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Employee's reinstatement on appeal does not mean automatic loss of transition payment

The Supreme Court has issued a ruling that will impact cases where the lower court wrongfully terminates an employment agreement and the court of appeal orders reinstatement. The Supreme Court ruled that as a court of appeal *cannot* reverse or annul a lower court's termination of an employment agreement, the transition payment awarded to the employee by the lower court remains due by the employer. This means that if the court of appeal finds that the employee should repay the transition payment, it must issue a specific ruling to that effect. Where the employment agreement has been discontinued for more than six months, the court of appeal can nonetheless determine that the total length of the previous, wrongfully terminated employment agreement should also be taken into account in calculating a future transition payment should the employment agreement be terminated once more. Lastly, the Supreme Court argued that reinstatement of the employment agreement may take place by a court decision without any further action required by the employer.

Background

In this case, the employee was employed as a care professional by Amsta, a health care institution, in 2008. At some point, the employer expressed its dissatisfaction with the employee's performance, but the employee – according to Amsta – did not sufficiently improve his performance after the employer's feedback. Amsta subsequently submitted a request to the sub-district court for termination (dissolution) of the employment agreement. The request was primarily based on article 7:669 (3)(d) of the Dutch Civil Code: the employee's failure to perform the duties as agreed in the employment agreement (the "d ground"). The sub-district court ruled that the criteria for court termination (based on the d ground) had been met and ruled that the employment agreement would terminate on 1 January 2017. The employee was awarded a transition payment.

The employee lodged an appeal against the sub-district court's decision, arguing that there were no statutory grounds for terminating his employment agreement. The employee asked the court of appeal to order Amsta to reinstate the employment agreement with effect from 1 January 2017 (the termination date) or, alternatively, with effect from a later date to be determined by the court of appeal. As the employee had suffered financially after the termination of his employment agreement, he also asked the court of appeal to put adequate provisions in place, as set out in article 7:682 (6) of the Dutch Civil Code (such as compensation for loss of income).

The sub-district court's judgment was not upheld on appeal. In relevant part, the court of appeal held that Amsta had not adequately assisted the employee in improving his performance and that, as a consequence, the statutory requirements for dismissal had not been met. The court of appeal annulled the decision of the sub-district court and ordered Amsta to reinstate the employment agreement as of 1 November 2017 (11 months after the initial termination date). The court of appeal did not agree with reinstatement as of an earlier date and rejected the employee's request to be awarded compensation for loss of income over the period he was not employed. As to the transition payment that the employee had received following the lower court's termination of his employment agreement, the court of appeal expressed the "assumption" that the employee would repay the transition payment, given the fact that the employment agreement would be reinstated. The employee then appealed to the Supreme Court.

In its judgment, the Supreme Court used the Amsta case to give guidance to legal practitioners on several aspects of the reinstatement of employment agreements by courts of appeal and – in that connection – a possible repayment of the transition payment.

Repaying the transition payment

The Supreme Court held that the Work and Security Act (*WWZ*) does not require the employee to repay the transition payment if the court of appeal reinstates the employment agreement. As the court of appeal cannot reverse or annul a termination by the sub-district court, the legal basis on which the employee originally received the transition payment remains. This means that the reinstated employee only has to repay the transition payment if the court of appeal explicitly orders the employee to do so on the basis of article 7:682 (6) of the Dutch Civil Code, which allows the court of appeal to put adequate provisions in place following wrongful court termination of the employment agreement. The Supreme Court ruled that the court of appeal erred in law by (i) annulling the judgment of the sub-district court, and (ii) assuming that the employee would repay the transition payment.

An interruption of more than six months in the employment agreement

In the Amsta case, the employment agreement had been discontinued for more than six months. This means that, according to the WWZ framework, the dissolved employment agreement would not be taken into account in the calculation of the transition payment if the reinstated employment agreement was eventually terminated. The Supreme Court ruled that this possible disadvantage for the employee should be taken into account by putting adequate provisions – in the sense of article 7:682 (6) of the Dutch Civil Code – in place. According to the Supreme Court, the court of appeal can remove this disadvantage by stipulating that the length of the terminated employment agreement, contrary to a strict WWZ interpretation, remains relevant in calculating a transition payment. Such a decision, however, can only be made in combination with an obligation imposed on the employee to repay the transition payment.

Reinstatement by the court of appeal or the employer?

In this ruling, the Supreme Court ended the uncertainty among legal practitioners about whether the employer or the court of appeal is meant to reinstate the employment agreement after wrongful dissolution by the sub-district court. The Supreme Court indicated that, in principle, the court of appeal "orders" the employer to reinstate the employment agreement, but that the WWZ does not block the court of appeal from directly reinstating the employment agreement. If an employee wants the court of appeal to directly reinstate him or her without the need of any further action by the employer, the court of appeal must be specifically asked to do so.

Stefan Sagel and Rik van Haeringen successfully litigated this case before the Supreme Court on behalf of the employee as part of De Brauw's pro bono policy.