

Cumulative ground for termination – does it ease rules on dismissal?

September 16, 2020

It has been eight months since the Labour Market in Balance Act introduced the option for employers to combine various grounds for legally dismissing employees. Allowing this “cumulative” ground was expected to make termination of an employment agreement easier, but emerging case law on the matter shows that courts apply the new ground restrictively. Termination on the basis of the single ground of a “damaged working relationship” may still prove more successful than going down the combined grounds route.

In July 2020, at last the first two employer’s requests were granted to terminate an employment agreement based on a combination of grounds: underperformance by the employee and a damaged working relationship. In both – separate but similar – cases, the courts ruled that the employer had failed to properly execute the employee’s performance improvement plan, which ultimately led to a breach of trust between the parties. The courts emphasized that, to grant a termination based on combined grounds, one of the termination grounds invoked needs to be nearly fulfilled. In these cases, it was the damaged working relationship: the parties had tried to repair the trust between them via mediation, but had not succeeded in doing so. Given that both employees involved were members of the management team, the courts recognised that a breach of trust at the management level could not lead to a successful performance improvement plan. Based on these circumstances, the courts also saw fit to grant the employees the maximum additional compensation of 1.5 times the transition payment.

Up until these two decisions, courts had rejected all requests for termination based on combined grounds, most importantly because employers failed to substantiate this cumulative ground independently; that is, apart from the other termination grounds brought forward by the employer. In their rulings, the courts emphasised that the cumulative ground is not meant to repair other incomplete termination grounds. It therefore appears that the courts’ restrictive interpretation of the cumulative ground has not yet led to the predicted easing of dismissal rules.

Statistics show that termination requests based on a damaged working relationship are the ones most likely to succeed. If the working relationship is indeed damaged beyond repair and the employee cannot be reassigned to another position, this termination ground may be the most advisable route for employers. Another advantage for employers is that they can avoid having to pay the additional compensation of 1.5 times the transition payment. However, they may still be ordered to pay additional equitable compensation, which can be higher or lower than the fixed 1.5 compensation.

If employers choose to include the cumulative ground in the

grounds listed in a termination request to the sub-district court, they should make sure that they provide *additional* supporting arguments that justify termination on that ground. Case law so far shows that it is not enough to list two or more other termination grounds, and simply refer to those when invoking the cumulative ground.