

Dismissal protection and dispute resolution

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Dismissal protection and dispute resolution

1. Dismissal protection

- a) Initiative employer
- b) Right to leave (freely choose an occupation)

2. Dispute resolution

- a) Individual
- b) Extra

1. Dismissal protection: Initiative employer

1900 Freedom of contract – thus free will of the employer

With the development of welfare states / labour law

- Notice period – reasonable (?)
- Justified – reasonable motive (?)
 - Closed list of grounds
 - Open norms (fair or fairness)

Other issues followed: severance payments; reinstatement; redress; appeal; I&C; etc.

1. Dismissal protection: Initiative employer

ILO Convention 158

Article 4 Valid reason

- a) connected to the capacity or conduct of the worker
- b) operational requirements

Article 5 and 6 not valid

- Trade union membership; seeking representation; filing a complaint; discrimination grounds; maternity leave
- Absence because of illness or injury

1. Dismissal protection: Initiative employer

Articles 7 – 10 redress and appeal against dismissal

Article 11 notice period or compensation in lieu
- Exception for summary dismissal

Article 12 Severance payment

Article 13 Consultation representatives

Article 14 Notification Competent Authorities

1. Dismissal Protection: Initiative Employer

ILO Convention 158

[List of ratifying countries](#)

[List of Conventions ratified by The Netherlands](#)

[List of Conventions ratified by Russia](#)

1. Dismissal Protection: Initiative Employer

European context (1)

Article 24 rESC

a. Valid reasons connected to

- Personal conduct or capacity
- Operational requirements

(not valid is same as ILO Conv. 158)

b. Without valid reason right to compensation or other appropriate relief + Right to appeal to impartial body

Ratification (reservations)

1. Dismissal Protection: Initiative Employer

European context (2)

Article 30 EU CFR protection in the event of unjustified dismissal

Article 153 TFEU legal base to adopt minimum standards on dismissal protection

Additional protection on the grounds of / in:

- part-time work
- Fixed term work
- OH&S committee
- I&C Directive
- EWC Directive
- Parental leave Directive
- Pregnancy Directive

1. Dismissal protection: Initiative Employer

Jacobs

Lawyers paradise

Question: Has the system become too protective?

- Some say yes – counterproductive as it discourages employers to hire new employees (flexible skill)
- Jacobs – mind that losing the job means no income, status and satisfaction

Question: How to find a balance between workers' needs for job protection and employers' needs for flexibility?

1. Dismissal protection: Initiative employer

Solution 1. Soft forms of personnel reduction

- Incl. early retirement; short time working; retraining; internal transfers; compensation packages for voluntary redundancies; etc.
- Issue of employability (burden on employee)

Solution 2. Use of a-typical workers (flexible skill)

- ? ... mini jobs; zero-hour contracts; etc (precariousness)

Solution 3. The Dutch approach???

1. Dismissal protection: Initiative employer

The Dutch approach (1)

Starting point

- Standard is a permanent full-time employment contract
- Prior permission for dismissal, either administrative body or civil district court
- Notice period various from 1 month up to 1 year
- Relatively high level of severance payment, including option for damages

1. Dismissal protection: Initiative employer

The Dutch Approach (2)

Step 1. Reform

1. Regulation of atypical forms of employment

- Fixed term contract, including anti-abuse clause (1998 Flexibility and Security Act)
- Temporary Agency Work (1997 Act on Labour Market Intermediaries)

2. Speeding up procedure permission administrative body (6-9 weeks)

1. Dismissal protection: Initiative employer

The Dutch Approach (3)

Step 2. Act on Work and Security

1. Stronger protection position of flex-workers

Dutch Flexicurity

2. Dismissal is faster, cheaper and more fair

Permanent is less permanent and flex is less flex

- Prior permission:

restructuring – administrative body

other grounds – civil court

- Transition payment

3. Limitation duration unemployment benefit

1. Dismissal protection: Initiative employer

The Dutch Approach (4)

? Faster, cheaper and more fair?



Act Asscher failed: new round of discussions

No longer any trust in 'Flexwet'

New act on dismissal law is a failure

Dismissal is not easier

Employers settle more often with high compensation

1. Dismissal protection: right to leave

Right to leave as part of right to work

–freely choose occupation and who to work for

Legal context

ILO

Conventions 29 and 105

Protocol of 2014

Recommendation 203

Council of Europe

Article 4 European Convention on Human Rights

Article 1(2) European Social Charter

EU

Article 5 Charter of Fundamental Rights

ECJ Case Law: Daddy's Dance Hall

1. Dismissal protection: right to leave

European Court of Human Rights Case *Chitos v Greece*

- Employment was chosen freely (ergo no forced labour)
- *Note special situation military service!*
- Clause to stay in service for a certain period
 - Context: education or training
 - Only if duty required is not “needlessly distressing”
 - Interest employer – enjoy investment
- Forced labour is
 - Nature of conditions of work AND modality in which conditions are executed
 - Employment is a relationship, not a commodity

2. Dispute Resolution: Individual

Fundamental right: Fair trial

- Acknowledged in ILO Convention 158; and rESC re dismissal
(right to redress and appeal)

- Article 47 EU CFR

- Article 6 ECHR

2. Dispute resolution: Individual

Article 6 ECHR

- Who has access – everyone! All employees, depending on “**the nature of the employee’s duties and responsibilities**” (*Pellegrin v France*)
- **Unless** in case of civil servants 1) access to court is explicitly excluded and 2) this exclusion is justified by on objective grounds in the State’s interest (*Vilho Eskelinen*)
- Idem: international organisations (although bit unclear) and embassy

2. Dispute Resolution

What kind of disputes?

A. Individual involves a single worker

B. Collective involves groups of workers

- i. Rights disputes** = disagreement about implementation or interpretation of a right
- ii. Interest disputes** = disagreement over the determination of rights and obligations or the modifications thereof (e.g. Negotiation CLA)

In NL – conciliation and mediation before going on strike

2. Dispute Resolution: Individual

What kind of courts?

- **labour or civil court**

ad. Labour Courts

Comprised by representatives of both sides of the industry (France) and an impartial professional judge (Belgium)

Points of concern

- impartiality
- independence

2. Dispute Resolution: Individual

Alternative Dispute Resolution (ADR -1)

1. Conciliation

- = to help facilitate communication between parties (good services)
- before going to court – UK

2. Mediation

- = help communication + proposing terms of settlement
- court based and voluntary – NI
- relational ‘in work situation’ – UK/Ireland

3. Arbitration

- = intervention of a neutral third party who is empowered to examine the situation
- As final step (binding) – Cyprus
- Unfair dismissals – UK (obliged!)

2. Dispute Resolution: Individual

Alternative Dispute Resolution (ADR -2)

4. Labour Inspectors or ombudsman

- Provide 1 and 2
- Special role

5. Non-judicial ADR

- based on Collective Labour Agreements – NI
- labour dispute committees – e.g. Lithuania (except dismissal!)

2. Dispute Resolution: extra

OECD NCP Contact Points

Part of the OECD MNE Guidelines

Everyone when the enterprise is headquartered or has an establishment in a State which has endorsed the MNE Guidelines

Thus: Russian NGO can bring claim against an enterprise headquartered in The Netherlands with the Dutch NCP

Kind of **mediation**, with publication of a report of the process and the agreement (when this was reached) – effect of naming and shaming