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This update once again concerns the balance of flexible and permanent work in the Netherlands. After having won the elections, the Government pledged to reform the 2015 reform of Dutch labour law¹. In that reform, the Government tried to reach a new balance between flexible and permanent work. This was done by limiting the time during which consecutive fixed-term contracts could follow each other before being mandatorily turned into an open-ended contract. The other main measure was to make dismissals quicker, easier and less costly. Permanent work would become less so, inciting employers to offer permanent contracts more readily, which in turn would help reach the other goal: making flexible work less flexible, because employers would offer permanent positions more readily².

However, research showed that it became harder to dismiss employees – although once successful, the costs were substantially lower than before. Therefore, the new coalition government introduced a proposal called «Balancing the employment market» (Wet Arbeidsmarkt in balans, WAB)³. The core idea is to reduce the differences in costs between flexible and permanent/typical work, to ensure that atypical and / or flexible types of contract are chosen because of a need for a certain flexibility, not because of costs⁴. Competition based on types of contracts used must be eliminated as far as reasonably possible. Therefore, employers will pay different premiums for different types of contracts according to the risk of unemployment: higher for flexible work, lower for permanent work. In addition, the statutory severance pay (transitievergoeding) will be due from the first day of employment, thereby equalizing costs in different types of contracts. Next to these ideas concerning costs of employment, the proposal contains two sets of measures: one dealing with flexible work, the other with permanent work – in particular the termination thereof. Below, these two main aspects will be discussed in more detail.

I - CHANGES REGARDING FLEXIBLE WORK

A first major change is the fact that from 1 January 2020 onwards, the employer must pay the statutory severance pay from the first day of employment onwards. Until then, generally speaking, the compensation is only due if the employee has worked for at least 24 months with the employer. As 24 months now is the maximum period during which use can be made of chains of fixed-term contracts, it comes as no surprise that in the majority of cases, fixed-term contracts are not followed up by permanent ones. After all, costs soar

1 Governmental Agreement «Trust in the future» [Regeerakkoord «Vertrouwen in de toekomst»]: https://www.tweedekamer.nl/debat_en_vergadering/uitgelicht/kabi_netsformatie-2017

2 Work and Security Act [Wet werk en Zekerheid], TK 2013/14, 33 818, no. 3.

3 TK 2018/19, 35 074, no. 3.

4 *Ibid.*, p. 8.

after 24 months. The government hopes that the equalization of costs will help employers in making a choice that is less cost-driven and takes into account other aspects such as the importance of the employee for the firm: how replaceable is s/he?

A second prospective change, however, seems to be diametrically opposed: the maximum period during which fixed term contracts may follow each other is (once again) prolonged from 24 to 36 months. This change is not explained easily. The Dutch employment market is functioning well, unemployment is at an all-time low and the maximum period has been reduced only in 2015, in order to get people into permanent employment more quickly. Back then, every employment law scholar warned that the combination of a maximum of 24 months of fixed-term work plus a start of rights to severance pay after 24 months would reinforce each other⁵. Therefore, it would have been worthwhile to see which changes to employer behavior the new right to severance pay from day one onwards brings before reversing the rules on chains of contracts once again. This is even more so, since the governmental arguments for the (renewed) prolongation of the fixed-term period are unconvincing, especially in the light of the excellent employment market figures.

A third change concerns on-call contracts. Often, these are less irregular than the name suggests⁶. Therefore, the government proposes to tighten the rules. In order to offer more (economic) security, the proposal contains an obligation to call upon the employee at least four days before the employee is supposed to start working⁷. By collective agreement, the 4-day period may be shortened to one day. The employer must notify the employee digitally or in writing of the call and the planned hours. This gives the employee the possibility to approve the call and therefore a ground to claim the wages in case the employer later refuses to let him work or cancels the call. Finally, in the 13th month of employment, the employer must offer a contract with a guaranteed minimum of working hours. The right to wages cannot be excluded any more in case there is no work. This minimum amount of hours is the average number of hours worked during the last twelve months.

All combined, the above measures, in the view of the government, will create a new balance regarding the costs of flexibility. This regulatory instrument of costs then should incentivise employers to make use of flexible contracts only in those cases where this is a real necessity and not merely a commodity.

II - CHANGES REGARDING PERMANENT WORK

The other main aspect of the propositions deals with permanent work. Here, the idea is to make it less permanent or at the very least, to make dismissal less difficult. According to the government, making dismissal less difficult will entice employers into offering permanent jobs more quickly - the idea behind the US American idea of employment at will.

5 E.g. A.R. Houweling, Bill on work and security and fixed-term employment contract: about the new annual contract of eight months [Wetsvoorstel werk en zekerheid en de arbeidsovereenkomst voor bepaalde tijd: over het nieuwe jaarcontract van acht maanden], TAP 2015, p. 27; A.R. Houweling, M.J.M.T. Keulaerds, P. Kruit: VAAN-VvA Evaluatieonderzoek WWZ, BJu Den Haag 2016, p. 61.

6 CBS, Flexibele Arbeid 2018.

7 TK 2018/19, 35 074, no. 3, p. 24.

A first change regards the probation period. So far, the absolute maximum for probation is two months, in case of a contract for more than two years or if agreed by collective agreement. This is perceived as too short. The new rules foresee a maximum probation period of five months for contracts of two years or longer, two months for contracts up to two years and three months for longer fixed-term contracts⁸. With this, obviously, new questions will arise. For example what to do with employees who get pregnant. During a two-month trial period, this can be concealed, during a five-month period this will be much harder. In case the employer decides to terminate the contract - which is possible without giving reasons - this will quite probably not be judged discriminatory unless the employer is actually stupid enough to say that he does this because of the pregnancy. Surely, the employee can avail herself of the legal presumption of discrimination, but as long as the employer has been careful in his praise before, there is a good chance that this termination will remain lawful. Interestingly, this kind of problems is not addressed in the preparatory works, although the government already spotted possible abuse of the longer trial period. For example, in order to prevent trial periods to be used as a kind of fixed-term contract, the proposal offers just one five-month period between the same employer and same employee. Even if a change of job occurs, which requires different knowledge and skills, the maximum trial period between employer and employee is two months and not a full five-month period. Furthermore, a permanent contract, which is terminated during the probation period, will be treated as a fixed-term contract for the purpose of chains of consecutive contracts⁹. Still, it remains to be seen whether the possibilities to terminate a permanent contract during a (long) probation period really lead to more permanent contracts.

Another interesting change with regard to permanent contracts regards dismissal law. Only in July 2015, a limitative list of grounds for dismissal was introduced. Before dismissing an employee, the employer must prove one full ground. If he fails, the contract cannot be terminated. This was a huge change from the old system, where dissolution of the contract by the judge was nearly always possible, but could cost a lot of money, if there were no proper reasons for it or if the reasons seemed flimsy to the judge. In order to cut costs, the system was changed to today's system of the statutory severance pay plus a possible extra compensation, the latter exclusively and by no means automatically in case the employer was grossly at fault. However, in the actual system, two things go hand in hand: the reason / proper cause and the possibility to terminate if re-integration on another spot within the (group of) undertaking(s) is not possible. According to the government, data over the last three years show that dismissal has become cheaper but more difficult due to employers unable to sufficiently prove a proper ground. This may be due to the fact that employers were not used to the grounds and the necessity to prove them, which often resulted in paperwork that was insufficient. Instead of waiting whether these start-up problems might gradually lessen, the government decided to adapt the system. The idea is that, from 2020 onwards, an employer may ask for a dissolution of the employment contract by the judge, if several reasons / grounds exist, but none of them is strong enough in itself to justify a dismissal¹⁰. The limitative reasons concerning the person and / or behavior of the employee may thus be considered in a cumulative manner. Interestingly, the government seems to

⁸ TK 2018/19, 35 074, no. 3, p. 59.

⁹ *Ibid.*

¹⁰ TK 2018/19, 35 074, no. 3, p. 54.

think that this kind of dismissal based on cumulative half-grounds is not a fully justified dismissal. After all, the proposal contains the idea of a higher severance pay, because of the fact that the grounds as such are insufficient¹¹. In my view, it is astonishing that the government even opens this way. Either a dismissal is legally possible, then there should be no reason for an extra compensation. The other option is that a dismissal is not legally possible, but then it should really not happen. In the proposal, however, a mix is created. From 2020 onwards, a type of lawful dismissal will exist that is less lawful than others and therefore necessitates an additional compensation.

III - APPRAISAL

The new proposal means to take over where the changes in 2015 stopped. Some of the ideas, like the equalization of costs for different types of contracts, seem a good idea. In that way, employers get the choice. Flexibility remains possible, but becomes more expensive which may mean that in the future it will be used in case of necessity rather than as a commodity. In a country where flexible work has become common, this may be a huge gain.

On the other hand, some of the other proposals seem less likely to offer good prospects. Personally, I am particularly skeptical with regard to the (renewed) prolongation of chains of fixed-term contracts from 24 to 36 months. If employers cannot be triggered to offer permanent contracts after two years, even in the current employment market situation, why should they be more prone to do so within three years? The addition of the cumulative ground for dismissal combined with the additional severance compensation seems another awkward idea. Regardless of what the government says, it does not fit into the current system and - much more importantly - already nurtures possible grieving: «The employer can do what he wants as long as he is prepared to pay». I truly wonder whether this helps in perceiving employment law as protective.

11 *Ibid.*, p. 56.