

## **Dutch Labour Law**

*by Reinier W.L. Russell*

### **Introduction**

Foreign employers in the Netherlands should realize that there are many Dutch legal provisions protecting the interests of all employees working in the Netherlands. These are, among other legal provisions, the rules regarding holidays, minimum wages, working hours, employment of (partly) disabled workers, equal treatment, dismissals, works councils, collective bargaining (CAO), health and safety at the workplace, social security and social assistance. In the following, a few issues of Dutch labour law will be explained.

### **Pension and AOW age**

In the Netherlands the AOW age (retirement age) of 65 years is under pressure. For civil servants, turning 65 no longer automatically means termination of the employment (as this provision of the collective agreement was deleted). Whether private-sector employees can still take the automatic termination of employment contracts of indefinite duration at the retirement age for granted, has become increasingly questionable as well.

In the past, employers and employees could be relatively sure that employment contracts of indefinite duration would end automatically upon reaching the retirement age of 65 years. This automatic termination was confirmed by case law of the Dutch Supreme Court and specialist legal literature, especially, if the employment contract and the collective agreement included a provision to that end (retirement age stipulation). This situation has now changed.

In the past year, for instance courts in Amsterdam and Delft ruled that an employment contract of indefinite duration cannot end rightfully because of its nature. After all, 'indefinite' means 'without definite end', therefore it does not even end upon reaching the age of 65. Even if an employment contract of indefinite duration includes a provision for retirement, this does not mean, according to the judges, that the employment contract does indeed end upon reaching retirement age. However, it is still a valid reason that justifies an employee's dismissal. In short, if employers and employees do not take adequate measures, the employment contract does continue beyond the age of 65, with all the consequences related thereto.

How do we have to deal with the termination of employment because of retirement in the future? Legislation should provide a solution of course, however, this is not the case yet. Considering the grounds of the courts, the parties can in fact not arrange for the employee to retire at the age of 65 when entering into an employment agreement. However, reaching the retirement age still remains a valid reason for the employer (and the employee) to terminate the employment contract. In order to make sure that the employment contract ends, the employer may apply either for a dismissal permit or initiate termination proceedings before the 65<sup>th</sup> birthday of the employee. Whether this will become an issue for the employer depends on the employee. Generally, most employees still want to retire at age 65. If, however, the employer is certain that the employee wants to continue working after 65, he has to take measures well in advance. After all, the employee may reconsider and simply return to his work after his 65<sup>th</sup> birthday. This is difficult to anticipate but can be prevented by drawing up a so-called termination agreement.

All things considered, these are enough reasons to make arrangements with the employee at the age of 64 to ensure the termination of employment contracts in due time, as long as there is no legislation on this matter.

## **Severance payment in case of manifestly unfair dismissal**

There are several ways to terminate an employment contract in the Netherlands. The two most important ones are:

- 1) Dissolution by the Subdistrict Court (*kantonrechter*) upon request, in the course of which the employee is often awarded severance pay based on the so-called 'Subdistrict Court Formula' (*kantonrechtersformule*).
- 2) Requesting a dismissal permit from the Dutch Employment Board (*UWV Werkbedrijf*) and giving notice in due time. If the employee deems the dismissal to be manifestly unfair despite the proper notice, he may turn to the Subdistrict Court. If the Subdistrict Court judge also deems the dismissal to be manifestly unfair, he may award the employee severance pay. In such cases, there is no standard formula to calculate the severance pay, as opposed to the Subdistrict Court Formula used in the event of dissolution of employment contracts by the court.

During the last year, various Courts of Appeal set up and applied standard formulas to calculate severance pay in case of manifestly unfair dismissal. The Court of Appeal in The Hague drew up and applied the so-called ABC formula, which was the Subdistrict Court Formula, reduced by 30%. Other Courts of Appeal, including Amsterdam, introduced their own formula, similar to the Subdistrict Court Formula, the so-called XYZ formula. In this formula X proceeds from the weighted years of service, Y proceeds from the most recent remuneration, and Z is the correction factor considering the circumstances of the case. Z is set at a maximum of 0.5, unless there are very important reasons to apply another factor. However, the Dutch Supreme Court recently ruled that a standard formula is not suitable to determine this kind of compensation. The severance pay must be based on actual loss. The Dutch Supreme Court therefore rejected both the ABC formula and the XYZ formula in its rulings of November 27, 2009 and February 12, 2010. These decisions have put an end to the attempts of the Courts of Appeal to make the amount of severance pay more predictable.

Therefore, the outcome of manifestly unfair dismissal proceedings remains unsure. If the Court deems a dismissal to be manifestly unfair, the amount of compensation depends on many circumstances. Thus, it is no longer certain that the amount awarded will at all times be lower than the severance pay calculated by the Subdistrict Court formula.

## **Probation period**

Parties to an employment agreement for an indefinite period of time can, only in writing, agree upon a probation period of one or two months. If the employment is agreed upon for a definite period under two years, the probation period is limited to one month according to Dutch law. This probation period can only be agreed upon once per employee.

During the probation period both the employer and the employee are allowed to terminate the employment agreement without giving prior notice and with immediate effect. However, an employee may not be dismissed on the grounds of, for instance, pregnancy or illness or any ground of prohibited discrimination (for example: race, gender, age etc.). Thus, it is, for example, allowed to dismiss a pregnant employee during the probation period but is not allowed to dismiss her *because* of the pregnancy.

## **Fixed period agreements**

Dutch law acknowledges two types of employment agreements, agreements for an indefinite period and agreements for a definite period of time. However parties can not endlessly use employment agreements for a definite period of time because the allowed number of consecutive agreements is limited to three by law. In case of a fourth consecutive employment agreement for a definite period of time, it is (by operation of

law) automatically converted into an employment agreement for an indefinite period. Hence, the fourth employment agreement for a definite period will not automatically lapse after the agreed period of time. As a result, dismissal of the employee will become a time-consuming and costly procedure.

The same applies for two or more consecutive employment agreements that exceed a 36-months period in total (for example two consecutive employment agreements of two years). In this case the last employment agreement for a definite period, will also be converted (by operation of law) into an employment agreement of indefinite period, including all consequences.

## **Further information**

The labour law specialists at Russell Advocaten have been advising corporate clients for many years and will help you find legal and practical solutions concerning any labour law questions, among others the termination of employment contracts, illness, holidays, severance pay, and other labour law issues.

Contact: mr. drs. R.W.L. Russell (reinier.russell@russell.nl). For more information on collective dismissal, please consult our Handboek Ontslagrecht (Guide to the law on termination of employment – [www.russell.nl](http://www.russell.nl)).

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\* Part of this article was published in Het Financieele Dagblad (the financial daily newspaper in the Netherlands). For more information see [www.russell.nl](http://www.russell.nl)