

SUMMARY

## **2014/58 How far must legal expenses insurance companies go in covering legal fees? (NL)**

***&lt;p&gt;Do&amp;nbsp;so-called&nbsp;&lsquo;UWV-proceedings&rsquo;, &nbsp;in which an employer requests a dismissal permit in order to terminate the employment agreement by notice, qualify as administrative proceedings, as referred to in Article 4 of Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance?&lt;/p&gt;***

### **Summary**

Do so-called ‘UWV-proceedings’, in which an employer requests a dismissal permit in order to terminate the employment agreement by notice, qualify as administrative proceedings, as referred to in Article 4 of Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance?

### **Facts**

In order to have a proper understanding of this case, some background information on both Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance (OJ 1987 L 185, p. 77; the ‘Directive’) and on Dutch dismissal law is essential.

One of the aims of the Directive is to ensure that a person having legal expenses cover must be able to choose a lawyer or other person appropriately qualified according to national law in any inquiry or proceedings. This freedom is set out in Article 4 of the Directive: ‘*Any contract of legal expenses insurance shall expressly recognize that (a) where recourse is had to a lawyer or*

*other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person.* This freedom applies to situations in which the insured person needs to be defended in judicial or administrative proceedings. It does not apply, for instance, when the insured person merely seeks legal advice.

Due to a statute known as BBA (in full: the Buitengewoon Besluit Arbeidsverhoudingen 1945 which translates as the Extraordinary Labour Relations Decree 1945), as a rule, employees can only be dismissed by means of (i) a court order or (ii) notice given following a dismissal permit. A dismissal in the absence of a court order or a dismissal permit can be declared void. BBA aims inter alia to protect employees and to prevent socially unjustifiable dismissals. An employer wishing to give notice of termination will, in accordance with BBA, apply for a permit. Such an application is made in writing to a governmental agency, a so-called independent administrative body. This agency is named Uitvoeringsinstelling Werknemersverzekeringen (which translates as Body Implementing Insurance Schemes), commonly abbreviated UWV. UWV applies certain guidelines when determining whether or not to issue a dismissal permit. Before making its decision, UWV invites the employee to present his or her view in writing. Both the application and the employee's response are frequently elaborate and sometimes legally complex documents. It is not uncommon for there to be a second round of written briefs. Oral hearings, however, are rarely held. There is no need for either party to be represented by a lawyer in these 'UWV- proceedings'. No appeal is possible against the ruling of UWV.

Having said that, once the company has obtained a dismissal permit and has served notice, the employee may take his or her (former) employer to court in unfair dismissal proceedings. In those proceedings, the arguments exchanged in the prior 'UWV-proceedings' usually play an important role. Employees often request financial compensation in unfair dismissal proceedings, but the court may even restore the employment agreement should it consider the dismissal manifestly unfair.

Massar took out legal expenses insurance with DAS, a Dutch insurance company. The insurance contract specified DAS as the company responsible for providing legal assistance cover. The contract also provided that cases are generally to be dealt with by DAS's own staff.

The employer of Massar intended to terminate his employment agreement and requested UWV to grant a dismissal permit. Massar wished to have his case defended by a lawyer of his own choosing, instead of someone from DAS's own staff. DAS refused to cover the costs involved. DAS took the view that proceedings for dismissal permits are *not legal proceedings* before a genuine court but rather 'pre-legal proceedings' before a governmental

agency that can be followed by unfair dismissal proceedings. According to DAS, UWV-proceedings are neither judicial nor administrative proceedings and do not fall within the ambit of (the national implementation of) Article 4 of the Directive.

Massar, not surprisingly, took the view that the aforementioned Article should be interpreted broadly, in order to reach the goals of the Directive and serve the interests of those covered by legal expenses insurance. For that reason, they should not be prevented from choosing their own lawyer. In his view the UWV-proceedings need to be regarded as administrative proceedings for the purposes of the Directive.

### **Judgment**

The Dutch Supreme Court has stayed proceedings and referred the following questions to the European Court of Justice for a preliminary ruling:

1. Does the term 'administrative proceedings' contained in Article 4(1) a of the Directive include UWV-proceedings, in which an employer requests a dismissal permit in order to terminate the employment agreement by notice?
2. If the answer to the first question depends on specific features of these proceedings, which features does the national court have to take into account when assessing whether the proceedings at hand qualify as administrative proceedings?

### **Commentary**

This case is of importance in the Netherlands, as Dutch insurance companies are still recovering from the painful blow administered by in the ECJ case of *Sneller – v - DAS* (7 November 2014, case C-442/12).

In this case, the ECJ held that the Directive precludes a legal expenses insurer from stipulating in its insurance contract that legal assistance will in principle be provided by its own employees, even in situations in which legal assistance is not compulsory under national law. That put an end to the common strategy of the Dutch insurance companies in employment cases (amongst others), whereby they took it as read that "our staff deal with the cases of all our clients and we do not allow them to choose their own lawyers, as they do not need them anyway, given that legal assistance is not mandatory in these types of employment law proceedings". Following *Sneller – v - DAS*, Dutch insurance companies have needed to change strategy. They now claim that, although the insured person exercises the right to choose his own lawyer in only a fraction of all cases, these represent a huge chunk of the total costs payable by the insurance companies. In fact, according to a large insurance company, less than

one per cent of all cases go to lawyers other than its own and yet the costs involved amount to about 20% of the total. The insurance companies warn that premiums will go through the roof if the freedom of an insured person to choose his own lawyer also covers proceedings like the ones at issue here.

This question is thorny. Clearly, the insured person has been granted a freedom to choose his own lawyer in judicial or administrative proceedings. This has been designed to 'help' insured persons. It is great at micro level (for an individual), but at macro level (for all persons wishing to take out legal expenses insurance) it may have undesirable effects. In other words: if this freedom is without reasonable limitations, it will most likely lead to considerable increases in insurance premiums in the end and may therefore backfire. This is an important consideration.

However, DAS did not provide detailed information about the possible financial consequences that might arise should the ECJ rule in favour of Massar. It also failed to explain why means other than simply restricting the insured person's freedom to choose his own lawyer would not work. For example, the ECJ has already held that limitations may be imposed on the costs borne by an insurer should an insured person exercise his right to choose his own lawyer. The insurance company may, for example, not cover the full costs incurred in connection with the defence of that insured person. Nevertheless, the conditions imposed should not be so severe as to render the freedom of the insured persons to choose his own lawyer impractical.

Although the Dutch Advocate-General and the Dutch Supreme Court were not entirely sure of their ground and have therefore referred questions to the ECJ, they have already indicated that they expect the ECJ to include UWV-proceedings within the scope of Article 4 of the Directive. One of their arguments derives from the *Sneller - v - DAS* case. In that case the ECJ clearly held that Article 4 of the Directive should not be narrowly interpreted, given its aim of protecting insured persons.

Having said that, we will have to wait and see what the ECJ rules and in the meantime, it would seem sound business rationale for insurance companies to expect the worst and have an adequate plan ready that, on the one hand entitles insured persons to exercise the freedom to choose their own lawyer, and on the other limits the costs involved for the insurance companies in order to keep insurance premiums at a reasonable level for all.

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*Court: Hoge Raad (Supreme Court)*

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