DISMISSAL LAW IN THE NETHERLANDS

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List of (frequently) used terms

English	**Short explanation**	**Dutch**
Act on Civil Servants	*This act contains all the rights and obligations for civil servants. They do not fall under the 'normal' civil law.*	Ambtenarenwet
Adversarial principle	*Principle that states that both parties in a judicial conflict should have the chance to be heard.*	Hoor en wederhoor
Completely fulfilled ground	*All the requirements for the existence of a certain dismissal grounds are met.*	Voldragen grond
CRCD	*Code for Reporting Collective Dismissal.*	Wet melding collectief ontslag
Court	*The Court in first instance that can judge labour law disputes.*	Kantonrechter
DCC	*Dutch Civil Code: Dutch law in which the civil law, including dismissal law, is codified.*	Burgerlijk Wetboek (BW)
Deficiency	*A deficiency of the employee means that his physical or mental health is not optimal for carrying out the labour agreed upon in the contract.*	Gebrek van de werknemer
Dismissal Arrangement	*A supplementary source of law in which the government further explains the process of dismissal and the conditions and requirements the employer should meet when he intends to dismiss an employee.*	Ontslagregeling
Dutch Employee Insurance Agency	*The Dutch authority which is responsible for judging*	UWV

	requests for dismissal on business economic grounds and long-term illness and also for the issuing of certain benefits to unemployed people or those who are incapacitated for labour.	
Fair compensation fee	*Compensation that the court will grant to an employee in rare cases, mostly when the employer has acted culpable.*	Billijke vergoeding
Fixed term contract	*A labour contract in which is agreed upon a date on which the contract ends.*	Contract voor bepaalde tijd
DLCA	*Dutch Labour and Care Act. Regulates, among other things, leave in case of pregnancy, illness, calamities, etc.*	Wet Arbeid en Zorg (WaZo)
Law on civil legal action	*Dutch law in which the procedural rules are laid down.*	Wetboek van Rechtsvordering (Rv).
Reflection-principle	*Principle that employer should use when dismissing employees on business economic grounds to determine in which order they should be dismissed.*	Afspiegelingsprincipe
Permanent contract	*This is a labour contract for an indefinite period of time.*	Contract voor onbepaalde tijd
Social partners	*The trade unions and the employer's organizations.*	Sociale partners zoals werkgevers- en werkenemersvertegenwoordigers
Successive employment contract	*The statutory regulation which determines when a fixed term contract becomes a permanent contract. See the footnotes that are related to paragraph 4.3.*	Ketenregeling
Summary dismissal	*Termination of the contract,*	Ontslag op staande voet

	mostly by the employer, with immediate effect.	
The re-employment condition	*If the employer received permission from the UWV for dismissal and terminated the employees contract, then the employer cannot hire a new employee for the same work within 26 weeks.*	Wederindiensttredingsvoorwaarde
Transition fee	*Fee the employer should pay to the employee because of the dismissal. The sum depends on the length of the employment.*	Transitievergoeding
Voidable	*In case a contract/decision/etc. is voidable, then one of the parties is entitled to declare it as invalid. After the contract is destroyed the contract had never lawfully existed.*	Vernietigbaar
Void	*Null or ineffective contract/decision/etc. If a legal action is void, it has no legal consequences because the action was never valid. It was invalid from the moment there was an agreement.*	Nietig
Work agreed upon	*This is the work agreed upon in the employment contract.*	Bedongen arbeid
WWZ	*Literally translated: Law on Labour & Security. A Dutch law that was implemented in 2015 and changed a lot of provisions of Dutch dismissal law. As the name suggests it aimed at finding balance between flexible labour and security for the employees.*	Wet Werk & Zekerheid (WWZ)

Introduction

Dismissal law is an important part of most labour law systems. Dutch law is no exception to that rule. Because labour is one of the most important aspects of most people's lives, being dismissed has a large impact on anyone. This leads to a need to clarify what justifies a dismissal and what does not. Dutch labour law is largely influenced by social and economic standards in the Netherlands, which means changes in these standards will have an effect on labour law and therefore dismissal law. As far as dismissal law goes, however, changes are usually made to maintain protection of employees, as this is the main principle in Dutch dismissal law. Interesting is the influence of the social partners on forming and changing labour law. Before any major change in a labour Act is made, in practice the support of the social partners is asked. This may be in the Socio-Economic Council (SER), a tripartite advisory council, or in the Stichting van de Arbeid, a bipartite body of employers' and employees' organisations.

The Wet werk en zekerheid (WWZ)
The revision of dismissal law in 2015 was based on an agreement of the social partners as well. This is the so-called Act on Labour and Security (WWZ) of 2015. The WWZ was preceded by a social agreement between the labour unions and employers organisations and the government, made in 2013.[1] This so-called 'social agreement' formed the basis for the WWZ, meaning that the law is to a large extent a codification of their agreement. Even for Dutch labour law, this amount of influence by another party than the legislator is exceptional. However, changing dismissal law appeared to be so difficult in the previous decades – several attempts were made – that this support was considered essential.
A major objective of the new Act was to simplify Dutch dismissal law and making it cheaper. As compensation, all employees who are dismissed receive a dismissal payment, after they have been employed for at least 24 months.
To reach the aspired goals, a number of changes were made. First of all, whereas before there was not a specific ground ('change of circumstances' was sufficient) now a fixed number of grounds are mentioned, which will be discussed later on. With this change the legislator hoped to achieve that dismissal would become easier and therefore cheaper, since the grounds for dismissal were clear and limitative. This would ensure that both employer and employee knew what grounds could lead to dismissal and what needs to be proven for dismissal to be allowed.

Second, the regulation on fixed term contracts was changed. Before the WWZ, fixed term contracts could follow up on one another for a maximum of three years or three consecutive contracts. After the WWZ, the maximum period of contracts was brought back to two years, which was supposed to ensure more permanent contracts for employees.

And third, regulation on dismissal payment was introduced to lower the costs of dismissal and ensure that employees were compensated (so called transition fee) for their dismissal and would be able to improve their labour market position (e.g. by training). However, the payment is without conditions and can also be used to top up unemployment benefit. The transition fee replaced the previous dismissal compensation. This was not regulated by the Act, but courts had, after consulting each other, made a formula that was published and often applied, though strictly speaking not binding. According to this formula the years of employment were multiplied by the monthly salary, and that was multiplied by a correction factor. The correction

[1] P.G. Vestering, 'Commentaar BW Boek 7 artikel 685', *SDU* 2014.

factor made it possible for the courts to take account of the particular situation, meaning that factor 1 means that no correction was made, and a factor higher than 1 took account of misbehaviour of employer and less than 1 misbehaviour of employee.
The new dismissal payment, the transition fee, does no longer give this freedom to court, but is strictly determined by the act, in order to ensure equality amongst employees.[2] After a contract has lasted for 24 months (or longer), the fee is applicable, even in case of summary dismissal if employee cannot be blamed for the circumstances leading to the dismissal. Exceptions to the applicability of the fee will be discussed later on.
The fee is based upon the length of employment with the current employer and any legal predecessors. For the first 120 months of employment, the employee is entitled to ⅙ of his monthly salary for every six months. After that period of 120 months the amount goes up to ¼ of his monthly salary for each month. The maximum is 75,000 euros or one full yearly wage.
The amount is, on average, lower than the formula that was used before and therefore should lower the cost of dismissals for employers.

These three changes were the main attempts at reaching the aforementioned goals. In reality, dismissal has become more difficult exactly because of the fixed grounds. And the new rules on fixed term contracts have led to more contracts ending after two years instead of three, leaving employees without a job quicker instead of employed on an undetermined contract. The transition fee is lower than most of the dismissal payments that were awarded before by the courts, however because it is applicable in more situations, the total costs are not lower than before.
These facts have led to discussion, even before the Act was implemented. For the most part, the grievances are aimed at the fact that the WWZ has not made dismissal law easier, because any dismissal now has to be based on one of the specified grounds. The new Dutch government (in office since Autumn 2017) has already announced its plans to change certain aspects of the WWZ. One of these changes is that in case of successive fixed term contracts a contract in such chain will become an indefinite contract only after the chain has lasted for three years, instead of the current two years.

[2] Article 7:673 DCC.

Chapter 1 Sources of law

In this chapter we will shortly indicate the relevant sources for the dismissal of employees in the Netherlands. In the coming chapters of this report the sources will re-appear regularly and the relevance of them will be more specified and clarified, when they are addressed.

- ***Dutch Civil Code (DCC)***

The basic rules of the Dutch Dismissal Law are laid down in Dutch Civil Code (further: DCC). The DCC sets out the criteria and principles employer and employee should take into account when involved in a dismissal procedure. Some provisions give the possibility to deviate from the provisions of the DCC. Further rules can be found in other Dutch Laws, such as the Sickness Benefit Act, the Working Hours Act and the Unemployment Insurance Act, but the most important rules are to be found in the DCC. This Code is the starting point for dismissal law.

- ***Additional sources***

The DCC is supplemented by a many Dutch regulations and decisions, in which procedures and criteria concerning dismissal are further specified. For example the Dismissal Regulation. The Dismissal Regulation gives an elaboration of rules concerning dismissal and the transition compensation. In this Regulation the Minister of Social Affairs and Employment explains further on which aspects the courts and the UWV (the public body from which permission for dismissals for economic reasons or illness has to be asked, to be discussed later) should focus when assessing if there is a reasonable ground for dismissal or not.[3] The courts and the UWV are both bound by the provisions laid down in this regulation.[4]

- ***Dutch Law on Collective Agreements***

In the DCC it is often mentioned that deviation from a certain provision is possible by collective agreement. The Law on Collective Agreements mentions the conditions for collective agreement.

- ***Dutch Law on civil legal action: procedural rules***

The above mentioned sources are all very relevant for the material side of dismissal law. The procedural rules that have to be taken into account in dismissal procedures can be found in the Dutch Law on civil legal action.

- ***Case law (Dutch and European)***

In the case law court interpret the Acts and thus set precedents for future conflicts in which the parties can refer to the previous relevant case law.

- ***EU and ECHR Law***

The Netherlands has implemented several EC/EU directives in the DCC. An example is the directive on equal treatment of men and women or transfer of undertakings.
In the European Convention on Human Rights (further: ECHR) mentions several fundamental (human) rights relevant to labour law. For example the right to a fair trial,[5] which has to be

[3] See: Regeling van de Minister van Sociale Zaken & Werkgelegenheid van 23 april 2015, *Stcrt.* 2015, 12685.

[4] See: E. Verhulp, 'Commentaar op aanhef Ontslagregeling', in: J.M. van Slooten, M.S.A. Vegter & E. Verhulp (red.), *Tekst & Commentaar Arbeidsrecht*, Deventer: Kluwer 2017.

[5] Article 6 ECHR.

realized in a dismissal procedure. Also the rights to freedom of association[6] and freedom of expression[7] may be relevant to dismissal law. See, for an example, the impact of the last two rights in the case Palomo Sánchez and Others v. Spain, in which members of a union were fired because they published an insulting comic strip about the employer. In this case the ECHR right were not infringed and the dismissal was lawful.[8]

[6] Article 10 ECHR.

[7] Article 11 ECHR.

[8] The European Court of Human Rights, 12 september 2011, application nos. 28955/06, 28957/06, 28959/06 and 28964/06 (*Palomo Sánches and Others v. Spain*)

Chapter 2 Definition

In this chapter we will answer the question whether the Netherlands has a system that defines the grounds on which a worker can be dismissed. There are three ways to achieve this:

-Permission by the Dutch Employee Insurance Agency (UWV);
-Decision by the court;
-Dismissal by mutual consent.

From article 7:669 paragraph 1 DCC follows that, if the employee does not give his consent for dismissal, the main rule is that an employment contract can be terminated only if there is a reasonable ground and reinstatement in another suitable function is not possible or reasonable. Three requirements follow from this sentence. The first requirement is that there must be a reasonable ground. The second that the relocation obligation (reinstatement attempt) must be met, i.e. the employer has to try to find a suitable job. To assess whether a suitable job is available, current vacancies or vacancies that will arise within a reasonable period of time are considered. Thirdly, the employment contract can only be terminated by asking the UWV or the court for resp. a permission or decision. We will discuss this in more detail below.
If the employee agrees with the termination of the employment contract, the employer no longer has to invoke one of the dismissal grounds. Required is that the employee agrees in writing.[9] After the agreement has ended, however, the employee has the right to a so-called 14 days reflection period.[10] During this period, the employee can revoke his consent. That may mean that the employer can make another offer in order to win the consent, or that he follow the procedure to address UWV or Court.

2.1 Statutory dismissal grounds

In article 7:699 paragraph 3 the grounds that are statutorily considered reasonable are listed. These are the 8 grounds listed in sub-paragraphs a to h. It is a limitative list. That means that it is a legal enumeration on which no expansion is possible.
For a ground to be sufficient for the dismissal it is required that it is deemed 'completely fulfilled', according to the Dutch terminology, meaning that the file underlying the dismissal provides sufficient material to accept that the ground can bear the dismissal.
First we will explain the grounds a and b. The employer needs the permission of the UWV if these grounds are invoked.[11] The UWV is an independent administrative body; traditionally it is the Employees' Insurances Agency, but it has also labour office powers, and the latter are relevant to the dismissal law.
The employer must apply to the UWV for a dismissal permit. The permit will be granted when the ground is fulfilled and the employer has done enough to prevent the dismissal and the reasons for dismissal are sufficiently substantiated.

Business economic reasons (sub a)
Ground a is the loss of a job as a result of the termination of the activities of the company or when in a future period of at least 26 weeks jobs have to be terminated as a result of measures that are taken, due to business economic circumstances, to ensure efficient

[9] Article 7:671 DCC.
[10] Article 7:671 paragraph 2 DCC.
[11] Article 7:671a DCC.

business operations. The loss of the job(s) must be structural and the employer must demonstrate that the loss of the job(s) is necessary. Also here the 're-employment condition' applies.[12] This condition implies that the termination of the contract because if this ground is voidable if the employer has the same activities of this employee carried out by another person within 26 weeks after the termination, and the employer has not given the former employee the opportunity to resume his previous employment on the terms customary with the employer.
The employer is not free to choose the employees to be dismissed: he is not allowed to determine the dismissal order himself, but the selected employees must reflect the composition of the workforce. For applying this rule, the employees are to be distributed over categories, according to the so-called reflection principle (the dismissed employees must not be only the last recruited ones, but must reflect the composition of the age structure of the workforce of the employer). For this purpose the employer must show, among other things, that the flexible employment relationships are terminated first.[13] How this works will be further explained in Chapter 6. Further rules in this regard are laid down in the Dismissal Regulation. We will not consider collective redundancy in this report.

Protracted illness (sub b)
Ground b means that there is ground that can bear the dismissal in the event of illness or deficiency of the employee as a result of which he is no longer able to perform the labour agreed on in the contract of employment. In addition, it must not be plausible that within 26 weeks recovery will occur and that within that period he can do the work agreed upon in an adapted form.[14]

Now we will review the other grounds of article 7:699 paragraph 3. These are to be assessed by a court (so there is a clear division of work between UWV and courts).
On the basis of article 7:671b paragraph 1 sub a DCC the employer can ask the court for a decision to dissolve the contract. The court will determine whether there the criteria for one of the dismissal grounds are fulfilled.

Frequent absenteeism (sub c)
Ground c is that the employee is not able to perform the work agreed upon on a regular basis as a result of illness or defects and this has unacceptable consequences for the business operations. The court can only grant the request if the employer has a statement by an expert confirming this situation.[15]

Unsuitability for the job (sub d)
Ground d is that the employee is incapable to perform the work agreed upon. The burden of proof lies with the employer. A condition is that the employer has informed the employee in good time of the fact that he does not function as the employer wishes and

[12] Article 7:681 lid 1 sub d DCC
[13] Article 7:671a lid 5 DCC.
[14] During the first 2 years of an employee's illness, the employer is obliged to pay wages. The employer must continue to pay at least 70% of the employee's wages per year in those 2 years. An employer must make every effort to keep an employee in work in those two years. He is also obliged to offer alternative work. After that, dismissal may be possible.
[15] Article 7:629a DCC.

that the employer has given the employee sufficient opportunity to improve his functioning.

Culpable acts or omissions (sub e)
Ground e are culpable acts or omissions of the employee. If the behaviour of an employee gives rise to dismissal, it must have been clear to an employee in advance what is or is not considered acceptable by the employer. That will be the case when such conduct or omission constitutes an urgent reason for dismissal.[16] An example of an urgent reason is when an employee commits theft. In the next chapter we will explain this more extensively.

Conscientious objection (sub f)
Ground f is the refusal by the employee to perform the work agreed upon because of a serious conscientious objection. An example is that a civil servant with the task to marry persons does not want to marry persons of the same sex. In this case the employer has to be made plausible that the work agreed upon cannot be performed in an adapted form (e.g. that a colleague cannot do the same sex marriages).

Disturbed employment relationship (sub g)
Ground g is a disturbed employment relationship; this can be a ground for dismissal if maintaining the employment contract cannot reasonably be demanded from the employer. Such cannot be demanded when employer and employee or colleagues cannot get along with each other. Still, the employer has to try to normalize the relationship(s), for example through mediation or relocation of an employee. If taking such measures does not have the desired effect, the court can assume a disturbed employment relationship which may lead to dissolution of the employment contract.

Other circumstances (sub h)
Next to the aforementioned grounds, there is also the ground that there are such circumstances that the employer cannot reasonably be required to continue the employment contract. However, this so-called h-ground can only be applied in the very special category of cases in which the facts on which the dissolution is based do not meet the requirements for one of the other grounds a to g. However, the h-ground cannot be used if there is insufficient material for accepting one of the other grounds; so it is an additional ground, that is accepted only rarely.

2.2 The relevance of complete dismissal files
Having a correct dossier has always been important in a dismissal case. Since the introduction of the WWZ, however, it is a crucial element in order to dismiss an employee. It is no longer possible for the judge to compensate a thin dossier with a higher dismissal payment. Now, the dossier must outline, for instance, proof that the employee is no longer capable to carry out the agreed labour. The file must show that the employer has informed the employee about this and offered him the time and the opportunity to improve his functioning. It must show that adequate care is given in the form of adequate education or adjustments in the work agreed upon. Only if these terms are met and this shows from the file, the judge will terminate the employment relation. When the judge rules otherwise, the employer needs to pay the legal costs. So, in order

[16] Article 7:678 DCC.

to prevent this, the employer acts has to keep records of the activities and performances of his employees in dossiers. This contains, among other things, performance and assessment interviews and records of malfunctioning and a suitable plan for improvement. The employer carries the full responsibility to compose the dossier correctly.

2.3 Dismissal prohibitions

Furthermore, the dismissal prohibitions of article 7:670 DCC apply. In case of a dismissal prohibition an employer must not terminate the employment contract. The dismissal prohibition grounds are the following:

Dismissal during disability and illness

Paragraph 1 prohibits the employer from terminating the contract during the time that the employee is unfit to perform his work due to illness. The prohibition of termination in the event of illness does not apply if the illness has started after the request for dissolution of the contract of employment has been received by the court.[17]

Dismissal during pregnancy and maternity leave

Paragraph 2 prohibits termination during pregnancy and during the period that the employee is on maternity leave as referred to in article 3:1 Dutch Labour and Care Act (DLCA).

Dismissal during military service

The employer cannot terminate the contract during the time that the employee is prevented from performing the work agreed upon because he has been summoned as a conscript to fulfil his military service or replacement service on the basis of paragraph 3. This is only of interest for military service abroad, since the Netherlands does not have active military service.

Dismissal during membership of certain employee participation bodies

The law prohibits, in paragraph 4, termination of the employment contract of members of the works council and other employee participation bodies referred to in the law. Examples are: the central works council, the group works council, the European works council and the staff representation.

Dismissal of candidate members and former members of employee participation bodies

Furthermore, there is also a prohibition of termination of the contract, included in paragraph 10, of the employee who is placed on the list of candidates before or less than two years ago has been a member of a works council or another form of employee representation.

Dismissal due to membership of the trade union or trade union activities

In accordance with paragraph 5, the employer cannot terminate the contract because of the employee's membership of an employee association or due to the performance of or participation in trade union activities for the benefit of that association.

[17] Article 7:671b paragraph 7 and article 7:699 paragraph 3 sub c DCC.

Dismissal due to political leave
The employer cannot terminate the employment contract with the employee who is on leave because of attending a meeting as referred to in Article 643. Article 643 contains the rules on political leave. The same applies if the parties do not agree on the leave as long as the judge has not dispose of the leave.

Dismissal due to applying for the right to a leave
An employee may be entitled to a leave on the basis of the DLCA. For a number of these types of leave applies a termination prohibition. These parental leave, adoption leave, short-term care leave or long-term care leave.

Dismissal due to transfer of the undertaking
A prohibition of terminating the contract is based on the implementation of directive 2001/23/EG (article 4 paragraph 1) in the DCC. Paragraph 8 of the directive states that the employer must not terminate the employment contract with the employee working in his company because of the transfer of the undertaking. This applies to the transferor and the transferee.

Dismissal due to the refusal to work on Sundays
The employer cannot terminate the employment contract because of the circumstance that the employee does not want to work on Sunday.[18]

2.4 Termination agreements
It is important to clearly distinguish consent with dismissal and agreement on termination of the contract. As mentioned above, in case of written consent of the employee the approval of UWV or court is not necessary, but other dismissal rules continue to apply, e.g. the right to transition fee. The initiative lies with the employer, as a result of which the employee is entitled to the transition fee.

The termination agreement is an agreement by which the parties terminate the employment contract by mutual agreement.[19] In a termination agreement mutual agreements are made between the employer and the employee, for example on the applicable notice period and dismissal payment. In a termination agreement statutory dismissal law is thus replaced by own arrangementsfee.

2.5 Dismissal without permission
The main rule is that a worker must agree with the dismissal. Above we have seen above, if there is no such consent the court can dissolve the employment contract or the UWV (Employee Insurance Agency) can give permission.
In addition, the employment contract can be terminated without permission of the employee in the following cases, which are to be seen as an exception.

Permission from the UWV (sub a)
When the employer has received a dismissal permit by the UWV.[20]

[18] Article 5 of the Working Hours Act.
[19] on the basis of article 7:670b DCC.
[20] Article 7:671a DCC.

The termination occurs during probation (sub b)
A probation period can be agreed for up to two months.[21] As long as the probation period has not expired, the employment contract can be terminated with immediate effect. Both the employer and the employee can be done.[22]If an employee has a fixed-term contract no probation period must be agreed.[23]

Termination due to urgent reason (sub c)
An employee can be fired immediately due to an urgent reason.[24] Examples of an urgent reason are: serious incompetence, the refusal to follow a reasonable order and theft. The circumstances of the specific case must be of a very serious nature, otherwise the termination is not successful. However, if there is an urgent reason, permission from the UWV or dissolution of the contract by the court is necessary and the aforementioned dismissal prohibitions do not apply.

Working as a housekeeper (sub d)
No permission is needed in the case of an employee who provides services exclusively or on normally less than four days a week for the household of the natural person by whom he is employed.

Director (sub e)
No permission is needed if the termination concerns the contract of a director of a corporation.

A member of the ecclesiastical office bearer (sub f)
No permission is needed in case of the termination of the contract with an employee who has a religious function.

The employee reached the retirement age (sub g)
No permission is needed when the employee has reached the retirement age as agreed upon in the employment contract. When no age is agreed, it concerns the age as determined in the statutory old age act.[25]

Special school or institution (sub h)
No permission is needed if the employee works at a special school/institution and the reason for the termination is in the employee's actions that are incompatible with the identity of the school/institution in question resulting from the religious or ideological basis, provided that permission for ending the contract is given by a commission independent of the employer.

[21] Article 7:652 paragraph 3 DCC.
[22] Article 7:676 DCC.
[23] Article 7:652 paragraph 4 DCC.
[24] Article 7:677 DCC.
[25] Article 7:699 paragraph 4 DCC.

Chapter 3 Criteria for allowing the dismissals

As discussed in the previous chapter, there are several valid grounds on which a contract can be terminated. The mentioned grounds offer a closed system of legal grounds which aims to protect the interest of the employer, of the employee and of the general interest which lies in the well-functioning of the labour market as a whole. The interests of the employer are related to his goal to let his organization operate as well as possible. This means that when the capacities or the behaviour of an employee are no longer in line with the requirements and regulations which are set out by the employer or his organization, the financial wellbeing of the organization requires the employer to end the employee contract. In order to do this, there needs to be a situation in which it is no longer reasonable to require the employer to let the contract continue. So, it is not required to maintain a situation that is disproportionately onerous for the employer. The previous chapter already explained the different valid reasons for dismissal. This chapter will complement the previous information by explaining some of the definitions more extensively and illustrate them with applicable jurisprudence. To prevent the information from becoming too extensive, not all of the termination prohibitions will be discussed here.

3.1 Statutory reasons under article 7:669 DCC

A valid reason for termination is needed when the contract is not closed for a certain period of time because in that case it does not terminate by operation of law.[26] As mentioned before, from article 7:669 paragraph 1 DCC follows the main rule.[27] The explanation of the three requirements that follow from this article[28] provide the basis for many lawsuits and legal documents. Because of a variation of facts and circumstances concerning dismissals, it is not always simple to use one of the statutory reasons. This will also be apparent from the following examples.

Starting with the statutorily accepted grounds for dismissal. There are eight limitative grounds on which dismissal can be based. Those grounds can be considered as valid reasons that are needed for the dismissal. There will be an explanation given underneath the subtitle. The subtitles are in the same order as in the previous chapter.

Business economic reasons (sub a)

The employer can dismiss an employee because of business economic reasons. However, this ground needs to be underpinned by the employer with adequate arguments which emphasize the financial necessity of the dismissal. For example, the mere fact that a debt will not offer sufficient justification if the company result is predominantly positive. That the positive results are not as high as they used to be or if they are declining, does not alter the fact that they are still positive. So, if there are positive results it will be particularly difficult but not impossible to formulate sufficient arguments to underpin that there is a business economic reason for

[26] When the labour contract is closed for a certain period of time it ends under the line of article 7:667 paragraph 1 DCC which is called 'termination by the operation of law'.

[27] See page 5.

[28] Reasonable ground, relocation obligation must be met and in case there is no consent of the employee the employment contract can only be terminated by referring the employer to the UWV or court. See page 10 of this document.

dismissal.[29] Other grounds for a business economic dismissal could be a business removal or a significant decline in the customer base.

In case there is a sufficiently substantiated business economic reason, dismissal is possible. The employer cannot decide himself which employee is to be dismissed if it concerns a function occupied by several employees. In that case the employer needs to act in line with a statutory selection method, also known as the reflection principle.[30] This means that the employees need to be divided into a number of age groups. In each of those groups the rule 'last in, first out' applies, so the employee with the shortest period of employment will be dismissed. Only in exceptional cases this method can be set aside. This can be the case in which the application of the reflection principle will have a disastrous effect on the survival of the enterprise because essential specialist knowledge will disappear.[31] Another example would be in case the employer can show that he wants to restructure his enterprise as efficiently as possible in response to the business economic situation leading to the merging of different functions with more requirements. In that case he is also allowed to select the employees with a higher educational level or wider usability that suits the presumably higher functional requirements of the new function.

Even when there is a valid business economic reason, the employer still needs to pay attention to the well-being of the employee. This will be depending on the circumstances of the case, such as the health or age of the employee and his chances on the labour market. There can be situations in which the employer is required to search for another job for the employee or to support him in his search for a new job.[32]

If the employer does not act in line with the just described rules he may have to pay, the so called, fair compensation in addition to the transition fee. Also, if the employer did act seriously culpable towards the employee, and that leads to dismissal the transition fee can be supplemented by a fair compensation.

Protracted illness (sub b)
After a period in which the employee was no longer able to perform the work agreed upon, he resumes his work usually in suitable employment. This means employment in the same function grade, or at least something very alike. It must be work that suits the employee. When the employee performs this suitable employment, the labour contract remains unaffected. In cases where it is clearly determined that the employee is definitively no longer able to proceed his work as usual, the employer can offer him a new labour agreement that meets his capacities. But if that offer stays out, there will be a turning point in which the suitable employment will be tacitly converted into the work agreed upon.[33] After that turning point the employee has

[29] Court of Amsterdam, 22 April 2016, ECLI:NL:RBAMS:2016:2601.

[30] Can be found in article 10 of the Dismissal Arrangement.

[31] Court Haarlem, 5 November 2004, ECLI:NL:RBHAA:2004:AT0771 (*Silver Aerospace B.V.*).

[32] Court of Amsterdam, 22 April 2016, ECLI:NL:RBAMS:2016:2601.

[33] There is no rule or standard about this period. It happens 'eventually'. Mostly at the moment that it is very clear that the work agreed upon will not be carried out by the employee again and that he can only carry out the suitable employment. Court of the Mid-Netherlands ('Midden-Nederland'), 7 December 2009, ECLI:NL:RBUTR:2009:BK:5511.

'new' work[34] and he will not be dismissed. The result is that if the employee gets sick again, he is able to claim salary during illness all over again.[35] This could be very onerous for the employer and to prevent such situations it is important for him to keep records of the activities or to be cautious in making new agreements.

Besides this, there is considerable room for discussion of the accepted ground of protracted illness. Even the term 'illness' is not as clear as it seems to be. Discords were about for example alcoholism[36] and obesity.[37] Both are covered by the term 'illness'. For now, there will be no further explanation of this in order to prevent this document from becoming too specialized.

Frequent absenteeism (sub c)
In this case an employee is not protracted ill, but for a lot of short periods absent. This could lead to organizational issues within the company in which he was employed. But, it is not easy to dismiss an employee based on this accepted ground. For this ground several conditions are to be met. Among other things,[38] the employer needs to demonstrate that the employee is not able to perform because of illness or defects. He also needs to prove that this has an unacceptable impact on the normal operation of the business. This term is very hard to prove and the judge does not often grant these requests.[39] Often it is easier for the employer to dismiss the employee based on mutual agreement.

Unsuitability for the job (sub d)
In case of unsuitability of the employee for the job, the employee often has to undergo an improvement process. This does, however, not automatically lead to a situation in which the employee′s abilities suit the requirements again. On the contrary, it often leads to tense relationships between the employer and his employee. In that case, a situation is created in which the requirements of this ground are often not met and the employment relationship only deteriorates.

Culpable acts or omissions (sub e)
It has been mentioned earlier that this ground requires an urgent reason. Urgent reasons are culpable, for example, if the employee acts in breach with the for him or her knowable rules of conduct that take effect in the company of the employer,[40] if he takes money from the company without permission,[41] if he does not non-comply with the supervision rules in case of, for example, illness,[42] if the employee frequently arrives too late without a valid reason which interferes with the business operation and the employer already confronted the employee with

[34] The suitable work became his work agreed upon even though he did not consult about it which the employer. It has happened automatically by operation of law.
[35] Central Appeal Council, 14 December 2016, ECLI:NL:CRVB:2016:4968 (*Kummeling/Oskam*).
[36] Court of Haarlem, 14 September 2011, ECLI:NL:RBHAA:2011:BT6776.
[37] Court of Breda, 23 September 2011, ECLI:NL:RBBRE:2011:BT6716.
[38] This was mentioned before on page 13.
[39] Court of Limburg, 30 March 2017, ECLI:NL:RBLIM:2017:2900.
[40] Court of North Holland, 23 March 2017, ECLI:NL:RBNHO:2017:2592.
[41] Court of Amsterdam, 28 June 2016, ECLI:NL:GHAMS:2016:2506.
[42] Court of 's-Hertogenbosch, 20 October 2016, ECLI:NL:GHSHE:2016:4702.

his behaviour; or if the employee has produced more favourable performance and production activity figures than were actually true which damaged the trust of the employer in him.[43]

In case there is a very serious culpable conduct in relation to the grounds that are mentioned above, it will be often the case that the transition fee shall not be incurred.[44]

Conscientious objections (sub f)
A serious conscientious objection will not immediately constitute a valid reason for dismissal. The employer has the responsibility to talk to his employees in order to seek an agreed solution. Only if both of them believe that a solution to the problem will not be found easily, a dismissal will be permitted. In other words, this ground may be used only in cases in which it is not possible to adjust the work or to give the employee alternative work.

Examples of conscientious objections are religious considerations or in society acknowledged ethical or political motives. The employee will have this kind of objections against a task that is assigned to him, such as printing and distributing publications with an immoral or offensive content, constructing a road across a nature area, covering fur coats with an insurance or cooperating in building a nuclear power station.[45]

If this ground is successfully invoked the employee will in principle be entitled to receive a transition fee. Only if he acted in a culpably manner the transition fee does not have to be paid.

Disturbed employment relationships (sub g)
A disturbed employment relationship can be an accepted ground for dismissal if the disruption is such that it cannot be reasonably expected from the employer to continue the employment contract. But that presupposes that the disruption is caused by the behaviour of the employee and that the employer is able to prove that he has striven to repair the relationship. And even if both terms are met there is still a considerable risk that the judge will refuse the request for dismissal. Only if the court is convinced that there is a serious and durable disturbed employment relationship, the contract will be dissolved. This could be for example based on the fact that the confidence of the employer in the employee is seriously undermined due to the latter's behaviour.[46]

Other circumstances (sub h)
When you translate the Dutch words that form this ground, you would end up with the term: 'catch-all clause'. But, since this term suggests that this accepted ground is the security net (for the employer) when it comes to the dismissal grounds, we do not use this term. According to the parliamentary history of the WWZ this certainly not a security net.[47] In fact, it is an exceptional ground for a judge to allow a dismissal. Clear examples of situations that fall under this ground are employees in detention, illegal employees or employees without a work permit.

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[43] Last and second last example, also High Council, 13 October 2017, ECLI:NL:HR:2017:2626.

[44] Court of Amsterdam, 28 June 2016,ECLI:NL:GHAMS:2016:2506 and also High Council, 13 October 2017, ECLI:NL:HR:2017:2626.

[45] *Parliamentary papers II* 1991/92, 22932, 3, p. 2.

[46] Court of Almelo, 13 March 2012, ECLI:NL:RBALM:2012:BV9177.

[47] This was also already mentioned in paragraph 2.1.

Although it seems that there is only a small chance that the judge will allow the termination of the employment agreement on this ground, employers may use clause as a subsidiary ground. For example if there was no serious and durable disturbed employment relationship (sub g) but the relation became so disrupted that it was no longer possible for the employee to carry out his work.[48] The h ground could offer a way out in such situation. But this is an exception rather than a common way to apply this ground.

Incompletely fulfilled grounds - i.e. documents submitted by the employer in which the provided information insufficiently show that there is indeed a situation corresponding with the ground in question - are currently a hot topic in the Netherlands. It appears to be difficult for employers to show sufficient information to convince the court that actually the ground applies, whereas the employer is convinced that the employee should no longer be employed for good reasons. Sometimes employers argue that, although maybe the facts are not strong enough to support one ground fully, in the situation in fact more than one ground is relevant, and that should be sufficient to grant dismissal. However, under the WWZ it is not possible to combine those grounds, because the grounds are limitatively listed. That is way employers often do not succeed in their request for dissolution of the contract.

At the end of last year a new government has been formed. In the coalition agreement it is announced that a bill will be made to address the difficulties with the grounds. The idea of the new government proposed to make dismissal on a cumulation of dismissal grounds possible.[49] This might make it easier for employers to dismiss an employee.

3.2 Valid reasons in case of article 7:670 DCC

The termination prohibitions which are mentioned in paragraph 2.2 are not repeated or further elaborated here. Most of them speak for themselves.

3.3 Valid reasons in case of article 7:671 DCC

From the termination prohibitions which are mentioned in paragraph 2.3 only a termination due to urgent reason (sub c) will be discussed in view of the relevant jurisprudence.

Termination due to urgent reason

An important example of a judgement concerning dismissal based on this ground is the case of a family business in the shoe industry. The problems started with one of the employees taking a long break. This led to severe discussions and eventually the daughter of the shoe maker threw hot tea in the employees' face. Then the employee moved the daughter outside the building, upon which the mother of the daughter threatened to hit him with a hammer. Instead of hitting him, she was hit herself by the employee by the wooden piece of the hammer. This eventually formed the ground for summary dismissal of the employee.

The *Hoge Raad* (Supreme Court) judge considered that in order to decide whether there is an urgent reason, you need to look at the circumstances of the case, the personal circumstances; the nature and the seriousness of the case; and the behaviour of the particular person. Also the nature of the employment, the duration of the employment and the performances of the

[48] Court of Amsterdam, 29 January 2016, ECLI:NL:RBAMS:2016:400.

[49] VVD, CDA, D66, Christenunie, 'Government agreement: Trust in the future', p. 22.

employee during his employment need to be taken into account. Lastly, the age of the employee and the consequences of the immediate dismissal have to be taken into account.[50]

Not only cases of physical abuse but also cases of other kinds of abuse and robbery will lead to immediate dismissal because of a seriously culpable conduct. Because the cases are often serious matters, usually the employee has neither right to receive unemployment benefit nor a transition fee.

3.4 Management tool

Can dismissal be considered as an ordinary tool of company management or is it an instrument that can be used only if there is no real other alternative?
In any case, dismissing an employee is not easy. It cannot be based on one conversation in which the employer tells the employee that he is not functioning properly or only on the fact that the employer is of the opinion that it is time for a 'fresh' workforce. The dismissal needs to be based on a file in which the worker's functioning is precisely described and which is based on an almost continuous consultation of employer and employee on the results and the development of the employee on which the employer and the employee agree.

Consequently, dismissal law restricts the employer in his possibilities to arrange his workforce freely. In other words, dismissal law restricts the employer in taking enterprise decisions. The employees are being protected by law in order to create a situation of individual financial security which on its turn may encourages the economic wellbeing of the society as a whole.

Despite the just mentioned restrictions, dismissal law can be used as a tool of company management in case it appears to be the last alternative in re- organization of the firm. Especially collective dismissal can be used as a tool for company management. Still it is no ordinary tool. The employer needs to investigate if there are other options to give employees other work within the company, in other companies or offer them educational courses. So, the alternatives to dismissal need to be observed in advance in order to be allowed to realize effect t a (collective) dismissal.

The employer also has the possibility to dismiss a worker 'partially', i.e. to reduce the number of working hours, if particular conditions are met. By doing this, he keeps his employees in the enterprise in times of economic problems, so that they are still employed after the firms is doing better. It cannot be taken for granted that employees will accept such offers of hour reductions, because of the lower wages.

Dismissal can thus be seen as an instrument which regulates the extent and composition of the work force in a company. Therefore, it can be also seen as a management tool. Not an ordinary tool, but a last resort for managing a well-functioning company.
This may also mean that, since for a healthy company, the employees need to meet several quality requirements, if an employee does not meet those quality standards anymore, there may be an accepted ground for dismissal. And it also enables the employer to part from an employee who frustrates a good business management.

[50] High Court, 12 February 1999, ECLI:NL:HR:1999:ZC2849 (*Van Essen/Schrijver*), also known as the Shoemaker-judgement (in Dutch: '*Schoenmaker-arrest'*).

Chapter 4 Relevant factors for allowing dismissals

This chapter will describe the factors for allowing dismissals in the Dutch system. We have just recited on which grounds a worker can be dismissed. But are there additional relevant factors for dismissal?

4.1 Is the number of workers employed relevant?

The number of workers who are dismissed is only relevant when the employer dismisses 20 or more of his employees within a period of three months. Such dismissals need to be based on a business economic reason (it is often a case of bankruptcy) and need to have an impact on one certain working area or district.[51] When this situation occurs, we talk of collective dismissal.
So, to answer the question as mentioned above, the number of workers employed is not directly relevant for dismissal, but the number of workers who are dismissed is relevant. In case there is a collective dismissal, the employer needs to act according to the Code for Collective Dismissal, that implemented the European directive on this topic.[52]. The most important rule which follows from this Code is that the employer needs to report its plans about a collective dismissal to the union and to the UWV. Besides that he needs to consult the union about a social plan. The social plan is a regulation which describes how the reorganisation will take place and what arrangements are made for the employees who are dismissed. Although the social plan is not mandatory by law, it is an obligation required by most collective labour agreements. It is not necessary that there is agreement with the employees themselves about this plan, but they need to be informed about what is going on. The way the employer dismisses the employees is not very relevant. The dismissal will only be invalid if the employer did has not fulfilled his obligations relating to the Code for Reporting Collective Dismissal. The Code protects, prevents or restrains negative effects on the interests of the employees and therefore it is considered to be very important.

Although the number of workers employed is not directly relevant for the dismissal, it has a direct influence on the transition fee. For employers, with fewer than 25 employees, the so-called small enterprises, there is a special regulation that will apply until 2020. Among other things, this regulation provides that the transition fee does not have to be paid if the dismissed employees are 50 years or older and if their employment period is longer than 10 years. Besides that, the fact that someone is employed by a smaller employer can lead to the fact that he receives a lower transition fee in case of business economical dismissal or even to complete refusal of a transition fee. This is because of the rule that the employer of a small company is allowed to ignore the years of service that have been carried out before the first of May 2013.[53] Even the age of the worker is not relevant in this situation.

4.2 Is the type of contract relevant?

Yes, the type of contract is relevant in case of dismissal. First the meaning of 'employment contract' in the Dutch law will be explained in short. The definition of the employment contract follows from the DCC.[54] It provides that it is a contract in which the employee is employed by

[51] The CRCD documented the working areas since the first of march 2012. They made six categories in which the twelve provinces of the Netherlands are divided.

[52] See for example Directive 75/129/EEG.

[53] Article 7:673d DCC.

[54] Article 7:610 DCC.

the employer in return for wage and for a certain amount of time. This 'certain amount of time' can be a fixed-term contract[55] or a permanent contract.[56] The fixed-term contract is a contract for a limited period (for example a year). In most of the fixed-term contracts a premature termination is not possible and the contract will terminate ex lege upon expiry. A precondition for this termination of the fixed-term contract is that the employer informs the employee one month in advance in writing that the contract will not be extended.[57] When this condition is met, the contract expires automatically 'by operation of law'. So, in case of a fixed-term contract the employee cannot simply be dismissed. This is different in case there is a mutual agreement about dismissal; it is a situation in which there is a summary dismissal because of an urgent reason or if the contract allows premature ending.[58] Then a premature termination is possible.

Also in case of a permanent contract the employee cannot be simply dismissed. As we have seen in the previous sections there need to be good reasons, imitatively mentioned in the Act, to dismiss the employee. These include economic reasons, malfunctioning of the employee, a function which is to be abolished, an illness or because of an urgent reason such as theft. In these types of situations a permanent contract can be terminated after consent of the UWV or dissolution by the court, depending on the ground.

Permission by the UWV is not necessary in the case of a domestic worker,[59] a director,[60] housekeeper,[61] an ecclesiastical office bearer,[62] an employer in special education[63] and in case the retirement age has been reached.[64]

4.3 Is the duration of the employment relation relevant?

Yes, it is possible that the duration of the employment relation is relevant. As mentioned above, a contract for a fixed term ends when the period for which the contract was made has come to an end.[65] It is possible that the contractual parties decide to sign a new employment contract, which is known as a successive employment contract.[66] In case a fixed-term contract is it may lead to a situation in which the type of the new contract changes, which has an influence on the way the employment relation can be dismissed. This is the case in a situation in which a fixed-term contract has been extended three times in a row[67] or if the employee has had in total fixed-

[55] Article 7:667 DCC up to and 7:668a DCC.

[56] Or open-ended contract, article 7:667 paragraph 6 DCC.

[57] In Dutch this is called the 'aanzegtermijn' which is translated 'announcement period'.

[58] Article 7:677 BW: each party is authorised to end the employment contract due to an urgent reason.

[59] Who works less than four days a week employed by a private person.

[60] Article 7:671 paragraph 1 sub e DCC.

[61] Article 7:671 paragraph 1 sub d DCC.

[62] Article 7:761 paragraph 1 sub f DCC.

[63] Article 7:671 paragraph 1 sub h DCC.

[64] Article 7:671 paragraph 1 sub g DCC.

[65] Article 7:667 DCC.

[66] Article 7:668a DCC, in Dutch it is called a 'ketenregeling'. Translated this would be a 'chain-regulation', which refers to the contracts following each other up like the links of a chain.

[67] With intervals that did not exceed six months, article 7:668a paragraph 1 sub b DCC.

term contracts for the duration of more than two years.[68] The fixed-term contract that is the fourth employment contract or the contract that exceeds the 24 months in total,[69] a permanent contract. And as discussed above, for the contract for an indefinite period a different form of dismissal applies than for the fixed term contract. This leads to a situation which is less attractive for the employer, because dismissal in case of a permanent contract is more complicated.[70] He can prevent this change of contract by waiting six months before he contracts the employee again.

The duration of the employment relation also has an influence on the transition fee. A condition for this fee is that the duration of the employment relation needs to have a minimum of two years. Besides the duration, also the level of salary affects the height of the transition fee. In the first ten years of service it amounts to 1/6th of the salary per month per half year of payment. After the ten years of service it amounts to 1/4th of the monthly salary per half year of the employment, maximized to 75,000 euros. It needs to be paid if the 24 months are exceeded and the employment contract ends because it terminated by the employer or if it is ended after the employee requested it because of serious culpable acting of the employer or if he did not act in case he should have acted.[71] There is no ground to claim a transition fee if the employee resigns, if the contract is terminated by mutual agreement,[72] if the employee acted seriously culpable, if the employee reaches pension age or if the collective labour agreement provides in an alternative payment.[73]

4.4 Is it relevant whether the employer is a public or a private legal person?

The Dutch system makes a distinction between 'normal' employees, statutory directors and civil servants. The dismissal procedure in each of the cases is different. Civil servants are employees with a temporary or permanent appointment at government services like the ministries, military defence[74] and the police. In addition to these 'real' governmental services, there are also institutions that are financed by the government but have enough independence to not be classified as 'real' governmental services. For example public education and some of the academic hospitals. Employees of these institutions with a permanent or temporary appointment will also be considered to be civil servants. In most cases, each governmental sector has its own legal system. But in general, the Act on Civil Servants determines the dismissal procedure of the civil servants. It is known as a closed dismissal system because the employer of the civil servant can only submit a ground for dismissal that is included in the regulation which is applicable to a specific function of a civil servant. As we have seen the WWZ has also introduced a limitative system, but the grounds for civil servants and employee are not the same. So, regarding to the grounds of dismissal, it is relevant whether the employer

[68] This will be for example the case if two fixed-term contracts, which did not have an interval that was longer than six months, have a total duration of 24 months (with the intervals included). After this period (of 24 months) the fixed-term contract becomes a permanent contract (which has no agreed ending-date). Article 7:668a paragraph 1 sub a DCC.

[69] And without exceeding an interval period of six months.

[70] As mentioned before, a fixed-term contract needs to be ended because of for example business economical grounds or illness with a duration that exceeds the period of two years. In these cases the employer needs to enforce the dismissal with an approval of the UWV or the court.

[71] Article 7:673 paragraph 1 sub b DCC.

[72] Agreements about a (transition) fee can be agreed by the parties otherwise.

[73] Article 7:673b DCC.

[74] Including for example customs.

is a private or a legal person. The most important difference is that in case a civil servant is dismissed, there will be no involvement of the UWV. A similarity is that the employee of the public person can be dismissed only if there is a ground for dismissal. But those grounds do not follow from the DCC but from the Act on Civil Servants or comparable public regulation Grounds for dismissal are amongst other things a situation of reorganisation, in case an employee is no longer capable for the work he needs to do, in case an employee has been ill for a period of two years and it is unlikely that recovery occurs within six months or that work can be carried out after replacement[75] or in case of other grounds.

Nowadays the main difference between dismissal in case of an employer that is a public or private legal person is that the employees that act under the authority of the public legal person enjoy a greater amount of protection concerning a dismissal. But this is changing. Civil servants are increasingly being dismissed whilst they used to be replaced in previous times.

The most common ground of dismissal of a civil servant is the ground of reorganisation. Functions expire and there is no longer place for all of the people employed. This protection of civil servants will decrease even more from the year of 2020. From then on civil servants will be treated almost equally as workers. This change will follow from the so-called Act on the normalization of the legal position of civil servants. From then on, the civil servants will also receive a transition fee in case of dismissal. In the current situation, the civil servants do not receive a transition fee because they are not employed based on an employment contract but they are appointed under public law. Because almost all of the provisions of employment law that are nowadays only applicable to workers are from 2020 also applicable on civil servants, they also will enjoy the access to a transition payment.

4.5 Another important factor: dismissal during bankruptcy

When the employer is declared bankrupt, different dismissal law applies. The articles that concern dismissal that follow from the DCC[76] are not applicable during bankruptcy and terminating the contract will be less difficult for the employee as well as for the employer. This is to protect the creditors from the wage claims mounting and it also prevents the employee from being at the charge of the bankrupt company for too long. In case of bankruptcy the administrator in bankruptcy will in most cases end the employment contract as soon as possible. The most important aspect in case of bankruptcy is that the administrator does not need permission from the UWV[77] and he is not tied to special dismissal prohibitions.[78] Instead, he does need an authorization by the so-called Judge-Commissioner[79] and the termination of the contract must occur within six weeks.[80] Workers of the bankrupt company can oppose this decision, but usually this is without possible positive outcome since there is nothing to gain.

[75] This situation needs to be assessed before dismissal is allowed.

[76] Articles 6:669, 7:671 and 7:671a DCC.

[77] Article 13a and 40 Bankruptcy Act.

[78] As mentioned in chapter one and two.

[79] This period cannot be extended. Article 68 paragraph 2 Bankruptcy Act.

[80] Article 40 Bankruptcy Act.

So, dismissal due to bankruptcy is more negative for employees than under normal dismissal law. Not only will they enjoy less protection,[81] but they will also not receive a transition payment.[82] To prevent employers from misusing bankruptcy to get rid of the employees in a relatively 'cheap' or easy manner, the bankruptcy will be annulled when it was proclaimed with the intention to evade the mandatory rules that aim to protect the interest of the employees.[83] When the bankruptcy is annulled, the regular dismissal rules will be restored which results in the annulment of the termination on the ground that there was no permission gained from the UWV.

[81] Because the bankruptcy administrator can dismiss the employees without significant obstacles. The permission of the UWV for example is not required. And although it is possible for an employee to start an appeal procedure, he will not benefit from this because most of the time in case of bankruptcy there is not much left to gain.

[82] Article 7:673c DCC.

[83] Article 10 Bankruptcy Act.

Chapter 5 Formal and procedural requirements

The employer has a number of obligations in case he wants to dismiss a worker; these include formal and procedural requirements. They will be listed below as well as the possible consequences of infringement of these rules.

5.1 Period of notice

If the period has expired in which that the employer can claim that the conditions for dismissal are not fulfilled, the employment contract can be terminated. Also in respect of this termination certain rules must be observed. These include the legal provisions that prescribe which period of notice must be observed. If the employer does not comply with the notice period, the employee is entitled to a compensation (in addition to the other ones discussed before).
For this compensation, the employee request the court within 2 months after the dismissal to grant a compensation equal to the wage determined in money for the period that the employment contract should have continued with a regular termination. This is the so-called irregularity allowance.

5.2 Notification obligation

Not later than one month before a temporary contract of six months or more ends, the employer must inform the employee whether or not the employment contract will be continued. In the event of continuation, the employer must also inform the employee about the conditions under which he wishes to continue the employment contract. If the notification obligation is not observed, the employer owes the employee a compensation equal to a monthly wage or in case of late compliance an amount in proportion to the delay.

5.3 Dissolution date

The law stipulates in article 7:671b paragraph 8 at what time the employment contract must end by dissolution. In principle, the court takes account of the applicable notice period by determining the end of the employment contract at the time when the employment contract would have ended upon termination. The duration of the dissolution procedure is deducted, with a minimum of one month.

5.4 Repairing of the employment contract

After termination, the court can repair the termination in two ways: n by annulling the termination and by restoring the employment contract.[84]
Annulling the termination is possible when the requirements of article 7:671 are not met or in case a prohibition of termination applies.[85] The employee must request annulment of the termination within two months.[86]
The employment contract can be restored if there was no accepted ground for dismissal. When recovery is not possible, a fair compensation can be awarded.

[84] Article 7:681 and 7:682 DCC.

[85] Article 7:681 DCC.

[86] Article 7:686a paragraph 4 DCC.

Chapter 6 The role of the UWV, workers' representatives and/or collective agreements in dismissals

6.1 Required permission of the UWV for dismissal on certain grounds

As seen in the previous chapters an employer in the Netherlands can dismiss an employee when there is a statutorily accepted ground for dismissal and relocation of the employee to another suitable function in the organisation is, even with additional training, not possible or not reasonable.[87] There are different possible accepted grounds. It depends on the ground of the intended dismissal whether or not the employer needs the permission of the UWV to be able to carry out the dismissal. There are two grounds which require such permission of the UWV. The first one is the loss of jobs in a company because of the termination of the activities of the company or, seen over a future period of at least twenty six weeks, the necessary loss of jobs as a result of taking measures, because of business economic circumstances, to ensure effective business operations. Secondly, when the intended dismissal is because of sickness or deficiencies of the employee as a result of which he is no longer able to perform the labour agreed upon in the labour contract. An employer can only intend to dismiss an employee on this ground if the sickness or deficiencies of the employee have lasted for at least two years and it is not plausible that the employee will recover within twenty six weeks and that within that period of twenty six weeks it will not be possible to perform the labour, agreed upon in the labour contract, in an adapted form.[88]

6.2 Dismissal test by the Dutch labour authority

When an employer intends to dismiss an employee on one of these two grounds the employer has to request a written permission from the UWV. The UWV will judge whether or not the employee could be relocated to another suitable function in the organisation and if the proposed ground is the right one, given the circumstances. If the circumstances can pass this test, the UWV will give the employer the permission to dismiss the employee.[89] These two grounds are related to economic reasons within the company, of which the UWV has a lot of expertise.[90]

It should be added, that the UWV is not the last body that has a say in permission requests for dismissals related to these two mentioned grounds. If the UWV refuses to give the permission, the employer can go to court and request the court to dissolve the labour contract between the employer and employee.[91] When the UWV does give the permission for dismissal to the employer, the employee also has to possibility to request the court to annul the notice of the employer and to restore the labour contract.[92]

6.3 The designation of a dismissal committee by collective agreement

In the case of an intended dismissal on the first mentioned ground 'the loss of jobs', it can occur that in a collective agreement an independent and impartial committee is appointed to which the employer should request the permission for such a dismissal instead of to the UWV. Such

[87] Article 7:669 paragraph 1 of the Dutch Civil Code (DCC).

[88] Article 7:669 paragraph 3 sub a and b of the Dutch Civil Code (DCC).

[89] Article 7:669 paragraph 1 of the Dutch Civil Code (DCC).

[90] *Parliamentary papers II* 2013/14, 33 818, 3. p. 5.

[91] Article 7:671b paragraph 1 sub b DCC.

[92] Article 7:681 DCC.

a collective agreement should be agreed with one or more trade unions. These unions should meet the following conditions. Firstly, the employees in the concerned company or industry are to be members of the union. Secondly, according to the statutes of the union, the union's goal is to represent the interests of their members who are working as employees in the concerning company or industry and thirdly, the union should possess full jurisdiction for at least two years. The collective agreement in which such a dismissal committee is appointed, should also include rules concerning the adversarial principle and the confidential treatment of submitted data. Furthermore, it should contain rules about reasonable terms for reaction of the employer and the employee and a reasonable term in which the commission should make a decision.[93] When an employer is bound by such a collective agreement, he will have to ask permission to the appointed dismissal committee, instead of to the UWV. This will be the case when the employer is a member of an employers' association which is a party in the collective agreement or when the collective agreement is declared generally binding by the government.[94] A generally binding declared collective agreement is applicable to all employers and employees in the concerning industry to which the collective agreement applies to.

This gives the parties to a collective agreement the competence to give the dismissal committee the power to decide on dismissal requests; a power that normally belongs to an administrative public body (UWV).[95] On this point the Dutch law also allows room for the social partners in the area of individual dismissal law.

How the appointing of such a committee works out in practice is clearly shown by the collective agreement of a well-known Dutch bank: ABN-AMRO. This bank has put the statutory possibility to appoint a dismissal committee by collective agreement in practice. Their collective agreement shows that this committee consists of three members, of whom one, the president of the committee, is chosen in consultation between the bank and trade unions. For the fulfilment of the other two places in the committee, the bank will appoint one member and the trade union will appoint the other member.[96]

Not only is this possibility to appoint a dismissal committee used in collective agreements that apply to companies. It can and is also used in a collective agreement that applies to a whole sector. This is shown by the fact that a dismissal committee is also appointed in the collective agreement which applies to all institutions of the Dutch higher professional education.[97]

6.4 Other deviations by collective agreement

For a dismissal on the ground of 'loss of jobs because of economic reasons' the employer has to use the so called 'reflection principle' to determine the order in which the employees can be given notice. As mentioned before, this principle means that employees will be divided in accordance of their age categories in categories of interchangeable functions. In each category the employees with the shortest employment will qualify for dismissal first.[98] However, if

[93] Article 7:671a paragraph 2 & 3 DCC.

[94] Article 9 paragraph 1 Law on the collective labour agreements (Wet cao).

[95] See: J. van Drongelen, 'De zogenaamde CAO-ontslagcommissie nader beschouwd', TRA 2014/85.

[96] Collective agreement ABN AMRO, p. 8.

[97] Collective agreement Higher Professional Education 2017-2018, p. 8.

[98] Article 11 par. 1 Dismissal Arrangement (In Dutch: Ontslagregeling).

agreed upon by collective labour agreement, the employer can choose to exempt a maximum of ten percent of the employees from the application of this principle.[99]

When an employer intends to dismiss an employee he has to take a certain term in account on which he has to notify the employee before the actual date on which the labour agreement will end. This term depends on the length of the employment and is regulated by the DCC. It is possible to deviate from the terms laid down in the DCC by collective agreement, on the condition that the term the employer uses isn't shorter than the term the employee has to take into account if he or she was the one to end the agreement.[100]

6.5 Role of the UWV after dismissal

After the dismissal the UWV will have an important role for a lot of the dismissed employees, because as long as they don't find a new job they can, under certain conditions, apply for an unemployment benefit. The UWV will judge whether they are eligible for this benefit.[101]

[99] Article 16 par. 1 Dismissal arrangement (In Dutch: Ontslagregeling).

[100] Article 7:672 par. 2 & 8 Dutch Civil Code.

[101] Article 22 par. 1 Unemployment law (WW).

Chapter 7 Judicial control of dismissals & procedural rules

7.1 Judicial control in dismissals on grounds a & b

As mentioned in chapter 6 for dismissal on the ground of long-term illness and loss of jobs the UWV has to be asked to give permission for the dismissal.

The role of the UWV in the dismissal procedures concerning these two grounds has received a lot of criticism in the past and also nowadays the compatibility with the right to a fair trial, laid down in article 6 of the European Convention of Human Rights (ECHR), is often questioned.[102] An important and much heard argument for this, is that the adversarial principle is not satisfied by the UWV. While in court the parties, both employer and employee, are heard, during the procedure with the UWV the hearing of the parties is not a standard part of the procedure.[103] Furthermore, it is also impossible for the employee or employer to ask revision of the decision by the UWV itself. Instead they have to request the court to decide on the case.[104] The parties have two months from the day of the decision of the UWV to submit a request to the court.[105] When such a request is submitted, the court judges if the decision of the UWV was correct. As said there is a reason why the UWV has a role in the dismissal on these two grounds: their expertise. The effectiveness and fairness of the procedure in front of the UWV can be contested, now the court in the end still is the one to judge about permission requests on these grounds. However, the positive thing is that, unlike before the WWZ, now all decisions on each dismissal ground can be subjected to the court, in one way or another.

7.2 Law on evidence in procedures on grounds a & b

Another aspect of the dismissal procedure at the UWV that is different from normal is visible when the employer has to deliver evidence to substantiate the dismissal request. As we will discuss hereafter, in a dismissal procedure in front of the court the general Dutch law of evidence will be applicable. This law does not apply to the requests for permission to dismiss on the a & b grounds, because the UWV is not subjected to this Act, since it is not a court. The UWV assesses whether or not the facts on which the employer bases his request are *plausible*.[106] As a result the employer who asks permission for dismissal on the a-ground, loss of jobs, should provide the UWV of information that supports his request.[107]

When an employee appeals to the court on a decision of the UWV concerning a dismissal requests on the ground of 'loss of jobs', according to the legislator the court has to adopt a reserved attitude in judging such a request (marginal test). The idea behind this is that an employer has a certain freedom to arrange his company and this should not be too much restricted.[108]

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[102] *Parliamentary Papers II* 33 075, 2011/12, p. 4 & 5.

[103] *See:* C.J. Loonstra, 'De rol van de UWV- en de ontbindingsprocedure volgens het regeerakkoord', *TRA* 2013/24.

[104] Article 7:671b par. 1 sub a jo. 7:682 par. 1 DCC.

[105] Article 7:671b jo 7:682 jo. 7:686a par. 4 sub a & d DCC.

[106] See: F. Laagland, 'Arbeidsprocesrecht en de WWZ', in: F.J.L. Pennings & L. Sprengers, *De Wwz,* to appear in 2018, par 6.x.

[107] *Implementation rules for dismissal on business economic reasons*, The Hague: UWV 2016, p. 10.

[108] *Implementation rules for dismissal on business economic reasons*, The Hague: UWV 2016, p. 10.

[108] *Parliamentary Papers II* 2013/14, 33 818, 3, p. 43.

7.3 Judicial control in dismissals on grounds c - h

For dismissal on one of the other possible grounds an employer has to go to court to ask the judge to dissolve the labour agreement with the employee.[109] This will be the case for the following grounds: frequent absenteeism, unsuitability for the job, culpable acts or omissions, conscientious objection, disturbed employment relationship and other circumstances which are of such nature that it cannot be expected from the employer to continue the agreement with the employee.[110]

The court will meet the request of the employer only when it agrees that one of the accepted grounds is satisfied in the case, that the employee cannot be, even with extra training, replaced to another suitable function in the organisation of the employer and there are no prohibitions for termination applicable (set out in chapter 1).[111] The employer has a lawful obligation to enable the employee to follow education to still be able to continue the labour agreement, also in the situation that the function of the employee disappears or the employee is no longer able to perform this function.[112] The court will judge whether or not the employer has fulfilled this obligation.

The court can also be addressed in cases when the employer has already terminated the labour agreement, but the employee does not agree with this or considers that the dismissal was not according to the statutory rules. This can be the case when an employer terminated the agreement without the needed permission of the UWV or when the employer terminated the agreement while there was a termination prohibition. Furthermore it can concern terminations of labour agreements with discriminatory aspects or the situation in which, after termination of the agreement on business economic grounds, the employer has another employee performing the job of the dismissed employee within 26 weeks, without giving the dismissed employee to be reinstated in this job.[113]

The law states that when the court decides that the dismissal didn't meet the requirements of a reasonable ground and impossibility to replace the employee to another suitable function in the organisation, the court can decide that employer has to restore the labour agreement with the employee. The court will decide on which date the labour agreement has to be restored and will make provisions in relation to the consequences of the interruption of the agreement.[114] When dismissals on the ground of loss of jobs as a result of business economic reasons or on the ground of long term illness are the result of serious culpable acting of the employer a fair compensation will be granted. In those cases the law excludes the option of restoring the agreement.[115]

The employer has to notify the employee of the dismissal on a certain term previous to the date on which the employer wishes to end the labour contract between them. What the length of the term is, depends on the length of the employment. When the employer dismisses the employer

[109] Article 7:671b par. 1 sub a DCC.
[110] Article 7:669 par. 3 sub c-h DCC.
[111] Article 7:671b par. 2 DCC.
[112] Article 7:611a DCC.
[113] Article 7:681 par 1 sub a-e DCC.
[114] Article 7:682 par. 1. sub a jo. par. 6 DCC.
[115] Article 7:682 par. 1 DCC.

on an earlier date than the lawful termination term indicates, the employee can go to court to ask for a compensation which will be equal to the amount of salary the employer would have earned if the agreement would've lasted until the end of the lawful termination term.[116]

Depending on the kind of request, a party has two or three months, from the moment the right to submit such a request arose, to submit the request to the court in first instance.[117] Thereafter, the employee can appeal to the decision of the judge, but this will not suspend the execution of the decision of the court in first instance.[118] The court will start with the procedure not later than four weeks after the request was submitted.[119] If a party means it has a very urgent request, it can always request for provisions who can be executed although the main conflict is not settled yet by the court.[120] The court can refuse to make such provisions if the court thinks the case is not suitable for such treatment.[121] A party can also request provisions for the period that the case is pending in front of the court.[122]

7.4 Law on evidence in procedures on grounds c - h

The general Dutch law concerning the evidence and burden of proof that applies in civil conflicts, is also applicable to the procedures that arise out of a conflict between an employer and employee concerning dismissal.[123] This means that the requesting party has to prove the facts mentioned in the request. When the counterparty does not contest the facts mentioned by the requesting party, the judge will assume these facts are true.[124] When the court wishes to deviate from these fundamental principles of the law on evidence, such deviation should be motivated by the court.[125]

7.5 Extrajudicial conflict resolution

The law states that the possibility for the employee to go to court to submit the above mentioned requests cannot be excluded or limited by any clause in an agreement.[126] However, this doesn't mean that the employer and employee cannot make a choice in the labour contract for arbitration or other extrajudicial conflict resolution to settle a conflict concerning dismissal.[127] When such a choice is made the court is unauthorized to decide in a dismissal conflict between the parties, unless the agreement to use arbitration is not valid.[128] The possibility to appeal

[116] Article 7:672 par. 10 DCC.

[117] Article 7:686a par. 4 sub a-e DCC.

[118] Article 7:683 DCC.

[119] Article 7:686a par. 5 DCC.

[120] Article 254 Law on civil legal action (in Dutch: Rechtsvordering).

[121] Article 256 Law on civil legal action (in Dutch: Rechtsvordering).

[122] Article 223 Law on civil legal action (in Dutch: Rechtsvordering).

[123] Article 284 par. 1 Law on civil legal action (in Dutch: Rechtsvordering); See: W.H.A.C.M. Bouwens & R.A.A. Duk, Van der Grinten Arbeidsovereenkomstenrecht, Deventer: Wolters Kluwer 2015, p. 517; Dutch Supreme Court 23 December 2016, ECLI:NL:HR:2016:2998, par. 3.18 *(Mediant-case).*

[124] Article 150 jo 149 par. 1 Law on civil legal action (in Dutch: Rechtsvordering).

[125] See: B. Barentsen & S. Sagel, 'Kroniek van het Sociaal Recht', *NJB* 2017/35, p. 2616.

[126] Article 7:681 par. 1 & 2 jo. article 7:682 par. 7 DCC.

[127] Court of Amsterdam 15 December 2010, LJN B08932.

[128] Article 1022 Law on civil legal action (in Dutch: Rechtsvordering).

against a decision that was a result of arbitration only exists when the parties have agreed upon the possibility to appeal in the labour contract.[129]

To summarize; the procedures for the requests of permission for dismissal at the UWV or the court differ in several aspects from each other. As said the adversarial principle is not included in a similar way in both procedures. Furthermore, the burden of proof seems to be greater when requesting permission for dismissal to the court than to the UWV. An employer who requests such permission should prove the plausibility of his statements in the procedure at the UWV, but in front of the court the employer should prove his the facts on which he bases his request and thus give more substantiation to his request. It also became clear that, when appealing to a decision of the UWV, the parties still end up at the court although their conflict concerns a dismissal on the a- or b-ground. Although the Dutch law provides in these procedures in front of the court or the UWV, parties still have the contractual freedom to agree upon extrajudicial conflict resolution, which leaves the court unauthorized.

[129] Article 1061a jo. 1061b Law on civil legal action (in Dutch: Rechtsvordering).

Chapter 8 Lawful dismissals

Lawful dismissals differ in terms of procedure and compensation. In this paragraph, the forms of lawful dismissal will be distinguished, starting with the forms that have the least amount of regulations.

8.1 Termination agreements

As mentioned before an employee can agree with the termination of his contract. The agreement will have to be in writing, otherwise it is of no legal value.[130] When agreeing to terminate the contract, an employee has the right to revoke his consent within two weeks. This is extended to three weeks if the employer did not inform the employee of this right.[131] Revoking the consent means that the employment contract will once again be in effect, ensuring the employees claim to wages and work.

When the employee does not revoke his consent, the agreement will end on the date both parties agreed to. The date and all other arrangements in the agreement are negotiable, making each agreement differ from the next, as long as the law is observed. A very important difference between this form of dismissal and the procedures where either the UWV is involved or a court decides to terminate the contract is that with this agreement no transition fee is required.[132] This is one of the exceptions on the obligation to pay the transition fee, even if a contract has lasted 120 months or longer. Most of these agreements will not be subjected to an examination by a court, making them a relatively easy option to terminate a contract as long as the employee is willing to consent.

8.2 Lawful summary dismissal

Based on article 7:677 DCC combined with 7:671 DCC an employer can dismiss an employee immediately, thereby foregoing the normally required notice period, when an urgent reason presents itself. This is called a summary dismissal. Some of these urgent reasons are summed up in article 7:678 DCC, this is however not an exhaustive list. More reasons might result in an immediate dismissal when an employer can't reasonably be expected to continue the contract with the employee. An example of lawful immediate dismissal is a case judged by the district court of Arnhem-Leeuwarden.[133] In this case the employee had been amply informed about his obligation to test and monitor food under his supervision and fill out the required forms truthfully. Disregarding these obligations led to a lawful dismissal because continuation of the contract could not reasonably be asked of the employer. An employee can also immediately terminate the contract based on urgent reasons, some of which are listed in article 7:679 DCC, which is once again not an exhaustive list.

Summary dismissal of an employee usually means the transitional payment is not required.[134] This is another exception to the general rule of the transition fee, even if a contract has lasted 120 months or longer.

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130 Article 7:670b DCC.

131 Article 7:670b paragraph 3 DCC.

132 Article 7:673 paragraph 1 DCC.

133 District Court of Arnhem-Leeuwarden, 8 April 2014, ECLI:NL:GHARL:2014:2856.

134 Article 7:673 paragraph 7 under c DCC.

The dismissal will also result in the employee losing his rights to any form of social security-payments regarding work such as payments based on the unemployment act. The wronged party can also claim an additional compensation fee because the other party was to blame for creating the circumstances which led to the immediate dismissal or termination.[135]
A summary dismissal is not subject to judgement by a court when neither of the parties involved question the legality of the dismissal. Because the consequences of a summary dismissal are quite severe however in most cases the recipient of the dismissal will most likely resort to challenging the claims in court. Whenever a summary dismissal turns out to be unlawful multiple options present itself regarding consequences and compensation, all of which will be discussed in the paragraph containing the unlawful dismissals.

8.3 Dissolution by a court

Both the employer and employee can request the court to have their contract dissolved.[136] As explained before the grounds for dissolution by the court are listed exhaustively in article 7:669 DCC as far as a request by the employer is concerned. An employee can make a request when circumstances dictate that the contract reasonably has to end immediately or after a short period of time (e.g. if the employer seriously misbehaves).[137] These circumstances are not specified further, which means any reason can be used for the appeal.

The court will first have to judge whether any grounds that prohibit dismissal are applicable before judging the actual request by the employer. The request by the employer has to be based on one of the aforementioned grounds and has to be able to support the request on its own. A request on an accumulation of grounds will currently not be successful. Whilst judging the request the court will have to decide whether or not the ground is sufficiently supported with arguments to dissolve the contract. If that is the case the court will rule in favour of the employer and dissolve the contract. The transition fee will be payable to the employee.[138] The court also specifies when the contract will end, usually taking the notice period otherwise applicable into account. In cases where the employer is to blame for creating the grounds on which a lawful dissolution has been granted the court can add an additional fair fee to the required transition fee. [139] An example of a successful appeal can be found in a case judged by the court of Rotterdam.[140] The employer stated that the employee did not function up to the required standard, even though multiple improvement projects had been attempted. The court ruled that the request based on article 7:699 paragraph 3 sub d DCC was sufficiently supported by arguments and therefore the contract was dissolved, after which the transition fee was awarded. Appeal against a decision of the court to to a Court of Appeal and further to the Supreme Court is possible.[141] This however does not revoke the standing sentence, meaning that during the appeal the contract remains dissolved if the court ruled such dissolution. It can be restored by a higher court after which it will once again take effect as if it had always been in effect. This means any wages not paid in between because the contract was dissolved will have to be paid.

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[135] Article 7:677 paragraph 2 DCC.

[136] Article 7:671b DCC.

[137] Article 7:671c.

[138] Article 7:673 paragraph 1 under a DCC.

[139] Article 7:673 paragraph 9 under a DCC.

[140] Court Rotterdam, 15 august 2017, ECLI:NL:RBROT:2017:6150.

[141] Article 7:683 DCC.

8.4 Permission for termination by the UWV

An employer can request permission to terminate the contract based on article 7:671a DCC combined with the grounds mentioned in 7:699 paragraph 3 under a and b DCC. The employee is notified by the UWV and is allowed to respond to the request by supplying evidence contradicting the need to terminate the contract. Based on the information supplied by the employer and employee a decision will be made regarding the permission and the result will be delivered to both the employer and employee at the same time and in writing.[142] If the permission is granted the employer has a four week window to finalize the dismissal. A notice period will have to be taken into account.[143] This notice period is shortened by the period in between the request for permission and the decision to give permission, as long as at least one month remains as notice period. The transition fee will also be obligatory.[144] Against the decision to deny the permission an appeal can be made to the court.[145] Against the decision to grant permission an employee can appeal to the court to reinstate the contract.[146] When reinstation is impossible due to circumstances attributable to the employer the court can decide to grant the fair fee to the employee instead of reinstating the contract.[147] This fee is based on the severity of the circumstances attributable to the employer.

8.5 Unlawful dismissals

Unlawful dismissals are an infringement on the rights of employees and therefore usually grant the wronged party either a compensation fee or reinstatement of the agreement, or in some cases both. In the following paragraph we will discuss the different forms of unlawful dismissal and their consequences.

Unlawful summary dismissal

As mentioned before most summary dismissals will eventually be brought before a court. The court will have to judge whether or not the circumstances were severe enough for summary dismissal, be it by the employee or employer. In most cases however it will be the employer that dismissed the employee. When a summary dismissal was not according to the rules it automatically means the termination was unlawful based on article 7:671 DCC which states that dismissal of an employee without his consent is not allowed. An example of insufficient circumstances can be found in a case judged by the court of Noord-Holland.[148] In this case the employee was dismissed following alcohol-related incidents. According to the employer, the employee came to work drunk twice. The employee however stated that he had had one drink on both occasions. Because the employer failed to prove that the employee had drank more than one drink and never set any rules regarding use of alcohol before work, the court ruled that the circumstances were insufficient for summary dismissal. In such case the employee can ask the court to reinstate the contract or to grant a compensation fee.[149] This fee is based on both the consequences of the termination of the contract for the employee as the severity of

[142] Article 7:671a paragraph 4 DCC.
[143] Article 7:672 DCC.
[144] Article 7:673 DCC.
[145] Article 7:671b paragraph 1 under b DCC.
[146] Article 7:682 paragraph 1 under a DCC.
[147] Article 7:682 paragraph 1 under b DCC.
[148] Court Noord-Holland, 22 February 2017, ECLI:NL:RBNHO:2017:1515.
[149] Article 7:681 paragraph 1 under a DCC.

circumstances attributable to the employer.[150] If the contract remains terminated but is deemed unlawful also the transition fee is granted to the employee. Added to this is a fixed fee based on the notice period required for a lawful dismissal.[151] The court can reduce this fee when the circumstances call for a reduction. Appeal against the court decision is possible but once again does not revoke the standing decision until a decision on the new appeal has been reached.

Appeal after dissolution

When an appeal to revoke the decision by a court has been made, the court of appeal will judge whether or not the decision to dissolve the contract was correct. If the request to dissolve the contract came from the employee and was granted, an appeal by the employer can only be made to correct the amount of compensation.[152] No appeal to reinstate the agreement can be made. If the request to dissolve the contract came from the employer and was granted, the employee can request the court of appeal to either order the employer to re-establish the contract or pay a compensation fee.[153] If the request to dissolve the contract, either by the employee or the employer, was first denied by a court and is later granted by the court of appeal, the contract will be dissolved by the date set by the court of appeal. In this case the regular compensation stated in the earlier explanation of lawful dismissals will be applicable.

[150] HR 30 juni 2017, ECLI:NL:HR:2017:1187.

[151] Article 7:672 paragraph 9 DCC.

[152] Article 7:683 paragraph 2 DCC.

[153] Article 7:683 paragraph 3 DCC.

Chapter 9 Special categories of workers

In previous chapters some of the special protection regulations have been named. In this chapter they will be explained further. These regulations are spread out over different acts and will be explained by act.

9.1 Dutch Civil Code

Based on the Dutch Civil Code for several categories of employees specific dismissal rules apply, providing them with specific protection. In most cases however this protection is not unlimited

Disability and illness

The DCC prohibits dismissal during periods of disability or illness during the first 24 months. This rule however has quite a few exceptions. If the illness started after a request to the UWV for permission to dissolve the agreement, the protection rule does not apply, meaning that dismissal can still take place. When an employee does not comply with the duties of article 7:660a DCC, which state that employees need to see specialists, accept suitable work and need to cooperate in reintegration activities and the employer has urged the employee to cooperate and has stopped paying wages according to 7:629 paragraph 7 DCC, the protection is not in effect. Dismissal in a probation period, immediate dismissals and the termination of all operations of the business also fall outside the scope of the protection.[154]

Pregnancy and maternity

Based on article 7:670 paragraph 2 DCC the employer can't dismiss an employee during her pregnancy. The employer can however request a doctor's certificate confirming the pregnancy. During maternity leave based on article 3:1 of the DLCA dismissal is also not permitted. This means that during the pregnancy and the following maternity leave an employee is, in principle, protected from dismissal. The protection offered through these articles is quite extensive and must be strictly adhered. A good example of this is a case that was judged by the court of Rotterdam.[155] In this case the employer asked the court to dissolve the contract with the (pregnant) employee. The grounds had nothing to do with the pregnancy and the employee never offered the pregnancy as reason and even in that case the court ruled that the contract could not be dissolved because of the pregnancy, showing a very strict adherence to the protection regulations. However, a few exceptions must be mentioned regarding the protection. When presented with grounds for summary dismissal as explained before the employer will still be able to dismiss the employee, even though she is pregnant or on maternity leave.[156] The same applies to dismissals within a probation period based on paragraph 2 under b of the same article. When the dismissal is based on article 7:699 paragraph 3 under a DCC (business economic reasons) the protection against dismissal is not in effect for a pregnant employee. It does still protect any employee on maternity leave. The last exception is when a contract with a specified time ends and the employer decides not to renew the contract. If the employee is able to prove that the decision was based on the pregnancy, however, the contract will have to be renewed, usually by court order.

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[154] Article 7:670a paragraph 2 DCC.

[155] Court of Rotterdam, 29 July 2011, ECLI:NL:RBROT:2011:BT2088.

[156] Article 7:670a paragraph 2 under c DCC.

Paternity
An employee who takes over pregnancy leave after the death of his or her wife protected from dismissal.[157]
Other forms of paternity leave are not protected. Requesting paternity leave from the employer must, however, not be a ground for dismissal and any dismissal based on that request will be repaired by the court.

Trade union representatives
An employee who is a member of a trade union can't be dismissed because of the membership or because of (taking part in) activities of said union.[158] This means that any dismissal based on that membership is unlawful. This however does not protect a member of a trade union from dismissals based on other articles in the Dutch Civil Code. The only protection offered is against dismissals based on the membership. Exception to this protection is when the employee takes part in activities of the union during working time without the consent of the employer.

Membership of an employees' consultation body
Any member of an employment consultation body is protected from dismissal.[159] The same goes for employees who are a candidate-member or who were a member less than 1 two years ago. Exceptions to this rule are listed in article 7:670a paragraph 2DCC. Dismissal during probation is still allowed, as well as summary dismissal and dismissal based on the termination of operations of the entire business. Whenever a dismissal is based on article 7:699 paragraph 3 under a DCC the protection for members, candidates and former members does not apply.

General exception
Bankruptcy is a general exception on all regulations of protection. Based on the history of the DCC it is assumed that, to facilitate the job of the curator during bankruptcy, he is not bound to any special protective measures.[160]

9.2 Equal Treatment Act
Based on the Equal Treatment Act (AWGB) any difference in treatment based on race, gender, nationality, sexual preference, faith or convictions, political views and so on is prohibited. This goes for direct difference and indirect difference, both of which are defined in article 1 AWGB. Based on article 5 paragraph 1 under c AWGB no difference in treatment is allowed as far as ending contracts goes. This means that dismissing an employee based on any of the aforementioned grounds is a direct violation of the Equal Treatment Act. Based on article 8 AWGB an employee can appeal to the court and request the reinstatement of his contract or a (fair) compensation fee based on article 7:681 DCC. Exception to these rules are religious (and comparable) institutions, schools based on a particular denomination and political institutions. These institutions are allowed to make exceptions on the equal treatment of employees, however in dismissal cases this seems unlikely unless someone changes believes or political conviction while already employed at one of those institutions.

[157] Article 7:670 paragraph 2 DCC.
[158] Article 7:670 paragraph 5 DCC.
[159] Article 7:670 paragraph 4 DCC.
[160] *Parliamentary papers II* 2014/15, 33988, nr 21 p. 2-3.

9.3 Equal treatment of men and women Act

This Act prohibits men and women to be treated differently based on gender specifically. Included in this Act is the ban on (sexual) intimidation.[161] Following this Act either disapproving of the intimidation or undergoing the intimidation without action may never be a ground for any decision regarding the person. This means dismissal based on reacting or not reacting to intimidation can't be a ground for dismissal. If a suspicion of unequal treatment is raised and made likely by the employee the employer is forced to prove that no unequal treatment was part of the decision (to dismiss the employee).

9.4 European Social Charter

Dismissal based on participating in a strike

The European Social Charter (ESC) regulates the right to strike in article 6 paragraph 4. Based on article G ESC infringements can be made on this right based on the protection of rights and freedoms of others, protection of public interest, national security, public health or moral grounds. However, based on Dutch case law penalty's following a legal strike are prohibited.[162] Unless a strike has been forbidden by a court or is in another way not in agreement with the right to strike, participating in it can't lead to a dismissal. This would be an unacceptable infringement on the right to strike.

European Regulation

The European Union has drawn up a lot of directives and regulations regarding labour law. Most of these were designed to ensure that employers are treated equally in regards to labour. This includes equal treatment in cases of dismissal. The following regulations are relevant for protection during dismissal.

Guideline 2000/43/EG

This guideline explicitly states that unequal treatment based on race or ethnicity should be eliminated to ensure equal treatment in all member states.[163] This also includes dismissal.[164] This guideline however offers no penalties for not complying with it, therefore member states are obligated to implement the Guideline to ensure actual protection for employees.[165] Under Dutch law this has been affected by the aforementioned Acts, including the Equal Treatment Act.

Guideline 2000/78/EG

Similar to Guideline 2000/43, this Guideline explicitly means to combat inequality based on, in this case, a number of grounds. These include age, faith or conviction, sexual preference, disability and age.[166] Once again this Guideline requires implementation by member states. Most of these grounds have been included in the Equal Treatment Act and the DCC.
The Netherlands have implemented most of the Guidelines into Dutch law, making it possible to actually enforce the Guideline in court. It is however important to note that based on the Mangold-verdict equal treatment is a fundamental principle of the European Union and

[161] Article 1a Equal treatment of men and women Act.

[162] High Court, 22 April 1988, NJ 1989/952 (*Veurink/Bakhuis en Post*).

[163] Article 1.

[164] Article 3 paragraph 1 under c.

[165] Article 9.

[166] Article 1 Guideline 2000/78 EG.

therefore national law must be read in accordance to European law.[167] National legislation can therefore never overrule European law, meaning that (wrongly) implementing a Guideline does not give any member state the possibility of undermining European law.

[167] C-144/04, *Mangold*.

Chapter 10 A review of the past ten years of Dismissal Law

Now we will discuss the developments in dismissal in the Netherlands in the past 10 years.

10.1 Economic crisis

The start of the economic crisis in the Netherlands first became visible in 2009, but it did not have much impact before 2010. The crisis caused a lot of unemployment and made employers more cautious to offer permanent labour contracts to employees. Since the end of 2015 signs of improvement of the Dutch economy are showing.[168] One effect of the crisis is that during such difficult economic times employers are less stimulated to invest in the education of their employees.[169]

10.2 Implementation of the WWZ

As said in the first chapter, in 2015 an important labour Act was implemented; the WWZ. In the preparation of this Act the trade unions and employers' organizations played an important role, because the WWZ was made after an agreement between these parties was made. One of the objectives of the WWZ was that more employees with fixed term contracts would end up with a permanent one instead of getting replaced by new employees with fixed term contracts.

The Act also changed the conditions the employer has to meet when he asks the court or the UWV to end a labour contract with an employee. Before the implementation of the WWZ the employer had to ask permission to the UWV for terminating the labour contract or he could request the court to dissolve the labour contract on the ground of weighty reasons or change of circumstances.[170] An employer could freely choose whether he wanted to address UWV or a court.[171] The WWZ introduced strict rules: for dismissal on some grounds the employer has to go to the UWV, for the others to the court. There are eight specific grounds on which an employer can request dissolution of the labour contract. Thus, it depends on the ground whether the employer has to go to court or to the UWV. The eight grounds are very clearly described in the law and an employer always has to base his request on one of these specific grounds. Besides that the employer now also has to prove it is impossible to replace the employee, even with additional training, to another fitting function. It's safe to say, that since the WWZ Dutch dismissal law sets higher conditions for an employer who wants to dismiss an employee than before. With this, the WWZ aimed to improve the protection of an employee against dismissal and to treat workers in the same way.

The obligation of the employer to look for possibilities for alternative work for the employee is narrowly related to another legal obligation of the employer: the obligation to provide the employees with training. In 2015 the Dutch legislator introduced a legal obligation for employers to train their employees.[172] This obligation includes educating and training employees in order to perform the labour agreed upon in the labour contract, but also the

[168] See: 'Nederland is economische crisis helemaal te boven', *NOS* 13 december 2016; 'Nederland 'heeft zich ontworsteld aan de economische crisis'', *Volkskrant* 15 september 2015.

[169] See: P. van Echtelt, R. Schellingerhout & M. de Voogd-Hamelink, 'Vraag naar arbeid', Den Haag: Sociaal Cultureel Planbureau 2015, p. 10.

[170] Article 6 Extraordinary Decision Labour Relations 1945; Article 7:685 DCC (old).

[171] P.G. Vestering, 'Commentaar BW Boek 7 artikel 685', *SDU* 2014.

[172] Article 7:611a DCC.

education of employees who are at danger of losing their job in order to enable them to perform another suitable job in the same undertaking. However, the act does not oblige the employer to train and educate the employees in such a way that they can continue working in another undertaking.[173]

Transition fee and fair compensation
Until the implementation of the WWZ the Dutch court could use a formula to determine the amount of the compensation the employee should receive when the labour contract was dissolved. This formula was based on a multiplication of the years the employee has worked for the employer, the monthly salary and a correction factor. This correction factor gave the court some space to decide that the compensation should be higher or lower, according to the opinion of the court concerning which party was to blame more for certain circumstances.[174]

This formula was replaced by the legal transition fee and the so-called fair compensation, which the employer has to pay to the employee when the labour contract with this employee ends.[175] The amount of the transition fee that the employer has to pay is calculated in relation to the length of the labour contract and the salary of the employee. The fair compensation is only paid in very serious cases. It is a compensation that the judge will impose, for instance when the employer has acted seriously culpable towards the employee, when the dismissal is based on discriminatory reasons or when the employer ended the labour contract while there was a legal prohibition.[176] The development from the formula of the court to a legally defined transition fee and fair compensation has limited the freedom of the court to adjust the amount of the compensation according to its own view. The transition fee is calculated according to strictly fixed rules.

10.3 Plans of the new government for the coming four years
Some of the rules of the WWZ will be revised, as was announced by the new government, that came into office at the end of 2017. They have announced their plans for the coming four years for the Netherlands. According to these plans the cumulation of some grounds for dismissal will be allowed, but in exchange a higher transition fee will be imposed.[177]

[173] See: G.J.J. Heerma van Voss, in: *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht 7. Bijzondere overeenkomsten. Deel V. Arbeidsovereenkomst*, Deventer: Wolters Kluwer 2015/64.
[174] See: R.A.A. Duk, 'A x B x C = toch eenvoudiger?', *ArbeidsRecht* 1997/52.
[175] Article 7:673 jo. 7:681 jo 7:682 DCC.
[176] Article 7:673 par. 9 sub a jo. 7:681 par. 1 sub b & c.
[177] See: VVD, CDA, D66, Christen Unie, 'Coalition agreement: Trust in the future'.

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