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DORMANT EMPLOYMENT CONTRACTS IN THE NETHERLANDS

These Dutch news will focus on the problem of the so-called dormant employment contracts and the solution that was eventually found for that problem. A dormant employment contract is a contract that still exists, but that is not executed any more. The employer does not pay wages and the employee does not work. Essentially, the contract becomes an empty shell. As this situation was deemed undesirable, the legislator as well as the (lower) courts were regularly asked for solutions. In November 2019, the Supreme court finally obliged, taking into account future legislation. In this piece, I will discuss the problem of sleeping contracts, explain how and why they come into being, briefly touch upon the case law of the lower courts, discuss the legislator's reaction at some length and finally describe and analyse the Supreme Court ruling¹. I will also try to critically appraise the solutions that were offered.

I - DORMANT EMPLOYMENT CONTRACTS

The existence of dormant employment contracts is due to two particularities in Dutch law on dismissal. In the first place, an employer is not allowed to dismiss a sick employee during the first 104 weeks of sick leave². The employer must instead pay wages and try to re-integrate the employee in a suitable job³. The second key particularity is the fact that in Dutch dismissal law, the employer must pay the statutory severance pay in case he terminates the contract or has it terminated by a judge⁴. If the employee decides to request termination of the contract or has it rescinded by the judge, the statutory severance pay will only be due if the termination by the employee is a reaction to gross misconduct on the employer's side, practically a constructive dismissal.

So, what happened was that an employer who had already been paying wages of a sick employee for 104 weeks and had quite probably also incurred costs with regard to re-integration, simply did not want to terminate the employment contract, in order to avoid paying the statutory severance pay. The employee, still unfit for work, was left in limbo, with no rights to wages after 104 weeks and no termination of the contract, the employer was left with an employee whose paper presence might have interesting consequences in cases of collective redundancies or redundancies on economic grounds. Employees,

1 See ECLI:NL:HR:2019:1734 (Xella Kalkzandsteenfabrieken).

2 Art. 7:670 lid 1 BW.

3 Art. 7:629 BW.

4 Art. 7:673 BW.

who wanted the severance pay, tried several routes to get this compensation. In the first place, employees had contracts rescinded by a judge and asked for a statement that the employer's refusal to terminate the contract amounts to gross misconduct and therefore the severance pay was due. A second option was to argue that the employer's refusal was done in bad faith or contrary to the obligations as good employer.

II - THE REACTION OF THE LOWER COURTS AND THE LEGISLATOR REACTION

Originally, the lower courts were unsympathetic to the employees' argument that not terminating an employment contract merely to evade the statutory severance pay was « unfair » or bad employership⁵, even though the former minister of social affairs, Asscher had stated that this was not how a good employer should behave. Lower courts therefore would not accept the employee argumentation and decline the request for payment of the severance pay⁶.

The legislator deemed this situation - in which literally several thousand employees were left to their own devices - undesirable and reacted with a new law: the Act concerning the compensation for the severance pay⁷. This law was adopted in 2018 and will enter into force on April 1st 2020. It will apply retroactively to contracts terminated due to more than two years of sickness if the employee is deemed to have lost at least 80% of his earning capacities and there is no prospect of getting better. It will be financed from the General funds on unemployment, managed by a public body, the UWV and financed by higher premiums for employers for that insurance.

The act concerning compensation of the employer aims to remove the main reason for employers to not terminate the employment contracts and keep them dormant instead. The act leads to changes in several laws, adding an art. 7:673e to the Civil Code. This provision entails that the UWV, will - upon request of the employer - pay compensation in regard to the statutory severance pay due by the employer, if the contract was terminated due to long-term illness and the employee has lost more than 80% of his earning capacity. The compensation is equal to the statutory severance pay plus costs made for retraining, but is limited to the severance pay due at the first day termination of the contract is legally possible, of - if that amount is lower - the wages paid during that period. However, even after the law had come into being, employers were still resisting the urge to terminate employment contracts. The act did, however, make some lower courts change their minds and accept either the argument that the employer was wilfully obstructive or that, as good

5 Art. 7:611 BW as interpreted in case law.

6 See e.g. Rb Overijssel, 21 maart 2019, ECLI:NL:RBOVE:2019:1021; Rb Limburg, 3 april 2019, ECLI:NL:RBLIM:2019:3068; Rb Limburg, 4 april 2019, ECLI:NL:RBLIM:2019:3211; Rb Limburg, 30 januari 2019, locatie Roermond, ECLI:NL:RBLIM:2019:855; Rb Overijssel, 11 april 2019, ECLI:NL:RBOVE:2019:1471.

7 Law of 11 July 2018, containing measures with regard to transition payment in the event of dismissal due to economic circumstances or long-term disability (Stb. 2018, 234).

employer, he should have terminated the employment contract⁸. Therefore, a rift occurred in the lower courts and discussion about the right course⁹.

III - THE CASE TRIGGERING THE PRELIMINARY RULING

A case from the south of the country offered the possibility to ask the Supreme Court for a preliminary ruling. In that case, the employee had been performing physically demanding work for more than 20 years, when he developed back problems. He went back to work, but the problems persisted, finally resulting in him being unable to work for more than 104 weeks in a row. The employee receives full invalidity pension due to having permanently lost more than 80% of his capacity to earn a comparable income. His private life is difficult as well, he has a consumer credit of almost € 47.000, no income and relies on a food bank. The wife is seriously ill and bed-ridden¹⁰. In this case, the judge in first instance agrees to ask for preliminary questions to the supreme court, because of the conflicting opinions in the lower courts and fundamental legal questions involved.

The first two questions deal in essence with the Dutch law on modifications, where an employer may make a reasonable offer and the employee must reasonably engage in negotiations if the circumstances at work have changed¹¹. The question now is, whether this concept can be turned around: can the employee request a change? And if so: could change also mean termination? The third question builds on this: Could it be argued that persistent an on-going incapacity is a change in circumstances that justifies an employee proposal to terminate the employment contract by mutual agreement? Finally, if the first three questions are answered (partly) in the negative, can the employer nevertheless be required to agree to a termination, particularly, when compensation for the costs incurred is available?

IV - THE ANSWER OF THE SUPREME COURT

The Supreme Court answers the first three questions together, as they essentially all deal with the question whether an employee can prompt a change in the contract or even a termination. According to the Supreme Court, this principle, that due to changed circumstances at work an employer can propose changes to the employment contract and the employee must in all reasonableness engage in discussion, cannot be turned around to offer the employee leverage over the employment contract. The last question essentially seeks an answer to whether or not good employership, in certain circumstances, nevertheless implies that a dormant contract must be terminated – and the severance pay must be paid – if the employee so request and the employer has no reasonable interest in the prolongation of the contract.

The Court starts with a clarification on how the compensation must be calculated. The decisive factor is not the amount of money the employer can claim back, but the statutory severance pay. It can therefore occur that the employer is not fully compensated, e.g. in

8 Arbitration Board Healthcare 27 december 2018, KG 18/24, *AR-Updates.nl* 2019-0065.

9 See the opposite outcomes in *Vzr. in de rechtbank Den Haag* 28 march 2019, ECLI:NL:RBDHA:2019:3109 versus *Vzr. in de rechtbank Gelderland*, 29 july 2019, ECLI:NL:RBGEL:2019:3440.

10 ECLI:NL:HR:2019:1734, para 2.2.

11 HR 11 july 2008, ECLI:NL:HR:2008:BD1847.

case the gross wage paid is less than the statutory severance pay. The new art. 7:673e BW does not intend to cover all costs but merely to prevent the cumulating of wage costs and termination costs. According to the Supreme Court, this aim is reached, if the employee is offered the severance pay that would have been due on the first day the employer could have terminated the employment contract, meaning 104 weeks + one day. This reasoning applies irrespective of the employer's possibility to reclaim either the wages paid or the statutory severance pay.

This leads the Court to answer the actual question as follows: if there is a termination of contract due to long-term sickness, in principle, the employer - being a good employer - must agree to an employee proposal to terminate the employment relation by mutual consent, awarding the employee the statutory severance pay. This severance pay may be limited to the amount due on the first day on which the employment contract could have been lawfully terminated, i.e. after 104 weeks and one day. Exceptions are possible in case the employer has a reasonable interest in retaining the employment contract, e.g. in case the employee can be re-integrated or healing / ... is foreseeable. The fact that the employee has almost reached pensionable age is no such reasonable interest¹².

Conclusion

The ruling, together with the new law to come into force on April 1st 2020 made several things clear. In the first place, an employer will not be able to prevent paying the severance pay by staying silent once an employee has « completed » his 104 weeks of sick leave and is deemed permanently incapacitated for at least 80%. The employer will not always be fully reimbursed, and besides, he has to pre-finance the compensation, as he will only be compensated for his payment to the employee once the act enters into force.

The scholarly criticism is not so much directed against the judgement itself, but against the underlying preconditions. Although it is true that the law does not differentiate between sick and healthy employees and the only difference is that between pensioners and non-pensioners, it is still hard to conceive why everyone who is supposed to have no more possibilities to work must be given a compensation lump sum that is meant to help finding a new job. An easier way to prevent cumulating of financial burdens for the employer would have been to refuse the right to severance pay to those employees who have been sick for more than two years and do not have possibilities to get into any kind of work. However, this is not what the legislator wanted, for whatever reason.

12 The reason behind this is that the statutory severance pay is not due once the employee has reached pensionable age, which therefore would save the employer a lot of money.