EELC EUROPEAN EMPLOYMENT LAW CASES

SUMMARY

# 2018/30 Harmonising terms of employment following a transfer is no simple matter (NL)

***The transferee in this case attempted to replace the transferred employees' salaries with lower in accordance with its collective agreement, compensating for the reduction by means of a 'personal allowance', which it then proceeded to reduce by a set percentage based on the age of the employees each time there was a wage increase. The court held that this 'basket comparison' method of harmonising the wages of old and new staff was at odds with Directive 2001/23, rejecting the transferee's argument that the 'ETO' provision in that directive permits such an amendment of the terms of employment.***

**Facts**

Albert Heijn operates a chain of food stores. Some are owned and managed by franchisees. Starting in 2011, Albert Heijn acquired a considerable number of these stores. On average, approximately 70 to 80 employees per store transferred to Albert Heijn pursuant to the rules on transfers of undertakings.

Prior to some transfers, some employees may have been paid a higher salary than they were entitled to under the collective agreement to which Albert Heijn is a party (the "Albert Heijn collective agreement"). To compensate for the difference, Albert Heijn applied a so-called 'basket comparison'. By this method, the terms of employment of a former franchisee-employee (basket 1) were compared to those of a comparable Albert Heijn employee (basket 2). Where basket 1 was more favourable, Albert Heijn granted the employee a 'personal allowance,' which aimed to ensure that his or her take home pay remained materially identical

to what it had been before the transfer.
However, a further element of the basket comparison method was this: whenever there was a wage increase under the Albert Heijn collective agreement, the personal allowance was reduced by a percentage of the increase. For employees below 35 at the time of the transfer, the personal allowance was to be reduced by 2/3 of the wage increase; for employees between 35 and 45 years it was to be reduced by 1/2; and for employees between 45 and 50 it was to be reduced by 1/3. For employees aged over 50 at the time of the transfer, the personal allowance was to remain unchanged (i.e. it would effectively become less through inflation). By this method, Albert Heijn aimed to gradually equalise the wages of its 'old' and 'new' staff going forward.

**The dispute**

In 2015, Albert Heijn acquired a franchisee store owned by De Block. As this was the transfer of an undertaking, De Block's employees transferred into the employment of Albert Heijn. One of the employees was a Sales Manager. Albert Heijn informed her that they would apply the basket comparison method to her terms of employment. Her salary at the transferee, in accordance with the collective agreement it applied (the collective agreement for food stores), had been €1,869.82 every four weeks. Given that her initial salary at Albert Heijn would be €1,650.77 every four weeks, she would be paid a personal allowance equal to the balance, this being €219.05 each four week period. However, each time the Albert Heijn collective agreement provided for a wage increase, this allowance was to be reduced by half of the increase.
On 23 January 2017, the trade union FNV gave notice to Albert Heijn that the use of a 'basket' method of comparison violated the rules on transfers of undertakings. FNV argued that the method led to a deterioration to the terms of employment and demanded that Albert Heijn stop reducing the personal allowance each time there was a wage increase. As Albert Heijn refused to do so, FNV started proceedings on behalf of both the Sales Manager and all other transferred Albert Heijn employees. It asked the court to order Albert Heijn to stop applying the basket comparison method and to compensate all employees to whom it had already been applied.

**Judgment**

**EU law**

The court began by stating that Dutch law on transfers of undertakings must be construed in line with Directive 2001/23. Article 3(1) thereof should be interpreted as meaning that, upon a transfer, the terms of an employment contract – and in particular those relating to salary and

its component parts – cannot be altered. Employees may not waive the rights conferred on them by the Directive, and those rights cannot be restricted, even with their consent (C-209/91 Watson/Rask, C-324/86 Daddy's Dance Hall and C-4/01 Martin/SBU). The court further referred to the ECJ's finding that the immediate application of a collective agreement may not lead to a situation in which transferred employees suffer a substantial loss of salary (ECJ, 6 September 2011, C-108/10 Scattolon).

**Basket comparison is at variance with the rules on transfers of undertakings**

Applying the abovementioned EU case law, the court held that the basket comparison method was not in accordance with the rules on transfers of undertakings. By adopting this method, Albert Heijn had unlawfully altered the base salary of its new employees and its composition. In the case of the Sales Manager, the method had resulted in a loss of almost €25 every four weeks (in the form of missed wage increases) - a loss that was liable to increase going forward.

**Unilateral amendment**

The court noted that, in Martin – v – SBU, the ECJ had held that, under certain conditions, a transferee has the right to amend terms of employment, but only where the transferor had also had that right. Albert Heijn failed to provide evidence that De Block had been entitled to reduce its employees' base salary and to replace the balance with a personal allowance.

**Harmonisation of terms and conditions**

Albert Heijn had opted for the basket comparison method because it wished to harmonise the terms and conditions of its incoming employees with its existing ones. This desire related directly to the transfer, and was therefore not good grounds for departing from the rules on transfers of undertakings, nor did it constitute grounds for amending the terms of employment.

**Economic, technical or organisational reasons ('ETO reasons')**

By Article 4(1) of Directive 2001/23, a transfer cannot of itself constitute grounds for dismissal. At the same time, this provision does not prevent dismissals for ETO reasons. Both parties – Albert Heijn and FNV – assumed that this allowed a transferee to amend terms and conditions for ETO reasons. The court doubted the correctness of this assumption, given that both the Directive and national Dutch law are silent on the subject. However, it was unnecessary to answer this question, as Albert Heijn had not proved any ETO reasons applied in this case.

**Werhof and Parkwood**

Albert Heijn also put forward the following argument, which it based on the ECJ's judgments in Werhof (C-499/04) and Parkwood (C-426/11): the effect of the transfer was that Albert Heijn inherited the rights and obligations deriving from the Sales Manager's contract of employment as they stood at the time of the transfer. Those rights and obligations did not include the right to future wage increases pursuant to the collective agreement for food stores, particularly as the wage increase claimed by the Sales Manager had not even been negotiated at the time of the transfer.
The court did not subscribe to this argument. The Sales Manager's claim was not based on the collective agreement for food stores. The fact that a transferee's collective agreement applies with immediate effect may not lead to a substantial detriment to a transferred employee's terms of employment.
As an aside, the court noted that Albert Heijn's interpretation of Werhof and Parkwood was not completely accurate, in that a transferee may, under certain conditions, be bound to wage increases provided by the transferor's collective agreement, even where those increases postdate the transfer (see Asklepios, C-680/15).

**Age discrimination**

FNV argued in addition that the basket comparison method was discriminatory on grounds of age. However, given the foregoing, the court had no need to go into this argument.

**Judgment**

The court issued a declaratory judgment that Albert Heijn was not entitled to reduce the personal allowances of transferred employees who had been awarded salary increases following application of the basket comparison method, and that it must increase those employees' salaries in accordance with the Albert Heijn collective agreement.
The court dismissed the claim for compensation for all employees who had been impacted by the basket comparison method in the past, as it felt that these claims should be settled at an individual level (as they differed in various ways). In fact, the Sales Manager's claim proved to be an example of why this should be the case: based on the facts, the Court found that Albert Heijn and this specific employee had in fact agreed on a new position at a lower job and salary level. This was not precluded by Directive 2001/23, since an amendment of this nature is permitted by national law and was not directly related to the transfer.

**Commentary**

In the case at hand, the court explicitly held that the application of the basket comparison method was at variance with the rules on transfers of undertakings. This judgment could have major consequences, as it is a frequently-used method of harmonising terms. Interestingly, in

a recent similar case, the Finnish Labour Court obliged the transferee to harmonise the salaries of employees, as the transferee had failed to provide compelling arguments for continuing to pay different salaries to employees with equivalent responsibilities (EELC 2018/20). If the combination of these cases combined were to be taken up as common practice, it would mean that a business transfer would lead to a 'levelling up' of terms and conditions (although it should be noted that no such obligation exists in the Netherlands).
The case also sheds light on several thought-provoking questions regarding ETO reasons in relation to the amendment of terms and conditions. Should a transferee be allowed to amend terms and conditions of employment for ETO reasons? Does the fact that EU law permits dismissal for ETO reasons imply that a transferee may amend terms and conditions for ETO reasons? Dutch scholars do not seem to have an unequivocal answer to these questions, advancing conflicting theories on the subject of the amendment of terms of conditions for ETO reasons.
The first theory is based on the idea that an amendment of terms of employment for ETO reasons falls within the scope of Article 4(2) of Directive 2001/23. It relies heavily on the specific wording of the Article, which reads, "If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for" the termination. The theory advocates that, by extension, an amendment of terms of employment can also qualify as a substantial change in working conditions, and, moreover, that such an amendment has (considerably) less 'detrimental effect' than the termination of an employment contract. Supporters of this theory also argue that an amendment of terms of employment following the transfer of an undertaking need not necessarily be related directly to the transfer and may be justified by organisational reasons. Further, this theory has been reinforced by a case in which the ECJ decided that national courts must assess whether the continued observance of the terms and conditions agreed in a collective agreement which expires on the date of the transfer, is not guaranteed after that date (C-396/07 (Mirja Juuri)).
The second theory holds that amendment of terms and conditions for ETO reasons is not permitted. This theory is strongly based on the fact that EU law does not explicitly regulate this issue. The theory also seems to question whether the termination of an employment contract is necessarily more detrimental than an amendment of terms and conditions, seeing as the latter is subject to more rigid rules than the termination of an employment contract.
In the past, several Dutch courts have allowed an amendment of terms and conditions for ETO reasons. However, Dutch scholars have heavily criticised these decisions. Unfortunately, due to the fact that Albert Heijn failed to prove that it was forced by ETO reasons to amend the employment conditions, the court in this case could not provide a thorough and unequivocal

judgment. It merely doubted whether the Directive allows an amendment of employment conditions for ETO reasons, seeing that there is a lacuna in both EU and Dutch law. I look forward to further national and transnational discussion on this subject.

**Comments from other jurisdictions**

Belgium (Gautier Busschaert, Van Olmen & Wynant): In Belgium it is not possible to unilaterally change essential term and conditions relating to transferred workers for ETO reasons – and wages are an essential condition. Only non-essential elements of the employment terms can be changed unilaterally. However, it is possible for the new employer and the transferred employee to mutually agree on a wage decrease, though only after the transfer has taken place. And of course, the employee can refuse to accept this agreement. Finally, it is possible to dismiss a transferred employee for ETO reasons, but in this case the employer needs to prove that these reasons have nothing to do with the transfer.

Bulgaria (Ivan P. Punev, Djingov, Gouginski, Kyutchukov & Velichkov): This issue has come up quite frequently in Bulgaria recently, as companies grapple to understand what kind of transactions trigger the transfer rules and how to act lawfully following a transfer.
There is no express statutory provision under Bulgarian law regulating the harmonisation of pay and benefits in cases of transfers of undertakings. Nor are there any rules definitively explaining whether amendments to the terms and conditions of employment on any particular grounds (e.g. ETO reasons) are lawful. Further, there is no case law that we are aware of from the Bulgarian courts that considers this aspect of transfers of undertakings.
Based on the general rule that all rights and obligations under the employment relationships transfer to the new employer 'as is', it is arguable it is possible to have two different rates of pay applying to the two groups of employees following a transfer. However, there are two main requirements to consider. First, the equal work for equal pay principle, and second, the prohibition against discrimination. It can be argued that a difference in pay and benefits resulting from a transfer does not violate the equal work for equal pay principal, and that it causes no discrimination because it does not fall within any of the statutory grounds for discrimination listed in Bulgarian law. However, because there is a lack of express statutory rules and no firm position taken by the courts on these matters, there is a risk of claims being made by employees based on unequal treatment and discrimination.
In practice harmonisation is often pursued by employers post-transfer for organisational reasons and – from a legal perspective and in the longer term - in order to avoid unequal treatment claims based on differences between incumbent and newly-acquired employees. In any harmonization initiative, if the relevant benefits are set out in the individual employment agreements, changes to their terms will require each employee's consent and may not be unilaterally imposed by the employer (save for certain expressly regulated exceptions, such as

unilateral increases to pay). Arguably, unilateral changes may be possible if the benefits are provided at the employer's discretion and are not fixed in writing in each individual contract.

Germany (Daniel Zintl, Luther Rechtsanwaltsgesellschaft mbH): Pursuant to § 613a(1) sentence 1 of the German Civil Code ( BGB), the purchaser of a company generally takes on all the rights and obligations of the business seller. However, German Labour law differentiates according to whether or not these rights and obligations originate from collective labour agreements.
In the present case, it was agreed in the employment contract between the plaintiff and the seller company that a collective labour agreement applied. Unfortunately, it is not clear from the ruling whether it was used in terms of pay.
If the employee's pay was agreed without reference either to a collective labour agreement (concluded with a union) or a bargaining agreement (concluded with the works council), the provisions of the old employment contract remain in force. The purchaser cannot unilaterally change the composition of pay in those circumstances. The only way to alter it would be by making an individual agreement or giving notice of dismissal to the employee with the option of altered conditions of employment. This presumably did not happen here, therefore the employee could demand the former contractually-agreed pay and its agreed composition from the transferee.
If the employment contract refers to a collective labour agreement for pay, this constitutes a right governed by the legal norms of a collective labour agreement or works agreement within the meaning of § 613a(1) sentence 2 of the BGB. The old (tariff) provisions on remuneration become part of the individual employment agreement between the employee and the transferor, and these transfer to the transferee. This is binding for one year after the transfer, with the only exception that changes that are beneficial to the employee are permissible beforehand.
However, according to § 613a(1) sentence 3 of the BGB, this does not happen if the rights and obligations in question are included in another collective labour or bargaining agreement that is binding on the transferee. In such a case, degradation of the employment conditions is possible and the one-year period does not apply. Nor does the Scattolon ruling of the ECJ change this. The prerequisite for this is that both the purchaser and the employees whose contracts transfer are members of the parties to the collective agreement (i.e. the employers' association and the union) or that the transferee is bound by the collective agreement by virtue of a declaration of general applicability (Allgemeinverbindlicherklärung) pursuant to § 5 of the Collective Agreement Act (TVG) following the transfer.
In the case at hand, a collective agreement was in force at the transferor at the time the business was acquired. According to that agreement, the employee needed to be put in a certain category with a lower salary. If both the employee and transferee had been members of

the parties to the collective bargaining agreement, or if the collective agreement applicable to the transferee had been declared generally applicable, then it would have been lawful to grant the employee a lower salary than previously. The additional compensation which the employer gave the employee would not then have been in conflict with § 613a(1) of the BGB, since the employer would merely have been providing an additional benefit at its discretion. If, however, the plaintiff was not a member of the trade union that was party to the collective bargaining agreement applicable at the transferee, then the provision from the employee's original employment contract would have continued in force and, pursuant to § 613a(1) sentence 2 of the BGB, the employer would not have been permitted to deviate from it for one year after the transfer to the disadvantage of the employee. It is debatable whether granting a lower basic salary with an allowance which decreases when basic salary is increased, would have constituted such a deviation to the disadvantage of the employee. It could be said to be disadvantageous in that the employee's salary development plan was not based on her original basic salary under the new collective labour agreement. This could be classified as disadvantageous for the employee and if so would be illegal.

United Kingdom (Bethan Carney, Lewis Silkin LLP): This case is very interesting from a UK perspective because it is an issue that the UK courts have long grappled with.
The current position in the UK (in line with the ECJ's decision in Daddy's Dance Hall) is that changes to terms and conditions of employment cannot be made (even with the employee's consent) if the sole or principal reason for the change is the transfer of an undertaking. If an employer purports to make such a change it will be void and the employee could apply to the courts for a declaration that the old terms still apply and for compensation (e.g. for backdated wages, if the new terms reduced salary).
The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'), which implement the Acquired Rights Directive ('ARD') in the UK, do permit a contract variation if (a) the sole or principal reason for the variation is an economic, technical or organisational reason ('ETO reason') entailing changes in the workforce, provided that the employer and employee agree that variation; or (b) if the terms of the contract permit the employer to make such a variation (Reg 4(5)) TUPE).
The ECJ decision in Martin and others – v – South Bank University 2004 ICR 1234, confirms that a contract variation made purely to harmonise terms and conditions is 'for a reason connected to the transfer' and therefore void. And it is unlikely that a wish to harmonise terms and conditions of pre- and post-transfer staff would amount to an ETO reason entailing changes in the workforce. According to the Court of Appeal decision in Berriman – v – Delabole Slate Ltd 1985 ICR 546, given in the context of dismissals for a reason connected with the transfer, for an ETO reason to 'entail changes in the workforce' there must be a change in the job functions or numbers of the workforce as a whole.

It is also worth noting that the courts usually construe unilateral contractual variation clauses very narrowly. Additionally, it is uncertain whether Reg 4(5)(b) is compatible with the ARD as it has been interpreted by the ECJ (e.g. Daddy's Dance Hall; Rask).
Terms and conditions relating to pay are fundamental terms. A detrimental change to such terms may fall foul of Reg 4(9) which says: "where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred [...], such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer."
TUPE contains a specific provision regarding terms incorporated from collective agreements which says that an employer can vary such a term, even if the sole or principal reason for the variation is the transfer, provided that (a) the variation takes effect more than a year after the transfer and (b) following the variation, the employee's contract taken as a whole is no less favourable to the employee than it was before (Reg (4(5B)). This is permitted by Article 3(3) of the ARD. There is no UK case law on this provision, as yet.
Would this provision help a UK employer in the same position as Albert Heijn? Overall the employee's pay was the same (adding together salary and allowance) but the employee was not getting the full benefit of salary increases. This would seem to suggest that the employee's contract (taken as a whole) was less favourable after the transfer. It is also worth noting that it is quite uncommon in the UK for contractual terms to be incorporated from collective agreements, far more frequently terms are agreed with individual employees (often on the employer's standard terms).
Because of all these difficulties in harmonising terms some transferee employers seeking to do so follow a strategy of dismissing the employees and offering them new employment on the new terms (perhaps accompanied by an inducement and a requirement that the employee sign a Settlement Agreement waiving any claims against the employer). Such a strategy has to be pursued extremely carefully, as it may result in employees refusing the new offer and bringing claims.

Subject: Transfer of undertaking, employment terms
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EELC EUROPEAN EMPLOYMENT LAW CASES

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