SUMMARY

2019/10 Employee's right of choice between transferor and transferee in the event of a business transfer (NO)

As a result of a transfer of an undertaking an employee lost her pension scheme rights. The transferor was bound by the pension scheme covering the employee which had been agreed upon in a collective agreement. However, the transferee company gave notification that it did not want to be bound by the collective agreement and, thus, the pension scheme. The Norwegian Supreme Court (Høyesterett) considered this loss a material negative change to the employment relationship. Therefore, the employee had the right to make use of the non-statutory exception rule of the right to insist upon continuation of the employment with the transferor, a non-statutory right of choice.

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Legal background

Regulation of an employment relationship in the event of a business transfer is contained in chapter 16 of the Act of 17 June 2005, no. 62 relating to working environment, working hours and employment protection, etc. (the '2005 Working Environment Act'). The chapter implements Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. According to chapter 16, the worker concerned has a right to continue their employment with the transferee after a business transfer. However, that worker has a right to make a reservation to the transfer, and not to continue the employment with the transferee. In such a case, as a main rule, the employee has no right to demand that the employment should remain with the transferor and the employment will terminate. Nevertheless, under certain conditions the employee has a non-statutory right to insist upon continuation of the employment with the transferor, a right of choice. What the circumstances are that constitute such a right is, however, not quite clear. Thus, this was the subject matter before the Norwegian Supreme Court in the present case.

Facts

A was employed at DNB Næringseiendom AS ('DNB') as market coordinator for the shopping mall Oslo City. The block in which the mall was placed was sold to Steen og Strøm Norge AS ('Steen og Strøm') and transferred on 1 January 2016. That this was a business transfer under the 2005 Working Environment Act was uncontested. Six persons were affiliated to the business, four of these had their permanent workplace at the mall, including A. At the time of the transfer these four employees were transferred to Steen og Strøm, who on 14 December 2015 gave notification that the company did not want to be bound by the collective agreement that was applicable to the transferred business, all according to the 2005 Working Environment Act. However, A had already announced on 3 December 2015 that she wanted to make use of the non-statutory right to insist upon continuation of the employment with DNB, in Norwegian known as '*valgrett*' (the right of choice). DNB did not accept A's request.

As employed at DNB, A was subject to the collective agreement between *Finans Norge* (Finance Norway) and *Finansforbundet* (the Finance Sector Union), and therefore covered by the AFP Scheme. The AFP Scheme is a collectively agreed pension scheme in the private sector. The AFP pension is an ungraded lifelong supplement to the retirement pension from the National Insurance Pension Scheme. After having turned 62, the employee is entitled to draw AFP, with or without working. AFP is not means-tested. Entitlement to AFP is dependent on an employee working for a company bound by a collective agreement with an AFP Scheme until the employee starts receiving their pension from the National Insurance Pension Scheme. The employee has to have sufficient seniority with one or more affiliated companies,

working at least in a 20%position, in order to have the right to AFP. That A had sufficient seniority in this case was recognised. In principle, the employee must have been employed in an affiliated company seven out of nine years, before reaching the age of 62. During the same time, the companies must have been affiliated to the AFP Scheme. Steen og Strøm was not affiliated to the AFP Scheme and, therefore, due to the transfer A would lose her rights under it. DNB compensated A for her loss and paid her a one-off amount of about NOK 85,000, approximately EUR 8,800.

At the time of the transfer, A was almost 61 years old. The question for the Supreme Court was whether A had the right of choice, i.e. the right to insist upon continuation of the employment with DNB, because she would not be able to make use of the AFP Scheme when she turned 62.

Judgment

The Supreme Court thoroughly scrutinised the preparatory works of chapter 16 of the 2005 Working Environment Act, in which the legislator discusses the issue of codifying the non-statutory right to choose, obviously ending up with not codifying the right. Instead, the right of choice should henceforth be such as it has been put forward in well-established Norwegian case law. The Supreme Court concluded its review into this aspect by stating that:

"...the question if the right to choose is at hand, depends on a substantial assessment of what effect on the employee's situation a business transfer will have. It has to be considered what is likely. The Supreme Court has evaluated a series of different effects of a business transfer and has not concluded with that some kinds of consequences are without importance and should not be evaluated. In other words, the kind of the effect has not been decisive, but their degree of importance in the substantial evaluation." (Section 51 of judgment, author's translation).

The Supreme Court pointed out that a right to the AFP Scheme depends on whether the conditions for granting AFP are met *at the time for drawing* AFP. The Supreme Court acknowledged that until the time for drawing AFP, the right to it is *merely a potential right*. The circumstances also depend on whether an employee has a *well-founded expectation* of drawing AFP, see section 56. Furthermore, in that section of the judgment, the Court emphasised that the issue in case law has not been *if* there was a right at hand, but *how likely* it is for the *negative effect* of the business transfer to occur. Thus, *loss of AFP as such* does not necessarily lead to such negative effect of a transfer that will trigger the right of choice. Rather, the starting point must be to what extent the conditions for AFP are met at the time of the transfer and how much time there is left for drawing the AFP, section 62, cf. section 57. The Supreme Court stated in section 57 that in a case such as A's, having the sufficient seniority required and with

less than two years before reaching the age of 62, there was no foundation in case law that the expectation for drawing AFP was without importance. In this connection, the Supreme Court pointed out that the AFP Scheme has to be seen in the light of the pension reform carried out in 2011, section 59. It would not be in line with the case law on the right of choice, the Supreme Court continued, setting aside the practical and economic importance of the AFP merely because it is a right following from a collective agreement, section 60.

In the substantial evaluation, the Supreme Court stated that if A would still have been covered by the AFP Scheme, she *most likely* would have been granted AFP at 62, fourteen months after the business transfer. With an estimated life expectancy of 85 years, A would lose an amount of NOK 1.3 million, approximately EUR 133,000, section 68. This must, the Supreme Court stated in section 70, be regarded as "a substantial change in working conditions to the detriment of the employee", cf. Article 4.2 of Directive 2001/23/EC. Therefore, A was recognised as having the right of choice since it was likely that the transfer would entail a loss of the abovementioned amount, section 71. Consequently, as at 31 December 2015 A had the right to continue the employment with the transferor DNB.

Commentary

To some extent, this judgment clarifies when there is such a substantial change in working conditions to the detriment of the employee that they have a right of choice. It was the first time the Supreme Court had to decide on whether loss of AFP Scheme entitlement in the event of a business transfer could involve the non-statutory right of choice. An employer has to consider if there is a situation of right of choice when the business transfer results in loss of AFP Scheme entitlement. How likely the loss of AFP is a negative consequence for the employee concerned shall be assessed in the light of the conditions for the AFP Scheme. Of importance in this regard is the employee's age and sufficient seniority at the time of the business transfer. However, this case concerned the AFP Scheme only and, as the Supreme Court stressed, one has to be careful in drawing too far-reaching conclusions applicable in general for evaluating whether a change is so substantial that the employee has a right of choice.

Comments from other jurisdictions

United Kingdom (Bethan Carney, Lewis Silkin LLP): Under UK law, employees who would otherwise transfer under TUPE have no right to remain employed by the transferor. They can object to the transfer, but if they do so, their employment usually simply ends on the transfer date without a dismissal and they are no longer employed by either transferor or transferee. There is an exception (as in Norway) where a relevant transfer 'involves or would involve a

substantial change in working conditions' which would be to their 'material detriment'. In such a case, the employee can treat the contract as terminated and the employee is treated as having been dismissed by the employer. In other words, the employee still does not have a right to remain employed by the transferor but could (probably) bring a claim for unfair dismissal, depending upon the length of service. The sort of circumstances described in this case would probably be sufficient under UK law to amount to a 'substantial' and 'materially detrimental' change to working conditions. However, unfair dismissal compensation is subject to a statutory cap, so the employee would not necessarily be able to recover their full loss.

Italy (Caterina Rucci, Katariina Gild): This report concerns one of the most complicated issues related to transfer of business and Italy is far from having an uncontested solution for it.

Initially, the theory was that if the pension fund was a legal person, rules on transfer of business would not apply, since the source of hypothetical rights was not a collective agreement or an employment contract, but a relationship with a third party.

On the contrary, where the additional pension fund was not a legal person, and presumably linked to a collective agreement, the related rights should transfer as a collective agreement related right. It should be noted that Italy does not have the three year limit, but a very different rule: CBA changes immediately if the transferee already has its own CBA of the same level of the transferor. Otherwise the transferee will be under an obligation to respect the original CBA until it expires or is changed by mutual consent.

The problem is however that in most cases, if the pension fund is a legal person, it is still linked to the CBA, and therefore it is difficult to object that it follows the employee.

Most of the additional private pension funds include provisions on change of employer, and make sure the money is either transferred (in most cases) or given back (exceptional cases).

An alternative solution might be an agreement with the new employer who, although under a different CBA, undertakes to pay a contribution to the former fund, which should prevent requests for return of any money.

EU principles are not of great help, since they make reference to a general principle, while there is a number of different situations related to private pension funds that apply in Italy.

Due to the number of different private/collective pension funds, it is very difficult to find out a general rule.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Transfer of undertakings, Employees who transfer/refuse to transfer

Parties: DNB Næringseiendom ASFinans Norge, Næringslivets Hovedorganisasjon – v – A, Yrkesorganisasjonenes Sentralforbund

Court: *Høyesterett* (Norwegian Supreme Court)

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