EMPLOYMENT LAW CHRONICLE

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The first full calendar year since the Netherlands saw the introduction of the Work and Security Act has now passed. This Employment Law Chronicle focuses on issues related to the Work and Security Act. Case law is still divided on the majority of issues that arise. The Supreme Court has ruled only once on the application of the Work and Security Act, namely the possibility of conditional termination. In addition, this Chronicle deals with important rulings in other parts of Employment Law, including nuancing of the obligation to make an immediate disclosure with reference to instant dismissal.

INSTANT DISMISSAL

One of the requirements for a legally valid instant dismissal is that the reason for dismissal must be given without delay. The rationale behind this is that it is clearly appropriate for the employee to know what traits or behaviours resulted in his/her dismissal by the employer. In formulating the reason for dismissal, things can sometimes go wrong if criminal terminology is used in the dismissal letter. Thus, the Supreme Court in its ruling Wapenaar/Taxi Hofman[1] ruled that if embezzlement was used as the ground for instant dismissal, then the employer must evidence that there was corresponding intent. Formulation of the reason for instant dismissal also played a role in the case of an employee against the car centre, Autocentrum Zuid-Nederland (Supreme Court 19 February 2016, ECLI:NL:HR:2016:290). The car centre had instantly dismissed an employee because he had filled up his partner's car using his business fuel card. The dismissal letter mentioned "theft of company property" as the ground for dismissal. The car centre sought a declaration by the subdistrict court that the instant dismissal was valid. On appeal, one of the arguments put forward by the employee was that the mention of criminal law concepts in the dismissal letter meant that the employer in principle had to prove all elements of the criminal offence. The Supreme Court held that in essence, the obligation to disclose the compelling reason is the fact that it is appropriate for the employee to immediately find out which traits or behaviours have compelled the employer to terminate the employment relationship. This type of dismissal letter can be omitted in the exceptional case where it is evidently clear to the employee what the compelling reason was that resulted in the dismissal; or at least, in those cases where the employee cannot reasonably be in any doubt. Consequently, the Supreme Court found that the wording of the dismissal letter cannot always be taken literally. Ultimately what matters is that it is immediately clear to the employee what the pressing reason was that resulted in dismissal. Even a ground for dismissal mentioned in the dismissal letter should be interpreted in the light of the circumstances of the case. This also applies in cases where the letter of dismissal mentions only criminal concepts. The Appeal Court ruled that it should have been clear to the employee that the term 'theft' related to the unlawful use of the fuel card. The Supreme Court upheld this interpretation applied by the Appeal Court. From the judgment on appeal it may therefore be inferred that the ground for dismissal must be interpreted in the light of the circumstances of each case, whereby the point is that the employee immediately knows the accusation made against him/her and it is not always necessary to evidence all elements of the criminal offence.

TEMPING CONTRACT

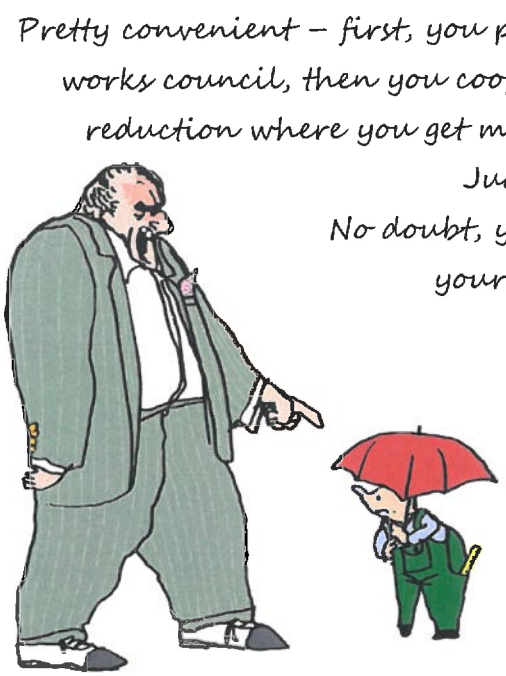
The temping contract is defined in Section 7:690 Dutch Civil Code. The interpretation of this provision has been under discussion for years. Differences of opinion have mainly centred on the question whether an allocation function is required for a temping contract. The classic allocation function aims at bringing together supply and demand of (temporary) employment in the labour market. This can be appropriate, for example to cover peaks of production during peak hours or replacement during illness. This is what the traditional temporary employment agency provides as a service. The allocation function is not explicitly mentioned in the definition laid down in Section 7:690 Dutch Civil Code, although the parliamentary history indicates that the allocation function is a requirement for a temping contract. The answer to the question is important because under Section 7:691 Dutch Civil Code, a slimmed-down labour law regime applies to temping contracts. Last year, the Supreme Court settled the debate with its ruling of 4 November 2016 in the case Care4Care/StiPP (ECLI:NL:HR:2016:2356).

Care4Care (C4C) is a company engaged in providing specialist medical staff to its clients. StiPP is the pension fund for the staffing industry. StiPP was of the opinion that the activities of C4C fell within the scope of the mandatory industry-wide pension plan. C4C objected to this and applied to the subdistrict court for a declaration that the requirement did not apply to it. C4C put forward as one of its arguments that a temping contract within the meaning of Section 7:690 Dutch Civil Code requires a classic allocation function and that its company did not fulfil this function. The subdistrict court agreed with the arguments of C4C and upheld the action. The Appeal Court and the Supreme Court, however, came to a different conclusion and decided that the allocation function was not a requirement for the formation of a temping contract. The Supreme Court held: 'From the history of Section 7:690 Dutch Civil Code, it cannot be inferred that the formation of a temporary agreement is subject to requirements other than those laid down in this section.

The text of Section 7:690 Dutch Civil Code does not require that the work carried out for the third-party is temporary, nor does the text imply a restrictive "allocation function" (...) From the Explanatory Memorandum to this Section, it appears that the intention of the legislator was for other triangular relationships apart from the - briefly put - "classic temping agency relationship" to fall under the scope of the provision, provided that such relationships meet the definition.' The literature also argues that although the requirement of the allocation function is not a requirement for the temping contract as referred to in Section 7:690 Dutch Civil Code, it is a requirement for the slimmed-down labour regime of Section 7:691 Dutch Civil Code. The Supreme Court also explicitly expressed an opinion on this point. The Supreme Court held that the legislative history provides no basis for applying different definitions of 'temping contract' in Sections 7:690 and 7:691 Dutch Civil Code and that such a difference in meaning is not obvious. Other triangular relationships can therefore qualify as a temping contract as referred to in Section 7:690 Dutch Civil Code and Section 7:691 Dutch Civil Code. In recent years, payroll companies have played an increasingly important part in the labour market. These companies often have a zero or limited allocation function. An important reason for employers engaging a payroll company is often to take advantage via the payroll company of the slimmed-down labour regime of Section 7:691 Dutch Civil Code. The Supreme Court, however, saw no reason to limit the scope of Sections 7:690 and 7:691 Dutch Civil Code to the traditional allocation function - a view which is also supported in the literature in order to prevent abuse of payroll companies. The Supreme Court held: 'Insofar as application of the rules of Section 7:691 Dutch Civil Code in the new triangular relationships - such as payrolling – resulted in consequences that are irreconcilable with the intention of the legislator in the provisions of Sections 7:690-7:691 Dutch Civil Code, it is primarily the task of the legislator to set limits here. That does not alter the fact that judges have the option of interpreting the rules laid down in Section 7:691 Dutch Civil Code in such a way as to avoid conflict with the rationale of those rules, nor from ruling that reliance on said rules is unacceptable according to standards of reasonableness and fairness.' With the final sentence, the Supreme Court has opened the door slightly so that abuse of the slimmed-down labour regime of Section 7:691 Dutch Civil Code can be combatted, although the space to do this seems very limited. In its ruling of 2 December 2016 (ECLI:NL:HR:2016:2757), the Supreme Court held with reference to the C4C / StiPP judgment that employment contracts between an employee and payroll company Tentoo should be categorised as temping contracts, despite the fact that Tentoo had not carried out any allocation function. Incidentally, the slimmed-down labour regime of Section 7:691 Dutch Civil Code pursuant to paragraph 6 does not apply to intra-group secondments. In the C4C/StiPP ruling, the Supreme Court also held that the words "supervision and direction" in Section 7:690 Dutch Civil Code have the same meaning as the relationship of authority in Section 7:610 Dutch Civil Code.

CO-DETERMINATION

Does the prohibition on dismissing members of the Works Council apply even if the Works Council does not meet all the requirements of the Works Councils Act? This question was brought before the Supreme Court in 2016 (Supreme Court 8 April 2016, ECLI:NL:HR:2016:604). The case covered the following facts. The employee, employed by Regiobouw as a contractor since 1989, became a member of the Works Council in 2000 and was later elected as chair. Under Section 12 (1) of the Works Councils Act (WOR), the period of office for a Works Council is three years. In this case, no use was made of the option to deviate from this period. After the three-year period, no new elections took place in 2003 due to lack of interest. The Works Council continued to present itself as a works council within the organisation and in an internal newsletter of June 2003, announced its intention of continuing its activities.



In 2006, Regiobouw carried out consultations with the 'Works Council', including consultation on a training dispute. It was found that the Works Council was not composed according to the rules and that elections should be held. In 2009, the 'Works Council', still chaired by the employee, gave its advice on a proposed reduction in the company. As a result of this reorganisation, the employee was also made redundant. Regiobouw then terminated the employment contract with the employee, with the permission of the UWV. After several (procedural) complications that we leave undiscussed here, the present proceedings dealt inter alia with whether the employee could appeal on the basis of the prohibition on dismissing (former) Works Council members (Section 7:670a Dutch Civil Code (old)). According to Regiobouw, the employee could not appeal on this ground because after his period of office had expired, the Works Council no longer met the statutory obligations required under the Works Council Act. According to Regiobouw, the Works Council ceased in 2003. Both the subdistrict court and the Amsterdam Court of Appeal held that the prohibition on dismissal was applicable, because even after expiry of the period of office, Regiobouw continued to work with the Works Council. In this context, Regiobouw had never objected to the Works Council nor to the role of the employee as chair. The Appeal Court of Amsterdam was on the fence as to whether there actually was a Works Council. Regiobouw did not agree with this judgment and went to the Supreme Court. The Supreme Court chose legal protection above legal certainty and applied a broad interpretation of the scope of the prohibition on dismissal. The rationale of the relevant protection against dismissal lies - according to the Supreme Court - in the protection of the relevant employees against discrimination as a result of activities within the framework of co-determination and in ensuring that they have the necessary level of independence to carry out these tasks. Given this rationale, this protection against dismissal - according to the Supreme Court - may also apply where the relevant Works Council does not meet all the conditions set by the Works Council Act. The absence of the prescribed election could therefore not be brought against the employee.

The ruling pronounced by the Arnhem-Leeuwarden Court of Appeal on 21 November 2016 is also noteworthy (ECLI: NL:GHARL:2016:9402). The case relates to an employee of Ferwerda, a wholesaler of car parts, who together with some colleagues had submitted a written objection to the use of hidden cameras. Ferwerda then called in the employees one-by-one for a meeting with the management, suspended them from work and applied for dismissal on the ground of a disturbed working relationship. The Appeal Court agreed with the subdistrict court that the employees deserved reasonable compensation. It was striking that the Appeal Court also considered it important that the Works Council should have had the right of ratification. The Appeal Court found that Ferwerda didn't have a Works Council, but that it should have had one based on the number of persons employed.

The Appeal Court then held that Ferwerda had acted improperly in terminating the employment contracts with the relevant employees, because these employees would have enjoyed protection from dismissal if they had been members of a Works Council. The Appeal Court, however, was unable to give any further opinion on the dismissal, because an appeal against the dismissal itself had not been made.

COLLECTIVE LABOUR AGREEMENT LAW

The Supreme Court was asked to rule on the so-called collective labour agreement standard in a case that was brought by 34 employees against Condor (Supreme Court, 25

November 2016, ECLI: NL:HR:2016:2687). According to settled case law, this standard applies to the interpretation of collective agreement provisions. The standard implies that collective agreement provisions must be interpreted objectively, whereby in principle, the wording of the provision, read in the light of the full text of the collective agreement, is of decisive importance.

Therefore, the interpretation does not depend on the intentions of the parties involved in the collective agreement, insofar as these intentions are not obvious from the collective agreement, but on the meaning according to objective standards based on the wording of the collective agreement.[2] The facts in the Condor case were as follows. The parent company, Condor had agreed a Social Plan concluded between its subsidiary Ossfloor and FNV, which was identified as a collective agreement and co-signed. It stipulated that Condor would guarantee the implementation of the Social Plan in the event of bankruptcy within the term (five years). For these reasons, the Works Council ultimately gave a positive advice. The Social Plan was then applied to the reorganisation that had been announced. A year later, the subsidiary Ossfloor went bankrupt. The union and all employees who remained after the reorganisation asked Condor to comply with the Social Plan.

Condor took the view that the Social Plan did not provide for those remaining employees to fall under the Social Plan. According to Condor, the scope of the Social Plan covered only the reorganisation that had been previously announced. Both at the court of first instance and on appeal, Condor gained the upper hand. The Appeal Court thereby held that the collective standard implies that no meaning can be inferred from the intentions of the relevant parties to the collective agreement. The Supreme Court, however, came to a different conclusion. The Supreme Court held that the rationale of the collective standard was firstly, to protect third parties against the intentions of other parties of which they could not be aware; and secondly, the need for a uniform interpretation for all parties bound by the agreement. The Supreme Court then held that an interpretation that deviated from this standard is conceivable for a situation such as this, concerning the question as to whether the remaining employees could derive any rights from the Social Plan, although they fell outside its scope based on the text of the Social Plan.

The Supreme Court found it relevant that while Condor had guaranteed implementation of the Social Plan and furthermore, that Condor had joined in the negotiations and was also a signatory to the Social Plan. Furthermore, the Social Plan had a term of five years. In addition, the Supreme Court found it relevant that the Works Council of Ossfloor had consented to the restructuring in view of the fact that it had concerns about the viability of Ossfloor and that all parties to whom the Social Plan was of interest, namely the union, Condor and all the remaining employees, were involved in the process. Based on these facts and circumstances, the Appeal Court had failed to recognise that when interpreting the Social Plan, the intentions of the authors of the Social Plan - which third parties could not be aware of - as well as earlier unpublished drafts of the Social Plan also had a part to play and that the positive advice given by the Works Council with regard to the reorganisation plan should also be taken into account. After all, in the light of the rationale of the collective agreement standard, there is no justification in applying the standard in this case. With this ruling, the Supreme Court did not indicate that the collective standard is off the table, but that adjustment is possible in terms of reasonableness and fairness.

THE RIGHT TO COLLECTIVE ACTION

In the previous Chronicle, we mentioned the Amsta ruling.[3] That ruling was seen by most experts as an extension of the right to collective action. It was perhaps with this ruling in mind that the FNV announced that KLM employees would take action at Schiphol after negotiations on a new collective agreement had faltered. KLM subsequently proceeded with an application for an interim order

Let's face it, Roger. Those were the days, one parachute after the other ...

prohibiting collective action. On 11 August 2016, the presiding judge at first instance allowed the application due to the enormous holiday pressure and the existing terrorist threat.

However, the judge did limit the duration of the prohibition so that it only ran until 4 September 2016.

The Amsterdam Court of Appeal upheld that order on 26 August 2016 (ECLI:NL:GHAMS:2016:3472).

The court considered it likely that the 70 to 114 flights affected by the strike would probably have an impact on a large number of passengers. The court also considered it likely that given the extreme pressure during the holiday period, it would take one or more days before flight traffic could be normalised.

The court held that the issue was whether a restriction of the right to collective action was urgently needed in social terms. In assessing the urgency, the court had to consider all circumstances. As part of this assessment, important factors could be the nature and duration of the action, the relationship between the action and the objective pursued, the damage caused to the employer or a third party and the nature of those interests and that damage. The Appeal Court then held that the consequences of a strike in the manner proposed by the FNV for a period up to 4 September 2016 would be so drastic that under Section g of the ESC, also taking into account the manner in which this Section has been applied by the Supreme Court (Amsta judgment), restriction of the right to collective action would be justified.

However, the Appeal Court stressed that from 5 September 2016, FNV would have sufficient resources to try and fulfil its goals. Incidentally, that was not necessary, because shortly afterwards the parties reached a collective agreement.

CONDITIONAL TERMINATION

In the previous edition of the Chronicle, we mentioned that after entry into force of the Work and Security Act, the question of conditional termination proceedings was under discussion. Under the old legislation, after the instant dismissal of an employee, the employee could apply for this dismissal to be annulled out-of-court. To reduce the risk of having to continue paying wages, employers could then apply for conditional termination. The court order for conditional termination made by a subdistrict court was not appealable, meaning that the employer was relatively quickly assured that the employment contract was terminated. The possibility of conditional termination followed from case law of the Supreme Court, which in its ruling emphasised the legitimate interest of an employer in conditional termination.[4]

With entry into force of the Work and Security Act, the possibility of out-of-court annulment has vanished. Furthermore, it is now also possible to appeal against a court order for dismissal and bring the case to the Supreme Court. Whether conditional termination is still possible under the Work and Security Act has been a burning question for the literature and case law since enactment of the Act.

In our previous Chronicle, we mentioned that the subdistrict court of Enschede intended to refer questions for a preliminary ruling (subdistrict court Enschede, 16 April 2016, ECLI:NL: RBOVE:2016:1507). The Supreme Court has now answered these questions.

The case involved a nurse working in a Residential Care Home, who was instantly dismissed by letter dated 26 February 2016 by his employer, the mental health institution Mediant, because of 'sexually transgressive behaviour, physical violence, verbal abuse and derogatory bullying'. The employee filed an application for annulment of the dismissal within the prescribed deadline. The employer responded with a defence and a separate application (primary) for conditional termination of the employment contract. Just before Christmas, the employers were able to breathe a sigh of relief when the Supreme Court ruled that conditional termination under the current law is still possible (Supreme Court December 23, 2016, ECLI:NL:HR:2016:2998).

Given the current system, according to the Supreme Court, an application for conditional termination is possible on the sole condition that the instant dismissal is annulled by the court of the same instance. In such a case, the employer can apply to the court giving that judgment to terminate the employment contract. An application on condition that the employment contract is reinstated on appeal, is not possible according to the Supreme Court. Thus, the Supreme Court confirmed that a subdistrict court cannot in advance contradict a judgment that will be handed down later by an Appeal Court. An application for conditional termination can - according to the Supreme Court - be based on the same facts as the instant dismissal.

The applications for annulment of the instant dismissal and conditional termination should be dealt with jointly and the burden of proof applies to both applications. Whether conditional termination is also possible on appeal, was not among the questions referred for a preliminary ruling and still remains unclear.

GROUNDS FOR DISMISSAL

Given our limited space and the current lack of a clear line in the higher case law, this year our discussion on the grounds for dismissal and reasonable compensation will focus on some reflections based on published studies and case analyses.

The past year has seen the publication of the results of several studies on the impact of the new right of dismissal in practice. In the article "'One year of dismissal case law under the Work and Security Act: research on published and unpublished case law'[5], prof. Houweling and dr. Kruit analyse the results of a study by the Dutch Employment Lawyers Association (VAAN) and the Employment Law Association (VvA). Based on the analysis of case law in four courts, they conclude that the number of rejections of dismissal applications has more than quadrupled under the Work and Security Act compared to the situation before introduction of Work and Security Act, namely from 9 percent to 38 percent. It was found that there are marked differences between the various grounds for dismissal. The most noteworthy finding is the low chance of success of an application on the D-ground (dismissal for malperformance). An application for dismissal on the D-ground based on inadequate performance was successful in only 16 percent of the cases. Applications on the E-ground (culpable conduct of the employee) and the G-ground (disturbed employment relationship) are - after filtering out the pro-forma applications - the most promising grounds for dismissal in dismissal proceedings, with about a 50-50 chance of success.

An application on the H-ground (other grounds) was successful in 29 per cent of the cases.

A dismissal via UWV on the A-ground (economic reasons) or the B-ground (long-term disability) offers a significantly better chance of success. The UWV figures show that only 6 percent of dismissal applications were rejected in the first six months of 2016, compared with 11 percent in the same period the previous year. Incidentally, in the figures the UWV has not distinguished between applications on the A-ground and on the B-ground.

Commissioned by the Ministry of Social Affairs and Employment, the Hugo Sinzheimer Institute (HSI) of the University of Amsterdam also studied the new dismissal proceedings. The research carried out by HSI addressed itself in accordance with the instructions only on the experiences of judges with the new legislation. The research used a questionnaire and in-depth interviews. The participating judges indicate as the main reason for the increase in the number of rejections that the grounds for dismissal should be tested more rigorously (45 percent) and that shortcomings in the employee's file can no longer be compensated for by a higher amount of severance pay (90 percent). Although the judges paint the picture that in the majority of cases, they are able to work with the closed system of grounds for dismissal, nevertheless half of them thought that in one or more cases the employment contract should have ended, even though the ground for dismissal was insufficient. Of these judges, 85 percent said they had rejected such applications at least once. This means that the judge did not dissolve the employment contract, even though he was actually of the opinion that it ought to have reasonably ended.

On the other hand, 26 percent of these judges say that in at least one of these cases they granted the application, together with the award of a reasonable amount of compensation to the employee. Therefore, these judges did allow applications for dismissal even though they thought that the ground for dismissal was insufficient, but compensated this with a reasonable amount of compensation.

Both studies show that the number of proceedings for dismissal under the Work and Security Act has further fallen. Incidentally, this trend was already underway well before the introduction of the Work and Security Act. It is still too early to assess the impact of the Work and Security Act on this trend.

REASONABLE COMPENSATION

In terms of reasonable compensation, the past year has also seen the publication of a number of analyses of case law. Frikkee and Smorenburg examined all published decisions on appeal in which the employee had sought reasonable compensation.[6] They found that subdistrict courts and/or the Appeal Courts had awarded reasonable compensation in twenty of the more than one hundred cases in which the employee had made a corresponding application. In their aforementioned publication based on published case law, Houweling and Kruit arrived at a percentage of 30. However, on the basis of the unpublished case law made available to them by four courts, it appeared that reasonable compensation was granted in only 5.5 percent of the cases in which the employee had made an application. The latter percentage is in line with the 'mouse hole' that the legislator had intended with the concept of 'reasonable compensation'.

The law is divided to date on the manner of calculating the amount of reasonable compensation. A distinction can be made according

the nature of the reasonable compensation. In case law on dismissal, the following circumstances have, inter alia, had a role to play: the degree of culpability of the employer (the Hague Court of Appeal, 23 August 2016, ECLI:NL:GHDHA:2016:2441), the length of the employment relationship (the Den Bosch Court of Appeal, 4 February 2016, ECLI:NL:GHSHE:2016:320), the consequences of the dismissal for the employee (the Hague Court of Appeal, 23 August 2016, ECLI:NL:GHDHA:2016:244), the punitive nature of the remuneration (the Arnhem-Leeuwarden Court of Appeal, 25 August 2016 , ECLI:NL:GHARL:2016:6882) and the financial position of the employer (Leeuwarden subdistrict court, 24 February 2016, ECLI:NL:RBNNE:2016:756; Rotterdam subdistrict court, 11 May 2016, ECLI:NL:RBROT:2016:3578).

The reasonable compensation can also be allocated instead of the annulment of a non-valid dismissal. In this context, in order to calculate the amount of reasonable compensation, on several occasions the judge made an estimate as to when the contract would have ended if the non-valid application for dismissal had not been made (the Den Bosch Court of Appeal, 23 June 2016, ECLI:NL:GHSHE:2016:2514 and the Den Bosch Court of Appeal, 10 November 2016, ECLI:NL:GHSHE:2016:5001).

On appeal, the Court of Appeal may also award reasonable compensation instead of recommending restoration of employment.

In such instances, there is no need for serious culpability on the part of the employer. In such cases, the amount of reasonable compensation was partly related to the remaining period of employment (the Hague Court of Appeal, 21 June 2016, ECLI:NL:GHDHA:2016:1750; the Den Bosch Court of Appeal, 23 June, 2016, ECLI:NL:GHSHE:2016:2512;

the Amsterdam Court of Appeal, 4 October 2016, ECLI:NL:GHAMS:2016:4036), the amount of the transitional compensation (Amsterdam Court of October 11, 2016, ECLI:NL:GHAMS:2016:4118) and the employee's new employment relationship (the Arnhem-Leeuwarden Court of Appeal, 22 April 2016, ECLI:NL:GHARL:2016:3215).

... the importance should be acknowledged of the hidden intentions unknown to third parties and of former, restricted drafts and unrevealed, heated, nightly fantasies. Thus, proven guilty beyond a reasonable doubt.

The amounts that were awarded vary widely. At the time of writing this article, the highest amount of compensation awarded was 141,500 euros gross (Gelderland District Court, 14 December, 2016, ECLI:NL:RBGEL:2016:7713). This amount - about one year's salary (including bonus) - was awarded to a company director and was equal to five times the transitional compensation, or more than 1.7 month's salary per year of service.

A judgment from the Supreme Court is being awaited to shed more light on how to calculate the amount of reasonable compensation.

Executives' Pay (Standards) Act

The Executives' Pay (Standards) Act caps the severance payment in the case of an individual arrangement between a senior executive and an association that must have regard to the Executives' Pay (Standards) Act, at a ceiling of 75,000 euros gross.

If the parties agree on a higher fee, the arrangement is void. In the event that certain legal conditions are met, employees, including senior managers, have been entitled to the transitional compensation since 2015.

This currently amounts up to 77,000 euros gross or one year's worth of salary, whichever is higher. Various judgments were passed by subdistrict courts last year as to whether it is possible for senior executives to accumulate a contractual severance payment as well as transitional compensation.

The subdistrict court of Amsterdam ruled (in a 96 Civil Procedure proceedings) that accumulation was not possible (13 June 2016,

ECLI:NL:RBAMS:2016:3672). Although the subdistrict court acknowledged that the transitional compensation in its capacity as a statutory provision is excluded from the scope of the Executives' Pay (Standards) Act, the court prioritised the Act's intention of setting limits on severance payments. According to the subdistrict court, moreover, this does not mean that applicability of the Executives' Pay (Standards) Act is able to cap the transitional compensation at 75,000 euros gross. In this case, the employee was only entitled to the transitional compensation if he renounced the contractual remuneration that the parties had agreed.

Four days later, the subdistrict court of Utrecht ruled that accumulation of the transitional compensation and contractual remuneration was indeed possible under the Executives' Pay (Standards) Act (17 June 2016, ECLI:NLRBMNE: 2016:3347). According to the subdistrict court, the transitional compensation in its capacity as a legal requirement did not fall within the definition of 'severance pay' as laid down in the Executives' Pay (Standards) Act and both payments could be paid out.

Case law is therefore still divided. For a more detailed discussion of the accumulation issue, please refer to the article entitled "The Executives' Pay (Standards) Act and the Work and Security Act do not overlap' by Vernooij and Voermans.[7]

Another Executives' Pay (Standards) Act issue that arose in 2016 was whether the salary for a period of suspension from work counts towards the maximum amount of transitional compensation of 75,000 euros gross.

The subdistrict court of Amsterdam answered this question (as part of the aforementioned 96 Civil Procedure proceedings) in the affirmative (ECLI:NL:RBAMS:2016:3672).

It should be considered that no exception exists for a situation where an executive is suspended by the employer and has filed an objection to this.

The fact that the parties had no intention of abusing the Executives' Pay (Standards) Act did not alter the answer given by the subdistrict court to the question.

The ruling by the subdistrict court of Almere at the end of last year (21 December 2016, ECLI:NL:RBMNE:2016:7023) took a different view.

The subdistrict court ruled that the remuneration paid during the involuntary suspension from work did not count towards the Executives' Pay (Standards) Act maximum. The subdistrict court considered it relevant that the parties had not agreed on the release of the director from his duties on full pay. The director was deprived of certain powers and he was compelled to carry out his other tasks from home. The director had objected to this and ensured that he was available to carry out his tasks. The settlement agreement further made provision for the director to induct the acting director until the end of the employment relationship.

The fact that this was not followed up was - according to the subdistrict court - the responsibility of the housing corporation. The subdistrict court held that strict application of the Executives' Pay (Standards) Act would entitle the housing corporation to a claim against the former director for overpayment. The subdistrict court, however, found that this did not reflect the intention of the legislator, namely the prevention of abuse. It was however evident to the subdistrict court that it was not an attempt by the parties to circumvent the Executives' Pay (Standards) Act. In this context, it was also important that the alleged excess of the legal maximum was limited to the salary paid during the statutory notice period.

LEGISLATION

Assessment of Employment Relationships (Deregulation) Act

The new Assessment of Employment Relationships (Deregulation) Act, which was introduced on 1 May 2016 to replace the Declaration of Independent Contractor Status, has caused quite a stir over the past year. At the end of last year, State Secretary Wiebes sent his second progress report to the House. The report shows that there is still much uncertainty about the new Deregulation Act. To dispel that uncertainty, it was decided to suspend enforcement until at least 1 January 2018, except in cases of 'obvious malicious intent'. In the period up to 1 January 2018, the State Secretary will try to create greater clarity about when the use of a (model) contract is required or not.

Occupational health and safety legislation

As of 1 July 2017, there will be a number of changes in health and safety legislation. One of the changes is that an employee has the opportunity to consult the company doctor, without the intervention of the employer. This can also be preventative, so before any absenteeism occurs.

If the employee disagrees with the opinion of the company doctor, he does not have to go to the UWV, but can seek a second opinion from a second company doctor at the expense of the employer. Another change is the expansion to the role of the Works Council, whereby the

Works Council has been given a mandatory right of co-determination in the selection and location of the prevention officer. Currently, the Works Council only has the right of co-determination regarding the duties of the prevention officer.

Transitional compensation in the case of long-term disability

There has been much discussion about employers who continue to employ long-term sick employees in order to avoid paying transitional compensation. To encourage employers to terminate the employment contract with the employee, a new draft bill was published late last year. Employees who have a long-term sickness can continue to claim the transitional compensation, but any transitional compensation that is paid out will be largely funded – according to the provisions set out in the bill - from the General Unemployment Fund (Awf). This is countered by an increase in the uniform General Unemployment Fund premium. The proposed date of entry into force is (not before) 1 January 2018. The bill, however, provides for the transitional compensation to be backdated to 1 July 2015.

NOTES

[1] Supreme Court 26 January 2001, ECLI:NL:HR:2001:AA9664.
[2] Supreme Court 24 February 2012, ECLI:NL:HR:2012:BU9889.
[3] Supreme Court 19 June 2015, ECLI:NL:HR:2015:1687.
[4] Supreme Court 21 October 1983, ECLI:NL:HR:1983:AG4670.
[5] 'One year of dismissal case law under the Work and Security Act: research into published and unpublished case law", A.R. Houweling and P. Kruit, TAP 2016, 264.
[6] 'Reasonable compensation on appeal,' C.J. Frikkee and M.E. Smorenburg, ArbeidsRecht 2017/2.
[7] 'Executives' Pay (Standards) Act and Work and Security Act do not overlap', C. Vernooij and B. Voermans, TvO January 2017, no. 1.