

1. INTRODUCTION

In the Netherlands, legislation governing the employment contract is mainly to be found in the Dutch Civil Code, the majority of such provisions having binding force. Furthermore, there are a number of other legal provisions regarding working conditions, employee participation, flexibility, equality and security. The dismissal regulations in the Extraordinary Labour Relations Decree 1945 and the Dismissals Decree, on the basis of which the UWV Werkbedrijf (the work placement branch of the Employee Insurance Agency), the former Centre for Work and Income, may grant, or refuse to grant, an employer a permit to (give notice to) terminate an employment contract, are also important. Finally, additional arrangements are often made in collective and individual labour agreements.

2. THE DIFFERENT TYPES OF EMPLOYMENT CONTRACTS AND THEIR TERMINATION

2.1 THE OPEN-ENDED EMPLOYMENT CONTRACT

In the Netherlands, the open-ended employment contract is the most common type of employment contract. With the exception of a trial-period and/or a non-competition clause, the employment contract does not need to be formalised in writing, unless otherwise prescribed in a collective labour agreement. The question of whether an employment contract exists is answered in light of the circumstances of the relationship between an employer and a worker. If a worker, during a certain period of time performs paid work, and the employer has the right to give instructions with regard to the work to be performed and the manner in which it should be performed, this constitutes in principle an employment contract.

In open-ended employment contracts, a trial period may not be agreed for a period in excess of two months. A longer trial period will not be valid (and therefore void).

An employment contract for an indefinite period of time may only be terminated by mutual consent, by giving notice or by dissolution ordered by a subdistrict court. Termination by mutual consent is possible at all times, but may have serious consequences for the employee's social security rights. The employee may terminate an employment contract at all times by giving notice which is in line with the statutory or agreed notice period. The employer may only terminate the employment contract by giving notice which is in line with the statutory or agreed notice period after obtaining a permit from the UWV Werkbedrijf (the work placement branch of the Employee Insurance Agency)

A permit will only be granted if the employee is performing poorly or if there is an economic necessity for dismissing the employee and (in the last-mentioned case) if a certain order for dismissing employees on economic grounds is taken into account. Unilateral termination without observance of a notice period (and without permission of the UWV) is possible however only if there is an urgent reason for dismissal.

A termination by giving notice may be challenged before the subdistrict court. If the subdistrict court finds the dismissal to be manifestly unreasonable, it may reinstate the employment contract or grant a severance payment to the employee. The dissolution of an employment contract may be requested from a subdistrict court on grounds of poor performance of the employee or economic reasons. If the subdistrict court grants a request for dissolution, it will usually grant a severance payment to the employee based on the number of years of service, the age of the employee and the blame borne by both parties in respect of the dissolution.

2.2 THE FIXED-TERM EMPLOYMENT CONTRACT

Less common, but still quite popular, are fixed-term contracts. Fixed-term contracts offer employers more flexibility than employment contracts for an indefinite period of time. The parties to the agreement are free to agree on a fixed term.

If a fixed term is agreed upon, the employment contract ends upon expiry of the agreed period, unless the parties have explicitly agreed on a notice period. If the parties prolong their cooperation after the end date, unless otherwise agreed, the parties are deemed to have concluded a fixed-term employment contract for the same duration and under the same conditions as the former contract.

If the parties enter into more than three fixed-term employment contracts in a row and/or at least two fixed-term employment contracts with a total duration of more than three years, the last employment contract is converted into an employment contract for an indefinite period of time by operation of law.

In fixed-term employment contracts of two years or more, a trial period may not exceed two months. In fixed-term employment contracts of a duration of less than two years, a trial period may not exceed one month. A longer trial period is not valid (and therefore void).

A fixed-term employment contract may not be terminated early by giving notice unless this possibility has been explicitly agreed by the parties. Dissolution of a fixed-term employment contract is possible at all times. However, because of the time consumed by the dissolution proceedings and the severance payment, it is usually favorable to let the employment contract end upon expiry.

2.3 THE ASSIGNMENT CONTRACT

A company may hire employees with the purpose of placing them at the disposal of other companies for a shorter or longer period of time. Between the company and the employee, there will be a normal employment contract. Depending on the employee's length of service with the company, the possibilities for terminating such a contract of employment are more extensive.

3. SOCIAL CONTRIBUTIONS AND THE DIFFERENT TYPES OF BENEFITS IN THE NETHERLANDS

3.1 PRESENTATION OF THE DUTCH SOCIAL SECURITY SYSTEM

The public social security usually falls into two categories: national insurance schemes and social security benefits.

3.1.1 National Insurance Schemes

National insurance schemes are financed by employers and employees through contributions. The levels of benefits are fixed and usually relate to the income for which contributions have been paid. Within the national insurance schemes, an important distinction is made between employed persons' insurance schemes and national insurances. This distinction relates to the persons covered by social insurance laws.

The tax authorities are responsible for the levy of wage tax and national insurance contributions. The wage tax and national insurance contributions are advance levies of income tax and national insurance contributions. Those paying wages or benefits withhold wage tax and national insurance contributions, as a result of which the persons receiving the wages or benefits have to pay no or reduced income tax/national insurance contributions. Those obliged to withhold wage tax and national insurance contributions are called withholding agents. Those whose wages or benefits wage tax and national insurance contributions are withheld are called employees. The wage tax and national insurance contributions are generally considered employee debts.

The following national insurances exist in the Netherlands: the *Algemene ouderdomswet* (AOW - the General Old Age Pensions Act), *Algemene nabestaandenwet* (Anw - the Surviving Dependants Act), *Algemene wet bijzondere ziektekosten* (AWBZ – the Exceptional Medical Expenses Act), *Algemene kinderbijslagwet* (AKW – the General Child Benefit Act). Most of the national insurances are administered by the Social Insurance Bank, which is not responsible for levying the taxes (the tax authorities are) but for the benefits arising out of the national insurance schemes. In addition to wage tax and national insurance contributions, employee insurance contributions are withheld. The employee insurances are *Ziektewet* (ZW – the Sickness Benefits Act), *Wet Werk en Inkomen naar Arbeidsvermogen* (WIA - the Work and Income (Ability to Work) Act), *Werkloosheidswet* (WW - the Unemployment Insurance Act), *Wet Arbeid en Zorg* (WAZO – the Work and Care Act).

3.1.2 Social Security Benefits

These benefits are financed from the general resources (tax income) and the amounts are less fixed. Examples of general regulations are the *Wet werk en bijstand* (WWB - the Work and Social Assistance Act) and the *Wet voorzieningen gehandicapten* (WVG – the Services for the Disabled Act). Among the regulations for special groups are the *Toeslagenwet* (TW - the Supplementary Benefits Act) and the *Wet Inkomensvoorziening Oudere en Gedeeltelijke Arbeidsongeschikte Werkloze Werknemers* (IOAW – the Older and Partially Disabled Former Self-Employed Persons Income Scheme Act).

3.2 PENSION SCHEMES

3.2.1 Introduction

Pension schemes have, in fact, developed into an integral component of employment. Part of the individual's income is reserved for a pension scheme. The pension system in the Netherlands has three bands, which are also called pillars. This distinction between the pillars was set up based on the philosophy that three parties are responsible for the accumulation of an adequate pension scheme for the individual: the government, the employer and the individual.

3.2.2 The three pillars

THE FIRST PILLAR (basic income)

This pillar is regulated by three Acts: the *Algemene Ouderdomswet* (AOW – the General Old Age Pensions Act), the *Algemene Nabestaandenwet* (ANW – the Surviving Dependants Act) and the *Wet Werk en Inkomen naar Arbeidsvermogen* (WIA – the Work and Income (Capacity for Work) Act).

AOW (the General Old Age Pensions Act)

The AOW-benefit is a national insurance that applies to all the residents of the Netherlands. As stated in Section 7 AOW, persons must meet two requirements to be entitled to receive an old age pension: they must have attained the age of 65 and they must have been insured up to this age. On the basis of the AOW, a person may claim old age pension at the age of 65. This old age pension is based on the concept that, when attaining the age of 65, one is no longer employed and for that reason no longer receives an income from employment. The AOW is a loss of income regulation. The amount of old age pension is, however, not related to the individual's previous income, but to the minimum wage. The amounts are fixed and based on the type of household.

ANW (the General Survivors' Benefits Law)

On 1 July 1996, the *Algemene Weduwen- en Wezenwet* (AWW – the General Widows' and Orphans' Benefits Act) was replaced by the *Algemene Nabestaandenwet* (ANW - the Surviving Dependants Act). This act provides for a benefit in case of death: the ANW-benefit provides entitlement to a benefit for the surviving spouse and unmarried partner who used to share the deceased's household.

WIA (the Work and Income (Capacity for Work) Act)

On 1 January 2006, the *Wet arbeidsongeschiktheid* (WAO - the Invalidity Insurance Act) was replaced by the *Wet Werk en Inkomen naar Arbeidsvermogen* (WIA - the Work and Income (Capacity for Work) Act). This act consists of two different regulations:

- The *Werkhervatting Gedeeltelijk Arbeidsgeschikten* (WGA - the Return to Work (Partially Disabled) Regulations), first of all provides for a social security benefit based on the last earned wage. When this ends, there may be entitlement to a subsequent benefit. A distinction is made here between partly disabled workers who work and those who do not work. A partly disabled worker who doesn't work, or doesn't work sufficient hours a week, is entitled to a subsequent benefit of 70 percent of the minimum wage multiplied by the percentage of disability (this is determined on the basis of the degree of wage loss as a consequence of disability). Someone who works will get a supplementary benefit of 70 percent of the difference between the last earned wage and

the wage earned in employment. For this, however, the person concerned must work sufficient hours.

- for people who are completely and permanently disabled, returning to work is not possible. An employee is completely and permanently disabled if he cannot earn more than 20 percent of his last earned wage and has no prospect of recovery. The *Inkomensvoorziening Volledig Arbeidsongeschikten* (IVA - the Fully Disabled Workers Income Scheme) provides for a benefit which is based on the last earned wage (up to a maximum of 70 percent of the hourly wage) and thereafter a subsequent benefit (70 percent of the minimum wage, progressively increased to reflect the length of time the person was in employment). Employees who now earn less than 35 percent of their wage are not subject to the law for the partly disabled, but should remain in the service of the employer as far as possible.

THE SECOND PILLAR (consisting of supplementary occupational pensions)

This consists of the collective supplementary pension schemes of enterprises, branches of industry or occupational groups. These are supplementary pension schemes based on the employment relationship. They therefore arise from the employment relationship and are mainly provided for in individual employment contracts or are arranged collectively through negotiations and contracts between employers (or employers' organisations) and employees (or employees' organisations). The administration of these supplementary pension schemes may be carried out by sectoral pension funds, occupational pension funds, company pension funds or insurers.

THE THIRD PILLAR (private provisions)

The third pillar consists of the insurances that are taken out individually and that are a source of income for old age, income in case of incapacity or income for the family in case of death of the insured. Among these individual arrangements are contracts for annuities, life insurances or old-age savings schemes taken out with life insurance companies. These are not schemes arising out of an employment relationship. These schemes create either a supplement to the first pillar - in the absence of a collective scheme - or a supplement to the first and second pillar. Such schemes are administered by insurers.

3.3 THE UNEMPLOYMENT BENEFITS SYSTEM

3.3.1 Characteristics

A typical characteristic of the Dutch *Werkloosheidswet* (WW - the Unemployment Insurance Act) is that claimants are considered unemployed when they "lose" at least five working hours per week. In other words, claimants do not have to be completely out of work in order to be considered unemployed. In most, if not all, employment benefit schemes in other countries a basic condition for the allocation of benefits is that the claimant is completely out of work.

A second characteristic of the WW is that the rules of the Act take the right to the benefit rather than the claimant as a starting point. For example, the Law does not say: 'the employee is no longer entitled to benefit if he takes up work again'. Instead, it says: 'the right to benefit ends insofar as the claimant is no longer unemployed'. A consequence of this system is that in the case of subsequent losses of working hours, two rights can exist at the same time in respect of one and the same claimant.

A third characteristic of the WW, in common with other Dutch social insurance laws, but in contrast to foreign systems, is that there are no thresholds and, as a result, workers in small part-time jobs are also covered.

3.3.2 Type of unemployment benefit

As of January 2006 there is only one type of employment benefit, the wage-related benefit.

In order to be entitled to the wage-related benefit, a claimant has to satisfy the following entitlement conditions:

- he has to have an unemployment-insurance. This is usually the case for employers under 65 years of age;
- he has to satisfy the conditions in relation to past employment, meaning that in the period before his unemployment he has worked 26 out of 36 weeks, and in the 4 out of 5 years before his unemployment he has worked at least 52 days a year;
- he has to be unemployed, which means that he must suffer a relevant loss of working hours; he must no longer be entitled to a wage for the hours during which he does not work; he must be available for work; and
- there must be no grounds for exclusion.

The duration of entitlement to the wage-related benefit depends on the duration of the claimant's past employment. Every year of employment entitles the employer to one month of benefit. The benefit entitlement has a maximum of 38 months.

During the first two months the unemployment insurance pays 75 per cent of the last earned wage. After that it pays 70 per cent. There is a ceiling value to the wage over which the percentage is calculated, namely €186,65 per day.

Up to January 2006 there used to be a second type of benefit, the short-term benefit. This has been abolished, but there is an exception: employers who meet the 26-out-of-36-weeks requirement but not the 4-out-of-5-years requirement can apply for an unemployment benefit for a maximum of 3 to 4 months.

3.4 SUPPLEMENTARY SOCIAL PROTECTION

In the Netherlands, there are three benefits which guarantee a so-called social minimum income: *Wet Werk en Bijstand* (WWB - the Work and Social Assistance Act), *Wet Inkomensvoorziening Oudere en Gedeeltelijke Arbeidsongeschikte Werkloze Werknemers* (IOAW – the Older and Partially Disabled Unemployed Workers Income Scheme Act) and the *Toeslagenwet* (TW – the Supplementary Benefits Act).

Wet Werk en Bijstand (WWB – the Work and Social Assistance Act)

On 1 January 2004, the *Algemene bijstandswet* (Abw - the Social Assistance Act) was replaced by the *Wet Werk en Bijstand* (WWB – the Work and Social Assistance Act).

Section II Subsection I WWB stipulates that all Netherlands citizens who find themselves with inadequate financial resources to meet their essential living costs, are entitled to government assistance. The social assistance benefit is the last safety net of the Dutch social security system. The following persons do not qualify for a social assistance benefit however:

- persons lawfully deprived of their liberty;
- persons serving as conscripts or doing alternative military service;
- persons who are unemployed due to work interruption or a lock-out;
- persons who stay abroad longer than four weeks;
- persons under the age of 18.

The following costs are not considered as essential living costs:

- maintenance obligations;
- penalties;
- damage suffered or caused;
- premiums for public insurances;
- costs of medical treatment considered as development medicine, or costs incurred abroad.

The municipal authorities use net basic amounts which are fixed nationwide, known as the social assistance benefit levels, to calculate the amounts of social assistance benefits. Each group has a separate standard amount. The final amount is fixed by the municipal authorities. The social services can award a supplementary allowance but both the basic amount and the supplementary allowance may also be reduced.

Wet Inkomensvoorziening Oudere en Gedeeltelijke Arbeidsongeschikte Werkloze Werknemers (IOAW – the Older and Partially Disabled Unemployed Workers Income Scheme Act)

The IOAW is intended to provide older and partially disabled unemployed persons with an income. The IOAW benefit supplements the (family) income bringing it up to the minimum guaranteed income level. Like the social assistance benefit (WWB), the IOAW benefit is provided by the municipal authorities.

To qualify for such a benefit, one of the following conditions must be met:

- persons who have become unemployed at or after the age of 50. They may claim an IOAW benefit on expiry of the wage-related unemployment benefit (and possibly the continuation benefit);
- persons at or above the age of 57,5 who have become unemployed if they meet the working weeks' requirement but not the four-out-of-five-years requirement for the unemployment benefit and who are then granted a short-term unemployment benefit. On expiry of this, they may claim an IOAW benefit; or
- partially disabled persons (less than 80%) who already received an IOAW benefit on 28 December 2005. However, a person does not qualify for a supplementary allowance under the *Toeslagenwet* (the Supplementary Benefits Act) if he or she has a partner who was born after 31 December 1971 and does not have a child under the age of 12.

Since the introduction of the Work and Income (Ability to Work) Act (WIA) on 28 December 2005, the IOAW no longer applies to partially disabled employees. In the course of 2006, the IOAW benefit will be replaced by a supplementary benefit under the *Toeslagenwet*. Persons who do not qualify for this supplementary benefit remain entitled however to an IOAW benefit.

Toeslagenwet (TW – the Supplementary Benefits Act)

The *Toeslagenwet* supplements an employee's salary in cases where his employer does not pay more than 70% of the employee's salary during the second year of his sick leave and where the employee's income falls below the social minimum.

A person qualifies for a supplementary benefit if:

- he or she is married (or cohabitating) and the joint income is lower than the gross minimum salary;
- he or she does not have a partner, has a child under the age of 18 and his or her income is less than 90% of the gross minimum salary; or
- he or she does not have a partner and his or her income is lower than 70% of the gross minimum salary.

A person does not qualify for a supplementary benefit under the *Toeslagenwet* if:

- he or she is under the age of 21 and living at home;
- he or she is married (or cohabitating) with a partner who was born after 31 December 1971 and has no child under the age of 12 living at home.

4. FOREIGNERS WORKING IN THE NETHERLANDS – TRANSFER OF UNDERTAKINGS

4.1 FOREIGNERS WORKING IN THE NETHERLANDS

One of the principles within the European Economic Area (EEA) is the free movement of employees. For EU citizens, this means that in principle, they may work in any other Member State. Employers intending to hire foreign workers must comply with the rules laid down in the *Wet arbeid vreemdelingen* (*Wav* – the Foreign Workers (Employment) Act).

Before the employer may employ a foreign employee, he must first have tried to fill the vacancy with either a Dutch or an EU employee. This implies that the employer must first look for suitable applicants in the Netherlands and in the EU countries. Only if no suitable applicants are found, foreigners from other countries in the EEA may be recruited. If this does not succeed either, employers may employ suitable candidates from countries outside the EEA. Employers must, however, prove, under Section 9 of the *Wav*, that they have made sufficient efforts to fill the vacancy with Dutch, EU or EEA workers.

To be allowed to employ a foreign employee, the employer and the employee must go through the necessary formalities so that the employee can legally work for a Dutch employer in the Netherlands. In addition, he or she must have a residence permit.

Foreign nationals from outside the EU who want to stay in the Netherlands for a period in excess of three months require a residence permit. They also require a special visa, a *Machtiging tot Voorlopig Verblijf (MVV)* (an authorization for temporary stay), to be allowed to stay in the Netherlands. Both the residence permit and the *MVV* are applied at the embassy/consulate in the foreign national's home country through the *Immigratie en Naturalisatie Dienst (IND)* (the Immigration and Naturalization Service). The employer applies for an *MVV* and the foreign

national applies for a residence permit. After an *MVV* is granted, it is sent to the embassy/consulate in the foreigner's home country for him to collect.

Employees from outside the EEA usually (also) require a work permit (*TWV*). Each employer who wishes a national from a country outside the European Union to perform work for them require a *TWV*, which is to be applied for with the *UWV Werkbedrijf* (the work placement branch of the Employee Insurance Agency) . A *TWV* is only issued if it has been proven that the grounds for refusal, described in Section 8 Subsection 1 and Section 9 of the *Wet arbeid vreemdelingen*, do not apply to this foreign national.

4.2 TRANSFERS OF UNDERTAKINGS

4.2.1 Transfer

If an employee is transferred to another branch against his or her will, his or her contract must provide for it (mobility clause). The collective agreement may also have clauses regulating this situation. If the contract does not allow a transfer, the employer must prove urgent reasons to be allowed to deviate from the contract. Even if the employer is allowed to transfer employees, the courts can determine whether he has used his powers reasonably. However the transfer can take effect sooner if there are such urgent reasons. The employer must consider the employee's personal interests as well. If disputes over this question are brought before the court, the court usually weighs both parties' interests in that specific matter.

4.2.2 Takeovers of Undertakings

There are three ways to take over a company: a share-for-share merger, a legal merger and a business merger.

Share-for-Share Merger

If company A acquires the majority of the shares of the company B, this is considered a share-for-share merger. Company B will continue to exist and, in principle there will be no changes to the employment contract.

Legal Merger

If companies A and B merge, they will continue to exist as a new legal person, C. All the employees of A and B will automatically become employees of C.

Business Merger

Company A acquires all the assets of company B. This is, in fact, considered to be a takeover, as a result of which company B transfers into company A. Dutch law provides for this situation with a special regulation in Part 8 of Title 7.10 of the Dutch Civil Code. This regulation's aim is to avoid the employee from being deprived of his or her legal position.

The protection of employees on the transfer of undertaking set out in the Sections 7:662-666 of the Dutch Civil Code is a result of the EC Directive and aims to "safeguard employees' rights in the event of transfers of undertakings, businesses or parts of businesses. On 17 July 1998, this EC Directive was amended. The main rule is that the rights and obligations arising out of an employment contract of employees working at the undertaking at the time of the transfer will be transferred to the transferee by operation of law (Section 7:663 of the Dutch Civil Code).

In principle, after a takeover, all the rights and employment conditions of the employee will remain the same with the new employer. It remains, however, possible to apply the transferee's own collective bargaining arrangement from the moment it is renewed after the transfer (Section 14a Wet CAO and Section 2a Wet AVV). An exception is also made for the rights and obligations in relation to pension schemes. The regulation also does not apply to insolvent undertakings. Because the act is a result of an EC Directive, the decisions of the EC Court of Justice are relevant. For instance, in relation to the question of when there is a 'transfer', the Court held that it was crucial that the 'identity' of the undertaking was retained. This will depend on whether buildings, appliances, other assets, customers, suppliers, products and also employees been transferred. The existence of a transfer will be decided after weighing up all these factors.

The Court of Justice held in the *Spijkers/Benedik* case that: "(...) *It is clear from the scheme of directive no 77/187 and from the terms of article 1 (1) thereof that the directive is intended to ensure the continuity of employment relationships existing within a business, irrespective of any change of ownership. It follows that the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the business in question retains its identity. Consequently, a transfer of an undertaking, business or part of a business does not occur merely because its assets are disposed of. Instead it is necessary to consider, in a case such as the present, whether the business was disposed of as a going concern, as would be indicated, inter alia, by the fact that its operation was actually continued or resumed by the new employer, with the same or similar activities. In order to determine whether those conditions are met, it is necessary to consider all the facts characterizing the transaction in question, including the type of undertaking or business, whether or not the business's tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred and the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities were suspended. It should be noted, however, that all those circumstances are merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation. (...)*".

4.2.3 Switching

Another possibility is that an employee switches companies within a group. It is, in that event, not always clear with which employer this employee has an employment contract: the original subsidiary or parent company or the division to which the employee has switched. It must, in such a case, be determined in light of the circumstances of the case if it is a case of both companies being considered as the employee's employer (equation).

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