Dismissal on Economic Grounds in the Netherlands After July 2015

Nicola Gundt

Electronic version

URL: <https://journals.openedition.org/rdctss/2302>

DOI: 10.4000/rdctss.2302

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2017

Number of pages: 154-161

ISSN: 2117-4350

Electronic reference

Nicola Gundt, "Dismissal on Economic Grounds in the Netherlands After July 2015", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2017, Online since 01 November 2021, connection on 04 December 2021. URL: <http://journals.openedition.org/rdctss/2302> ; DOI: <https://doi.org/10.4000/rdctss.2302>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0 International.

DISMISSAL ON ECONOMIC GROUNDS IN THE NETHERLANDS AFTER JULY 2015

NICOLA GUNDT

Assistant Professor at Maastricht University, The Netherlands

This contribution describes the dismissal on economic grounds in the Netherlands after the changes introduced by the Dutch Work and Security Act¹ (*Wet Werk en Zekerheid, WWZ*) in 2015. The aim of the reform was to make Dutch dismissal law less complex, fairer and less expensive for employers. Since the reform, a dismissal under Dutch law requires one of the grounds exclusively listed in art. 7:669 (3) Civil code (*Burgerlijk wetboek, BW*). An aspect which enhances the fairness of the system is that the employer's choice whether to address the judge or an administrative authority in order to be able to terminate the contract has been abolished, too. The two ways are now directly linked to the ground for dismissal. In case of dismissal on economic grounds and dismissals due to an employee's incapacity lasting for more than 104 weeks, the administrative authority is the competent organ. All other grounds are reviewed by the judge. Possibly even more important than this removal of the element of choice of procedure on the employer's side is the fact that the compensation for dismissal is, in principle, identical for both procedures. Usually, the employee will have a right to a transitory compensation, calculated according to the law. The main point of discussion at the moment concerns the possible additional equitable compensation, as neither the conditions for its award nor the (approximate) sum can be predicted.

I - THE DEFINITION OF REDUNDANCY

Art. 7:669 (3)(a) BW defines an economic ground for dismissal as the disappearance of jobs due to the termination of the undertaking or the disappearance of jobs for at least 26 weeks due to management decisions which are necessary in order to run the undertaking properly. So far, this definition

¹ Stb 2014/216.

has never been challenged in court. This may be due to the fact that until 2015, the administrative authority decided whether the employer had sufficiently established the economic necessity to dismiss employees. The decisions are not published and no appeal was possible against such a ruling. Until now, the fact that the definition is now found in the Civil code and that the law allows for a judicial review of the administrative procedure, has not led to much case law, at least not cases in which the definition of “redundancy” was at stake.

A collective redundancy is the termination of the employment contracts of at least 20 employees working within the same working area during a period of three months.² Since the changes made to the law in 2012, the definition of “collective redundancy” has not been challenged in court.

II - THE PROCEDURE

In order to be able to dismiss an employee, the employer must request permission from the administrative authority to dismiss the employee. This authority will check whether the conditions to ask for a dismissal have been fulfilled and whether the “right” employees have been selected for dismissal.³ The administrative authority will first establish whether the requirements of art. 7:669 BW are met. An employer must show that jobs will disappear (art. 7:669 (3)(a)), but also that reintegration of the employee(s) in another job, even after training, if necessary, is not possible within a reasonable period of time. Furthermore, the administrative authority ensures that atypical employment relations are terminated first.⁴ The rule applies to employees on fixed-term contracts with less than 26 weeks of contract left⁵, to employees working on-call for irregular hours, to agency workers, for whom the user will have to terminate the contract for services with the agency and to employees who have reached the pensionable age. These dismissals take place before the procedure that determines who else is to be dismissed is started.

A - LAST IN FIRST OUT CORRECTED BY AGE

When deciding which employees have to be dismissed, the employer has very little choice, at least, as long as the employees fulfil interchangeable jobs (*uitwisselbare functies*). In order to prevent the employer from “saving” employees by offering them a unique or different job, the Decree on dismissal contains a detailed definition of interchangeable jobs and the administrative agency will monitor closely whether or not jobs are interchangeable, especially if changes of job descriptions are made within a short period of time before the dismissal procedure is started.⁶

Art. 11 of the Decree on dismissal defines the order of dismissal. The method is called the mirroring principle (*afspiegelingsbeginsel*). First, the employees employed

2 *Wet Melding Collectief Ontslag* (WMCO), van 24 maart 1976, Stb 1976/223.

3 The exact procedure is regulated by a decree: *Regeling UWV ontslagprocedure*, 23 april 2015, Stcrt 2015/12688.

4 Art. 7:669 (5) BW.

5 Art. 17 Decree on Dismissal; see policy rules on economic dismissals (*UWV Den Haag*, November 2015, p. 23).

6 Art. 13 and 14 of the Decree on dismissal (*Ontslagregeling*, 23 april 2015, Stcrt 2015/12685).

in interchangeable jobs must be sorted into age groups. Then, the proportion of each age group in regard to the number of employees is determined. This ratio must remain intact as much as possible. Within the age groups, those with the lowest seniority will have to leave first, leaving intact as much as possible the overall proportion of younger and older employees. For example: in a business, 12 employees work interchangeably as salespersons. When sorted into the different age categories, three fall within the first group, four in the second, none in the third, two in the fourth and three in the fifth group. Four jobs cease to exist. The calculation is as follows: the number of employees in the age group is divided by the number of all interchangeable employees and then multiplied by the number of necessary dismissals. For age group one, this means $3/12 \times 4 = 1$, for group two it is $4/12 \times 4 = 1,333$, for group three the result is 0 as no employees are in that group, for group four it is $2/12 \times 4 = 0,666$ and for group five $3/12 \times 4 = 1$. The number before the comma indicates the dismissals. In this case this means that the employees with the shortest period of seniority in group 1, 2 and 5 have to be dismissed. As this leaves one additional employee to be dismissed, the second criterion is the highest number after the comma. This is the .6 in group 4. There also, the employee with the shortest period of seniority will have to be dismissed. With this combination of age groups and seniority, the Dutch Government tries to prevent discrimination on grounds of age and maintain the mixture of older and younger employees as much as possible as it was before the dismissal. However, this leads to extremely strict rules, which offer no freedom for the employer to keep better or more motivated employees.

Art. 11 (5) of the Decree on dismissal, on first sight, offers an option to keep important employees. If the employer can show that an employee possesses specific knowledge or skills that would make his dismissal detrimental to the whole business, the employee in question may be spared in the *afspiegeling*. However, from the policy rules, it becomes clear that these specific skills or abilities have nothing to do with the job or function. According to the examples in the policy rules, art. 11 (5) of the Decree applies e.g. to an employee who has a drivers licence for heavy trucks, which means that he can fill in for the regular truck driver and thus offer more flexibility to the undertaking.⁷ The employer must define the specific knowledge or skills and must also argue in a detailed way in which way the employee's dismissal would be burdensome. He should be able to explain how often the specific abilities are needed now and in the (near) future, how a (long-term) absence of the employee is dealt with and how much it would cost in terms of time and money to get another employee to the level that the other employee can be spared.⁸ In contrast to its wording, therefore, art. 11(5) does not offer a legal basis for the employer to choose employees he wants to keep because they excel in their jobs.

B - THE ALTERNATIVE LIFO

The lack of choice in determining who is to be dismissed, or rather, who can be spared, has been a point for discussion for a long time. Employers want more freedom to keep excellent employees and high potentials. Art. 16 of the Decree on dismissal offers some flexibility while still protecting employees against arbitrary dismissals. It offers the possibility to exclude up to 10% of those employees who would, under the rules of art. 11, be dismissed. Applicability of this rule has to be agreed by collective agreement.

⁷ Policy rules on economic dismissals, UWV Den Haag, November 2015, p. 26.

⁸ Policy rules on economic dismissals, UWV Den Haag, November 2015, p. 28.

The employer may then exclude up to 10% of the employees under four conditions: the employees must be periodically assessed, they must know whether or not they perform excellently and what the employer expects from their development, they must know that being qualified as excellent can mean an extra protection against dismissal and must be given the same possibilities to develop towards excellence. However, even if all these requirements are fulfilled, using art. 16 is not allowed, if this leads to extra dismissals in the oldest or youngest age group.

Considering the number of requirements, the work this means in terms of employee management, files to be kept and possible discussions on whether or not someone is excellent, it is not surprising that this rule is not used frequently. A regulation offering so little freedom on so many conditions will not offer the flexibility employers are looking for.

C - THE COLLECTIVE AGREEMENT

Since the changes made by the Dutch Work and Security Act of 2015, the law explicitly states that the rules discussed under 3.1 and 3.2 will *not* apply in case a collective labour agreement exists that contains rules on the choice of employees in case of dismissal.⁹ That collective agreement must be concluded with trade unions that fulfil additional requirements. The union(s) must have members in the undertaking or sector, the Articles of Agreement must specify that one aim of the union is to promote members' interests and must possess entitlements to rights (have full legal personality) for at least two years. These requirements are identical to the requirements to be met by a trade union that has to be informed and consulted in cases of collective redundancies.¹⁰ The criteria have not been discussed during the Parliamentary debate.¹¹ Ideas on representativeness in order to add legitimacy to the collective agreement, have not been accepted by the legislator.¹²

The collective agreement must install a commission, which must be independent from the employer and which considers the employer's request to dismiss employees instead of the public law administrative authority.¹³ The law itself lays down minimum requirements concerning the procedure to be regulated in the collective agreement. The collective agreement must contain rules on fair hearing, respect of privacy and confidentiality of facts and information, ensure a reasonable period of reaction and a reasonable maximum duration of the procedure.¹⁴ With regard to the content of the collective agreement, such as possible alternative selection criteria for dismissal, material law limits and so on, the law remains silent. During Parliamentary debates it became clear that alternative selection criteria need to respect the law.¹⁵ Within the margins of the law, everything is possible, as long as employers' and employees' representatives can agree upon it. Although this seems

9 Art. 7:669 (6) BW.

10 Art. 3 (3) WMCO.

11 *Kamerstukken II*, 2013/14, 33818, nr. 3, p. 104-106.

12 Advies van de Adviescommissie Arbeidsrecht Nederlandse Orde van Advocaten, *Kamerstukken II*, 2013/14, 33818, nr. 7, p. 131/2; Werkgroep cao-recht Vereniging Nederlandse Arbeidsrechts Advocaten in their submissions to the First Chamber.

13 On the nature of this commission, see J. van Drongelen, De zogenaamde 'cao-ontslagcommissie' nader beschouwd, *TRA* 2014/85.

14 Art. 7:671a(2) and (3). It is interesting to note that the sanction is unclear.

15 *Kamerstukken II*, 2013/14, 33818, nr. 3, p. 47.

REDUNDANCY IN THE NETHERLANDS

like the employers' dream, art. 7:671a (2) and (3) BW has not been used to a great extent so far.¹⁶ Several explanations can be offered.

a) APPLICABILITY OF THE COLLECTIVE AGREEMENT

In Dutch law, the applicability of collective agreements is either based on agreement via membership of the trade union or by individual agreement to the collective agreement or a declaration by the minister that a collective agreement is generally binding in the sector.¹⁷ During the Parliamentary debate, discussion on how employees will become bound to a collective agreement regulating dismissals showed little understanding on how collective agreements work. The government even stated that for the dismissal commission installed by agreement to be competent, it is sufficient that the employer is bound by the agreement.¹⁸ This statement is a complete departure from the contractual view that prevailed so far. Furthermore, it left unclear whether just the committee will be competent instead of the administrative authority, or whether deviating rules concerning the eligibility for dismissal will also apply. Although this debate was mainly restricted to academia, it may be that the lack of clarity on this point is a disincentive for employers to make use of collective agreements.

Members of trade unions or employers' associations who are contracting partners to the collective agreement are bound to it via art. 9 of the Collective Agreements Act (Wcao). However, due to low union density, not many employees are bound via this mechanism.¹⁹ Thus far, the problem has been solved via either art. 14 Wcao or incorporation clauses. Art. 14 Wcao provides that an employer must offer the employment conditions laid down in the collective agreement that is binding on him to employees not bound by the agreement. In case the employees agree, the collective agreement will apply to them. The employees may also refuse. This will happen, in case the individual employee thinks that the collective agreement is detrimental to his case. In that case, the employer has no legal basis to force the employee to accept the collective agreement. Different dismissal criteria will then apply in the business. This, in turn, will be perceived as unequal, inequitable and unfair by employees and will, consequently lead to protests and even lawsuits challenging the dismissal.

A second way of ensuring the applicability of the collective agreement is the use of incorporation clauses in the individual employment contract which declare a collective labour agreement applicable. By agreeing to the individual employment contract, the employee also accepts the collective agreement. Still, an old incorporation clause may not be sufficient to bind an employee to a new collective agreement that has been substantially amended.²⁰ The reason for this is a rather old judgment in first instance.²¹ There, the court held an employee not bound by an old incorporation clause that was invoked by the employer, while the trade union of which this employee was a member had refused to sign

16 For examples see e.g. https://www.frv.nl/site/alle-sectoren/caos/caos/27146/ING_Bank_-_soc_plan_2016-2017.pdf; <https://www.unie.nl/LinkClick.aspx?fileticket=hJPrCjsfVto%3D&tabid=3064&portalid=1&mid=11745>. Both agreements do not differ substantially from the law, but do provide for the use of the 10% rule described in para 3.1.2.

17 Art. 2 Wet avv.

18 Kamerstukken II, 2013/14, 33818, nr. 7, p. 131.

19 See J.M. van Slooten, Het komende, driekwart dwingende ontslagrecht, TRA 2013/76.

20 R.M. Beltzer, Het incorporatiebeding, verleden, heden en toekomst, ARBAC, 2012, januari-maart.

21 Ktr. Hilversum (vzr), 1 februari 2006, ECLI:NL:RBAMS:2006:AV1661.

the collective agreement. According to the court, the employee could, in all reasonableness, not be bound by an old clause agreed under completely different conditions which now functioned in a completely different setting as the bigger unions had refused to agree to the collective agreement. This line of reasoning may also apply to incorporation clauses which are suddenly used to bring about binding force for selection criteria for dismissal, even though the law provides for extra checks concerning the trade unions who can qualify as bargaining partners.

Finally, the binding force can be brought about by declaring the collective agreement generally applicable. Early on in the discussions, the government made clear that provisions dealing with redundancies, the installation of a committee and different selection criteria can be declared generally applicable. In that case, the rules apply to everyone in the sector who is not exempted.²²

b) PERIOD OF VALIDITY OF THE COLLECTIVE AGREEMENT

The most difficult practical aspect concerning dismissal law in collective agreements is that in the Netherlands, collective agreements cannot be concluded for a period of more than five years.²³ Also, the generally binding effect cannot exceed five years.²⁴ This means that every five years, there will be a new round of bargaining. This recurring need to bargain may be conceived as burdensome. Another point is that the effect of collective agreements can linger forever, if an employee was bound by an old agreement and refuses to be bound in any way by a new agreement. This so-called after-effect makes the effective use of collective agreements in dismissals even more problematic.

c) TRADE UNIONS' POINT OF VIEW

Another, rather different, explanation for the scant use of collective agreements in order to lay down applicable selection criteria in case of economic dismissals may be that trade unions are not really willing to engage in bargaining on dismissal criteria. After all, if they agree to different selection criteria, employees may feel that they have been dismissed "thanks to the trade unions".

III - COMPENSATION

Since July 2015, the law provides for the payment of a lump sum severance payment in case of dismissal if the employment relation has lasted at least 24 months.²⁵ This so-called transitory compensation compensates for the loss of a job and ensures that an employee has the financial means to pay for training which enables him to find a new job.²⁶ In principle, this is the only compensation the employer has to pay. The employer, therefore, can be fairly sure of the costs of a dismissal.

22 Art. 2(1) Wet avv.

23 Art. 18 Wcao.

24 Art. 2 (2) Wet avv.

25 Art. 7:673 (1) BW.

26 *Kamerstukken II*, 2013/14, 33818, nr. 3, p. 38

REDUNDANCY IN THE NETHERLANDS

The compensation consists of 1/6th monthly salary for every six months in service during the first ten years of employment and 1/4th monthly salary for every six months in service after ten years.²⁷ The compensation is due when the employer terminates the contract, except if the employee has acted in a seriously reprehensible way (*ernstig verwijtbaar handelen*). Even though it is a legal right, it must be claimed in court.²⁸

The only situation in which the employee can ask for extra compensation, the so-called equitable compensation, is where the employer has acted in a seriously reprehensible way. The government expected this option to be available only in extreme cases²⁹. So far, judges seem to take heed of the warning not to be too generous. Behaviour that is merely reprehensible but not severely reprehensible will not lead to compensation, even though the employer was wrong.³⁰ The question where to draw the line is one of the most heatedly debated issues in doctrine,³¹ and from case law it becomes clear that judges take into account a wide variety of circumstances and weigh them according to their individual judgement.³² For example, the Amsterdam district court takes into account that the employer was negligent with regard to re-integration of the employee during sickness. However, the employer was sanctioned for that and mended the situation. Taking part in a special scheme for older employees was a disadvantage for the employee in question, but there was no way the employer could have foreseen this. Therefore, no equitable compensation is awarded. The Central Netherlands District court in another case awards the equitable compensation. The decisive facts are that the employer did not protect the employee when she told him that she was mobbed, ridiculed and shunned. Furthermore, the employer did not try to mend the situation, refused reintegration in another function and place and just wanted to be rid of the employee.

Even though the equitable compensation is meant to compensate for the wrong done and to act as a deterrent for the employer not to display this kind of behaviour again, the compensations so far are generally speaking much lower than the "neutral compensation" that existed until 2015.³³ Until now, the average equitable compensation if the employee asks for the termination of the contract by the judge under art. 7:671c BW equals 1,56 monthly salaries per year of seniority, and even this is due to one judgment allowing a huge compensation.³⁴ If this one judgment is taken out of the equation, compensation is a mere 0,78 monthly salary per year of service.³⁵ As already indicated, this is much lower than the

27 The law contains temporary measures for small businesses and elderly workers, leading to different calculations.

28 If it is claimed, it is awarded in 77% of the cases P. Kruit, 'Statistiek Ontbindingsprocedure: de balans opgemaakt na een jaar Wwz', *ArbeidsRecht* 2016/35.

29 The so-called mouse-hole (*muizengaatje*).

30 See e.g. Ktr. Roermond, 21 november 2016, ECLI:NL:RBLIM:2016:9997.

31 See already the worries of the Council of State, *Kamerstukken II*, 2013/14, 33818, nr. 4, p. 46; S.F. Sagel, Het muizengaatje verdient de hoofdprijs, *TRA* 2014/96; B. Schouten, Ernstig verwijtbaar handelen of nalaten: over de omvang van een muizengaatje, *TAP* 2015, p. 60-71.

32 See e.g. Ktr. Amsterdam, 14 oktober 2016, ECLI:NL:RBAMS:2016:6977Ktr. Utrecht, 22 februari 2017, ECLI:NL:RBMNE:2017:543.

33 The so-called District judge formula (*Kantonrechttersformule*), a way of calculating compensation for termination of the contract according to the old art. 7:685 BW.

34 Ktr Alkmaar, 22 januari 2016, ECLI:NL:RBNHO:2016:553.

35 P. Kruit, 'Statistiek Ontbindingsprocedure: de balans opgemaakt na een jaar Wwz', *ArbeidsRecht* 2016/35.

sums due under the old system. However, as lowering the cost of dismissal was one explicit aim of the changes in 2015, this is not surprising. The main problem for Dutch advocates, legal experts and judges is, that the government offered no guidance whatsoever with respect to the calculation of the equitable compensation. Therefore, the individual judges' approaches differ widely, from (contrary to the Parliamentary history) using the old formula,³⁶ not compensating for the consequences of the dismissal (as this is already compensated in the transitory compensation),³⁷ compensation for the loss of the job notwithstanding the transitory compensation,³⁸ and judges who also compensate secondary damage, like loss of pension rights.³⁹ Even the first judgement by the Supreme Court on this matter from the end of June 2017 did not offer much guidance.⁴⁰ Het Supreme Court made clear that the equitable compensation should reflect the seriousness of the employer's fault, but should not be punitive in character. Furthermore, factors such as age or length of service – although already taken into account in the transitory compensation – can still play a role with regard to the equitable compensation. So, even after this first judgement in highest instance, considerable doubts and discussions remain.

CONCLUDING REMARKS

It seems that with the reforms of 2015, Dutch dismissal law has become more transparent and fairer on several points. This relates to the fact that the employer can no longer choose the procedure, the fact that compensation awarded under both procedures is the same and the fact that some compensation will usually be due. The choice of employees to be dismissed was already limited and, in fact, remains so. Even though collective agreements offer nearly unlimited freedom to decide on alternative selection criteria for economic dismissals, the instrument is not used to a great extent. It is usually limited to the application of the 10% talent rule. However, as explained above, the use of art. 16 necessitates a clear and consistent policy. So far, I have not seen a social plan which completely departs from the Decree on dismissal.

On the other hand, one main point remains unclear, the equitable compensation. The lack of clarity concerning the access to the equitable compensation (when is something seriously reproachable?), and the calculation of the compensation and the approximate sum to be awarded, has led to much controversy, legal dispute and – so far – conflicting judgments. In collective dismissals, social plans usually offer a compensation which is higher than the transitory compensation, but less than the “neutral dissolution” formula would have offered until 2015.

36 Rb. Amsterdam, 29 januari 2016, ECLI:NL:RBAMS:2016:400.

37 Rb. Amsterdam, 7 december 2015, ECLI:NL:RBAMS:2015:8752, JAR 2016/2.

38 Rb. Midden-Nederland, 21 april 2016, ECLI:NL:RBMNE:2016:2440, RAR 2016/165; Rb. Noord-Holland, 28 juni 2016, ECLI:NL:RBNHO:2016:5444, RAR 2016/169.

39 Rb. Noord-Holland, 28 juni 2016, ECLI:NL:RBNHO:2016:5444, RAR 2016/169 en Hof Den Haag, 22 maart 2016, ECLI:NL:GHDHA:2016:715, JAR 2016/111

40 HR 30 juni 2017, ECLI:NL:HR:2017:1187