EMPLOYMENT LAW CHRONICLE

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Last year, the Dutch Supreme Court pronounced a large number of rulings in the field of the Work and Security Act (*Wet werk en zekerheid*). Therefore, a large part of this Chronicle deals with those decisions. The items discussed include rulings on the grounds for dismissal, the transition allowance and the fair compensation, the obligation to pay wages after immediate dismissal and a number of procedural aspects. Furthermore, attention will be paid to case law on #metoo and the rulings of the European Court of Justice on the lapse of holidays. Finally, we will discuss a number of relevant developments in laws and regulations.

GROUNDS FOR DISMISSAL AND REINSTATEMENT OBLIGATION

In the ANWB ruling (HR 13 July 2018, ECLI:NL:HR:2018:1212), the Supreme Court clarified the application of the A ground (dismissal for economic reasons) on a number of points. ANWB had decided to reorganise the Media division on account of the poor financial results of that specific division. As a result of the reorganisation, the employment agreement with a content management coordinator was terminated. The employee lodged a complaint in cassation to the effect that the economic need had incorrectly been assessed (only) on the basis of the financial situation of the Media division. In the employee's opinion, the financial situation of ANWB as a whole should have been considered. The discussion centred on Article 3 of the Redundancy Scheme. That article provides that, if a company forms part of a group, the assessment of the economic need should be based only on the company where jobs become redundant. According to the employee, ANWB could not rely on this provision because the Media division did not form an independent legal entity. The Supreme Court disregarded that argument. The Supreme Court stated first and foremost that the Redundancy Scheme should be regarded as a right within the meaning of Article 79 of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*). Subsequently, the Supreme Court held that, although the explanatory notes to Article 3 seem to have been written for situations where each business is run in a separate legal entity, the rationale of the scheme can also hold if certain independent divisions can be distinguished within one single legal entity. This means that, to assess the economic need, ANWB was allowed to look at the Media division only. Another item for discussion was the reinstatement obligation. The employee stated that her position as content management coordinator had partly returned in the new position of theme editor. The parties agreed that the two positions were not interchangeable. On the basis of Article 9 of the Redundancy Scheme and the 'Implementing Rules on Dismissal for Economic Reasons' of the Employee Insurance Agency UWV, the new position must, in such event, first be offered to an employee who 1) is suitable for that position, and 2) would, on the basis of the principle of proportionality *afspiegelingsbeginsel*) last qualify for dismissal. The employee argued that in this 'reversed proportionality' not only suitable employees should be involved, but also employees who could be 'made suitable for the position', such as herself. According to the Supreme Court, this does not follow from the Redundancy Scheme and the explanatory notes thereto or from the Implementing Rules of the UWV, with respect to which the Supreme Court mentioned as an aside that those Implementing Rules (being UWV policies) are not binding on the court. Consequently, in the event of reversed proportionality, only employees who are suitable for the new position at that moment may be taken into account. Perhaps superfluously, the Supreme Court added that an employee who 'can be made suitable for a new position through education within a reasonable period' did indeed rank above *external* candidates. Last year, also the D ground (malfunctioning) was worked out in further detail on a number of points. In the Plano Plastics ruling (HR 16 November 2018, ECLI:NL:HR:2018:2105), which the Supreme Court based on Article 81 of the Judiciary (Organisation) Act, the Advocate General held that, although there was no general obligation to draw an employee's attention to their malfunctioning, the Court of Appeal had correctly assessed that the employer should have done so in that case. A factor here was, *inter alia*, that the oral warnings had not produced any effect and that Plano Plastics had had more than sufficient reasons to call the employee to account about their performance. In another case

(HR 16 February 2018, ECLI:NL:HR:2018:206) the employer had transferred a malfunctioning employee to another position. The Court of Appeal ruled that, by that transfer, the employer had given the employee sufficient opportunity to improve their performance *and* had given the employee the chance to prevent their dismissal. The Supreme Court ruled this case on the basis of Article 81 of the Judiciary (Organisation) Act as well.

In the Shell case, the Supreme Court pronounced a ruling on application of the H ground and the reinstatement obligation of employers (HR 18 January 2019, ECLI:NL:HR:2019:64). That case concerned an employee with an employment history within the Shell group of over 40 years, who had worked for various Shell companies as an expat for over twenty years. According to the Shell expat scheme, expats are assigned from the country where they are recruited ('Base Country') and enter the employment of a Shell company in the 'Host Country'. Before the end of the assignment period, expats may participate in the group's internal job application rounds that are organised four times a year. Any vacancies for such positions are posted on an online platform. The employee's last assignment for Shell in Gabon had ended on 1 August 2015 and, by that time, the employee had not yet found a new position. Therefore, he returned to the Netherlands, where he entered the employ of Shell International Exploration and Production BV ('SIEP'). Subsequently, Shell offered the employee a position in Rotterdam twice, but the employee refused both positions. Furthermore, the employee applied for a new position fifteen times in four selection rounds, all in vain. At SIEP's request, the employment agreement was eventually terminated as of 1 December 2016 on the basis of the H ground. On cassation, the employee stated that the dismissal should have been assessed on the basis of the A ground, but the Supreme Court dismissed that argument because there were no redundancies. What is more interesting is that the Supreme Court agreed with the Court of Appeal that, in this case, the tests of the fair ground for dismissal and that of the reinstatement coincided. The Supreme Court held that the H ground is a generally formulated residual category. The mere circumstance that reinstatement is not possible or does not stand (or no longer stands) to reason may lead to a situation where an employer cannot reasonably be required to continue the employment agreement. As to the details of the reinstatement obligation, the Supreme Court noted that the obligation is not an obligation of result, but that it is about what can be required from an employer in the given circumstances. This means that an employer has a certain degree of discretion in this respect.

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In another case, the employee did rely successfully on the employer's reinstatement obligation. The 's-Hertogenbosch Court of Appeal (6 December 2018, ECLI:NL: GHSHE:2018:5118) ruled that the employer had not made enough efforts to reinstate the employee. The employer had neither consulted with the employee on any reinstatement options nor investigated the possibility of reinstatement abroad. In the opinion of the Court of Appeal, the mere referring to websites on which vacancies of the group are posted does not suffice. On that ground, the Court of Appeal denied the termination requested.

TRANSITION ALLOWANCE

In the KOLOM decision, the Supreme Court introduced the possibility of part-time redundancy and ruled that, in such a case, an employer may have to pay a proportional transition allowance (HR 14 September 2018, ECLI:NL:HR:2018:1617). The Supreme Court held that the law does not provide for partial termination of employment. Nor does the law provide for any right to a partial transition allowance in the event of reduction of working hours. Nevertheless, according to the Supreme Court, the possibility of part-time redundancy and the associated entitlement to a partial transition allowance must, in special circumstances, be accepted. By way of example, the Supreme Court referred to the situation where it is necessary that jobs are partially redundant due to economic circumstances and to the situation where an employee remains partially disabled. In those cases, the reduction of working hours must be at the employer's risk and expense. The Supreme Court formulated two conditions for awarding a partial transition allowance: 1) the reduction of working hours must be 'forced by circumstances"; and 2) the reduction of working hours must be substantial and structural, i.e. a reduction of hours of at least twenty per cent which is reasonably expected to be permanent. The partial transition allowance should be calculated in proportion to the reduction of working hours. It does not matter how the part-time redundancy is effected. This may, for example, take place by a reduction of hours, partial termination by mutual consent, or full termination followed by a new employment agreement.

No transition allowance will be due if an employee's conduct was 'seriously culpable'. On 30 March 2018, the Supreme Court ruled that an employer may even have to pay a transition allowance after a correctly given immediate dismissal (HR 30 March 2018, ECLI:NL:HR:2018:484). The Supreme Court held that seriously culpable acts or omissions cannot be assumed on the sole basis that there is an urgent reason for immediate dismissal. After all, assuming an urgent reason does not require that an employee can be reproached for their conduct. In two cases, the Arnhem-Leeuwarden Court of Appeal ruled that, after an immediate dismissal, the employer actually had to pay a transition allowance (23 March 2018, ECLI:NL:GHARL:2018:2831 and 1 September 2018, ECLI:NL: GHARL:2018:8329).

On the basis of Article 7:673 (7) (b) of the Civil Code (*Burgerlijk Wetboek*), employees who have reached state-pension age are not entitled to the transition allowance if their employment agreements are terminated. In the literature, a discussion started as regards the question as to how such exclusion relates to the equal treatment legislation. The Utrecht Sub-district Court asked the Supreme Court for a preliminary ruling (ECLI:NL:RBMNE: 2017:3249). On 9 February 2018 (ECLI:NL:PHR:2018:158), the Advocate General concluded that there was *no* discrimination. The Advocate General held that the legislature pursues a legitimate aim, namely to prevent that a transition allowance accrue to persons who are entitled to a state pension benefit and, as a result, are no longer dependent on performing work to support themselves. In line with the Advocate General, the Supreme Court concluded that, in this case, there was no age discrimination (HR 20 April 2018, ECLI:NL:HR:2018:651).

FAIR COMPENSATION

Last year, a significant amount of case law was published on the amount of the fair compensation. In our last Chronicle, we discussed the New Hairstyle ruling (HR 30 June 2017, ECLI:NL:HR:2017:1187). In this ruling, the Supreme Court presented a number of views for determining the amount of the fair compensation. The Supreme Court ruled that, *inter alia*, the consequences of the dismissal may be considered and that the wage that an employee had received if the termination had been annulled may be taken into account. Income from another job, income that may be acquired in the future, the degree of blame on both sides, as well as the reason why the termination had not been annulled may also be taken into account.

The Stichting Zinzia Zorggroep case (HR 8 June 2018, ECLI:NL: HR:2018:878) focused on the question as to whether the views referred to above also apply if the employee files a request for termination on the basis of Article 7:671c of the Civil Code. In this case, the employee was of the opinion

that the employer had acted in a seriously culpable manner, *inter alia* by wrongly suspending her, and requested an fair compensation. The Sub-district Court found for her and awarded a gross fair compensation of EUR 70,000. The Court of Appeal was also of the opinion that Zinzia's acts or omissions were seriously culpable. The Court of Appeal deemed, however, a lower gross compensation of EUR 25,000 suitable. The Court of Appeal took into account the circumstance that the employee had found other employment shortly after the order for termination by the court in the first instance. On cassation, the employee complained in vain about the amount of the compensation. Firstly, the Supreme Court noted that the views are also suitable for application in cases where the fair compensation is based on a request for termination of the employee. Also in that case, the ultimate aim is to compensate the employee on account of serious culpable acts or omissions of the employer. The Supreme Court further held that the employee had found employment elsewhere and had not provided any information about the income received by her from her new job, and that she had not submitted any details of other material damage. Apparently – and not incomprehensibly – the Court of Appeal inferred that the employee had not suffered any material damage as a result of Zinzia's seriously culpable conduct.

The same day, the Supreme Court also pronounced another interesting ruling on the fair compensation (HR 8 June 2018, ECLI:NL:HR:2018:857). This case was about the fair compensation that an appellate court may award to an employee, if it rules that awarding the request for termination by the court in the first instance is incorrect. In that case, the law (Art. 7:683 (3) of the Civil Code) provides an appellate court with two options. The appellate court may instruct the employer to reinstate the employment agreement or, in lieu thereof, award the employee an fair compensation. The Subdistrict Court terminated the employment agreement in the first instance, but the Court of Appeal ruled that the termination had been awarded incorrectly. In this case, the Court of Appeal did not see reason for reinstatement of the employment agreement, because it had not become sufficiently evident that the sick employee was actually able to resume work. Moreover, the employer could not be required to reinstate the employment agreement either, *inter alia*, because of the lapse of almost two and a half years. The Court of Appeal did, however, not award an fair compensation either. The employee appealed to the Supreme Court against this decision. The Supreme Court ruled that a court *may* order an employer to reinstate the employment agreement or that an employer *may* award an fair compensation to the employee. This means that the court is under no obligation to do so. Furthermore, the Supreme Court ruled that, if an appellate court decides to award an fair compensation, the views of the New Hairstyle ruling are also relevant to that situation. In a case against ServiceNow (HR 30 November 2018, ECLI:NL: HR:2018:2218), an employee's complaint in cassation against the substantiation of the Court of Appeal did succeed. On appeal, the Court of Appeal ruled that there was no full D ground, due to an inadequate improvement plan, but that meanwhile a full G ground had arisen (the Asscher escape). According to the Court of Appeal, the employer had acted in a seriously culpable manner. The Court of Appeal awarded a gross fair compensation of EUR 15,000. The employee lodged a complaint in cassation about the amount of the fair compensation. According to the employee, the Court of Appeal should have taken the expected duration of the employment agreement into consideration. The Supreme Court found for the employee. When determining the compensation, the Court of Appeal should have considered the expected duration of the employment agreement if the employment relationship had not been disrupted due to the fault of the employer.

A court may also award an fair compensation to an employee if the employment agreement has ended by operation of law and the non-continuation thereof is the consequence of seriously culpable acts or omissions of the employer. This was what happened in the case of an employee against Colliers International (HR 19 October 2018, ECLI:NL:HR:2018:1979). The employee requested an fair compensation after his employment agreement for a definite period of time had not been extended. He received a negative response from both the Sub-district Court and the Court of Appeal. Both the Sub-district Court and the Court of Appeal held that it is not important what had occurred after the employee had been notified of the fact that his employment agreement was not extended. On cassation, the Supreme Court ruled, however, that the employee had correctly relied on the starting point that weight may also be attached to facts and circumstances that have occurred between the notification by the employer and the termination by operation of law, and that, in that respect, weight may also be attached to facts and circumstances that have occurred after the termination by operation of law.

IMMEDIATE DISMISSAL AND ENTITLEMENT TO WAGES

In the Wilco ruling (HR 13 July 2018, ECLI:NL:HR:2018:1209), the Supreme Court had to look into the question as to whether an employee was entitled to wages after an immediate dismissal which was held valid on appeal. The case concerned an employee of a book printing company, who had been dismissed with immediate effect on account of theft of books. The Sub-district Court had annulled the dismissal with immediate effect. On appeal, the Court of Appeal ruled, however, that the employee's immediate dismissal was correct. Subsequently, the Court of Appeal had to set a new, future, end date for the employment agreement. Although the immediate dismissal in itself had been given in a legally valid manner, the employment agreement had, as a result of the decision of the Sub-district Court, continued to be in effect. The Court of Appeal ruled that, on the basis of Article 7:628 of the Civil Code, the employee could not claim wages from the date of the immediate dismissal. The employee lodged appeal in cassation. The Supreme Court ruled that, on the basis of Article 7:627 in conjunction with Article 7:628 of the Civil Code, a court may rule that an employee is not entitled to wages if it turns out in retrospect that the immediate dismissal was annulled incorrectly. Here, two periods can be distinguished: 1) the period between the dismissal and the decision in the first instance annulling the dismissal; and 2) the period between that decision and the termination of the employment agreement on appeal. Both periods are subject to the starting point that the cause of the non-performance of work cannot reasonably be for the employer's account. For period 2, that starting point can be derogated from if, in the given circumstances, the decision of the court in the first instance should, either fully or partially, be at the risk of the employer. Finally, the Supreme Court noted that it is also possible to mitigate the wages due in principle (Article 7:680a of the Civil Code), or to deny an employee their entitlement to full or partial payment of wages on the basis of Article 6:248 (2) of the Civil Code. For the possibility to mitigate a wage claim, we also refer to the Hyatt ruling (HR 6 July 2018, ECLI:NL:HR:2018:1094).

PROCEDURAL LAW

In the Mediant case, the Supreme Court ruled (23 December 2016, ECLI:NL:HR:2016:2998) that the statutory rules of evidence apply *mutatis mutandis* in termination proceedings. In our last Chronicle, we discussed two rulings of 16 February 2018 which also regarded the rules of evidence in termination proceedings (ECLI:NL:HR:2018:182 and ECLI:NL:HR:2018:220). In those cases, the Supreme Court distinguished between the asserted facts and circumstances on the one hand, and the assessment whether there was a reasonable ground for dismissal as referred to in Article 7:669 (3) of the Civil Code on the other. It is up to the employer to assert, and in the event of a dispute sufficiently prove, the facts and circumstances that it wishes to base its request for termination on. The eventual assessment whether the demonstrated facts constitute a reasonable ground within the meaning of Article 7:669 (3) of the Civil Code is not subject to the rules of evidence. On 29 June 2018, the Supreme Court pronounced another ruling on the application of the law of evidence in termination proceedings (ECLI:NL:HR:2018:1045). Certe, the employer, reproached the employee with inadequate teamplayership and communication. The Sub-district Court terminated the employment agreement on the basis of the D ground. The Court of Appeal upheld that decision. The Court of Appeal held that, although the employee's professional performance was sufficient, there could still be malfunctioning in other aspects, such as communicative skills. On cassation, the employee complained that the Court of Appeal had incorrectly disregarded her substantiated defence and offer of proof. The employee had disputed Certe's statements, giving reasons, and did so based on, *inter alia*, statements made by former co-workers. The employee offered proof of her statements, *inter alia*, by hearing witnesses. She also put forward that the problems in the teamplayership could be traced back to organisational problems at Certe's, including an excessive workload. The Supreme Court found for the employee and ruled that the Court of Appeal had incorrectly failed to address the employee's offer of proof.

The BAM Infra Telecom ruling (HR 28 September 2018, ECLI:NL:HR:2018:1812) focused on the question as to whether a court may hold *ex officio* that an employer may withdraw its request for termination if it is ordered to pay the transition allowance. BAM requested termination of an employment agreement without a transition allowance because, according to BAM, the employee had acted in a seriously culpable manner. The Court of Appeal terminated the employment agreement and ordered BAM to pay the employee, to the extent that the request for termination was not withdrawn, a transition allowance. Subsequently, BAM withdrew the request. On cassation, the Supreme Court ruled that a court is under the obligation to offer the possibility of withdrawing the request (only) if an

fair compensation is awarded, but not in cases where an employer is ordered to pay the transition allowance. After all, the indebtedness thereof follows directly from the law. A court may, however, render a provisional decision, the proviso being that the request for termination is not withdrawn prior to a certain date. A court may, however, render such a provisional decision only if such decision is, or has been, claimed or requested, or is implied in the claim or the request.

In the recent Amsta ruling (HR 25 January 2019, ECLI:NL:HR:2019:80), the Supreme Court gave more clarity on the reinstatement of the employment agreement on appeal. On the basis of Article 7:683 of the Civil Code, an appellate court may order an employer to reinstate an employment agreement. Also on the basis of the Parliamentary History, a discussion arose on the question as to whether an appellate court could reinstate the employment agreement itself. In the Mediant and Vlisco cases, the Supreme Court had not given an opinion on the subject, but in the Amsta ruling the Supreme Court ruled that an appellate court could also reinstate the employment agreement itself, provided that a request to that effect had been submitted. In support thereof, the Supreme Court referred to Article 3:300 of the Civil Code, which generally includes the possibility of enforcement of an executory title. Furthermore, the Supreme Court held that, in the event of reinstatement, a court may make (*ex officio*) provisions, such as awarding compensation for loss of income and pension. Furthermore, in that ruling, the Supreme Court held that reinstatement of the employment agreement does not automatically imply that an employee is to pay back their transition allowance. After all, the reinstatement does not lead to lapse of the basis for such allowance. An obligation to pay back the allowance does not arise until the court has ordered the employee to do so.

LEGAL QUALIFICATION

The Deliveroo cases focused on the question as to whether the relationship with meal food riders must be qualified as an employment agreement or as an agreement for services. In this respect, the Amsterdam District Court rendered two contradictory decisions (23 July 2018, ECLI:NL:RBAMS:2018:5183 and 15 January 2019, ECLI:NL:RBAMS:2019:198). In the former case, the District Court ruled that the agreement was an agreement for services. The food rider had been working on the basis of an employment agreement for a period of eighteen months, after which the working relationship has been converted into an agreement for services. The court held that the latter agreement explicitly provided that the parties did not intend to enter into an employment agreement. The food rider had even confirmed that by email and registered with the commercial register of the Chamber of Commerce. Moreover, the food rider could decide for himself whether or not he wished to carry out or refuse orders. He could also report for work at any time that it suited him. The food rider used his own bicycle and used the clothes and thermo box given to him by Deliveroo during his former employment. He was allowed to carry out orders for competitors and be replaced by somebody else. For each completed order, the food rider received an all-inclusive fee on an invoice basis. These were reasons for the Sub-district Court to qualify the legal relationship as an agreement for services, which focused on the intention of the parties. In the second case, which had been instituted by FNV trade union, the same District Court ruled that, in derogation from the written agreements, the legal relationship between Deliveroo and its food riders qualified as an employment agreement. In this decision, the District Court emphasised the manner in which the working relationship was actually implemented and attached less importance to the intention of the parties. The court pointed, *inter alia*, at the food rider's great interest in remaining available and performing well. After all, the food rider could thus earn important advantages, such as additional log-in facilities in the systems for food riders. As a result, the food rider was actually not fully free to make himself available, or at least not if he wished to generate (sufficient) income. The court also held that the food rider could be replaced only if his replacement showed valid proof of identity and a permit to perform work in the Netherlands in advance. As a result, according to the court, the possibility of replacement was empty. The court did not attach any substantial value to the registration with the Chamber of Commerce, as this was an obligation imposed by Deliveroo. Furthermore, the court held that Deliveroo still had wide authority to issue instructions. No relevant difference with the period in which the food rider worked on the basis of an employment agreement had been revealed.

The past year saw few developments in the field of legislation on the legal qualification. The Assessment of Employment Relationships (Deregulation) Act (*Wet deregulering beoordeling arbeidsrelaties*) is still not being enforced, except in the event of malevolent conduct. The suspension of the enforcement has, for the time being, been extended to 1 January 2020. Furthermore, on 26 November 2018, Minister Koolmees presented various plans to replace the Assessment of Employment Relationships (Deregulation) Act. These plans are scheduled to be worked out in further detail in 2019.

#METOO

Last year, a significant number of rulings were pronounced on the subject of sexual harassment. In most cases, this led to termination of the employment agreement. A few times, the employee was dismissed with immediate effect (Alkmaar Sub-district Court 27 February 2018, ECLI: NL:RBNHO: 2018:1725 and Amersfoort Sub-district Court 14 November 2018, ECLI:NL:RBMNE:2018:5652), but, more often, the employment agreement was terminated at the employer's request. In respect of severance payments, case law shows a varying picture. In a number of cases, the court ruled that the employee had acted in a seriously culpable manner, which resulted in the employee not receiving a transition allowance (The Hague Court of Appeal 13 February 2018, ECLI:NL:GHDHA:2018:223; 's-Hertogenbosch Court of Appeal 21 June 2018, ECLI:NL:GHSHE:2018:2705 and Maastricht Sub-district Court 12 July 2018, ECLI:NL:RBLIM:2018:6664), whereas in other cases, despite culpable conduct, the employee did receive a transition allowance (The Hague Sub-district Court 1 March 2018, ECLI:NL:RBDHA:2018:2670; Maastricht Sub-district Court 22 March 2018, ECLI:NL:RBLIM: 2018:2766; Utrecht Sub-district Court 27 June 2018, ECLI:NL:RBMNE:2018:2885 and Rotterdam Sub-district Court 19 October 2018, ECLI: NL:RBROT:2018:8327). In one case, the Court of Appeal reached the conclusion that the employer had deliberately wrongly accused the employee, which led to the employer being ordered to pay the employee a gross fair compensation of EUR 40,000 (Arnhem-Leeuwarden Court of Appeal 20 December 2018, ECLI:NL:GHARL:2018:11149).

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HOLIDAYS

On 6 November 2018, the Court of Justice of the European Union pronounced three interesting rulings on the subject of holidays. The Max-Planck-Gesellschaft/Shimizu (ECLI:EU:C:2018:874) and Kreuziger/Land Berlin

(ECLI:EU:C:2018:872) cases revolved around the legal validity of schemes on the basis of which holidays lapse if not taken in due time. In earlier rulings, the Court of Justice had ruled that a (national) scheme may not lead to lapse of holidays if an employee has not been given the opportunity to take them (see for example the King ruling, CJEU 29 November 2017, ECLI:EU:C:2017:914). In the 6 November 2018 rulings, the Court of Justice even took the matter one step further. The Court of Justice ruled that, although an employer does not need to oblige its employees to take holidays, it is, however, required to ensure 'specifically and transparently that the worker is actually given the opportunity to take the paid annual leave to which he is entitled and must encourage, formally if need be, to do so'. According to the Court of Justice, this means that an employer must inform its employee in good time and in a precise manner that their holidays will lapse if not taken within a certain period. The burden of proof is on the employer. Only if the employer can produce such proof and the employee has, apparently, deliberately decided not to take their holidays, may such days lapse. This ensues from both Article 7 of Directive 2003/88 and Article 31 (2) of the Charter of Fundamental Rights of the European Union. In the Max-Planck ruling, the European Court of Justice ruled that Article 31 (2) of the Charter has direct effect. This means that the provision sets aside national schemes, if such schemes are conflicting with such provision. The third ruling of the same date (ECLI:EU:C:2018:871) confirmed the latter point.

Laws and regulations

BALANCED LABOUR MARKET ACT

On 5 February 2019, the House of Representatives passed the Balanced Labour Market Act (*Wet arbeidsmarkt in balans*). The legislative proposal is currently under debate in the Senate. The envisaged effective date is 1 January 2020. The Balanced Labour Market Act contains, *inter alia*, the introduction of a cumulative ground for dismissal, entitlement to the transition allowance from the first day of the employment agreement, expansion of the provision on succession of fixed-term employment contracts, and more rights for on-call workers. The proposal no longer contains the proposed extension of the trial period to up to five months.

TRANSITION ALLOWANCE COMPENSATION SCHEME

Dormant employments of long-term sick employees have been the subject of discussion for a long time. It is the intention that the Transition Allowance in case of Dismissal for Economic Reasons or Long-Term Incapacity for Work Act (*Wet transition allowance bij ontslag wegens bedrijfseconomische omstandigheden of langdurige arbeidsongeschiktheid*) will solve that problem. Based on this act, employers may claim financial compensation for certain transition allowances in the event of redundancy on account of long-term incapacity for work. The act is worked out in further detail in the Transition Allowance Compensation Scheme (*Regeling compensatie transition allowance*). The entry into force of the act and the scheme was published recently in the Bulletin of Acts and Decrees (*Staatsblad*) (27 February 2019) and the Government Gazette (*Staatscourant*) (26 February 2019), respectively. The compensation scheme will enter into force on 1 April 2020 with retroactive effect until 1 July 2015.

IMPLEMENTING RULES OF THE UWV

The Implementing Rules regarding Dismissal for Economic Reasons have changed with effect from 1 August 2018. The new rules provide, *inter alia*, that, if there is no Works Council in place where this is required (> fifty employees), the rules for businesses with ten to fifty employees must be applied. In that case, consultations are to take place and advice must be requested from the employees for resolutions that may lead to redundancy or changing of jobs of at least 25 per cent of the staff. Without such consultations, applications for dismissal are premature and the UWV will refuse them. Furthermore, it has been clarified how it is to established whether positions are interchangeable. In response to the Auntie Louse ruling (HR 14 July 2017, ECLI:NL:HR:2017:1349), the new rules provide that the formal job description should be taken as point of departure and what an employer can require from its employee on the basis thereof. Furthermore, the new rules explain in further detail what may be required from an employer within the framework of its reinstatement obligation within the company or (international) group.

IMPLEMENTING RULES OF THE UWV

Often, overtime is compensated in time off (a time-for-time scheme). With effect from 1 January 2019, the Minimum Wage and Minimum Holiday Allowance Act (*Wet minimumloon en minimumvakantiebijslag*) has been amended on this point. If, by performing overtime, an employee earns less than the minimum hourly

wages in a certain salary period, such overtime may be compensated in time only if an applicable collective bargaining agreement offers that possibility. The time off must then be taken before 1 July of the following calendar year, failing which the employer will still have to pay the overtime hours.

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