SUMMARY

2019/41 A question of age discrimination (NL)

The Supreme Court found that the Court of Appeal did not properly examine whether the difference of treatment of employees based on a social plan may be justified.

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The Supreme Court of the Netherlands has found that the Court of Appeal did not properly examine whether the difference of treatment of employees based on a social plan may be justified.

Legal background

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation has been implemented in Dutch law through the Equal Treatment in Employment (Age Discrimination) Act. On the basis of this legislation, a difference in treatment based on age does not constitute discrimination if, within the context of national law, it is objectively and reasonably justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary (Article 6 of Directive 2000/78 and Article 7 of the Equal Treatment in Employment (Age Discrimination) Act).

Facts

This case centres around five former employees of NXP Semiconductors Netherlands B.V. ('NXP'). All employees were born between 1950 and 1952. The employees were made redundant on 1 January 2014 in light of a reorganization, following which their employment was terminated on 1 April 2014. To facilitate the reorganization, the employer and trade unions agreed on a social plan: Social Plan 2010 NXP Semiconductors Netherlands (the 'social plan'). Part of the social plan involved a calculation of severance pay for redundant employees. If the amount of severance pay would be higher than the total pay the employee in question

would have received until retirement, the severance pay would be capped based on the social plan. For these calculations, a hypothetical retirement age would be used based on the applicable pension scheme. For employees born between 1950 and 1952 and who could lay a claim to a supplementary pension scheme (the 'VEP-scheme') this meant that their severance pay was calculated based on the hypothetical retirement age of 62. For employees born from 1953 onwards the hypothetical retirement age for the calculation of the severance pay was 65 due to changes to the VEP-scheme.
The employees argued before the courts that this measure resulted in age discrimination and was therefore void. The subdistrict court dismissed the claim of the employees. The judgment was upheld on appeal. The Court of Appeal considered that the difference in treatment was justified. To this end, the Court of Appeal considered that the measure as laid down in the social plan was an appropriate and necessary measure to achieve the legitimate aim. The Court continued that it cannot be insisted that a collective measure should involve an individual examination of each particular case in order to establish what is best suited to the specific needs of each employee, since the management of the regime concerned must remain technically and economically viable, for which it referred to the verdict of the ECJ of 26 September 2013 (C-546/11 (*Toftgaard*)).

Judgment

The appeal in cassation challenged the Court of Appeal's verdict that the capped redundancy pay measure was necessary to achieve the legitimate aim of the difference in treatment based on age. The appeal succeeded.
The Supreme Court found that the Court of Appeal had considered the capping of the redundancy pay so as to limit it to the pay the employee would have enjoyed until their retirement age qualified as a legitimate aim. It should be noted that the legitimacy of the aim was not in dispute. The Court of Appeal considered the social plan as a collective agreement between the employer and trade unions to be an appropriate means to achieve the aim.
The Supreme Court considered that when determining the necessity of the measure the Court of Appeal carried out the assessment in light of a different legitimate aim, namely the aim of creating collective hypothetical retirement ages (the means) in order to prevent determining the retirement age of each individual employee, instead of the legitimate aim of capped redundancy pay previously considered by the Court. The Court of Appeal thus wrongfully determined the means to be the legitimate aim. Consequently, the Court of Appeal assessed whether the means were necessary to achieve that (wrongfully determined) legitimate aim. In other words, the Court of Appeal assessed if the means were necessary to achieve the means.
The Supreme Court also held that the Court of Appeal had failed to recognize that the measure may reach further than necessary to achieve the legitimate aim. The Court of Appeal

could not disregard the arguments of the employees that they would have retired at the age of 65 in the event that employment had not been terminated, because retirement at 62 would have resulted in a decrease of income of up to 40–60%. The employees argued that, because of their hypothetical retirement age and its financial consequences, they were significantly worse off than their colleagues born from 1953 onwards with a hypothetical retirement age of 65. The Supreme Court considered that the Court of Appeal could not simply disregard the arguments only because it cannot be insisted that a collective measure should involve an individual examination of each particular case in order to establish what is best suited to the specific needs of each employee. The Supreme Court quashed the verdict of the Court of Appeal and referred it back to a Court of Appeal in a different district.

Commentary

In essence, this case centres around the question whether the difference in hypothetical pension age, 62 or 65, when calculating severance pay as laid down in a social plan constitutes a difference in treatment based on age. The answer is yet to be determined due to the referral back to the lower court. The verdict of the Supreme Court nicely sets out the applicable (case) law regarding equal treatment based on age.
The Supreme Court worked its way from Directive 2000/78/EC to the Dutch legislation. The Court of Appeal seemed to confuse the means to achieve the legitimate aim and the legitimate aim itself when assessing whether the discrimination may be justified.
The Supreme Court implied that the Court of Appeal further overlooked the weighing of interests involved when assessing the necessity of the measure too easily. I suspect the Supreme Court came to this conclusion in light of the *Rosenbladt* judgment of the ECJ which was referenced when setting out the applicable case law (ECJ 12 October 2010, C-45/09, ECLI:EU:C:2010:601). In this verdict the ECJ considered that in order to examine whether the measure at issue goes beyond what is necessary for achieving its objective and unduly prejudices the interests of workers who reach the retirement age, when they may obtain liquidation of their pension rights, that measure must be viewed against its legislative background and account must be taken both of the hardship it may cause to the persons concerned and of the benefits derived from it by society in general and the individuals who make up society.
This case illustrates that the assessment of discrimination can still be a struggle and that questions of equal treatment should be handled with the utmost precision. A step by step approach can be recommended when assessing if discrimination may be justified.

Comments from other jurisdictions

Austria (Hans Georg Laimer and Lukas Wieser, zeiler.partners Rechtsanwälte GmbH): As far as

can be seen no Austrian Supreme Court case law dealing with age discrimination in a social plan currently exists. However, Austrian lower instance courts have already stated that one of the objectives of a social plan is to provide benefits for bridging periods of unemployment. Thus, employees who are reaching the general retirement age may be excluded from social plan benefits as the objective – to bridge periods of unemployment – is not met in that case (cf. OLG Graz 7 Ra 53/12m). However, according to Austrian Supreme Court case law a termination of the employment solely because the employee reaches an early retirement age is discriminatory (cf. OGH 9 ObA 106/15a). Thus, a differentiation between a hypotactically (early) retirement age and the actual regular retirement age may be an unjustified age discrimination under Austrian law.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): German courts have to deal regularly with the issue of unequal treatment in social plans. Most recently, the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') had to decide (judgment of 16 July 2019 – 1 AZR 842/16) whether a social plan provision which refers to the 'earliest possible' entitlement to a statutory pension when calculating the amount of severance payment constitutes an indirect discrimination against severely disabled persons; however, at least with regard to age, it denied such discrimination.
Since the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – 'AGG') came into force, social plans must respect the special protection against discrimination provided by the AGG; this also includes discrimination on grounds of age. However, not every difference of treatment on grounds of age is against the law. According to Section 10 AGG, a difference of treatment on grounds of age shall likewise not constitute discrimination if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. According to Section 10(1) No. 6 AGG, for social plans it applies in this respect:

"Such [legitimate] differences of treatment may include, …
6. differentiating between social benefits within the meaning of the Works Constitution Act (Betriebsverfassungsgesetz), where the parties have created a regulation governing compensation based on age or length of service whereby the employee's chances on the labour market (which are decisively dependent on his or her age) have recognizably been taken into consideration by means of emphasizing age relatively strongly, or employees who are economically secure are excluded from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit."

In this connection, the BAG has confirmed several times in the past that it is permissible if the amount of the severance payment depends on whether the employees to be dismissed are entitled to an early retirement pension (cf. BAG, judgment of 11 November 2008 – 1 AZR 475/07). The same shall apply if the employee is entitled to an early retirement pension after

receiving unemployment benefit (Regional Labour Court of Baden-Württemberg, judgment of 24 February 2012 – 12 Sa 51/10). The same should also apply if the earlier pension payment leads to a reduction of the pension entitlement for the affected employee (different opinion, however, Regional Labour Court of Hamburg, resolution of 16 November 2017 – 7 TaBV 3/17). It is also considered permissible to agree on different calculation formulas to calculate the amount of severance payments for employees who are close to retirement age and those who are not (BAG, judgment of 26 March 2013 – 1 AZR 813/11). According to the jurisprudence of the BAG, social plans are intended to provide forward-looking compensation and bridging functions: severance payments should not be seen as an additional remuneration for work performed in the past. Instead, severance payments are intended to compensate or reduce the economic disadvantages for employees caused by the loss of their jobs. Against this background, the fact that employees may be entitled to an early retirement pension can be taken into account when calculating severance payments. On this basis, the BAG considered it permissible to provide employees with only a minimum severance payment of two months of gross salary after reaching the age of 62, while for employees aged 51 to 59 the social compensation plan provides severance payments up to one month of gross salary per year of employment.
This was also confirmed again in the current decision of the BAG. The BAG reaffirmed in its decision of 16 July 2019 (1 AZR 842/16) that it is a legitimate means to use a different calculation method to calculate the amount of severance pay for employees close to retirement age if the severance payment is intended to compensate for the economic disadvantages caused by unemployment. This is because the provision of compensation corresponding to the needs of the employee in question, when the financial means available are limited, would constitute a legitimate aim within the meaning of Union law. In addition, a differentiation according to the year of birth is also an objectively appropriate, necessary and appropriate means. However, what is not permissible is if the reference to the earliest possible entry into retirement leads to a reduction of the severance payment for severely disabled persons and thereby turns an advantage for this group of persons into a disadvantage.

Subject: Age discrimination
Parties: Five anonymous employees – v – NXP Semiconductors Netherlands B.V.
Court: Supreme Court (Hoge Raad der Nederlanden)
Date: 19 April 2019
Case number: Decision no. 18/00457
Internet publication:https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:647

Creator: Hoge Raad
Verdict at: 2019-04-19
ECLI: ECLI:NL:HR:2019:647
Case number: 18/00457
Judges: E.J. Numann, A.H.T. Heisterkamp, T.H. den Tanja-van Broek, C.H. Sieburgh, and H.M. Wattendorff
Lawyers: H.J.W. Alt and S.F. Sagel
Case Law References: 7 Wgbl