
THE EMPLOYMENT LAW REVIEW

EDITOR
ERIKA C COLLINS

LAW BUSINESS RESEARCH

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THE
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REVIEW

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CONTENTS

Editor's Preface	1
<i>Erika C Collins</i>	
Chapter 1 ARGENTINA.....	5
<i>Enrique Stile and Javier Enrique Patrón</i>	
Chapter 2 AUSTRALIA	16
<i>Dianne Banks, Peter Feros, Kim McGuren, James Pomeroy, Sarah Gray and Hanh Chau</i>	
Chapter 3 AUSTRIA.....	28
<i>Jakob Widner</i>	
Chapter 4 BELGIUM.....	45
<i>Chris Van Olmen</i>	
Chapter 5 BRAZIL.....	59
<i>Luis Antonio Ferraz Mendes and Mauricio Froes Guidi</i>	
Chapter 6 CANADA.....	67
<i>Jeffery E Goodman and Christopher D Pigott</i>	
Chapter 7 CHINA	79
<i>K Lesli Ligorner</i>	
Chapter 8 DENMARK.....	92
<i>Marianne Granhøj</i>	

Chapter 9	FRANCE.....	103
	<i>Jérémie Gicquel</i>	
Chapter 10	GERMANY.....	118
	<i>Thomas Griebel</i>	
Chapter 11	GREECE	133
	<i>Effie Mitsopoulou, Nicholas Maberiotis, Ioanna Kyriazi and Ioanna Argyraki</i>	
Chapter 12	HONG KONG.....	146
	<i>Michael J Downey</i>	
Chapter 13	HUNGARY	162
	<i>Dániel Gera and Nelly Prokec</i>	
Chapter 14	INDIA	176
	<i>Manishi Pathak and Sebba Kanwal</i>	
Chapter 15	IRELAND	189
	<i>John Dunne</i>	
Chapter 16	ISRAEL	204
	<i>Mor Limanovich and Tal Keret</i>	
Chapter 17	ITALY.....	214
	<i>Raffaella Betti Berutto and Filippo Pucci</i>	
Chapter 18	JAPAN	226
	<i>Setsuko Ueno</i>	

Chapter 19	KOREA.....	239
	<i>Young-Seok Ki and John Kim</i>	
Chapter 20	LATVIA.....	250
	<i>Sigita Kravale</i>	
Chapter 21	MEXICO.....	263
	<i>Oscar de la Vega and Monica Schiaffino</i>	
Chapter 22	NETHERLANDS.....	275
	<i>Els de Wind and Aedzer Oreel</i>	
Chapter 23	NORWAY	294
	<i>Gro Forsdal Helvik</i>	
Chapter 24	POLAND.....	306
	<i>Roch Patubicki and Slawomir Paruch</i>	
Chapter 25	PORTUGAL	319
	<i>Maria da Glória Leitão and Diogo Leote Nobre</i>	
Chapter 26	RUSSIA.....	332
	<i>Irina Anyukhina</i>	
Chapter 27	SINGAPORE.....	347
	<i>Daniel Lim and Min-tze Lean</i>	
Chapter 28	SOUTH AFRICA	358
	<i>Susan Stelzner, Stuart Harrison, Bradley Conradie and Zabida Ebrahim</i>	
Chapter 29	SPAIN	373
	<i>Juan Bonilla</i>	

Chapter 30	SWEDEN	387
	<i>Henric Diefke</i>	
Chapter 31	SWITZERLAND	397
	<i>Ueli Sommer</i>	
Chapter 32	TAIWAN.....	408
	<i>T C Chiang</i>	
Chapter 33	TURKEY	417
	<i>Serbüilent Baykan and Handan Bektaş</i>	
Chapter 34	UNITED ARAB EMIRATES.....	426
	<i>Ibrahim Eksadig</i>	
Chapter 35	UNITED KINGDOM.....	436
	<i>Christopher Walter and Helena Laughrin</i>	
Chapter 36	UNITED STATES	449
	<i>Patrick Shea</i>	
Chapter 37	VENEZUELA	460
	<i>José Manuel Ortega P</i>	
Appendix 1	ABOUT THE AUTHORS.....	475
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS....	505

Chapter 22

NETHERLANDS

*Els de Wind and Aedzer Oreel**

I INTRODUCTION

The primary basis for Dutch employment law is found in Book 7 of the Dutch Civil Code, where general rules on employment contracts are set forth for employers and employees. Book 7 outlines the main contractual issues, such as the establishment of an employment contract, the specific terms, equal treatment and termination. Employers and employees (or their representatives) can to a certain extent derogate from the Civil Code by individual or collective employment contracts (collective labour agreements, or ‘CLAs’). CLAs are important instruments governing working terms and conditions covering a large part of the employment contracts in the labour market. In many areas, detailed laws and regulations exist in separate acts, such as the Works Council Act, the Collective Dismissal Act and the Working Time Act. Many employment rules and regulations stem from EU legislation. The ‘grey’ areas in employment law are clarified by case law.

Employers and employees in the Netherlands have the option of going to the Labour Office or court in the case of termination of an employment contract. In practice, parties will first try to reach an amicable settlement. If no amicable settlement can be reached, the cantonal court division of the district court (cantonal court) has jurisdiction to deal with the termination. A separate procedure exists for unfair dismissals, which are mostly referred to the cantonal court. Alternatively, the employer can seek termination by asking the Labour Office for a permit to give notice of termination of the employment contract. There are some differences between the court and Labour Office procedures (see Section XI, *infra*).

If a dispute arises with respect to the content or execution of the employment contract (e.g., on payment of salary or the applicability of non-compete clauses), the parties can refer their case to the cantonal court or to the district court. Both the employer and the employee have a choice to initiate preliminary relief proceedings or proceedings based on the merits of the case. To start preliminary relief proceedings,

* Els de Wind is a partner and Aedzer Oreel is an associate of Van Doorne.

the claimant must be able to demonstrate an urgent interest in obtaining a speedy ruling from the court.

Generally, decisions by the cantonal court or the district court are open to appeal at the Court of Appeal. Decisions of the Court of Appeal are open to cassation with the Supreme Court in The Hague.

II YEAR IN REVIEW

Due to the economic crisis, in 2009 employees were less inclined to reach an amicable settlement with respect to the termination of their employment contracts than they were in previous years. As career prospects are less favourable, employees have been doing the utmost to keep their jobs.

Due to the new court recommendations on the calculation of severance pay that came into force on 1 January 2009 (see *infra*), the average amount of severance received by employees for the early termination of their employment has dropped by (approximately) 30 per cent.

The Court of Appeal in The Hague has developed a formula to calculate the severance amount in unfair dismissal claims. The intention of the court was to create more uniformity among the courts in general regarding the level of severance pay granted in such cases. The court came up with a formula similar to the formula used in ordinary termination cases, in which the employer usually asks the competent court to terminate an employment relationship (the ‘court formula’; see Section XI). However, the other four Dutch courts of appeal did not follow this method and created their own formula. The Supreme Court has now ruled that due to the differences between ordinary termination cases and unfair dismissal cases, the court formula designed at the time for ordinary termination cases should not be applied in unfair dismissal cases. The compensation granted to the employee in an unfair dismissal case should be based on the actual damages of the employee caused by the dismissal rather than on the result of applying the standard formula. The Supreme Court further stated that a court judging an alleged unfair dismissal must first decide whether or not the dismissal was indeed unfair. Only if this is the case does the issue of compensation become relevant.

To enable companies to deal with an immediate drop in revenue due to the economic crisis, the government has made it easier for companies to temporarily reduce the total number of working hours. This is called the ‘part-time unemployment’. Employees who are faced with this measure continue working for a certain number of hours (e.g., 80 per cent of their former hours) and receive state unemployment benefits for the remaining hours. This enables companies to make full use of these employees when the economic situation improves, instead of having to make them redundant.

A new act was proposed some time ago to cap the severance pay of employees whose annual salary exceeds €75,000 gross. This proposal has received much criticism. It is uncertain whether the draft bill will eventually get through Parliament (see also Section XII, *infra*, regarding the outlook for draft bills).

III SIGNIFICANT CASES

Two significant cases are pending with the courts, both with respect to transfer of undertaking ('TUPE') issues. The outcome of these cases will be of Europe-wide interest. The first case concerns litigation initiated by a group of employees of ING who transferred to RR Donnelley following a transfer of undertaking. Before the transfer, after long negotiations with the unions involved, a protocol was signed in which ING, RR Donnelley and the unions agreed on the terms and conditions that the employees would enjoy after the transfer. All 'primary' employment terms would remain the same but some 'secondary' terms (benefits) could not be continued by RR Donnelley or could only be continued with unreasonably high costs. In the procedure on the merits (preliminary relief proceedings and appeal preliminary proceedings took place at the end of 2006 and 2007), the Amsterdam court has ruled so far (an appeal is pending) that all terms and conditions do transfer but under certain (limited) circumstances it is against standards of reasonableness and fairness for the employees to require that the transferee (RR Donnelley) continues certain employment terms.

Since the transferee (the new employer, in this case RR Donnelley) is not a bank, it simply cannot continue the specific employment terms (e.g., it cannot offer the employees specific banking products at attractive prices) and the transferee can only continue the employment term for disproportionate and therefore unreasonably high costs. The employees should be compensated (by the former or the new employer) in a reasonable way. What is reasonable will have to be interpreted case by case.

The other TUPE case pending – also for some years now – concerns the question of whether only employees who are directly employed with the transferor may transfer following a transfer of undertaking, or if employees could transfer if they do not have an employment contract with the transferor but are (clearly) physically working in the business of the transferor that is being transferred.

In this case, a group of employees was employed by Heineken Nederlands Beheer BV, a staffing company within the Heineken group of companies. These employees, working in catering, were seconded to work in another Heineken entity (Heineken Nederland BV). The catering activities were outsourced to a professional catering company, Albron, the transfer constituting a TUPE. However, since the employees were not employed by the transferor (Heineken Nederland BV), Heineken and Albron took the position that the employees did not transfer, but remained employed by Heineken Nederlands Beheer BV. The cantonal court in Utrecht concluded that the employees did not transfer because they were not employed by the transferor at the time of the transfer. But the court also took the position that an employee who is not employed with the transferor but has been working in the transferor's business for a long period (in this case 20 years) is indeed protected by TUPE and does transfer with the business. The Amsterdam Court of Appeal has now asked a (pre-trial) question of the European Court of Justice ('the ECJ') regarding whether employees who are employed by a company and who are seconded to work in another company within the same group of companies transfer with the business they work in, although they are not employed with the transferor. A decision from the ECJ is not expected until the end of 2010.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Under Dutch law, an employment contract does not need to be in writing or in any particular other form. It can be agreed upon orally, but a written employment contract is recommended as evidence of terms of employment. Since there is no legal requirement to have a written employment contract, the parties could start their employment relationship if no contract has been signed. They would breach the law, however, because some information has to be provided to the employee in writing. Certain provisions must be embodied in a written contract signed by both parties to be valid, such as a probationary period and a non-compete clause. The employee must, following a European directive, receive specific information such as the name of the employer, the place of work and the holiday entitlement in writing. The following information is recommended to be included in the employment contract:

- a* the name and domicile of the parties;
- b* the place of employment;
- c* the function of employee;
- d* the date of employment;
- e* if the employment contract is for a limited time, the duration of the agreement;
- f* the holiday entitlement and the way this is being determined;
- g* the notice period for both parties;
- h* the salary and when this will be paid out;
- i* the usual working hours per day or per week;
- j* whether there will be a pension scheme;
- k* the applicability of a collective labour agreement;
- l* if the employee will be working outside the Netherlands for longer than one month, certain specific information must be provided; and
- m* whether the contract is a temporary employment contract.

It is recommended to agree on a probationary period (different lengths being allowed under different circumstances) in the employment contract, as well as any post-contractual obligations. When judging a case or an employment contract, it should be verified whether one or more collective labour agreements or employee handbooks (often with a different name such as code of conduct, general rules and regulations, etc.) apply.

The terms and conditions of employment can in principle only be amended with the employee's consent. Unilateral amendment by the employer is possible, but only under limited circumstances. If parties to an employment contract have agreed on a unilateral amendment clause, this will help, but to change terms or conditions of employment the employer would still have to bring forward major business reasons that outweigh the employee's interest in keeping the employment conditions unchanged. Such major business reasons could, for instance, be a change in tax laws, or major economic business reasons. If no unilateral amendment clause has been included in the employment contract, the employer can base the unilateral amendment on the ground that the employee should accept the amendment under his or her obligation to act as a reasonable (diligent) employee or on the (general) ground of reasonableness and fairness.

In any case, to be able to unilaterally amend terms and conditions of employment the employer must prove major business reasons.

ii Probationary periods

The parties to the employment contract may agree in writing on a probationary period, which should be the same length for both the employer and employee. During the probationary period either party may terminate the employment contract immediately without notice and without stating the reasons for termination. No further obligations for either party will exist beyond such termination (including payment of wages by the employer). A maximum probationary period of one month may be agreed for a temporary employment contract for employment of less than two years, for temporary employment for the duration of a project, or for the replacement of an employee (with no agreed termination date). A maximum probationary period of two months may be agreed in a temporary employment contract of two years or longer and in a contract for an indefinite period.

iii Establishing a presence

A foreign company can hire employees without being officially registered. However, under certain circumstances a foreign company may be required to register or may voluntarily be registered as a withholding tax agent (a company with the obligation to pay taxes on behalf of the employees). An obligation to register will exist if the company has a permanent establishment in the Netherlands for payroll tax purposes. A permanent establishment is defined as an industrial or commercial establishment located in the Netherlands that is equipped with sufficient manpower and other resources to operate as an independent business. A permanent establishment will exist by way of a legal assumption if the foreign company makes employees available on the Dutch labour market or if the employee works on the Dutch section of the continental shelf for a consecutive period of at least 30 days (e.g., on a drilling platform). If employees are hired through an agency or another third party, no registration will be required, provided the agency or third party qualifies as employer/withholding agent.

A foreign company can engage an independent contractor without being officially registered. It should be carefully checked whether the relationship between the company and the contractor can be considered by the tax authorities to be *de facto* employment relationship that may result in a withholding obligation for the foreign company (see above). Upon request of the contractor, the tax authorities can provide independent contractors with a declaration of employment relationship ('VAR'). If the independent contractor has a declaration stating that his income is considered to be profit from a business or that the activities are performed for the account of his own private limited company, in principle no withholding obligation will exist for the foreign company.

A Dutch resident independent contractor can, for Dutch tax purposes, constitute a permanent establishment of a foreign entity if certain conditions are met. This would be the case if the contractor is authorised to represent and bind the foreign entity in the Netherlands. Under this authorisation, the representative is independent in making entrepreneurial decisions while these decisions do not bind himself but bind – and are for

the account of – the foreign entity. The existence of a permanent establishment under Dutch tax law may be restricted by the provisions of a double tax treaty, if applicable.

For tax purposes the permanent establishment would constitute a place of business to which certain income can be attributed. This income will then be subject to corporate income tax, which may be limited under a double tax treaty, if any. Dutch corporate income tax is levied over the profit of a branch at a rate of 20 per cent (for profits not exceeding €200,000) or 25.5 per cent (for profits over €200,000). A Dutch independent contractor will invoice the branch for his or her own services, which are generally subject to 19 per cent VAT. The contractor will have to report such income as a contractor of the branch in his or her personal income tax return.

If a company hires employees there is a statutory minimum wage for employees aged 23 or older and a minimum wage for employees aged between 15 and 22, the level of which varies according to the age of the employee. Wage taxes and social security premiums are deducted at source. The employer is responsible for reporting and withholding. All employees are entitled to a minimum holiday of four times their working time per week. These statutory holidays are in addition to public holidays, of which there are normally seven each year. No extra day is automatically given should a public holiday fall on a weekend.

The employer must provide a statutory holiday allowance for all employees of 8 per cent of the employee's gross annual salary, but only up to three times the minimum wage. It is possible to make an employee's salary inclusive of the statutory holiday allowance, provided that this is agreed in writing. The employee is entitled to receive at least 108 per cent of the minimum wage applicable to his or her age.

V RESTRICTIVE COVENANTS

Article 7:653 of the Civil Code provides rules on non-compete clauses in the employment contract. Such clause will only be valid and binding if agreed in writing and signed by both parties and the employee is 18 or older when signing it. A generally accepted term for a non-compete obligation is one year. Parties are free to agree upon a non-compete clause. However, it will ultimately be up to the court to decide whether the clause is validly agreed and should remain in force in its original form. A court may limit or even (wholly or partially) annul a non-compete provision if it finds that, while balancing the employer's interests that are to be protected by such a provision and the employee's interest in having a free choice of work, the interests of the employee should prevail. The court may also decide to keep the provision in place but grant the employee a form of compensation when the employer insists on keeping the clause. Under the law, there is no obligation for the employer to pay the employee for the term during which the employee is bound by a post-contractual validly agreed non-compete clause. Employers are advised to confirm or renew the non-compete clause if and when an employee is performing a different job or different activities that will or might lead to the non-compete obligation weighing more heavily on the employee. Without such renewal or confirmation, the non-compete restriction may have lapsed when the employer seeks to apply it.

If the employer gives notice of termination irregularly (without taking legal requirements into consideration such as applying the full notice period), the employer

can no longer keep the employee to the non-compete clause. Therefore, if the employer wants to keep the employee to the non-compete clause, the employer must make sure to give notice taking into account all legal notice requirements.

VI WAGES

i Working time

Dutch working time regulations are laid out in the Working Time Act. The statutory maximum working hours for an employee of 18 years or older are:

- a* 12 hours per shift;
- b* 60 hours per week;
- c* an average of 45 hours per week in each period of 16 consecutive weeks; and
- d* work must be organised as such that the employee works up to a maximum (on average) of 55 hours per week over a period of four consecutive weeks.

Deviation from (only) this last rule is possible via CLAs. In general an employee must have 11 hours of rest every day, which can be limited once every week to eight hours, and to 36 consecutive rest hours once every week or 72 hours every two weeks. The employee is entitled to short breaks.

Night work is defined as a shift in which at least one hour is worked between midnight and 6am. The maximum duration of a night shift is 10 hours. The night shift may be extended to 12 hours, but only for a maximum of five times per two weeks and a maximum of 22 times per annum. After such extended night shift, the employee may not work for at least 12 hours. In a period of 16 weeks, the employee may work at most 36 night shifts.

If a night shift ends after 2am, the employee may not work for 14 hours. This rest period can be shortened once a week to eight hours, but only if the type of work or the working conditions so require. If a night shift ends before 2am the employee may not work for 11 hours. After three or more consecutive night shifts, an employee may not work for at least 48 hours.

If an employee works 16 or more night shifts in 16 consecutive weeks, he or she may only work a total of 40 hours per week. If an employee works fewer than 16 night shifts in 16 consecutive weeks, the employee may work an average of 48 hours (as with normal daytime work). In the case of consecutive shifts of which one shift is a night shift the employee may work at most seven consecutive shifts. This can be eight if agreed in a CLA.

ii Overtime

There is no statutory requirement to compensate overtime. Parties can agree on compensation of overtime in the employment contract. Any applicable CLA should be checked to see if there is any provision on the threshold for receiving overtime compensation and the level of compensation, which is usually the case.

Overtime is normally compensated by extra salary payments. Parties can agree on a 'time for time' scheme. This would mean that an employee works, for example, 40 hours on a 38-hour contract and thus 'saves' two hours per week to be used later on as

free time. No statutory rates apply for overtime remuneration. These rates are usually laid down in the employment contract or in a CLA, (e.g., 150 per cent of the regular hourly salary for hours worked between midnight and 6am, or 200 per cent of salary for hours worked on Sundays).

Rules on limits to overtime that may be performed in a given period are found in the Working Time Act.

VII FOREIGN WORKERS

An employer is not required to keep a register of foreign workers. However, there is an obligation to keep identification for each employee on file. The employer is obliged to verify the authenticity of the identification. The employer must keep these copies for five years after the termination of the employment contract. There is no limit on the number of foreign workers in a workplace or company.

i Non-EU

On the basis of the Foreign Nationals Employment Act a work permit is required for workers from a non-EU country. The permit is issued by the Labour Office, and has to be requested by the employer. As a rule, an employer will only receive a permit if it proves that no EU workers are available for the job. A work permit is granted for a maximum duration of three years. In practice, more than 50 per cent of the permits granted are granted for (only) six months. Workers from outside the EU who have worked legally in the Netherlands for at least three years as well as persons admitted on humanitarian grounds no longer need a work permit.

The application for a work permit by the employer will only be dealt with by the authorities once the foreigner has applied for an authorisation for temporary residence ('MNV') before coming to the Netherlands. Foreigners from a number of countries (including Australia, Canada, New Zealand and the US) do not require an MNV. However, these foreigners need to have filed an application for a residence permit prior to their employer's application for a work permit.

A residence permit is required to stay in the Netherlands for longer than three months. Generally, the holder of a residence permit is under the same obligations as Dutch nationals (i.e., taxes, social security contributions and customs duties). Residence permits are usually issued for periods of six months to one year. After five years of main residence in the Netherlands, performing work on a regular basis and gaining sufficient income, a foreigner qualifies for a permanent residence permit.

As from 1 October 2004 a work permit is no longer required for 'knowledge workers'. The main difference between a knowledge worker and a 'regular' employee is that a knowledge worker must earn a minimum annual salary of €50,183 gross or €36,801 gross if under 30 (amounts indexed every year). Furthermore, the employer must be admitted to the procedure for hiring knowledge workers by the Dutch Immigration and Nationalisation Service by signing a one-time application form, stating (*inter alia*) that the knowledge worker earns at least the amounts mentioned *supra*.

ii EU

Residents of any EU country (excluding Romania and Bulgaria) and their immediate family have the same rights to work and to social security benefits as the resident nationals of any other EU country.¹ The only limitation on the exercise of these rights is that the Dutch authorities may exclude any EU national on grounds of public safety or health.

As ‘proof of the right of residence’ an EU national requires a ‘residence permit for a national of a Member State of the EU’ which is obtainable from the Aliens Police Department in the Netherlands. This document will be provided immediately, subject only to the production of a valid passport or official identification card and a letter from a prospective employer confirming employment. Provided the offer of employment is for more than a year, the applicant will be entitled to a residence permit for five years. No separate work permit is required by EU nationals and the residence permit may always be renewed.

Provided the foreign worker is subject to Dutch taxes or premiums, the employer will generally be obliged to withhold taxes and premiums and pay these amounts to the tax authorities. Foreign nationals temporarily seconded to the Netherlands can use a special expatriate tax regime, the ‘30 per cent ruling’, provided that certain conditions are met. This tax ruling has the effect of materially reducing the rate of income tax paid by the employee. Generally, it is advisable to apply for this before moving to the Netherlands.

If a foreign employee is employed by a Dutch company on the basis of an employment contract governed by Dutch law and physically works in the Netherlands, Dutch employment law will apply and the employee can seek protection under it. Under specific circumstances, mainly depending on where the employee carries out the activities (e.g., only in the Netherlands or also in other countries and to what extent), another country’s law can apply to the employment relationship of a foreign worker. Employees who are temporarily seconded by their original employer to work in the Netherlands could fall under the scope of the European Directive on Posting of Workers. Following this directive, Member States of the EU must ensure that their national businesses (companies) guarantee posted workers a central core of mandatory protective legislation. The directive seeks to guarantee that workers who are being temporarily posted (and to whom an employment contract subject to another country’s laws remains applicable) will enjoy the rights as laid down in certain minimum protective provisions in force in the Member State to which they are temporarily posted, no matter what the law applicable to the contract is. These minimum protective provisions concern:

- a* maximum work periods and minimum rest periods;
- b* minimum paid annual holidays;
- c* minimum rates of pay, including overtime rates;
- d* conditions of hiring out of workers, in particular by temporary employment undertakings;
- e* health, safety and hygiene at work;
- f* protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and

1 By virtue of EU Regulation No. 1612/68 and Directive 68/360.

- g equality of treatment between men and women and other provisions of non-discrimination.

VIII GLOBAL POLICIES

Companies in the Netherlands do lay down internal discipline rules in codes of conduct or handbooks. Other than employment terms and conditions, which are usually also laid down in handbooks or codes, such disciplinary rules are generally not regulated by statute, but are used to impose disciplinary measures.

In general no approval or consultation requirements exist for the introduction of a policy providing disciplinary rules. Disciplinary rules do not have to be filed with or approved by government authorities.

The employer is legally required to have a policy in place regarding labour conditions in general and, within that policy, a policy that is focused on the prevention of or limitation of ‘psychosocial work stress’, including sexual harassment, aggression and violence, bullying and stress-creating pressure in general. For the introduction of a policy related to the labour conditions, the employer needs to obtain the prior approval of the works council.² When introducing a policy, the company must be sure that general rules of equal treatment and data protection are followed. As indicated *supra*, employers in the Netherlands with larger numbers of employees do provide handbooks or codes that provide not only disciplinary rules but also employment terms and conditions. The way of binding employees to these handbooks or codes and communicating any changes to them is subject to different legal requirements.

The rules should preferably be communicated in Dutch, although this is not strictly necessary. The only requirement is that the employees who will be bound by the rules have to understand them.

If rules are implemented for the first time, these rules (the handbook or code) should preferably be handed to the employees who then sign for acceptance. If it is difficult to provide each employee with a hard copy of the rules (for instance in companies with large numbers of employees), they may also be distributed via the intranet. However, it will then be up to the employer to demonstrate that the employees indeed received a copy of the rules and understood them. The implementation, amendment or withdrawal of general regulations on certain employee benefits requires the prior approval of the works council.

The employer can provide in the employment contract (of new hires) a reference to a handbook or code providing employment terms and conditions or disciplinary rules. By signing the contract, the employees declare they have seen and understood the rules applicable to them. In terms of disciplinary rules, there is no requirement for the employer to have these rules signed by employees. The employer has a general right to impose disciplinary rules on its employees. If the handbook or code includes employment terms and conditions a reference to such handbook or code in the employment contract is sufficient to bind the employee, but the employer will still have to be able to prove that the employee received the handbook or code.

2 Article 27 of the Dutch Works Councils Act.

Changes to disciplinary rules may be communicated via the intranet, but in the case of employment terms and conditions, changes can only be made with the employee's consent (and under certain circumstances the prior approval of the works council).

IX EMPLOYEE REPRESENTATION

Depending on the number of employees in the company, there is a requirement for companies to set up representative bodies. Under the Works Council Act ('the WCA') a company must have a works council if it employs 50 or more employees. Smaller companies can have a voluntary works council or can put another form of employee representation in place.

A company that employs between 10 and 50 employees may be under the obligation to establish an employee representative body. An employee representative body must be established at the request of a majority of the workers or it can be established by the employer voluntarily. Such body has limited powers compared to a works council. According to the WCA some of the provisions applicable to a works council are also applicable to the employee representative body.

If there is neither a works council nor an employee representative body, but the company employs between 10 and 50 employees, the company must establish an employee consultation meeting at least twice a year to discuss the general course of business of the company. The company must hold such a meeting any time at least 25 per cent of the employees request so.

If the management of a company does not fulfil the obligation to install a works council when required, any interested party can ask a court to order such installation. The works council is an independent body elected by the employees. It has its own by-laws. A works council must have the following number of members:

- a* 50 to 99 employees inclusive: five members;
- b* 100 to 199 employees inclusive: seven members;
- c* 200 to 399 employees inclusive: nine members;
- d* 400 to 599 employees inclusive: 11 members;
- e* 600 to 999 employees inclusive: 13 members; and
- f* 1,000 to 1,999 employees inclusive: 15 members.

There will be an additional two members for every further 1,000 employees, up to a maximum of 25 members. Employee representative bodies must have at least three members.

The election procedure for representatives in a works council is for the most part laid out in the WCA. In short, the process is that the employer will set a date for the elections and announce that date to the employees and trade unions. There must be at least 13 weeks between the announcement of the election date and the election date itself. The employer prepares a list of all employees eligible for election and voting. Candidates can be put forward by employees and trade unions. At least two weeks before the election the final lists of candidates should be adopted. Usually a committee is appointed to organise the elections (i.e., to prepare and certify the ballot papers and to determine the date and hour of the election). After the election, the results are announced to the company, and the works council is in place.

An employee representative body is elected by a secret written election process by employees working in the company.³ No specific procedure must be followed, although in practice it is similar to the election of a works council.

The term of office of works council members is three years unless the works council itself determines that the term of office will be two or four years. The works council can determine that half of the members will resign every two years. Elections are, therefore, held every two, three or four years. If an employee no longer works in the company, membership of the works council ends automatically. The term of office for members of the employee representative body has not been set down in statute.

Works council members may interrupt their work for internal consultation, training and education (on full pay) for a number of hours to be determined in conjunction with the employer. The works council may appoint committees and call in experts; it may use certain facilities of the company (conference rooms, telephones, etc.) and it holds its meetings as much as possible during working hours. Employee representative bodies have fewer rights than works councils. An employee representative body, for example, only has a right of prior advice under very specific circumstances. As the Works Council Act includes fewer rules with respect to employee representative bodies, in practice rules similar to the one for works councils are applied to employee representative bodies on issues such as the number of hours per annum that the employees and members may use for training. The company must allow both the works council and the employee representative body to meet for a mutually agreed number of hours per annum.⁴

Representatives enjoy protection from dismissal and from discrimination on account of their positions. This applies to employees who are or have been on the list of nominations for elections to the works council, who are or used to be members of the works council or of an employee representative body, who are or used to be members of committees of the works council, who have taken the initiative to establish a works council, or who perform duties incidental to the office of secretary of the works council (not necessarily a member of the works council). When asked to terminate the employment contract of a person mentioned *supra*, a court must verify that the request is not connected with the membership of the works council or a works council committee.

The works council has a number of general rights such as the right of initiative, the right to general and specific (financial) information as well as some special powers, such as the right of advice and the right of prior approval. The company must seek the works council's advice in respect of certain intended major economic decisions by the company.⁵ If the advice goes against the intended decision and the company nevertheless takes the decision, such decision may not be implemented during a period of one month from the day the works council was informed of the decision or could have reasonably know about the decision. During that month, the works council has the right to appeal to the Business Chamber of the Amsterdam Court of Appeal. If the company intends to implement, change or withdraw general regulations in certain areas of employee benefits,

3 Article 35c WCA.

4 Articles 18 and 35c of the WCA.

5 Article 25 of the WCA.

it needs prior approval of the works council.⁶ Failing such approval, the company must seek approval of the cantonal court after having asked the business committee to mediate. If no approval is obtained, any such decision taken is null and void.

X DATA PROTECTION

i Requirements for registration

The Dutch Data Protection Act (‘the DPA’) provides the rules, stemming from a European directive, for data protection in the Netherlands. If the company qualifies as a data controller (the entity that determines the purposes and means of the processing of personal data), then the company must notify the processing of the personal data either to the Data Protection Authority or, if applicable, to its data protection officer. Some forms of data processing are exempt from notification, and are listed in the Exemption Decree.

The notification of processing must include the name and address of the employer (i.e., the data controller), the purpose of processing the data, the type of employees and the type of data that will be processed, the recipients of the data, whether the data will be sent to countries outside the EU and a general description of the security measures that are taken. The data controller also has the duty to inform the data subject of its identity, which types of data are processed, the purpose of processing, recipients of the data and the retention period. The data controller can provide this information by means of a privacy statement, for example.

The DPA has six justification grounds for processing personal data, of which in practice three are most relevant for an employer. The first relevant ground is the employee’s consent. Reliance on consent should be confined to cases where the employee has a genuine free choice and is subsequently able to withdraw the consent without detriment. The employee’s consent is not required if the employer can successfully demonstrate that the processing of data is necessary for the execution of an agreement to which the data subject is a party, namely, the employment contract (second ground). The third justification ground is the legitimate interest of the employer. This is considered an open norm, and requires balancing the justified interests of the employer against the interests of the relevant employee.

According to the DPA, the data controller must implement technical and organisational security measures with regard to personal data. The personal data should preferably be provided on a need-to-know basis. It will depend on the sensitivity and the nature of the data to whom certain data will be accessible and what powers such people will have to use, change or analyse the data, etc. In principle, the data should be accessible to the data subject; he or she has the right to access, and may ask, at reasonable intervals, whether (and what) personal data are processed relating to him or her.

The data controller must implement appropriate technical as well as organisational measures to secure personal data against loss or against any form of unlawful processing. These measures must guarantee an appropriate level of security, taking into account the state of the art and the costs of implementation, and having regard to the risks associated

6 Article 27 of the WCA.

with the processing and the nature of the data to be protected. These measures must also aim to prevent unnecessary collection and further processing of personal data.

ii Cross-border data transfers

Companies do not need to register with the Data Protection Authority if the data are transferred to a country within the EEA or a country with an adequate level of protection (a list of which can be found on the EU website), or a US company that is 'Safe Harbor' certified. If the data are transferred to other countries, then the data controller needs to obtain a permit from the Minister of Justice.

The employer will only have to inform the employee if the transfer of data is based on legitimate interest. No consent will then be required. However, consent of the Works Council will have to be obtained for the transfer.⁷

A data transfer agreement is always required. When the safe harbour principle applies, no additional permit is needed. In all other cases when personal data are transferred to a country outside the EEA without an adequate level of protection, a permit from the Minister of Justice is required.

Whether onward transfer is allowed will depend on several factors, such as the nature of the personal data, the countries to which the data will be re-exported, who will have access to the personal data and the purpose of the onward transfer. Where it concerns the US, the safe harbour principles contain rules in respect of onward transfer.

Onward transfer means that data are not just transferred once, but where the data are re-exported to third parties. An example of such re-export would be when Dutch employee data are transferred to a global database in, for example, the US, and are then made accessible to employees worldwide via the internet. Such transfer is then considered to be an 'onward transfer' from the US to those parties. Another possibility is that a service provider subcontracts the maintenance of the database to third parties, located anywhere in the world.

iii Sensitive data

Sensitive personal data are:

- a* religion;
- b* race;
- c* political convictions;
- d* health;
- e* sexual preferences;
- f* membership of a union;
- g* criminal records; and
- h* personal data concerning unlawful or objectionable conduct connected with a ban imposed with regard to such conduct.

Pictures (e.g., of employees) may also qualify as special personal data, as they may show information about a person's race or religion.

7 Article 27 of the WCA.

Based on the DPA, it is prohibited to process personal data concerning a person's religion or philosophy of life, race, political persuasion, health and sexual life, or personal data concerning trade union membership, except under special circumstances provided in the DPA. This prohibition also applies to personal data concerning a person's criminal behaviour, or unlawful or objectionable conduct connected with a ban imposed with regard to such conduct. The DPA provides an exemption for the processing of medical data by employers under strict circumstances. Processing of special personal data is also allowed, if the data subject gives his or her explicit consent or if the data subject has manifestly made the data public himself.

iv Background checks

Background checks are commonly done in the process of hiring new employees, but certain restrictions apply. Information on the applicant can be obtained through the applicant, any public source like the internet, or through references, preferably with the permission of the applicant. An employer should always take care not to take discriminatory action, which includes equal treatment on the basis of age, race, gender, religion, belief, political conviction, nationality, sexual orientation, marital status, disability or chronic disease. The selection procedure for applicants in the Netherlands is restricted by fundamental rights of privacy, non-discrimination and equal treatment, the DPA and the Medical Test Act. Furthermore, various rules of conduct regarding recruitment and selection have been drafted by (professional) associations. Finally, a CLA may contain binding rules on selection and recruitment.

In the Netherlands it is common to ask detailed questions about the applicant's professional training and educational background. The applicant is obliged to give the employer the information he or she needs to get a fair and honest idea about the applicant's capabilities. The employer may ask for original documents or diplomas. Recent case law shows that employers do not need permission to check the employment history of their applicants (as long as the received information is correct). Further information can be obtained through public sources (including search engines like Google) and observations of the interviewer.

Information on credit and financial background can only be obtained through the applicant, through a public source or with the permission of the applicant. The employee is not required to answer questions on his or her credit and financial background unless that is relevant to performing the job.

An employee in principle does not have to answer questions about his or her criminal background. When, however, the criminal background is relevant to the performance of the job, the applicant is required to inform the employer thereof (e.g., an accountant who has been convicted for fraud or a primary school teacher who has been convicted for child abuse).

If relevant to the job, special selection procedures or methods can be used, such as psychological and assessment tests. A psychological test is not considered a medical test. A psychological test or assessment may only be conducted by or under the supervision of a psychologist with due observance of the guidelines set by the Dutch Professional Association of Psychologists ('NIP'). The psychologist may only provide the employer with the results of the tests or assessment with the applicant's consent.

The basic rule is that medical tests are prohibited unless a particular job makes exceptional demands on the employee's physical strength and stamina. One could think of jobs that require high physical demands (e.g., heavy lifting) or jobs that require physical fitness because of a high risk of injury or a high safety risk to the employee or others (e.g., pilots). Sometimes there will be a statutory obligation to take a pre-employment medical test (e.g., under the Nuclear Energy Act or the Maritime Crew Act). The pre-employment medical test may not serve as a tool to make a selection between job applicants. The test can only be done after all other assessments of the job applicant's suitability for the job have been completed and if on the basis of those assessments the employer has the firm intention to hire the applicant.

In relation to drug or alcohol use, the principal rule is that an applicant or an employee is in principle allowed to do whatever he or she wants in his or her free time as long as it does not influence his or her functioning as an employee. There are exceptions to that rule depending on the job (such as when the employee is a role model, e.g., a teacher). Generally, applicants cannot be asked about their use of illegal drugs since that would be a violation of privacy rights. In the Netherlands, drug or alcohol tests are considered medical tests. When the employee is already hired, case law shows that testing is allowed under very particular circumstances and when the employer has a reasonable suspicion that an employee uses drugs or alcohol. The employer will then have to prove that the use of drugs or alcohol negatively influences the work of the employee. The employer has a far-reaching duty to assist the employee if the employee has an alcohol or drug problem. Whether such a duty exists depends on the circumstances.

XI DISCONTINUING EMPLOYMENT

i Dismissal

Under Dutch law an employer must have a reason to dismiss an employee. The most common reasons for termination are business economic reasons and performance reasons. It is important to keep a file on employees to be able to prove underperformance and the reasons for dismissal. In general, the employee will have to be made aware of his or her underperformance and will have to be given a reasonable chance to improve (unless there is an urgent case for dismissal).

The employer and the employee have several ways of terminating an employment contract. Termination by mutual consent is the most common way. Parties can terminate the employment contract by mutual consent at any time. Such termination by mutual consent is to be confirmed in a settlement agreement. The conditions of termination, which usually include a severance payment by the employer, based on the court formula (see *infra*), are subject to negotiation and the outcome will depend on the facts and circumstances of the case.

If no amicable settlement can be reached, the company must obtain the approval of the Labour Office for giving notice of termination or a court decision on the termination. In both cases the reasons for the intended termination have to be clear. Employees do not need the approval of the Labour Office or court to terminate the contract. They simply need to take the applicable notice period into consideration when terminating their employment.

The Labour Office procedure will usually take about six to eight weeks provided that the reasons for termination are clear. The Labour Office does not have the authority to award compensation to the employee. If the termination reason is difficult to substantiate then the Labour Office's approval may be withheld. There is no appeal from the decision of the Labour Office. If the Labour Office denies approval, however, then the employer could bring an action in court to terminate the contract (if immediately done, the employer will not have a high chance of the court doing so). If a contract is terminated by the employer with Labour Office consent and with due observance of the applicable notice period, the employee can contest the dismissal in court in an unfair dismissal case and claim compensation. Generally put, a dismissal can be unfair when the consequences of the dismissal are too serious for the employee compared with the interests of the employer.

Once permission is granted to the employer to terminate the employment contract, the applicable notice period should be considered. The statutory term of notice to be observed by the employer is one month for every five years of service with a maximum of four months. These terms may be extended by written agreement and may be reduced in an applicable CLA. The statutory term of notice to be observed by the employee is one month. The parties can deviate from these statutory rules in writing. If the notice period for the employee is extended beyond the statutory notice period of one month, the term of notice to be observed by the employer must be at least twice as long as that of the employee, which may not exceed six months (and therefore the notice period for the employer may not exceed 12 months). An employment contract should be terminated as per the day they agreed on or the day determined by custom, which is usually the last day of the period of salary payment.

When giving notice after having obtained approval from the Labour Office, the employer must take into account the notice period. To compensate for the time involved in the dismissal procedure with the Labour Office, the employer may reduce the term of notice by one month, provided that at least one month's notice remains. Payment in lieu of notice is permitted. The parties should, however, realise that the employee will only obtain state unemployment benefits as from the end of the applicable notice period (had that notice period been taken into account). Should the parties therefore agree that the employee will not be employed during the full notice period (i.e., that the notice period will be wholly or partly paid out), the authorities can decide to deny the employee unemployment benefits for a certain period of time. This consequence is usually pointed out to the employee (in writing) to avoid any claims for loss of income in this respect.

The employer has the choice to, instead of asking the Labour Office for approval to terminate, petition the cantonal court (in the case of statutory directors the competent court is the district court) to terminate the employment contract. This route is usually followed in the case of higher-level functions and if no major business economic reasons exist for the dismissal. After the employer has filed a petition with the court, the employee will have the opportunity to file a defence statement. An informal hearing will take place during which the court can put questions to the parties and their attorneys and the parties may further defend their case. The proceedings at the cantonal court can generally be completed within a relatively short period (as a rule it takes six to eight weeks between filing the petition and the issuing of the judgment). The court will apply a reasonability test regarding the ground for termination. If the request is granted the employment agreement will terminate as per the date ordered by the court. The court

can terminate the employment on very short notice, without having to observe any statutory or contractual notice period. The court can award ‘reasonable compensation’ to the employer or the employee.

Instant dismissal for (urgent) cause is possible in the case of severe misconduct by an employee. The employer need then not take the notice period into account. The employer should act swiftly as the dismissal should be given in due course, which means immediately following the unacceptable behaviour of the employee. Whether or not the behaviour will form sufficient cause to instantly dismiss the employee will depend on the circumstances of the case, such as how long this behaviour has been going on and whether the employee has been warned about this behaviour.

There are no statutory rules with respect to the amount of compensation to be paid in the case of termination of an employment contract. However, the cantonal courts have made recommendations as to how the amount of compensation should be determined in case of termination by the court (‘the court formula’). The recommendations provide that the compensation to be awarded will be determined by the following formula:

$$A \text{ (years of service)} \times B \text{ (earnings)} \times C \text{ (correction factor)}$$

For the calculation of A, the years of service of the employee need to be weighed as follows: the years of service completed before the age of 35 are to be multiplied by 0.5. Years of service completed between 35 and 45 are to be multiplied by 1. Years of service completed between 45 and 55 are to be multiplied by 1.5 and years of service since the age of 55 are to be multiplied by 2. These factors are applied cumulatively. Any period of six months plus one day is rounded up to one full year of service. The compensation is capped at the employee’s earnings until the pensionable age.

The method of calculating the employee’s earnings are his or her monthly gross salary, plus agreed fixed pay components such as 8 per cent holiday allowance, end-of-year payment (‘13th month’), regular overtime pay and regular shift work allowance.

If the termination of the employment contract is based on ‘neutral grounds’ the correction factor will be one; the grounds for termination are considered ‘neutral’ when neither the employer nor the employee is to blame (e.g., if the employee is made redundant as a result of a reorganisation for economic reasons). There may be circumstances that justify an adjustment – up or down – of the correction factor. The court may apply a correction factor of zero if the circumstances of the case do not justify any compensation at all (e.g., serious dereliction of duty or misconduct). In that respect, as mentioned *supra*, it is important to keep a file on employees to be able to prove underperformance. If proven (and if the employee has had a reasonable chance to improve) the court could decide not to award any, or a relatively low amount of, compensation.

Certain categories of employees, besides employee representatives, are protected from dismissal. In general an employer cannot give notice if the termination is based on discriminative grounds such as sexual preference. Employees are protected from dismissal during *inter alia* the first two years of incapacity to work; the period during which the employee is pregnant (including the period up to and including the 16th week after childbirth); military (or alternative compulsory) service; membership of a union; political leave; and during adoption, parental or care leave. Under those circumstances termination with permission of the Labour Office is not allowed. The employer must ask

a court to terminate the employment contract or settle with the employee on termination with mutual consent. Employees belonging to the groups mentioned can be summarily dismissed for urgent reasons such as serious misconduct or gross negligence.

ii Redundancies

An employee can be made redundant for economic business reasons. The intention of an employer to dismiss a group of at least 20 employees within three months (in the same Labour Office region) qualifies as a collective redundancy and must be notified to the Labour Office and trade unions involved. The notification should at least include the reasons for the redundancy, whether or not the works council (if there is one) has been consulted, the criteria used to determine which employees will be made redundant and the calculation method for severance pay. After notification the company can choose to follow the individual termination procedures with the Labour Office, to ask the court to terminate the employment contracts (although some courts refer the company to the Labour Office once it finds out that a collective dismissal is involved) or to settle with the individual employees involved.

In cases of collective redundancy, a request for advice needs to be addressed to the company works council or another employee representation body if the redundancy falls under the scope of Article 25 of the Works Council Act. The process of obtaining advice is discussed *supra*.

Usually, a social plan is agreed with the trade unions involved, including, for example, severance payments or outplacement programmes. The social plan can set forth agreements as to rehiring of employees. If the employer asks the Labour Office for permission to give notice of termination to an employee, such permission is often granted under the condition that if a suitable position becomes available for the employee within six months after termination, the employer must offer such position to the employee. In practice, this rule is not often used. During the process of termination, an employer generally is required to offer the employee any suitable alternative position that is or becomes available.

XII OUTLOOK

The Dutch government has plans to gradually increase the pensionable age for employees from 65 to 67. Most employment contracts currently provide that the employment contract will end when the employee reaches the age of 65. This means that employers should consider amending their (standard) employment contracts.

The government and the unions will continue to look for ways to minimise severance compensation at termination of employment and excessive bonuses, especially in the financial sector.

Further, employers and trade unions may be seeking to agree ongoing obligations for the employer to make sure that a former employee finds suitable employment elsewhere after termination of employment, rather than paying the employee (high) severance compensation.

The outlook for pending legislation mentioned in this chapter is uncertain following the collapse of the coalition government in February 2010. After elections, the new government is likely to take a fresh look at such draft bills.

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