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Transferee has no claim against transferor for paid leave accrued before transfer (NL)

CONTRIBUTOR Amber Zwanenburg*

Summary

A transferee cannot claim the value of leave accrued but not taken by transferred employees before a transfer from the transferor.

Background

Dutch law entitles employees to a minimum of four weeks' paid annual leave. A fulltime employee is therefore entitled to twenty paid annual leave days. Granting additional 'contractual' leave days is customary. On top of the right to paid annual leave, most employees are also entitled to payment of 8% of their annual salary as holiday allowance. Typically, this is paid once per annum, normally in May.

Both annual leave[1] and holiday allowance are considered rights that transfer pursuant to Article 3(1) of the Acquired Rights Directive 2001/23/EC (the 'Directive').

Dutch law provides for the transferor and transferee to be jointly and severally liable in respect of obligations that arose before the date of the transfer and for the transferor's liability to be limited to one year from the date of the transfer. This means that affected employees can sue both their old and new employers for salary claims based on a contract that existed at the date of the transfer.

The Directive was primarily designed to protect employees, rather than to regulate the legal relation between transferor and transferee. Therefore, questions relating to this relationship are not explicitly addressed in the Directive. Often, this is arranged by contract, but a contract is not a necessity. After all, the transfer of an undertaking should take place 'in the context of contractual relations': a contract as such is not required. If no contract is in place, questions relating to the relationship between the transferor and transferee should be resolved by domestic law. Here, the Directive and the national legislation transposing it can play a role.

The Dutch implementing law does not make any provision for the relationship between the transferor and transferee. And case law on this topic is scarce. The only example I know, predating the case at hand, derives from the District Court in Zwolle.[2] This Court ruled that the transferee may recover the annual 8% holiday allowance for employees who transferred from the transferor, to the extent that this was accrued during their employment with the transferor. The Court noted that, to ensure employees' rights are safeguarded, the transferee must retain the employees' employment conditions. Because the transferee is obliged to pay the transferred employees 8% of their annual salary as holiday allowance in one go, even though part of this allowance was accrued before the date of transfer, the Court ruled that the transferee was entitled to claim this back from the transferor.

This ruling is in line with that of the Austrian Supreme Court (*Oberste Gerichtshof*), reported in *EELC* 2010/23. The Austrian Supreme Court held that, if holiday pay is paid for an amount of holiday that accrued before the date of the transfer, the transferee has – in the absence of an express provision stipulating otherwise – the right to recover the costs involved from the transferor. A German Court would likely draw the same conclusions.[3] This Austrian ruling was welcomed by Dutch scholars, arguing that this indeed was a sound solution that should be applied in the Netherlands as well.[4]

* Amber Zwanenburg is a lecturer of Labour Law at the Erasmus University of Rotterdam.

1. ECJ 7 February 1985 Case C-135/38 (*Abels*).
2. District Court Zwolle-Lelystad 19 October 2011, ECLI:NL:RBZLY:2011:BU5790.
3. CfoJ by Paul Schreiner on the Austrian Case Report in *EELC* 2010/23 and BGH decision of 25 March 1999 – III ZR 27/98.
4. A.J.C. Theunissen, 'Vakantieverlof en ovo: bestemming nog niet bereikt', *TAP* 2010/7, p. 276-280 and CfoJ Peter Vas Nunes and Dorothé Smits on the Austrian Case Report in *EELC* 2010/23.

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Facts

Up to May 2010, the company BDG Technisch Administratieve Diensten B.V. ('BDG') provided pay roll services and posted 600 employees to Agentschap NL, an agency belonging to the Dutch Ministry of Economic Affairs. The employees were employed by BDG. As a result of a tender, the service contract between BDG and Agentschap NL was not extended. The pay roll services were taken over by BDG's competitor, CapitalP. The employees involved subsequently entered into the service of CapitalP. These employees had, at the moment of the transfer to CapitalP, large amounts of leave accrued but not taken.
The question arose as to whether the value of these holidays should be paid by BDG, as the transferor to Capital P, as the transferee.

Judgment

The Court of Appeal in The Hague assumed for the sake of argument that a transfer of undertaking had occurred. It subsequently ruled that the transferee could not claim the value of the leave transferred. The Court considered that the Directive and the Dutch implementation law were not designed to regulate the relationship between the transferor and transferee. Because this relationship is not addressed in statute, the Court stated it could not hold the transferor liable for payment of the value of the leave. The Court failed to see a legal ground justifying such a claim.

The Court ruled that, in general, the Dutch Civil Code provides that, where two parties are jointly liable for a debt and one of them pays that debt, that one has recourse to the other for half of the sum paid, unless a provision of law, custom or legal act (*rechtshandeling*) should reasonably lead to a different division of liability. In other words, the question at stake boils down to what is reasonable under the circumstances at hand. The Court finds it reasonable to not allow the transferee to claim the relevant expenses from the transferor. Where a transfer does not occur as a result of an agreement between the transferor and the transferee, but instead results from a tendering process initiated by a third party, it would have been up to the third party (initiating the tender process) to provide how the transferee and the transferor should deal with issues of accrued rights. The transferee and the third party should have predicted what liabilities the transferee would be taking on and should have known that the transferee would be obliged to allow the employee to take paid leave accrued before the date of the transfer. If the transferee does not cover these expenses in an agreement, this should not be to the detriment of the transferor.

The transferee also argued that the transferor had been unjustifiably enriched at the expense of the transferee, and was therefore obliged to repair this up to the amount of the enrichment, or to a reasonable extent.[5] The Court, however, took a different approach and held that the fact that the transferee must allow the employees paid holiday leave, is not a 'loss': there are no losses suffered or profits missed. The expenses are simply based on an obligation arising from a contract of employment allowing the employee to take paid time off work. But even if the expenses were to be considered losses, the 'enrichment' that is involved is not unjustifiable. The enrichment of the transferor, after all, was something that the transferee could have foreseen and should therefore not be at the expense of the transferor.

Commentary

This ruling stands out as it is not in line with prior case law in the Netherlands, nor is it in line with case law in Austria and Germany. Having said that, the question at stake is simply not addressed in the Directive, nor in Dutch law, which has allowed the Court to weigh the arguments and assess what is reasonable in the circumstances.

A relevant circumstance was, according to the Court, the fact that the expenses were foreseeable for the transferee: it could and should have taken this into consideration when taking part in the tender process. But more arguments in favour of this view can be found. To name a few: Is it reasonable to expect the transferor to compensate the competing transferee for expenses, after having lost its contract to this competitor? And would it not be unfair for the transferor to have to pay the full value of the unspent leave in cash up front? After all, it is uncertain that the employees will actually use all their transferred right to paid leave (e.g. the right to take leave can be time-barred). Moreover, the economic value of up-front payment for leave may very well exceed the economic value of allowing the employees to actually use their leave, as it can be done at a moment in which there is little demand for the employees (i.e. there was no work anyway).[6] In other words, the transferee's claim could exceed the transferor's savings.

An important counterargument is normally that the transferor has made appropriate reservations or provisions on its balance sheet for leave accrued but not taken. Not having to pay these amounts might therefore seem like an enrichment of the transferor to the detriment of the transferee. But this argument did not convince the Court in the current case. It does, however, seem to have convinced a prior Dutch court (the District Court in Zwolle), and the Austrian and German courts. It is therefore questionable whether the Appellate Court in The Hague has set a new standard. It may

5. Section 6:212 Civil Code.
6. A.J.C. Theunissen, 'Vakantieverlof en ovo: bestemming nog niet bereikt', *TAP* 2010/7, p. 276-280 and CfoJ Peter Vas Nunes and Dorothé Smits on the Austrian Case Report in *EELC* 2010/23.

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very well be that the particulars in this case – the transferor loses a contract to a competitor – were decisive. Probably time will tell. It may very well be that Dutch courts will apply a case-by-case approach.

Subject: transfer of undertakings

Parties: *De Staat der Nederlanden (Ministerie van Economische Zaken, Agentschap NL)* – v – *BDG Administratieve Diensten B.V.*

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