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Preliminary questions on “dormant employment agreements” referred to Dutch Supreme Court

The Limburg District Court has referred preliminary questions to the Supreme Court on the issue of long-term disabled employees, also known as ”sleepers”. The questions were suggested to the district court during preliminary relief proceedings in a test case brought jointly by Stichting Achmea Rechtsbijstand (SAR) and De Brauw Blackstone Westbroek.

The issue of “dormant” employment

Since the Dutch Work and Security Act (WWZ) entered into force in 2015, there has been a tendency among employers not to terminate the “dormant” employment contracts of long-term disabled employees. Due to long-term illness, the employees in question no longer perform any work and, after two years of illness, the employer is allowed to stop paying wages. This results in dormant employment where employers avoid the obligation to pay the employee a transition payment by not terminating the employment agreement. Employees are currently entitled to such a transitional payment if the employment has lasted for at least two years and is terminated at the employers’ initiative. By contrast, if the employment contract is terminated at the employee’s initiative, the employee is not entitled to a transitional payment, unless the termination of the contract is a result of a *seriously culpable* act or omission of the employer.

The Dutch legislature felt this was an undesirable situation, and all employees – including long-term disabled employees – who are dismissed, are entitled to a transition payment. At the same time, it acknowledged that having to pay a transitional payment places a burden on employers, since they are already under an obligation to continue paying wages during the first two years of illness and have to incur costs to reintegrate the employee within their organisation during this period. In order to encourage employers to terminate an employment agreement after two years of illness, the Regulation on Compensation of Transitional Payments (Compensation Regulation) was recently enacted. Based on this regulation, employers will be able to ask the Dutch Employee Insurance Agency (UWV) for reimbursement of transition payments that have been made to employees dismissed after two years of sickness. The amount of this reimbursement is limited to the transition payment the employee was entitled to after two years of illness. This means that the financial consequences are limited where the employer terminates the employment contract. The Compensation Regulation will enter into force on 1 April 2020 and has retroactive effect until the date that the WWZ entered into force in 2015.

Despite the expected entry into force of the Compensation Regulation, many employers remain unwilling to terminate dormant employment contracts. In the Netherlands, there are thousands of “sleepers” who want their dormant employment agreement to be terminated in order to receive a transition payment. SAR currently represents approximately 600 long-term disabled employees. However, so far it has been almost impossible for these “sleepers” to enforce this in court. In short, judges generally rule that according to Dutch law, (i) there is no legal obligation for an employer to terminate an employment contract after two years of illness, and (ii) the employer does not act in a seriously culpable manner if he does not end the dormant employment agreement. The situation seems to be deadlocked.

The preliminary questions

In a test case brought before the Limburg District Court on behalf of a long-term disabled employee, an alternative route was suggested. This alternative route is based on the Supreme Court’s landmark *Stoof/Mammoet* decision, where the Supreme Court ruled that based on the open standard of “reasonableness and fairness”, an employee can be required – acting as “a good employee” within the meaning of Article 7:611 Dutch Civil Code – to accept a proposal from the *employer* to amend the terms of employment. In short, that is the case if (i) there are valid reasons for the employer to propose an amendment of the terms of employment (i.e. unforeseen, changed circumstances at work), (ii) the proposal is reasonable, and (iii) the employee can reasonably be expected to accept the proposal.

In the present case, the question was raised whether this *Stoof/Mammoet* standard also applies in a situation where the *employee* – instead of the employer – makes a reasonable proposal to the employer to amend the terms of employment, and whether a proposal to terminate the employment agreement by mutual consent qualifies as such a proposal. Tailored to the issue of dormant employment, the following questions arise in particular. In the first place, the question whether the long-term disability of the employee (in connection with the entry into force of the Compensation Regulation) can be considered as changed circumstances at work within the meaning of condition (i) in *Stoof/Mammoet*. If so, a second question arises: is the proposal made by the employee in principle, except in special circumstances, reasonable – within the meaning of condition (ii) in *Stoof/Mammoet* – if this proposal entails not only termination by mutual consent but also the payment, by the employer, of a transitional payment that is limited to the amount the employer will be compensated for under the Compensation Regulation? Finally, in the event that the Supreme Court will rule that the *Stoof/Mammoet* standard does not apply if the employee makes a reasonable proposal, the question arises whether or not the employer may have an obligation to accept a reasonable proposal made by the employee to terminate his or her dormant employment under different conditions.

The Limburg District Court referred these questions to the Supreme Court on 10 April 2019. Hopefully, the Supreme Court will provide clarity later this year.

On behalf of De Brauw Blackstone Westbroek, Stefan Sagel and Irina Timp litigated this case before the district court and will represent the employee before the Supreme Court.