

# Newsletter

November 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. Transfer of undertakings and the personnel company

In the Newsletter of November 2010 we informed you about the Albron ruling. The Court of Justice of the European Union (hereinafter: "ECJ") ruled last year in this case that employees who are formally employed by a personnel company but are permanently detached to an operating company within the same group are, in the event of transfer of those activities, also transferred to the acquirer of those activities. Amsterdam Court of Appeal recently decided in this case that - in short - Dutch law does not preclude the ECJ's interpretation.

### *Facts*

A brief reiteration of the facts. The employee - together with 70 other employees - was employed by the personnel company Heineken Nederlands Beheer B.V. (hereinafter: "HNB"). The employee was permanently assigned by HNB to the operating company Heineken Nederland B.V. (hereinafter: "Heineken NL") as a member of catering staff. At a certain point, Heineken NL decided to transfer the catering activities to Albron, by virtue of a contract. The employee claimed that the transfer of the catering activities to Albron constituted the transfer of an undertaking, and that he had therefore automatically become a staff member of Albron. Albron put forward the defence that the employee could not have been transferred because his employment contract was with HNB and not with Heineken NL.

### *Court of Justice of the European Union*

Albron appealed against this judgement before Amsterdam Court of Appeal, which referred a question about the interpretation of the EU Transfer of Undertakings Directive (hereinafter: "Directive") to the ECJ for a preliminary ruling. The ECJ ruled last year that in the event of the transfer of an undertaking belonging to a group to an undertaking outside that group, the employees who were assigned on a permanent basis to that undertaking - although they were employed by a different group company - are also transferred.

### *Further course of proceedings*

Member States must implement the Directive in their own national law. In the appeal proceedings before Amsterdam Court of Appeal, Albron argued that the Directive had been incorrectly implemented in Dutch law, that interpretation in conformity with the Directive results in a judgement in conflict with Dutch law, and also that the principle of legal certainty militates against application of the Directive.

Amsterdam Court of Appeal does not agree with Albron's arguments, and decides in its judgement of 25 October 2011 that:

- as a result of the ECJ's ruling, there is no dispute about the interpretation of the Directive;
- there can be a transfer of an undertaking if within a group there is a contractual employer (a formal employer), in this case HNB, and a non-contractual employer (a material employer), in this case Heineken NL;
- the wording of the Netherlands Civil Code (BW) offers latitude for such a concept of multiple employership;
- the Netherlands Civil Code (BW) does not further preclude interpretation in conformity with the Directive;
- legal certainty is not at issue. The principle of legitimate expectations cannot be invoked. From the law, parliamentary history and case law, it is not possible to derive the legitimate expectation that the law cannot be interpreted differently. All the more since it has become apparent during the hearing that the contract between Heineken NL and Albron regarding the transfer of the catering activities to Albron already took account of the possibility that this involved the transfer of an undertaking.

### *Conclusion*

The line taken last year by the ECJ remains unchanged by this judgement. This means that the transfer of an undertaking can be said to exist for employees who are not formally employed by the undertaking that

transfers its activities, but are permanently assigned to that undertaking. Amsterdam Court of Appeal recently decided that Dutch law does not preclude this interpretation given by the ECJ.

## **2. Failure to compensate national holidays for part-timers is unlawful discrimination**

If a recognised national public holiday falls on a day on which an employee does not work, and the employer does not compensate the employee for this in any way, the employer is unlawfully discriminating between part-timers and full-timers. This was the opinion recently given by the Equal Treatment Commission (CGB).

In this case, the employee had a regular weekly day off on Monday. The employer's employee manual designated 9 national public holidays on which the employees would not have to work. If a public holiday fell on a "part-time day", part-timers were not allowed to take their day off on a different day, and they were also not compensated in any other way. The Commission considered that a full-timer will on average be able to take 2.7 recognised public holidays more per year than a part-timer. The employer is pursuing a legitimate purpose by not offering part-timers any compensation for this. However, it is also possible to pursue this legitimate purpose in a non-discriminatory way. By offering no compensation whatsoever, the employer is perpetrating unlawful discrimination. The employee can now choose, on the basis of the Commission's opinion, to bring proceedings in a civil court to enforce his/her rights and possibly to claim compensation.

The opinion given by the Commission also offers another alternative on the basis of an annual hours system. A system of this kind is based on the total number of days per year minus weekends and public holidays. This leaves the number of working days, which are then divided by five (working week) and multiplied by the average working hours. This gives the number of hours per year that the employee must work. For the part-timers, this system then entails that the employer can book the applicable extra hours off at the beginning of each year.

In view of the Commission's opinion, it is therefore advisable to carefully examine the current system of days off on national public holidays. In this way, an employer can reduce the risk of claims being made by part-timers who miss out on days off in connection with national public holidays.

## **3. Theft means dismissal**

Unlawfully taking a bicycle by mistake can also justify instant dismissal, according to the recent judgement of Bergen op Zoom Subdistrict Court.

An employee had taken a colleague's bicycle home, without his permission. The employee thought that it was his wife's stolen bicycle. After interviewing the employee, the employer suspended him and then instantly dismissed him, despite the fact that the employee had meanwhile returned the bicycle to the colleague concerned. The employee then invoked the nullity of the dismissal. The employer requested the Subdistrict Court for conditional setting-aside of the employment contract by reason of the theft.

The employee claimed that there was no question of theft, since he had never had that intention. He had thought that the bicycle belonged to his wife.

The Subdistrict Court found in favour of the employer and set aside the employment contract insofar as it still existed. The Subdistrict Court considered that the theft of the wife's bicycle did not justify the employee taking the law into his own hands, even on the basis of the employee's assertion that he was 100%

convinced that it was his wife's stolen bicycle. The employee could have notified the employer's security service or informed the police. The Subdistrict Court held that taking the bicycle, in conjunction with not returning it immediately, gave an urgent cause for dismissal. There was therefore no justification whatsoever for the employee taking the law into his own hands. The employee's intention was not decisive. This again confirms that theft can usually result in instant dismissal.

#### **4. Penalty clause not wholly void due to exclusion of court's power of mitigation**

A penalty clause in an employment contract is not wholly void due to exclusion of the court's power of mitigation. The provision that a court can mitigate a penalty is mandatory law. Clauses that vary from this are void. But this does not entail that the whole penalty clause is void, according to a judgement recently given by Leeuwarden Court of Appeal.

After his employment ended, the employee returned the company laptop one week late. The employment contract stated that if the employee returns company property late, he "will incur an immediately payable penalty, *which is not subject to judicial mitigation*, of NLG 10,000 per breach and per day that the breach continues". The employer demanded payment of an amount of EUR 4,537.80 from the employee for the late return of the company laptop, citing the agreed penalty clause.

##### *Partial voidness of penalty clause*

The employee principally argued that he did not have to pay the penalty because the whole penalty clause was void, as he claimed that the exclusion of the court's power of mitigation in the penalty clause was wrongful. He said that Article 6:94 of the Netherlands Civil Code (BW) stipulates that such clauses are void. The Court of Appeal did not find in the employee's favour. It held that Article 6:94 of the Netherlands Civil Code (BW) does not entail that the whole penalty clause is therefore void; only the part of the penalty clause that excludes judicial power of mitigation is void. The Court of Appeal therefore partially upheld the penalty clause. This is also in line with the idea in the law that a voidness must not encroach further than is justified by its purpose.

##### *Mitigation of penalty*

Alternatively, the employee claimed that the penalty had to be mitigated. The Court of Appeal held that mitigation of the penalty is only to be considered if the application of a penalty clause in the given circumstances would lead to an excessive and therefore unacceptable result. The demanded penalty was many times higher than the value of the laptop. The Court of Appeal therefore mitigated the penalty (greatly).

##### *Conclusion*

A penalty can be imposed on a breach of all kinds of rules that are established by the employer. Often a penalty is imposed on breach of the prohibition of sideline activities, the confidentiality clause and the non-competition clause. The law imposes conditions on the legal validity of a penalty clause. Among other things, the penalty clause must include the amount of the penalty. For breaches during the employment, the penalty to be imposed within one week may not be more than a half day's pay. For employees who earn more than the minimum wage, it is permitted to vary from this. For most employees, then, an employer can agree a higher penalty. Under the law, the court has the right to mitigate the penalty if a party requests this. It appears from the case law that the court should use this power with restraint: mitigation is only to be considered 'if it is evidently required by reasonableness and fairness'. A clause that excludes the court's power of mitigation is void. But this does not mean that the whole penalty clause is void, according to Leeuwarden Court of Appeal.

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## Contact:

### Amsterdam, Utrecht, Eindhoven

Roeland Hartman

T: +31 (0)88 407 04 08

E: [roeland.hartman@hollandlaw.nl](mailto:roeland.hartman@hollandlaw.nl)

### The Hague

Nicky ten Bokum

T: +31 (0)88 407 03 08

E: [nicky.ten.bokum@hollandlaw.nl](mailto:nicky.ten.bokum@hollandlaw.nl)

### Rotterdam

Wendy de Jong

T: +31 (0)88 407 02 35

E: [wendy.de.jong@hollandlaw.nl](mailto:wendy.de.jong@hollandlaw.nl)