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Dutch Supreme Court: employers must end dormant employment

Today, 8 November 2019, the Supreme Court answered preliminary questions of the Limburg District Court. These questions were suggested to the district court during preliminary relief proceedings in a test case brought jointly by Stichting Achmea Rechtsbijstand and De Brauw Blackstone Westbroek. Following the Advocate General's opinion, the Supreme Court has ruled today that employers must in principle terminate dormant employment agreements by mutual consent and pay a transition payment, at the employee's request. This landmark decision is a breakthrough for thousands of long-term disabled employees whose employment is left in a dormant state by their employers.

Background and preliminary questions

Since the Dutch Work and Security Act (WWZ) entered into force in 2015, many employers have refused to terminate dormant employment agreements with long-term disabled employees. Maintaining these employment agreements in a dormant state, allows employers to avoid paying the employee the statutory transition payment, which amounts to a maximum of EUR 81,000 or the employee's annual salary, whichever is higher.

To encourage employers to terminate employment agreements once an employee has been ill for two years, parliament has passed the Transition Payment Reimbursement Act (WCT). The WCT enters into force in April 2020 and is retroactive to 2015, when the WWZ entered into force. Under the WCT, employers will soon be able to ask the Dutch Employee Insurance Agency to reimburse them for transition payments made to employees dismissed after two years of illness. Although the reimbursement will be limited to the transition payment that the employee was entitled to after two years of illness, or the wages that were paid during the first two years of sickness – whichever is a higher amount –, any financial consequences for employers will be limited. Even so, it is estimated that there are still thousands of cases of dormant employment, as the WCT does not contain a statutory obligation for employers to terminate employment agreements.

In the test case before the Supreme Court, a long-term disabled employee dealing with chronic back pain, had repeatedly – but unsuccessfully – requested that the employer terminate employment by mutual consent, subject to the employer making a transition payment. The employer refused to terminate employment. The employee eventually filed a claim, seeking compensation for missing out on the transition payment as a result of the employer's refusal to terminate the employment.

During the first stage of the test case, the Limburg District Court referred questions that were raised on behalf of the employee, to the Supreme Court. In short, the Supreme Court was asked whether a “good employer” as outlined in Article 7:611 the Dutch Civil Code must agree – and if so, under what circumstances –, to a long-term disabled employee’s proposal to terminate their dormant employment agreement, subject to a transition payment being made to the employee.

The Supreme Court’s ruling - clarity for both employers and employees

The advisory opinion of Advocate General De Bock was issued on 18 September 2019. In short, the Advocate General’s view was that the employer must in principle and at the employee’s request, terminate the dormant employment agreement and make a transition payment.

The Supreme Court followed the advisory opinion of the Advocate General. According to the Supreme Court, the position taken by employers – that no obligation to terminate the dormant employment exists, since termination would have (substantial) financial consequences for the employer –, is no longer valid due to the entry into force of the WCT. Under the WCT, the employer will be reimbursed for making a transition payment. In addition, the Supreme Court considered that it is clear that the Dutch legislature wants to end the tendency of employers to not terminate the dormant employment agreements of long-term disabled employees. As a consequence, the Supreme Court ruled that the principle of “good employment practices” as set out in the Dutch Civil Code implies that an employer may not keep an employment agreement “dormant” with the sole aim of avoiding making the transition payment. As a consequence, the employer must, in principle, terminate a dormant employment agreement and make a transition payment if a long-term disabled so requests. This may only differ if the employer has legitimate interests in continuing the employment agreement – for example, if there is a realistic prospect that the employee can be reintegrated. However, the fact that an employee will reach retirement age in the near future, (in which case under the Dutch Civil Code they will not be entitled to a transition payment), *cannot* be considered a legitimate interest in continuing the employment agreement. The Supreme Court further ruled that the burden of proof of such a legitimate interest lies on the employer.

The ruling of the Supreme Court results in a breakthrough for thousands of long-term disabled employees whose employment is dormant. In addition, this landmark decision provides much-needed clarity for both employees and employers, considering the ambiguity in the case law from the lower courts and in legal literature on this much-disputed topic.

Stefan Sagel and Irina Timp of De Brauw’s employment team litigated this case before both the district court and the Supreme Court.