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 | Dutch House for Whistleblowers Act

In the last few years, there have been a number of cases, both in the Netherlands and abroad, in which employees got in trouble after reporting abuse on the work floor. This is why the legislature has introduced the House for Whistleblowers Act (Wet Huis voor Klokkenluiders). The law came into effect on 1 July 2016.

The objective of the House for Whistleblowers Act is twofold: on the one hand, it offers protection to employees (which includes self-employed workers and others without an employment agreement) who are not afraid to raise the alarm about suspected abuse, and on the other, it aims to contribute to a solution to abuses in society.

First of all, the House for Whistleblowers Act stipulates that organisations with over 50 employees are obliged to adopt internal regulations for reporting abuse on the work floor. Secondly, pursuant to the House for Whistleblowers Act, a House for Whistleblowers has been set up.

Suspicion of abuse

An employee (or former employee) has a suspicion of abuse within the meaning of the law if this suspicion is based on reasonable grounds (a rumour or second-hand information is not sufficient) and the public interest is at stake as a result of that abuse. These reasonable grounds may arise from knowledge the employee gained with his employer, or from work he performed at another organisation. The public interest is at stake in instances such as a violation of statutory provisions, a danger to public health, a danger to safety of persons or a threat of damage to the environment. In addition, the public interest is at stake if, due to an improper act or omission, the proper functioning of a government organisation or company is under threat. If the employee is of the opinion that this is the case, he or she can report it.

Internal regulations

The basic premise of the act is that, before employees report abuse to the House for Whistleblowers, they must first attempt to report it to the employer itself in accordance with the internal regulations on reporting abuse. To this end, the act obliges employers (with 50 or more employees) to provide the people in its employment with a written overview (whether or not in digital form). In addition, employers must provide information on the legal protection employees are under when they report abuse and information on the circumstances under which an abuse can be reported externally to the House for Whistleblowers and the procedure involved. The internal regulations must in any case specify the following:

- the manner in which the internal report will be handled;
- a description of the definition of a suspicion of abuse;
- a reference to the employee to whom the suspicion of abuse can be reported;
- the obligation of the employer to treat the report confidentially if the employee so requests;
- the manner in which the employee will be protected after making the report; and
- the possibility for the employee to consult an adviser (of 'the House') confidentially regarding the suspicion of abuse.

For employers, an advantage of the internal regulations is that they will be able to take measures to resolve suspected or confirmed abuses sooner. Note that (in accordance with Section 27 of the Dutch Works Councils Act [Wet op de ondernemingsraden]) the Works Council has a right of consent in respect of any intended decision to adopt, amend or revoke such an internal procedure.

House for Whistleblowers

Where the internal regulations offer no solution, or the employee is of the opinion that he or she has been prejudiced in connection with the report, the employee can turn to the Investigation Department of the House for Whistleblowers. The House consists of an Advice & Assistance Department and an Investigation Department. Primarily during the internal reporting procedure, the duties of the Advice & Assistance Department consist of i) providing information and advice to employees, ii) referring employees to the correct authorised bodies and iii) providing general information and psychosocial assistance. At the request of the person reporting the abuse or (in the event of several signs of abuse) on its own initiative, the Investigation Department can investigate the reported abuse. During such an investigation, the employer will be heard. Based on this investigation, the Investigation Department will draw up a public investigation report. This report will contain an analysis of the abuse and set out the (suspected) causes, the extent of the consequences and possibly also recommendations to the employer. The employer and the person who reported the abuse can comment on the report in writing. The report will be made public, though without reference to names and organisations. If recommendations are made to the employer, the employer must inform the Investigation Department within a reasonable term of how it will act on the recommendation. If the employer intends not to act on the recommendation at all, it will have to provide the Investigation Department with reasons.

Does your organisation employ more than 50 people? If so, make sure you have internal whistleblower regulations in place. Naturally, we would be happy to assist you in drawing up such regulations.

2 | Expansion of works council's right of consent with regard to pensions

If an employer offers a pension scheme, whether or not because it is obliged to do so, this is an employment benefit of the employer. Therefore, it is important that employees can have a degree of influence on this. Employees will exercise most of this influence through the right of consent of the works council. Practice has shown that the existing regulations on the right of consent with regard to pension are too unclear, too incomplete and too unstructured. The legislative proposal for 'Amendment to the Works Councils Act and the Pensions Act in connection with the works council's powers with regard to the employment benefit of pension (34378)' aims to resolve this.

Current powers

At present, the right of consent of the works council is provided for in part in the Dutch Works Councils Act (Wet op de ondernemingsraden – WOR) and the Dutch Pensions Act (Pensioenwet). The works council only has a right of consent in respect of an intended decision of the employer to adopt, amend or revoke a pension scheme insofar as this pension scheme is administered by an insurer. If the pension scheme is

administered by another administrator, the works council does not have this right.

In addition, at present, the works council does not always have a right of consent in respect of amendments to a pension scheme. If the pension scheme has been placed with a corporate pension fund, a mandatory sectoral pension fund or a non-mandatory sectoral pension fund, for example, the works council will, under certain circumstances, only have a right of consent in respect of the adoption or revocation of the pension agreement, and not in respect of its amendment.

Finally, the works council's right of consent currently only pertains to the pension agreement and not to the corresponding administration agreement or administration regulations, even though the administration agreement or administration regulations do have a direct influence on the pension agreement.

Changes

The legislative proposal aims to clarify and simplify the right of consent in respect of pension schemes. For the sake of clarity, the right of consent in respect of pension schemes will, to the extent possible, be provided for in only the Works Councils Act.

In addition, the right of consent will be simplified as the legislative amendments aim to no longer make a distinction between the various types of pension administrators. The works council will have a right of consent, regardless of the type of administrator the pension has been placed with. In addition, the works council will always have a right of consent in respect of amendments to a pension scheme as well. As indicated above, this right was limited previously.

In addition, the new rules stipulate that the right of consent will also apply to the administration agreements. This means that the works council will have a right of consent in respect of the adoption, amendment or revocation of, among others:

- rules on the manner in which the contribution owed is determined;
- the standards on the basis of which and the conditions under which supplements are granted; and
- the decision to place the pension agreement with a certain pension administrator.

Exceptions

The works council does not have a right of consent if the specifics of the pension have already been laid down in a CLA or regulations under public law, for example, or if the pension is administered by a sectoral pension fund with which the pension had to be placed. The idea behind this is that the social partners have already put enough thought in these pensions and the interests of employees have already been sufficiently represented.

What does all this mean in practice?

The aforementioned amendments mean that, from now on, the employer will require the consent of the works council for all decisions concerning a collective pension scheme. This procedure will take some time, which means that the employer is well-advised to take this into account when planning decisions. In addition, the expansion of the right of consent may lead to multiple legal proceedings. A good relationship with the works council may help prevent legal proceedings and make the decision-making process run more smoothly. In addition, regularly informing the works council and offering pension courses may help as well, as pensions are often considered complicated matter.

The Senate has now adopted the legislative proposal. The law will take effect at a time to be decided by royal decree. At the time of writing, the date was not known yet.

3 | Employee using cocaine: still entitled to transitional compensation?

Over a year ago, the legislature introduced statutory transitional compensation. In principle, every employee who has been employed with an employer for at least 24 months and whose employment agreement is terminated, is entitled to transitional compensation. The compensation will not be payable only in the event of a serious imputable act or omission on the part of the employee. But what constitutes a serious imputable act? The District Court of The Hague[1] recently delivered a judgment on this subject.

The background

The employee in question had been employed with a port authority in the position of 'terminal operator' since 1984. In 2013, his employer confronted him about his behaviour on a number of occasions: he was regularly late for work, often reported sick, behaved aggressively and fell asleep on the job. The employer suspected that the employee was struggling with an alcohol and drug problem. A process involving interventions, consultations with the company physician and arduous reintegration efforts for the employee followed.

In early September 2015, things went wrong. The employee caused an accident at work with a vehicle (a 'Tugmaster'). The investigation into the incident showed that the direct cause of the accident was that the employee had either had a black-out

[1] District Court of The Hague, 1 July 2016, ECLI:NL:GHDHA:2016:1868.

or had fallen asleep. The drug test that was subsequently carried out confirmed the employer's suspicions: the employee's sample contained traces of cocaine.

The Subdistrict Court

Shortly afterwards, the employer applied to the Subdistrict Court, requesting that it dissolve the employment contract on the grounds of an imputable act, a damaged employment relationship and/or other grounds. In addition, the employer requested that the Subdistrict Court rule that no transitional compensation would be payable.

The Subdistrict Court found that there was sufficient reason to dissolve the employment contract within a shorter period than the statutory notice period. According to the Subdistrict Court, the employee had committed a serious imputable act, which meant that he was not entitled to transitional compensation. The employee did not accept this decision; he argued that, rather than his (recent) drug use, the cause of the problem was a burn-out.

Appeal

According to the Court of Appeal, the Subdistrict Court had rightly dissolved the employment contract. However, in order for transitional compensation to be withheld, the imputable act must be qualified as serious. Unlike the Subdistrict Court, the Court of Appeal found that the facts and circumstances of the case provided insufficient grounds for that. The Court of Appeal considered that there had been a long employment relationship, in which the employee had performed normally for most of that time. In addition, the Court of Appeal found that it could not be ruled out that the employee had fallen asleep behind the wheel as a result of a physical burn-out, rather than the use of cocaine. As the employee had not committed a serious imputable act, the Subdistrict Court had also been wrong in not observing the applicable notice period. While the dissolution of the employment contract was upheld, the date was adjusted to a later date, and the employee was entitled to transitional compensation of EUR 75,000.

Practical consequences

This ruling will go against many people's sense of justice. It is hard to explain that in such a case the employee is still entitled to transitional compensation, as his behaviour was imputable, but not seriously imputable. So how far can an employee go before the right to transitional compensation can be denied? This ruling shows that an employee can go quite far.

This seems to be in line with the intentions of the legislature. Parliamentary history shows that acts are only considered seriously imputable in special circumstances. Examples of this include an employee repeatedly failing to comply with the check-up regulations that apply in the event of illness (even after suspension of wages), without valid reason, or an employee committing theft or fraud, causing him to no longer be worthy of the employer's trust. Special circumstances are rare: courts are not likely to rule that an employee has committed a serious imputable act. This judgment shows that the duration of employment can also play a role.

And even if the employee has committed a serious imputable act, the court can still rule that withholding the transitional compensation is unacceptable based on the principles of reasonableness and fairness. This may mean that the employee will be granted – full or partial – transitional compensation after all.2

Making it fairer, faster and cheaper. This is the angle of the Dutch Work and Security Act (Wet Werk en Zekerheid). However, in view of the above, it is highly debatable whether (all) these objectives have actually been achieved.

[2] Parliamentary Papers II, 2013/2014, 33 818, 3, page 113. 113.

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