SUMMARY

2013/35 Transferee liable for transferor’s pension premium arrears (NL)

<p>Both the transferor and the transferee are affiliated to one and the same mandatory industry-level pension fund. A transfer of undertaking occurs. The transferor has not paid all pension contributions due prior to the date of transfer. The pension provider attempts to collect these contributions from the transferee. The court holds that these contributions can successfully be claimed by the pension provider from the transferee based on the transfer of undertaking legislation.</p>

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Facts

The cleaning company GOM purchased a business from another cleaning company named VBG. Both companies are affiliated to the same industry-level pension fund that has been made compulsory on the basis of the Dutch legislation on compulsory affiliation to an industry-level pension fund. This purchase resulted in a transfer of undertaking. It was

clear from the outset that VBG had not paid all contributions due to the pension provider in the period up to the transfer. It was agreed between GOM and VBG that, among other matters all claims of pension providers regarding periods predating the transfer of undertaking, would remain at the risk and expense of VBG and were excluded from the purchase. When fixing the purchase price, the outstanding pension contribution payments were also taken into consideration (perhaps – this is no more than conjecture

–meaning that the fact of the arrears in contributions reduced the purchase price). Following the transfer, GOM registered all employees transferred to the pension provider in order to continue their pension scheme. The pension provider subsequently demanded full payment from GOM of the outstanding contributions that date from before the transfer of undertaking, amounting to approximately two million Euros.

In short, GOM argues that it cannot be held liable to pay these contributions to the pension provider based on two main arguments. It firstly argues that in the case at hand payment of pension contributions is based on statute (the act on compulsory affiliation to an industry-level pension fund, without an agreement between employer and employee being required) rather than on an agreement (a pension agreement between the employer and employee). Therefore, payment of pension contributions does not constitute a right that transfers upon a transfer of undertaking. Secondly, GOM states that, even if there is a right at stake that transfers, the pension provider is not entitled to autonomously collect contributions predating the transfer, since the transfer of undertaking legislation provides rights to employees and not to third parties, such as pension providers. In brief, according to GOM the pension provider does not have a right to claim.

Judgment

The court rules that the Dutch Pension Act stipulates that affiliation to an industry-level pension fund that has been made compulsory is to be put on a par with a pension arrangement agreed directly between the employer and the employee. The connection with the employment agreement is the same regardless of whether the pension is arranged through a compulsory industry-level pension or through a pension agreement concluded between the employer and the employee. The fact that affiliation to the industry-level pension fund has been made compulsory by law rather than by being part of the employment contract does not affect the conclusion that the former can be regarded as a right arising from the employment agreement. The rights and obligations under a compulsory industry-level pension scheme therefore transfer in exactly the same manner as a pension agreement concluded between the employer and the employee. The court subsequently holds that entitlements predating the transfer of undertaking also transfer to the transferee. This includes outstanding pension

contributions.

The question therefore remains whether the pension provider can demand payment of the outstanding contributions from GOM based on the transfer of undertakings legislation. The court holds that this legislation aims to protect employees. Pension entitlements are part of the rights to be protected. The employer's obligation to pay contributions forms part of the employment agreement and constitutes an integral part of the employee's pension entitlements. Non-payment of these contributions therefore adversely affects the rights that are to be protected by the transfer of undertaking legislation. Should all employees individually have to claim payment of the outstanding contributions, that would entail all employees having to combine their rights in order to claim. This cannot have been the legislator's intention. Moreover, non-payment of contributions to the pension provider does not result in the employees losing their pension entitlements. In consequence, the employees may not be very keen on starting litigation against their new employer. This, however, does not mean that the employees concerned lack interest in payment of these contributions. Non-payment of contributions will eventually impact on their pension entitlements. Given the foregoing, the court rules that, taking into account the goal of the transfer of undertakings legislation, a reasonable interpretation is that the pension provider has a right to collect payment of outstanding pension contributions predating the transfer of undertaking from the transferee, based on that legislation.

Commentary

This ruling is interesting and of practical importance. Pursuant to Article 3(4) of the Acquired Rights Directive, entitlements in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or intercompany pension schemes (outside the statutory social security schemes) do not transfer, unless the Member State provides otherwise. In 2002, the Netherlands introduced legislation under which pension rights transfer, although a number of exceptions are in place. Should the existing pension scheme transfer to the transferee, the transferee is liable for this pension scheme, including possible entitlements relating the employee's employment predating the transfer, such as premium obligations in respect of prior service.

The situation in the case reported above was that the transferor and the transferee were both affiliated to one and the same industry-level pension fund, membership of which had been made compulsory on the basis of the Dutch Act on compulsory affiliation to an industry-level pension fund. This made the situation fairly unproblematic, given that Dutch statute specifically regulates this situation. It provides that the transferee must continue the same pension scheme for the benefit of the employees that have been transferred to it.

The court's ruling that pension entitlements deriving from a mandatory industry-level pension fund are to be considered "rights" as referred to in article 3(1) of the Acquired Rights Directive – "*the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee*" – is in my view convincing. The pension entitlements (i) are in place due to the employment agreement; (ii) are intrinsically linked to that employment agreement (even though this right has not been made a condition in the employment agreement between the employer and employee); and (iii) the Dutch pension act stipulates that such a compulsory industry-level pension be put on a par with a pension agreement concluded between the employer and employee. That, in consequence, the transferee is also liable for payment of pension contributions predating the transfer of undertaking is a logical result of the pension right being transferred. It should be noted that often statutory rights of employees have not been agreed in writing between the employer and employee transfer. For example, the Dutch statutory holiday pay of 8% that has to be paid out once a year, is a right that transfers to the transferee regardless whether the right to it has been stipulated in the employment agreement, including the holiday pay accrued prior to the date of transfer.

Given the above, the employees themselves could, in my view, easily claim payment of the pension contributions in court from the transferee, including those contributions due prior to the date of transfer. They, however, had no genuine motivation to make such a demand from their new employer. The law entitles them to full pension payment at the end of the day, regardless whether their employer has actually paid contributions. Therefore, the pension provider felt the need to step in. The pension provider is a third party. Dutch law does not specifically entitle the pension provider to collect contributions from the transferee predating the transfer of undertaking. The pension provider therefore had to fall back on the general rules regarding the transfer of undertaking.

The Acquired Rights Directive primarily focuses on, grants rights to and imposes obligations on the "direct stakeholders": the transferor, the transferee and the employees concerned. From a legal point of view, third parties – that is, parties other than the transferor, the transferee and the employees concerned – usually remain unaffected by the transfer of undertaking: the transfer of undertaking does not impose obligations on them. The ECJ, for instance (admittedly in a case that is less directly connected with employment conditions than the underlying case), held that the Acquired Rights Directive does not require, in the event of a transfer of undertaking, the preservation of the lease of commercial premises entered into by the transferor of the undertaking with a third party even though the termination of that lease is likely to entail the termination of contracts of employment transferred to the transferee

(ECJ, 16 October 2008, C-313/07). In the case at hand, the position because the third party was affected de iure by the transfer of undertaking as a third party, the pension provider, was entitled to a claim against the transferee solely on the basis of the transfer of undertaking legislation. I doubt whether the Acquired Rights Directive actually provides the pension provider with such a right and I doubt whether Dutch law was intended to go beyond what the directive says in this regard.

Having said that, the ruling is practical and filled with good intentions in order to protect employees, by helping the pension provider. Whether the ruling actually helps employees in general remains to be seen. It may cause potential buyers not to purchase businesses in distress, as the buyer may have to pay a large amount of outstanding pension contributions. The potential buyer may choose to wait until the target company enters into bankruptcy proceedings and only at that point purchase the business. The transfer of undertaking legislation does not apply in such cases (in the Netherlands) and the pension provider will therefore have no claim against the buyer for outstanding contributions. This, obviously, is a situation that, far from encouraging employee protection, serves only to worsen the position of employees.

Subject: Employees who transfer/refuse to transfer

Parties: GOM Schoonhouden BV - v - Stichting Bedrijfstak- pensioenfonds voor het Schoonmaak- en Glazenwassersbedrijf Court: Kantonrechter Utrecht (Subdistrict Court Utrecht)

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