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The redeployment obligation means being active in the Netherlands!

Since the Work and Security Act came into force in the Netherlands, it has become more difficult to dismiss an employee. Building a file has become more important and employers should investigate whether it is possible to redeploy the employee in another suitable position, possibly providing training. Although it was the intention of the government to make it easier for an employer to terminate an employment contract, it turned out to be the opposite. Especially the redeployment obligation is far-reaching.

Under current Dutch law, dismissal is only allowed if (i) there is a reasonable ground for dismissal and (ii) redeployment of the employee in a suitable, alternative position, whether or not with the help of schooling, is not possible or appropriate.

There are eight reasonable grounds and this list of grounds is exhaustive. Furthermore, the grounds cannot be combined. In short, these grounds are:

- a) Headcount reduction for business economic reasons (redundancy);
- b) Long-term (two (2) year) disability;
- c) Frequent and disruptive sickness absence;
- d) Incapacity to perform the contractual work other than for a medical reason (i.e. poor performance);
- e) Serious misbehaviour;
- f) Refusal to perform the contractual work for reasons of conscience (conscientious objections);
- g) Disrupted employment relationship; and
- h) Reasons other than those mentioned above of such a nature that the employer cannot reasonably be required to continue the employment agreement.

The grounds determine which route for dismissal applies: (i) giving notice of termination of the employment agreement with permission of the UWV or (ii) dissolution by the Cantonal Court. Dismissal on grounds (a) and (b) requires permission from the UWV, dismissal on grounds (c-h) requires a court dissolution.

When assessing whether a suitable position is available within the company, positions will be taken into account for which a vacancy exists or will arise within a reasonable time. In addition, positions of employees on temporary contracts and of temporary workers are also taken into account. In that case, these employees will have to make place for a permanent employee whose position becomes redundant. However, this does not apply if the activities are of a temporary nature (with a maximum duration of 26 weeks). If the employer's company is part of a group of companies, positions in the other companies belonging to this group must also be involved in the assessment of whether there is a suitable position available.

If an employee is not suitable for a specific position, but this position can be made suitable for him within a reasonable term (which in principle is equal to the statutory notice period) through training, this position may still be designated as suitable. The obligation to follow training is linked to the possible option of redeployment. Therefore, an employer cannot be obliged to train an employee while there is no perspective of redeployment into a suitable position.

The redeployment obligation which the employer must comply with in the context of an employee's termination is a best-effort obligation, not an obligation to achieve a certain result. But how far do the efforts need to go? How active does the employer need to be? The answer is: extremely active! That is underlined by a recent ruling by the Tilburg Sub-District Court.

This case concerned an employee who had himself suggested an alternative suitable position within the framework of the employer's obligation to redeploy him, but that suggestion was quite simply rejected by the employer without further substantiation. According to the Sub-District Court, the employer had failed to enable the employee to take part in an assessment. The employer had also failed to demonstrate that the job suggested by the employee was unsuitable for the employee in terms of training, experience and skills, and that the employer could not be required to enable the employee to prepare for the job with the aid of training. That failure turned out expensive for the employer: its request for termination was rejected.

Correct

- ✓ Actively assist the employee in finding another suitable position
- ✓ Enter into consultation with the employee about possible redeployment (orally or in writing)
- ✓ Enable the employee to take tests within the application process for the potential new position
- ✓ Remove any obstacles that may exist regarding the potential new position (for example, by offering specific training opportunities, or by looking for specific solutions for aspects that do not directly "match" with the new position)

Incorrect

- × Merely send the employee a list of vacancies or refer him/her to the internal vacancies database
- × Investigate the opportunities for redeployment within just one day, despite the company being a member of a large (international) group of companies
- × State that redeployment is not possible or reasonable, without any further substantiation

Important: In the Redundancy Scheme, a notional situation has been created for the payroll relationship, implying that the payroll employee is deemed to be employed by the client. The redeployment obligation therefore falls on the client. This is only different if the agreement between the payroll employer and the client is terminated at the initiative of the payroll employer because the client fails to meet its financial obligations for a period of three months.

Please contact Yvette Dissel from Boontje Advocaten (tel. + 31 20 572 71 90, dissel@boontjeadvocaten.nl) should you have any questions on this topic.
