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FAIR COMPENSATION FOR INDIVIDUAL DISMISSAL

1. This contribution discusses the first judgment in cassation offering some clarity concerning the new equitable indemnisation. Since July 2015, Dutch dismissal law allows two types of compensation. The first is the fixed, standard indemnisation, awarded when the employer decides to terminate an employment relation that has lasted at least 24 months and the termination is not related to seriously reprehensible behaviour on the employee's side. The aim of this indemnisation is a double one. It is meant to compensate for the loss of the job, but also intends to facilitate the process of finding a new job, hence the name transitory compensation (*transitievergoeding*). In the words of the legislator: with this amount, calculated according to the rules set out in art. 7:673 BW, the "normal" consequences of a "normal" dismissal are fully compensated. The second indemnisation is the so-called equitable indemnisation. This is due in exceptional circumstances, e.g. if the employer has acted in a seriously reprehensible way. This concept, which is new in Dutch law, has not been defined during the parliamentary debates. The only thing the debates make clear is that this refers to extraordinary situations, in which there is not merely fault at the employer's side, but grave faults. It is this wrongful employer behaviour that the indemnisation is meant to compensate and to prevent for future cases.

2. However, this lack of clarity concerning the equitable indemnisation has led to much debate in doctrine and to wildly differing judgements in first and second instance. Scholars as well as judges found it difficult to figure out the borderline between "merely" reprehensible behaviour and seriously reprehensible behaviour in the first place. This has led to some bizarre judgements, like the one about a teacher who gave his pupils the answers to a test beforehand which was not deemed to be seriously reprehensible. After all, the teacher had not done so for personal gain. Another main issue was the question which factors would be relevant in order to calculate the equitable indemnisation. This has been made more difficult by the change in the system in 2015. Until then, an manifestly unreasonable dismissal could lead to compensation (art. 7:681 BW old). The Court of cassation had clarified in 2009 and 2010 that this was not an automatism. In the first place, the obvious unreasonableness had to be established, and only then could any compensation be calculated. The main factor for this calculation were the consequences of the dismissal for the employee (*gevolgencriterium*). However, with the new law, the general consequences of dismissal are already compensated in the fixed compensation. Therefore, insecurity reigned concerning possible factors that are relevant for the calculation of this extra compensation.

3. Therefore, with insecurity concerning not only the question when, but also how much to award, ideas of scholars and judgements showed substantial variation. By now, doctrine seems unanimous in assuming that the compensation that is due because of the employer's seriously reprehensible behaviour should be related to the seriousness of the fault or wrongdoing.

Equal to loss of wages

However, some scholars, and quite some judges interpreted this in a way that lead to the award of punitive damages. They found some justification in the parliamentary debates, during which it had been stated several times that the compensation should also aim at preventing the employer from acting like this ever again.

4. Judgements in factual instance show the same three tendencies. One group of judges awarded compensation without any motivation, merely stating that as the employer had acted in a seriously reprehensible way, that this was something extraordinary and therefore compensation amounting to ... would be awarded.

A second group of judgments relates the equitable compensation to the wages which would have been due, had the employee asked for annulment of the termination instead of the equitable compensation. Those judges argue that in these cases, the compensation should be regarded as the equivalent of the annulment and therefore should be equal in amount.

Finally, a group of judges calculates the compensation mainly or even exclusively with regard to the question which amount could be seen as punitive damages to the employer.

5. In these circumstances, the Court of Cassation was asked to decide a case concerning the equitable compensation. The case was about a hairdresser who, after a conflict concerning vacations, was dismissed. She claimed equitable compensation next to the fixed compensation. The two lower instances awarded compensation, but in cassation, the hairdresser claimed that it had been wrongly calculated as the two lower instances had not taken into account the consequences of the dismissal to a sufficient degree, had failed to appreciate that the indemnisation should have a punitive character and should at least amount to the amount of wages missed.

The Court of Cassation starts with a brief explanation of the system. The fixed indemnity is meant to cover the normal consequences of a dismissal, such as losing the job and the effort of finding a new one. The equitable compensation, in contrast, is only due in extreme cases, namely where the employer acts in a seriously reprehensible way. It therefore seems – though the Court of Cassation does not say so explicitly – that in a first step, the seriously reprehensible behaviour of the employer must be determined. Concerning the calculation of compensation, according to the Court to Cassation, the only consequences of the dismissal which can be relevant in calculating the equitable compensation are those directly linked to the employer's behaviour. Secondly, the Court of Cassation accepts the argument that the equitable compensation is the equivalent of the action in annulment. This means that the judge should take into account the wages that would have been earned, had the employee chosen to ask for an annulment of the dismissal. With regard to compensation for future wages, the judge will have to decide whether the employee's decision not to ask for annulment and thus for termination is due to the employers reprehensible behaviour. Another aspect is whether the employee has already found another job and has an income

from that. Finally, the fact that the fixed compensation is due, will also have to be part of the calculation. The Court of Cassation concludes by saying that the employee must be compensated for the employer's wrongdoing and that, for an employer, an unlawful dismissal should not be less costly than a lawful one. However, in the view of the Court, nothing in the Parliamentary debates shows that something like punitive damages had been intended. Yes, the employer should be prevented from acting like this again, but this is not the same as punitive damages.

6. The judgement of the Court of Cassation made at least clear which factors could, should or should not be taken into account when calculating the equitable compensation. As usually – after all, the Court decides a case and is not writing a handbook – the judgement could have provided more guidance.

In the first place, the judges could, without much effort, have clarified whether the two-step test developed under the old law with regard to manifestly unreasonable dismissals still holds. There, the appraisal was a clear two-step test, the first question being whether the situation qualified as manifestly unreasonable and only the second, which compensation would be equitable. It seems that the Court of cassation, like doctrine, assumes that this old structure still holds with regard to the new compensation. The first question to be answered therefore is whether the employer's behaviour can be qualified as seriously reprehensible. Only if the answer is a yes, the second question, namely: which compensation is adequate, will be addressed. As the parties to the dispute had not asked a question on this, the Court of Cassation did not explicitly deal with this. Considering that the law formulates the employer's behaviour as precondition for awarding the compensation, that the two-step test means continuation of a system and that doctrine is pretty unanimous, it seems safe to assume that this is indeed the way forward.

However, this does not make it easier to distinguish between merely reprehensible behaviour on the one side and seriously reprehensible behaviour on the other side. As these are factual questions, it is hard to imagine that the Court of Cassation will be able to offer more clarity on this front.

Concerning the factors to be taken into account and the calculation of the equitable compensation, the judgement is pretty clear. The bottom line seems to be that an unlawful dismissal must not pay off; it must be at least as costly as a lawful one for the employer. However, in this light some of the remarks of the Court of Cassation are slightly odd. Assuming that the main reason for the extra compensation is the fact that the employer acted manifestly reprehensibly, it is slightly out of place to take into account possible employee earnings with a new employer. It is true, the employee in that case has no (or lower) loss of income, but still, the employer acted manifestly against the law, good morals and the like. If an employee is e.g. discriminated and mobbed away, why should it matter for the compensation for the employer's wrongdoing that the employee has found a new job? Here, the problem that the Dutch system does not make a clear choice for the equitable compensation to be a kind of damages to be awarded because of the wrongdoing becomes obvious. Under the old law, the compensation due in case of manifestly unreasonable dismissal was meant to be, and was also called damages (*schadevergoeding*), which, also, as much as possible should be calculated concretely. Under the new law, there is a general, fixed compensation, because of the unfavourable situation of losing a job. There is also an extra compensation – the Dutch word used is the same in both cases (*vergoeding*) – in case the employer does something wrong. It seems that part of the old system remains, particularly the precondition for the “damages” to be awarded. However, whether the

compensation is also meant to be a form of damages, remains unclear from the judgement. In doctrine, several scholars argue that it should actually be seen as a form of damages, but without the need to calculate the damages according to concrete losses.

Another aspect that is still not entirely clear is why the fixed transitory compensation should have consequences for the equitable compensation as both are based on different grounds. The first is, after all connected to the dismissal as such, the second to the wrongdoing. Does this mean that there are cases in which the first step: can the employer's behaviour be qualified as seriously reprehensible, has to be answered with yes, while this does not lead to extra compensation? How should this relate to the statement that an unlawful dismissal should not pay off? Admittedly, the Court never says that there should be extra damages just because of the unlawfulness, but then this could mean that the unlawful dismissal is as effective and not more costly than the lawful one.

Therefore, at least in my view, once it has been established that an employer has acted in a seriously reprehensible way, this should lead to some compensation, even a token one, in order to prevent future actions of the same calibre and to offer some "satisfaction" for the ex-employee, regardless of real damages incurred. However, at the moment, this is definitely not common ground.