Lexence

An overview of Dutch Employment Law

For foreign businesses and expats

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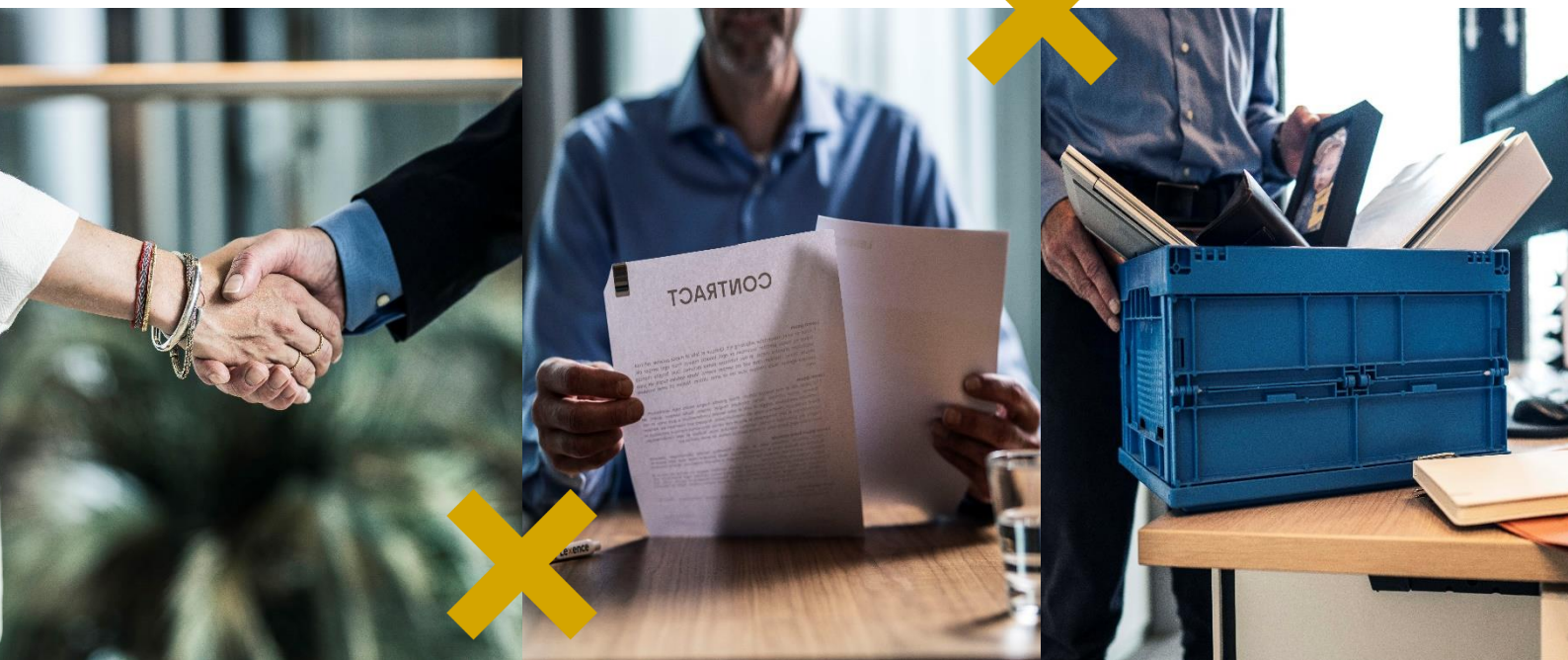
Introduction

More and more companies are fully or partly established in the Netherlands. At the same time, there has been a sharp increase in the number of expats moving to the Netherlands and working for a Dutch employer. These employment relationships are governed by Dutch law.

Dutch employment law is complex and in some ways unique. This white paper provides an overview and the key points of attention and practical tools. For clarity, the white paper is divided into three sections:

i. entering into the employment contract;
ii. possible events during the term of the employment contract; and
iii. termination of the employment contract.

The white paper expressly provides an overview and does not intend to provide a complete representation of Dutch employment law or cover the topics exhaustively.



Entering into the employment contract

Term of the employment contract, terms and conditions of employment and post-contractual clauses

The fixed-term and indefinite-term employment contract

An employment contract can be entered into for a fixed or indefinite term. An employment contract need not be entered into in writing, although this is preferred (partly for reasons of evidence). Additionally, certain agreements require the explicit consent of the employee, such as a trial period or non-competition clause. The content of the employment contract is in principle without specific formalities.

Fixed-term employment contracts

The term of a fixed-term employment contract is set in advance or the end date thereof can be objectively determined (for example, for a specific project or replacement in case of illness or pregnancy). A fixed-term employment contract ends by operation of law on the end date of the employment contract; in principle, no prior notice of termination is required. However, a *notification* must be given (see below), which should not be confused with *a notice of termination*. If the work continues tacitly after expiry of the term of the employment contract, a new employment contract for the same term will be deemed to have been entered into, based on the same terms and conditions of employment.

Duty of notification

In the case of a fixed-term employment contract with a term of more than six months, the employer is obliged to inform the employee no later than one month before the expiration of the employment contract about the continuation of the employment relationship: does the employer wish to renew the employment contract, or not? And if so, on what terms?

If the employer fails to inform the employee in a timely manner, it must pay the employee compensation equal to the employee's wage for each working day that the employer is late, up to a maximum of one month's gross salary. Regardless of whether or not the employee received notification , the employment contract will end by operation of law.

Provisions on succession of fixed-term employment contracts

There is a system governing the conversion of a chain of successive fixed-term employment contracts into an indefinite-term employment contract. In other words, the number of successive fixed-term employment contracts is subjected to a maximum.

The conversion to an employment contract for an indefinite term takes place:

- upon entering into a fourth successive fixed-term employment contract; or
- if the chain of employment contracts (which may be two successive employment contracts) is longer than three years from the start date of the first employment contract.

The chain is interrupted if employment contracts are separated by a period of 6 months or longer.

Indefinite-term employment contracts

Indefinite-period employment contracts do not have a predetermined end date. The parties must therefore terminate the employment contract themselves, or have it terminated. In this regard, see the third chapter of this white paper. Thus, the employment contract for an indefinite term offers an employee more security and gives them a stronger legal position.

Collective Bargaining Agreement

A collective bargaining agreement ("CBA") is a written agreement containing arrangements with regard to the terms and conditions of employment, for example about wages, allowances, overtime pay, working hours, trial period, notice periods and/or pension. A CBA is entered into by one or more employers, one or more employers' organisations and one or more employees' organisations (generally trade unions).

The arrangements in a CBA take precedence over those in an individual employment contract. It is therefore important to check whether a CBA applies and what terms and conditions of employment it contains before entering into the employment contract. However, not all sectors have a CBA in place. In that case, the terms and conditions of employment in the employment contract prevail.

Trial period

During a trial period, the parties may terminate the employment contract with immediate effect and without observing a notice term. Additionally, there is no requirement to provide a reason for terminating the employment contract. It is not possible to include a trial period in employment contracts that have a term of six months or less.

A trial period must be agreed on in writing in order for it to be valid. The maximum duration of the trial period depends on the term of the employment contract. When parties enter into an employment contract for an indefinite period or for a fixed term of two years or more, the maximum trial period is two months. However, if the employment contract is entered into for a fixed term of less than two years, the maximum trial period is one month.

Notice period

The duration of the statutory notice period for the employer depends on the term of the employment contract:

- one month if the employment contract has lasted less than five years;
- two months if the employment contract has a term between five and ten years;
- three months if the employment contract has a term between ten and fifteen years;
- four months if the term of the employment contract exceeds fifteen years.

If the employee gives notice of termination, the statutory notice period is one month, regardless of the term of the employment contract.

The parties may agree on a different notice period, provided that the statutory notice period is the minimum notice period to be observed.

If the agreed notice period for the employee is longer than one month, the notice period for the employer must be twice as long. For example, if the employee has an agreed notice period of two months, the employer's notice period will have to be four months. The notice period for the employee can be extended up to 6 months, which results in a 12-month notice period for the employer.

Salary

The employee is entitled to a consideration for the work performed: a salary. The salary may not consist of anything other than money, goods, the use of a home, services or securities (and other receivables). In almost all cases, a salary is paid in money. If the salary is paid in money, it must be Dutch legal tender.

The parties have freedom to negotiate the amount of the salary. However, the freedom to negotiate is limited by the Minimum Wage and Minimum Holiday Allowance Act and any salary regulations in a CBA.

Under the Minimum Wage and Minimum Holiday Allowance Act, an employee is in principle entitled to a minimum wage. As of 1 January 2025, the minimum wage for employees aged twenty-three years or older will be EUR 2,315.21 gross per month in case of an employment contract for 38 hours per week. The government generally revises this amount twice a year. The statutory minimum holiday allowance is equal to 8% of the annual gross salary to which the employee is entitled.

The employer is obliged to pay the salary on time. If the employer fails to do so, the employee will be entitled to (i) statutory interest and (ii) statutory increase, which may rise to as much as 50 percent of the salary due.

Days' leave and holiday allowance

Employees are entitled to a minimum of 20 days' leave per year based on full-time employment (40 hours per week), although it is common for a higher number to be granted (usually 25 days' leave in case of full-time employment). A CBA may also contain arrangements about this.

In addition, employees who earn less than three times the minimum wage are entitled to a minimum holiday allowance. The holiday allowance must be at least 8% of the employee's gross annual salary.

Post-contractual clauses

The parties are free to agree in a written employment contract on clauses that protect the employer, both during the term of the employment contract and in case the employment contract ends.

This includes, for example, a confidentiality clause, an ancillary activities clause, a non-competition clause and a non-solicitation clause. The employer may impose a penalty in the event that these clauses are violated.

Confidentiality

For an employer, it is advisable to contractually agree on a confidentiality clause. A confidentiality clause forces an employee to maintain secrecy with regard to trade secrets. It is important that the employee observe confidentiality not only during, but especially after the employment.

Ancillary activities clause

The employer may include an ancillary activities clause to prohibit the employee from also working for others if the employer has objective reasons for doing so. This may be for reasons concerning the employee's health, protecting company information or avoiding conflicts of interest.

Non-competition clause and non-solicitation clause

An employer may agree on a non-competition clause (including a non-solicitation clause) with an employee, provided that this is done in writing with an employee who has the age of majority in an indefinite-term employment contract.

A fixed-term employment contract may contain a non-competition clause only if the employer states in writing that it is necessary on account of compelling business interests. This is subject to strict requirements. An explanation for the compelling business interest may be the existence of specific knowledge or commercial information within the company that the employee becomes aware of and that would unreasonably harm the employer if the employee transferred to a competitor.

In case law, a non-solicitation clause is equated with a non-competition clause. This means that a non-solicitation clause is subject to the same conditions as a non-competition clause.

Penalty clause

An employer may impose a penalty on violation of clauses in the employment contract if the employment contract specifies the clauses to which the penalty applies and the amount of the penalty is agreed in writing in advance. The penalty may be imposed both for each violation and for each day the violation continues.

Possible events during the employment contract

Illness, unsatisfactory performance and a disrupted employment relationship

Good employer and employee practice

Both the employer and the employee are obliged to conduct themselves as good employers and good employees. That is to say, the relationship between the employer and employee is governed by reasonableness and fairness. What is meant by good employer and employee practice is decided in part by the judicial views, societal interests and personal interests prevailing in the Netherlands.

In this way, various issues are resolved through good employment practice. For example, with regard to the right to reinstatement in case of suspension, unilateral change in employment conditions, behaviour at work, remuneration, the termination of dormant employment contracts, and so on.

The parties need not include any provisions in the employment contract in this regard. The statutory provision about this has direct effect in every employment contract.

Illness

An employer is required to pay an employee who is ill at least 70% of – at most – the applicable maximum daily wage during illness. In practice, many employers pay at least 70 percent of the employee's salary – in any event during the first period.

This obligation exists for the first two years of the employee's illness. Moreover, during the first year, the amount payable to the employee may not be less than the minimum wage. In the second year, the salary that must be continued to be paid during illness may be less than the minimum wage.

It may be agreed in a written employment contract that the employee is not entitled to wages at the start of the illness (up to two days). This is called the waiting period.

The employer is obliged to reintegrate an employee who is ill as soon as possible. In doing so, the employer has several obligations. If the employer fails to perform its reintegration obligations, it may be required to continue paying the employee's wages for another year after the mandatory two-year period. This is called a wage sanction.

Conversely, the employee must also make an effort to return to work as soon as possible. If the employee fails to stay available for the company physician, the employer will have the right to suspend wages. If the employee does not cooperate with the reintegration, the employee will lose the right to payment of wages – under certain circumstances and after having been given a warning.

Inadequate performance

The concept of inadequate performance is neutral in the sense that the employee certainly cannot always be blamed for failing to meet the job requirements. No hard evidence of inadequate performance needs to be presented. It suffices if the employer makes the inadequate performance plausible. Thus, the inadequate performance must be sufficiently specified.

It is also relevant how long there has been inadequate performance and whether it can be supported by evidence. In determining whether the employer has made the employee's inadequate performance plausible, it is also relevant to note how long the employee has had the job. The longer an employee performs a particular job, the less likely it will be to assume that the employee is unsuitable for the job.

The employee must not be "caught off guard" by a dismissal on account of inadequate performance. For that reason, the employer must first discuss the matter with the employee and it must be attempted to improve the performance. A number of guidelines apply for answering the question of what may reasonably be required of a good employer. One of these guidelines is that the employer must discuss the criticism of the performance with the employee and keep a record thereof.

Before the employer can successfully request the Subdistrict Court to have an employment contract dissolved (also see the next chapter), it is important that the employer itself has tried to improve the employee's performance by means of a specific improvement programme. The duration of this improvement programme depends on the nature of the inadequate performance, but is usually three to six months. It is important that at the end of this improvement programme it can be determined as objectively as possible whether the employee has improved their performance to the desired level. Finally, it must be clear to the employee in advance what the consequences will be if the improvement programme is unsuccessful.

Disrupted employment relationship

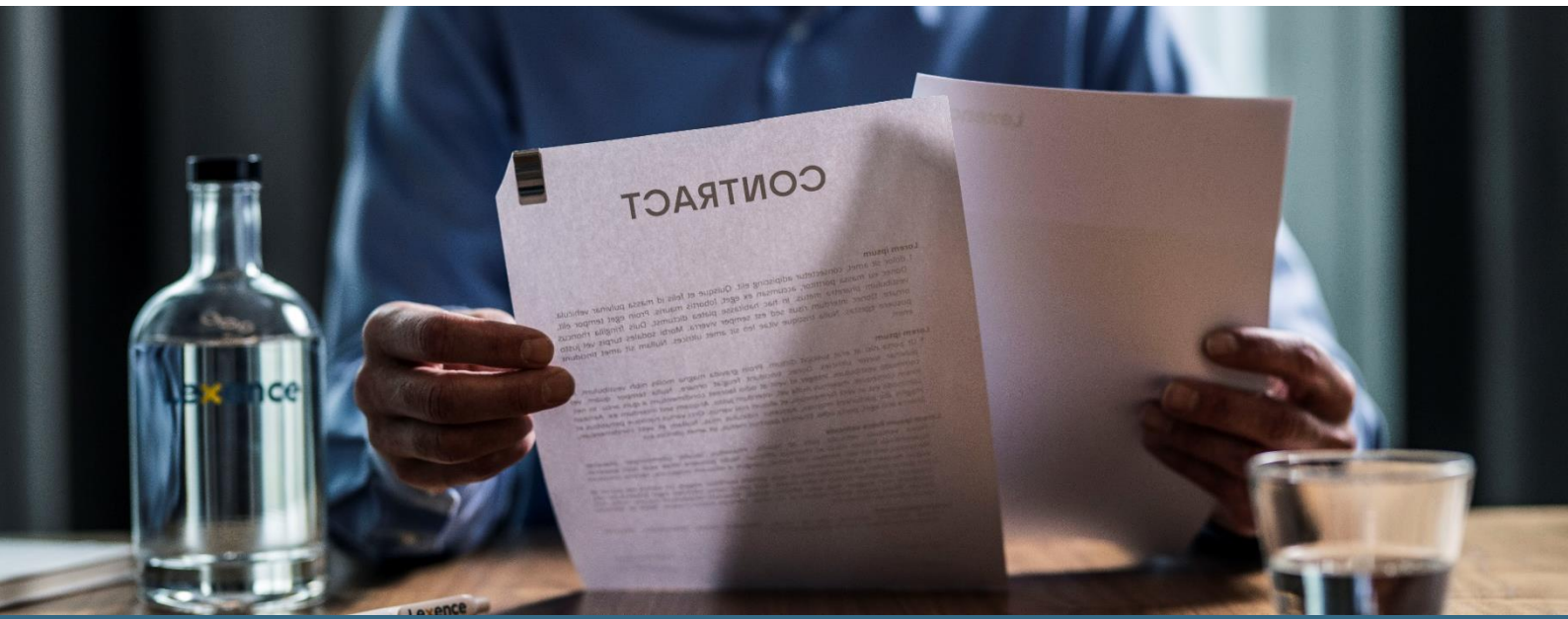
There are many reasons why the employment relationship between parties can be disrupted. An employer is expected to de-escalate and try to normalise the relationship. If this does not lead to a solution, the employer may be expected to seek the help of a specialised mediator.

If that, too, is unsuccessful, the employer has the option of filing an application for dissolution of the employment contract with the Subdistrict Court (also see below). In that case, the employer must demonstrate that there is (i) a permanently and irreparably disrupted employment relationship, (ii) such that the employer cannot reasonably be required to have the employment contract continue. A valid ground for dismissal requires that (iii) the employer must have made a demonstrable effort to improve the employment relationship.

Culpable acts or omissions

It must be clear to the employee – barring exceptional cases – what standards of conduct apply within the employer's company and which standards the employee must adhere to. It is advisable for an employer to establish those standards of conduct in an employee handbook or code of conduct. Of course, the employer's requirements in that regard must be reasonable.

Culpable acts or omissions are expressly broader than conduct for which the employee can be dismissed with immediate effect (see Chapter 3). Less serious conduct can also be qualified as "culpable". Depending on the seriousness and nature of conduct, an employer can impose sanctions ranging from a warning to filing an application to dissolve the employment contract.



The end of the employment contract

The notice of termination, dissolution or termination by mutual consent

Preventive dismissal assessment

Unlike many other countries, Dutch employment law provides a *preventive dismissal assessment*. This means that if employers wish to unilaterally terminate an employee's employment contract, they require prior approval from the Employee Insurance Agency (**UWV**) or the Subdistrict Court.

An employer is granted such approval only if it has *reasonable grounds*. These reasonable grounds are exhaustively laid down in the law. Examples include: economic reasons, long-term illness, inadequate performance, a disrupted employment relationship and culpable actions of the employee. Each of these reasonable grounds has an assessment framework of its own, and judges do not grant their approval lightly.

The preventive dismissal assessment does not apply to termination of the employment contract by operation of law or to dismissal with immediate effect. Additionally, the preventive dismissal assessment is not applicable if the employee is willing to terminate the employment contract by mutual consent through a settlement agreement.

UWV: economic or organisational reasons and long-term illness

An employer is not free to choose where to file a dismissal permit application. The law prescribes that the UWV decides on dismissal permit applications that involve economic or organisational reasons and long-term illness. UWV is a government agency that also decides on employees' entitlement to benefits, among other things.

Economic or organisational reasons

The UWV observes restraint in reviewing an employer's decision to reorganise its business. The basic premise is that the employer has policymaking latitude to set up its business as it sees fit. However, the employer must be able to justify its choices and must follow strict ground rules when selecting redundant employees. For example, the employer is not free to choose the employees who will be made eligible for dismissal.

The UWV distinguishes six economic circumstances that can be used as grounds for economic or organisational dismissal. These are:

- a poor or deteriorating financial situation;
- a decrease in work;

- organisational or technological changes;
- relocation of the company;
- termination of the company's activities; and
- cancellation of the wage cost subsidy.

For each reason, the employer must provide a comprehensive and cogent substantiation.

The employer must submit the dismissal permit application on the basis of dismissal forms (A, B and C). The employee may submit a written defence against the dismissal permit application. In principle, there will be no hearing. Sometimes the employee's defence raises crucial questions following which the UWV orders a second written round before making a decision on the dismissal permit application.

The UWV's decision is to either grant or reject the application. If the UWV grants the dismissal permit application, the employer will be entitled to terminate the employment contract – with due observance of the notice period. In that case, the employee is entitled to a transition allowance. The employee is free to lodge an appeal against the UWV's decision before the District Court.

Long-term illness

During the first 104 weeks of incapacity for work a prohibition on termination applies, equal to the period during which the employer is required to continue paying the employee's wages. This means that the employer may not terminate the employment contract with the employee because the employee is incapacitated for work.

Provided that the employer is not subject to a wage sanction, the prohibition on termination lapses after 104 weeks, after which an employer may request the UWV for permission to terminate the employment contract with the employee. The procedure is the same as the procedure for dismissal on account of economic or organisational reasons, but with a different assessment framework.

Briefly put, the employer will have to demonstrate that it has fulfilled its reintegration obligations and that the employee's recovery is unlikely in the short term.

The Subdistrict Court: more personal grounds

For the more personal reasonable grounds based on which an employer can seek the termination of the employment contract, an application for dismissal must be filed with the Subdistrict Court. Examples of such grounds are inadequate performance, culpable acts or

omissions and a disrupted employment relationship. The legal framework with regard to these reasonable grounds has been discussed in Chapter 2.

A decision of the Subdistrict Court can be appealed before the Court of Appeal and possibly in appealed in cassation before the Supreme Court.

Prohibition against termination

Under certain circumstances, an employer is prohibited from terminating an employment contract or having it dissolved. That is called a prohibition on termination. The prohibition includes termination during illness, pregnancy, pregnancy leave and during or after membership of an employee participation body.

Depending on the specific prohibition on termination and the ground for termination itself, employers may not terminate an employment contract during or because of the existence of a prohibition on termination. The most relevant prohibitions on termination are illness and pregnancy, which are virtually absolute in the case of termination on economic or organisational grounds.

The settlement agreement: termination by mutual consent

The employer may also try to arrive at the termination of the employment contract in mutual consultation – in order to avoid a procedure at the UWV or the Subdistrict Court. This is called a termination by mutual consent. The arrangements made in case of termination by mutual consent are recorded in a settlement agreement.

A variety of arrangements can be made in a settlement agreement. For example, about a longer or shorter notice period, a severance pay (the parties are not bound by the severance pay upon concluding a settlement agreement), exemption from work, a final settlement, post-contractual clauses, legal costs, and so on.

A settlement agreement usually includes a provision on final discharge. Such a provision entails that the employer and the employee will no longer have any claims against one another – other than those agreed in the settlement agreement. The parties are bound by the settlement agreement and can hold each other to it. It is therefore advisable to seek legal advice before entering into a settlement agreement.

The employee does, however, have a statutory reflection period. If the employee is informed of such a reflection period in the settlement agreement, they have the right to rescind the settlement agreement without giving reasons by written notice to the employer within 14 days

after agreement has been reached. If the settlement agreement does not specify this reflection period, it will be 21 days.

The transition allowance

If the employment contract ends at the initiative of the employer (except in case of dismissal with immediate effect), an employee will be entitled to a transition allowance. If the employee terminates their own employment contract, there is no right to a transition allowance (and, incidentally, no right to unemployment benefits).

If the employer does not voluntarily proceed to pay the transition allowance, the employee must submit an application with the Subdistrict Court within three months of the last day of the employment contract. If the employee fails to do so, then the employee's right to the transition allowance will be forfeited.

The transition allowance is a gross payment, which is calculated using a formula. Roughly speaking, the employee accrues 1/3 monthly salary in transition allowance for each year worked at the employer. More specifically, the formula is as follows:

- 1/3 monthly salary for all full years of service;
- 1/36 monthly salary for the remaining full months; and
- 1/1095 monthly salary for any remaining days.

The transitional allowance can be easily calculated at:
https://www.lexence.com/tool/transitievergoeding/

Dismissal with immediate effect

Finally, the employer and, for that matter, the employee, may terminate the employment contract with immediate effect and without any preventive assessment on account of urgent reasons, such as fraud, theft or other very serious misconduct. The law provides a non-exhaustive list of actions by an employee or employer that are considered urgent reasons. Termination with immediate effect is also known as dismissal with immediate effect.
The dismissal with immediate effect must be without delay, simply put: as soon as possible after the urgent reason becomes known to the employer, and the employee must be informed of the dismissal and the reason(s) for the dismissal as soon as possible. This requirement is very strict.

The consequences for the employee are far-reaching: the payment of wages stops immediately, the employee is not entitled to the transition allowance, is not entitled to unemployment

benefits, and is in principle liable to the employer for damages. The employee can lodge an appeal against the dismissal with the Subdistrict Court within two months. Given the far-reaching consequences, a dismissal with immediate effect is reviewed strictly by judges. If a dismissal with immediate effect is wrongly effected, the employee will be reinstated or the employer will owe fair compensation and a transition allowance.

Closing

This white paper was written by **Jordi Rosendahl**, attorney-at-law and partner at Lexence.

Jordi Rosendahl specialises in employment law and dismissal law. He advises employers, directors and employees on their position under employment law and assists them in negotiations and during procedures at the UWV or the District Court.

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