

Recent Developments in Dutch Employment law

I. Recent case law suggests that foreign employees also enjoy protection from dismissal under Dutch law

Under Dutch law termination of employment at the instigation of the employer implies requesting and securing prior permission from the UWV (a semi-governmental organisation), followed by written notice of termination, thereby observing the applicable notice period. This is laid down in the BBA. A failure to request or to secure prior permission from the UWV results on a voidable notice of termination, should the employee so claim.

Until recently, foreign employees were deemed to be excluded from this protection against dismissal. The difference in treatment was justified by the Dutch Supreme Court ruling in 1987, whereby the Supreme Court underlined the importance of the BBA in protecting the social economic relations in the Netherlands. More in particular, in preventing unfair dismissals in the interests of both the Dutch labour market in general and the employees in question in particular.

In a case concerning an American expat employed by a Dutch company on the basis of a local employment contract the Amsterdam Court of Appeal recently ruled differently. The Court emphasized the increasing importance of the European Union and the resulting free movement of workers. The purpose of the BBA should therefore be seen in a European rather than a purely national context. Consequently, the purpose of the BBA should be considered to be the protection against unfair dismissal rather than the protection of the Dutch labour market. As a result, the Court no longer deems it appropriate to withhold the protection against dismissal offered by the BBA to foreign employees.

The employee in question was an American national who was employed in the Netherlands by a Dutch company on the basis of an employment contract for a definite period of time of three years. The employment contract was governed by Dutch law. The employment contract contained no provisions in respect of a concrete relocation outside the Netherlands. After one year the company gave notice of termination having sought nor secured prior permission from the UWV. The employee claimed that termination was null and void.

The Court of Appeal was of the opinion that in view of the nature of the employment contract as outlined above the employee was not fundamentally different from 'regular' employees working in the Netherlands who do enjoy protection against unfair dismissal under the BBA. The argument put forward by the company, namely that it was justified in assuming that the employee would not upon termination of his employment remain in the Netherlands and would thereby not fall back onto the Dutch labour market, was not sufficiently valid, or so the Court ruled, let alone the argument that the employee performed his duties for a department with an obvious international character.

The judgment may have implications for companies employing foreign nationals in the Netherlands. According to the judgment, the likelihood that prior permission from the UWV is required will

increase as the employment relationship is more closely associated with the Dutch labour market. Relevant factors to consider are (i) whether the employment contract contains an explicit choice of law for Dutch law, (ii) the nationality of the employee, (iii) the place where the employee performs his duties and (iv) the intention of the parties as to a possible repatriation or transfer to a third country.

II. Illness and build-up of paid holidays

Under Dutch law an employee who is ill only builds up paid holidays over a maximum period of 6 months. In a recent judgement the European Court of Justice (ECJ) ruled that irrespective of illness, employees are entitled to a statutory minimum of 20 paid holidays (based on fulltime employment). According to the ECJ, this follows from the Directive on Working Hours.

The judgement implies that Dutch statutory law is currently not in line with the Directive on Working Hours. However, the Directive does not have horizontal effect – i.e. the Directive cannot be invoked by employees against his/her employer. As a result of the judgment, the Dutch Government is required to change statutory regulations in this respect.

A new legislative proposal intends to remedy this apparent violation of EU law by ensuring that ill employees will in future accrue paid holidays in the same manner as ‘regular’ employees. At the same time the new legislative proposal also implies a reduction of the limitation period applicable to paid holidays. The underlying reason for this is the prevention of an excessive build-up of paid holidays on the part of employees. Currently, the statutory limitation period in respect of paid holidays is 5 years after these accrue. Under the new legislative proposal this period will be reduced to 1.5 years. The legislative proposal is not likely to become law for some time as it will need to be adopted by both the lower and upper Parliamentary Chamber. In any event if adopted this new regulation is likely to lead to an increase employment costs for companies.

III. Fourth successive employment contract for a definite time possible for employees up to the age of 27 years

Under Dutch law employment contracts for a definite period of time terminate by operation of the law upon expiry of the contractual term. Successive employment contracts for a definite period of time also expire by operation of the law, unless mandatory regulations prescribe that the employment contract in question should be considered as an employment contract for an indefinite period of time. This is the case in the event that (i) the overall number of employment contracts for a definite period of time exceeds 3, or (ii) the overall chain of employment contracts including intermittent periods exceeds 36 months.

Due to the current economic crisis the government has introduced a temporary measure which implies an exception to the rules outlined above. In respect of employees up to the age of 27 years, a third successive employment contract for a definite period of time (thereby amounting to the fourth employment contract for a definite period of time overall) will also terminate by operation of

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the law upon expiry of the term, provided that the overall chain of employment contracts including intermittent periods does not exceed 48 months. This temporary measure came into effect per 9 July 2010 and will in principle be available until 1 January 2012 with an option for the Cabinet to extend the measure until 1 January 2014.

There was some discussion concerning the ultimate moment a fourth consecutive employment contract for a definite period of time can be offered to an employee under the age of 27 years. Although it is not yet entirely certain, it would appear that provided the employee is under the age of 27 years when entering the fourth consecutive employment contract for a definite period of time, this last employment contract will also terminate by operation of the law upon expiry of the contractual term.

In view of the fact that termination of employment contracts for an indefinite period of time is subject to employee protective statutory regulations, it is advisable for employers to make use of the options the law provides in this respect.

IV. Recent ECJ Decision Raises Questions About Upcoming Developments in Transfer of Undertaking Rules

A recent ruling from the European Court of Justice (ECJ) has both employees and employers asking questions about developments in transfer of undertaking rules (TOU rules). TOU rules protect employees from the adverse affects of legal transfers and mergers by automatically transferring the terms and condition of employment between the transferring company and the employee in place at the time of transfer from the transferring company to the acquiring company. TOU rules are set forth in an EU Directive. Under EU law these rules need to be implemented in local statutory law by each EU member state, the Netherlands included. Where the TOU rules apply, affected employees of the transferring company automatically become employed by the acquiring company on the basis of the same term and conditions of employment (including accrued years of service, (in principle) Collective Labour Agreements and in some cases, pensions. TOU rules do not apply in all situations of legal transfers of businesses. Firstly, the transfer must occur as the result of an asset transaction; share transactions do not implicate TOU rules. Secondly, courts will examine multiple factors to determine whether TOU rules apply to a particular transfer, looking to see whether there has been a transfer of a continuing economic unit which retained its identity after transfer.

On 21 October 2010 the ECJ considered whether TOU rules apply to a transfer of undertaking from a company (Heineken Nederland BV) within the Heineken group to a company outside the Heineken group (Albron). What made this case somewhat different from normal transfers is that the employees in question were not employed by the transferring company (Heineken Nederland BV). The employees (in fact all employees of the Heineken group) were employed by a so-called staffing company (HBN). A staffing company does not normally engage in commercial activities, its sole purpose is to act as legal employer to the employees, who are all seconded to the various

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group companies. Heineken Nederland BV decided to outsource its catering activities to a third party, Albron. The catering employees, who were employed by HBN but seconded to Heineken Nederland BV, were not considered to automatically become employed by Albron on the basis of TOU rules. After all, statutory law as well as case law prescribed that only employees with an employment contract with the transferring company automatically transfer upon retention of the terms and conditions of employment.

Albron offered Heineken catering employees an employment contract, albeit on the basis of its own (less favourable) terms and conditions. One of the employees claimed that TOU rules applied in this case and, helped by a trade union, initiated legal proceedings before the Dutch Court. The Dutch Court held for the employee. Albron lodged an appeal. The Court of Appeal asked the ECJ to explain whether TOU rules apply under these circumstances. The ECJ concluded that TOU rules apply in this case, despite the fact that the employee was not employed by, but merely seconded to Heineken Nederland BV. In support of its ruling the ECJ referred to the aim of the EU Directive establishing TOU rules, namely the protection of employees in the event of a transfer of an undertaking.

The ECJ ruling seems to imply that employees who are employed by one company but are permanently seconded within the group to another company (the employee in question had been seconded for a period of 20 years) are automatically transferred together with the activities. The ECJ has not indicated whether the specific nature of the legal employer in question – namely a staffing company as opposed to a ‘regular’ group company – was a crucial factor here.

Whether TOU rules will be applied in other cases of secondment or outside of transfers affecting group companies is an open question. However, in view of the emphasis the ECJ appears to put on the fact that this case concerned a permanent secondment within a company group may indicate that this judgement will not open the floodgates to all transfers of activities involving seconded employees. We will have to wait and see how TOU rules develop.
