

# Legal Alert

## Netherlands Supreme Court provides clarity regarding apparently unreasonable dismissal

3 December 2009

### Introduction

How should compensation for apparently unreasonable dismissal be estimated? This question, which focuses primarily on the discussion regarding whether the calculation of this compensation may follow the Cantonal Court Formula, has been the subject of heated discussions in the Netherlands for years.

As you know, the Court of Appeal of The Hague attempted to end this discussion on 14 October 2008 (see our [Legal Alert of 5 November 2008](#)). Briefly summarised, the Court of Appeal held that a dismissal is apparently unreasonable if the employer did not offer an amount equal to compensation calculated in conformance with the Cantonal Court Formula, less 30%. The Court of Appeal stipulated as well that the amount of compensation must also follow the Cantonal Court Formula in force at the time of the employment, less 30%.

Even though this method met the need of greater legal certainty, the other Courts of Appeal did not concur with the Court of Appeal of The Hague. Following consultations, the other Courts of Appeal

opted for their own doctrine, which they expressed on 7 July 2009 (see our [Legal Alert of 22 July 2009](#)). The Courts of Appeal held that in assessing whether or not a dismissal was apparently unreasonable, all circumstances of the case must be taken into account. If this assessment shows that the dismissal was apparently unreasonable, the amount of compensation must be calculated in conformance with the XYZ formula. This formula is in fact identical to the previous Cantonal Court Formula, provided that in principle, the Z factor (equal to the C factor in the Cantonal Court Formula) is set at a maximum of 0.5.

Cantonal court judges were not very taken with this new doctrine or with the dissension it had created. This was expressed in a number of decisions in which they did not follow or only partially followed the line of 'their Court of Appeal' (inter alia see Cantonal Court of Groningen, LJN: BK1218). This gave rise to legal inequality and legal uncertainty; the need for an unambiguous line for apparently unreasonable dismissal had never been this great. On 27 November 2009, the Netherlands Supreme Court met this need in a notable ruling.

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### *Facts*

Stam had been employed by Van de Grijp since 16 September 1974. In several periods Stam only worked for a limited number of hours because he was unfit for work. In May of 2003, Stam was no longer deemed suitable for his position, but was deemed able to perform other work without any further limitation of his hours. Stam did not agree to this; he was prepared to fulfil a different position, but with limited hours.

Subsequently, after Stam had been unfit for work for two years, Van de Grijp applied to the Central Organisation for Work and Income (CWI) for a dismissal permit. After receipt of the dismissal permit, Van de Grijp terminated the employment contract. Stam felt that this dismissal was apparently unreasonable and for this reason *inter alia* claimed compensation on the grounds of apparently unreasonable dismissal.

The Cantonal Court in Dordrecht dismissed Stam's claims, but the Court of Appeal of The Hague did not concur with this ruling. As explained previously, the Court of Appeal held that a dismissal is apparently unreasonable if the employer did not offer compensation in conformance with the Cantonal Court Formula, less 30%. Since Stam had not received any compensation, the dismissal was found to be apparently unreasonable. The Court of Appeal then stipulated that compensation had to be estimated in conformance with the Cantonal Court Formula, less 30%.

Van de Grijp, assisted by our office, brought proceedings before the Netherlands Supreme Court. In this test case, Van de Grijp *inter alia* took the position that the mere fact that no compensation was granted did not imply that the dismissal was apparently unreasonable. In addition, Van de Grijp challenged that in estimating compensation in the event of apparently unreasonable dismissal, the Cantonal Court Formula less 30% can be followed. The

Netherlands Supreme Court agreed with this position.

### *Main findings of the Netherlands Supreme Court*

The Netherlands Supreme Court found that, based on all circumstances of the case, it must first be determined whether or not the dismissal was apparently unreasonable. The mere fact that the employer did not offer any compensation is insufficient to assume that the dismissal was apparently unreasonable. Nor may it be assumed as a rule of thumb that in principle, a dismissal is apparently unreasonable if no compensation in conformance with the Cantonal Court Formula less 30% is granted.

Only if the dismissal is found to be apparently unreasonable does the question regarding estimating the compensation become an issue. The Netherlands Supreme Court began by holding that the compensation for apparently unreasonable dismissal has a different nature than the compensation that can be granted in dissolution proceedings. For apparently unreasonable dismissal, a court must concretely estimate the damage that the employee suffered, based on all the circumstances of the case, while in dissolution proceedings, equitable compensation can be granted. In addition, the nature of these proceedings differs. Apparently unreasonable dismissal proceedings are standard proceedings in which the customary rules regarding proof and compensation apply. This is in contrast to dissolution proceedings, the objective of which is to render a swift decision in a single instance, where the court rules based on what it feels is plausible.

For this reason, the Netherlands Supreme Court is of the opinion that the Cantonal Court Formula cannot be used as the point of departure in estimating compensation for apparently unreasonable dismissal. Nor does the application of a generic discount - in this case 30% - conform to the manner in which compensation for apparently unreasonable should be determined.

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The Netherlands Supreme Court is of the view that the predictability envisaged by the Court of Appeal also does not justify the application of a formula. After all, this predictability primarily depends on the insight a judge offers into how specific compensation is arrived at. According to the Netherlands Supreme Court, in this framework it is conceivable that judges will create some degree of harmonisation by clearly specifying the relevant factors and by explaining the financial consequences that can be attached to the various factors, without using a fixed formula.

### Comments

This ruling is highly relevant for practice; by outlining a clear, unambiguous framework regarding apparently unreasonable dismissal, the Netherlands Supreme Court ended the undesirable legal uncertainty regarding how to assess whether a dismissal was apparently unreasonable and, subsequently, how to calculate the compensation.

In assessing whether or not a dismissal was apparently unreasonable, the Netherlands Supreme Court repeated that all circumstances of the case must be included in the assessment. The rule of thumb of the Court of Appeal of The Hague to the effect that a dismissal must be held to be apparently unreasonable if no compensation was granted, was explicitly dismissed. This outcome is favourable for the employers; a standard right to compensation in the event of dismissal is shelved for the time being.

The Netherlands Supreme Court also stipulated the method for estimating compensation in the event of apparently unreasonable dismissal, i.e. in accordance with the normal rules of estimating damages. In this framework, the Netherlands Supreme Court explicitly found that no general formula may be applied, which means that neither the Cantonal Court Formula nor - probably - the XYZ formula can continue to serve as the criterion in estimating compensation for apparently unreasonable dismissal. Our office is handling separate Supreme Court proceedings on the XYZ

formula. A ruling in these proceedings is expected early next year.

What does this mean in practice: are the lower courts now without any guide in estimating compensation for apparently unreasonable dismissal?

This does not seem to be the case at all. Now that the general rules for estimating compensation apply, parties will have to clearly submit and, if necessary, prove the circumstances that may be relevant in establishing the amount of compensation. Based on these arguments and after weighing the circumstances of both parties, the court will have to determine the compensation. In this context, the Netherlands Supreme Court explicitly instructed lower courts to improve the substantiation of their decisions. By specifying which factors justify what amount of compensation, they can explain to everyone and thus enable everyone to predict the approximate compensation that will be granted under specific circumstances. Since no standard formula may be used, practice will also demand this. How courts will substantiate in detail the amount of compensation and whether they will comply with the Netherlands Supreme Court's call to harmonise this to some extent will have to be demonstrated in practice. In any event, the Netherlands Supreme Court outlined a clear framework, and it is now up to the lower courts to work this out carefully and transparently.

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### Contact information

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