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I - NEW IDEAS ON DISMISSAL LAW

The changes introduced in 2015 led to a strict system of seven grounds for dismissal one of which the employer must fully prove before a dismissal is legally possible. Furthermore, the employer now has to pay a compensation called transitory compensation in case of dismissal. Employers complained since the first proposal that the seven grounds were much too limited and that a combination of grounds should be possible. However, the law came into being unchanged. During the negotiations concerning the new Coalition Government, it became clear that something would have to be done. Therefore, in the coalition agreement, one can read that the coalition partners agree to propose a law that accommodates the objections and complaints concerning the current system.¹ In the first place, the future law will, once again make it possible to combine different grounds for dismissal in order to justify a dismissal. The argument is that an employer cannot and should not be expected to continue employing an employee who does not function properly and who cannot get along with his employer. Under current law, either aspect must be proven to the extent that it can in itself serve as ground for dismissal. The new government wants to change this. A combination of grounds must be possible if the judge is of the opinion that the employment relation cannot be continued even though neither ground is sufficiently established on its own. According to the government, this relaxation of procedural requirements will be compensated by an extra monetary compensation of up to half the amount of the transitory compensation, which will still be due. So, in essence, the employer will have an easier time proving his reasons for dismissal, but must compensate the employee for this relaxation. If this is considered from the outside, it is a weird decision. After all, either the legislator must be of the opinion that a dismissal based on two half-fulfilled, but reinforcing grounds is sufficient justification for a dismissal, in which case a higher compensation is - to say the least - an interesting policy choice, or the legislator is of the opinion that two half fulfilled grounds for dismissal do not equal one full ground, in which case the policy choice should be that dismissal is not possible. However, the choice made, the acceptance of two half-established grounds plus an extra compensation make these newly possible dismissals reek of a trade-off.

Another aspect that is about to undergo changes is the transitory compensation itself. The changes relate to the compensation that needs to be paid in case the employment relation is terminated because of long-term sickness (i.e. more than 104 weeks) and in case of economic grounds for dismissal.² The transitory compensation has a double aim; it is meant to compensate for the loss of employment as well as to provide opportunities and means for retraining and finding a new job.³

1 *Regeerakkoord 2017*, Para 2.1.

2 *Kamerstukken II*, 2016/17, 34699, n° 3.

3 *Kamerstukken II*, 2013/14, 33818, n° 3.

In case the employee is dismissed after two years of sickness, when reintegration is not possible for the employer, this compensation was widely regarded as unfair. The employer has already made quite some costs by paying the employee's wages for those two years and quite probably also incurred costs concerning the employee's reintegration or retraining process. Furthermore, the two year period of inactivity is also included in the period over which the compensation is due. The first option was to exempt employers from the need to pay the transitory compensation in these cases. That option was, however, quickly set aside, as, in the eyes of the legislator, it was contrary to the compensation's aims.⁴ After all, even someone who after two years of continued sickness or invalidity gets an invalidity benefit may still have the possibility to start a new, different job for which the compensation could be helpful. This is especially true for employees who only get partial invalidity benefits. However, according to the legislator, even employees who receive a 100% benefit, can still benefit from the transitory compensation.⁵ Furthermore, a complete exclusion of the right to transitory compensation for employees who have been incapable of working for two years is incompatible with the requirements of Dutch legislation on equal treatment concerning handicapped and chronically ill persons.⁶ The proposal therefore is to still make the employer pay the compensation as well as try and retrain the employee, but to reimburse and so compensate the costs incurred. The compensation will be paid by the general funds on unemployment, which will therefore raise the premiums by 0,1% in order to have the necessary funds.⁷

The same proposal for changes to the transitory compensation also contains the proposal to change the rules applicable in case of dismissal on economic grounds. According to the legislator, today's rules are seen as unfair and too heavy a burden for employers who already are in economic trouble. Right now, the law accepts that measures equivalent to the transitory compensation can be agreed upon by collective agreement. However, the monetary value has to equal the transitory compensation, meaning that collective agreements cannot lead to cost-saving measures.⁸ Under the proposed rules, the transitory compensation will not be due in case of economic dismissal if the employer has concluded a collective agreement with one or more trade unions that provides of measures to prevent or shorten periods of unemployment, regardless of the monetary value of these measures. The only important aspect is that the measures envisaged by the agreement offer real prospects of preventing or shortening unemployment.⁹ These measures may

4 *Kamerstukken II*, 2016/17, 34699, n° 3, p. 2.

5 *Ibidem*.

6 *Ibidem*, p. 3.

7 *Ibidem*, p. 8.

8 Art. 7:673b BW.

9 *Kamerstukken II*, 2016/17, 34699, n° 3, p. 9.

be combined with a monetary compensation. If the whole compensation is to be paid in money, generally speaking, the amount will have to equal the statutory compensation, but lower compensations will be possible under the proposal, if the economic situation of the undertaking is too serious to allow for that or if the parties to the collective agreement agree on using the available funds for other measures such as retraining program and the like¹⁰. In my view, this proposal is a dangerous one. Even though it is limited to dismissal on economic grounds, it seems prone to abuse, as, e.g. enhancing one's competitive power can also constitute an economic reason. Furthermore, it is interesting to notice that the legislator opts for a way which already exists, deviation by collective agreement, but which so far, has been scarcely used. Even the much easier to apply provision which already exists is not widely used, and in my view a more complicated, less favourable provision, that will put the "blame" to squander employment conditions on trade unions is not likely to undergo a different fate.

II - WORK-LIFE BALANCE

The second field in which changes are discussed concerns the work-life balance of working parents. Since 2016, several amendments to parental, paternal and birth leave have been discussed, but recently, a new proposal on the extension of leave in case of birth (*Wet invoering extra geboorteverlof, WIEG*) has been made public for internet consultation.¹¹ Whether or not there is a link to the Pillar of Social Rights and its focus on work-life balance remains unclear from the Parliamentary proposal.

No hints to that link can be found in the "preliminary works" by the Social and Economic Council (*Sociaal Economische Raad, SER*) who was asked for an advice in this matter. The Council wants to reach three goals with the revised rules on leave: more employment participation of women, better possibilities to combine paid work and care and more flexible working time models¹². With regard to the child's needs, the Council points to the importance of continuity and stability in caring which can be provided through leave. Finally, fathers will have more possibilities to get involved in caring and household from the very start. This leads to a more equal spreading of household chores. Therefore the possibilities for leave during the first year of the child have to be broadened and the existing rules (birth leave, paternal leave, parental leave) need to be simplified.¹³ However, new rules must not lead to extra (financial) burdens for employers. The idea is to have one unified system of one type of leave which cannot be transferred from one parent to the other and which covers today's leave of a maximum of 26 weeks. The Minister for Social affairs, however, did not take over the proposal. His proposal extends periods of leave after birth and during the first years of life of a baby. The aim is to enhance the bond between baby and parent and to allow for a more equal distribution of household duties from the beginning onwards.¹⁴ In the first place, the proposal prolongs the paid birth leave for the mother's partner from two days to once the weekly working time. Furthermore, the partner has a right to five weeks of unpaid leave during the first six month of the baby's life. However, during these weeks, benefits are available to a maximum of 70% of the insured maximum daily pay rate. The

¹⁰ *Ibidem*, p. 10.

¹¹ *Concept wetsvoorstel WIEG*, 19 februari 2018.

¹² SER advice *Optimalisering verlof na geboorte kind*, advies 2018/1, 16 februari 2018.

¹³ *Ibidem*, p. 9.

¹⁴ This was already foreseen in the earliest drafts, *Kamerstukken II*, 2016/17, 34617, n° 3 p. 1.

legislator intends to make the partner's leave more equal to that of the mother, thereby strengthening the mother's position on the employment market.¹⁵ Also, more and more, partners want to be part of the child's upbringing from the very start and want to divide household tasks more equally. Possibilities to put paid employment to a second place for a certain time help in finding this new balance.¹⁶ The leave can be taken up full time or part time, if the employer agrees to that last possibility. In addition, both parents have a right to parental leave of 26 weeks, which, however, is unpaid, unless otherwise agreed.

To conclude, in Dutch law, not much has happened due to the prolonged coalition talks and the impossibility of an outgoing government to legislate on controversial issues. However, ideas have ripened in the meantime and quite some proposals are now getting into the Chambers of Parliament. The two changes discussed above will, if adopted, have quite some implications for the future of Dutch labour law, as they touch upon the termination of contracts and the way in which a balance of interests is to be found between the employer's interest of having a workforce ready at hand and the employees' interests of having time in case of important and incisive changes to their private life. In that way, the changes are a continuation - and in the case of termination partial reversal - of the reforms of the last two years starting with the Act on employment and security and the Act on working not time- and place bound.

¹⁵ *Concept wetsvoorstel WIEG*, p. 7.

¹⁶ *Ibidem*, p. 8.