

Newsletter

October 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.

Contents:

1. Fulfilment of a contractual severance arrangement
2. Unfair dismissal and anticipation of proposed amendment of Collective Redundancy (Notification) Act
3. Bill amending Working Hours (Adjustment) Act
4. Non-admission of an employee who considers himself fit for work is at the employer's own risk

1. Fulfilment of a contractual severance arrangement

Contractual severance arrangements in the banking sector have come under increasing pressure in recent times, due to the credit crisis, government interventions and public criticism. It appears that banks are increasingly averse to full payment of the (high) salary and severance arrangements. The right to fulfilment of (excessive) contractual severance arrangements has already been considered in a number of judgements, including one given recently by The Hague Court of Appeal¹.

This case concerned an employee who took up the position of Chief Risk Officer with Fortis Bank Nederland on 1 December 2007. His employment contract included a contractual compensation in the event of (unilateral) termination of the employment contract by the employer. This compensation was two years' gross annual salary including bonus (EUR 1,500,000 gross). After 14 months the employee's position ceased to exist, and Fortis requested the Subdistrict Court to set aside his employment contract. The Subdistrict Court set aside the employment contract, and awarded compensation to the employee of EUR 250,000.

Judgement of Subdistrict Court

After these setting-aside proceedings, the employee commenced new proceedings in which he claimed fulfilment of the contractual compensation, less the compensation that had already been awarded. The Subdistrict Court found that in principle the bank had an obligation to pay the contractual compensation that had been agreed with the employee. However, it considered that for a period of employment lasting 14 months a compensation of two years' salary including bonus was excessive, if not ridiculous. In this situation, said the Subdistrict Court, to award this contractual compensation would be unacceptable according to the standards of reasonableness and fairness, and it was therefore refused.

Judgement of Court of Appeal

The employee appealed against the Subdistrict Court's judgement. The Court of Appeal acknowledged that a compensation of two years' salary including bonus was very high in relation to a duration of the employment contract of 14 months. However, the guiding principle had to be the employment contract concluded between the parties, and the compensation agreed in that contract. The Court of Appeal took the view that in this case the principles of reasonableness and fairness could not override the contractual agreement between the employee and the bank. The Court of Appeal overturned the Subdistrict Court's judgement, and awarded the contractual compensation to the employee.

This judgement is in line with previous judgements of Amsterdam Court of Appeal and Arnhem Court of Appeal with regard to the fulfilment of contractual severance arrangements. In view of this judgement, it is advisable - for example - to link a contractual severance arrangement to the duration of the employment (graduated scale). In this way, it is at least possible to ensure that an employee does not receive a large contractual compensation after a short period of employment.

¹ The Hague Court of Appeal, 3 May 2011, LJN: BQ7192.

2. Unfair dismissal and anticipation of proposed amendment of Collective Redundancy (Notification) Act

A dismissal is manifestly unfair if an employer terminates the employment contract for business reasons without giving a termination payment to the employees soon after it has terminated employment contracts for the same business reasons and has given a termination payment to the employees. Arnhem Court of Appeal² also ruled on 26 July 2011 that the employer did not have to anticipate the proposed amendment of the Collective Redundancy (Notification) Act (WVCO).

The case is as follows. The employee had worked for the employer for 26 years when the employer ran into financial problems. The employer felt compelled to apply to the Public Employment Service (UWV WERKbedrijf) for permission to dismiss 9 employees. Because the employer ultimately reached an amicable arrangement with these employees for termination of their employment contracts, the employer withdrew all the dismissal applications. The employer and the employees concerned set down the conditions of termination of their employment contracts in a settlement agreement, which granted a termination payment to the employees.

Because the employer's financial situation continued to become more acute, the employer felt compelled to close the site concerned. The employer therefore applied to UWV WERKbedrijf for permission to dismiss the other 15 employees. After receiving permission from UWV WERKbedrijf, the employer terminated their employment contracts, without granting a termination payment. One of the employees subsequently took the view that his dismissal was manifestly unfair.

Judgement of Court of Appeal

In judging whether a dismissal is manifestly unfair, the Court takes account of all the circumstances of the case at the time of the dismissal. The fact that the employee had worked for the employer for more than 26 years and had always performed well does not have to be decisive in the judgement of whether the dismissal is manifestly unfair. However, Arnhem Court of Appeal takes the view that, since the business reasons are the same as those for the employees who did in fact receive a termination payment, the employer could have been expected to investigate whether it could obviate the adverse (financial) consequences for the other employees. Since the employer had omitted to do this, its termination of the employment contracts was manifestly unfair.

In addition to claiming manifestly unfair dismissal, the employee alleged that the employer had failed to fulfil its obligations ensuing from the WVCO by not giving notification of the dismissals to the trade unions concerned. The employee argued that the employer should have anticipated the amendment of the WVCO. Briefly stated, the gist of this amendment is that if an employer wishes to terminate the employment contracts of 20 or more employees (regardless of the method of termination of the employment contract) within a time period of 3 months, the employer must notify this to the trade unions concerned and to UWV WERKbedrijf. The proposed amendment stipulates that the termination of the employment contract by mutual consent also "counts" for the assessment of whether the requirements of the WVCO have been satisfied. The underlying idea is that the notification to the trade unions must be independent of the route that an employer wishes to take in order to terminate 20 or more employment contracts. The amendment of the WVCO is discussed in detail in our June newsletter (this newsletter is also available on our website: www.hollandlaw.nl/NW/nl/Newsroom/Publications).

² Arnhem Court of Appeal, 26 July 2011, JAR 2011/241.

Arnhem Court of Appeal does not concur with the employee in his view that the employer should have anticipated the proposed amendment. According to the Court of Appeal, the current WMCO remains applicable until the time when this amendment has come into force.

Conclusion

If you wish to implement a reorganisation in which the termination of the various employment contracts is realised by concluding settlement agreements (with some or all of the employees), it follows from this judgement of Arnhem Court of Appeal that you do not have to anticipate the proposed amendment of the WMCO. At present it is still unclear whether, and if so from what date, the WMCO will actually be amended. We will keep you informed of any relevant developments.

3. Bill amending Working Hours (Adjustment) Act

On 9 September 2011 a Bill amending the Working Hours (Adjustment) Act (WAA) was introduced to the Lower House of the Dutch parliament (Parliamentary Paper 2010-2011, 32889, no. 1, Lower House). This Bill envisages further support of flexible work in the Netherlands. One of the proposals is therefore that the short title should be changed to 'Flexible Work Act' (WFW). A brief summary is given below of what the WAA currently entails, and the main changes proposed in the Bill.

The WAA

Under the WAA the employee can submit a request to his/her employer once every two years to adjust his/her working hours. The employer must grant this request unless there are compelling business or scheduling reasons not to do so.

Only employees who have worked for the employer for at least one year can request an adjustment of working hours. The request must be submitted at least four months before the intended commencement date of the adjustment. The statutory right to working hours adjustment does not apply to employees who are covered by a Collective Bargaining Agreement (CAO) that contains substantive stipulations on working hours adjustment.

The WAA is only applicable for employers with 10 or more employees.

The proposed changes to the WAA

The main proposed changes are:

- In addition to the right to request the employer for an adjustment of the number of working hours, employees are also given the right to request an adjustment of the times and place of work;
- The requirement that an employee must have worked for the employer for at least one year before being able to submit the above-mentioned request is reduced to 26 weeks;
- The requirement that the request must be submitted at least four months before the intended commencement date of the adjustment is reduced to two months;
- The requirement that the employee can only submit the request once every two years is reduced to once a year;
- The WFW will also be applicable for employers with fewer than 10 employees.

It can be seen from the proposed changes to the WAA listed above that the scope of this Act will be extended. The proposed changes give more employees more opportunities to organise their work flexibly, and they also create the possibility of working at home. It is also important that this Bill is applicable for all employers. The possibility of derogating from the WFW in a CAO is retained. Such a CAO will then have to include stipulations that give employees opportunities to adjust the number of working hours, place of work or times of work.

The Bill is currently under consideration by the Lower House. After this it will have to be submitted for approval to the Upper House, after which the Bill can be passed. It is therefore still unclear whether all the above-mentioned changes will ultimately be made, and from what date. We will naturally keep you informed of the latest developments concerning this Bill.

4. Non-admission of an employee who considers himself fit for work is at the employer's own risk

Non-admission of an employee who considers himself fit for work is at the employer's own risk if it is found (retrospectively) that this employee is no longer unfit for work.

When employees are incapacitated for work, an employer usually relies on the advice of an OHS physician or insurance company's medical advisor with regard to that incapacity for work. A recent judgement of The Hague Court of Appeal on 6 September 2011³ shows that if an employer adheres to an employee's incapacity for work, because of contradictory signals regarding that incapacity for work, this is at its own expense.

What was the situation? The employee had worked for the employer as a draughtsman since 1985. On 2 February 2006 the employee reported sick with psychological complaints. After two years of incapacity for work, the Public Employment Service (UWV WERKbedrijf) decided on 28 January 2008 that the employee would not receive a disability benefit under the Work and Income (Capacity for Work) Act (WIA), as he was less than 35% unfit for work. Because the employer did not grant the employee admission his work, the employee brought interim relief proceedings and claimed reinstatement and payment of salary. The Subdistrict Court rejected this claim, because in its view the employee was still unfit for work and the employer could not be required to admit the employee to his work, because it could be said with a high degree of probability that resumption of the work would lead to renewed absence. Ultimately, on the basis of reports of employment experts, the employer re-admitted the employee to his work as from 10 June 2009, and resumed payment of salary. The employment contract was subsequently terminated with effect from 1 May 2010. The employee's claim for salary was rejected in the first instance by the Subdistrict Court, because in its view the employee was at that time to be regarded as still unfit for work. The employer could therefore not have been required to admit the employee to his work and to pay salary.

Judgement of Court of Appeal

The employee appealed against the judgement of the Subdistrict Court. The Court of Appeal considers that an employee retains his right to continued payment of salary if he has not performed the agreed work due to a cause that in reasonableness should be at the employer's expense. This situation occurs, for instance, if an employer does not allow (or no longer allows) an employee, who declares that he is willing to perform the stipulated work, to perform his work, and in retrospect it is indeed found that the employee was not unfit for

³ The Hague Court of Appeal, 6 September 2011, LJN: BT2233.

such work. In such a case, the employer is obliged to continue to pay the salary from the moment when the employee declares he is willing to work, even if the employer's decision to refuse admission to the workforce due to the employee's incapacity for work, assumed (initially) by the employer, was based on e.g. the opinion of an insurance company's medical advisor regarding the employee's (in)capacity for work. This rule also applies if the employee has not medically substantiated in any way his view about his fitness to perform the stipulated work. The employer's argument, that according to the National Ombudsman the OHS physician's opinion was produced in contravention of the principle of *audi alteram partem*, does not in this case save the employer. In the view of the Court of Appeal, the employer has not succeeded in proving that the employee was unfit for work. The National Ombudsman's finding with regard to the way in which the OHS physician's opinion was produced and the judgements of the Subdistrict Courts are insufficient for this purpose. This entails that the employee is entitled to salary, plus the statutory increase of 25%.

Conclusion

As an employer it is important to realise that if an employee declares that he/she is willing to resume work, a refusal by the employer to allow the employee to do this can ultimately have financial consequences. This is particularly the case if an employee considers him/herself to be fit for work. In that case, an employer cannot simply fall back on the advice of its OHS physician.

Holland Van Gijzen

**Attorneys at Law | Civil-Law
Notaries**

About Holland Van Gijzen

Holland Van Gijzen is a leading Dutch law firm with an outstanding reputation with regard to providing legal services. Our 150 attorneys at law and civil law notaries are active in all areas of law which are relevant to entrepreneurs and their businesses. With offices in Amsterdam, The Hague, Eindhoven, Rotterdam, Utrecht, Brussels and legal desks in London and New York, we are able to provide you with fitting answers to all your legal questions. In the Netherlands Holland Van Gijzen Advocaten en Notarissen LLP has a strategic alliance with Ernst & Young Belastingadviseurs LLP.

For more information, please visit:
www.hollandlaw.nl

Holland Van Gijzen Advocaten en Notarissen LLP is a limited liability partnership registered in England and Wales with registered number OC335658 and is registered in the Netherlands with the Chamber of Commerce Rotterdam number 24433164.

© Holland Van Gijzen Advocaten en Notarissen LLP 2011

Disclaimer

This publication has been drawn up with the greatest possible care. Holland Van Gijzen Advocaten en Notarissen LLP is not liable for any inaccuracies and/or incompleteness of the information provided in this publication, nor can any rights be derived from its contents.

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