SUMMARY

2016/4 Transferee liable for transferor's overdue pension contributions (NL)

<p>If both the transferor and transferee are affiliated to one and the same mandatory industry-level pension fund, the transferee is liable vis-à-vis that pension fund for <italic>pension contributions (premiums) due but not paid to that fund prior to the date of transfer</italic>. A judgment to this effect, which was reported in EELC in 2013/35, was recently confirmed on appeal.</p>

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Facts

Cleaning companies must by law participate in a specific industry-level pension scheme that is managed by an independent pension fund. On 21 May 2008, the cleaning company GOM purchased the business of the cleaning company VBG, taking over its staff. The transferee VGB was in arrears with the payment of its pension contributions. At the time of the acquisition there was an overdue payment amounting to nearly € 2 million. In the purchase contract, GOM and VBG had agreed that all claims of third parties, such as pension funds and insurers, regarding periods predating the transfer of undertaking would remain for the risk and expense of VBG and were excluded from the acquisition. Following the transfer, the pension fund, however, demanded full payment from GOM of the said sum. GOM countered

this claim with two arguments. The first was that, in the case at hand, the requirement to pay pension contributions was based on statute (compulsory affiliation to an industry-level pension fund, no agreement between employer and employee being required) rather than on an agreement between employer and employee. Therefore, the employer's obligation to pay pension contributions did not constitute a right of the employees that transfers upon the transfer of an undertaking. GOM's second argument was that, even if there was a right that transferred, the pension fund was not entitled to autonomously collect the contributions predating the transfer, since the law on transfers of undertakings provides rights to employees and not to third parties such as pension funds.

First instance judgment

The court of first instance ruled that, according to the Dutch Pension Act, mandatory affiliation to an industry-level pension fund is to be treated in the same manner as a pension arrangement agreed directly between employer and employee. The fact that affiliation to an industry-level pension fund has been made compulsory by law rather than in an employment contract does not alter the conclusion that the rights deriving from the mandatory affiliation can be regarded as rights arising from the employment agreement. The rights and obligations under a compulsory industry-level pension scheme therefore transfer, including entitlements predating the transfer of the undertaking.

The court of first instance furthermore held that the law on transfers of undertakings aims to protect employees. Pension entitlements are amongst the rights to be protected. Non-payment of pension contributions adversely affects those rights. If all employees individually had 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, as non-payment of contributions to the pension fund does not result in the employees losing their pension entitlements, the employees may not be very keen to start litigation against their new employer. This does not mean that they lack interest in payment of these contributions, as non-payment of contributions would eventually impact on their pension entitlements. Based on this reasoning, the court of first instance ruled that, given the aim of the law on transfers of undertakings, a reasonable interpretation of that law is that a pension fund has an independent right to collect payment of outstanding pension contributions predating the transfer of undertaking from the transferee.

Court of Appeal's judgment

The Court of Appeal addressed three issues: (i) does a pension based on mandatory affiliation to an industry-level pension fund qualify as a "right or obligation arising from a contract of

employment" within the meaning of the Dutch legislation transposing the Acquired Rights Directive? If so (ii) does the obligation incumbent on VBG to pay the pension contributions predating the transfer of the undertaking, transfer to GOM? If so (iii) does the pension fund have an independent right to claim payment of overdue pension premiums from GOM?

After extensively quoting the parliamentary history of the Pensions Act, the Court of Appeal drew the conclusion that pension is a right arising from a contract of employment, i.e. a term of employment, regardless whether it arises as a result of mandatory affiliation to an industry-level pension or from an individual contract. It therefore is a right that transfers. GOM's argument that pension contributions are on a par with income tax and social insurance contributions – which according to Dutch practice do not transfer - does not alter that conclusion. According to the Court of Appeal, income tax and social insurance contributions, unlike pension, cannot be regarded as terms of employment, but rather as obligations deriving from law.

The Court of Appeal also held that an obligation in respect of pension contributions that became due before the date of a transfer of an undertaking, goes across to the transferee. It based this finding on a provision of Dutch law under which, for a period of one year following the transfer, the transferor is liable along with the transferee for obligations relating to the employment agreement that arose before the transfer of the undertaking. In consequence, GOM is liable as well. The fact that non-payment of contributions to the pension fund does not result in the employees losing their pension entitlements, does not alter this conclusion.

With regard to the final issue, the Court of Appeal argued that, prior to the transfer, the pension fund was entitled to claim (overdue) pension contributions from VBG. Given that the obligation incumbent on VBG to pay these contributions transferred to GOM, the 'corresponding' right of the pension fund to collect those contributions also transferred. The Court of Appeal furthermore noted that, according to the pension fund's Articles of Association ('statutes'), both VBG and GOM were obliged to pay the contributions at issue. In consequence, based on the law on transfers of undertakings, the pension fund had the right to collect the (overdue) pension contributions from the transferee.

Commentary

In my commentary of the first instance judgment in this case, in EELC 2013/35, I argued why also in my view it appears logical that pension entitlements deriving from a mandatory industry-level pension fund should be considered rights as referred to in Article 3(1) of the Acquired Rights Directive. Unfortunately, the Court of Appeal made a slight mistake where it held that payment of social security contributions does not qualify as a right under the

Acquired Rights Directive. The European Court of Justice recently ruled that these payments do qualify as such (ECJ 28 January 2015, C-688/13, Gimnasio Deportivo San Andrés).

It makes sense that the transferee is liable for overdue pension premiums. Long ago, in the Abels case (ECJ 7 February 1985, C-135/83), the ECJ ruled that obligations of the transferor resulting from a contract of employment and arising before the date of the transfer, transfer to the transferee. As in the judgment reported above, the ECJ based its decision (in part) on the fact that the Member States are entitled to provide that the transferor continues to be liable after the date of transfer, in addition to the transferee. This indicates that it is the transferee that is primarily liable for bearing the burdens resulting from employees' rights existing at the time of the transfer.

But can a third party - a pension fund – autonomously, that is to say, in its own right, claim payment of overdue pension premiums from the transferee that were to be paid by the transferor? Here, the ruling reported above is not persuasive. There is no national statute granting the pension fund the right to collect overdue payments from the transferee. The Acquired Rights Directive itself primarily focuses on, grants rights to and imposes obligations on the 'direct stakeholders': the transferor, transferee and employees concerned. Third parties tend to remain unaffected by a transfer of an undertaking. The transfer does not impose obligations on them. The mere fact that prior to the transfer there was an obligation upon the transferor to pay pension premium and a corresponding right for the pension fund to collect these premiums, whilst the pension rights transfer to the transferee, does not automatically mean the pension fund has a right to claim these old premiums due from the transferee. The same applies to the argument that both the transferee and transferor are bound by the same statutes vis-à-vis the pension fund. After all, the fact that before the transfer there are mutual rights and obligations between the transferor and the pension fund, whilst after the transfer of undertaking there are mutual rights and obligations between the pension fund and the transferee, does not logically require that the pension fund can treat the transferor and transferee as one and the same party.

Having said that, I understand that the result reached is practical from the pension fund's point of view. At the same time, however, it introduces a lot of uncertainty. There are of course many obligations incumbent on the transferor towards a third party arising from an employment contract, and corresponding rights of this third party towards the transferor. For example, the obligation to pay for study for the employee and the right of the institute providing this education to collect that money, or the obligation to pay the mobile phone bill of an employee, and the right of the phone company to collect. Are all these third parties entitled to claim the costs predating the transfer of undertaking directly from the transferee? Such questions remain unanswered.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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