EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2011/33 Reimbursement of costs of expert support to Participation Bodies in The Netherlands (Article)

<p>This article deals with one aspect of Dutch law in the field of works councils, client councils and school councils (together: “participation bodies”), namely reimbursement of legal fees and other expenses. Reimbursement of legal costs forms a crucial, though sometimes expensive element, in the law aimed at supporting these participation bodies. This article considers both the legal and the practical aspects. It may be of particular interest to lawyers of companies with subsidiaries in the Netherlands.</p>

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Works councils

Dutch works councils have far-reaching powers, incomparably more so than their counterparts in other European jurisdictions (comité d’entreprise, Betriebsrat, etc.). For example, they almost have a power of veto over certain management decisions and may apply to the courts for an order against management. For this reason, works councils regularly seek

the advice of lawyers, accountants and other consultants (together: "consultants") and it is not uncommon for a works council to litigate against management. Obviously, a works council needs funds in order to pay its consultants and to finance legal proceedings. This article sets out briefly what the Dutch Works Councils Act (WCA) says on this topic and how recent case law has construed the law.[2]

Article 22 WCA

The issue of who pays the expenses that a works council incurs is dealt with in Article 22 WCA. This provision consists of three paragraphs:

- paragraph 1 deals with day-to-day expenses such as secretarial assistance, conference rooms, computers, etc.;

- paragraph 2 deals with the cost of hiring consultants and includes litigating against management;

- paragraph 3 provides that a works council may agree to be given a budget out of which it must pay all or some of its expenses.

Paragraphs 1 and 3 rarely lead to disputes and are therefore not addressed in this article. Paragraph 2 provides that, in the absence of a budget covering the cost of hiring consultants and litigating, all such expenses are payable on the employer's account, with two provisos.

The first is that management must have been notified in advance of the works council's intention to engage a consultant. The idea behind this is that management - because of the sizeable costs usually involved - can object in advance, both to the necessity of engaging an expert and/or conducting legal proceedings and to the amount of the (estimated) costs. The law does not set any formal requirements for this notification, but from an evidentiary point of view it is always wise to put it in writing.

The second proviso is that management may object, in which case there is a procedure for determining whether the employer should bear the consultant's costs. This procedure involves seeking the advice of a conciliatory commission and, if that fails to settle the matter, taking legal proceedings in which the court determines whether, in all circumstances of the case, engaging the consultant is reasonably necessary for the works council to discharge its statutory duties.

It should be noted that the costs of legal proceedings can be divided into three categories: (1) the costs of legal assistance, (2) procedural costs such as court fees and the expense of hearing

witnesses and experts and, potentially, (3) an award for the opposing party's legal expenses in the event the opposing party (i.e. management) wins the case. Article 22(2) WCA relates only to the first two categories.

A difficulty that crops up regularly is that the works council wishes to hire work on the basis of an hourly rate and therefore cannot state in advance how much he will be charging for his services. For this reason, works councils frequently give management no more than a provisional estimate of the cost to be incurred. Another difficulty is that the procedure for determining who is to bear the consultant's costs in the event the employer objects to footing the bill, takes time and in many cases there is insufficient time to await the outcome. Sometimes a works council will find itself forced to go ahead and hire a consultant without knowing whether or not the employer will pay his fee, with the risk that if the court rules in favour of management, the members of the works council may (depending on the terms of their agreement with the consultant) be personally liable to pay the fee.

Recent case law

No Prior Notification of Anticipated Costs

In 2008, the management of Stichting Thuiszorg Nederland (STN), a non-profit provider of social services for elderly and disabled people, informed the works council of its intention to relocate one of STN's offices and sought the works council's advice on this proposal. The works council hired the services of an accountant for the purpose of assessing the necessity of the proposed relocation, as well as its financial impact. It informed management in an email of the fact that it had engaged an accountant. Management did not object to the accountant being engaged and merely asked the works council to issue its advice within two weeks. Because of this extremely short deadline, the accountant started immediately without prior notification of his likely costs. Strictly speaking, neither the works council nor the accountant acted in accordance with Article 22(2) WCA. Using this as an argument, STN refused to pay the accountant's fees. The County Court of Delft held that under the circumstances STN could blame neither the works council nor the accountant for failing to inform management of the anticipated cost in a (more) timely manner[3]. The circumstances included the fact that management:

- granted only a short deadline to the works council to issue its advice;

- knew that the accountant had been engaged;

- did not object to engaging the accountant as such;

- even after the accountant's estimated costs had become known, still did not object;

- without objecting to the amount, paid the accountant for his work from mid-April 2008 onwards; and

- did not sufficiently dispute that the accountant's fee was reasonable.

This judgment departs slightly from Article 22(2) WCA, but nevertheless does justice to its rationale. Management had the opportunity to object to the works council's desire to engage an accountant in the absence of a cost estimate. Instead of doing this, management simply raised the time pressure for issuing the advice. Under these circumstances the works council could rely on management not to question the lack of prior notification of the expected costs. The judgment underlines the importance of management's making known in good time its objection to the expert's engagement and/or to the costs involved, in order to avoid "implied consent".

Although this judgment goes to show that the prior notification requirement of Article 22(2) WCA is not an ironclad rule, the outcome was less favourable for the lawyer engaged by STN's works council.[4] The lawyer had not given a prior cost estimate. A major difference, however, with the accountant was that the lawyer was not under extreme time pressure and in his case management had insisted on a prior cost estimate, and in fact, had even asked repeatedly for an estimate (to no avail). Under those circumstances, so the Court of The Hague held, the lawyer had no right to assume that STN had given him a "blank cheque". He should not have confronted management with a fait accompli. Contrary to what STN could have expected pursuant to the wording of Article 22(2) WCA, however, the court held that this did not mean that the cost of hiring the lawyer could not be charged to STN at all. In the court's view the purpose of Article 22(2) WCA was that management should pay the costs that under the given circumstances could be reasonably considered necessary in retrospect. It is debatable whether this ruling does justice to the purpose of Article 22 WCA, the second paragraph of which clearly stipulates that the costs of an expert can be charged to the company only if the latter has been notified of the expected costs in advance. Perhaps in this case it was also relevant that management had been notified in advance but did not object to the necessity of hiring a lawyer.

Objection to Cost Estimate

It is possible that management might not initially object, following prior notification of engagement of an expert and of his provisional cost estimate, but later on refuse to pay the

costs of further advice. In such a situation, the court's appraisal would focus on the need for the additional services and no longer on the question whether consultation of the expert was reasonably necessary. Before embarking on his (additional) services, the expert engaged by the works council would be wise to first record in writing that management does not object to (additional) consultation and the costs involved. If the expert fails to do so and management objects to the costs, it could end badly for the expert and the works council members. The County Court of Venlo, for example, held that the fact that the works council and the expert had failed to heed management's objections to the amount of the quote submitted by the expert, meant that the costs would be borne by them.[5] In a case before the Court of Middelburg the expert, too, came off the worse.[6] The court held that under Article 22(2) WCA management was not required to pay the costs of legal assistance, because this was in violation of the law's purport, i.e. to avoid management later being confronted with unexpectedly high costs. Management had (unilaterally) made a budget available for each separate item of consultation, stating that if those amounts were inadequate, an application for additional funds was expected. No such new application came, nor did the works council contest the reasonableness of the budgets prior to incurring the costs. Instead, the lawyer confronted management with a fee statement amply exceeding the budget. Because in this case the works council did not have its own budget, as referred to in Article 22(3) WCA (because it had not agreed to having a budget of its own), the court (rightly) decided the dispute on the basis of Article 22(2) WCA. The court held that, by not notifying management in advance of the (substantial) budget excess, the lawyer and the works council had taken the deliberate risk that management would prove unwilling to increase the budget. In appraising whether the costs of the lawyer were reasonable, the court, basing its reasoning on the parliamentary history of the WCA, considered three criteria, namely (i) the importance and nature of the issue, (ii) the amount of the costs and (iii) the employer's financial position. As the company was going through a bad patch financially, the court found it understandable that management did not want to write the works council a blank cheque for those costs. Insofar as they exceeded the budget provided they were held to be for the lawyer's account.

Uncertainty about (Continued) Existence of Works Council

Clearly, the applicability of Article 22 WCA is subject to the condition that the works council (still) exists. The Court of Leeuwarden and the Court of Appeal of Leeuwarden held that this was no longer the case after the transfer of a concession for public (bus) transportation from BBA to Arriva.[7] In both instances the court held that the lawyer's claim no longer had a basis and that Arriva was not required to pay his fee. Neither court agreed with the lawyer that the change of concession constituted a transfer of undertaking as a result of which BBA's works council had also transferred to Arriva. The Court of Appeal referred to the ECJ's "Finnish bus"

judgment[8], arguing that there was no question of a transfer of undertaking because Arriva had not acquired any tangible assets (such as buses) from BBA. The latter's works council had not transferred and had in fact ceased to exist on the date on which the concession was transferred. From the date of transfer of the concession the employees who had entered Arriva's service were represented by Arriva's works council. The Court and the Court of Appeal were of the firm opinion that, because the works council had ceased to exist, there was no basis in Dutch law for payment of the costs of legal assistance. In our opinion, both courts wrongly disregarded the fact that the former works council members - who ran the risk of being held personally liable for the lawyer's fees - had an employer/employee relationship with Arriva as well. Given that at the time the expert was engaged - i.e. prior to the transfer of the concession - they were entitled to rely on the expert's fees being costs that they had to incur for the works council (then still in place) to properly discharge its duties, it seems incorrect (i.e. incompatible with the principle of "good employership") that the members of the works council should have to pay the invoices. In our view Arriva should have honoured the lawyer's claim.

In an earlier dispute between Equant and its European Works Council, the Amsterdam Court of Appeal ruled differently. This court held that Equant would have to pay the costs of an expert hired by the EWC despite the fact that Equant had ceased to have a European Works Council.[9] The background of this dispute was the following. Pursuant to an agreement entered into in 1997, Global One had established a European Works Council, which called itself 'Global One European Employee Forum' (the 'EEF'). On 1 July 2001 Global One merged with Equant N.V., a subsidiary of France Telecom. In 2002 Equant terminated the 1997 agreement and announced that it would establish a European Works Council at the Equant level. France Telecom, however, objected to the establishment of a European Works Council at the Equant level because it wished to establish a European Works Council at the higher France Telecom level. The EEF in turn took the position that the 1997 agreement had not been terminated lawfully, that the EEF would continue to exist until a new European Works Council had been established and that Equant would have to honour its undertaking to seek the advice of the European Works Council. The court ruled that Equant's termination of the agreement was lawful and that Equant could not be forced to establish a European Works Council at the Equant level, given that under the European Works Council Act, that obligation lay with France Telecom as the parent company. In the court's view the EEF still existed, but only for the purpose of finalising its activities, which - so the court held - could be understood to include the conduct of legal proceedings such as the one at issue. Equant, therefore, was ordered to pay the court fees and those of the expert engaged.

Client councils and school councils

Hospitals, nursing homes and other institutions in the field of health care must, as a rule, have two participation bodies, each with separate powers of co-determination: a works council to represent the interests of the staff and a client council for the purpose of representing the interests of the patients, inhabitants, etc. (the "clients"). Schools are exempted from the obligation to have a works council. Instead, they must have a school council whose members are elected by and among two groups, the staff and the parents/students.

As is the case with works councils, these client councils and school councils occasionally require legal assistance. There have been several court cases regarding the question who bears the cost of such assistance. One of these cases[10] concerned a lawyer who informed management of an institution that the client council had engaged him and that he would charge € 360 per hour. Management did not respond. Six weeks later the lawyer sent management an invoice. It specified the dates on which he had performed work for the client council as well as details of the services rendered. In a covering letter the lawyer explained that he could not predict how much more he would be invoicing, but that if the legal proceedings that he was pursuing were limited to one legal brief and one hearing, he anticipated that he would bill 50 - 70 more hours at an average rate of € 275. Management responded that it would pay neither the invoice already sent nor any future invoices. The court that adjudicated the dispute regarding the lawyer's fees held that the client council had had a reasonable need to consult a lawyer, that the lawyer had informed management in advance as specifically as he reasonably could how much his assistance would cost and that, therefore, management was under an obligation to pay the lawyer's fees.

Another case concerned a children's hospital where management had unilaterally replaced the existing client council with a new council because some of the existing council's members had resigned and the remainder were parents of former patients[11]. Management argued that the "old" council no longer represented the interests of the patients and therefore had to be replaced. The (members of) the old council challenged its replacement all the way up to the Supreme Court, clearly an expensive operation. Not only did these members lose the case in three instances, they were ordered to pay the legal fees out of their own pockets. A similar fate befell the members of the client council of a municipal health care institution that was replaced following a breach of trust between it and management[12].

Health care institutions and schools have tight budgets. Money that goes towards the legal expenses of a client or school council is money that cannot be spent on hospital beds, or school computers, etc. This fact gives management at least a psychological advantage in disputes over legal expenses, as the school council of Prinsehaghe School found out[13]. Although the outcome of this case was determined by a technicality, the court did observe that a school, despite its budgetary constraints, should reserve sufficient funds to allow its school

council to enlist adequate legal assistance.

Survey

A survey among chairpersons and secretaries of works councils of listed companies, client councils and school councils revealed that the majority of the members of these participation bodies were unaware of the risk of personal liability for the cost of expert support. Most of the interviewed members of works councils said that this risk would not deter them from seeking legal assistance where necessary. Apparently they take for granted that their management, given the importance of a harmonious relationship with the works council, will not make an issue of the cost of expert support. Most of the interviewed members of client councils and school councils, on the other hand, observed that the risk of personal liability would certainly be a barrier to hiring an expert.

Conclusion and Recommendation

The ability of participation bodies to engage experts is crucial to the quality of co-determination in the Netherlands. It is important, therefore, that expert support to participation bodies is regulated in such a manner that their members are sufficiently confident to be able to enlist support if necessary for the proper discharge of their duties. However, a review of Article 22 WCA and of the case law based thereon reveals that the members of a participation body in some cases do run the risk of being held personally liable for those costs. Notably, the situation in which time pressure makes it impossible for them to inform management in advance of the expected costs and the situation in which costs turn out to be much higher than expected (because the advice involves more work than projected). Although neither problem can be solved by amending Article 22 WCA there are practical ways of minimizing or excluding the risk of personal liability in those cases.

However, in our opinion Article 22 WCA falls short in situations in which the works council's existence is uncertain. For example, in the event of a (supposed) transfer of undertaking in which it is not clear whether the works council has transferred to the acquiring company, or has ceased to exist. The rules in respect of client councils and school councils do not provide for this situation either.

Subject to the outcome of a possible follow-up survey, we feel that a new paragraph should be inserted in Article 22 WCA, to read as follows: 'The provisions contained in paragraphs 1 and 2 apply also in situations in which the members of a former works council have incurred costs in the execution of this body's duties, provided that when they incurred those costs there were still reasonable grounds for them to assume that the works council still existed at that time.' A similar provision should be inserted in the laws relating to clients councils and school

councils.

Creator:
Verdict at:
Case number: