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Labour market developments

Following the entry into force in July 2015 of the Work and Security Act, Dutch employment law has fundamentally changed. The Act aimed to simplify dismissal law and to reduce the disparity between permanent and flex workers. General elections in 2017 resulted in a coalition agreement, again meaning changes in employment law.

Thanks to stable economic growth, the number of jobs will increase over the next two years to around 10.2 million in 2018. In a number of sectors, such as care and construction, the labour market is tightening. In the ICT sector there is already a shortage. Unemployment has fallen to 4.7% of the labour force in September 2017, according to Statistics Netherlands. The proportion of employees with a flexible contract has risen sharply in recent years. In the first quarter of 2017, the number of flex workers increased even more than the number of permanent jobs.

Employment claims

Dismissal cases for business-related reasons or long-term sickness are brought before the UWV, the Dutch labour office. Dismissal cases for other reasons such as performance are brought before the Court. The number of dismissal cases has dropped. This is partly due to the improving economy. Another reason is found in new legislation: strict conditions are applicable and many dismissal cases based on performance issues or a 'disturbed relationship' are being rejected.

For the most part, employment cases are settled amicably through a settlement agreement. Although not frequently invoked, employees have the right to revoke their consent to the settlement agreement within two weeks after the agreement has been signed. This right should be mentioned in the settlement agreement itself, failing which the right to revoke the consent is extended to a three-week period.

Mediation as a means of amicable dispute resolution is popular in the Netherlands, also in employment disputes. There is no legal requirement to mediate before litigation. Also, courts may refer cases to mediation only on a strict voluntary base, of course. Advantages are found in the informal setting and the procedure being less time-consuming and costly.

Since July 2015, UWV decisions have been subject to appeal to the Court, and subsequently to the Court of Appeal, and further to appeal in cassation to the Supreme Court. Also, cases brought before the Court are subject to appeal and cassation. As a result, the number of appeal cases has increased.

Issues surrounding mobility of the workforce

At the end of 2016, the provisions of the EU Intra-Corporate Transfer (ICT) Directive were implemented. Partly overlapping the highly-skilled Knowledge Migrant programme, the new rules will harmonise the Dutch system with the EU Directive and the other nations implementing it. The goal is to increase intra-EU mobility for multinational corporations and, once implemented throughout the EU, the avoidance of duplicate administrative procedures and costs.

Recent changes in legislation contain measures aimed at increasing the flexibility of the Dutch workforce. The employer is obliged to inform the employee at least one month before a fixed-term contract of six months or more ends, whether or not the contract will be continued, and if so what conditions will apply. The total number of employment contracts entered into may not exceed three, and the total duration of these fixed-term employment contracts may not exceed two years. In case of more than three fixed-term employment contracts at intervals not exceeding six months, or in case the total duration exceeds two years, the last employment contract will qualify as an employment contract for an indefinite period.

Further proposals to amend Dutch employment laws, amongst others regarding the total maximum duration of a fixed-term contract and also regarding the maximum duration of the probationary period (now one month, in case of a fixed-term employment agreement exceeding six months) are expected.

Redundancies, business transfers and reorganisations

Collective dismissal

In a collective dismissal scenario (a restructuring which involves the redundancy of at least 20 employees within a three-month period in a certain geographical area), the employer is required to send a collective dismissal notification to the UWV (which is a government body) and the relevant trade unions based on the Dutch Collective Dismissal Notification Act ("CDNA").

Under the CDNA, the dismissal of any employee based on redundancy cannot take place until the UWV has been notified of the envisaged redundancies and consultation with the relevant trade unions has taken place. The trade unions should be informed in writing about the envisaged restructuring and provided with details on the reason for the restructuring and the consequences for the employees. Further, the employer should invite the trade unions for a consultation meeting and try to conclude a social plan. There is no obligation as such to reach an agreement with the trade unions. However, the employer must be able to demonstrate that it did its utmost to try to come to an agreement with the trade unions and in practice, trade unions may threaten strikes to force the employer back to the negotiation table. In a redundancy situation, employment contracts can only be terminated unilaterally by observing notice *after* the employer has obtained the prior approval of the UWV. The UWV will also take into account whether or not the works council has been involved properly, according to the regulations of the Dutch Works Council Act.

Transfer of undertaking

Any transfer of a part of an undertaking within the Netherlands may fall within the scope of Dutch law implementing the European Directive Transfer of Undertakings (Protection of Employment) Act ("TUPE"). In determining whether TUPE applies, the Courts look

at the type of undertaking (or part of undertaking) involved, whether fixed assets are being transferred, whether the majority of employees dedicated to the activity are taken over, and whether the business/activities disposed of can be regarded as a going concern. In other words: the identity of the undertaking or part of the undertaking should remain more or less intact for TUPE to apply. The answer to the question whether TUPE applies strongly depends on all the actual facts and circumstances. Pursuant to TUPE, all rights and obligations from the employment contracts remain intact in case of a transfer. Those rights and obligations transfer to the transferee by operation of law (for pension rights, special provisions may apply). Dutch regulations provide for joint and several liability for the transferor and the transferee for the duration of one year for claims in respect of employees' employment arising before the date of transfer.

Business protection and restrictive covenants

Any employee is obliged by Dutch law not to disclose trade secrets or other confidential information. Failing to observe this obligation will be considered an unlawful act, tort or even, in material cases, a criminal act. This would make the employee liable for damages suffered by the employer. Nevertheless, most employment contracts contain as standard a confidentiality clause, including a penalty clause for any breach of said obligation. This is to raise awareness amongst staff, broaden the scope of the confidentiality obligation and send a strong signal to the employees that they should take the confidentiality obligation seriously.

Restrictive covenants – such as non-compete and business relationship – are generally used in the Netherlands, although mainly for commercial and business-sensitive positions within the company. Non-compete and business relationship clauses will only be valid under Dutch law if agreed with an adult and if agreed in a document that is signed by both parties.

Due to changes in Dutch employment law, restrictive covenants in fixed-term contracts are void. An exception is possible only if from a written motivation, forming an integral part of the covenant, it follows that the company has compelling business reasons that make the covenant necessary in the specific individual employment agreement. If such a written motivation is lacking or if the motivation is not well-motivated, the restrictive covenants are not enforceable. For restrictive covenants in indefinite-term contracts, this specific additional rule does not apply.

Apart from the formal legal requirements that can be contested in Court, any validly agreed restrictive covenant is still subject to moderation by a Court. In these procedures, Courts will normally weigh both the interest of the employer and the employee. Courts generally look at the type of position of the employee within the company, seniority, access to confidential information, the possibility of a step in career or salary, and the ability to find alternative employment in another type of industry. As such, the generally acceptable duration of non-compete provisions is a maximum of 12 months after termination, and business relationship clauses tend to be acceptable up to a maximum of 24 months. The employee can request the Court to allow financial compensation for the period of restriction by the covenants, however case law shows that Courts only grant such compensation under special circumstances.

Discrimination protection

The Dutch Equal Treatment Act prohibits (both direct and indirect) discrimination in general, but specifically on the following grounds: religion, personal beliefs, political

opinion, race, sex, nationality, sexual orientation and civil status. This act also determines some specific provisions concerning the employment relationship. These provisions determine that discrimination is prohibited under the following circumstances: when offering a job; in job placement services; when entering into and terminating an employment relationship; in employment conditions; and in working conditions.

Furthermore, there are some specific employment-related discrimination acts which prohibit discrimination on the following grounds: handicap or chronic disease; age; temporary/permanent employment contract; and part-time/full-time working hours.

The Dutch discrimination legislation only permits direct discrimination when it is explicitly allowed by law (e.g. certain genuine occupational requirements). Indirect discrimination – or direct discrimination based on age – is only permitted when there is an objective justification for the difference in treatment. This requires a legitimate aim and the means for achieving this aim must be proportionate and necessary.

The Dutch discrimination legislation provides several exceptions on the general prohibition of discrimination meant to favour certain disadvantaged groups, such as women, ethnic minorities and people with a chronic disease or handicap; so-called positive discrimination.

Concerning the burden of proof, it is required that an employee who feels discriminated needs to state (and prove) the relevant facts which give rise to the suspicion that the employee is discriminated against. If the employee succeeds in this, the burden of proof will shift to the employer and the employer needs to prove that the employee was not discriminated against. An employee can choose to file a complaint with the Dutch Institute for Human Rights or (directly) file a request at the Court. Judgments by the Dutch Institute for Human Rights are not legally binding, so employers can choose to ignore them. In that event, an employee has to go to the Court.

The recent coalition agreement, presented in October 2017, states that discrimination on the labour market is unacceptable, and requires a firm approach. The so-called 'Plan of action labour market discrimination' gives attention to combating discrimination in selection procedures, pregnancy and a firm enforcement role of the Dutch Labour Inspectorate.

Protection against dismissal and financial compensation

The basic dismissal requirements are that permanent employment contracts can only be terminated unilaterally through the Court or with the prior permission of the UWV. Exceptions apply for dismissals: *i*) during a validly agreed probation period; *ii*) for justified urgent cause for dismissal (e.g. theft, fraud, embezzlement, etc.); and *iii*) because the employee reaches the pensionable age as meant in the Dutch Old Age Pensions Act. For clergymen, clerics, homeworker and statutory directors, further exceptions apply.

The UWV forms a decision pre-dismissal as to whether there is a so-called reasonable ground for dismissal. A comparable test is applied by the Court. This also means that under Dutch law it is possible that the employment contract cannot be terminated unilaterally because the permission of the UWV, or the dissolution by the Court, is denied.

There are eight reasonable grounds defined in statute:

(a) long-term sickness, 104 weeks or longer;

(b) redundancy for business economic and/or (work) organisational reasons;

(c) frequent sickness;

(d) underperformance after an improvement plan (and training);

(e) culpable actions or omission of the employee;

(f) conscientious objections;

(g) a disrupted working relation to such an extent that continuation of the relationship cannot be expected of the employer; or

(h) other circumstances.

Dismissal for personal/individual reasons such as underperformance or a disrupted working relation must be brought before the Court. 'Neutral reasons' such as reorganisations, or termination after two years of illness, have to be dealt with through the UWV procedure by requesting permission to give notice.

Apart from the need to prove at least one valid ground for dismissal, an employer must also substantiate that it is not possible to redeploy the employee (even after training) elsewhere in the organisation or in a vacancy at an affiliated company within the group. Only in the event that the employee is terminated based on culpable actions or omission of the employee does this redeployment obligation not apply.

The UWV does not deliver its decision until it has heard the employee's view, although this is mostly done on paper and without an oral hearing. The process following a permission application lasts between one and two months from the date that the full application is filed at the UWV. If the permission is granted by the UWV, the employer can serve notice to terminate with due observance of the applicable notice period, minus the time the UWV procedure took. However, a minimum of one month's notice must always be observed.

Also, the Court does not deliver its decision until it has heard the employee's view. The Court will invite both parties to explain their position during an oral hearing. The oral hearing is planned within four to eight weeks from the date the dissolution request is filed with the Court. If the Court dissolves the employment contract, it will observe the applicable notice period minus the time the dismissal procedure with the Court took; however, again a minimum of one month's notice must always be observed.

An employment contract can be terminated at any time by mutual consent. This is also the most popular way of terminating the employment contract. In practice, an employee generally only cooperates with a mutual consent termination if the reasoning behind the termination is convincing enough (and it is therefore likely that the UWV or the Court will 'approve' the termination) and in exchange for a reasonable severance package. A termination by mutual consent will not jeopardise the entitlement of the employee to unemployment benefits as such.

Termination bans

Some specific groups of employees are protected by means of a prohibition to give notice of termination. This statutory ban applies, for example, during illness shorter than 104 weeks, pregnancy and during a membership of the works council. Furthermore, it is not allowed to terminate the employment contract due to trade union membership and due to taking parental leave. There are specific exceptions to this rule. It is, for example, possible to give notice of termination in specific circumstances if the employer is able to prove that the termination is not in any way related to the statutory ban on termination.

Financial compensation and other remedies

In principle, every employee who has been employed for at least 24 months and whose employment contract is terminated or not extended at the employer's initiative is entitled

to a statutory transition fee: 1/6th monthly salary for every six months of employment during the 10 years of employment and 1/4th monthly salary for every successive six-month period. The transition fee is capped at €77,000 gross (2018: €79,000) or any higher gross annual salary. For small companies and employees older than 50 years, different rules may temporarily apply. If the employee is dismissed for a justified urgent cause, he is not entitled to a statutory transition fee as such.

A Court may award additional fair compensation in the event of misconduct on the side of the employer. The Supreme Court ruled in 2017 that this additional compensation does not have a punitive damages character. The compensation is, however, related to the degree of culpability and will be established based on all facts and circumstances, including the consequences of the dismissal for the employee. No specific calculation formula is applicable.

If the employment agreement is, for instance, terminated without a justified urgent cause for dismissal or based on a false dismissal ground, this will automatically lead to a situation where the employee can request the Court to award additional fair compensation. Another option for the employee in this event is to request the Court to reinstate the employment agreement with retroactive effect.

Statutory employment protection rights

Notice periods

Under Dutch law, the employee must observe a notice period of one month. For the employer, the length of service determines the length of the notice period:

- up to five years of service: one month;
- five to ten years of service: two months;
- 10 to 15 years of service: three months; and
- 15 years of service or more: four months.

A longer notice period for the employee can be agreed upon if this is agreed in writing. In this event, the notice period for the employer must be twice the notice period for the employee (e.g. two months' notice for the employee and four months' notice for the employer). Some further divergences from the statutory notice period are possible if it is included in the applicable collective labour agreement (CLA). For example, a CLA allows the notice period for the employee to be reduced to less than one month.

Employees in the Netherlands are entitled to a statutory minimum number of vacation days, equivalent to four times the weekly working hours (e.g. a full-time employee (40 hours per week) is entitled to 20 holidays per year). Moreover, the employee is statutorily entitled to a holiday allowance of 8% of the annual salary, however only calculated on the basis of the salary that does not exceed an amount equal to three times the statutory minimum wage. However, in practice this cap is not frequently used by employers. Normally, the holiday allowance is based on the full monthly basic salary without the cap, however excluding any bonus or profit-sharing schemes. Additional entitlements are possible, if included in the applicable CLA.

Rules for working hours can be found in the Dutch Working Hours Act and the Working Hours Decree. The number of working hours may vary by sector and depend on the kind of labour performed when stipulated in a CLA. In general, an employee is allowed to work a maximum of 12 hours per day, for a maximum of 60 hours per week. Over a period of four weeks, an employee is allowed to work no more than 55 hours per week,

on average. Over a period of 16 weeks, the number of working hours may be a maximum of 48 hours per week, on average.

Family-friendly rights

Female employees have the right to 16 weeks of maternity leave. This period shall be increased by two to four weeks in the case of a multiple birth. During the leave, the Employee Insurance Agency will pay 100% of the salary of the employee, but no more than the maximum daily wage (as of July 2017: €207.60).

Currently the partner of the new mother is entitled to only two days of fully paid leave. The recent coalition agreement states that the full paid parental leave for partners will be extended to one week. Furthermore, there are plans for an additional parental leave of five weeks, during which the employee is entitled to 70% of his salary. The proposed changes are expected in 2019 and 2020. Further, new legislation was implemented to provide the employee with more possibilities to work from home.

Worker consultation

A company is obliged to install a works council if more than 50 persons are working at the company. All employees fall under the scope of the definition of employee. Companies with at least 10 but fewer than 50 employees are required to establish a staff representation upon request of the majority of the workforce. Election of the works council members takes place via list of candidates. Trade unions may submit candidates for the list if they have members among the workforce of the company. The number of members of the works council varies between 3 and 25 members depending on the size of the company.

The consultation rights of the works council pertain to two major areas with a different legal framework: (1) advice procedure on strategic decisions, as mentioned in article 25 of the Dutch Works Council Act ("DWCA"); and (2) consent procedure on regulations regarding (secondary) employment conditions, as mentioned in article 27 DWCA. Furthermore, the works council has a more general right to information, and advice is required in the event of an appointment or involuntary dismissal of a managing director of the company.

Advice procedure

The works council must be consulted at a point in time when the advice of the works council may still have considerable influence on the decision. In the request for advice, the company has to provide information regarding: (i) the reasons for the intended decision; as well as (ii) the consequences of the intended decision for the employees of/employment within the company; and (iii) the measures that will be taken in this respect. The company must also hold at least one consultation meeting with the works council. The works council should render its advice within a reasonable period. There is no period set by law. The timing of the advice procedure depends on the exhaustiveness of the information and motivation given in the advice request, the complexity of the intended measures, the consequences for the employees and the reasonableness of the questions from the works council.

Furthermore, the works council must be put in a position to advise on the execution of the decision, provided this has not happened in the initial request for advice. If the works council does not consent ("negative advice") to the intended decision and the company does not act in accordance with the works council's advice, the company must notify the reasons for deviation to the works council in writing. In that case, the execution of decision must be delayed by a one-month waiting period. During this waiting period, the company

is prohibited to execute the decision and the works council may start legal proceedings at the Enterprise Chamber of the Court of Appeal in Amsterdam. As such, the Court of Appeal can actually overturn the decision of the company if, after consideration of all relevant interests, the decision to proceed with the decision is one which the management could not reasonably have made.

Consent procedure

For the topics mentioned in article 27 DWCA, the intended decision should have an impact on all employees or a group of employees. From case law of the Supreme Court it follows that the list is exhaustive, and the topics mentioned in this article should not be interpreted too broadly. The works council must consent to the changes. If the works council does not consent to the changes, the company can request the Court to grant consent to the changes.

Changing employment conditions

Changes to primary employment conditions (e.g. salary, number of holidays) are not subject to consent of the works council. If such employment conditions are regulated via an applicable collective bargaining agreement, changes should be effected by the relevant trade union organisations. Under Dutch law, the Minister of Social Affairs and Employment can declare certain collective bargaining agreements partially or fully generally binding for the whole industry for a certain period of time. All employers within the relevant industry are, in that event, obliged to apply at least the employment conditions as laid down in the collective bargaining agreement to their employees.

The approval of the employee is required for amendments to the employment contract that are not regulated via a collective bargaining agreement. On the other hand, a unilateral amendment clause may entitle the employer to amend an employment condition included in the employment contract. According to law, the employer may only invoke this amendment clause if it has agreed such with the employee in writing, and the employer has such a weighty interest in that amendment that the employee's interest would be damaged as a result, must take second place in accordance with standards of reasonableness and fairness.

If no unilateral amendment clause is involved, the employer will be able to amend an employment condition in the employment contract unilaterally by invoking the requirements of reasonableness and fairness. Good employee practice and being a good employee may also constitute a basis in this respect. In that context, the Supreme Court of the Netherlands has stipulated that in general, an employee should respond positively to reasonable proposals by the employer relating to changed circumstances in the workplace, and may only reject such proposals if the acceptance of such under the given circumstances cannot reasonably be expected from the employee. From Dutch case law it follows that the consent of the works council to amend or withdraw certain employment conditions does not bind the individual employee. On the other hand, the consent of the works council will be an important element that a Court will look at when balancing the interest of both the employer and employee when amending employment conditions.

Employee privacy

Data protection rights for employees and obligations for employers are laid down in the Dutch Personal Data Protection Act (DPA). On May 25th, 2018, the General Data Protection Regulation (GDPR) will enter into force and replace the DPA. The current DPA determines that if an employer processes data of employees, the employer must

notify this to the Dutch Data Protection Authority (DP Authority). In the accompanying Exemption Decree, multiple forms of data processing data are exempted from notification, for example, data processing in the context of a staff and salary administration. Processing data is only allowed when one of the limitative conditions of the DPA is applicable. Most relevant for the employment relation are the necessity of processing data for the execution of a contract, or the necessity of processing data to take care of a legitimate interest. Processing sensitive personal data, such as health data, is only allowed on the basis of some very restricted limitative grounds.

Based on the GDPR, employers in the Netherlands will as of May 25th, 2018 be confronted with additional obligations to secure gathered personal data of employees against loss or any form of unlawful processing. Large companies (with 250+ employees), companies that are processing data on a large scale (e.g. recruitment firms, employment agencies) and companies that are processing sensitive personal data (e.g. Arbo services companies or hospitals) will also be required to register all data-processing operations for their own administration. Insight into this administration can be requested by the DP Authority and the employee at any time. The Dutch Data Protection Authority ("DP Authority") will be provided with extra means to keep oversight, including the possibility to impose steep penalties in the event of a breach of the GDPR obligations of €20 million, or 4% of the worldwide yearly revenue of the company.

Monitoring/surveillance in the workplace

Monitoring in the workplace is only allowed when it is necessary to protect the legitimate interest of the employer or in the event of health or safety risks and the aim cannot be achieved by less drastic means. Furthermore, it is important to determine whether the interest of the company of monitoring outweighs the interest of an employee's right of privacy.

An employer can restrict internet use during working hours by stating clear rules about the use of internet and email, for example, in a code of conduct or a guideline. However, an employer cannot completely prohibit the private use of email during working hours, considering the right to privacy of employees, which right also extends outside the work place. The employer needs to inform the employees about these internet and email rules. If there is a works council within the company, it has the right of prior consent to any such regulations. Controlling employees' social media is only allowed when an employer has a legitimate reason and control is therefore necessary.

Vetting and background checks

Screening potential employees is only allowed when an employer has a legitimate aim and the legal conditions of the DPA are met. Important to note is that unambiguous consent of the potential employee is not a legally valid basis for processing data, because of the relationship of dependence. An employer must carefully weigh whether a background check is necessary for the position, and which data is relevant in that respect. Furthermore, an applicant needs to be informed that he or she will be screened, for example, in the job application text. Recently, the DP Authority stated that employers cannot screen social media accounts of applicants without reason. Only when there is a legitimate aim and the legal requirements are met, can a company check an applicant's social media accounts.

Drug testing and other forms of testing in the workplace

In principle, applicants or employees are free to do whatever they want in their own time, as long as it is not influencing their performance or the legitimate business interests of the

employer. Under some circumstances there are exceptions, depending on a specific job with a special responsibility or with health or safety risks.

Other recent developments in the field of employment and labour law

Atypical workers

The Dutch labour market is seeing increasingly varied forms of employment, with particularly strong growth in temporary employment relationships. A significant proportion of the Dutch workforce consists of workers who work for companies other than their formal employer; for example, agency workers. Employers frequently choose to use these three-party arrangements, because of the flexibility to hire and fire employees. For instance, the CLA for agency workers provides for more flexibility relating to the amount of consecutive temporary employment contracts and to the total duration of consecutive temporary contracts.

Training

Since 2015 the Dutch Civil Code expressly provides that an employer should allow an employee to attend necessary training for the performance of his/her duties. This obligation also implies that if the position of the employee will become redundant or the employee is no longer able to fulfil his/her role, the employer must allow the employee to follow training for the continuation of the employment contract (if this can reasonably be required).

National minimum wage levels

All employees of 22 years and older are entitled to the statutory minimum wage. The amount of minimum wage as of 1st January 2018 and based on a full working week (40 hours) for an employee of the age of 22 or older is €1,578 per month. The net amount the employee will receive depends on the taxes and social insurance contributions withheld from their wage. Younger employees (15 to 21 years) are entitled to the statutory minimum youth wage, which is determined solely by the age of the employee. The government adjusts the amount of the minimum wage and the minimum youth wage twice a year, on 1st January and 1st July. As of 1st July, 2019, it is intended to reset the minimum age for the statutory minimum wage from 22 years to 21 years. On the same date, it is also intended to raise the percentages on which the minimum youth wage for 18, 19 and 20 year-olds is based.

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