

Legal Alert

Manifestly unfair dismissal: ABC becomes XYZ?

22 July 2009

Introduction

The discussion regarding compensation in the event of manifestly unfair dismissal (*kennelijk onredelijk ontslag*) has taken a new direction.

In a number of rulings of 14 October 2008, the Court of Appeal of The Hague held that the calculation of the compensation in the event of manifestly unfair dismissal will follow the cantonal court formula, albeit reduced by 30%. That Court of Appeal also held that initially, a dismissal is manifestly unfair due to the sole fact that no compensation in conformance with this same cantonal court formula (reduced by 30%) is granted (see our [Legal Alert of 12 November 2008](#)). On 7 July 2009, the other Courts of Appeal explicitly opted for a different course. On that date, the Courts of Appeal of Amsterdam, Arnhem and 's-Hertogenbosch collectively took the position that the cantonal court formula will not be applied in the manifestly unfair dismissal procedure.¹ Instead, they have introduced a new XYZ formula.

¹ Court of Appeal of Amsterdam 7 July 2009, LJN: BJ1644, LJN: BJ1648; Court of Appeal of 's-Hertogenbosch 7 July 2009, LJN: BJ1713, LJN: BJ1716; Court of Appeal of

The practical use of the 7 July rulings and the contents of the XYZ formula are addressed in this Legal Alert.

Manifestly unfair dismissal

Section 7:681 of the Dutch Civil Code stipulates that if one of the parties terminates the employment contract in a manifestly unfair manner, the judge may grant the other party compensation. Manifest unfairness is *inter alia* involved if the consequences of the termination for the employee are too serious compared to the employer's interest in the termination. All circumstances of the case at the time of the dismissal must be collectively taken into account in the assessment.²

What is special about the 7 July rulings is first of all that in these rulings, the Courts of Appeal list the circumstances that are particularly relevant,

Leeuwarden as subsidiary place of session of the Court of Appeal of Arnhem 7 July 2009, LJN: BJ1688. It is likely that the Court of Appeal of Leeuwarden will take the same position.

² *Inter alia* see HR 15 February 2008, NJ 2008, 111.

Manifest unfair dismissal: ABC becomes XYZ?

which is useful in practice. These circumstances have been arranged into four categories, but must be considered collectively. The first category regards the employment and the termination. Relevant factors include the length of the employment, the employee's age, functioning and any disability and related circumstances. The second category regards the availability of other (appropriate) work; the third category regards the financial consequences of the termination for the employee. Finally, the fourth category regards the provisions made by the employer and the financial compensation offered. In contrast to the Court of Appeal of The Hague, the other Courts of Appeal feel that in and of itself, the mere fact that no severance payment is awarded if the employment is terminated is insufficient to justify the opinion that the dismissal is manifestly unfair. This is just one of the circumstances that must be included in the consideration of all facts; it must not be considered separately.

In the event of manifest unfairness, the amount of compensation is calculated using the new XYZ formula.

The XYZ formula

Like the cantonal court formula, the XYZ formula consists of three factors that are multiplied. The formula is:

$$\text{compensation} = X * Y * Z$$

The X factor is the number of weighted years of service, the Y factor is the most recent wage and the Z factor is the correction factor. At first glance, these are the same factors used in the cantonal court formula, but there are important differences between the two formulas.

X factor: the number of weighted years of service

The X factor is determined in the same way as the A factor in the **former** cantonal court formula. In calculating the number of years of service, the term of service is rounded off to whole years; a period of more than six months is rounded upwards. Then the years of service are weighted.

The years of service up to the moment at which the employee reached the age of 40 count as 1, the years from 40 to 50 count as 1.5 and the years of service from the time the employee reached the age of 50 years count as 2.

Y factor: most recent wage

The Y factor is determined in the same way as the B factor in the (current) cantonal court formula. In calculating the Y-factor, the most recent gross wage is used as the basis. Fixed and agreed upon wage components, such as holiday allowance and a fixed bonus, are added to the wage. Except in very exceptional cases, the calculation of the Y factor does not include the employer's share of the pension premium, a company car, expense allowances, the employer's share in the health insurance premium and non-structural wage components, such as a non-structural bonus.

Z factor: correction factor

All circumstances at the time of the dismissal are weighted in the correction factor. These are the circumstances that are also relevant in assessing whether or not manifestly unfair dismissal is involved.

In principle, the maximum compensation is $Z = 0.5$. The Z factor will only be higher in exceptional circumstances. The rulings do not explain when such exceptional circumstances occur. None of the 7 July rulings awarded compensation in which Z is greater than 0.5.

The compensation is rounded off to whole numbers and is a gross amount.

Initially, the compensation does not exceed the amount of income the employee is expected to lose until she/he reaches the age at which she/he is entitled to a pension.

Comments

The rulings show that with the maximum Z factor, the three Courts of Appeal have attempted to follow their case law of previous years. That is why we do not expect any far-reaching changes in the

Manifest unfair dismissal: ABC becomes XYZ?

amount of compensation for manifestly unfair dismissal, even though the X factor is calculated in conformance with the A factor of the former cantonal formula, which results in higher compensation, in particular for younger employees.

What is interesting is the relevance of the 7 July rulings to negotiations between employers and trade unions regarding social plans. In the past six months the discussion focused primarily on whether to use the former or the new cantonal court formula; the central question can now be expected to be: ABC or XYZ?

With the development of the XYZ formula, the Courts of Appeal of Amsterdam, Arnhem and 's-Hertogenbosch have taken a clear position in the discussion regarding the amount of compensation in the event of manifestly unfair dismissal. However, this does not put an end to the discussion. In a ruling also on 7 July 2009, the Court of Appeal of The Hague confirmed that it will use the cantonal court formula less 30% in manifestly unfair dismissal procedures, clearly showing that it will not apply the XYZ formula.³ This means that legal inequality in manifestly unfair dismissal cases is inevitable.

Nevertheless, the end of the discussion seems to be in sight. Various cassation proceedings are pending against the rulings of the Court of Appeal of The Hague, including accelerated proceedings initiated by our firm. The Netherlands Supreme Court may render a final decision on the Hague approach of "ABC minus 30%" before the end of the year. The new doctrine of the other Courts of Appeal is also expected to end in proceedings before the Netherlands Supreme Court. It is hoped that the Netherlands Supreme Court will provide clarity in those proceedings and will end the present inequality.

To be continued.

³ Court of Appeal of The Hague 7 July 2009, LJN: BJ1712.

Manifest unfair dismissal: ABC becomes XYZ?

Contact information

If you have any questions regarding the subject of this Legal Alert, please contact:

Stefan Sagel

T +31 88 888 1755

E stefan.sagel@debrauw.com

Amsterdam

Tripolis

Burgerweeshuispad 301

P.O. Box 75084

1070 AB Amsterdam

The Netherlands

T +31 88 888 1888

F +31 88 888 1889

London

5th Floor, East Wing

10 King William Street

London EC4N 7TW

United Kingdom

T +44 20 7337 3510

F +44 20 7337 3520

New York

650 Fifth Avenue, 4th floor

New York, NY 10019-6108

United States

T +1 212 259 4100

F +1 212 259 4111

This publication is intended to highlight issues.

It does not intend to be comprehensive or to provide legal advice.

If you no longer wish to receive our newsletter, please inform our Communications Department in Amsterdam or send an e-mail to: unsubscribe@debrauw.com