EELC 2018/35 Employees who lose their jobs upon retirement are not entitled to statutory severance compensation (NL)

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Summary

A provision of Dutch law, according to which employees who lose their jobs upon retirement are excluded from the right to statutory severance compensation, is not in breach of the Framework Directive.

Legal background

Dutch dismissal law was amended quite radically on 1 July 2015. Under the new law, almost all employees who lose their job involuntarily are entitled to a 'transition award'. In most cases, this award amounts to at least one third of one month's salary for every year of service with the employer, with a maximum of, in most cases, twelve months' salary. There is a major exception. Article 7:673 (7) (b) of the Civil Code ('Article 7b') provides that an employee whose employment ends upon reaching the contractual retirement age, is not entitled to a transition award. In the event the parties have not agreed on a retirement age, the relevant age is the age at which the employee becomes eligible for State retirement benefits ('AOW benefits'). In the case reported here, the contractual retirement age and the age at which the employee became eligible for AOW benefits (the 'AOW age') coincided. It was 65½.

Facts

X was employed by a hospital. His contract incorporated by reference a collective agreement which provided that the employment contract terminated automatically on the AOW age. As per Article 7b, X was not paid a transition award. Arguing that Article 7b is discriminatory and therefore ineffective and to be disapplied, X claimed the amount of transition award to which he would have been entitled in the absence of that provision, which was € 48,216. The court was unsure whether Article 7b was in compliance with Article 6 of Framework Directive 2000/78, which it purports to transpose, and which reads: "Notwithstanding Article 2 (2), Member States may provide that differences of treatment on grounds of age shall not constitute discrimination, if, within the context of national law, they are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary". The court was in no doubt that Article 7b treats employees whose employment terminate as a result of having reached retirement age ('retirees') unfavourably on grounds of age. The issue was whether this differential treatment was objectively justified. The court therefore sought guidance from the Supreme Court.

Judgment

The Supreme Court began by distinguishing between two categories of retiree: retirees whose employment terminates on or after their AOW age and retirees whose employment terminates before that age. Given that X fell within the former category, there was no need to rule on the latter situation.

The Supreme Court then emphasised that Member States enjoy a wide margin of appreciation, both as to the legitimate aim they wish to pursue and as to the means they elect to achieve that aim.

Next, the Supreme Court quoted extensively from the parliamentary debate relating to the introduction of Article 7b, with a view to identifying the rationale for (i) entitling employees to a transition award and (ii) excluding retirees from such entitlement. As appears from that debate, the rationale for entitling employees to a transition award is twofold: (A) the award compensates for the loss of a source of income (the 'compensa-

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tion rationale') and (B) it facilitates the transition to a new job (the 'transition rationale'). Both are to be seen as the implementation of the employer's 'duty of care' towards its employees. That duty stops once an employee ceases to be dependent on work for an income. Hence, the objective of Article 7b is to limit entitlement to a transition award to those employees who need it. This is a legitimate aim, and Article 7b is an appropriate means to achieve it. As for the necessity requirement, Article 7b does not clash excessively with the legitimate interests of retirees. It rests on a conscious balancing of interests between employers, older employees and younger employees, by Parliament, which has broad discretion in such matters. The result is a system in which an employer may terminate the employment of an employee without formalities and without cost when the latter reaches the AOW age. The fact that not all employees are eligible for full AOW benefits does not alter this, given that those without full State benefits are, as a rule, eligible for welfare. Moreover, the new law on dismissals was designed to make dismissal simpler, faster and cheaper. It introduced an abstract and standardised set of transition award rules, which does not allow for individual assessments (see the ECJ's judgment in *Toftgaard,* C-546/11).

Conclusion: Article 7b is not at odds with Directive 2000/78.

Commentary

1. The Supreme Court felt sufficiently confident to adjudicate this matter without seeking the ECJ's guidance. As long as the ECJ has not ruled on Article 7b, we cannot be 100% certain that it is in line with the Framework Directive. I can understand that the Supreme Court did not wish the ECJ to become involved. Quite apart from the delay this would have caused, national courts should be reticent about going to Luxembourg on every occasion where they have the slightest doubt regarding the interpretation of a directive. The Supreme Court's judgment seems sound to me.
2. It is important to note that the Supreme Court declined the lower court's invitation to also rule on the status of Article 7b inasmuch as it excludes from the transition allowance retirees who lose their job *before* the AOW age. I anticipate that the Supreme Court will be called upon to rule on that more thorny issue sooner or later.
3. Article 6 of the Framework Directive references "a legitimate aim, *including* legitimate employment policy, labour market and vocational training objectives". In its judgment in *Age Concern* (C-388/07), the ECJ held "that the aims which may be considered 'legitimate' within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers." Does excluding retirees from the right to a transition award qualify as a social policy objective? I am inclined to reply affirmatively, particularly in light of the ECJ's judgment in *Odar C-152/11*, but the Supreme Court did not address this question, in any case, not explicitly.
4. The reason for paying discharged employees severance compensation has been in debate for decades. Under the old law, the court's decision whether or not to award such compensation, and if so how much, was more or less discretionary, although there were guidelines in the form of formulas, in particular the so-called A x B x C formula, in which A represented (age-weighted) years of service, B represented average monthly salary and C was a variable by means of which the court could increase or reduce the A x B outcome according to the circumstances of each case. It was generally held that one of the reasons for awarding severance compensation was to reward the employee for his or her loyalty to the company. Why else did the formulas that were used to determine the amount of compensation depend on length of service? Is a 50-year old who is dismissed after one year of service really less in need of compensation than a 40-year old who stayed with the same employer for twenty years? Under the new law, there is a statutory right to severance compensation, now called the 'transition award'. Just as under the old law formulas, the amount of the transition award under the new law is the product of years of service and salary. In its explanation of the rationale for the transition award, the government elected to pretend that seniority is not one of the determining factors. In my view, the government did not provide a good explanation for this. For example, its explanation fails to make clear why an employee who is terminated following permanent and complete disability, and who is therefore entitled to 75% of last-earned salary until retirement age, gets a transition award, even though s/he has no need to transition to a new job and does not lose a source of income. And why does someone who is dismissed shortly before the AOW age, and is eligible for unemployment benefits (70%) for up to three years, get a full transition allowance, in many cases one year's salary, whereas his or her loss of income from work is less? In brief, the rationale behind the transition award rules and, hence, the judgment of the Supreme Court (which had to rely on that rationale), leave questions unanswered. This is not to say that I find fault with that judgment.

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5. As the government explained, one reason for factoring in seniority in the 'service x salary' method of calculating the transition award is that employees have a tendency to 'get rusty'. By staying put in the same job for many years, they lose 'employability'. A person who has switched jobs regularly tends to be better skilled in finding a new job. This could be a reason for relating the amount of the transition award to seniority. In fact, the new law not only amended the rules on dismissal, it also introduced an obligation by the employer to promote 'employability'. Literally, it reads, "The employer shall procure that the employee can obtain such schooling as he needs to continue in his job and, to the extent this can reasonably be expected of the employer, to continue being employed in the event his position becomes redundant or he is no longer capable of exercising it." Although this provision does not require the employer to offer employees 'general' vocational training, including training for jobs with *other* potential employers, it comes close. An employer that neglects its duty to prevent an employee from 'rusting' should pay more if and when it terminates an employment relationship. Is this the rationale, or one of the reasons, for relating transition award to seniority? I doubt it, because that would yield a paradox. It would mean that employers pay for hanging on to their staff. Hanging on to staff, i.e. not dismissing them, is precisely what Dutch dismissal law aims to do.
6. A contractual provision according to which an employment contract terminates on the AOW age does not discriminate on grounds of age in the event the AOW age is identical for all staff. At this time, the AOW age depends on year of birth. A person born in 1952 reaches the AOW age when s/he turns 66. For a person born between January and August 1953, the AOW age is 66 4/12. And so forth, until the AOW age (under the law as it now stands) is 67 3/12. This means that a company in which all employees retire on their AOW age discriminates on the basis of age. Whether such discrimination is objectively justified, is another matter.
7. The Supreme Court notes that the new law was designed to make dismissal "simpler, faster and cheaper". Almost all employment lawyers take the view that the new law has made dismissal more complicated.

Comments from other jurisdictions

Germany (*Paul Schreiner, Luther Rechtsanwaltsgesellschaft mbH*): German labour law does not provide for a general entitlement to compensation upon termination of employment, unlike Dutch law. German labour law does also not allow for a claim for compensation upon retirement. The German statutory protection in cases of dismissals aims at reinstatement, not the dissolution of the employment contract and the payment of severance. However, in cases of restructuring and collective redundancy, the works council can demand a social plan, providing benefits for the redundant employees. In terms of calculating the redundancy payments, the whatever detriments the employees have suffered as a result of the termination need to be taken into account. If an employee is about to reach retirement age the amount payable can be reduced on the basis that when s/he reaches retirement, there will no longer be any detriment as a result of the termination.

Romania (*Andreea Suciu, Suciu | The Employment Law Firm*): There is no debate about whether to grant a transition award to an employee who is terminated before, on or after the state retirement (AOW) age, because in Romania, the termination of employment at the AOW age occurs by operation of law. Termination of employment by operation of law is strictly regulated under the Labour Code and does not involve payment of any compensation.
However, our Constitutional Court has been recently faced with a discrimination claim about the termination of employment at the AOW age. This is because the statutory AOW age, unlike in the Netherlands, is not identical for men and women. The standard AOW age for men is 65 and the current AOW age for women is 60. Between now and 2030, there will be a standard AOW age of 63 for both based on a gradual increase to the retirement age for women.
The Constitutional Court ruled that the termination by law of the employment contract of a female employee who reached the legal AOW age was unconstitutional based on gender discrimination. The employee was therefore allowed to opt to extend her contract until she reached the legal retirement age for men. Based on the Constitutional Court's decision, the Labour Code was amended on 14 November 2018. The employee needs to communicate her option to her employer in writing no later than 60 days before reaching the legal AOW age. Should the employee not express an intention to extend, the employment contract will terminate by operation of law on the date she reaches the current AOW age for women.
Since the Constitutional Court's decision, we have already been instructed on two cases dealing with the extension of the employment contract by female employees who have reached the legal AOW age. This has only confirmed my intuition that many female employees would want to take up this new opportunity, both because the AOW for women is young and because of the right to accumulate income with AOW benefits that it provides.

Belgium (Peter Pecinovsky, Van Olmen & Wynant): Employment contracts do not automatically terminate when an employee reaches retirement age in Belgium either. But unlike in the Netherlands, in the case of a

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dismissal by the employer retirement age, the employer must still give notice (or pay dismissal compensation). This is the same notice period as normal, but is capped at a maximum of 26 weeks. If the notice is given before the employee reaches the retirement age, the notice period will not be reduced. The employee also has to give notice when s/he wants to end the contract. Only if the contract is ended by mutual agreement is notice unnecessary.

Austria (Erika Kovács, Vienna University of Economics and Business): The Austrian model of statutory severance payments could serve as a model and solve some of the problems demonstrated by this case. The Austrian system of severance pay was reformed in 2003. According to the new rules, the employer pays a monthly amount equal to 1,53% of the employee's gross salary into the employee's personal account in a severance payment fund, from the second month of the employment relationship. The employee is entitled a payout from the severance pay after three years of employment in the following cases: dismissal by the employer, unjustified summary dismissal by the employer, the employee's justified resignation, the cancellation of the contract by mutual consent or time lapse, in the case of a fixed-term contract.
Employees who lose their jobs upon retirement are entitled to statutory severance pay independently of the reason for their job loss. The employee has the right to a severance payment in any event from the date s/he retires and receives his or her pension from the statutory pension scheme. The employee is also entitled to severance after reaching the age for early retirement. The employee can choose between receiving a lump sum or transferring it to pension fund, insurance company or company pension scheme.
This system of severance pay has a number of advantages, notably, that the employer does not need to pay a huge sum of money all at once at the end of the employment relationship. On the other hand, employees cannot not lose their severance pay. Even in the case of the employee's death, it will be paid out to his or her heirs.

Cyprus (*Nicos Panayiotou, George Z. Georgiou & Associates LLC*): A similar issue arose in Cyprus in 2007. The Cyprus Labour Institute, which is a not-for-profit organisation run by PEO (Pancyprian Federation of Labour), asked the Equality Authority (EA) to examine whether Article 4 of the Termination of Employment Law, which excludes an employee who reaches the state pension age (currently 65) from the right receive compensation for unlawful dismissal, is discriminatory on grounds of age.
The Ministry of Labour, Welfare and Social Insurance took the position that Article 4 is not discriminatory because the overwhelming majority of the employees that reach the age of 65 have retirement rights. The EA, disagreeing with the Ministry, stated in its report that (a) in Cyprus there are employees over the age of 65 who have reduced pension rights or no pension rights at all; and (b) according to a European Commission report, Cyprus has the highest poverty risk for people over the age of 65 in the EU and one of the lowest state pensions of all the Member States. The EA concluded that many employees in Cyprus that are over 65, have a real need to continue working and that Law 24/67 should not set an age criterion that adversely affects their employment rights.
Despite the above EA report, the Attorney General of the Republic of Cyprus did not any amendment of the Law and, therefore Article 4 still applies. So far, no employee has challenged the Article's validity in Court.

Subject: Age discrimination

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Court: Supreme Court (*Hoge Raad*)

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