

Legal Alert

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Double news about the cantonal court formula

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Introduction

With this special news report De Brauw draws your attention to two important recent developments concerning the cantonal court formula. On 30 October last, the cantonal court judges section decided to change the formula which dated from 1996. The most important changes and their practical significance are described in this Legal Alert. Attention will also be paid to a series of remarkable judgments given by the Hague Appeal Court on 14 October last, in which the cantonal court formula was held to be applicable to a manifestly unreasonable dismissal.

The cantonal court formula

Section 7:685 (8) of the Civil Code provides that if a contract of employment is dissolved the cantonal court judge may grant the employee compensation if he deems such to be fair in view of the circumstances of the case. In 1996, in order to bring more unification to the way in which cantonal courts calculated such compensation, the Cantonal Court Judges Section developed the cantonal court formula. According to the cantonal court judges, the formula is now due for an update. The definitive text of the new formula is not yet available. The Cantonal Court Judges Section, however, has already made the most important

changes known by means of a press release. The following changes will according to expectations be implemented as at 1 January 2009.

Calculation of years of service

The cantonal court formula comprises three factors. Factor A is the number of years of service taken into account. This factor must be multiplied by the gross monthly salary plus the fixed and agreed wage components (factor B). The special circumstances of the case are expressed in the adjustment factor C, such as the risk sphere and the wrongfulness. The formula then reads:

$$\text{dismissal compensation} = A \times B \times C.$$

Factor A will in future be calculated differently to the way in which it is now calculated. To date, the years of service with the employer in question are counted up to the 40th birthday as 1, from 40 to 50 as 1.5 and the years of service from 50 onwards as 2. The valuation of the number of years of service will in the new situation be further differentiated. The years of services up to the age of 35 will count as 0.5, the years of service from 35 to 45 as 1, the years of service from 45 to 55 as 1.5, and the years of service from 55 onwards as 2.

Position on the labour market and financial position

In addition, the cantonal court judges also wish to give more consideration in the C factor to the position of the employee on the labour market and to the financial position of the employer.

An employee who has been enabled by his employer to keep his knowledge up to date, or an employee working in a line of business in which there are many vacancies, will need less financial protection and must therefore accept a smaller amount by way of dismissal compensation. At the same time, more account will be taken of the financial position of the employer if the employer is able to show by means of annual accounts and well-substantiated projections, that he will be unable to pay the compensation as calculated according to the formula.

Older employees

For the application of the cantonal court formula used at present, except for nonmaterial damage, the compensation is capped at the amount of the expected loss of income up to the 65th birthday. Since many persons no longer automatically retire on reaching the age of 65, the cantonal court judges find this guideline more difficult to apply. In determining the compensation according to the "new style" formula, account will therefore be taken of the time when the employee according to expectations would have wanted to stop working and retire.

Short period of employment

For contracts of employment which are terminated within 2 years, the cantonal court judges have announced that they will calculate the compensation in the normal way. This appears to bring a change to the practice where the amount of the compensation in case of a very short period of service usually turns out to be more than the amount indicated by the formula.

If a contract of employment for a fixed period does not provide for premature termination, then the compensation on termination will in principle be equal to the wages for the time remaining. The employer must in other words serve out the contract financially.

Date of entry into force

It is expected that the cantonal courts will as from 1 January 2009 be working with the new formula.

Whether that means that the new formula will be applied solely to applications that are lodged after that date or to all decisions given after 1 January 2009, is still unclear. It would seem logical that the formula would apply to applications filed after that date, because of the fact that the parties will need to bring their case documents in line with the new formula.

Practical significance

What will be the practical significance? Through the change in the A factor, the compensation will for by far the majority of employees come out considerably lower than is now the case. How the stronger focus on special circumstances, position on the labour market and financial position will work out, is still unclear. Case law will show. The parties will in any case have to advance the necessary arguments and assertions in their statements of case and other documents.

Where older employees are concerned, it will become interesting for employers to timely start discussing retirement plans with their employees.

It is important for employers to keep the 'new style' cantonal court formula in mind when terminating the employment of an employee. It may be wise to already anticipate the new formula in any negotiations going on at this moment concerning dismissal compensation.

The cantonal court formula in case of manifestly unreasonable dismissal

Besides the modification of the cantonal court formula discussed above, the formula has also received a lot of attention in a different way these past weeks. On October 14th last, the Hague Appeal Court opted in seven judgments for taking the cantonal court formula as starting point for the calculation of the compensation on account of manifestly unreasonable dismissal (see *inter alia* LJN: BF6720). Where in earlier judgments of that Appeal Court application of the cantonal court formula in case of manifestly unreasonable dismissal was still dismissed out of hand (see e.g. The Hague Appeal Court 10 January 2003, JAR 2003/105), this formula is now – with a small adjustment – being embraced by that same Appeal Court.

Section 7:681 of the Civil Code provides that if either party terminates the contract of employment manifestly unreasonably, the cantonal court may grant compensation to the other party. There existed no clear guidelines for determining the level of compensation. Some cantonal court judges sought a link with the cantonal court formula (see e.g. Utrecht Cantonal Court 16 July 2008, *LJN*: BD7366), others definitely did not do so. The Appeal Courts have in general in the past few years turned against the use of the cantonal court formula in the case of manifestly unreasonable dismissals. This was recently the case with the 's-Hertogenbosch Appeal Court on 16 September 2008, *LJN*: BG2170. The Hague Appeal Court, however, now thinks differently: a dismissal is generally manifestly unreasonable if the employer has not offered to pay compensation equal to the level calculated on the basis of the cantonal court formula, less 30%.

The Appeal Court has qualified this main rule in one of its judgments for the case where the dismissal has taken place after two years of occupational disability. Dismissal is in that case in itself not manifestly unreasonable, not even if the employer does not offer to pay any compensation.

Practical significance

The compensation payable in manifestly unreasonable dismissal proceedings must according to the Hague Appeal Court in essence be calculated according to the cantonal court formula as this would be done in termination proceedings. The circumstances of the case are therefore taken into account for the determination of the C factor.

With the above judgments the Hague Appeal Court intended to bring more clarity in the application of the cantonal court formula in cases of manifestly unreasonable dismissal. In practice this increased clarity has been awaited for some time and is therefore a praiseworthy ambition. The question that now remains is: what will the other appeal courts do and what will be the opinion of the Supreme Court. For the time being in the Hague Appeal Court district one must reckon with the cantonal court formula less 30%. These judgments, especially in the case of dismissals as a result of reorganization – where the C factor is in principle 1 – create clarity.

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