Supreme Court of Finland (Finnish Supreme Court rules on effect of transfer on voluntary pensions)

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Finnish Supreme Court rules on effect of transfer on voluntary pensions

COUNTRY FINLAND

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Summary

The transfer of an undertaking causes all terms of employment to transfer to the transferee, including pension benefits (based on domestic Finnish law).

Facts

The plaintiff was originally employed by Sampo Oyj ("Sampo"). On 1 January 2002, as a result of the transfer of the undertaking, he transferred into the employment of Itella Oyj ("Itella"). Sampo had taken out a supplementary pension scheme that was more comprehensive than the statutory pension scheme. The supplementary pension scheme was not agreed explicitly in writing, but was based on Sampo's usual practice. Itella did not offer its employees a supplementary pension scheme.

The plaintiff took the position that Itella had an obligation to continue providing him with the same pension benefits as he had had when employed by Sampo. Itella contested this, pointing out that the Finnish legislation in force on 1 January 2002, as interpreted by the Supreme Court, did not require a transferee to retain a voluntary supplementary pension scheme.

The debate hinged on the meaning of Chapter 1, Section 10 of the Finnish Employment Contracts Act 55/2001 (the "2001 Act") in the light both of domestic Finnish law and the implementation of the Acquired Rights Directive 77/187/EEC (later replaced by Directive 2001/23/EC). Until 1 December 2002 the 2001 Act provided that a transfer of undertaking leads to the transfer of "rights and obligations" existing at the time of the transfer. On 1 December 2002 the 2001 Act was amended as a result of Amendment 943/2002. This amendment added to the text: "the rights and obligations ***and employment benefits related thereto***" (emphasis added).

The question at issue was whether the 2001 Act, in force on the date of the transfer (1 January 2002), should be construed as meaning that "rights and benefits" included supplementary pension benefits. Given that in 2001 the Supreme Court had ruled that this was not the case (judgement no KKO 2001:72), the court of first instance and the appellate court found in favour of Itella.[1] The plaintiff appealed to the Supreme Court.

The following table may help the reader understand the chronology referred to below:

Government Proposal 1970 (228/1969)	Government Bill 1992 (109/1992)	1993 Act (Amendment 235/1993)	2001 Act (Amendment 55/2001)	Transfer 1 January 2002	Government Proposal (97/2002)	2002 Act (Amendment 943/2002)
		Directive 77/178/EEC	Directive 2001/23/EC	1.1.1	1.1.2	1.1.3

Judgement

The essential question in this matter was whether the provision in the 2001 Act in force at the date of the transfer, where it referred to "transferring rights and obligations to the transferee", should be interpreted as including voluntary supplementary pension benefits or not. Itella and the lower courts said no, stating that Amendment 943/2002 was not applicable since it entered into force after the transfer.

The Supreme Court began by pointing out that, although Article 3(4)(a) of Directive 2001/23/EC provides that pension obligations do not transfer to the transferee, Article 8 of the Directive allows Member States to legislate otherwise. Therefore, the question at issue was to be resolved, not by reference to the Directive, but solely by reference to domestic Finnish law, i.e. the 2001 Act. In other words, the issue was how to construe Finnish law as it stood before 1 December 2002: did "rights and obligations" include benefits under a supplementary pension scheme?

The Supreme Court reversed judgement KKO 2001:72. That judgement had been based mainly on the Government Bill that was introduced in 1992 with a view to transposing Directive 77/187/EEC (Government Bill 109/1992). Now, in 2009, the Supreme Court referred instead – mainly – to the Bill that was introduced in 1970 with a view to introducing the Employment Contracts Act 1993 (Government Proposal 228/1969). Using this old legislative material, the Supreme Court came to the conclusion that it was the legislator's intent, when using the expression "rights and obligations", that ***all*** rights and obligations should remain unaltered following a transfer, including benefits under a voluntary supplementary pension scheme, which tend to be significant benefits for employees. There is no reason to consider these benefits as having a different status from other terms of employment.

It is noteworthy that in its interpretation of the wording as quoted above, the Supreme Court also referred to the report of the Employment Contracts Act Committee (1969:A 25) on which the said 1970 Proposal was based. The prevailing legal status at that time was held to be unsatisfactory, as the continuation of employment contracts in the event of a transfer was not explicitly regulated. Therefore the Committee report stated specifically that as of the date of the transfer, the transferee would also become liable for the transferred employees' social benefits.

Furthermore, the Supreme Court underlined in its ruling that the provision relevant in this case, Section 7 (corresponding to Section 10 of the 2001 Act), was not amended in the process of implementing Directive 77/178/EEC. Amendment 235/1993 concerned the allocation of the liabilities of the transferee and transferor for the employee's pay and other claims deriving from the employment relationship which fell due before the transfer. The Supreme Court emphasised that Amendment 235/1993 did not lead to the exclusion of supplementary pension benefits, as they were to be regarded as transferable social benefits. Thus, the Supreme Court ruled on the basis of the existing legislative material regarding the said Government Proposals that supplementary pension benefits are to be considered as transferable social benefits as laid down in earlier provisions of the Act.

Thus, the Supreme Court concluded that Itella was liable to retain the supplementary pension scheme in force at the time of the transfer.

Commentary

Finland implemented Directive 77/187/EEC in 1993 by amending the Finnish Employment Contracts Act. As underlined by the Supreme Court, the Directive is a so-called minimum directive, meaning that it does not affect the right of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees or to promote or permit collective agreements or more favourable agreements between social partners (Article 8). Although Member States must adopt the measures necessary to protect the interest of employees and former employees in respect of pension rights existing at the time of the transfer, they need not require transferees to continue contributing to pension schemes after the transfer. However, Article 8 makes clear that the Directive "shall not affect the right of Member States to apply or introduce laws [...] which are more favourable to employees". The question is whether that is the situation in Finland.

In this respect, it is interesting to have a closer look at the earlier ruling of the Supreme Court in 2001 (KKO 2001:72) where the Supreme Court came to a different judgement, which was reversed in the judgement reported here. In its 2001 ruling the Supreme Court held that neither the Directive nor Finnish law make the transferee liable for a supplementary pension scheme which the transferor has taken out for its employees. The Supreme Court based this on the fact that, according to Government Proposal 109/1992, the Finnish Act of 1993 had been adjusted to correspond with Directive 77/178/EEC. The Supreme Court referred to the reasoning of the Government Proposal, according to which the purpose of the 2001 Act was to *"implement the minimum requirements within the Finnish employment legislation laid down by the Directive"*. Furthermore, the Supreme Court noted that in the Government Proposal there was an explicit reference to the provisions of the Directive regarding the non-transferability of employees' supplementary pension schemes in the event of a transfer. The Court referred to Article 3(3) of Directive 77/178/EEC (corresponding to Article 3(4a) of Directive 2001/23/EC) according to which: *"paragraphs 1 and 3 shall not apply in relation to employees' rights to old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States."*

For these reasons, in the 2001 case the Supreme Court had found the transferee not liable for the employee's voluntary supplementary pension benefit.

As can be seen from the Supreme Court's reasoning, it can be concluded that the Supreme Court viewed the legislative status very differently in 2009 than in 2001. It would appear that whereas the Supreme Court in 2001 used the Government Proposal of 109/1992, which was drafted in order to implement the Directive, as its main legislative source, in 2009 it used the original Government Proposal drafted in 1970 for the then new Employment Contracts Act 1993 (Government Proposal 228/1969). The reason why the Supreme Court did not refer to the original Government Proposal for the Employment Contracts Act in the 2001 case remains unknown, but it seems that the Supreme Court has interpreted employment law very differently in these two cases. Unfortunately, the decision does not indicate why a different approach was followed, so no explanation can be given for the difference in approach.

Comments from other jurisdictions

The Netherlands (Ronald Beltzer): Under Dutch law, the situation until 2002 seemed clear: all voluntary pension schemes were exempted from automatic transfer, regardless of whether they could be defined as "pension schemes" or "pre-pension (early retirement) schemes", even though that distinction was, in hindsight, relevant, since the ECJ ruled in the *Martin e.a. /SBU* case (10-1-2004) that *early retirement benefits [...], paid in the event of early retirement arising by agreement between the employer and the employee to employees who have reached a certain age, are not old-age, invalidity or survivors' benefits under supplementary company or inter-company pension schemes"* within the meaning of the Directive. From 2002 on, however, all voluntary pension schemes are, as a rule, transferred in cases of transfers of undertakings (Article 7:664 of the Civil Code). This is in accordance with Article 8 of the Directive, which makes clear that the Directive *"shall not affect the right of Member States to apply or introduce laws [...] which are more favourable to employees"*. Because of the complex legal nature of Dutch pension schemes (e.g. mandatory participation for certain branches of industry and the need to insure pension obligations), there are certain exceptions to this rule, the most important being that the transferee is already bound by another pension scheme at the time of the transfer. This latter pension scheme may be less favourable to the employees whose contracts are being transferred, but this situation has been covered by the legislator. However, this, in turn, may lead to transferees introducing a rudimentary pension scheme before the date of the transfer in order to avoid the more expensive scheme of the transferor being automatically transferred. It is not certain whether this is legitimate; it could perhaps be argued that such a construction constitutes an abuse of power.

Austria (Martin E. Risak): Austrian lawmakers have taken advantage of the possibility of exempting voluntary contractual pension benefits from automatic transfer, as foreseen in the Acquired Rights Directive 77/187/EEC. The legal provisions are somewhat complicated as they give the transferee the right to refuse to take over these benefits and in return, entitle the employee to refuse to be transferred to the transferee. In the case at hand it would have been possible for the transferee to refuse to take over the pension scheme of the transferor. The time bar for refusal is quite flexible – the transferee must state his decision at the latest within a reasonable time limit set by the employee. It would therefore not be possible for the transferee to take over pension obligations based on cutomary practices of which he was not aware.

Other provisions apply to pension benefits deriving from collective bargaining agreements and based on works agreements with works councils. The latter are the most relevant source of company pension schemes in practice and may be terminated by the transferee upon notice. The legal effect of termination is somewhat unclear – there is no existing case law on the subject and the various related questions are much disputed in the legal literature.

Germany (Paul Schreiner): In Germany pension rights are not excluded from the transfer, the entitlement to a pension after the employment relationship forms part of the remuneration of the employee. It can be either be based on the employment contract, works customs or collective agreements. In the first two cases the entitlement is transferred automatically, in the last case a pension system at the transferee on a collective basis can replace the existing pension scheme.

United Kingdom (Richard Lister): Under the UK's Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), some pension entitlements transfer in exactly the same way as any

other benefit - e.g. personal pension schemes and "stakeholder" schemes.

In contrast, if the transferor has an occupational pension scheme, the transferee is not obliged to replicate it (subject to some important exceptions - see below). The transferee has the choice of either admitting transferred employees to its own occupational pension scheme or it can make a contribution to a stakeholder scheme. In either case, in broad terms, it is a pre-condition that the employer must be prepared to pay up to 6% of the employee's salary into such a scheme and can only require the employee to match employer contributions up to a maximum of 6% of salary. Nevertheless, this may result in a substantial deterioration in pension benefits for the employees who transfer. (The relevant rules are not contained in TUPE but in the Transfer of Employment (Pension Protection) Regulations 2005.)

Some rights under occupational pension schemes are still regarded as transferring under TUPE, in line with the ECJ's rulings in Martin and Beckmann. This is a complex and uncertain area but it includes schemes conferring pension benefits in the event of early retirement. As almost all occupational pension schemes include early retirement benefits, the incoming employer in these circumstances may find it safer to replace transferring employees' occupational pension entitlements with a scheme providing equivalent benefits - albeit that this will be expensive.

Finally, employers inheriting staff from public sector bodies under TUPE need to be aware that public sector procurement requirements will generally require employees to be provided with pensions that are certified by the Government Actuary's Department to be substantially equivalent to those they enjoyed in the public sector.

[Footnote]

1 The appellate court based its decision not only on the Supreme Court's judgement in case no KKO 2001:72 but also on the fact that the contract between Sampo and Itella provided that Itella would not offer the transferred employees supplementary pension benefits. This argument played no role in the Supreme Court's reasoning.

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