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JCC/JETRO/WK法律事務所共催セミナー
「今さら聞けないオランダ労働雇用法の基礎」
2023年7月6日（木）

JCC/JETRO/WK ADVOCATEN Seminar on Dutch Labor/Employment
Law

6 July 2023 (Thursday)

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労働関係の法律

日本労働法

労働三法：労働基準法 労働組合法
労働関係調整法

その他：

- 職業安定法
- 障害者雇用促進法
- 高齢者雇用安定法
- 雇用保険法
- 労働者派遣業法
- 等

オランダ労働法

オランダ民法第7巻

その他：

- 従業員協議会法
- 労働作業環境に関する法律
- 均等待遇法
- 最低賃金法
- 労働時間調整法
- 労働協約に関する法律
- 等

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よく耳にする用語概説

法定最低賃金

年に2度決定される（1月1日、7月1日）。

2023年7月1日～

Age	Per month	Per week	Per day
21 years and older	€ 1.995,00	€ 460,40	€ 92,08
20 years	€ 1.596,00	€ 368,30	€ 73,66
19 years	€ 1.197,00	€ 276,25	€ 55,25
18 years	€ 997,50	€ 230,20	€ 46,04
17 years	€ 788,05	€ 181,85	€ 36,37
16 years	€ 688,30	€ 158,85	€ 31,77
15 years	€ 598,50	€ 138,10	€ 27,62

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ホリデー・アローワンス = 休暇手当

12か月給料合計額の8%を支給。法的に義務付けられている。

法定最低賃金額の3倍以上の給料を支給されている従業員に対しては、ホリデー・アローワンスが給料合計額に含まれているとすることが可能。但し、その旨雇用契約書に記載されており、本人の同意が必要。

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13か月目のボーナス

法的に定められておらず支給義務なし：任意。

13か月目のボーナスを支給することの弊害：

- その分余分な人件費がかかる。
- 従業員全員に支給、そして、固定賃金なので、毎年支払い続けなくてはならない。当然、ワークパフォーマンスの良くない、不満足な従業員にも支払い続けなくてはならない。
- 解雇時のトランジション補償金を計算する際に、固定賃金となっているため、含めて計算することになる。

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法定最低年次有給休暇数

法定最低年次有給休暇数はフルタイム勤務で年に20日。パートタイム勤務の場合は、勤務時間の割合で比例計算した日数となる。年次有給休暇数を法定最低数の20日にする会社は少ない。少なくともフルタイム勤務で、25日支給にする会社が多い。法定最低年次有給休暇数20日のうち消化しなかった休暇数は、翌年の6月30日まで持ち越すことが可能。翌年の6月30日までに消化しなかった場合、消滅する。例えば年次有給休暇数が25日の場合、5日は5年間持ち越すことができる。

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パートタイム勤務の意味

日本でいうところのパートタイマー（パート）の意味とは全く異なる。パートタイム勤務従業員はあくまでも日本でいうところの正社員である。例えば、週に一日勤務であっても、週に数時間勤務であっても正社員であり、フルタイム勤務従業員と同様の権利、法律が適用になる。

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年金

AOW (State Pension) 法定受給資格年齢

Year	Pensionable age	Concerned people born
2020	66 years + 4 months	After 31 August 1953 and before 1 September 1954
2021	66 years + 4 months	After 31 August 1954 and before 1 September 1955
2022	66 years + 7 months	After 31 August 1955 and before 1 June 1956
2023	66 years + 10 months	After 31 May 1956 and before 1 March 1957
2024	67 years	After 28 February 1957 and before 1 January 1958
2025	67 years	After 31 December 1957 and before 1 January 1959
2026	67 years	After 31 December 1958 and before 1 January 1960

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職業年金

職業年金は任意。使用者は従業員に対し、職業年金への加入、職業年金制度への拠出を提供する必要はない。従業員からの希望がある場合、職業年金制度を実施するほうがより良い人材確保ができる場合、加入を考慮すべきである。

但し、適用になっている労働協約が存在する場合は、その労働協約が決めた職業年金制度に加入することが必須である。

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退職金 = Retirement Payment

日本では、多くの企業が退職金制度をもっていて、厚生労働省の調査によると、退職金がある企業の割合は全体の75.5%である（2016年1月22日付の日本経済新聞の記事による）。それに対し、日本でいうところの退職金、退職金制度はオランダでは存在しない。そもそも退職金という概念がオランダでは存在しない。

注意事項：退職金と解雇(即時解雇を除く)の際に支払われるトランジション補償金 = Transition Compensation を混同しないように注意。いわゆる日本の退職金とオランダでの解雇の際に支払われるトランジション補償金は全くの別物。

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年次昇給についての考え方

最低賃金について定めた法律はあるが、昇給及び昇給額について定めた制定法の規則は存在しない。従って、労働協約、個々の雇用契約または会社の慣習により昇給について定められていない場合、会社は毎年社員の給料額を上げる義務はない、理論上、毎年昇給がゼロでも法的には問題なし。が、特に今現在のようにインフレが進んでいる中、社員のモチベーション維持、良い人材の維持をするためにどのように対処すればよいのか。

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就業規則

日本労働基準法は、常時10人以上の労働者を雇用する事業所ではその使用者に対して、就業規則を作成し、労働基準監督署長に届け出るように義務付けている。が、オランダでは、就業規則について定めた法律はない。従って、就業規則作成義務はないが、従業員数が数名に増えた場合または今後増えると予想される場合は、作成を考慮することが好ましい。

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雇用契約

使用者は、期限付き無期限を問わず、すべての労働者に対して、必ず定めなければならない労働条件（使用者、労働者の氏名及び居住地、労働がなされる場所、職務または労働の内容、雇用開始期日、契約期限、年次有給休暇日数、賃金及び賃金支払い期、労働時間、年金制度加入の有無等）を雇用契約に記載し、提示しなくてはならない。[民法第7巻第655条]

2022年8月1日付で施行された「トランスペアレントで予測可能な労働条件法」により、使用者に、さらなる広範な情報を労働者に提供する義務（通知義務）が課せられた；雇用契約や就業規則に（特別）有給休暇（緊急休暇や産前産後休暇等）を取得する権利、雇用契約終了に関する手続き、個々の賃金要素（ボーナス、手当等）の詳細、働く場所等を記載しなくてはならない。

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期限付雇用と無期限雇用

オランダで社員を採用する際、無期限雇用の他に、期限付雇用のオプションがある。最初期限付契約を締結し、契約期間中に様子を見て、当該社員に関し納得、確認が得られた時点で契約を無期限にかえるというのが、慣例的な方法である。

期限付雇用契約は、36か月まで合計3回まで締結することが可能。合計3回以上または36か月以上延長する場合、雇用契約は無期限雇用契約に移行する。

期限付雇用契約を延長しない場合（期限の満了がきて雇用契約が終了する場合）においても、トランジション補償金を支払う義務が発生する。

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Dismissals in the Netherlands

General features:

- Very strict rules
- Employee protection is at a very high level
- Limited number of grounds for dismissal
- Prior permission needed for dismissal
- Uncertainties are the risk of the employer

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Premature termination of fixed term contract

In principle this is not possible, unless a “premature termination clause” is included in the employment contract.

The employer still needs a ground for dismissal.

No such clause: premature termination not possible.

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Notice period for the Employer

The applicable notice period has to be observed.
Dutch law has the following notice periods:

Employment	
< 5 years	1 month
5-10 years	2 months
10-15 years	3 months
> 15 years	4 months

In a Collective Labour Agreement (CLA) or in an individual employment agreement, a different notice period can be included.

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In most cases: ground for dismissal necessary

There is no possibility to terminate, unless either:

The Court

or

The UWV



has ruled on the ground for dismissal

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Termination of employment

The employer cannot terminate the employment contract, unless:

- Prior permission from the UWV
- Employer starts a termination procedure at the court and has a reasonable ground
- There is an urgent cause for instant dismissal
- By mutual consent (settlement agreement, very common)

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Exception: trial period (1)

- Has to be concluded in writing (digitally)
- Before the commencement of work
- Must be an equal period for both the employee and employer (otherwise it is not valid)
- First contract for this position
- The employee is not known to the employer, for instance because of a previous job in a sister company

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Trial period (2)

Contracts for indefinite period	Maximum 2 months
Contracts for > 2 years	Maximum 2 months
Contracts for < 2 years	Maximum 1 month

- Not possible to agree to a trial period on a contract less than 6 months
- If a trial period of 3 months is agreed upon, the trial period is not valid

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Trial period (3)

Using a trial period

- No ground required
- No notice period applicable
- Transition payment applicable, but very low
- Trial period can be invoked even before start of employment

It's not possible to use a trial period:

- In a discriminatory manner (i.e. because of pregnancy)
- To force the employee to agree to another agreement (for instance with lower compensation)

Be aware that an employee can also invoke a trial period. This is an issue in the current hot job market

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Instant dismissal



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Instant dismissal

- Instant dismissal (also called summary dismissal) is the most far-reaching form of dismissal
- In the event of gross misconduct on behalf of the employee, the employer can “fire” the employee immediately and without severance compensation.
- This requires immediate and diligent action from the employer.
- The employee should pay damages to the employer.
- Instant dismissal is not without risk: if not all requirements are met, there can be significant financial exposure for the employer.




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Instant dismissal (2)

In order to dismiss an employee with immediate effect, the employer should:


- Have an urgent cause to dismiss (mostly gross misconduct);




- Give notice immediately;



- Provide the employee with an explanatory letter



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Instant dismissal (3)

Urgent cause to dismiss

- This should concern gross misconduct that makes it unacceptable (for the employer) to continue the employment agreement.
- A good example is employee fraud.
- The personal circumstances of the employee are relevant.
- Gross misconduct (for instance a drunk employee) in principle leads to an urgent reason to dismiss. However, if an addiction is the cause of the behavior, the personal circumstances (medical reasons) can prevent the employer to dismiss the employee.

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Instant dismissal (4)



Policies of the employer are very relevant. If unwanted behavior of the employee is incorporated in an employee handbook, instant dismissal could be possible even in the event of minor offences.

A notorious example is a cleaner at Amsterdam Schiphol Airport who ate a small bag of peanuts that was left over after a flight. Because the policies of the employer were crystal clear (eating of left overs during work was never allowed), the employee could be instantly dismissed.



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Instant dismissal (5)

DISMISSAL BAN (OPZEGVERBODEN) NOT APPLICABLE

- Dismissal bans like illness, pregnancy or membership of a works council (which normally would prevent the employer from being able to terminate the employment) are not applicable in the event of an instant dismissal

IMMEDIATE ACTION REQUIRED

- The employer has to investigate the situation properly before dismissing the employee. The employee must be heard: if he's denied that opportunity, it can affect the legitimacy of the dismissal
- The investigation has to be swift but diligent. If too much time passes after the discovery of the unacceptable behavior, the dismissal will not be considered "without delay" and therefore there will not be a valid dismissal

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Instant dismissal (6)

DISMISSAL LETTER

- The employer provides the employee with a dismissal letter containing the cause for the dismissal. An oral statement is not sufficient: the employer will have substantial problems in terms of evidence as to the cause(s) of the dismissal.

CONSEQUENCES FOR THE EMPLOYEE

- The consequences of an instant dismissal for the employee cannot be overestimated. The employee **cannot** make a claim for **unemployment benefits (WW)**. There is (with some exceptions) **no obligation** on behalf of the employer to pay a **severance compensation** to the employee.

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Instant dismissal (7)

WHAT AMOUNT OF COMPENSATION NEEDS TO BE PAID IN THE EVENT OF A WRONGFUL TERMINATION?

- If the instant dismissal is determined invalid by the Court (and the employee does not seek reinstatement) a special severance compensation ("billijke vergoeding") needs to be paid. All circumstances of the case are relevant in determining the amount.
- The financial loss of the employee as a consequence of the dismissal is the most important factor. An older, high earning employee can for instance claim several annual salaries: it might be unlikely that he will find other employment at his job level. The highest severance compensation is more than EUR 1.000.000 gross. This consisted all salary and missed pension accrual until the pension date of the employee.

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Instant dismissal (8)

IF THE EXPOSURE CAN BE SO SERIOUS, WHY DO EMPLOYERS STILL DO INSTANT DISMISSALS?

- A lot of employers have a “zero tolerance” policy as to unacceptable behaviour. Hence if there is a case of fraud or theft, they use instant dismissal to get rid of the employee
- This also serves as an example to other employees, that will hopefully abstain from the unacceptable behavior in the future.
- Instant dismissal is also used to force a breakthrough to get rid of an employee, in a situation that normally wouldn’t warrant a dismissal. A conflict would escalate. This however is a risky strategy, given the substantial exposure.
- A “regular” Court request can be more appropriate

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Transition payment

- Applicable in almost all dismissal situations
- Also applicable when employer does not extend the fixed term employment contract

Not applicable:

- If employee reaches pension age
- If the employee gives notice to terminate the employment agreement
 - If there is gross misconduct on behalf of the employee



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Transition payment

1/3 monthly salary including (8 %) holiday allowance per year employed

Example:

Monthly salary: EUR 4.000

Years of employment: 7

Calculation transition payment:

$1/3 \times (4.000 \times 1,08) = 1.440$ per year employed

$1.440 \times 7 = \text{EUR } 10.080$



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Grounds for dismissal

No trial period or instant dismissal: grounds needed

- a. **Company economic grounds**
- b. Long term illness (> 24 months)



- c. Frequent absence due to illness

d. Underperformance

- e. Liable behaviour
- f. Conscientious objections
- g. Conflict at work
- h. Other reasons for dismissal
- i. Combination of grounds



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B. Illness for more than 24 months

- The employer has the obligation to continue paying the employee for the first 24 months of illness, or until the fixed term contract expires
- After that, permission from UWV can be requested by the employer to terminate the employment agreement
- The government reimburses the transitievergoeding (*transition payment*) to the employer
- The 24 months can be extended if the employer did not meet the obligations to reintegrate the employee

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C. Frequent absence due to illness

- Not applicable to long term illness
- Not applied a lot, low chance of success
- The absence has serious consequences for the employer
- For instance: the employee calls in sick every 3 weeks for a few days, and this causes a lot of problems

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E. Liable behaviour (1)

- The misconduct of the employee should be serious enough to justify a dismissal
- The employee should be aware that the behaviour is not acceptable
- For instance:
 1. Behaviour that is always wrong (fraud)
 2. Behaviour prohibited in an employee handbook
 3. The employee received a warning before



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E. Liable behaviour (2)

In the event of **gross misconduct**:

- No transition payment is to be paid by the employer
- The bar is set high for this

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F. Conscientious objections

- Almost never used
- An example: an employee of the Dutch governmental health service refused to work on the Covid vaccination programme



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G. Conflict at work

- The employee has a severe and irreversable work conflict
- 
- The employer should have tried to solve the conflict; very often this is done through mediation
- 
- After a failed mediation process, usually termination in Court can be achieved
 - This ground is the most successful ground in Court

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H. Other reasons for dismissal

- Exceptional circumstances should apply, for example:
- Imprisonment of the employee
- Football coach being dismissed due to bad results
- Truck driver who loses his driving license
- Not very useful in most cases

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I. Combination of grounds

- If 2 or more grounds are almost fulfilled (but not completely), this ground may be a solution.
- For instance: there is underperformance (but no coaching was offered) and a work conflict (but mediation was not applied).
- However: most Courts are reluctant to apply this ground.
- Higher severance compensation may be applied by the Court (max 150 % of the transition payment)

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Redeployment?

Employer should investigate beforehand whether an employee cannot be redeployed in another suitable position within a reasonable timeframe (if necessary with training)



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Termination request at the court

No notice prohibition can be applicable

For example:

- Sickness of the employee (unless more than 2 years)
- Pregnancy of a female employee
- Membership of a works council

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Termination request at the court

Procedure:

Employer files request

Employee can file a defense

Within approx. 2-3 months: court hearing

Usually: settlement negotiations before or during hearing

Otherwise: judge will pass judgment

Most often two weeks after hearing

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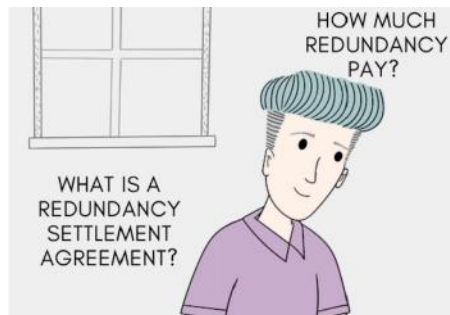


Dismissal due to economic hardship of the employer

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How to avoid the UWV



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What to offer



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Article 7:669 paragraph 3 sub a Dutch Civil Code:

"A position becoming redundant as a result of cessation of activities of the employer, or a position becoming redundant over a future period of at least 26 weeks, due to the necessity to take measures based on company economic circumstances required for an efficient operation of the company"

Employer needs to submit documentation to show:

- a. That there are company economic grounds for a reorganization
- b. That the reorganization results in the position of the employee becoming redundant;
- c. That there are no other alternative positions available within the company (even with additional training of the employee)
- d. The opportunities to redeploy the employee have been explored with the employee, but have not been proven viable

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Documents to send to UWV

- Part A: information about the employer
- Part B: information about the employee
- Part C: substantiation of reorganization
- Official start of the procedure after part A is filed → negotiations
- Extension of deadlines
- Parts B&C usually filed together
- All documents are filed digitally

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Internal procedure

- Employee reporting ill before and during procedure
 - File part A first
- Meeting to inform employees
- Timeframe

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a. Company economic grounds

- UWV guidelines
- Deteriorating financial situation
 - Documents of last three years + current year
- Less work available
 - Insight in staff numbers of last 18 months
 - Inability to attract more work
- Prognosis of upcoming 26 weeks with and without reorganization

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a. Company economic grounds (2)

- Organizational or technological changes
 - Possible overlap with deterioration finance or less work
 - Technological changes need to be explained
- Moving of the company location
 - Outsourcing labour to a different location altogether is no ground
- Terminating the activities altogether
- Prognosis of upcoming 26 weeks with and without reorganization

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a. Company economic grounds (3)

- Necessity of informing the works council
- Involvement of workers unions in specific branches
 - i.e. Technological sector, medical sector
- Social plan
 - Goal: equal treatment of all employees that become redundant

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b. Redundancy of the position

- First: What position to target?
- Who are actually in that specific position?
 - The position must be interchangeable, not the employees
- If the employer does not want to dismiss all employees with interchangeable positions, the employer must investigate which employees are eligible for dismissal

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b. Redundancy of the position (2)

Interchangeability applies if the contents of the position, the necessary competences and knowledge related to the position and the temporary or structural nature of the position are comparable

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Eligible for dismissal?

- **In the same position**
- Flexible agreements (agency, fixed term agreements) must be terminated first
- Principle of representation
- Proportional distribution per age group
- Shortest service time = first to go

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An example:

15-24 years	25-34 years	35-44 years	45-54 years	>55 years	Total
					15
					15 9

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Court of Appeals Amsterdam, 28 February 2023 (Primus Wafer Paper)

Before reorganization:

2x Machine operator 'regular'

2x Machine operator A

Salary: €3.500,-

No training required

2x Machine Operator A already had necessary training

3x Machine Operator 'regular' have longer service time

Employer dismisses the 2x Machine Operator 'regular'

After reorganization:

3x Machine operator A

Salary: €3.500,-

Little training required for new machines

Court of Appeals: position is interchangeable, because training can be given and salary is equal
Dismissal denied, because Machine Operator 'regular' have longer service time

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c. Suitable alternative position

- If a specific employee is in line for dismissal, it should be assessed whether there is an alternative position available
- *Position which is in line with the employee's education, experience, and capabilities."*
- A subjective test regarding the personal possibilities of the employee
- If a position is vacant or becomes vacant in the next 26 weeks (after UWV granted permission), the employer must determine whether this position can serve as a suitable alternative position for the employee
- Again: with training if necessary

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c. Suitable alternative position (2)

Court of Appeals Den Bosch, 9 September 2021 (Multilingual HR talent)

Employee works as HR assistant in The Netherlands, experience in international business

There are economic grounds for dismissal ✓

Employee is in line for dismissal within her position ✓



Colleagues not able to move abroad because of language barrier

But: multiple vacancies within the group concern

Court: employer has not investigated whether vacancies abroad would be suitable for **this** employee, due to her **specific talent**
→ **Dismissal denied**

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d. Redeployment efforts

- Joint effort and joint responsibility
- Parties need to investigate together what is still possible
- Most of the case law concerns employers not being able to provide evidence of efforts
- Not a result-driven test, but an effort-driven test

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Key takeaways

- Avoid the UWV where possible, settle on forehand
- Start the UWV-procedure first, then settle
- Go through the steps thoroughly
- Don't forget vacancies within the concern
- Keep documents of redeployment efforts

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Conclusion

- After UWV gives permission: notice to the employee
- Applicable notice period can be shortened with time spent during procedure
- Permission denied → appeal at district court for the employer
- Permission granted → appeal at district court for the employee

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Dismissal due to lack of performance



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“Incapacity of the employee to perform his duties other than as a result of illness or disability of the employee, provided that:

- i. the employer has informed the employee in a timely manner and has given the employee adequate opportunity to improve his performance, and*
- ii. the incapacity of the employee is not the result of an inadequate duty of care of the employer towards schooling or employment conditions of the employee*

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Underperformance as ground for dismissal

7 cumulative requirements:

- (i) **serious underperformance** over an extended period of time (well documented in periodic performance assessments),
 - The employer should be aware of the underperformance
- (ii) the employee **should be notified** of his underperformance in time,
 - (annual) performance reviews
- (iii) there are several realistic **opportunities** offered to the employee **to improve the performance**;
 - The employee should be offered a realistic timeframe and tools
- (iv) the employee is provided with **concrete training opportunities** to improve his performance;
 - The training should be relevant as to the problem, so problems as to interacting with colleagues should not be addressed with a sales training

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Underperformance as ground for dismissal (2)

7 cumulative requirements:

- (v) the employee is provided with **concrete coaching opportunities** to improve his performance;
 - For instance a coach that helps the employee interacting with colleagues
 - (vi) the alleged underperformance is **not the result of insufficient working conditions** and;
 - If the employee has no good work materials, this should be addressed first
 - (vii) there are no **possibilities to redeploy the employee** (this should be done at concern level).
 - If all other requirements are met, the employer still needs to look for **other possible positions**
- This ground leads to a lot of denied requests in Court, since the requirements are extensive.

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Statistics

Ground Success/ failure rate in Court in 2020

Ground Success Failure

A	40%	60%
B	100%	0%
C	0%	100%
D	16%	84%
E	46%	54%
G	64%	36%
H	27%	73%
I	16%	84%

(Source: Statistiek Ontbindingsprocedure 2020: een bijzonder WAB- en coronajaar)

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However...

Most cases get settled, also during proceedings and result in a dismissal

These cases do not show in these statistics

In the event this ground fails and things have soured between employer and employee, another ground (work conflict, G) can possibly be applied

ECLI:NL:GHARL:2021:8610

Request for termination was granted on the g-ground. Held that employer had acted seriously culpable.

Employer had suddenly dismissed employee as incompetent and had not offered him a chance of improvement.

An extra compensation of € 38.500 was awarded.

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Performance management

Effective **performance management** is essential to businesses. Through both formal and informal processes, it helps them **align their employees, resources, and systems to meet their strategic objectives**. It works as a dashboard too, providing an **early warning of potential problems** and allowing managers to know when they must make adjustments to keep a business on track. **Organizations that get performance management right become formidable competitive machines.** (McKinsey 2017)

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Performance management

- Up to the company to decide the scope and merits of performance management
- Usually through regular performance reviews, 50/50 self-assessment and assessment by manager
- In writing and signed by both manager and employee
- In the event of underperformance, a Performance Improvement Plan (PIP) is possible

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Job description

Important to establish the demands and features of a position. Performance requirements should be laid down in a job description.

What should be in a job description?

General:

- Department/division and name of the position
- Salary
- The job to be performed
- The objectives
- Specific responsibilities

Responsibilities:

- Daily responsibilities
- Immediate superior
- A typical working day
- Examples of recurring and non-recurring duties that arise from the regular responsibilities

(Source: Hays)

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Job description

ECLI:NL:RBAMS:2020:4487 (Booking.com):

Objective requirements should be stipulated for employees and whether an employee performs adequately should **not be made dependent solely on the average performance of (other) employees.**

Ecofys ruling: employee performed technical position. Employer, however, felt that employee should also be able to acquire customers. Lagged behind his colleagues in this respect. But acquisition was not part of his job.

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Burden of proof?

What if underperformance is difficult to measure?

Sometimes it is not possible to put "hard" evidence on the table when it comes to underperformance. This is the case, for example, with issues such as not fitting in with the corporate culture or not getting along with the professional network.

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Burden of proof?

ECLI:NL:HR:2016:2998 (Mediant): the employer should prove the ground for dismissal

It is therefore essential that **written proof** of the underperformance is available

Supreme Court: Employer has a degree of discretion as to whether there is underperformance

HR February 16, 2018, ECLI:NL:HR:2018:182 (Decor)

Facts and circumstances must be proved as employer, underperformance must be made plausible.

So assessment of underperformance is a **discretionary competence** of the employer. Important that the employer acts objectively.

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Burden of proof?

It is very important for the employer to collect as much data, correspondence, interview reports and the like as possible, because the Court has to assess a situation when he does not know the company and the employee and has not been present at all the events.

When documenting the improvement process, evaluation and performance reviews, and when making interview reports where the issue has been discussed, it is always important to keep in mind that things must be written down in such a way that an external person (such as a judge) will understand from these documents what is going on.

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What kind of efforts should you make as an employer to improve the performance of the employee?

Supreme Court: that depends on the situation. Some viewpoints:

- **The nature, content and level of the job;**
→ If the job has a complicated nature, more efforts from the employer can be expected
- **The education and experience present in the employee;**
→ If the employee is well educated and experienced, the efforts of the employer can be less intense than
- **The nature and degree of the employee's incapacity** in the event of an inexperienced employee
- If the employee had serious shortcomings, the employer should do more to help
- **The duration of the inadequate performance** from the time the employee was made aware of it;

Source: ECLI:NL:HR:2019:933 (*Ecofys*)

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- **The duration of employment;**
→ In the event of a long time employee, the employer should make more efforts to adjust the performance
- **What has already been done in the past to improve performance;**
→ Past efforts also count and make that the employer will have to do less to help the employee improve
- **The extent to which the employee is open to criticism and committed to improvement;** and
→ If the employee is not open to criticism and improving, the employer does not need to keep trying and can at some point dismiss the employee
- **The nature and size of the employer's business**
→ An big employer has to make more effort than a small one

Source: ECLI:NL:HR:2019:933 (Ecofys)

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These viewpoints are not exhaustive

'What help, support and guidance an employer can be expected to provide in a specific case to improve the employee's performance, as well as how this should be recorded, depends on the circumstances of the case'

Source: ECLI:NL:HR:2019:933 (Ecofys)

So: a plan to help the employee improve should always be tailor made

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Timely notice

Employer must communicate to employee its expectations about performance in a timely manner.

Employee must not be "caught off guard".

Report in writing what the areas of improvement are.

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Timely notice

ECLI:NL:GHARL:2016:761, Arnhem-Leeuwarden Court of Appeal

'No **sudden message** here, as follows from established facts'.

Improvement efforts and criticism of performance given **continuously** in recent years.

Employer made necessary investments to improve employee's performance.

This is also important to give the employee an opportunity to improve performance.

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Lack of self-reflection on the part of employee?

Then underperformance is easily assumed.

Self-reflection: Ecofys ruling point 7:

'Is employee open to criticism?'

Not open to improvement? → case for dismissal

Employee cannot refuse to improve:

ECLI:NL:RBROT:2022:11243 → dismissal granted

It is not substantiated that the improvement plan contained disproportionate targets. Indeed, the objectives in the plan largely correspond to the established targets and KPIs known to the employee. However, the employee refused to cooperate with the improvement plan because he had a different view

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The employer has a certain discretion in judging the employee's performance and to impose performance requirements

But: a termination request will most likely be denied if the employer hasn't made a performance improvement plan (PIP) for the employee

The PIP is not regulated by law in the Netherlands

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What is a PIP?

Gartner (Management consultancy) uses this definition:

*A performance improvement plan (PIP) is a **document that aims to help employees who are not meeting job performance goals**. A PIP covers specific areas of **performance deficiencies**, identifies skills or training gaps and **sets clear expectations** for an associate's future conduct.*

*Objectives must be met **within a certain period**, and failure to do so may result in employment actions (such as termination). The role of HR in a PIP is to work with the employee's managers to determine whether a PIP is appropriate and to provide guidance to both the manager and employee for the duration of the plan.*

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PIP: Performance Improvement Plan

- +/- 4 - 6 months usually, depends on the employee and position
- Goals for improvement + how to improve
- Stipulated in a SMART manner
 - **S**pecific,
 - **M**easurable,
 - **A**chievable,
 - **R**elevant, and
 - **T**ime-Bound
- Which means will be used to help employee improve (i.e. coaching)
- Employee and manager sign the plan



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- A PIP can only be started if the employer establishes underperformance
- Therefore, annual performance reviews are essential
- The demands for the employee should be crystal clear
- Periodic assessment during the PIP and documentation of it is essential
- The PIP has to offer a realistic chance to improve
- The employee cannot be “set up to fail”

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Is it required that the employee can be blamed for the underperformance?

- In principle, the concept of underperformance is neutral; by no means can the employee always be blamed for not (or no longer) meeting the job requirements. For dismissal for underperformance there is no requirement that there is culpability on the part of the employee.
- Nevertheless, there are conceivable cases in which the employee can be blamed for the underperformance.

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ECLI:NL:RBOVE:2019:4957 (**Deltion College**)

- Conduct and attitude
- English teacher without (sufficient) self-reflection.
- Teacher had a rebuttal or an excuse time after time.
- But Deltion made the mistake of requiring the teacher to acknowledge the points of improvement each time. This is not required.
- This resulted in sufficient substantiation of why the teacher, in relation to her job profile, would be an unsuitable English teacher. Termination denied.
- It is important to **state clear areas of improvement** as employer.

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Goals PIP




Output
Behaviour

For example:

The employee cannot handle the work load
 The quality of the work of the employee is insufficient
 The employee does not reach his goals
 The employee has a poor relationship with colleagues
 The employee handles clients poorly




The PIP can also concern part of the duties of the employee: so only behaviour, not the output

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- However in practice, a PIP is often used to get rid of employees
- The PIP should include a **realistic period of time to improve**. It should also include the consequences of failing the goals of the PIP for the employee

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REASON	GOAL	ACTION	ASSESSMENT CRITERIA
Customers complain about an employee's low quality service	Customer service improvement: 1. Communication 2. Product knowledge 3. ...	1. Undergo a training session on communication with customers 2. Studying a catalogue of company products	1. Customer satisfaction scale rate 2. A test on the knowledge of company's products
Unsatisfactory quality of work	1. Minimize the number of errors in work 2. Meet deadlines	1. An employee receives a timesheet of their working time to follow 2. Employee's work is monitored by the team lead	1. A number of deadlines met 2. Assessment sheet of work quality
Productivity improvement	1. Increase the number of subscribers 2. Increase the amount of articles per month 3. ...	1. An employee develops a plan on how to raise the number of subscribers 2. An employee follows definite strategies to improve working capacity	1. Analysis of subscribers' retention 2. A number of articles written and amount of time spent on work
Inappropriate workplace behavior	1. Eliminate violation of subordination 2. Improve communication with other co-workers 3. ...	1. Undergo a communication training 2. Behaviour correcting counselling and team-building activities	Receive co-workers' feedback on communication with the employee

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Redeployment

- ECLI:NL:RBOVE:2020:2129 (Centric).

Here there is a sufficient ground for dismissal, but no reason to assume that re-employment of employee in another suitable position within a reasonable time is not possible.

- There was no evidence of an active search by Centric for another suitable position for the employee, whereas this could have been expected of the employer based on the requirements of good employment practices.
- No termination due to underperformance

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Senior Vice President EMEA

December 2021 and January 2022: employer marks performance as "underperformance"

20 April 2022: PIP

12 July 2022: employer wishes to terminate employment agreement

Court: financial goals are not met by employee, but that is not sufficient to establish underperformance.

PIP not concrete enough to help the employee improve

Dismissal denied

(ECLI:NL:RBOVE:2022:3523)



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Employment since 2016

6 March 2021: employer tells employee that he is underperforming

23 March 2021: start of PIP

15 April 2021: report of poor performance

Multiple conversations between manager and employee

5 meetings with HR advisor

Employee gets angry, mediation

Court: in 2020 the employee still performed well, according to annual performance report

PIP in March came as a surprise for the employee

Employer was putting other negative things from the past in writing in 2021

Focus on negative issues only; there was no real opportunity for improvement

However, things have soured between employer and employee because of this. No termination on the basis of underperformance, but because of a work conflict. The conflict was caused by the employer and the inadequate plan, so additional severance payment

(ECLI:NL:RBMNE:2022:2220)

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Senior Operator

Underperformance since 2018

Annual reviews: performance is poor

Reviews are consistent

2020: still underperformance, although the employee had the opportunity to improve

Employer offered ways to improve: courses, meetings and coaching programs

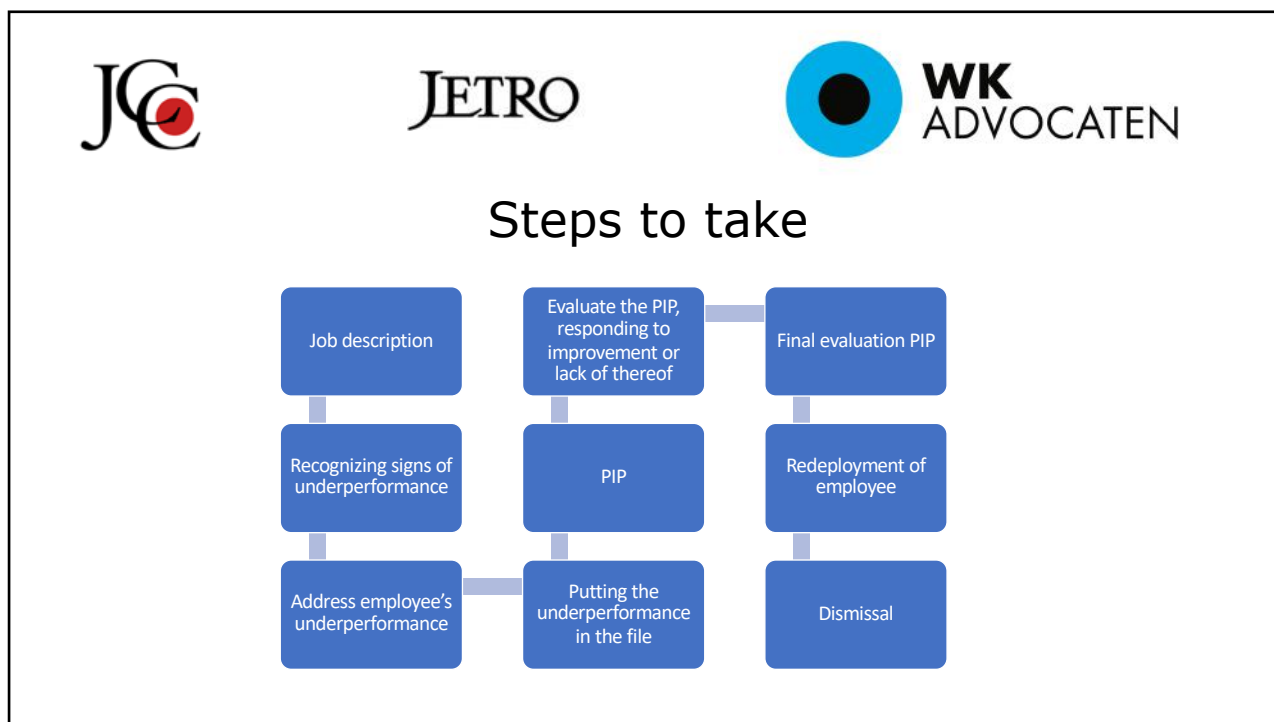
Employer has also fulfilled obligation to offer alternative positions and discuss these with the employer

Court agrees with termination of the employment agreement



(ECLI:NL:RBZWB:2022:7239)

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How to effect the dismissal?

When these steps have been taken → explanatory letter and settlement agreement

Negotiations with (lawyer of) the employee
 Agreement? Dismissal is effected
 No agreement? Court proceedings

Will take 2-3 months

Settlement is still possible during proceedings

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How to effect the dismissal?

The Court request should (at least) contain:

- The job description
- Annual performance reviews
- Written communication with the employee and reports of meetings
- Announcement of the PIP
- PIP
- Periodic evaluations of the PIP
- Final evaluation of the PIP, and why the employee did not improve
- Response of the employee

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Key takeaways

- Dismissal on the basis of underperformance is challenging
- But there is no alternative; performance management is important
- A proper job description and annual performance assessments are essential
- In most cases, other possibilities for dismissal will come up (settlement agreement, other ground)
- It is up to the employer to assess the performance / underperformance, there is discretion
- It is important to follow all the required steps, if this is done, dismissal is possible
- A PIP should be tailor made, stating clear areas of improvement and offer a realistic chance for improvement

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