Newsletter Employment Law

In this Newsletter we offer you in a short and concise manner information on recent case law, new legislation and current developments in the Dutch employment law arena

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1 | Employees are not entitled to payment of holidays not taken during a suspension, but are entitled to payment of holidays taken during forced company closures

An employee is not entitled to payment of holidays he applied for but does not take if, after applying for those holidays, he is suspended. After all, the employee could have amended his application for holidays, but failed to do so.

However, an employee is entitled to payment of holidays taken during forced or customary company closures of the employer, as the company closure did not follow from a written agreement. The above is a judgement given by the subdistrict court of Arnhem-Leeuwarden on 24 May 2016.

The facts

The employee had submitted an application for holidays to the employer. The employer had not responded to it. The employee was subsequently suspended. In the final settlement, the employer had deducted these holidays that were

not taken. In addition, the employer had deducted holidays the employee had taken during the forced company closure between Christmas and New Year's Eve. The employee demanded payment of these holidays.

First instance

With regard to the holidays taken during the suspension, the subdistrict court held that these were set before the employee was suspended. In addition, the employee had not requested that these holidays be revoked. With regard to the holidays taken during the period between Christmas and New Year's Eve, the subdistrict court found that the employer had been in the habit of closing the entire company during this period since its incorporation, and that the employee always took holidays during that period. In the opinion of the subdistrict court, this period can therefore, in principle, be considered a holiday period. The employee had not indicated to the employer that he did not wish to make use of these holidays. Therefore, the subdistrict court dismissed the claim for payment of those holidays.

Appeal

On appeal, the employee argued that the days during which he had not worked because he had been suspended could only be considered holidays to a limited extent, and only with his permission. In this regard, the employee referred to Section 7:636, subsection 1 of the Dutch Civil Code. However, this section pertains to the setting of holidays if there is no right to payment of wages. According to the Court of Appeal, reliance on (the analogy of) this section therefore does not hold. After all, this section does not provide for the situation in which the employee is suspended, and the employee was entitled to wages while being suspended.

In addition, the Court of Appeal rejected the employee's argument that his application for holidays should not have been taken to mean that he agreed to taking those holidays after being suspended (which was not foreseeable at the time he applied for the holidays). In this regard, the Court of Appeal found that the employee should have consulted with the employer if he had wanted to amend the application for holidays in connection with the suspension. In that case, the employer would have had to act like a good employer in assessing this request for an amendment. However, according to the Court of Appeal, being a good employer does not mean that the employer should have suggested moving the holiday period of its own accord. This even applied if the employer should have been able to understand that the employee's holiday would be overshadowed by employment related problems. Therefore, the Court of Appeal dismissed the claim regarding the holidays taken during the suspension.

The Court of Appeal did allow the claim regarding the holidays taken during the period between Christmas and New Year's Eve. According to the Court of Appeal, the employer did not state that the setting of these holidays was provided for in a written agreement. By law, setting collective holidays (company closure) requires a written agreement to that end. In addition, the Court of Appeal found that the mere fact that, in previous years, the employee had conformed to this unilateral allocation of holidays (whether or not through the passage of time), did not mean that the employee was obliged to do so (again) in this case.

Conclusion

1. Employers and employees have to agree on collective holidays (company closures) in writing. This can be included in the employment agreement, a personnel manual or a collective labour agreement.
2. The employee may amend an application for holidays in connection with unforeseen circumstances. The employee has to take the initiative to do this. In assessing such a request for an amendment, the employer must act like a good employer.

2 | Employee successfully appeals to the District Court after employer dismissed him with the permission of the Employee Insurance Agency (UWV).

(At the subdistrict court of Amsterdam, 22 April 2016, JAR 2016/133)

Since the implementation of the Work and Security Act (Wet Werk en Zekerheid – WWZ), employees can appeal against dismissal permits from the UWV. In such case, the subdistrict court can reinstate the employment agreement. As a recent judgement of the subdistrict court of Amsterdam shows, this can have major consequences.

So what was the issue? A small foundation had a number of employees. For a number of years, it had been struggling with significant negative equity, and it was afraid that it would not be able to face a financial setback. Therefore, the foundation made the position of coordinator redundant. It applied to the UWV for a dismissal permit for the employee who held the relevant position. According to the UWV, the foundation had reasonable grounds for terminating the employment agreement. Therefore, the UWV gave its permission to dismiss the employee. The foundation did so, paying the employee a transitional compensation.

The employee did not agree with his dismissal, and appealed to the subdistrict court. As it turned out, the case was not as clear-cut as initially thought. While the position of coordinator had been made redundant, the employee had been working in the position of Public Relations Officer for several months. In addition, while the equity of the foundation was negative, the negative equity was decreasing. The foundation's figures had been positive for a number of years. The employer had little to say in response to the employee's arguments. The subdistrict court subsequently came to a different conclusion than the UWV had: it ruled that the foundation had not had reasonable grounds for the dismissal. Therefore, the employee should not have been dismissed.

However, at the time, the employment agreement had been terminated for almost six months. Therefore, the subdistrict court ordered that the employee reinstate the employment agreement. With regard to the period between the two employment agreements, the employer was ordered to make up the difference between the employee's unemployment benefit and his monthly salary. In addition, the employee was allowed to keep the transitional compensation paid, partly as a compensation for the pension he will miss out on. The subdistrict court did not order the employer to provide for holidays, as the employee had not worked.

In this judgement, the subdistrict court was actually somewhat lenient, as it could have reinstated the employment agreement (and, as a result, the obligation to continue paying wages) retroactively. It did not do so as the foundation largely relies on subsidies.

As shown, having to reinstate an employment agreement can have major consequences for an employer. This does not just apply to cases like the case under consideration, in which it may not always be a surprise for the subdistrict court to order that the employment be reinstated. More often, it is a grey area, in which it is often difficult to judge in advance whether the UWV will accept an application for a dismissal permit. It is conceivable that, in cases like that, both employers and employees end up appealing to the subdistrict court. In addition, they can subsequently institute appeal proceedings with the Court of Appeal, and appeal in cassation to the Supreme Court.

It is best to prevent situations like these as much as possible. Therefore, it is important that a dismissal on economic grounds is substantiated as thoroughly as possible, and to act in accordance with the rules. Of course, we would be happy to assist you in this.

3 | The requirement that notification be given in writing

When it comes to the requirement that, in the event of a duty of notification, the relevant notification must be put in writing, there is no room for flexibility. This was the judgement of the subdistrict court of Alkmaar of 18 May 2016.

Employers must inform employees with an employment agreement for a definite period of time (of six months or longer) whether the employment agreement will be renewed no later than one month before the employment agreement ends, in writing. In the event of renewal, employers must also communicate the conditions under which the employment agreement is renewed, in writing. If an employer fails to comply with this duty to give notice, it will owe the employee a compensation that is equal to the amount of one month's salary (and a pro-rated compensation in the event of late payment).

In the case under consideration, the employee requested that the subdistrict court order the employer to pay a compensation to the amount of one month's salary. The employee relied on a failure to comply with the duty to give notice. The employer defended itself by arguing that it had informed the employee orally that his employment agreement would not be renewed and that the employment agreement would end. In addition, it had informed all the employees jointly, in writing, that the employment agreement of the employee would not be renewed. According to the employer, this meant that the employee knew what was going to happen.

The subdistrict court held that the oral notice is not valid. According to the subdistrict court, notice must be given in writing. In addition, the subdistrict court held that the written announcement made by the employer was a general announcement, rather than a personal announcement to the employee. According to the subdistrict court, the latter should have taken place. A letter the employer sent to the employee, in which the employer indicated that the employment agreement would end by operation of law, did not help the employer either. The same applied to an email in which the employer indicated that the employment agreement would be ending at the end of that month, and that the employer would like to schedule an evaluation interview the following day. According to the subdistrict court, these notices leave room for the possibility that a new employment agreement would be offered. The subdistrict court held that the employer had failed to comply with its duty of notification, and that the employer therefore owed the employee a compensation to the amount of one month's salary.

If employers do not wish to renew an employment agreement for a definite period of time, they must (i) inform the employee personally, (ii) in writing, that the employment agreement (iii) will not be renewed. It follows from the decision of the subdistrict court that an employer does not comply with its duty to give notice by informing an employee that his employment agreement will end by operation of law (on a certain date). In other words, it must be clear that the employment agreement is not going to be renewed. If an employer fails to give notice properly, the employee can claim a compensation to the amount of no more than one month's salary.

4 | The reflection period commences when agreement is reached on the essentials of the termination of the employment agreement.

A termination agreement is only valid if it is entered into in writing (the requirement that agreements must be set out in writing) Employees have the right to cancel a termination agreement within fourteen days of it being formed (the so-called 'reflection period'). The reflection period commences when agreement is reached on the essentials of the termination of the employment agreement (in writing). This was recently determined by the Court in Preliminary Relief Proceedings in Leiden.

The employer and the employee had negotiated on (the conditions that would apply to) a termination of the employment agreement by mutual agreement. On 28 January 2016, the employee's lawyer received a draft termination agreement. This contained the essentials of the termination of the employment and the statutory reflection period. On 29 January 2016, the employer's lawyer made a final offer to the employee's lawyer by email. That same day, the employee's lawyer informed the employer's lawyer by email that the parties had reached an agreement.

On 16 February 2016, the employee invoked the reflection period. The employer subsequently requested that the subdistrict court set aside the employment agreement conditionally, though only in the event that the employment agreement did not end by means of a termination agreement. The employee subsequently instituted preliminary relief proceedings. The employee claimed continued payment of wages and reinstatement.

According to the Court in Preliminary Relief Proceedings, case law shows that, on the one hand, the purpose of the reflection period is to prevent employees from feeling pressured by the employer to terminate the employment agreement, while employees are not (always sufficiently) aware of the consequences thereof. On the other hand, the reflection period gives employees the opportunity to obtain legal advice.

The Court in Preliminary Relief Proceedings found that it is important for the parties to have a demonstrable and concrete time at which the 14-day reflection period starts. According to the Court in Preliminary Relief Proceedings, this does not mean that the reflection period only starts after the parties have actually signed the (written) termination agreement. In respect of the requirement that the agreement must be set out in writing, the Court in Preliminary Relief Proceedings referred to a judgement of the Supreme Court, which was: 'that the requirement that an agreement must be set out in writing provides a special guarantee that the employee has carefully considered the consequences of the stipulation that is onerous to him.' Finally, the Court in Preliminary Relief Proceedings referred to case law that shows that the requirement that an agreement must be set out in writing can be met by means of Whatsapp messages and statements of agreement sent by email.

The Court in Preliminary Relief Proceedings found that the mere fact that the employee's lawyer confirmed by email that (today, i.e. 29 January 2016) the parties had reached agreement on the essentials of the termination agreement (including the stipulation concerning the right of reflection) provides sufficient evidence that the arrangements with regard to the termination agreement were known to the employee as of that date, and he agreed to them. According to the Court in Preliminary Relief Proceedings, signature of the (definitive) termination agreement is therefore not required. This means that the parties reached agreement on (the conditions that would apply to) termination of the employment agreement on 29 January 2016. This means that the employee was too late in invoking the reflection period. The claim for reinstatement and the claim for wages were dismissed.

Conclusion

It is favourable to the employer if the reflection period commences before both parties have actually signed the termination agreement. This decreases the risk of an employee (delaying the signature and, as a result) being able to rely on the statutory reflection period. Therefore, it is important to explicitly indicate during the negotiations when and under which conditions agreement is reached (in writing). The decision of the Court in Preliminary Relief Proceedings shows that this is the time at which the termination agreement is formed and the reflection period starts. We would obviously be happy to assist you in this.

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