EMPLOYMENT LAW CHRONICLE

Over the past year, the case law of the Dutch Supreme Court (hereinafter: "Supreme Court") has shown a diversity of employment-law issues. This Chronicle devotes attention, among other things, to the dormant employment contracts, the extrajudicial annulment of employment contracts due to fraud, the transition payment in the event of forced reduction in working hours (with unemployment benefit), unilateral changes to employment conditions and a number of procedural aspects. In addition, rulings of the Court of Justice of the European Union on the transfer of undertakings, holidays in excess of the statutory entitlement and working hours legislation will be discussed. The authors conclude with a number of relevant legislative and regulatory changes.

BY / KAROL HILLEBRANDT , CHRISTIAAN OBERMAN & NADIA ADNANI

TERMINATION DUE TO UNSATISFACTORY PERFORMANCE

For termination on the d-ground (unsatisfactory performance) an employee must have been provided with sufficient opportunity to improve his or her performance. In addition, the un- suitability for the position must not be the result of insufficient care for training on the part of the employer. However, the law does not specify how employers must fulfil these obligations. What kind of help, support and guidance an employer can be expected to provide depends on the circum-stances of the case. In its ruling of 14 June 2019 (ECLI:NL:HR:2019:933), the Supreme Court formulated the following points of view that may play a role in making this assessment: (i) the nature, content and level of the position, (ii) the employee's education and experience, (iii) the nature and degree of unsuitability of the employee, (iv) the duration of the unsatisfactory performance from the moment the employee was notified thereof, (v) the duration of the employment, (vi) what has already been done in the past to improve the performance, (vii) the extent to which the employee is open to criticism and is committed to improvement and (viii) the nature and size of the employer's organisation. This case involved a senior consultant, who was called to account about her functioning and behaviour, in particular her lack of self-reflection and her inability to deal with feedback. The employee was asked to draw up an improvement plan herself, in which she was intensively guided by the employer. After seven months, the employee had still not made it clear how she thought she could improve her performance. The Court of Appeal ruled, which ruling according to the Supreme Court did not err in law, that, in view of the level of her position and her work experience, the employee should be able to show self-insight into her areas for improvement. The employee could also have been expected to indicate what concrete measures or courses she needed to improve her performance. Partly in view of the intensive guidance provided by the employer, the employer had provided sufficient care.

EMPLOYMENT CONTRACT ANNULMENT ON THE GROUNDS OF FRAUD

On 7 February 2020 (ECLI:NL: s2020:213), the Supreme Court delivered an interesting judgment on the possibility of extrajudicial annulment of an employment contract on the grounds of fraud. The employee had applied and been employed in the position of Director of Healthcare, but appeared to have lied about his qualifications on his *curriculum vitae*. He had provided incomplete and incorrect information about previous employers, previous positions, received training, BIG (re)registration(s) and work experience as a (directing) therapist in specialist mental healthcare. After the employer had discovered this, it extrajudicially annulled the employment contract on the grounds of fraud as referred to in Section 3:44 of the Dutch Civil Code and claimed repayment of the salary on the basis of undue payment. The Court of Appeal was of the opinion that the closed dismissal system does not preclude extrajudicial annulment on the grounds of fraud, but that for a successful appeal thereto, the additional requirement is that the employment contract has been (almost)

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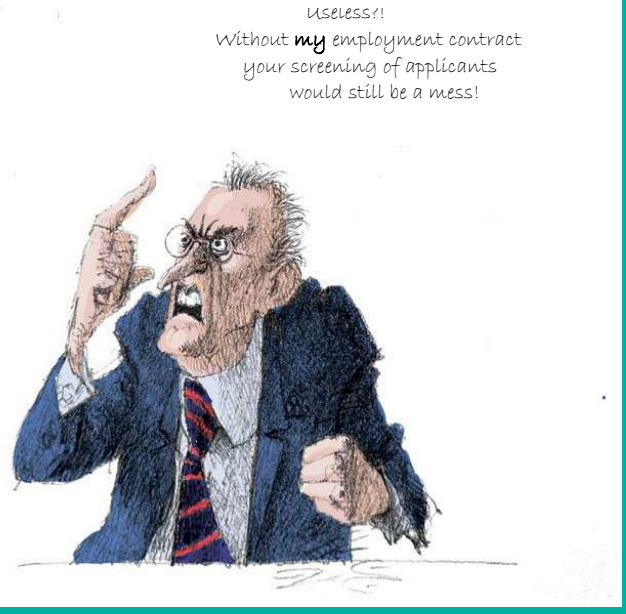
completely useless. On this basis, the Court of Appeal rejected the employer's claims. The Supreme Court reversed the judgment. It confirmed that the statutory system of dismissal law does not preclude extrajudicial annulment on the grounds of fraud, since the system does not protect employees who commit fraud when entering into an employment contract. But according to the Supreme Court, annulment does not require that the employment contract has been completely useless. After all, this does not follow from Section 3:44(3) of the Dutch Civil Code. In the literature, a number of authors have argued that the extrajudicial annulment of an employment contract on the grounds of a vitiated consent is only permitted if the employment contract turns out to be completely useless after the discovery of the vitiated consent. This line of reasoning has sought harmonisation with case law on the admissibility of a resolutive condition in employment contracts. A number of courts have adopted this approach, but the Supreme Court has now confirmed that "uselessness" is not a requirement for the annulment of the employment contract. As regards the unduly paid salary, however, account can be taken of the extent to which the employment contract turned out to be useless, or the extent to which the employment contract has yielded benefits for the employer.

TRANSITION PAYMENT

In the Kolom ruling, the Supreme Court introduced the possibility of forced reduction in working hours (with unemployment benefit) (*deeltijdontslag*) for special cases and ruled that in such case an employer may owe a pro rata transition payment (HR 14 September 2018, ECLI:NL:HR:2018:1617). The Supreme formulated two conditions for granting a partial transition payment: (i) there must be a reduction in working hours "forced by circumstances" and (ii) there must be a substantial and structural reduction in working hours (a reduction in working hours of at least twenty percent that is reasonably expected to be permanent). On 15 October 2019, the Court of Appeal of Amsterdam referred to the Supreme Court for a preliminary ruling questions concerning the second condition (ECLI:NL:GHAMS:2019: 3717) The case concerned a teacher who had become incapacitated for work. She was reassigned to the position of teaching assistant within the organisation. As a result, the working time factor decreased by 0.2. In an interim order, the Court of Appeal ruled that there was a substantial and structural reduction in working time of twenty percent, as a result of which the employee was entitled to a partial transition payment.(ECLI:NL:GHAMS:2019:3231). However, there was also a significant difference in salary between the position of teacher and the position of teaching assistant. In this case, therefore, the question was also whether, with regard to the substantial and structural salary decrease, there may also be a right to a partial transition. payment. That question is currently before the Supreme Court.

The expiry period within which the transition payment may be claimed is three months (Section 7:686a(4)(b) of the Dutch Civil Code). The Court of Appeal of Den Bosch had to rule on the application of this period in respect of the pro rata transition payment (ECLI:NL:GHSHE:2019:4187). This case concerned an employee who, as from 2 May 2017, only performed fifty percent of his usual activities due to illness. In view of the Kolom ruling, the employee claimed the pro rata transition payment. The Court of Appeal of Den Bosch ruled that the regular three-month expiry period also applies to the pro rata transition payment, despite the fact that until the Kolom ruling the employee was unaware that he was entitled to a transition payment Contrary to what the employee had argued, the employer's reliance on the expiry period was not unacceptable according to the standards of reasonableness and fairness.
On 19 April 2019 (ECLI:NL:HR:2019: 632), the Supreme Court ruled on the way in which variable pay should be included in the calculation of the transition payment.



In accordance with the Wage Components and Working Hours Regulations (*Regeling looncomponenten en arbeidsduur*), the Supreme Court started from the premise that the size of the variable part of the monthly salary should be included in the calculation of the transition payment on the basis of the average variable monthly salary in the twelve months prior to the dismissal. However, according to the Supreme Court, this statutory qualifying period may be "pre-extended" in the event of periods of illness, leave or strike, so that these periods do not form part of the qualifying period. The Supreme Court added that courts are not at liberty to deviate from the statutory qualifying period, unless its full application would be unacceptable in the given circumstances according to the standards of reasonableness and fairness.
Pursuant to Section 7:673b of the Dutch Civil Code, it is possible to make an equivalent provision by collective agreement instead of the transition payment. In its ruling of 29 March 2019 (ECLI:NL:HR:2019:449), the Supreme Court decided that a provision that was already included in the collective agreement before the entry into force on 1 July 2015 of the Work and Security Act (*Wet werk en zekerheid*) and that has been maintained after that date, does not preclude that provision from being regarded as an equivalent provision. In the ruling, the Supreme Court also formulated a number of points of view for assessing the equivalence of the provision: (i) the value of the provision compared to the transition payment, (ii) the specific situation of the employee concerned, (iii) whether the aim of the scheme is to prevent or shorten the period of unemployment and (iv) whether the parties to the collective agreement have deemed the provision to be equivalent. The Supreme Court noted that the same provision for one employee can be considered equivalent to the statutory transition payment, while for another employee it is insufficient. With effect from 1 January 2020, Section 7:673b of the Dutch Civil Code has been amended, in the sense that an alternative provision in a collective agreement can only replace the transition payment in the event of dismissal for commercial reasons.

FAIR COMPENSATION

In the much-discussed New Hairstyle ruling of 30 June 2017[1], the Supreme Court gave guidelines for determining the amount of the fair compensation. In that case, the New Hairstyle hairdressing salon had unlawfully terminated the employment contract with one of its hairdressers. In the meantime, the Court of Appeal of Den Bosch, which dealt with the case in more detail, gave its ruling on 14 February 2019 (ECLI:NL:GHSHE:2019:516). Applying the viewpoints formulated by the Supreme Court, the Court of Appeal of Den Bosch arrived at a fair compensation of EUR 4,000 gross. Earlier, the subdistrict court and the Court of Appeal of Arnhem-Leeuwarden had awarded the same amount. The employee's gross monthly salary was EUR 224.51. In keeping with the ruling of the Supreme Court, the Court of Appeal took, inter alia, the following factors into account in determining the fair compensation: (i) how long the employment contract was expected to have lasted if the notice of termination had been annulled, whereby the Court of Appeal considered it plausible that the employment contract would have been terminated in the very short term due to the disturbed relationships (ii) the degree of culpability of the employer, whereby the Court of Appeal considered that the employer had deliberately given notice of termination in violation of the applicable rules (iii) why the employee had applied for fair compensation instead of annulment of the notice of termination; according to the Court of Appeal, this could not be invoked against her, since return was not a realistic option, (iv) whether the employee had in the meantime found another job, which was not the case, and (v) the transition payment of EUR 1,596 gross granted to the employee, whereby the transition payment was not deducted from the compensation, but was only included in the assessment.

PROCEDURAL LAW

The ruling of the Supreme Court of 22 March 2019 (ECLI:NL:HR:2019:404) shows that, in the era of the Work and Security Act, a relatively straightforward case can also become very complex. This case concerned, among other things, whether the employee had timely and correctly claimed the transition payment. The facts were as follows. OMEGA had dismissed the employee with immediate effect on 25 April 2017. In legal proceedings, the employee then primarily sought annulment of the dismissal. In the alternative, "if it is considered that the instant dismissal was justified, but without there being any serious imputable act or omission on the part of [the employee]", the employee requested to be granted the transition payment. In a conditional counterpetition, OMEGA asked for the employment contract to be terminated in case the instant dismissal would not be upheld. In response, during the oral hearing of 7 July 2017, the employee requested, in the event that the conditional request for termination was granted, that the transition payment be granted (pursuant to Section 7:673(1)(a)(2) of the Dutch Civil Code). The subdistrict court immediately annulled the instant dismissal, terminated on the g-ground and awarded a transition payment to the employee. OMEGA appealed against the judgment of the subdistrict court. In her cross-appeal, the employee requested a declaratory decision that there was no urgent reason for the instant dismissal and to order OMEGA to pay the transition payment. The Court of Appeal set aside the judgment of the subdistrict court in which OMEGA was ordered

payment and considered, in short, i) that the alternative request for the granting of a transition payment was made by the employee under the condition that the employee was justifiably dismissed with immediate effect (pursuant to Section 7:673(1)(a)(1) of the Dutch Civil Code), but that this request was not actually made because this condition was not met, and ii) that the request made on appeal for the granting of the transition payment was not made within the expiry period. The Supreme Court decided otherwise. According to the Supreme Court, the Court of Appeal had disregarded the fact that the employee in the first instance, before the end of the expiry period, in response to OMEGA's request for conditional termination of the employment contract, also submitted a request to be granted a transition payment on the grounds of Section 7:673(1)(a)(2) of the Dutch Civil Code. The employee's request was allowable, since the subdistrict court had granted OMEGA's request for termination. Again, the lesson for lawyers is that it is of great importance to formulate the claims clearly and properly.

Over the past year, the Supreme Court has given a number of judgments on the assessment date on appeal. In the Achmea ruling (HR 19 July 2019, ECLI:NL:HR:2019:1234), an employer requested that the employment contract be terminated on the d-ground. The subdistrict court granted this request. On appeal, the employee invoked for the first time the existence of the prohibition of termination of employment during an employee's illness. The Court of Appeal then held that it would assess the decision of the subdistrict court *ex tunc*. Because the employee had not invoked the prohibition of termination of employment during an employee's illness before the subdistrict court, the subdistrict court did not have to take this into account. The Court of Appeal therefore declared the employee's appeal unfounded. In cassation, the Supreme Court held that the Court of Appeal had justifiably stated that the decision of the subdistrict court had to be assessed *ex tunc*, i.e. according to the situation as it was at the time of the decision of the subdistrict court. According to the Supreme Court, this did not alter the fact that an employee may invoke new facts and circumstances, such as a prohibition of termination, for the first time on appeal. However, the new facts and circumstances must have occurred before the decision at first instance.

The ruling of 30 August 2019 (ECLI: NL:HR:2019:1294) dealt with the question of which party had the burden of proof. The case concerned an employee who had been working for Lapack as a production worker since 2009. The collective agreement for the wood processing industry was applicable to the employment contract. According to Article 10 of the collective agreement, the employee was eligible for a standard wage if he fulfilled the requirements of his job. If he did not meet the job requirements, he could be classified in so-called "entry-level scales" (*instroomschalen*). Every year, the wages rises one step until the standard wage is reached. A lower salary than the standard wage could therefore only be applied to employees who did not yet meet the job requirements. According to the employer, the employee could not claim a salary in accordance with the standard wage, but the subdistrict court had allowed the employee's claim. On the other hand, the Court of Appeal set aside the judgment of the subdistrict court and ruled that, if the employee claims that he is entitled to the standard wage on the ground that he meets the job requirements and the employer contests this with reasons, the employee must prove his submissions on the basis of the main rule of Section 150 of the Dutch Code of Civil Procedure. The employee had not done so and his offer of evidence was also insufficiently specified. However, the Supreme Court arrived at another opinion. The Supreme Court pointed out that an employee who meets the requirements of his job must receive the standard wage for that job. There is only room for a lower salary if employees do not yet meet the job requirements. Salary in accordance with the standard wage is therefore This is confirmed by the word "standard wage". According to the Supreme Court, it follows from this that it may be sufficient for an employee who claims the standard wage applicable to a particular position to state and, if necessary, prove that he has entered into an employment contract with the employer, that the collective agreement applies and that he is employed in that position. It is then up to the employer to state and, if necessary, prove that one of the exceptions to that main rule applies, so that the employee cannot claim the standard wage. The Supreme Court set aside the ruling of the Court of Appeal and referred the case back to the Court of Appeal of Den Bosch.

UNILATERAL CHANGE OF EMPLOYMENT CONDITIONS

The Supreme Court also ruled on a case involving a unilateral changes clause as referred to in Section 7:613 of the Dutch Civil Code (HR 29 November 2019, ECLI:NL:HR: 2019:1864). The employer, Fair Play Centers, had made a change to the pension scheme by invoking such a unilateral changes clause. Prior to the change, the pension premium was paid in full by the employer. After the change, part of the premium was paid by the employees. The joint works council (GOR) had approved this change. In addition, 590 of the 595 employees had not objected to the change. Of the five employees who had objected, one commenced legal proceedings against the employer. The subdistrict court rejected the employee's claim. It was of the opinion that the employer had such a major interest in the unilateral change in the premium burden distribution that the interests of the employees could give way thereto according to the standards of reasonableness and fairness. The subdistrict court pointed out that the results had structurally deteriorated and that the taking of measures had

therefore become inevitable. The subdistrict court also held that both the joint works council and almost all employees had agreed to the change. However, the Court of Appeal set aside the judgment of the subdistrict court. According to the Court of Appeal, it was not apparent that the decline in operating results necessitated further cost control. Moreover, it was not clear why cost control could only be achieved through a different distribution of the premium burden. The Court of Appeal also noted that a major interest did not already follow from the consent of the joint works council. In the event of a unilateral change in primary employment conditions, the employer must, even if a works council has agreed to this, continue to demonstrate that it has a major interest to do so. The fact that only five out of 595 employees had objected does not say anything about the nature and importance of the employer's interest. In cassation, the Supreme Court agreed with the complaint that the Court of Appeal had only dealt with the question of whether the reasons put forward by Fair Play Centers for the change of the employment conditions constitute a major interest and had not weighed the existence of this interest against the interest of the employees in unchanged maintenance of the employment conditions. However, the ruling of the Court of Appeal must also be read against the background of the fact that the change of the employment conditions in this case would result in a substantial income decline for the employees. After all, as a result of the changes, employees would henceforth have to pay a significant part of the pension premiums themselves. In this context, the Court of Appeal had also pointed out that Fair Play Centers had in fact requested a pay cut from the employees. According to the Supreme Court, the ruling of the Court of Appeal therefore implied that the interest of Fair Play Centers as an employer in the change of the present employment conditions, weighed up against the interest of the employees in unchanged maintenance of the employment conditions was not of such importance that the interests of the employees from whom a pay cut was requested, had to give way to the interest of the employer on the grounds of reasonableness and fairness. In other words: the assessment of whether there is a major interest is always a relative one.

CIRCUMVENTION OF PROVISIONS ON SUCCESSION OF FIXED-TERM EMPLOYMENT CONTRACTS

In its ruling of 21 February 2020 (ECLI:NL:HR:2020:312), the Supreme Court ruled on a construction aimed at circumventing the provisions on succession of fixed-term employment contracts (*ketenregeling*). The employee had been employed by Taxi Dorenbos as a taxi driver on the basis of three consecutive fixed-term employment contracts. After the third employment contract, the employee (on-site and on the initiative of Taxi Dorenbos) signed a fixed-term employment contract with an employment agency undertaking. The employee continued to work for Taxi Dorenbos in the usual way, but from that moment on he received his wages through the employment agency undertaking. After the employee had not been deployed for some time, he took the position that there was an open-ended employment contract with Taxi Dorenbos. The Supreme Court ruled that, although a temporary employment contract existed on paper between the employee and the employment agency undertaking, this contract was only designed to circumvent the provisions on succession of fixed-term employment contracts. There was therefore no question of a temporary employment contract. Thus, a fourth employment contract between the employee and Taxi Dorenbos was deemed to have been entered into; hence an open-ended contract had come into force.

DORMANT EMPLOYMENT CONTRACTS

In the Xella ruling of 8 November 2019 (ECLI:NL:HR:2019:1734), the Supreme Court cut the knot in the long-term discussion about dormant employment contracts. The Supreme Court ruled that, on the grounds of good employment practices, employers are, in principle, obliged to cooperate in the termination of an employment contract, granting the transition payment, if the long-term incapacitated employee so requests. The employer may only refuse such a request if it has a legitimate interest to do so. This may be the case, for example, if there are still reintegration possibilities for the employee. The fact that an employee retires shortly afterwards - which causes the entitlement to the transition payment to lapse - is not regarded as a legitimate interest. The amount of the transition payment must be calculated as at the date on which the employer could have terminated the employment contract due to long-term incapacity for work (i.e. in principle, after the two-year statutory delay). Under the transition payment compensation scheme (*Regeling compensatie transitievergoeding*), employers may then recover (part of) the paid transition payment from the employee insurance agency UWV.[2] This scheme came into effect on 1 April 2020 and has retroactive effect from 1 July 2015.

My contract wouldn't wake up, but me?! I couldn't fall asleep at all...

For the Supreme Court, this possibility of compensation seems to have been the decisive factor in accepting the obligation for employers to dismiss an employee at his own request on payment of the transition payment. In the lower courts, the Xella ruling has already been applied several times. In most cases, the question was whether the employer had a legitimate interest in refusing the employee's request to be made redundant. In most of these judgments, this was not the case and the employer was ordered to pay (compensation in the amount of) the transition payment. In keeping with the Xella ruling, the subdistrict court of Rotterdam (ECLI:NL:RBROT:2019:9396) decided that the employee's approaching state pension age did not constitute a legitimate interest in keeping the employee employed. Neither did the employer's argument that the company was in financial difficulties. The employer had not produced any financial documents or annual figures showing that it would immediately run into financial difficulties if it had to pre-finance the transition payment. However, the subdistrict court did understand that this caused a "considerable burden" for the employer, on the basis of which it extended the term for paying the transition payment to three months after the entry into force of the compensation scheme. In another case that was pending at the Court of Appeal of Den Bosch (ECLI:NL:GHSHE:2020:31), the employee had already passed the state pension age. However, before reaching the state pension age, the employee had already twice (in 2017 and 2019) made a proposal to terminate the dormant employment. The employer had refused to cooperate on both occasions. The Court of Appeal found that the employer had not asserted another interest in maintaining the employment. contract than not having to pay the transition payment. The employer was therefore obliged to pay compensation in the amount of the transition payment. The Court of Appeal also found the following: (i) the employee had made his request prior to the Supreme Court's ruling in the Xella case, but after the publication of the compensation scheme, (ii) the employee had made the request before he reached the pensionable age and (iii) the fact that the compensation of the employee insurance agency UWV may be lower than the transition payment due does not necessarily preclude the employer's obligation to agree to a termination on payment of the transition payment. See also the ruling of 4 February 2020 of the Court of Appeal of The Hague in a similar case (ECLI:NL:GHDHA:2020:146). If the statutory delay of two years of illness has passed before 1 July 2015 (the moment at which the Work and Security Act entered into force), the employee will in principle not be entitled to termination of his dormant employment contract, granting the transition payment (ECLI:NL:RBAMS:2020:997 and ECLI:NL:RBMNE:2020:563). However, this was different in the following case (ECLI:NL:RBMNE:2020:912). The employee became incapacitated for work in 2010. Because it was unclear to what extent the employee could still be reintegrated into the employer's company, the employer's application for a dismissal was rejected on 4 August 2015. It was not until May 2016 that it was established that it was no longer possible to redeploy the employee. Because the date of this finding was after 1 July 2015, the subdistrict court of Leeuwarden terminated the (dormant) employment contract at the employee's request, granting the transition payment (even though the two-year period of illness had passed well before 1 July 2015).

HOLIDAYS IN EXCESS OF THE STATUTORY ENTITLEMENT

On 9 November 2019 (ECLI:EU:C:2019:981), the Court of Justice of the European Union ruled on the status of holidays in excess of the statutory entitlement. The TSN ruling makes it clear that Member States may apply different rules to holidays in excess of the statutory holidays. Member States are free to decide when the additional days will expire or when they must be taken. Member States may also decide that the additional days be not carried over to the next (reference) year in the case of incapacity for work. Article 7 of Directive 2003/88/EC states that employees are entitled to a minimum period of four weeks' holiday (on a full-time basis). More favourable national provisions exceeding this minimum are therefore permitted. There seems to be no need for the Netherlands to amend the statutory provisions. The statutory limitation period of five years for holidays in excess of the statutory entitlement does not conflict with this directive.

TRANSFER OF UNDERTAKING

On 27 February 2020 (ECLI:EU:C:2020:121), the CJEU issued an important ruling on the concept of "identity" when transferring an undertaking. As in the Liikenne ruling (the "Finnish bus case"), this German case involved a government concession for the operation of bus lines, which was transferred from one bus company to another. In the Liikenne ruling, the CJEU had decided that, in order to assess whether the identity of the undertaking had been preserved, it was of overriding importance whether the buses had been transferred from the transferor to the transferee. In the German case, however, the CJEU ruled that this is not always of overriding importance. The difference between the two cases was that in the German case the buses could not be transferred along because they did not comply with the "legal, technical and environmental requirements" attached to the granting of the concession. In order to assume the existence of identity retention, the CJEU considered it important that the transferee had taken over a substantial

part - in terms of number and expertise - of the transferor's staff. The CJEU attached particular importance to the fact that some of the employees taken over had many years of experience as a bus driver in the relevant rural region, which was essential for the transferee to be able to continue the bus lines uninterruptedly. Furthermore, the CJEU held that the transferee was providing essentially the same bus transport service as the transferor, which service had not been interrupted and had probably largely been operated on the same lines and for the same passengers.

EQUAL TREATMENT

In the following case, the Belgian court referred to the CJEU for a preliminary ruling a question about Directive 2006/54. One of the objectives of this directive is to ensure the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. It was about a woman who had applied for the position of shop assistant. She was explicitly told that she was not hired because she was pregnant. The person who had conducted the interview with the applicant on behalf of the employer (the "shop manager") had indicated that she found her suitable, but was not allowed to take her on. The applicant filed a complaint with the Institute for Equality between Women and Men. The shop manager was then dismissed. Both the shop manager and the applicant then applied to the court with a claim for damages. In the proceedings, the question was to what extent a third party/witness (the shop manager in this case) is covered by the protection of the directive. In its ruling of 20 June 2019 (ECLI:EU:C:2019:523), the CJEU held that employees other than the person who has been discriminated against on grounds of sex should also be protected, since they may be disadvantaged by their employer because of the support they have provided, formally or informally, to the person who has been discriminated against on grounds of sex.

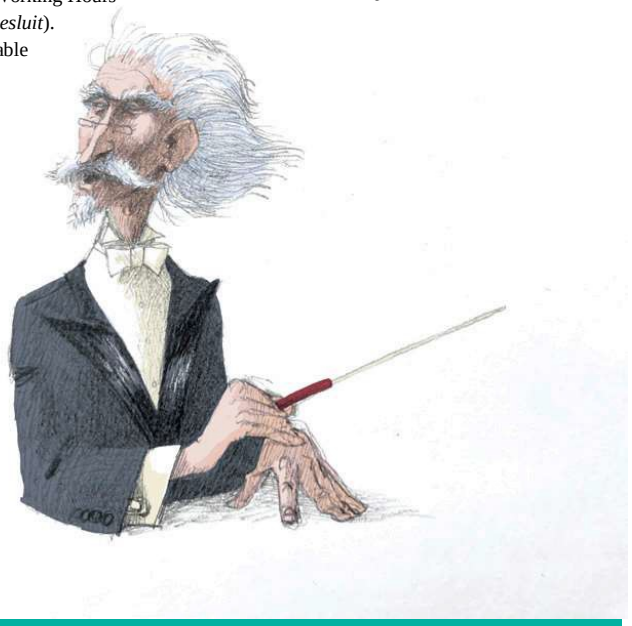
WORKING CONDITIONS

In the so-called Prikklok ruling (ECJ-EU 14 May 2019, ECLI:EU:C:2019:402), the CJEU answered questions referred by the Spanish court for a preliminary ruling. The CJEU ruled that each Member State must impose on its employers the use of a system to measure the daily working time of each employee. The system must be accessible, objective and reliable. According to the CJEU, only in this way is it possible to guarantee the right of every employee to daily and weekly rest periods in accordance with the Working Time Directive 2003/88/EC. The CJEU has not defined who must register working time and also explicitly gives discretion to the Member States as to the form of registration. Incidentally, it has already been laid down in the Working Time Directive that certain exceptions may apply to managers. In the Netherlands, Section 4:3 of the Working Hours Act (*Arbeidstijdenwet*) contains a general obligation to properly record working time and rest periods. However, this obligation has only been further worked out for specific sectors in the Working Hours Decree (*Arbeidstijdenbesluit*). It is therefore questionable whether Dutch laws and regulations meet the criteria as formulated by the CJEU in the Prikklok ruling.

RIGHT TO STRIKE

Last year, the Supreme Court gave another judgment with respect to the right to strike (HR 19 July 2019, ECLI:NL:HR:2019:1245). It concerned proceedings of the Dutch Airline Pilots Association (hereinafter: "VNV") against EasyJet Airline. The case concerned the interpretation of the "scab-prohibition" as laid down in Section 10 of the Placement of Personnel by Intermediaries Act (*Wet allocatie arbeidskrachten door intermediairs*, hereinafter: "Waadi"). This section prohibits the use of external temporary workers to perform work in a company where a strike is in progress. According to Section 1(1)(c) of the Waadi it is prohibited "to, in return for payment, provide manpower to another party for the performance of work under supervision and management of that other party other than under an employment contract concluded with that party." There is an exception to

When I dreamed the whole score again last night, the tachograph was not switched on. Still I would like to see it in my overtime...



this provision in Section 1(3)(c) of the Waadi, namely that the provision of manpower does not include "the provision of manpower for the performance of work in an undertaking which is maintained by the same undertaking as that which provides the manpower". A strike had broken out at EasyJet in the Netherlands. EasyJet is an English company with several branches in Europe that focuses on the low segment. Fifteen pilots from the Dutch branch had gone on strike. EasyJet had the flights of these pilots carried out by fourteen foreign pilots, who came from other EasyJet branches and entities in other countries. The VNV stated that EasyJet was thereby in violation of the scab-prohibition. The VNV opted for a broad interpretation of the Waadi. After all, it was about protecting the right to strike and the fact that the pilots flown in were not part of the conflict and had better employment conditions. After the VNV had got the worst of the bargain before the court in preliminary relief proceedings and before the Court of Appeal, the Supreme Court also held that the parliamentary history of these provisions shows that the legislator's purpose in imposing the scab-prohibition, as laid down in Section 10 of the Waadi, was solely aimed at the recruitment and deployment of external temporary workers and not at the deployment of one's own replacement staff. Parliamentary history does not provide any grounds for an extension of that prohibition, such as the deployment of one's own staff from other branches. According to the Supreme Court, EasyJet had therefore not violated the scab-prohibition by deploying foreign pilots. Incidentally, the Supreme Court found that EasyJet had not acted in violation of good employment practices either, as VNV had stated.

LAWS & REGULATIONS

Balanced Labour Market Act

On 1 January 2020, the Balanced Labour Market Act (*Wet arbeidsmarkt in balans)* came into force. This introduced, among other things, a cumulative ground for dismissal, the right to transition payment from day one, an extension of the provisions on succession of fixed-term employment contracts (*keten-regeling*) and more rights for on-call workers.

Cumulative ground for dismissal / i-ground

The so-called i-ground has been added to the closed system of reasonable grounds for dismissal. This ground makes it possible for the court to terminate an employment contract if there is no well-considered ground for dismissal, but a combination of circumstances from several grounds for dismissal.

Transition payment from day one

Employees who are dismissed from 1 January 2020 onwards (including during the probationary period) will be entitled to a transition payment as from the first working day, equal to a third month's salary per year of service. This applies to all employment relationships, regardless of the duration of the employment and the age of the employee. Also, the calculation will no longer be rounded off (downwards) to half years of service, but a pro rata calculation will take place.

Extension of the provisions on succesion of fixed-term contracts

As from January 2020, an employer may conclude three temporary contracts with an employee with a total duration of *three* years (instead of two years), before an open-ended contract comes into force.

On-call workers

As from January 2020, the employer must call up on-call workers at least four days in advance. If the employer fails to do so, the employee will not be obliged to comply with this call. If the employer withdraws or changes the call within these days, the employee will be entitled to continued payment of wages for the period for which he was called up. In addition, if an employment contract has lasted twelve months, the employer will be obliged to make an offer for fixed working hours in the thirteenth month. This offer must be equal to the average working hours of the past twelve months.

Payrolling

With the entry into effect of the Balanced Labour Market Act, payrolling no longer qualifies as deployment and therefore no longer falls under the "lighter" employment-law regime. In addition, henceforth a person employed through a payrolling company will be entitled to the same primary and secondary employment conditions as employees directly employed by the client.

Change in unemployment insurance contribution

The sectoral unemployment insurance contribution has been abolished and replaced by a new system. As from 1 January 2020, employers will pay a higher unemployment insurance contribution for fixed-term employment contracts and a lower contribution for open-ended employment contracts. Employers must state on the payslip whether an employment contract is open-ended or fixed-term and whether it is an on-call contract. Employment contracts that have been tacitly converted to open-ended contracts must be recorded as such in writing. The government has given employers until 1 July 2020 to comply.

Increase in maximum transition payment

As of 1 January 2020, the maximum transition payment has increased to € 83,000 (from € 81,000 in 2019) or a maximum of a gross annual salary if that exceeds € 83,000

NOTES

1. ECLI:NL:HR:2017:1187
2. See also *Advocatenblad* 9 July 2019: "Slapend dienstverband is niet zomaar de wereld uit", N. Cuppen and M. van den Eeckhout.