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Client briefing July 2015

WWZ update – Dutch dismissal system

As of 1 July 2015 the changes to the Dutch dismissal system, as part of the Dutch Work and Security Act (*Wet Werk en Zekerheid,* "WWZ"), become effective. In this newsletter we highlight a number of points in the modified dismissal system.

Fair dismissal ground

- As of 1 July 2015, every dismissal will require a so-called 'fair ground' for dismissal; Dutch law provides for an exhaustive list of these dismissal grounds.
- The dismissal ground will determine the termination route via either the UWV or Court. In contrast to the pre-1 July 2015 regime, the employer cannot freely decide on the dismissal route.

Termination route	Dismissal ground
UWV (application for a dismissal permit)	• Redundancies for business economical reasons; or • long-term incapacity.
The cantonal court (request for termination)	• Frequent absence as a result of illness or incapacity; • non-performance; • culpable acts or negligence of the employee; • conscientious objections; • disturbed working relationship; or • other circumstances.

- A dismissal needs to be justified by one of the dismissal grounds. It is not possible to combine different dismissal grounds to jointly constitute a fair dismissal ground.
- An imperfect dismissal ground will result in a rejection of the dismissal. In view of, for example, an employee's alleged non-performance, it is essential that the employee's file is in order. The Court no longer has the option to justify the termination based on an incomplete file by awarding higher compensation to the employee.

Transition allowance

- When an employment agreement has continued for at least 24 months, a transition allowance will in principle be due if either:
  - the employment agreement is being terminated by the employer: 1) serving notice; or: 2) requesting the court to effect such termination; or
  - a fixed-term employment agreement terminates by operation of law.

Duration of the employment (in months)	Accumulation transition allowance per full period of 6 months:
24-120	1/6 x monthly wages
>120	1/4 x monthly wages
>120 (when the employee is 50 years or older, and the employer employs > 25 employees)	1/2 x monthly wages (for every full half year of service after reaching the age of 50)

- The transition allowance is maximized at either EUR 75,000 or, when the employee's annual wages are higher than EUR 75,000, an amount that is equal to such annual wages.
- The meaning of 'monthly wages' within the context of the transition allowance is linked to the so-called 'B-factor' of the cantonal court formula that applied until 1 July 2015, being the gross monthly wages (calculated as hourly wages multiplied by the working hours per month), plus:
  - holiday allowance and fixed end-of-year bonus;
  - applicable overtime allowance and shift allowances; and/or
  - applicable bonuses, profit distribution and/or end-of-year bonus.
- If payment of the transition allowance in a lump sum has unacceptable consequences for the employer's

business operations, the employer is permitted to spread the payment of the transition allowance over a maximum period of six months. Statutory interest will be payable by the employer on the part of the allowance that is paid later than one month following the termination date.

- The employer and the employee may agree that the costs incurred by employer for the benefit of the employee in view of his pending dismissal (eg transition and/or employability costs) can be deducted from the amount of the transition allowance. This is, for example, also relevant to the employer's costs related to observing a longer noticed period than the statutory or contractually agreed notice period.
- If prior to 1 July 2015 a social plan has been agreed with the trade unions that is registered as a collective bargaining agreement, the entitlements pursuant to such social plan will, in principle, prevail over the transition allowance. For other arrangements regarding termination compensation or facilities that are concluded before 1 July 2015 (for example, contractual severance arrangements), the employee should be given the choice between this payment or the transition allowance. If the employer does not provide for the relevant choice, the employee will be entitled to both the compensation that was concluded before 1 July 2015 and the transition allowance!

Redeployment

- Before a dismissal can be effected, the employer must consider whether within a reasonable period of time, it is possible to redeploy the employee (possibly with additional training).
- For this purpose employers will need to look for possible existing vacancies or vacancies that may arise within a reasonable period of time. In addition, employers are required to look for suitable alternative positions that are fulfilled by employees on a fixed-term contract, hired personnel or standby workers. In certain circumstances, employees within these categories may be replaced by an employee whose job has become redundant.
- If the employer forms part of a group of companies, the redeployment efforts also extend to the other operating companies of the relevant group.
- A position is deemed suitable if its job requirements correspond to the education levels, experience and capabilities of the employee, possibly with additional training. Training is only required in view of the expected redeployment in a specific position.
- The term of the reasonable period for redeployment is linked to the employer's statutory notice period of one to four months, depending on the employee's years of service. For employees with an occupational disability, the reasonable period amounts to 26 weeks.
- It is in principle up to the employer to decide which employee is most suitable to fulfill a possible vacancy.

Business economical reasons

- In the event that an employer who forms part of a group of companies makes redundancies, UWV will assess the necessity for the redundancies solely on the basis of the business economical circumstances of the entity where jobs are to be made redundant rather than on the basis of the situation of the other group companies.
- The outsourcing of activities may not constitute a fair ground for termination if the nature and scope of the work does not change and the sole purpose of the outsourcing is to replace permanent employees by flexible and less expensive workers. This may be different when the work is being outsourced to a 'truly' independent worker, i.e. pursuant to the Dutch Tax Authorities' relevant assessment.
- In reorganizations, redundant employees will in principle be selected on the basis of the reflection principle (*afspiegelingsbeginsel*). With effect from 1 July 2015, it is possible to deviate from this principle on the condition that such deviating arrangement is included in the collective bargaining agreement (including a social plan registered as a collective bargaining agreement) and an independent and impartial collective bargaining agreement Redundancy Committee (*CAO-Ontslagcommissie*) has been established.

Education during employment

- Employers must facilitate an employee's training necessary for the excercise of their duties pursuant to their employment agreement. To the extent that such can in reasonableness be expected from the employer, the employer also needs to offer training which is necessary to broaden the employee's employability within the company of the employer.
- Employers are responsible for maintaining the level of job specific knowledge of their employees, including those who have been employed long-term. As a result, we expect that the threshold for a non-performance file, especially for an employee with long service, shall not easily be met.
- The law explicitly provides that a dismissal for non-performance will not be permitted if the non-performance is the result of the employer's insufficient care for the employee's training or education.
- Although the costs of education are to be borne by the employer, it is still possible for the employer to under certain conditions impose an obligation upon the employee to refund relevant costs to the employer.

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