EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2020/17 Capping of redundancy allowance in view of (future) entitlement to early retirement pension (NL)

The Supreme Court of the Netherlands has quashed a verdict of the Court of Appeal that held that a social plan provision stipulating the capping of a redundancy allowance in view of an entitlement to early retirement pension was invalid because of age discrimination. According to the Supreme Court, a more marginal justification test should have been applied to a social plan. The Court of Appeal, moreover, did not consider all the legitimate aims it specified and should also have taken additional social plan measures as well as pension measures from the past into account. By not doing so, it was not properly examined whether the social plan constituted age discrimination.

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Legal background

p style="margin-right:-26px">Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation has, in respect of the prohibition of age discrimination, been implemented in the Dutch Act on Equal Treatment on the Ground of Age in Employment (*Wet gelijke behandeling op grond van leeftijd bij de arbeid* – 'WGBL'). On the basis of this legislation, a (direct and indirect) difference in treatment based on age does not constitute discrimination if it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 7 WGBL).

Facts

p style="margin-right:-26px">Employee X, born in 1952, joined ABN AMRO Bank in 1981. On 1 August 2015 he was made redundant following a reorganization. A social plan applied that was concluded between the relevant trade unions and the Bank. The social plan provided that employees who were made redundant were entitled to 100% of a calculated redundancy allowance or were given a period of one year to look for new employment within the Bank or with another employer ('mobilization measure'). If no new job had been found following this period their contract would be terminated and they would be entitled to a 75% redundancy allowance. The allowance was calculated based on age, length of service and monthly wage but was capped so that employees couldn't receive a higher amount of redundancy allowance than the total pay the employee in question would have received until the so-called 'individual retirement age'. The latter is a hypothetical early retirement age based on a calculation involving the applicable occupational pension scheme and a former scheme that was based on a lower retirement age. Unsuccessful in finding a job within the year, the contract of employee X was terminated on 1 September 2016. He was denied any redundancy allowance. Due to the cap, the calculation of the allowance resulted in a nil amount as his individual retirement age was before 1 September 2016. Hereupon, the employee decided to take early retirement and, as a consequence, his pension entitlements were reduced.

p style="margin-right:-26px">Before the courts, the employee claimed a 75% redundancy allowance of € 230.775 gross, arguing that the measure to cap the redundancy allowance resulted in age discrimination and was therefore void. The subdistrict court considered the measure to be discriminatory, but still capped the allowance on other legal grounds so that it equalled the loss of income until the ordinary retirement age and made good for the pension reduction because of taking early retirement. The Court of Appeal upheld this decision. The Court considered that the social plan provision was not an appropriate and necessary measure to achieve the legitimate aim put forward by the Bank, being a fair distribution of limited financial resources among those made redundant. According to the Court, the measure caused

disproportionate hardship to older employees without any apparent necessity.

Judgment

p style="margin-right:-26px">The appeal in cassation challenged the Court of Appeal's verdict that the capped redundancy pay measure was discriminatory on the basis of age. The appeal succeeded. The Supreme Court found that the Court of Appeal did not properly examine whether the social plan constituted age discrimination. In the light of the wide discretion granted to the social partners in choosing not only the aims of social policy but also the means to implement it, and the fact that the disputed measure was the result of an agreement negotiated between employees' and employers' representatives which offers considerable flexibility, the choices made by the social partners should be judged with restraint. It should, therefore, be assessed whether the measure was manifestly inappropriate to attain the legitimate aims set out and, in order to examine whether the measure goes beyond what is necessary, whether it unduly prejudices the legitimate interests of the workers who are disadvantaged by the measure. In doing so, the measure to cap the allowance must also be judged against the background of the 'mobilization measure' from the social plan, as well as compensatory pension measures taken by the employer at the time that the mandatory retirement age was raised in the Bank's pension scheme. Finally, the Supreme Court considered that the Court of Appeal specified that the social plan had as its aims the restriction of the financial consequences for the employer and the remaining employees, the compensation of the economic disadvantages for employees caused by the loss of their jobs and the fair distribution of limited financial resources among those made redundant. Of those aims, the Court of Appeal, wrongfully, only considered the latter aim explicitly. As a result of this, the Supreme Court overturned the verdict of the Court of Appeal and referred it back to a Court of Appeal in a different district.

Commentary

p style="margin-right:-26px">This is the second time in a short period that the Dutch Supreme Court has annulled a verdict that concerns the question whether the Dutch practise of capping redundancy pay in view of a future entitlement to (early) retirement pension constitutes age discrimination (see C. Huijts, *A question of age discrimination*, **EELC 2019/41**). Also for the second time, the Supreme Court's decision does not directly touch on the merits of the case. Instead, it focusses on the procedural way to conduct a proper objective justification test. The Supreme Court cites in this respect especially from the *Rosenbladt* decision of the ECJ (ECJ 12 October 2010, C-45/09, ECLI:EU:C:2010:601). The considerations of the Court of Appeal, however, do not appear to deviate that much from the justification test set out in the European case law. Still, the Supreme Court also indicates that, besides the redundancy allowance, other

measures from the social plan as well as general pension measures taken by the employer in the past must be taken into account. Although compensating measures can certainly play a role in order to properly weigh the interests involved (e.g. ECJ 16 October 2007, C-411/05 (*Palacios de la Villa*), ECLI:EU:C:2007:604), one may question the relevancy of measures that equally benefit all employees made redundant or, in the case of the pension measures, even all employees, and which, therefore, do not seem to alleviate the unequal treatment because of age of some of the workers who lost their jobs.

p style="margin-right:-26px">The most interesting point made by the Supreme Court in regard to the way in which to conduct an objective justification test would be that this test should be a marginal one in the case that the measure is collectively agreed upon by the social partners. At least, the Supreme Court states in this respect that "*the choices of the social partners must be judged with restraint*". This touches upon a contested issue in the case law of the ECJ. The ECJ has made clear that the fact that the measure flows from a collective agreement does not principally change the assessment of the justification for the difference of treatment on grounds of age. Collective agreements, like laws, regulations and administrative provisions, must observe the principle of equal treatment implemented by Directive 2000/78/EC (ECJ 8 September 2011, C-297/10 (*Hennigs*), ECLI:EU:C:2011:560). Nevertheless, the ECJ has also repeatedly held that the social partners, like the Member States, enjoy a broad discretion in their choice of social policy aims and means and that collective agreements offer flexibility and can, therefore, add to the proportionality of the measure (*Palacios; Rosenbladt*). The conclusion might possibly be that, in principal, the same objective justification test applies to statutory measures as well as measures flowing from collective agreements, but that in practise especially the proportionality test may be of a more strict or a more lenient nature. The latter does not seem so much to depend on 'the authors' of the measure perhaps, but more on the particular subject. So far, the more lenient test has especially been applied by the ECJ in cases on the termination of employment due to a mandatory retirement age.

p style="margin-right:-26px">In the cases on severance or redundancy pay the ECJ has expressed itself more clearly on what would be the outcome of the objective justification test if applied to the merits of the case. It seems remarkable that (the applicability of) this case law is not explicitly discussed by the Supreme Court. Also in previous cases on severance or redundancy pay the Supreme Court has mostly relied on the European case law in respect of mandatory retirement ages (see **EELC 2019/41** and Hoge Raad 20 April 2018, ECLI:NL:HR:2018:651 on the non-payment of Dutch statutory severance pay to workers who have reached the pensionable age).

p style="margin-right:-26px">From the case law of the ECJ on severance allowances it can be seen that not permitting payment of such an allowance to workers who, although eligible for

an old-age pension, nonetheless wish to waive their right to such a pension temporarily in order to continue with their career, unduly prejudices the legitimate interests of these workers. According to the ECJ it may force those workers to accept an old-age pension which is lower than the pension which they would be entitled to if they were to remain in employment for longer, leading to a significant reduction in their income in the long term (ECJ 12 October 2010, C-499/08 (*Andersen*), ECLI:EU:C:2010:600). The later *Landin* decision clarifies that *Andersen* only sees to a denial of severance allowance in case of an entitlement to *early* retirement pension. The risk of a significant loss of income due to receiving a reduction in pension entitlement does not concern employees who have reached the ordinary retirement age (ECJ 26 February 2015, C-515/13 (*Landin*), ECLI:EU:C:2015:115).

p style="margin-right:-26px">Applied to the Dutch case at hand, the denial of the redundancy allowance appears to have forced the employee in question to take early retirement, leading to a pension reduction in the long term. Although without any specific reference to European case law, the Court of Appeal seems to have followed this line of reasoning, considering the measure to be discriminatory but still capping the allowance so that it equals the loss of income until the ordinary retirement age and compensates for the reduction in pension entitlement received. Admittedly, it can also be argued that *Andersen* and *Landin* are not applicable to the Dutch case at hand. The *Andersen* and *Landin* judgments both concern a national statutory measure on severance pay, which is primarily directed at facilitating reintegration into employment. The redundancy allowance of ABN AMRO Bank is laid down in a social plan and is aimed primarily at reducing the economic disadvantages of employees who are made redundant. It, thus, more resembles the social plan allowance from the *Odar* judgment of the ECJ (4 December 2012, C-152/11, ECLI:EU:C: 2012:772).

p style="margin-right:-26px">In *Odar* the ECJ permitted a severance allowance which took into account the pension entitlements of older workers, including a pension with reductions on the ground that it is drawn early (for the consequences of the *Odar* decision in case of disabled workers, see Ines Gutt, EELC 2020/15). However, in justifying this, the ECJ stressed that the social plan provision provides only for a reduction in the amount of compensation, due to the guarantee that the allowance will be at least equal to half of the amount calculated using the standard formula based on age and length of service. The social plan of ABN AMRO Bank, on the other hand, denies any compensation even if the worker suffers economic disadvantages. This raises the question whether this social plan provision nonetheless constitutes age discrimination on the basis of Directive 2000/78/EC, even if judged again according to the proper objective justification test set out by the Supreme Court.

Comments from other jurisdictions

Germany (David Meyer, Luther Rechtsanwaltsgesellschaft): The decision of the Dutch court is similar to two recent decisions of the German Federal Labour Court on age and disability discrimination in 2019 (decisions from 7 May 2019 - 1 ABR 54/17 - and 16 July 2019 - 1 AZR 842/16; for the latter see Ines Gutt in EELC 2020/15).

The Court tends to acknowledge a broad discretion for the social partners in concluding social plans on collective redundancy measures. This includes the option to apply a different calculation mode or even exclude employees from severance payments if they are close to retirement age. Either of these options constitute age discrimination but may be justified by a legitimate aim if the means of achieving that aim are appropriate and necessary.

In both cases the BAG made similar considerations to those of the Dutch court. In general, collective agreements must regard disadvantages and possible reductions for early drawing of a retirement pension and should include some kind of compensation. A general exclusion of compensation payments (i.e. reduction to zero) is therefore only possible if the financial resources are very limited and are already needed to compensate financial disadvantages of other employees. Though the court confirmed the exclusion in the first case we do not expect this decision to be the court's general approval to exclude older employees from severance payments if they are close to retirement age.

The BAG as well mentions the ECJ's decisions in the cases "Odar" and "Andersen". However, it does not see a contradiction to "Andersen" as that decision focused on payments to ease the transition to a new employment relationship. In contrast, severance payments according to social plans are regularly deemed a future-oriented compensation due to the loss of a past employment.

p style="margin-right:-26px">**Subject:** Age Discrimination

p style="margin-right:-26px">**Parties:** ABN AMRO BANK N.V. – v – Former employee X

p style="margin-right:-26px">**Court:** *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands)

p style="margin-right:-26px">**Date:** 24 January 2020

p style="margin-right:-26px">**Case number:** 18/05125

p style="margin-right:-26px">**Internet publication:** https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2020:114

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