

Newsletter

July 2011



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. Be careful with terminology when a salary penalty is imposed for failure to meet reintegration obligations

Although failure to co-operate with reintegration is a ground for excluding the continued payment of salary, an employer is nonetheless obliged to pay an employee's salary because in his letter to the employee he explicitly stated that the salary was suspended, according to a judgement given by Leeuwarden Court of Appeal on 29 March 2011.

The employee worked as an international truck driver. Following a prolonged absence due to sickness earlier in 2004, the employee had not performed the stipulated work since September 2005, as a result of various physical complaints. However, between August 2006 and January 2007 he did some driving work within the framework of "second track" reintegration (different work). In May 2007 the employer asked an employment counselling service to examine the employee's reintegration possibilities. This service recommended support in finding different work with a different employer. However, the employee said that he did not want to apply for different work, and wanted to wait for the second opinion of the Employee Insurance Agency (UWV). The employer responded to this by writing a letter in which he stated that the payment of salary was suspended with immediate effect.

The UWV's second opinion was that the employee was unfit on medical grounds to perform his own job, and also the adjusted driving job within the framework of the second track. The employee then proceeded to meet his reintegration obligations by externally seeking suitable work via a reintegration service, and claimed retrospective payment of the suspended salary.

The Court of Appeal ruled as follows. The employer had been entitled to stop payment of the employee's salary when the employee ceased to meet his reintegration obligations, by refusing to seek different suitable work. However, the employer himself wrote in his letter that he was suspending the salary. This means that as soon as the employee started to meet his reintegration obligations again, the suspended salary would then have to be paid. The Court's view is that the salary penalty is such a drastic measure for the employee that an employer may be expected to choose his words carefully. The employer therefore had to retrospectively pay the suspended salary.

There is a distinction between suspending the salary and stopping payment of the salary. If an employee fails to comply with regulations relating to the checking of his/her incapacity for work, the appropriate penalty according to the law is suspension of the salary. However, if the employee fails to meet his/her reintegration obligations, the employer is entitled to stop payment of the salary.

2. Tacit consent of employees to the employer's power to unilaterally change a bonus plan

According to Amsterdam Subdistrict Court¹, employees can tacitly consent to an employer's power to unilaterally change a bonus plan each year. Yet although this power to make changes had become part of the bonus plan, the employer was not entitled to invoke it, on the grounds of good employment practices ("good employership").

¹ Amsterdam Subdistrict Court 24 March 2011, CV 09-44193.

Since 2003 the employer had applied a bonus plan which gave employees entitlement to an annual bonus if they achieved certain targets. From 2006/2007 the annual bonus plans stated that the employer reserved the right not to pay a bonus if the parent company (the "Group") had not met its targets. The employees had not consented to this reservation.

At the end of the bonus year 2008/2009 the employer informed the employees that no bonus would be paid for that year, because the Group had not achieved its targets. The employees were unhappy with this conduct of the employer, and therefore sought a declaratory judgement that the employer did not have the right to unilaterally introduce a reservation relating to the Group's results into the bonus plan.

The Subdistrict Court stated that each year the parties had factually handled the bonus in accordance with the bonus plan presented for that year. The employees had not objected to the contents of the bonus plans, nor to the fact that the employer had made changes to the bonus plans each year. Consequently, the Court held that there were sufficient grounds for the judgement that the individual employees had tacitly consented to the employer's power to unilaterally change the bonus plan each year. That power of the employer had thus become part of the bonus plan.

However, the Court took the view that the employer had not acted as a "good employer", by not paying a bonus for the bonus year 2008/2009. An important aspect of this was that the employer had promised the bonus unconditionally in 2003, and that it replaced a regular salary increase. The bonus income was also 5% of the total individual remuneration, and for some employees was part of the pensionable income ("pension basis"). Finally, it was important that the employer had only taken the decision not to pay the 2008/2009 bonus after the bonus year had ended. At that point, the employees had worked hard the entire year for the bonus. The employees therefore retained entitlement to the bonus payment for the bonus year 2008/2009.

From this judgement it can be deduced that under certain circumstances, namely if the employer factually makes changes (small or otherwise) each year to a bonus plan and the employees do not object to this, employees can tacitly consent to an employer's power to unilaterally make changes. Although this judgement appears to offer - more - scope to employers to invoke the power to unilaterally make changes in plans and arrangements, this judgement does not relate to the requirement to record in writing the unilateral changes clause, which according to the Netherlands Supreme Court can also be included in a profit-sharing plan that is declared applicable to the employment contract. And apart from any power that an employer may have to unilaterally change (bonus) plans and arrangements, consideration must always be given to whether an employer can actually invoke that power, on the grounds of good employment practices.

3. Manifestly unreasonable dismissal for long-term sickness with varying outcomes

A number of judgements have recently been given on the question of whether a dismissal after long-term incapacity for work is manifestly unreasonable. The judgements show that it depends very much on the circumstances of the case whether a dismissal after two years of sickness is manifestly unreasonable or not.

The first judgement was given by Rotterdam Subdistrict Court on 13 May 2011. This case concerned an employee who started work with (the legal predecessor of) the employer on 8 September 1975. He worked

as an electronics service technician in the field team. The employee had never worked for another employer. In 1996 the employee became incapacitated for work due to psychological complaints. The psychological complaints were not connected with the work, but only with the employee's personal situation. In 2007 the employee returned to work for a few hours per week on a therapeutic basis. At the end of November 2007 he again stopped work completely. The employer then requested an employment counselling examination, which found that the employee was unfit for his own work, but could be deployed in different work. The employer did not, however, offer the employee suitable work. In the context of the application for disability benefit under the Work and Income (Capacity for Work) Act (WIA), the Employee Insurance Agency (UWV) deemed that the employer had made insufficient reintegration efforts, and imposed a penalty of continued payment of salary for 52 weeks. The employer then called in a professional reintegration service, which gave the employee training in job application techniques. However, the employee did not succeed in finding different work. In October 2007 the UWV curtailed the salary penalty to 3 October 2009. Then on 23 October 2009 the employer applied to the Public Employment Service (UWV WERKbedrijf) for a dismissal permit for the reason of long-term incapacity for work. This dismissal permit was granted on 10 March 2010, and the employer immediately terminated the employment contract with due observance of the notice period. The employer did not offer the employee a severance payment. The employee then brought manifestly unreasonable dismissal proceedings against the employer, and claimed damages on the grounds of the "consequences criterion" (the consequences of the dismissal for the employee are too serious compared with the employer's interest in the dismissal). The Subdistrict Court considered that the sole fact that no severance payment was offered did not automatically make the dismissal manifestly unreasonable. Moreover, the sole fact that a salary penalty had been imposed on the employer did not automatically make the dismissal manifestly unreasonable. However, both these circumstances together - in combination with the fact that the employee was 55 years old when the employment contract was terminated, had always performed well, and because of his sickness had a foreseeably weak position on the labour market - did make the dismissal manifestly unreasonable. The Court found that the employer should have given the employee a severance payment so that he could have adjusted his lifestyle and financial obligations to the new situation. On the basis of the employee's long period of service, the Court ruled that the employer must supplement the employee's WIA benefit to 100% of his salary for a period of 1.5 years. This came to EUR 12,552, while the amount claimed by the employee was more than EUR 300,000.

The judgement of Groningen Subdistrict Court of 19 May 2011 provides an example of dismissal of a long-term sick employee which was not deemed to be manifestly unreasonable, but for which the employee already received compensation under a redundancy plan ("social plan"). The case involved an employee who started work with the employer in 1987, as a printer. In 1999 the employee had to stop work because of RSI complaints. After four months of incapacity for work, he returned to work in the lower position of production assistant but at the same salary. The employee later tried to work with a "four-colour printing press" but as a result of his complaints this was not possible. In 2010 the employer implemented a reorganisation due to the poor financial situation of the company. This reorganisation included the elimination of the position "production assistant". The employer applied for a dismissal permit for the employee in question and the other employees who held this position. For all the employees who had to be made redundant, a redundancy plan was formulated in accordance with the Grafimedia Collective Bargaining Agreement (CAO). The employee was made redundant as from 1 September 2010. Under the redundancy plan he was entitled to compensation of EUR 12,206.30. The employee brought proceedings against the employer on the grounds of manifestly unreasonable dismissal. He took the view that the employer should not have been permitted to dismiss him, because his official

position was “printer” and not “production assistant”. The employee also invoked the “consequences criterion”.

The Subdistrict Court ruled that with regard to the question of whether the employee was rightfully proposed for dismissal, one should not look at the official job title but at his factual work. Because the employee was factually working as a production assistant, he was rightfully proposed for dismissal. The Court also found that the employer had made sufficient efforts to reintegrate the employee, and that the compensation under the redundancy plan was appropriate. The Court therefore rejected the employee’s claim for damages. Thus because of the redundancy plan, this employee was not in fact left empty-handed, which undoubtedly played a part in the Court’s judgement.

An unfavourable outcome for the employee can also be found in the judgement of Haarlem Subdistrict Court of 9 June 2011. This involved a female employee who started work with the (legal predecessor of the) employer in 1975. On 21 December 2005 the employee became incapacitated for work as a result of cancer. From December 2007 the employee received a disability benefit under the Return to Work (Partially Disabled) Regulations (WGA), based on a disability percentage of 45-55%. In April 2009 the Public Employment Service (UWV WERKbedrijf) issued a dismissal permit for the employee. The employer terminated the employment contract with effect from 1 June 2009. The employee then claimed damages of more than EUR 120,000 from the employer, on the grounds of manifestly unreasonable dismissal. The employee invoked the “consequences criterion”. She took the view that the employer should have offered her a severance payment, because she had worked for the employer for a long time and the dismissal had serious financial consequences for her. She also took the view that the employer had shown insufficient interest in her during her illness.

The Subdistrict Court did not agree with the employee. It found that the employer had done enough to reintegrate the employee. It also found that the fact that no severance payment was offered was not sufficient cause to characterise the dismissal as manifestly unreasonable, even though the employee had a weak position on the labour market. A relevant factor in this was that the employer did not apply for a dismissal permit as soon as the second year of sickness expired but had waited a further 1.5 years, and had therefore continued to pay her salary much longer than prescribed by law. The Court therefore rejected the employee’s claim.

It follows from these judgements that great importance is attached to long periods of employment in combination with the labour market position of a long-term sick employee who has always performed well. If the labour market position of the employee is foreseeably weak, the employer will have to do something to alleviate the consequences of the dismissal for the employee, or will have to offer support in finding another job. The employer can do this by offering an outplacement procedure, severance payment or supplement to the employee’s disability benefit under the Work and Income (Capacity for Work) Act (WIA), but also by not applying for a dismissal permit immediately after the expiration of two years of sickness, so that the employee is given extra time to reintegrate or to look for another job.

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Contact:

Amsterdam, Utrecht, Eindhoven

Roeland Hartman

T: +31 (0)88 407 04 08

E: roeland.hartman@hollandlaw.nl

The Hague

Nicky ten Bokum

T: +31 (0)88 407 03 08

E: nicky.ten.bokum@hollandlaw.nl

Rotterdam

Wendy de Jong

T: +31 (0)88 407 02 35

E: wendy.de.jong@hollandlaw.nl