LEGAL UPDATE

Transfer of undertaking and collective labour agreement: a dynamic doctrine

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The employer who acquires employees through a transfer of undertaking should pay close attention if a Collective Labour Agreement (**CLA**) has been declared applicable to these employees. Even if the new employer has nothing to do with that CLA, the possibility exists that the new employer must apply not only the existing CLA, but also its future versions. This is relevant, for example, for a wage increase agreed in a subsequent CLA. Does the new employer have to grant that wage increase?

The Supreme Court has now answered this question in the affirmative in its judgment of 12 July 2024 (ECLI:NL:HR:2024:1068 (in Dutch)).

Facts
Employer Mol Logistics transferred activities to IDL. This resulted in a transfer of undertaking as a result of which the employees concerned automatically joined IDL. In principle, the employees retained their terms of employment in the process. The employment contracts stated that the Collective Labour Agreement for Transport & Logistics would apply as valid from time to time (a so-called "*dynamic incorporation clause*"). This clause therefore - as usual - not only declared the existing CLA applicable, but also all future versions of the CLA.

The dynamic incorporation clause and transfer of undertaking
For some time, it has been unclear how to deal with such a dynamic incorporation clause after a transfer of undertaking. Is the situation then frozen "as is", or must the new employer also apply all future versions of the CLA, even though those CLAs are concluded by parties over which the new employer has no influence?

In the Asklepios judgment, the Europen Court of Justice ruled in 2017 that all future versions of the collective agreement must also be applied as *long as national legislation provides for sufficient possibilities to unilaterally change terms of employment*. As a unilateral change of terms of employment in the Netherlands is notoriously difficult, the status for the Netherlands was unclear.

The Supreme Court has now ruled that Dutch law provides sufficient scope for unilateral changes to terms of employment. Thus, it has now also become clear for the Netherlands that a dynamic incorporation clause means that after a transfer of undertaking, the transferred employees are not only entitled to their existing CLA, but also to future versions of it.

For employers, this does not make things easier. On the other hand: in the same judgment, the Supreme Court had reaffirmed that a change in terms of employment is possible, not because of but after the transfer of undertaking. Such a change can be realized by mutual consent, or unilaterally by making use of the possibilities that Dutch employment law provides. However, we know from existing case law that a unilateral change is subject to strict requirements.

Do you have any questions on this topic? Then feel free to contact one of our specialists from the Employment & Pensions team.

This is a Legal Update by Pieter Mantel.

For more information:

Pieter Mantel
+31 30 25 95 552
pietermantel@vbk.nl