

Newsletter

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Employment Law

This Employment Law Newsletter of the Holland Van Gijzen Employment Law Section is to provide you with concise information on recent case law, legislation and current developments in the Dutch employment law arena.

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1. No further extension of employer's insurance obligation

If an employee is injured while performing his/her work, the employer is liable if it has failed in its duty of care (Article 7:658 of the Netherlands Civil Code (BW)). However, if the employer has fulfilled its duty of care, it cannot in principle be held liable for the employee's injury. The option of invoking Article 7:611 of the Netherlands Civil Code (good employment practices) is only open in cases where the duty of care under Article 7:658 BW is of little or no significance - as in the case of road accidents - or where the injury was not actually sustained in the performance of the work, but a relation exists to the employee's work.

With regard to injury in consequence of road accidents, an employer is in principle liable for this under Article 7:611 BW, unless the employer is adequately insured for road accidents that an employee sustains as a road user in the performance of his work. This then relates to employees who:

- (i) are involved in a road accident as the driver of a motor vehicle;
- (ii) sustain injury as a cyclist or pedestrian in consequence of an accident involving one or more vehicles; or
- (iii) sustain injury as a cyclist in consequence of a single-bicycle accident.

Thus even if the employer has fulfilled its duty of care (7:658 BW), it can still be liable by reason of failure to fulfil the insurance obligation under Article 7:611 BW.

A recent case at the Netherlands Supreme Court focused on the question of whether the insurance obligation also applied for a pedestrian who sustains injury in the performance of his work in consequence of a 'single-pedestrian' accident. The Supreme Court also recently ruled on the question of whether such an insurance obligation would also apply outside the context of 'road accidents'. That is to say, should the above-mentioned insurance obligation be further extended?

Single-pedestrian accident

This case¹ concerned a TNT mail deliverer who slipped on a lump of ice or frozen snow while delivering the mail on foot, which caused her to fall and break her ankle. The employee held TNT liable under Article 7:658 BW (breach of the duty of care) or Article 7:611 BW (good employment practices) for the injury she sustained. It was established that TNT had not failed in its duty of care. TNT could therefore not be held liable under Article 7:658 BW for the injury sustained by the employee.

The question remained open whether the employer had an obligation, on the grounds of good employment practices, to arrange an adequate insurance that would have covered this injury (the insurance obligation). The Supreme Court decided, however, that the employer's insurance obligation was not further extended to a road accident in which the employee, as a pedestrian, sustained injury through a 'single-pedestrian' accident. The Supreme Court considered: "*From Article 7:611 of the Netherlands Civil Code it is not possible to derive an obligation of TNT to arrange an adequate insurance to cover the risk of a single-pedestrian accident such as happened to [respondent]*".

¹ Netherlands Supreme Court, 11 November 2011, LJN: BR5215 (TNT).

Insurance obligation outside the context of road accidents²

An employee worked as a social therapist at a secure hospital. One day, while performing his work, the employee was grabbed by a patient and hit several times, including on the head. As a result of this incident, the employee ultimately became wholly unfit for work. The employee then held the secure hospital liable under Article 7:658 BW and Article 7:611 BW. The Court of Appeal ruled that the secure hospital had fulfilled its duty of care under Article 7:658 BW, but because the secure hospital had not taken out insurance to cover the risks to the employees of violent offences perpetrated by patients, it was still liable for the injury sustained by the employee.

The Supreme Court first examines the employee's assertion that the Court of Appeal had been wrong to rule that the secure hospital had fulfilled its duty of care. In the proceedings, the secure hospital had put forward concrete facts to substantiate its standpoint that it had taken sufficient measures against aggressive patients. According to the Supreme Court, by doing this the secure hospital (and the Court of Appeal) had failed to recognise that the secure hospital was required to describe the general measures and instructions to protect against the dangers inherent in dealing with patients in a secure hospital. The fact that in the proceedings the employee did not use sufficient concrete arguments about these general measures and instructions did not help the secure hospital, since it had the obligation to furnish facts regarding the general safety aspects. In the view of the Supreme Court, the secure hospital had thus not fulfilled its duty of care and was therefore liable for the injury under Article 7:658 BW.

The Supreme Court then examines the standpoint of the Court of Appeal that the secure hospital was obliged by reason of good employment practices to arrange an adequate insurance. The Supreme Court refers to the above-described TNT ruling, asserting that the insurance obligation must remain restricted to the road accidents as specified in (i), (ii) and (iii). Moreover, the incident with the patient did not occur at a place where the secure hospital as the employer had only limited control and influence. On the contrary, the incident occurred on the workforce itself. If an insurance obligation were also to apply for those circumstances, then, according to the Supreme Court, the legal system of employer's liability would be excessively impaired. After all, in that case there could be a risk that employers no longer have to fulfil their duty of care, because simply by having insurance they cannot be held liable. In addition, a more far-reaching insurance obligation creates legal uncertainty, because it is not possible to draw a clear boundary with (other) occupational accidents for which no employer's insurance obligation would apply.

Conclusion

In these two judgements, the Supreme Court wished to indicate that it did not want any further extension of the insurance obligation for the employer. The Supreme Court wanted to restrict this insurance obligation to the road accidents as specified above in (i), (ii) and (iii). The Supreme Court considers:

"In the present state of the legislation, it must also remain restricted to those cases, because this concerns an exception to the rule laid down in Article 7:658 of the Netherlands Civil Code that the employer is only liable for occupational accidents if it has failed in its duty of care (...)"

The Supreme Court takes the view that it is up to the legislature to offer employees a more far-reaching, general protection against the risk of accidents in connection with their work. For the present then, on the

² Netherlands Supreme Court, 11 November 2011, LJN: BR5223 (De Rooyse Wissel).

grounds of these judgements of the Supreme Court, the employer has 'only' a restricted insurance obligation.

It is possible that these judgements could lead to a change in the law on employer's liability. If there are any developments in this area, we will naturally keep you informed.

2. Accrual of vacation entitlements of sick employee

In our newsletter of August 2011 we already looked at the accrual of vacation entitlements of a sick employee as from 1 January 2012. We also discussed the rule that an employee who has been unable to take statutory vacation days due to sickness is permitted to accumulate these vacation days. The statutory vacation days are thus not forfeited, and the employee must be able to take his/her statutory vacation days at a later time. The question is then: for how long can the sick employee continue to accumulate these vacation days?

The European Court of Justice (ECJ) recently ruled that, in view of the (European) objective of right to paid annual leave, a long-term sick employee is not permitted unlimited accumulation of vacation days.³ Determination of the period up to which a sick employee can accumulate such vacation days falls in principle, according to the ECJ, within the competence of the member states.

In the explanatory memorandum to the new vacation legislation, the Dutch legislature is clear about this period. It states that for the vacation days that cannot reasonably be taken by the employee, through sickness or otherwise, a limitation period of five years applies (Article 7:642 of the Netherlands Civil Code (BW)). This means that if an employee has been unable to take his vacation days because he has been wholly unfit for work, he will no longer be entitled to these vacation days (only) after five years.

In the above-mentioned case, the ECJ held that a period of 15 months (specified in a German collective agreement) is also compatible with the (European) objective of paid annual leave. This period is therefore considerably shorter than the limitation period of five years stated in the explanatory memorandum.

This judgement can offer an opening for the Dutch legislature to change the limitation period with regard to these vacation days, all the more so because the ECJ's judgement is of a later date than the Bill concerning vacation days. There has as yet been no sign from the Ministry of Social Affairs and Employment that the new Act, which will come into effect as from 1 January 2012, will be changed on this point.

3. Disturbed working relationship after transfer of undertaking

A recent judgement of Alkmaar Subdistrict Court⁴ again confirmed that, in the event of transfer of an undertaking, an employee receives protection if the new employer wishes to offer different employment conditions to the employee.

³ Court of Justice EU, 22 November 2011, EUR C-214/10.

⁴ Alkmaar District Court, Subdistrict Sector, 5 July 2011, LJN: BU5123.

What was the situation? The employee had worked for the employer since 23 November 1987 in the position of production operative. The employee performed his work at the employer's location in Hoorn. In September 2010, De Mandemakers Groep B.V. ("DMG") acquired the shares of the parent undertaking of the undertaking where the employee worked. The employees were informed that the undertaking had been sold to DMG and that the site in Hoorn would be closed. The employee then became sick. During his sickness, two members of the Personnel department visited the employee and presented him with a choice. The employee could agree to a proposal to amicably terminate his employment contract, or consent to a new employment contract under less favourable employment conditions.

The employee then felt that he had no other option than to himself request the Subdistrict Court to set aside the employment contract. According to the Subdistrict Court, it had become sufficiently clear that good co-operation between the parties was no longer possible. The employment contract was therefore set aside.

The Subdistrict Court considered that the share transaction, followed by a reorganisation in which the site in Hoorn was closed and the activities located there were taken over by the DMG head office, must be classed as the transfer of an undertaking. Since the Subdistrict Court held that this was a transfer of an undertaking, the employee received protection, in the sense that he had retained his rights.

Moreover, the employees should have been informed in due time about the proposed decision to make the transfer, and the legal and social consequences of this transfer. The employer had failed to fulfil this obligation to provide information. The Subdistrict Court therefore took the view that blame could be attributed to DMG for the disturbed working relationship, and awarded the employee a compensation based on a "C-factor" (correction factor reflecting the degree of blame) of 1.5.

From this judgement it can be concluded that a (new) employer must act with due care if there is a transfer of an undertaking. Although a share transaction that does not involve a change in the employer is not classed as a transfer of an undertaking, in this case there was also a transfer of activities. In that event, the employees must be informed about the consequences of the transfer for the employees. The employees retain their rights arising from the employment contract and *ipso jure* enter employment with the new employer.

If an employee himself asks for the employment contract to be set aside because the transfer entails a change in the circumstances to the disadvantage of the employee, the setting-aside of the employment contract is 'at the expense of' the employer. This does not mean, however, that the employee is by definition entitled to a higher compensation than in a 'no-fault' situation. An employee only retains the right to a possible benefit under the Unemployment Insurance Act (WW). In this case, the new employer had acted so negligently that the Subdistrict Court saw cause to increase the C-factor.

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