HOUTHOFF

FNV/Pontmeyer case

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Unilateral change

If an employer wants to change employment conditions, this is in principle only possible with the consent of the employee. When it comes to austerity measures, employees are not so quick to agree. In that case, the employer may still be able to make changes via the unilateral change clause, if the parties have agreed to it, or via good employee and employer practices. The latter entails that the employer has made a reasonable proposal to the employee and that this proposal cannot be refused by the employee according to standards of reasonableness and fairness. Whatever the basis, the test to unilaterally change employment conditions is strict and rarely passed.

The first question to be asked in the case of a change envisaged by the employer is whether it concerns a condition of employment. Otherwise, the doctrine of unilateral change is, in principle, not applicable. Policy rules that the employer may put into place governing the work or policy within the company are usually not employment conditions. A favour or "extra" that the employer has provided out of courtesy and which is not reciprocated by the employee does not qualify as an employment condition either. But it is not required that firm agreements have been made to be able to speak of employment conditions. Acquired rights can also be qualified as employment conditions and employers cannot simply change them. That is what the *FNV/Pontmeyer* case was about (22 June 2018, ECLI:NL:HR:2018:976).

What was the situation?

Within Pontmeyer, a trading company in building materials, various collective labour agreements (CLA) apply, including the CLA for the timber trade. Pontmeyer wanted to change the pay scales and salary trends of employees who earn a salary above the CLA limit and therefore do not fall under the scope of the CLA. According to the amended remuneration policy, employees with an income above the CLA limit would no longer receive the usual CLA salary increase or indexation, but instead a salary increase that was made dependent on the assessment of the employee concerned. The Works Council agreed to this. In May 2012, Pontmeyer informed the employees involved of this change by letter.

Proceedings

According to the trade union FNV, Pontmeyer did not have the authority to unilaterally introduce a new remuneration system in deviation from the Collective Labour Agreement for the Timber Trade, and it commenced proceedings. In the proceedings, Pontmeyer stated that the salary increases and one-off payments were not employment conditions and that it could therefore unilaterally make adjustments.

In cassation, the Supreme Court considered that the question of when it follows from a course of conduct followed by the employer towards the employee during a certain period of time that there is an employment condition (acquired right) applicable between the parties, cannot be answered in a general sense. It comes down to the meaning that the parties have attributed to each other's conduct and statements and that they could reasonably have attributed to them in the given circumstances. In this context, the following viewpoints are important:

(i) the content of the course of action;
(ii) the nature of the employment contract and the position of the employer and employee in relation to each other;
(iii) the length of time during which the employer has pursued the relevant course of action;
(iv) what the employer and the employee have said or not said to each other in connection with this course of action;
(v) the nature of the advantages and disadvantages resulting for the employer and the employee from the course of action, and;
(vi) the nature and extent of the circle of employees affected by the course of action.

The Supreme Court set aside the judgment of the Amsterdam Court of Appeal and referred the case to The Hague Court of Appeal for further consideration.

The Hague Court of Appeal, first of all, decided whether the change of remuneration policy concerned an introduction and/or change of employment conditions, whereby the Court of Appeal assigned significance to viewpoints (i) to (vi) as formulated by the Supreme Court. The list of viewpoints was not exhaustive; more viewpoints are conceivable. In addition, the Court did not have to assess and address these viewpoints separately by, as is said, "ticking them off". The important thing is that it is known which points of view the judge attaches significance to.

On this basis, the Court of Appeal ruled that the indexations and one-off payments were employment conditions. All employees with an income above the CLA limit could be confident that they were entitled to it, even if it had not been explicitly agreed with them. An employment condition existed between the parties in this respect, because

- all employees with an income above the CLA limit, from their entry into service until the amendment of the remuneration system, automatically and without exception received all indexations and one-off payments of the CLA Timber Trade ,
- no reservation was ever made by Pontmeyer regarding granting of the above and no conditions were imposed thereafter; and
- it concerned long-term employees, the majority of whom had been with the company for at least 25 years. In all cases, this course of action by Pontmeyer covered a long period of time.

In this long-lasting course of affairs, the employees with an income above the CLA limit were entitled to expect that, just like the employees who were subject to the CLA Timber Trade, they would receive these indexations and one-off payments for as long as this CLA provided for them.

The Court of Appeal also ruled that the unilateral introduction of the new remuneration system, and no longer the automatic granting of the indexations and one-off payments of the CLA Timber Trade, was not legally valid. In the absence of a unilateral change clause, this must be agreed between employer and employee. The test in this case is therefore whether there was concrete, reasonable cause to change the employment contracts of the employees with an income above the CLA limit, whether Pontmeyer made a reasonable proposal to these employees, and in the affirmative: whether these employees could reasonably be required to accept this proposal. In the opinion of the Court of Appeal, in view of the business necessity, there were changed circumstances that gave rise to the proposal. That a proposal was actually made to the employees, was not sufficiently substantiated by Pontmeyer. The individual employees were confronted with the change as a *fait accompli* by letter of May 2012. For this reason alone, the requirement for a reasonable proposal had not been met.

Nor could the proposal be described as reasonable. The proposal seems to have been made primarily to put an end to the situation in which, according to Pontmeyer, employees with an income above the

CLA limit were not remunerated in line with the market, i.e., too highly. The Court of Appeal saw no reason to consider this proposal reasonable due to Pontmeyer's business situation at the time.

Therefore, the amendment of the remuneration system by Pontmeyer did not result in the forfeiture of the rights of the employees with an income above the CLA limit to continued allocation of the indexations and one-off payments in the manner provided for in the CLA for the Timber Trade.

In conclusion

In FNV v Pontmeyer, the Supreme Court listed for the first time six viewpoints that provide employers and employees more guidance in assessing whether something constitutes an employment condition. The way in which The Hague Court of Appeal used the viewpoints to assess whether there was an acquired right and therefore an employment condition, can easily be applied in practice. What is not innovative is that unilateral change of employment conditions is rarely allowed.