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## SUMMARY

### *Extraordinary procedural dismissal law*

In Dutch Employment law, dismissal procedure deviates from the standard civil- and administrative litigation procedure. For instance, the procedure for obtaining authorization prior to the termination of a Contract of Employment, pursuant to Article 6 of the Extraordinary Labour Relations Decree (*Buitengewoon Besluit Arbeidsverhoudingen*) is governed by the General Administrative Law Act (*Algemene wet bestuursrecht*) but fails to grant the right to petition a Notice of Objection under Administrative law or appeal against the Institute for Employee Benefit Schemes Order (*Uitvoeringsinstituut Werknemersverzekeringen (UWV)*). In context of the procedure for judicial Dissolution of the employment contract by the District Court under Article 7:685 of the Civil Code (*Burgerlijk Wetboek*) there is no right of appeal or judicial review. Additionally, the statutory law of evidence can on occasion lack full implementation. In this thesis, these deviations are referred to as 'diluted procedural dismissal law'. The term 'diluted' is used as parties are restricted in their normal procedural rights.

This study was inspired by earlier criticism of diluted dismissal law procedure, as it is considered not to be in accordance with Article 6 of the European Convention on Human Rights (ECHR), which guarantees the right to a fair trial. Moreover, this diluted procedure offers no opportunity to rectify incorrect decisions, which is considered unsatisfactory, especially considering the major interests for the parties involved in the dismissal case. The central questions in the study are defined as follows:

*'At which points does the current Dutch dismissal law procedure deviate from the standard civil- and administrative procedural law, what is the ratio of such deviation and to what extent can these deviations be justified, given the implications for the legal protection of the parties involved, and taking into account the requirements of Article 6 ECHR? Are there useful alternatives in foreign legal systems (Germany and Italy) for the noted deviation in the Dutch dismissal procedures?'*

In the last chapter the consequences of the Work and Security Act on this study are questioned. This statute passed through the First Chamber on June 10, 2014 and resulted in new dismissal legislation, effective as of June 1, 2015. Additionally, the new

dismissal law is reflected to the alternatives used in Germany and Italy to ensure quick certainty about the termination of the employment contract, which interest is served by the deviation in Dutch dismissal procedures.

In order to answer the above questions, firstly an analysis of the Dutch dismissal procedures is conducted (chapter 2-4). Thereafter, which parts of the dismissal procedures deviate from the normal civil- and administrative litigation are scrutinized along with and the presiding ratio. It becomes apparent that both the procedure under Article 6 of the Extraordinary Labour Relations Decree (hereinafter referred to as UWV-procedure) and the judicial dissolution procedure under Article 7:685 of the Civil Code deviate from the normal civil- and administrative litigation with respect to available legal remedies. There is no administrative Objection procedure – nor is appeal possible against the order refusing or granting prior permission for termination of the employment contract under Article 6 of the Extraordinary Labour Relations Decree. Article 7:685 paragraph 11 Civil Code stipulates that it is not possible to appeal against a dissolution decision. Furthermore it is observed that the dissolution process does not enjoy the protection of the ordinary rules of evidence. According to the legislator and Supreme Court, the legal rules of evidence contained in Section 9, Title, 2 Book 1 of the Dutch Code of Civil Procedures, do not apply in urgent rescission proceedings.

A common ratio is uncovered at the root the diluted procedural dismissal law in both the UWV-procedure as the judicial dissolution procedure. The diluted regulations serve the speed of the legal procedure in both proceedings. When an employer chooses to terminate an employment contract in accordance with Article 7:685 of the Civil Code, the rescission is immediately clear, as well as the compensation which eventually needs to be paid by the employer. This is due to the absence of appeal against the decision and the incomplete application of the rules of evidence. Where an employer opts for requesting permission of the UWV, the situation is more complex. Despite the fact that due to the absence of administrative Objection and appeal in context of Article 6 of the Extraordinary Labour Relations Decree it is readily apparent whether permission is granted or refused, there are still some other dismissal proceedings possible. Unlike the preventive dismissal proceedings, these proceedings are not characterized by diluted procedural rights. Appeal and judicial review is possible and there is a full application of evidential law in these procedures. This is especially problematic in proceedings which follow after the employee invokes annulment of the dismissal. In such cases, there may be years of uncertainty for both employer and employee as to whether or not the employment contract is actually terminated. In practice this uncertainty, to a large extent, can be solved by conducting one of the preventive dismissal proceedings conditionally. Due to the possibility of conducting a conditional dissolution procedure or requesting permission 'to the required extent' the diluted procedural regulations in the preventive dismissal procedures are introduced in the repressive dismissal procedures that involve uncertainty about the termination of the employment contract. Accordingly, the

diluted procedure ensures quick certainty about the termination of the employment contract, also in dismissal proceedings following a request for annulment of the dismissal.

Chapter 5 to 7 focuses on the question how the diluted procedure in dismissal law relates to the subsequent criticism from the perspective of legal protection and the right to a fair trial as guaranteed by Article 6 ECHR. With regard to the UWV-procedure the criticism is considered justified. Article 6 paragraph 1 of the ECHR requires the determination of a civil right, such as the termination of an employment contract, by an (independent) tribunal. The UWV cannot be classified as such. The UWV is not independent of governmental administration. However, this does not in itself mean that the Convention has been breached. According to settled case law of the European Court, it is accepted that in administrative proceedings the lower instances may not qualify as independent and impartial tribunals. In such instances, it is necessary for domestic law to offer a full appeal on both legal and factual aspects of the original legal disciplinary or administrative decision to satisfy with the requirements of Article 6 ECHR. Furthermore, if one of the appeal grounds is upheld, the reviewing court should have power to quash the impugned decision or make it inoperable. In the case of a decision of the UWV: no administrative appeal exists. In that sense, the administrative remedy ban in the context of Article 6 of the Extraordinary Labour Relations Decree is problematic in the light of Article 6 ECHR.

The exclusion of administrative remedies of appeal against the decision under Article 6 Extraordinary Labour Relations Decree does not imply that there is no legal protection at all for the employee and the employer if they disagree with the decision to grant or refuse permission of dismissal. If the permission is refused the employer can renew the request. The employer can also turn to the District Court and request dissolution of the employment contract. Academic literature assumes two possible remedies for the employee when challenging the grant of a dismissal permit: action arising from a wrongful act of the UWV and a complaint about 'manifestly unreasonable dismissal' of the employer (Article 7:681 Civil Code). However, both remedies are unable to eradicate the Article 6 ECHR defect in the UWV-procedure. Both procedures do not make the decision of the UWV inoperative when appeal is upheld. In chapter 5 there are two 'new' remedies tested against an erroneous grant of permission for dismissal: the ability to invoke the nullity of the permission, resulting in the annulment of the dismissal and declaring the termination as null and void due to abuse of power. It was concluded that these remedies would be able (under certain circumstances) to fully review the decision of the UWV as required by Article 6 of the ECHR and bring the UWV-procedure in conformity with Article 6 of the Convention. Nevertheless, the possibility of these remedies brings the interest served by the diluted procedural dismissal law – quick legal certainty – in trouble. Application of these new procedures would mean that during three instances there might be uncertainty about whether or not the employment contract is ended. The interest served by the diluted procedural dismissal law on the one hand, and the compliance of the current UWV-procedure with Article 6 ECHR on the other hand, seems incompatible.

The testing of the two extraordinary procedural regulations in the dissolution procedure: the prohibition of remedies and the incomplete applicability of the statutory law of evidence, were more positive. Firstly, Article 6 ECHR does not require the existence of courts of appeal or judicial review. Furthermore, the principle of 'equality of arms' guaranteed by Article 6 ECHR has some repercussions in terms of the national rules of providing evidence, but also (urgent) dissolution procedures take this principle into account, under penalty of breaking the ban on remedies.

Although the diluted legal protection involved in the dissolution procedure does not in itself breach Article 6 ECHR, it is possible that in some proceedings, as well as any other proceedings of final judicial authority, conflict with Article 6 ECHR. This can be the case in the event of e.g. incorrect application of the principle of adversarial proceedings by the magistrate. The dissolution Court may also, like any other court, make an error in the assessment of a dispute resulting in an erroneous dissolution decision. The chance of the occurrence of such an error is increased by the premise of Dutch District Courts in that they are not bound to the legal rules of evidence in a dissolution procedure. However, the latter principle turned out not to be necessarily based on the law end/or the case law of the Supreme Court. On this basis a reversal can be advocated. The District Court must in each individual dissolution case assess whether any urgency precluded the application of the law of evidence.

It has been observed that the legal ban on remedies of Article 7:685 paragraph 11 Code Civil does not mean that there is no legal remedy at all against an invalid dissolution order. For instance, breaking the legal ban on appeal and judicial review is possible if the District Court (i) wrongly applied Article 7:685 Code Civil, (ii) wrongly failed to apply Article 7:685 Code Civil, or (iii) as part of the dissolution process, has failed essential forms. According to settled case law of the Supreme Court this is the case if fundamental principles have been violated to such an extent that it cannot be described as a fair and impartial proceeding. This formulation has obvious similarities with the right to a fair hearing by an impartial judge as guaranteed by Article 6 ECHR. Although the Convention itself does not oblige Contracting States to establish courts of appeal or courts of judicial review, the Convention demands the existence of a judicial tribunal, which fulfils all the requirements of Article 6 ECHR where civil rights and obligations are determined. If this is not the case, there will be a breach of Article 6 ECHR. Apparently, the Supreme Court wishes to prevent this by breaking the legal ban on appeal and judicial review. By opening the possibility of appeal, an occasional violation of Article 6 ECHR can be remedied by the Dutch Court of Appeal and prevent the Contracting State violating of the Convention. Breach by the District Court of proper adversarial proceedings, equality of arms or impartiality are grounds for breaking the legal remedies ban under Article 7:685 paragraph 11 Code Civil. Insufficient reasoning is not a ground for breaking the aforementioned legal ban. At this point, the case law of the Supreme Court is not in accordance with the Strasbourg Case law. According to the European Court, a lack of reasoning is a violation of the fundamental principle of a 'fair hearing' as guaranteed by Article 6 ECHR.

The grounds developed by the Supreme Court for breaking the legal remedies ban, means nothing for an improper termination order. Nevertheless, it was found that in some cases the appropriateness of the termination order could be repaired or compensated in an alternative legal action. Firstly, limited possibilities offer recovery in accordance with Article 31 of the Code of Civil Procedures and an enforcement dispute. Recovery pursuant to Article 31 Code of Civil Procedures require a clear error of the magistrate. In an enforcement dispute only the termination fee or legal costs can be suspended. The decision to terminate the employment contract is not subject to execution. In addition, the enforcement judge may only order the suspension of the execution in the case of abuse of power by the executor (usually the employee). Abuse of power cannot be based on the contents of the judgment, except in the event of an apparent legal or factual error in the decision to execute. Should the incorrect dissolution order be the result of deception by the other party, the extraordinary remedy of 'withdrawal' can help.

A more general possibility to contest an improper dissolution decision concerns the doctrine of wrongful jurisdiction. It has been argued that the Supreme Court in the case *Greenworld/Arbiters* broadened the possibility of holding the State liable for wrongful jurisdiction. The Supreme Court considered and decided in the case *Greenworld/Arbiters* that it is difficult to accept that no liability exists arising from a wrongful act if it appears that the judge with regard to a destructed judgment acted deliberately, recklessly or with clear gross negligence, falling far below the standard of what a proper performance of duty entails. Unlike the old standard arising from the *Bezorgde Procuratiehoudster*-judgement, this new standard can establish liability for improper dissolution decisions. State liability is assumed when the Court has acted expressly, on purpose, with deliberate recklessness or with gross manifest disregard of what a proper performance of duty entails. With respect to the latter criterion a connection can be made to the interpretation of the European concept of 'a sufficiently serious breach' that is applied in the determination of State liability for a breach of community law by a highest Court.

In chapters 8 and 9, the diluted procedural dismissal law is placed in comparative perspective. Research has been conducted into which way Germany and Italy have settled the interest of early certainty regarding unilateral termination of an employment contract in their dismissal law. Firstly, it has been observed that Germany and Italy do not have a diluted procedural dismissal law like to the Dutch. In Germany it is in all circumstances possible to appeal against a dismissal judgment of the Labour Court and thereafter appeal to the Supreme Court in certain circumstances. In Italy, it is in all circumstances possible to lodge an appeal and an action of judicial review against a dismissal judgment. In both countries, the dismissal proceeding can cover at least three instances and in every instance the termination by the employer can be annulled. As a result of this fact, certainty may be delayed regarding the termination of the employment contract. The amount of wage claims can significantly increase in case of a void or annulled termination, which is

strengthened in Italy by the slowness of the procedures. In both countries this practice is subject to criticism and there is a search for solutions. In Germany, employers and employees have found a solution in concluding termination agreements and settlements. The employee often uses the dismissal procedure to maximize the severance payment of the employer. Italy has attempted to introduce more speed and certainty in the dismissal system by reforming the dismissal law in the summer of 2012, one of which being a special fast track dismissal procedure. Limitation periods have been shortened and the first instance proceedings have been divided into two phases. The first phase results in a temporary acceptance or rejection of the appeal, which is comparable to the Dutch interlocutory proceedings. Just like the Dutch preventive dismissal procedures Italy has adapted ordinary procedure in order to accelerate the dismissal proceedings. However, unlike the Dutch preventive dismissal procedure the Italian fast track dismissal procedure is not characterized by an exception in appropriate remedies. The first phase judgment can be appealed against while thereafter it is possible to lodge a further appeal and/or judicial review application.

Due to the Dutch diluted procedure in dismissal law, in the preventive dismissal proceedings certainty is established quickly regarding the unilateral termination of the employment contract by the employer. It was argued that if this quick procedural mechanism was abolished, the pressure on other measures to minimize the uncertainty about the termination of the employment contract would increase: concluding termination agreements under award of a severance payment to the employee (Germany) and lodging interlocutory proceedings in which re-employment and wages is demanded by the employee (Italy). Significantly, the current German practice is a conceivable option for the Netherlands due to the substantial financial risks as a result of a long and uncertain dismissal process since the employer is forced to enter into termination agreements and settlements with employees, which use the dismissal procedure mainly to maximize the severance payment.

In the last chapter of this study (chapter 10) the soon to be in force Work and Security Act is examined. Additionally, the new dismissal law is compared with equivalent measures used in Germany and Italy to ensure the interest served by the current extraordinary procedural details in the Dutch dismissal procedures.

In the new dismissal law, termination with prior permission of the UWV still exists. However, in the future (June 1, 2015) this route is reserved for termination for economic reasons or after long-term disability of the employee. The 'manifestly unreasonable dismissal'-procedure will disappear. Instead, when the employee disagrees with the grant of a dismissal permit, the employee may lodge a request for reinstatement of the employment contract. Importantly, the termination by the employer is reviewed – other than in the framework of the manifestly unreasonable dismissal proceeding – according to the same criteria applying to the UWV. This is not only a review of the termination by the employer but also a review of the underlying permission of the UWV. If it is considered the dismissal does not meet

the criteria for termination (and permission from the UWV), the District Court will demand that the employer reinstate the employment contract and the District court takes some legal provisions concerning the legal effects of the interruption of the employment contract. An improper decision by the UWV may be rectified. A full review of the decision of the UWV is possible, making the decision inoperative. In contrast to the current dismissal system, in the new system the Article 6 ECHR defect in the UWV-procedure is rectified. In this study, 'new' proven remedies against an (improper) granted dismissal permission of the UWV are therefore no longer necessary.

Furthermore, the Work and Security Act provides possibilities for appeal and judicial review against every dismissal judgment. This means the termination route via the UWV can cover at least four instances: (i) UWV, (ii) appeal to the District Court, (iii) appeal to the Court and (iv) appeal to the Supreme Court, in which each instance may result in a finding that the employer must reinstate the employee. Appeal and judicial review are possible in the dissolution procedure, which has to be applied in case of a dismissal because of reasons located in the personhood of the employee. Concerning possible remedies the preventive dismissal proceedings are no longer 'diluted'.

On the one hand it was concluded that this general possibility of appeal and judicial review enhanced the legal protection for the parties involved. On the other hand, however, it involves a considerably longer period of uncertainty about whether or not the employment contract has come to an end. In the current situation, due to the preventive dismissal procedures with diluted procedural details whether or not conducted conditionally, parties often know within two months if the employment contract has been properly terminated. In the future, this step may take years. Taking into account the experiences in Germany and Italy, serious doubts arise about the practicability of such a system. Such a system has Italy led to a reform which aims to create more certainty for the parties involved in a dismissal case. Different procedural rules have been introduced to accelerate the dismissal proceedings. In Germany, employers and employees escape long and uncertain dismissal proceedings by conducting termination agreements and settlements with higher fees on non-substantive grounds. Such practice could also occur with the Work and Security Act in the Netherlands. Given these findings, it is argued in the last section of chapter 10 that if a dismissal system contains procedures which are decisive for the final termination of the employment contract (as in the Netherlands after the Work and Security Act taking into effect), it is preferable to have no possibility for appeal and judicial review against the judgment in first instance, similar to the current dissolution procedure under Article 7:685 Code Civil. For the employer, such a system has the great advantage of quick clarity about the termination of the employment contract. The advantage for the employee is that possibility of judicial review, which can result in either the denial of a proposed dismissal, or termination annulment or reinstatement of the employment contract. One disadvantage of such a system is



that the judge can make mistakes which cannot be rectified in appeal. To fill this lacuna it is advocated that, as is now the case in the current dissolution procedure, it should be possible to break the legal ban on remedies. Furthermore, the possibility should exist to lodge an action out of State liability for unlawful jurisdiction. Should the District Court act with manifest disregard of the proper performance of its duties, then the damage suffered by the party involved should be recoverable.