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Termination of contracts of employment on economic grounds

DUTCH REPORT

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I. Introduction: General Legal Framework

a. *What are the main rules on termination of a contract at the initiative of the employer?*
b. *What is the personal scope of these rules?*
c. *Is there additional protection provided through collective bargaining /agreements?*

General framework of the dismissal system in the Netherlands

Since we have come in a (second) economic crisis within a few years, the law on dismissals in the Netherlands has become an important issue. The Netherlands is the only country in Europe with a system of a priori public permit system for dismissals. This means that an employer who wants to dismiss an employee needs to have either the permission of the public employment service (UWV) (based on legislation: BBA[1]) or a decision of the court on termination of the contract (article 7:685 CC). Only the contract of employment of employees as defined in the Dutch Civil Code (article 7:610) can be terminated by court decision on grounds of Article 7:685CC. The scope of persons covered by the condition that they can only be given notice after permission of the UWV is broader. Articles 1 and 2 of BBA extend this dismissal protection to some other categories of workers and exclude others, among whom teachers and civil servants. The procedure on obtaining a dismissal permit is regulated in the Dismissals Decree.

There are special dismissal rules which apply to civil cervants.The Civil Servants Law mentions a limitative number of dismissal grounds civil servants can only be dismissed on these grounds. These grounds are: dismissal on own request, functional age dismissal, retirement age, dismissal because of reorganization, dismissal because of illness, dismmissal since the civil servant is incapable of performing his/her work, and dismissal on other grounds. This procedure is totally different from the regular dismissal procedure for employees in private companies. For civil servants' dismissal no prior permission from the UWV or a judge is needed.

Review of the Dutch dismissal system

Individual Dismissal	
Permission by public employment service (UWV)	Rules and procedures mentioned in the Dismissal Decree (Article 6 and 9 BBA)
Termination by judicial dissolution	Mentioned in the Dutch Civil Code, article 7:685

[1] This is a government decree dating from 1945, still valid but amended over time. The rule on dismissal permit has been nearly unchanged.

<table>
<tr><th colspan="2">Collective Dismissal (at least 20 employees)</th></tr>
<tr><td>Dutch Act on Notification of Collective Dismissal.</td><td>Rules and procedures in article 3 of the notification. After notification:<table><tr><td>Permission public employment service</td><td>Termination by judicial dissolution</td></tr></table></td></tr>
</table>

<table>
<tr><th colspan="2">Economic grounds for a dismissal</th></tr>
<tr><td>Permission public employment service</td><td>According to the Dismissal Decree, the UWV named 7 categories of economic reasons. These reasons are
Bad financial situation
Work reduction
Organisational changes/reorganisation
Technological changes
Suspension of (a part of) the company activities
Company removal
Expire of (remuneration costs) subsidy</td></tr>
<tr><td>Termination by judicial dissolution</td><td>Economic grounds not explicitly mentioned. The termination of a contract at the initiative of the employer based on economic grounds is also possible by court decision. The ground for this decision is that circumstances have substantially changed, which can also be an economic reason. The court will examine whether the economic reason is plausible. The circumstance of improper performance or economic crisis can be considered as a substantial change of circumstances.</td></tr>
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Two ways of termination:

1. **The permit by the Dutch public employment service**

The employer can terminate a contract of employment by giving notice only after the prior permission of the UWV, the Dutch public employment service (see paragraph II.1). The rules and procedure are mentioned in the BBA, elaborated in the so called Dismissal Decree.

The UWV is positioned as an independent organization with public authority, which is not subordinated to the Ministry of Social Affairs and Employment. The UWV has published guidelines on how it performs its powers, called “Ontslagregels beleidstaak UWV”. These guidelines aim at a uniform application of the rules of the Dismissal Decree.
In case of a request for a permit, the UWV investigates the reasons for the requested termination of the employment contract..The UWV also decides on unemployment benefit entitlement of the person after he/she has been dismissed, but it does not require dismissal/redundancy payments to be paid as part of the dismissal procedure.

Administrative officials and dismissal based on economic grounds

In the ‘Dismissal Decree’ is mentioned which rules apply in case of dismissals based on economic grounds.
The Dismissal Decree states that if the employer wants to dismiss his employee because of economic reason he has to make plausible that the job or jobs have to be skipped. However, if there is a declaration from the trade unions that the reasons given by by the employer are indeed good reasons for reducing the number of jobs, the employer does not longer have to make plausible that because of the economic reasons certain jobs have to expire. The rules and procedures are further explained in section III.

2. **Dissolution of the contract by the Court**

A second way of terminating contracts, existing as a full alternative to the giving notice after a permit system, is that of dissolution by court. Unlike other countries in Europe, the Dutch dismissal law system does not have a specific labour judge. In the Netherlands it is the district court, more specifically the cantonal judge who has the jurisdiction in labour related cases. Procedures before this court constitute a fast and simple procedure without many formalities. Another characteristic of these procedures is that the normal ‘evidence rules’ are not applicable.

The possibility of termination of a contract by the Court is mentioned in the Civil Code, Article 7:685 that states that an employment contract can be dissolved by a court decision in case of '*serious reasons'*. Section 2 of article 7:685 lists two categories of 'serious reasons':

1. In the first place it refers to the concept of '*urgent reasons*' that may give rise to 'summary dismissal'
2. The second category of serious reasons is a '*change of circumstances'* which are of such nature that the contract of employment should reasonably terminate immediately or within a short period.

3. Dismissal law and the labour market

Since in the Netherlands the number of flexible workers whose contracts can be terminated quite simply, is considerable[2], dismissal law for ecomomic reasons has become less important than in the past. In most of the cases of flexible relations the dismissal rules do not apply or apply only partly.

We will list the flexible relations that escape wholly or partly the dismissal rules.

a. *Freelance* workers.

Freelance workers work occasionally for different 'employers'. Most of the time there is no employment relation as defined in the Dutch Civil Code (article 7:610). Their relationship is more similar to a contract of service. Freelancers usually have more than one commissioner. They (usually) are a kind of 'independent workers', also called self-employed people. Since there is no labour relation as defined in article 7:610 Civil Code or in the BBA, dismissal protection does not exist for these freelance workers. In rare cases it could be that the freelance contract has to be defined as a employment contract according to article 7:610 CC and then the whole body of dismissal law is applicable. An example is the worker who works for a certain period of time, under the authority of an employer, is receiving wages, (article 7:610) and works for a long(er) period for the same employer/commissioner.

b. *Worker on call*

A worker on call relationship means that the employer can call the employee to perform work only when there is work available. The contract is a minimal/maximal contract and sometimes the contract is a 0 hours contract. Most of the time the dismissal rules do not apply because of the fact there is no labour argreement.

[2] In 2007 there were 575.000 flexworkers, in 2011 734.000 workers had a flexibal contract.while the total workforce in 2011 contained 7338000 workers. (Source: CBS http://statline.cbs.nl/StatWeb/publication/?VW=T&DM=SLnl&PA=80479NED&LA=nl)

c. Temporary agencies workers and fxed time contracts

Temporary agency workers fulfill an important role in the Netherlands. The dismissal rules do not apply to temporary agency workers in the first 26 weeks of their work. (Article 7:691 jo 7:668a Civil Code). This means that the agency can immediately end the contract if the hirer decides to terminates the job. After a certain period of working for the same office, as provided by the collective agreement, a person can be awarded a contract for a fixed term, and, after an even longer period, even a contract for an indefinite period. However, that happens very rarely.
There are specific rules which apply in the case of fixed time contracts. Article 7:668a of the civil code states that after three fixed time contracts with an interval less than three months, the fourth contract will be an indefinite period of time contract. Article 7:688a also states that fixed time contracts with an interval less than three months with a duration of 36 months or more, the last fixed time contract will be an indefinite period of time contract.

4. Collective Redudancies

In the general overview of the system of Dutch dismissal law, in particular on economic grounds we have to mention the law on collective dismissal because this regulation is particularly important in cases of dismissal for economic reasons. These rules and procederes will be explained broadly in paragraph 2.1

II. Termination of the contract based on economic grounds

1. Social Actors

Which actors are involved with the termination of a contract at the initiative of employer based on economic grounds? What are their functions (trade unions, works council, governmental authorities)?

In this chapter an answer will be given on the questions mentioned above. Before answering these questions it has to be kept in mind that there is a dual system in the Netherlands regarding dismissals (see chapter 1). If an employer wishes to terminate a contract based on economic grounds there are several social actors which are involved in the procedure; the UWV, work council and trade unions.

Social Actors

UWV

The UWV (was already introduced in the previous chapter).

Works Council

According to the Dutch Works Council Act (WCA), an entrepreneur maintaining an enterprise in which, as a rule, at least 50 employees are employed or working, is obliged to establish a works council for the purposes of information and consultation with and representation of the employees employed by the enterprise.

The works council is entitled to receive all information that it reasonably needs to properly perform its duties. According to the Dutch Work Council Act the works council has a right to render advice on (among others) any decision the entrepreneur proposes to make that involve important changes in the organisation of the enterprise.

In relation to dismissals on economic grounds the entrepreneur is obliged to request the advice of the works council in case of

- transfer of control of the company of a part thereof;
- establishment, take-over or relinquishment of control of another company, or entering into or making a major modification to or serving a permanent co-operative venture with another company, including entering into or effecting major changes of or severing of an important financial participation on the account of or for the benefit of another company;

- termination of the operations of a company or a major part thereof;
- major reductions or expansions or other changes to the company;
- major changes in the organizational structure of the company or in the division of powers within the company;

in so far they affect the employment or employment conditions of workers (article 25 WCA).

Should the entrepreneur's decision deviate from the advice given by the works council, the former must give a full account of the reasons (in writing). The execution of the decision must be postponed for a month. During that month, the works council may lodge an appeal with the Enterprise Section of the Amsterdam Court of Appeal (Ondernemingskamer) against a decision by the entrepreneur (article 26 WCA). It can lodge the claim on two grounds: either the decision is not in accordance with the advice of the works council or facts or circumstances have become known which, if they had been known to the works council at the time of rendering its advice, could have been grounds for not rendering the advice as rendered.

The court can award the claim on the grounds that the entrepreneur, in weighing the interests involved, could not reasonably have arrived at the decision. It may (if the works council has so requested) order the entrepreneur to withdraw its decision in whole or in part, or to reverse specified consequences of the decision. The court may also issue an order to prohibit the entrepreneur to perform or implement certain actions. Any failure to comply with or any violation of the aforementioned prohibitions is forbidden. An appeal against the decision of the court can be lodged with the Supreme Court (Hoge Raad).

Except the one-month waiting period there are no statutory terms for the works council consultation. The Dutch Works Council Act only requires that the advice be requested within a reasonable time frame, so as to allow the works council to have a say in the decision that is to be taken. The decision to reorganize can only be implemented if the works council renders a positive advice or, if it issues a negative advice or no advice at all, after a one-month waiting period (article 25, section 6 WCA).

For enterprises with fewer than 50 employees there is no obligation to install a works council. However there are two employee participation schemes in place for an enterprise with fewer than 50 employees (articles 35b and 35c WCA)

Members of works councils enjoy special protection in order to be able to perform his/her duties completely independently from interference by the company. In order to protect the position of members of the works council and members of committees, to ensure their independence and to prevent possible retaliation measures on the part of the employer, the Dutch Works Council Act provides for protection from prejudice. The Dutch Civil Code provides for statutory protection against dismissal.

Consequently it is prohibited to terminate an employment contract with a member of the works council or one of its committees. C*andidate members* or *former* members of the works council or of a committee enjoy also special protection, although less than full members.An exemption is the termination based on the cessation of operations of the company or of the part of the company the employee is employed. The court will, aside from verifying whether there are valid grounds for termination, only terminate the employment contract if and when it is satisfied that the request for termination is not related to the membership of a works council or committee. That implies a member or a former member of a works council is not additionally protected in case of dismissal based on economic grounds.

Trade Unions

In the case of a collective dismissal the employer has an obligation imposed by the Act on the notification of Collective Redundancies (WMCO) and/or collective agreement to notify its intention to make a collective redundancy to the relevant trade unions. The employer has to do this in writing, in a timely manner. The obligation to report and to supply additional information provides trade unions with the opportunity to start negations with the employer. These negotiations may and usually do result in a social plan containing a termination regulation for the employees involved. When negotiations between an employer and trade unions result in a social plan and this social plan meets the requirements for qualifying as a collective agreement (in particular that it is notified to the Minister of social affairs), the social plan becomes a binding agreement.

The duties imposed by the WMCO to inform and to consult the trade unions enable the worker's representatives to exert pressure on the employer to investigate alternatives for the collective dismissal and if dismissals are unavoidable to provide for severance pay and reintegration facilities. If the employer does not cooperate sufficiently the trade unions may threaten and make use of collective actions such as strikes, sit ins etc. In the Netherlands there have been actions of this type.[3] These actions have had various results, sometimes they have delayed the closure of a plant or increased the amount of compensation to redundant workers. However the trade unions do not have the power to forbid a collective dismissal.

2. Procedural requirements

What are the main procedural requirements in case of dismissal (individual/collective) and what are their aims?

[3] For example the AKZO case in 2010 and more recently strike actions against the closure of the Mitsubishi plant.

As aforementioned it has to be kept in mind that a distinction must be made between collective and individual dismissals.

2.1 Collective dismissal

As has been pointed out above, because of The Dutch Act on Notification of Collective Dismissals, the employer has to report his intention in writing to the UWV and the trade unions, giving the grounds for its decision. The employer's notification must contain amongst other things:

- the reasons for the intended collective dismissal;
- the number of workers to be dismissed subdivided according to function, age and sex;
- the measures he envisages in respect of the consequences of the dismissals for the employees affected.

If the collective dismissal is aimed at reducing the workforce, the criteria mentioned above relating to the number of workers to be dismissed are important for the question of the selection criteria as to who is to be made redundant. According to article 4:2 of the Dismissals Degree the workforce must reflect the average age distribution.

According to article 3 of the WMCO the calculation of the number of dismissals for the purpose of whether there is a collecitve dismissal also the dissolutions of the contract by the court (based on article 7:685 CC) are relevant. Since 1 March 2012 also the employees whose contract of employment are terminated by mutual consent, count for the threshold of 20 employees. The notification to the UWV and the trade unions therefore is not dependent anymore on the way persons are (to be) dismissed.

The UWV will consider individual requests for permission to dismiss employees no sooner than one month after the notification report is submitted: so there is a one month waiting period.

Social Plan

In the Netherlands there are no legal regulations on social plans. The social plan is usually negotiated with the trade unions. Social plans can be negotiated on sectoral level, but more often they are negotiated at enterprise level. Where there is no such collective agreement the social plan may be ‘negotiated’ with the works council. That is called an ‘enterprise agreement’. A social plan negotiated with the works council will lack legally binding effect. The law does not provide binding effect to these arrangements. Nevertheless they can get binding effect if the employees explicitly or implicitilyt (by not objecting to it) accept the ‘agreement’ in their individual employment relationship.

As employers and trade unions are free to conclude a social plan, such plans show great diversity. However a major point of departure in almost every social plan is the promise that forced dismissals will be avoided as much as possible. Furthermore the social plan deals with the order of redundancies and the selection of the employees that have to be made redundant by setting the criteria for selection.
Also in almost every social plan it is stated what measures and provisions apply for redundant employees in case their contract will be terminated.

The main components in a Dutch social plan are:

• Dismissal order, which employees have to leave and who will remain.
• Support by the employer in finding a new job.
• External outplacement support in finding a new job.
• Search period for a new job: how long is an employee allowed – at the expense of the employer- to search for a new job?
• The severance pay.

The dismissal order is determined by reflection. The 'reflection principle', as discussed before, determines which employees must leave and which employees can remain.

A very important part of the social plan is the severance pay.The employee then has the choice of a severance or outplacement support.
The severance pay can be calculated in several ways. It is often calculated according to so-called the cantonal judge formula (see below). It can also be a monthly allowance that supplements the future wage (if this is lower) or unemployment benefit. This is a so called suppletion agreement.

In the case a social plan has a suppletion rule, the ex-employee receives money every month to compensate a fall in income.This is the case if s/he is umemployed, since unemployment benefit is 70% of the last earned wage. In case of wage, this is also often lower, in particular for 40-plus employees.

Further on we will discuss the Dutch cantonal judge formula which might be used in case of a severance.

Statutory law in the Netherlands does not require the employer to pay severance payments. Such payments are only due if imposed by a judge if the procedures of articles 7:681 Dutch Civil Code and article 7:685 Dutch Civil Code are followed or if indivdually or collectively agreed.
It may be concluded that the results of social plans to a large extent achieve their aim of limiting forced dismissals and easing financial consequences for the employees involved. It can also be stated that a social plan forms an important part of the

negotiations with the trade unions as they will base their support, in case of reorganization, on the content of that social plan.

2.2 Individual dismissal

As has been said before an individual employment agreement can be terminated in two ways:

1. By *giving notice* after having received a *dismissal permit* from the UWV. Without a dismissal permit a notice of termination is null and void. There has to be a valid reason for dismissal before the Uwv can grant a permit. The Dismissal Decree provides for gounds for a justified dismissal. Grounds are: incapability of the worker, redundancy or other substantive reasons.
2. After the UWV has assessed evidence provided by both parties it will issue a decision. There is no possibility for administrative appeal if the UWV refuses or grants the dismissal. The consequences for the employee will be dealt with in paragraph. However if an employer disagrees with the refusal of a dismissal permit s/he can renew the request a few months later, but again s/he has to give evidence that the grounds for dismissal are justified. As has been indicated in paragraph 1, an employment contract can also be terminated by court decision (article 7:685 CC). The major ground is a serious reason consisting of a substantial change of circumstances. An economic crisis or, in more general terms, economic problems can and usually are considered as a substantial change of circumstances. The drawback of a termination by court decision based on “changed circumstances” is that the court may award substantial compensation to an employee as a condition for termination.

A third way of termination of an employment contract is the mutual agreement. Parties (employer and employee) may agree to an out-of-court settlement, or the employer may provide for a reasonable redundancy payment in which case the employee would not have any grounds to start proceedings the dismissal.

A procedure to be mentioned here is the possibility to lodge a claim before court that there is an “apparently unreasonable dismissal” (article 7:681 CC).This may be the case if no sound reason is given for the termination or if the financial effects of the termination (the compensation or the severance payment) are too harsh on the employee in comparison with the interests of the employer. Whether the effects are too harsh will depend on the specific circumstances of the case (e.g., tenure, age, etc.).

III. Economic reasons for dismissal

a) *How is this "economic" reason described, what should be understood by "economic" reason? .For instance, could transnational relocation be considered as an "economic" reason?*
b) *Based on this reason, can the dismissal be either, individual, plural or collective? In this case, is the meaning of the "economic reason" changing in any way? (a less strict requirements, for instance).*

The questions a and b are answered together in this chapter. A distinction is made between individual termination and collective termination. Transnational relocation is a specific circumstance under Dutch law and is treated in a separate paragraph. After that paragraph, the answer to question c is given.

1. Individual termination

BBA procedure

Detailed rules on dismissal permits are laid down in the Dismissals Decree and the UWV Policy Rules on Dismissals. These rules also apply when a dismissal permit is requested for economic reasons.
In the procedure of obtaining a permit for dismissal from the UWV, the law distinguishes three possible grounds for giving notice: issues pertaining to business economics, incapacity of the employee, and grave and permanent breakdown of the employment relationship.
Thus, the employment contract can be terminated for economic reasons, for example if a reorganisation is taking place or a company is closing down or relocating. It canalso happen that part of the company's activities are closed down.

According to the Dismissals Decree, there are seven categories of economic reasons. These categories are:

- Bad financial situation;
- Work reduction;
- Organisational changes/reorganisation;
- Technological changes;
- Suspension of (a part of) the company activities;
- Company removal;
- Expiration of (remuneration costs) subsidy;

The UWV takes into account that an employer has to take the appropriate decisions necessary for his enterprise. The employer has a large discretionary power taking the initiative to terminate a contract based on economic grounds.

The UWV does not check in depth the economic reasons presented by the employer. There is only a marginal assessment by the UWV. A marginal review means that the UWV only tests if the employer could reasonably come to his decision. The employer can make its own business decisions, but the UWV only grant a permit if the proposed termination is *objectively reasonable*. The UWV has limited powers to determine whether the decision of the employer is plausible and if he reasonably could come to his decision.
The employer must therefore indicate the grounds on which his request is based while the employee affected may submit a defence. Thus, permit is not granted automatically as a simple formality. The UWV assesses the request on its merits when the employee substantially contests the request.

The UWV does not decide on redundancy payments, nor are such payments mandatory under Dutch law. Usually, the employer has to pay a compensation based on a collective agreement or based on terms in the individual employment contract, if they are made.
After termination of his contract, the employee can start a court procedure on the basis of article 7:681 CC. If the termination of the contract is apparently unreasonable, the judge can decide that the employer has to pay a compensation to the employee. This procedure is more or less exceptional because the employee has to give evidence that the dismissal was apparently unreasonable. The grounds for this are very restricted.

Court decision

The termination of a contract at the initiative of the employer based on economic grounds is also possible by court decision. The ground for this decision is that circumstances have substantially changed, which can also be an economic reason. The court will examine whether the economic reason is plausible. The circumstance of improper performance or economic crisis can be considered as a substantial change of circumstances.

The economic reason is not laid down in the Dutch Civil Code. The cantonal judge therefore does not have his own definition of economic reasons, but uses the criteria of the UWV, which are laid down in the Dismissals Decree and the UWV Policy Rules on Dismissals. However, these rules are not binding in court proceedings. The cantonal judge is therefore less strict in the test of the economic reason by the employer The consequence of a termination by court decision based on “changed circumstances” is that the settlement of severance payment is part of the judgment. The employer has the choice to accept the proposed compensation by the cantonal judge or to withdraw the request for termination. In the first situation, the contract is terminated and the employer has to pay the dismissal payment to the employee. In

the last situation, the contract will be continued and the employer doesn't have to pay the proposed compensation by the court.

The amount of compensation depends on the specific circumstances. There are no statutory rules regarding severance payments, but in general courts tend to use the so-called 'cantonal judge formula'.[4]
The cantonal court formula comprises three factors: A x B x C. Factor A is the service period. The service period is based on the age of the employee and the duration of the service. This factor has to be multiplied by the gross monthly salary plus the fixed and agreed wage components (factor B). The special circumstances of the case are expressed in the correction factor C. The standard correction factor is 1. The correction factor is the only flexible one of the three. The facts and circumstances of the situation are taken into account. These influence the amount of severance payment, because the correction factor becomes smaller than 1 when the facts surrounding the termination are primarily attributable to the employee. The correction factor can be higher than 1 when those facts are primarily attributable to the employer.
In case of termination of a contract at the initiative of the employer based on economic grounds, the correction factor usually is 1. If the employer argues that he is in such a bad financial situation so he can not afford a high compensation that the amount should be less, the judge can change the correction factor in a number smaller than 1. This is the so called "*habe nichts habe wenig defense*".

In the Netherlands, there is no limitation of the amount of severance payment, however, there has been an ongoing discussion whether the payment should be limited to a one-year pay for employees with an annual salary above 75,000 euro.[5]
See also paragraph 6 Draft legislation.

2. Collective termination

BBA procedure

In case of a BBA procedure, there is no difference between the assessment of the UWV of an individual dismissal request, a plural dismissal request and its review of a collective request. The meaning of the economic reason is not changing in any way and there are not less strict requirements.
At the end of the day assessing the request for the permit the UWV checks in every individual case if the dismissal meets the requirements of Article 6 of the BBA and Dismissal Decree. The employer has to demonstrate that he could not have reasonably decided otherwise for every single contract.

[4] The formula has been developed by association of cantonal judges. It has been amended in the course of time. The formula is not binding in legal terms, but is mostly followed by the judges.
[5] Thematic Report 2011, European Labour Law Network, *Dismissal – particular for business reasons- and Employment Protection*, p. 82-84.

Court decision

In case of a collective dismissal, termination of the employment agreement is also possible by court decision. The court is competent in case of collective dismissal. The court is not (legally) bound by the rules of the BBA procedure, but it quite common that it applies the rules similarly. The court has anyhow to respect the rules *prohibiting dismissals* as laid down in article 7:670 and 670a CC. The prohibitions of dismissal of this article include dismissals on ground of illness, pregnancy, conscription, membership of an employees association. It is not allowed for the employer to terminate the contract in one of this cases. See paragraph V for the consequences.

Similarly as the UWV the court will examine whether the economic grounds are plausible on the basis of documents provided by the employer and usually verified by accountants if the employer states that the dismissal is necessary due to economic difficulties. However, the court does not examine the plausibility of the economic reasons if the relevant trade union declares that the dismissal is necessary.[6]

3. Transnational relocation

Transnational relocation is a special circumstance under Dutch law. The employment contract cannot be terminated because of transnational relocation, because of the European Directive 2001/23/EC relating to the safeguarding of employees' rights in the event of transfers of enterprises, businesses or parts of enterprises or businesses. The Directive is implemented in Article 7:662 – 666 of the Dutch Civil Code.

The employment contract between the transferor and the employee cannot be terminated “because of the transfer”,but based on Article 5 of the Directive and article 7:663 CC. An exception is the termination taking place for economic-, technical-, or organizational reasons (“ETO-reasons”).The transferee is allowed to terminate employment contract after the transfer of an enterprise on the grounds of ETO-reasons, as the transferor would have been allowed to terminate employment contracts before the transfer for such ETO-reasons.
In accordance with the directive on transfer of enterprise enterprises dismissal that are or reasonably could be connected to the transfer are prohibited. In case the employees of the transferor have been transferred to the transferee the latter has to respect the principle of seniority (“Last In, First Out” per interchangeable job category), when selecting employees for redundancy. More about this principle is dealt with in paragraph IV.c.

[6] Also in this case the court follows the practice of the UWV in this respect.

There is a difference between economic reasons and ETO-reasons. The first reasons are relatively simple to demonstrate by the employer, because of the fact that the UWV only reviews such reasons marginally, as mentioned above. The employer has the freedom to make its own business decisions.
The ETO-reasons have another background. The termination of contracts because of the transfer of enterprise would frustrate the principle of protection of employees. Such a termination is therefore not permitted. Termination of an employment agreement is, however, allowed for economic-, technical-, or organizational reasons ("ETO-reasons"). The UWV uses the economic reasons and the ETO-reasons together. In case of transfer of an enterprise, the request for (collective) dismissal should be reviewed on the existence of economic reasons, on the used selection criteria and on the possibilities for replacement, training, outplacement and reinstatement. What is different from the review of the economic reasons where these criteria are not necessarily have to be applied.[7] That does not imply that the UWV is not using these criteria when assessing the economic grounds for dismissal. It can use them as guidelines, which the UWV often does.

A transfer of enterprise can result in double functions, but can also have the consequence that some functions does not exist in the enterprise of the transferee or cannot be created. Termination seems to be the solution.
In that case, the transferee must respect all rights and obligations arising from the employment agreement, including years of service. Because of the fact that employees hold their seniority, the employees of the overtaking enterprise also count for the selection of redundancy.

The European Court of Justice[8] decided that transferred employees' length of service with their former employer does not as such constitute a right which they may assert against the new employer. On the other hand, length of service is used to determine certain rights of employees of a financial nature, and it is those rights which will have to be maintained by the transferee in the same way as by the transferor. This judgment could lead to the situation that a transferred employee is candidate for dismissal, but the transferee must take into account the entire length of service for his redundancy payment.

The situation in the Netherlands is different, because of the fact that difference in favour of the employees is permitted. The UWV does not fully respect the principle of seniority of the transferred employee, but looks at the "moment of transition". Important is the timing of the permits the employer has asked for it. If the old employer ask for permission of termination of contracts before the transfer of enterprise, the employees of the transferor are the basis for the determination.

[7] UWV Werkbedrijf, Ontslagprocedure, UWV WERKbedrijf Beleidsregels en regelgeving, SDU Uitgevers 2010, p. 208.
[8] Collino & Chiappero/Telecom Italia, r.o. 50 – 53. *Case C-343/98.*

The background of this rule is that if a weak enterprise is acquired, it can be unreasonable to terminate the contracts of the employees of the stronger transferee because of the “afspiegelingsbeginsel” (the principle of proportionality) above the contracts of the employees of the acquired weaker company.[9] In fact, hereby, there is created a priority for the existing employees. If the new employer asks, after a certain period , for a permit, Article 4:1 of the Dismissal Decree applies.

c) *Is the employer obliged to justify the dismissal or to prove the economic situation and how?*

4. Individual termination

BBA procedure

In the UWV Policy Rules on Dismissals the UWV has described how the employer must substantiate the application and what documents must be submitted. An application for a UWV permit must state the reasons for the termination of the employment contract by the employer. The employee is given the opportunity to give a response, on which the employer can comment. Occasionally the parties are heard in person.

In case of asking permission for dismissal to the UWV on the basis of economic reasons, the employer has to make plausible that there are economic reasons for a structural decrease of working places. The burden of proof that the grounds of the termination are plausible, lies with the employer.

If the proposed layoff, redundancy or downsizing is based on economic reasons, the employer has to provide a financial report by an accountant that proves that there has been a downturn in business for the past 3 fiscal years and that downsizing the workforce is the most cost effective measure.

The employer has to prove to the UWV that a reduction in the workforce is necessary in relation to the decrease of business. To do so, the employer is usually required to provide specific documentation supporting the claim, such as consecutive balance sheets showing a clear decrease, a comparison with similar businesses incurring losses, efforts taken to avoid dismissals and a forecast that the situation will not change. If the employer does not succeed in giving convincing information, the UWV can refuse the permit. The consequences for the employer and the employee will be dealt with in chapter IV.

[9] UWV Werkbedrijf, Ontslagprocedure UWV WERKbedrijf Beleidsregels en regelgeving, SDU Uitgevers 2010, p. 211.

Court decision

Although the economic reasons are not laid down in the Dutch Civil Code and the Dismissals Decree and the UWV Policy Rules on Dismissals are not binding in those procedures, the court usually requires the employer to prove by documents that there are plausible reasons for termination of the contract on economic grounds. These documents usually have to be verified by accountants. See also chapter II.

5. Collective dismissals

In case of collective dismissals, pursuant to the WMCO, prior notification and detailed information of the proposed lay-offs must be given on a confidential basis to the UWV and the trade unions in the industry. As has been described above generally speaking a social plan shall be drawn up regarding the financial consequences and facilities for employees involved.

In order to either receive permission to give notice or successfully petition the court to dissolve the employment contract(s), the employer must have a valid reason for the termination on economic grounds. As shown above the request of the employer will be assessed on the basis of certain criteria.
The case-law is not clear about the criteria but the outcome depends on the circumstances of the case and the facts proved by the employee. The judge does not inveitgate the facts himself.

In assessing requests for collective dismissals for economic reasons the UWV applies a set of criteria. The relevant information the UWV needs for its assessment is usually provided by the employer prior to the formal request for the permit to dismiss employees. The most relevant criteria are

- Have the financial reasons for the elimination of the position(s) been sufficiently substantiated?
- Has the selection of the employees to be dismissed been carried out correctly? In other words: have the criteria on proportionality set out in the UWV Policy Rules been correctly applied?
- Has the employer provided sufficient and convincing arguments that the employees concerned cannot be reallocated to other jobs?

When reorganization due to a relocation of economic activities is at stake, some requirements for the employer to clarify are added, such as:

- the former and future organization chart with an explanation and reasons for the changes;
- a comparison with (or general information related to) similar businesses;
- the forecast if nothing were to change;

Next to these the other most important requirements remain crucial:

- the efforts taken to avoid the dismissal (cost-cutting measures);
- a list of the employees involved, including position, age and starting date;
- the correct use of the selection criteria.

Finally the employer also has to show that bridging the problems temporarily is impossible.[10]

Reason

The UWV applies strict requirements concerning the financial information to be provided by employers. An employer must in any event submit his annual accounts for the preceding three years, as well as a substantiated projection for the next six months.

Selection

The order of dismissal is determined by the principle of proportionality. See paragraph IV.c.

Reallocation

The employer must prove that the relevant employees cannot be reallocated to other jobs within the employer's enterprise or organisation. An employer must in any event submit its annual accounts for the preceding three years, as well as a substantiated projection for the next six months. More about the reallocation is described in paragraph IV.b.

[10] Tom Claassens, *Legal aspects of doing business in the Netherlands*, Loyens & Loeff, 2011.

IV. Social and economic interest

Due to the fact there are no explicit grounds for the termination of a contract on grounds of economic reasons, we will discuss the guarantees of the employees in relationship with the questions A until D and therefore there will be no question number E.

A. Rules to consider all the parties' interests

Is one of the aims of the rules to consider all the parties' interests? For instance, is the employer obliged to examine alternatives to dismissal?

1. All the parties' interests in general

1.1 All the parties' interests and alternatives under the UWV procedure, and the cantonal judge procedure

In general the UWV decides on the application for dismissal as discussed before. The UWV has a standard policy if an employer applies for the termination of a contract of an employee. Different from the approach of the UWV is the termination of a contract by court decision. As pointed out before, despite the fact that a cantonal judge does not have to follow the rules provided by the UWV (the policy rules on dismissal), he will apply most of the rules of termination subject to the circumstances of the case.

In order to investigate alternatives for dismissals on economic grounds some measures that possibly will decrease the number of dismissed persons or mitigate the consequences for the employees affected by the reorganisation, have to be envisaged. For this purpose measures have been taken by the government, which cope with the need for a work reduction either permanently or temporarily. When assessing and weighing the interests of the employer and the employees alternatives can be attractive. The measures we discuss hereafter have to be assessed in the context of the need of work reduction.

According to article 3.1 Dismissal Decision, the UWV judges whether the intended dismissal is reasonable. Hereby the possibilities and interest of the employer and the employees have to be taken into account. In the judgement of the reasonability of the dismissal, other interests may play a role except to the employer and the employees, such as the labour market interest.

Article 7:611 CC and 7:685 CC give the UWV and the cantonal judge some grip as a guiding principle in order to decide whether a request for dismissal does meet the required standards.

The UWV tests in general:

1. Is there a necessity for the dismissals do to business economic reasons?
2. Have the possibilities for replacement been fully fulfilled?
3. Are the right employees addressed for dismissal, and has the correct dismissal order been used?

To increase the opportunity of a new job the employee might offer support. The employer can organise a Mobility Office. However, there is no obligation for employers to comply with such support. The Mobility Office will set up a space in which the employee could possil via the Internet and other channels search for vacant jobs. If necessary, an employee could provide the opportunity for an employee to receive trainings. This training is organized by the Mobility Office. Employers can also use external contacts to the redundant workers in other organizations to introduce their 'former' employees.

1.2 Interest of the parties under a social plan

A social plan is not legally required. By creating a social plan laws and rules on mergers and reorganization must be taken into account. Changes in organizations are bound to legislation affecting the interests of the workers. Legislation includes from applicable collective agreements, the Civil Code, the Collective Redundancy Notification Act, Act on the CAO, and the dismissal decision.

A social plan intendeds to make arrangements and provision for employees affected by the reorganization. With the social plan the employer provides the manner in which the social and financial consequences of the reorganization are collected. In a collective redundancy, the employer must make arrangements for both departing and remaining employees. Each departing employee is entitled to the facilities from the social plan. A social plan is part of the reorganization plans. The employer shall implement the social plan and will pay rising costs.

1.3 Replacement

As a starting point we should take into account an employer has the duty to provide the view of approach for the consideration of replacement of a redundant employee.[11] The question that becomes interesting is how far the expected effort of an employer to replace an employee has to reach. Due to article 3.1 of the Dismissal decree, a reasonability test is the required approach. In case of economic dismissal, the employer has generally the aim to reduce employee costs. Due to the decline of

[11] Termination procedure UWV Werkbedrijf, Beleidsregels en Regelgeving, p. 69

workplaces, a possibility of replace of not likely to happen. The employer has to prove he optimally tested the possibilities prior to apply for a dismissal permit.

In case of collective redundancies, replacement is often dealt with in the social plan. In general the agreements in a social plan are binding for the contracted parties involved and therefore not for review of the UWV.[12] Solely in cases in which the employee binds itself to replacement in the social plan, the UWV implicates the promise of the employer prior to the application for dismissal of an employee.

1.4 Outplacement

A measure to be envisaged in the procedure of assessing the validity of the proposed dismissals is the possibility to replace the worker who is on the list of persons to be dismissed.[13] The question that becomes interesting is how far the expected effort of an employer to replace an employee has to reach. Due to article 3.1 of the Dismissal Decree, a reasonability test is required. In case of economic dismissal, the employer has generally the aim to reduce employee costs. Due to the decline of workplaces, a possibility of replace of not likely to happen. The employer has to prove he optimally tested the possibilities prior to apply for a dismissal permit.

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Training and education

Education does not lead to another job in a direct manner. Therefore, training and education at time of a dismissal is probably too late to resort the requested effect. After the replacement of an employee, additional education might be required. All the study costs an employee has to make, to fulfil the new job at its best, have to be paid by the employer. Most of the social plans contain a commitment for the employer, according to training and education.

2. A|lternatives to dismissal

2.1 The temporary work reduction support scheme
It can happen that due to a decline in turnover and profits an enterprise may have to reduce the workforce. However, on the long run there may be the prolblem that he is unable to find well qualified personel again when the market is re-established. In

[12] Termination procedure UWV Werkbedrijf, Beleidsregels en Regelgeving, p. 165
[13] Termination procedure UWV Werkbedrijf, Beleidsregels en Regelgeving, p. 69
[14] Termination procedure UWV Werkbedrijf, Beleidsregels en Regelgeving, p. 165

order to allow enterprises to maintain their workfocre a temproar scheme allowed enterprises, who did not disiss their workers, to reduce their wage costs by reducing the working hours of employees, and thes eworkers were paid part-time unemployment benefit One advantage of this scheme is that knowledge and skills within the firm did not disappear. This scheme was designed and introduded during the financial crisis in 2008
The employer was obliged to restore the working hours of the employee once the possibility take place.*The scheme has now been terminated but may revive in case of a new crisis.*

2.2 Parttime dismissal

Another alternative to dismissal of one or more employees is *'part-time dismissal'*.15 This alternative consists of the principle that the employer terminates the contract of the employee according to the legal standards, and offers a new contract with fewer working hours to the employee. In general it is accepted that the employment ratio is indivisible. This means in general the UWV does not agree with a dismissal spread over more employees, compared to the number of dismissals taking place, according to article 4.3 of the Dismissal Decree.16 The 'part-time dismissal' provides employers the opportunity to maintain the knowledge of the present employees.

An employer who applies for a dismissal due to business economic reasons, needs to come up with plausible factors which might lead to dismissal in case of efficient business operations. This is solely the case when the structural situation results in the loss of work places; or structural work reduction. Only then, a dismissal, which is seen as the last resort for an employer, is justified. If there is only a need for temporary work reduction, this practice can not be used as a basis for dismissal.

B. Duty of adaption or reinstatement

Is there a duty of adaption or reinstatement?

1. Reinstatement under Dutch labour law

First of all we have to mention that the Dutch labour law system does not give explicit rules for reinstatement of employees. It does not have to give such rules because in case the dismissal permit has been refused, the employee continues to have his or her job. Reinstatement is therefore not necessary. Likewise is the situation for the civil judge. Refusing to dissolve the employment contract has the same outcome: the contract continues to exist.

[15] UWV, 'Beleidsregels Ontslagtaak UWV', version december 2009, p. 21-2.
[16] Idem.

The UWV has to test what the employer has undertaken in order to prevent the dismissal.[17] As far as the employer has to possibility to reinstate an employee, the UWV will not accept dismissals on economic grounds. However, not solely on prudential reasons the UWV checks the possibilities for employers to reinstate employees. One might think of dismissal reasons which affects the person of the employee (such as a disturbed working relationship).[18] From now on however, we will focus on the prudential dismissal.

An employer needs to fulfil the criteria that an appropriate business concept needs the dismissal of several jobs within the company. A transfer of employees should be investigated prior to the dismissal. Questionable is to what extend one might expect the employer to reinstate a redundant employee. In order to answer this question article 3:1 of the Dismissal Decision is important. The UWV needs to estimate the reasonability of the proposed dismissal. One of the criteria to the reasonability principle is the possibility of reinstatement places.

The nature of an economic dismissal is in the interest of the employer. For example in a bad financial situation the employer strives to reduce the cost of employer in which there is no place for reinstatement. With a reorganisation, the situation is different. With the remaining positions in the company the UWV expects the employer to search for capable employees within the existing workforce. Before the request of the dismissal at the UWV the employer need to prove he used the possibilities for reinstatement optimally.[19]

In a corporation with several locations, the employer has more possibilities. The UWV request such an employer to search for reinstatement within all the locations of the company. Within a concern, the UWV request the employer to search for reinstatement within daughter companies, within the reasonable area of the employer. As we see, the nature and extent of the organization defines the duty of reinstatement for the employer.

Not solely the employer has a duty for reinstatement. The UWV expects the employee an active attitude to prevent the forced dismissal.[20] Active job application might be required. According to the weight of the interest for the employee, the duty of care of the employer increases in situations the dismissed employee served for a long time at the company.[21]

Special attention is required in the case of article 7:682 CC. According to this article a cantonal judge has the opportunity, in case of an apperently unreasonable

[17] UWV, 'Beleidsregels Ontslagtaak UWV', version december 2009, p. 20-1.
[18] Idem.
[19] UWV, 'Beleidsregels Ontslagtaak UWV', version december 2009, p. 20-2.
[20] UWV, 'Beleidsregels Ontslagtaak UWV', version december 2009, p. 20-3.
[21] HR 28 maart 1997, *JAR* 1997/90 (Cemsto / El Azzouti).

termination, to restore the contract of the employee. Important to notice is that the contract had been terminated untill the cantonal judge decision came into force. Therefore an employee might have suffered income, or other forms of compensation.

One might think of situations in which the relationship between the employer and the employee incurred damage to which restore of the contract is not of both parties interest. In such a situation, according to article 7:682 sub 3 CC, the cantonal judge may condemn the employer to pay a ransom, where after the contract will not be restored.

Reinstatement and the 26 weeks clause

The dismissal permit might contain a reinstatement clause, based on business economic grounds. (the so called: 26 weeks clause). This condition might include that an employer who intends to hire within 26 weeks of the dismissal decision a new employee for work that is similar in nature, is bound to re-employ the dismissed employee. The 26 weeks clause applies to part-time workers and temporary workers as well.

The juridical base of this clause is 'Ontslagbesluit UWV, article 4.5'. The district court in Nijmegen, ruled that this article is meant to protect the employee on grounds for dismissal, solely on the fact the work might be done cheaper by another employee.[22]

2. Adaptation under the Dutch labour law regime

Adaptation might exist in four areas. First we have the adaptation of the organisation, secondly adaptation of the work, thirdly adaptation of the enterprise and finally and probably most important one, the adaptation of the individual worker.

A comprehensive approach to individual time and to implement “the general principle of adapting work to the worker”, as referred to in EC Directive 93/104 does play a role in the Netherlands as well. Therefore it is necessary to envisage methods that leave working time not solely on the regulation of the employer or of collective bargaining as it is known in today’s labour law.

Within the traditional international working time regulations as consented within the ILO, there is no legal basis for the individual worker to make a claim against the employer to adapt work to his personal situation successful. Therefore we might conclude that for an individual worker, there is no obligation for the employer to adapt his work to personal standards.

[22] Kantonrechter Nijmegen, 11th of August 2009, LJN BJ8094.

C. Priority list for dismissals

Is there a priority list for dismissals ("last-in first-out" or "social selection", for instance)?

1. 'Last-in first-out' principle under Dutch Law

To be able to answer the question whether or not the Netherlands has a priority system for dismissals, we have to discuss the economic necessity of dismissal for the employer first. In case of reorganisation of a company, there may be a priority list for dismissals, both for individual cases and collective redundancies.

Prior to the present 'reflection principle', to which I will come back later, the Netherlands used a principle in which the working years of service for the same employer did count. This so called 'years of service' or 'last-in first-out' principle encompassed that in each category exchangeable jobs within a business location, the employee with the least years of service, would be the first in line for dismissal.[23] This system, generally known as the 'last-in first-out' system, had been replaced as a main rule, by the 'reflection' principle per March 2006.[24]

2. The 'Reflection' principle as priority tool for dismissals

The 'reflection' principle, contains the underlying relationship between the number of employees and divided groups of age within the business, and the ratio of dismissals within these groups. The groups are divided in the ages: 15-25 / 25 – 35 / 35 – 45 / 45 – 55 / 55 and above. The UWV provided a manual to decide which employees are eligible for dismissal.[25] Reflection will not be available if a unique job (a job which can only be possessed by one employee) will dilapidate.[26]

There are several reasons why an employer is allowed to deviate from the 'reflection principle'. First, this is the situation in which the employee is indispensible. Another reason might be the weak labour market position of the employee. Deviation of the 'reflection principle' is solely allowed with decent argumentation by the employer.[27] This follows from the fact that deviation from the 'reflection principle' makes automatically the next employee in line candidate for dismissal.

The UWV treats temporary employees, posted employees and borrowed employees of another company as the first eligible for dismissal, if those employees work in

[23] .G. Verburg, 'Arbeidsrechtelijke aspecten van reorganisatie', p. 46.
[24] Idem.
[25] CWI, 'Handleiding afspiegeling algemeen', Version 1.1, of May 2006.
[26] UWV, 'Beleidsregels Ontslagtaak UWV', version of December 2009, p. 10-2.
[27] UWV, 'Beleidsregels Ontslagtaak UWV', version December 2009, p. 10-2.

exchangeable functions which are eligible for dismissal.28 Subsequently the employees on a temporary contract are the next in line. The last in this priority order are the employees with a permanent contract.[29]

As discussed above, the UWV makes use of an action plan in order to decide that the dismissal is in accordance with the reflection principle:[30] for this is relevant:

- the business location. the workforce.
- the category of exchangeable functions.
- the number of employees working in those exchangeable functions.
- the age group these employees belong to.
- Calculation of the percentage of workers in each group.
- the necessary reduction of workers in each divided age group.
- Multiply action 6 with action 7.
- Determine in each group of age, the number of employees eligible for dismissal.

After the calculation of the number of employees eligible for dismissal in each group of age, the employee with the least years of service for the company is the first eligible in line for dismissal.[31]

One of the most important factors for this procedure Is that there has to be a distinction between the duration of the contract of the employee and his/her age. The duration of the contract of the employee is a weighing factor for dismissal, but not the fact that an employee can because of his age, not easily find a new job.[32]

3. Interchangeable jobs

In case of an enquiry for dismissal at the UWV for business economic reasons, the selection of dismissal for employees to contribute operates under the 'reflection principle' as discussed before. The 'reflection principle' is applied by category of interchangeable jobs of the establishment.
UWV will at the assessment of such a resignation determine whether the employer has correctly applied the category of interchangeable jobs- and will therefore have to form an opinion which jobs are and which are not interchangeable.

The concept of interchangeable jobs should be distinguished from the notion of the appropriate function, which is leading to the relocation efforts by an employer in the

[28] UWV, 'Beleidsregels Ontslagtaak UWV', version December 2009, p. 10-3.
[29] UWV, 'Beleidsregels Ontslagtaak UWV', version December 2009, p. 10-4.
[30] UWV, 'Beleidsregels Ontslagtaak UWV', version December 2009, p. 10-5/6.
[31] Calculating the years of service for the employer might be necessary.
[32] A. van Zanten-Baris, 'De grondslagen van de ontslagvergoeding', 2009, p. 132.

context of dismissal for business economic reasons, after the selection of dismissal for conducted employees has taken place.

An employer who request for a dismissal may indicate that application of the 'reflection principle' is not at stake because the function of the for redundancy nominated employee is completely canceled or will lapse. In this situation it may happen that a new position within the company is / will be created that shows clear similarities with the lapsed function. The question then, is whether this new feature is interchangeable with the lapse function taken into consideration.

To determine whether there are interchangeable positions, a review is necessary on the basis of the factors mentioned below for interchangeability (job content, skills and knowledge, skills required, level and reward). The factors should always be assessed in mutual consistency. It is for the employer to demonstrate that the new function is sufficiently different from the expired function.

Prior to the dismissal of an employee, an employer has the opportunity to consult with the employee about the termination of the existing contract. This is the so called 'settlement agreement'. This normally contains of a proposal by the employer to the employee which might lead to negotiations on the terms of ending the contract. In case the 'settlement agreement' meets several criteria, the employee is not blameworthy of his unemployment, in other words s/he will not refused unemployment benefit because of his signing the agreement.

4. Exceptions to the priority rules for dismissal, conditions of the 'settlement agreement'

The employer need to come up with the initiative to terminate the contract, to which the employee replied positively. In the agreement it needs to be explicitly said, the employee is not to blame, and there is no reason for urgent reason for dismissal.

Reasons for termination should be on neutral grounds, such as economic reasons or organization grounds. Despite the fact other factors might have lead to the 'settlement agreement' are often let of the agreement on purpose. The 'settlement agreement' is an important contract in which all the arrangements have to be clear. After the signing of the contract there is no way back for the termination of the contract, neither for the employer, nor the employee.

The 'settlement agreement' provides some certainty to the employee and the employer. Both will know when the contract of the employee will end. The employee might receive a compensation for the dismissal, which should be incorporated in the 'settlement agreement'. The compensation could be based on the 'district court formula', although there is no need to encompass with this type of compensation by the employer.

D. Hire new employees

Is the employer allowed to hire new employees once the dismissals have taken place?

1. General terms and the '26-weeks' clause

An employer has the obligation to hire an employee on a free basis. To this principle however, there is an important exception.

The UWV has the possibility to allocate a dismissal license under the condition of the '26 weeks clause' of article 4.5 Dismissal Decision. The dismissal license might contain a reinstatement clause, based on business economic grounds. This condition might include that an employer which intend to hire a new employee for work that is similar in nature, within 26 weeks of the dismissal decision, is bound to re-hire the dismissed employee. The 26 weeks clause applies additionally to part-time workers and temporary workers.

The juridical base of this clause is 'Ontslagbesluit UWV, article 4.5'. The district court in Nijmegen, rules that this article is meant to protect the employee on grounds for dismissal, solely on the fact the work might be done cheaper by another employee.[33]

Since 1 March 2007, the '26-weeks clause' is automatically implemented in a dismissal license given by the UWV. One of the reasons for this automatic implementation was the migration of worker from Eastern-Europe. In order to protect Dutch workers, which are more expansive compared to their colleagues from the East, the UWV implemented the clause.

The result of infringement of the clause is a salary payment obligation and no legal termination of the contract, to which extend the employee has to be reinstated.

A dismissal decision with a '26 weeks clause' is a legally binding, however a conditionally decision.[34] Important notice to mention is that every contract falls within the scope of the clause, regardless whether this will be a temporary contract or reduced working hours. In the case a function within a company remains the same, as it was before the dismissal of the employee, the former employee is prescribed to the function. Decisive in this are the words: 'the same kind' of work in order to determine whether the former employee is able to retain his former job.
In case of collective redundancy, the Dutch civil judge followed the rules of the dismissal order.[35] However, now that the 'reflection principle' has been introduced in

[33] Kantonrechter Nijmegen, 11 August 2009, LJN BJ8094.
[34] Termination procedure UWV Werkbedrijf, Beleidsregels en Regelgeving, p. 178.
[35] Termination procedure UWV Werkbedrijf, Beleidsregels en Regelgeving, p. 180.

2006, there will remain a grey area and we have to wait for a new juridical decision in order to determine whether the situation has changed during the last years.

The '26 weeks clause' requires the employer to rehire the employee for whom a dismissal permit was given, if within 26 weeks of the given dismissal permit, if a vacancy comes available for 'the same kind' of work.

2. **Method Blecourt**

In this method, a quality improvement is deemed over a number of similar, usually higher, features over a smaller number of new created functions which are applicable to every former employee. The employer is then able to decide who are eligible to the functions with higher standards, while not eligible employees by way of the reorganization are made redundant.

The cantonal judge is considered that with a reorganization objective criteria should be involved in orde to decide which employees are eligible for severance. The 'reflection principle' is therefore the most common method. By using the method of Blécourt, the employer can choose the best people, to his knowledge. This opposes labour law in the Netherlands. If the newly created position, lies close to the old function, there is hardly to speak of a new position. The method Blécourt in this case shall not be used as a selection criterion. The more there is a serious new job with a correspondingly higher salary and more responsibilities, the more chance of success the Blécourt method has.

V. Consequences of dismissal based on economic grounds and access to the Court

What are the consequences of a lawful dismissal?

1. Dismissal with the permission of an administrative official

When the UWV decides to give a dismissal permit, there is no possibility to appeal against this decision. However the worker has the option to claim damages before court alleging the dismissal was unjustifiedas mentioned in article 7:681 Civil Code. Examples of unjustified dismissals are mentioned in section 2 of the article namely, dismissal without a reason or a false reason, or if the hardship endured by the employee is disproportionate to the employer's interests. When the UWV decides to give a permission the employer must comply with the notice periods mentioned in article 7:672. This means an ending period of one month when the duration of the contract was less than five years, two months when the duration of the contract was more than five years and shorter than ten years, three months when the duration was ten years or longer and finally for months when the duration of the contract was fifteen years or longer. When the employer fails to apply the ending period the worker can also claim compensation. (Article 7:677 sub 3 Civil Code)

2.Dismissal by court decision

When the judge decides to end the contract there is no possibility to appeal against this decision. The judge can compensate the employee. When the judge decides to declare the contract dissolved he may decide that the employer has to pay compensation to the worker. However the judge has to give the employer the possibility to withdraw his request so the employer does not have to pay the compensation. This rule applies because of the fact there is no appeal possible against the amount of compensation the employer has to pay. The judge can only decide to pay compensation if the reason of the dimissal by court decision is a change of circumstances. The amount of the compensation is calculated by a special formula, namely the ‘cantonal court formula’.

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3. Unemployment

In the case of a dismissal there is, especially in times of crises, a chance that the employee faces troubles with finding a job. When the UWV has given their permission to end the contract there is a chance the worker is unemployed for a while. Under Dutch law it is possible to receive unemployment benefits from the state. This is mentioned in the unemployment law, or ‘WW’. The employee can request for unemployment benefits at the UWV. There are some criteria the employee has to fulfill before receiving benefits. To qualify for unemployment benefit,

a person who becomes unemployed must have been employed in at least 26 weeks of the 36 weeks y preceding unemployment, (the so called *referte-eis, qualifying period*). People receiving benefit must be available for work and if they are offered suitable employment they are obliged to accept it. They must also actively seek work. Workers who are deemed to have become unemployed voluntarily do not receive benefit, or receive only reduced benefit. This applies to those who have been dismissed for an urgent reason, or who have resigned without a good reason. Unemployment benefit is funded through the contributions paid by employers, and the amount depends on the last earned salary. Benefit is payable for a minimum of three months; this period is prolonged by one month for each year of work more than 3; the maximum is 38 months. If the unemployment benefits are not sufficient to sustain the employee or his family, he or she can claim a means-tested supplement to reach the social minimum.

4. Unlawful dismissal

A dismissal is considered to be unlawful if there is no permission of the UWV ex article 6 of the BBA or in case of a dismissal prohibition as mentioned in article 7:670 Civil Code. The worker can invoke nullity of the employer's dismissal. The consequence is the contract is considered as not to be ended and the worker can claim continuing payment of the wages as stated in article 7:628 Civil Code under the condition that he is willing to perform his work.This article states that the employee has the right to be paid if the fact that he did no perform his work is at the risk of the employer.

In case of a summary dismissal the reasoning is similar. A summary dismissal is possible if there is an urgent reason according to the requirements laid down in article 7:677 CC. Examples of urgent reasons are mentioned in the Civil Code, article 7:678 CC for the employer and article 7:679 CC for the employee. If the judge decide that there is no urgent reason, the dismissal is unlawful. Since permission of the UWV is failing, the dismissal is null and void. For this reason the employee can claim the payment of the wages on the ground and under the conditions of article 7:628 CC.

5. Dismissal prohibitions

Dutch dismissal law knows dismissal prohibitions. The first one has been dealt with before: lacking a dismissal permit issued by the UWV the dismissal is null and void. This is called the general dismissal prohibition. The other example of a dismissal prohibition can be found in article 7:670 CC. The dismissal prohibitions of this article consists prohibitions on ground of illness, pregnancy, conscription, membership of the employees association. It is not possible for the employer to terminate the contract in one of this cases as explained above.

6. Acces to the court

When the employer asks for a permission of the UWV to terminate the contract, there is no possibility for the employee to appeal against the decision of the UWV. However in some cases the employee has to start a ‘apparently unreasonable dismissal’ procedure to claim compensation (article 7:681 CC or to claim reinstatement article 7:682 Civil Code. In case of termination by a court decision, section 11 of article 7:685 Civil Code states that there is no possibility to appeal against this decision.

VI. Discussions and draft legislation

Are there any law changes projected or new draft legislation on dismissal based on economic grounds? If that is the case, which are the main objectives and new rules?

It is important to note that the economic crisis did not have as much effect in the Netherlands until this moment. However at this very moment the Netherlands are also experiencing financial problems due to the national debt which is above the European standards, this will most certainly affect labour law. One explanation why the crisis did not have its effects until this very moment could be that the flexibilisation of labour law in 1996/1997 has made the Dutch labour market to a large extent flexible. Another explanation for the smaller than expected rise of unemployment figures is the fast growing group of "independent persons without personnel" (called zzp'ers in Dutch); self-employed workers, especially in professional services, arts and creative industries. They have acted as a buffer in the labour market, adjusting to less demand by accepting lower payments for their work or suffering from the loss of work without this being registered in the unemployment statistics.

Simplification of the Dutch dismissal system.

The dual dismissal system, which was explained in the previous chapters, has been subject of discussion for over 30 years. Various attempts have been made to abolish the prior administrative test that was established in the BBA 1945. In the last years the discussion has been brought back to life. In 2000 two models were presented:

- The first model that was proposed is a variation on the current dual system. Although the administrative test would remain intact, the model would add the option of objection and appeal to administrative decisions in order to protect rights and promote uniformity.
- The second proposed model is a new system, whereby the courts may test dismissals only retrospectively. Employers can terminate a contract without a prior permit of public authorities as long as their decision is based on "reasonable grounds". In this case, employees should be fully informed and given ample opportunity to express their views, otherwise termination could be reversed. Although the proposed legislation does not state the amount of severance pay to be awarded to the employee in such cases, it does spell out which factors should be considered in calculating the sum (Cantonal Court Formula). If employees feel the termination was unreasonable or that they have received insufficient severance pay, the onus should be on them to initiate legal proceedings. The possibility of annulment of the dismissal by the court remains, but applies only to fixed-term contracts and cases in which a legal ban on termination exists.

Political parties in parliament and the social partners have not reached an agreement yet and therefore the discussion has continued.

Recently a new proposal has been made by a political party in parliament for new legislation. This proposal, which is about the abolishment of the prior administrative test is quite similar to the second model as mentioned above. The proposal contains the following elements:

a) Abolishment of the prior administrative test
b) Giving notice after the employee has had ample opportunity to express their opinion
c) Limitation of the dissolution procedure ex article 7:685 of the CC (explained in previous chapters) to situations in which there is a prohibition on termination. Appeal will be possible.
d) After giving notice the employee will receive a top-up to his unemployment benefit to reach 90% of his former wages during the first three months of his unemployment (explained in previous chapters)

The main reason for this proposal is that the dual dismissal system is too complicated also there is an inequality of treatment when it comes to flexible workers and employees with a fixed term agreement.

Maximum redundancy payment

Another proposal is that employees with a yearly salary of €75,000 or more can only receive a maximum amount of €75.000 as severance payment. This will only apply in case the contract is dissolved by a court. This proposal is currently still being discussed in parliament and it remains doubtful whether it will be accepted.

Where the parties have agreed on a salary exceeding the cap, the salary may not, by law, exceed the cap and any excess is deemed to have been unlawfully paid. Unless a court rules otherwise this applies to the severance payment as well. After a warning, the Minister has the authority to impose an order for periodic penalty payments on the enterprise and the employee concerned. Where the parties fail to change the salary or severance payment, the Minister will recover the payment from the individual involved. This amount is due to the State and not to the institution. Auditors are placed under a statutory obligation to report excessive remuneration on their own initiative to the Minister. Tax authorities, pension funds and insurers are obliged under law to provide information when so requested.

The regulation, which is influenced by the economic crisis, provides supervisory committees or supervisory boards operating in areas such as the care sector and housing associations with a clear regulatory standard. In view of the widespread support and the regulatory limits now applying to central government’s senior civil servants the bill is expected to be passed, although it still has to go through the

Second Chamber (Parliamnet). The bill may also heighten attention on the controversial bill on salary caps in the private sector.

Short- Term work arrangements

The Netherlands had an Short- Term work arrangements (hereinafter 'STWA') program before the 2008-2009 crisis, but it was mainly used for 'force majeure' of individual firms (in case of flood, fire, et cetera) and was not intended for economic crises. As of 1 April 2009, the government replaced the existing STWA with a part-time unemployment scheme, with less strict entry rules (for the sake of simplicity, we will continue to call this facility 'STWA'). Companies could apply for part-time unemployment benefits paid by the state of up to 70% for maximum 15 months. Employees would lose 15% of their total wage in case of 50% unemployment, though the unions succeeded in negotiating many company agreements with additional employer payments up to 100%. In June 2009, the Minister announced a halt as the budget foreseen for the new scheme had been spent, but under renewed pressure from the social partners the STWA was prolonged, albeit with tighter entry criteria. The new scheme was due to end by 1 January 2010, but the government prolonged it by another three months. By now it has been closed.

The ongoing discussion about the dual dismissal system and the abovementioned proposals are influenced by the two economic crises that we are in since a few years. Since the recent economic crisis the country is facing (serious national debt up to more than 4% this year), the discussion has been reopened with the coalition government to develop measures containing substantial savings and costs reductions. Measures in respect of the labour market will be considered among which dismissal law and unemployment schemes. The future will show what will be the outcome.