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Labour Court sets out employers' equal treatment obligations following the transfer of a business (FI)

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Summary

The Finnish Labour Court recently decided a case about the transfer of a business and the associated obligation to harmonise employees' salaries. The Court held that the employer had not shown good reasons for continuing to pay different salaries to employees with equivalent responsibilities long after the transfer.

Facts

In 2005, employees of several municipalities were transferred to work for a newly-formed federation of municipalities. In 2013, a further transfer to another federation of municipalities took place. The ensuing case concerned the salaries of physiotherapists following the transfers.

Under the applicable collective bargaining agreement, the employer had categorised the jobs of physiotherapists into two levels of responsibility. After the first transfer in 2005, three physiotherapists working at the lower level had received a higher basic salary than other physiotherapists working at the same level. Moreover, the salaries of some physiotherapists working at the higher level were lower than those of the three physiotherapists in question. These discrepancies had come about as a result of the employees transferring to the federation of municipalities from several employers with diverse pay systems.

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Under Chapter 2, Section 2 of the Employment Contracts Act (55/2001, as amended), employers have an obligation to treat employees equally, unless deviation is justified, considering the tasks and positions of the employees. Moreover, Section 6 of the Constitution of Finland guarantees equality for all under the law.

Initially, the labour union and the employers' association considered there to be lawful grounds for the salary differences: upon the transfer of a business, employees move to the service of a new employer but retain their old terms of employment. In 2012, the labour union accepted the salary levels as they were at that time. Therefore, at the time of the second transfer, the salary differences still existed.

Proceedings

In 2015, the labour union changed course and demanded that the employer compensate for the salary differences retroactively. The employer refused to do so. In 2017, the labour union filed a claim against both the employer and the employers' association. The union accused the employer of breaching its obligation to treat employees equally and to apply the collective bargaining agreement and it accused the employers' association of failing to fulfil its supervisory obligations.

The labour union argued that even though there had originally been acceptable grounds for the salary differences, the employer should have harmonised the salaries within a reasonable time – which the labour union considered to be two years. It also noted that the salary differences were not particularly significant and therefore, harmonising the salaries would not have been exceptionally difficult. It requested that the Court confirm there had been no acceptable grounds for the differences after February 2010. The claim only went as far back as 2010, as the time limit for claims in relation to earlier periods had expired.

The employer and the employers' association accepted there were salary differences. They stated that the transfer of the business had created acceptable grounds for the differences and that these acceptable grounds still existed, given that neither the collective bargaining agreement nor case law defined the period within which harmonisation should take place. Another justification was that the labour union had accepted the salary levels in 2012 and had not asked for harmonisation until 2015. Last, the defendants argued that the employer's limited

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finances made it impossible to harmonise salaries, especially since both the law and the collective bargaining agreement prevented the employer from decreasing salaries.

Judgment

The Court accepted the claims and held that the employer had not shown acceptable reasons for the salary differences, such as reasons related to the tasks or positions of the employees. Although the transfer of the business had originally constituted acceptable grounds for salary differences, the employer was obliged to eliminate the differences within a reasonable time. Although there is no guidance from case law as to what should be considered a reasonable time, the Court found that such a significant time had passed that this could not be considered reasonable.

Based on national and ECJ case law (*Dekker* C-177/88, EU:C:1990:383 and *Hill & Stapleton* C-243/95, EU:C:1998:298), the Court also stated that an employer's financial difficulties cannot constitute grounds for treating employees unequally when it comes to salary. The Court found that the evidence of the employer's financial situation provided no reason to depart from this principle.

It was also important that since 2012 the employer had no longer planned to harmonise the salaries. It was irrelevant that the labour union had accepted the employer's decision to discontinue the harmonisation plan. The obligation to treat employees equally is based on mandatory law and this cannot be deviated from by agreement.

The Court fined the employer for knowingly violating the collective bargaining agreement and the employers' association for breach of its supervisory obligations.

Commentary

This case confirms two rules in relation to transfers of businesses. First, in conformity with previous case law, that there is a primary obligation to harmonise salaries within a reasonable time. Second, until harmonisation has taken place, the employer must at least have a realistic plan in place to ensure it is done. In this case, the employer failed to deliver on both grounds and was therefore sanctioned by the Court.

This is also the first case in which a clear breach was found for failure to harmonise within a certain time. The Court ruled that the physiotherapists should have been paid higher salaries since February 2010, as requested by the union. It is a little unfortunate that, as claims before February 2010 were barred as out of time, it remains unclear what exactly constitutes a reasonable time for harmonisation following a transfer. However, what is clear is that the Court considered five years unreasonable.

It should also be noted that the Court did not find evidence of the employers' financial constraints persuasive. However, by stating that the *evidence* gave no reason to depart from the principle that the financial difficulties of an employer do not constitute grounds for paying unequal salaries, the Court left open the possibility that financial difficulties could form acceptable grounds for unequal treatment in cases where the evidence was stronger.

The judgment stresses the obligation on employers to harmonise employment terms and conditions – salaries in particular – and to do so within a reasonable time following a transfer.

Comments from other jurisdictions

Bulgaria (Ivan Punev, Djingov, Gouginski, Kyutchukov & Velichkov): Generally, the equal pay for equal work rule is an underlying principle of Bulgarian employment law. Thus, generally, employers must ensure that employees receive equal pay for equal work or work of equal value, and employees must not be discriminated against in terms of their pay.

There is no express statutory provision under Bulgarian law regulating the harmonisation of pay and benefits in the case of a transfer. Nor have we been able to find any case law from the Bulgarian authorities giving their official position on this.

On basic principles in both Bulgaria and some other EU countries, two different rates of pay may apply at least initially because under the transfer rules, all rights and obligations transfer to the new employer "as is". Following that, the general requirements in relation to pay and benefits should be complied with. The two main ones are (i) the equal pay for equal work principle, and (ii) the prohibition against discrimination (i.e. that the way in which pay is decided should be based on objective criteria and should not lead to discrimination). Again, it could be argued that (i) a difference in pay and benefits resulting directly from a transfer does not violate the equal pay for equal work principle, and (ii) a transfer as a reason for paying people different rates does not fall under any of the statutory grounds of discrimination listed in Bulgarian law. However, given the lack of legal and judicial clarity on this issue, there is always a risk that employees could bringing claims for unequal treatment or discrimination to test the position.

In practice, however, employers often harmonise post-transaction for organisational reasons.

Germany (Nina Stephan, Luther Rechtsanwaltsgesellschaft mbH): The decision of the Finnish Labour Court is

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surprising and contradicts the settled case law of the German labour courts.

The German legislature has enshrined the principle of equal treatment and special prohibitions against discrimination in various laws, including the General Equal Treatment Act, the Part-Time Working Period Act and the Temporary Employment Act. However, unlike the Finnish legislator, in Chapter 2, Section 2 of the Employment Contracts Act, the German legislator has not expressly enshrined a general principle of equal treatment in employment law. Nevertheless, this general principle is accepted in Germany as an expression of the principle of equality in Article 3(1) of the German Constitution. It provides that employers must treat their employees and groups of employees in a comparable situation, equally.

The principle of equal treatment applies when an employer provides benefits based on a general principle. The mere fact that there are different groups of employees does not violate the principle of equality of itself. A general obligation to provide equal pay for equal work does not exist under German law. Only if the employer decides to grant a certain benefit (which is not the case if new employees are transferred by way of the transfer of an undertaking) must it take into account the principle of equal treatment, in other words, there needs to be a sufficient reason for particular groups of employees to be treated differently.

The following applies in Germany (and seems in line with the Finnish labour courts): failure to harmonise working conditions does not violate the principle of equal treatment under labour law. There is no obligation for an adjustment if the original business has completely dissolved and the employees are integrated into the business of the transferee, or if the business was transferred more than a certain time ago. The transfer of the business constitutes an objective reason to continue with different pay rules and thus with unequal treatment. By law, the transferee is only obliged to provide the same working conditions as existed before the transfer and to pay the same as the transferor. According to Section 613a(1) of the German Civil Code:

> *"If a business or part of a business passes to another owner by legal transaction, then the latter succeeds to the rights and duties under the employment relationships existing at the time of transfer."*

According to the case law of the Federal Labour Court (BAG), there is no room for the principle of equal treatment to be applied if the working conditions existing before the transfer of business are continued. This means that there is no legal basis for a subsequent obligation to adjust, even after a longer period of time (BAG, judgment of 31 August 2005 – 5 AZR 517/04).

According to Supreme Court case law, the principle of equal treatment only applies when the transferee establishes new working conditions after a transfer.

Greece (Ioanna Chanoumi, KG Law Firm): In the case of a transfer, the transferee's legal obligation is to take on all the rights and obligations of the existing employment agreements at the date of the transfer. Neither the law (Presidential Degree 178/2002), nor Greek jurisprudence, provides any obligation on the transferee to harmonise pay between transferred and existing employees – even after a reasonable time following the transfer. The different treatment of transferred and existing employees in cases of transfers is not in conflict with the principle of equal treatment. The purpose of Presidential Decree 178/2002 is to protect the acquired rights of the transferred employees. It does not extend to financial improvement in the context of harmonisation procedure.

In practice, many employers do suggest a full or partial harmonisation of pay and benefits to employees, in order to avoid having to administer two different systems.

Italy (Caterina Rucci, Fieldfisher): Italy has an unusual rule about the application of collective bargaining agreements in cases of transfers. It is the only country where there is no time limit for applying different conditions in cases where the transferee does not have a collective agreement of the same level as the one the transferor used to apply. In such cases, the transferee should continue to apply the transferor's CBA indefinitely.

In Italy, pay is normally determined by national CBAs and it would be very rare to find no national CBA being applicable by an employer. This might occur more often for lower level CBAs, but these more rarely have agreements on salaries. They tend instead to have rules on specific benefits. As it might be complicated to continue to grant a specific benefit, especially if it is linked to the activity carried out by the transferor, in most cases, harmonisation clauses are negotiated during consultations on the transfer.

United Kingdom (Bethan Carney, Lewis Silkin LLP): This is a very interesting case from a UK perspective because it is difficult to harmonise terms and conditions following a TUPE transfer in the UK. The UK courts have interpreted the ECJ's decision in *Foreningen af Arbejdsledere i Danmark – v – Daddy's Dance Hall* as meaning that an employer cannot change an employee's terms and conditions for a reason connected with the transfer. Harmonising terms following a transfer is generally held to be a 'reason connected with the transfer'. If an employer attempts to do so, any detrimental change is ineffective (even if the employee purports to agree). An employer wishing to harmonise pay following a transfer has two choices. The first is to 'level up', which is possible. The second is to dismiss and offer to reemploy on the new terms. This leaves the employer at

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risk of an unfair dismissal claim (as the termination will probably be automatically unfair as for a reason connected with the transfer), so the employer usually asks the employee to sign a settlement agreement waiving claims at the same time. Employees are likely to ask for compensation for signing such an agreement.

Unlike in Finland, there is no general requirement under UK law that employees are treated equally unless deviation is justified. There is however a requirement that men and women are paid equally. If there are men and women doing the same job following a TUPE transfer but paid differently that would put the employer at risk of an equal pay claim. As in Finland, it might be able to argue that it should have a reasonable period following the transfer to equalise pay and that the TUPE transfer amounts to a 'genuine material factor' unrelated to sex for the pay difference. If the delay is too long, there is a risk that a court will determine that the TUPE transfer is no longer the operative reason for the pay difference and that there is a breach of equal pay legislation.

There may be similar arguments to be made in relation to other protected characteristics (such as race) but if there is no unlawful discrimination, a difference in pay for employees doing the same job at the same level could continue indefinitely in the UK without being in breach of the law.

Subject: Transfer of undertaking, general discrimination, terms of employment

Parties: The municipal organisation for trained care personnel (KoHo ry) – v – Local Government Employers (KT) and Kainuu Social and Health Care Federation of Municipalities

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