benefits, and so receive a 'windfall'.

Subject: Age Discrimination

Parties: R. Baarslag and four others – v – Kaba Nederland B.V.

Counsel: A.A.M. Broos for plaintiffs, S. Kropman for defendant

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