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SUMMARY DISMISSAL FOR URGENT CAUSE

Introduction

All or nothing. There are hardly any nuances in relation to the consequences of summary dismissal for urgent cause ("summary dismissal") under Dutch labour law. If the summary dismissal is lawful, the employee sees his employment relationship end from one moment to the next, without any claim to the observance of a notice period, let alone any compensation for manifestly unreasonable dismissal. If the decision goes the other way, however, the employee proverbially comes out on top and the outlook for the employer is then particularly unfavourable, with various types of claims hanging over him that can accumulate to a considerable amount.

In view of this, both parties to the employment contract have a significant interest in clarity regarding the content of the three statutory requirements that are set under Section 7:677 of the Dutch Civil Code ("DCC") for a lawful summary dismissal and in the unambiguous and predictable application thereof in legal practice. Briefly put, these three requirements are (i) that the employee must have given the employer urgent cause, (ii) that the employer must have immediately implemented the dismissal once that urgent cause came to his attention and (iii) that the employer notified the employee of the urgent cause at the same time as the dismissal.

A view that is quite regularly expressed in legal literature is that legal certainty with regard to summary dismissal is hard to find. The key question of this book is whether that theory is correct. This book will therefore examine the following questions in depth in relation to the aforementioned three sub-requirements (i) what does the specific requirement entail precisely? and (ii) does the requirement, in view of how it is elaborated in case law, 'work' in a proper and predictable manner in practice or does it rather lead to legal uncertainty? The most important findings of the examination are summarised below.

In conclusion, a further look is taken at the future of summary dismissal in order to see whether this legal concept should be retained.

Immediacy requirement

It may be concluded with regard to the immediacy requirement, which is discussed in Chapter 2, that the criticism that this requirement does not work properly – because it supposedly encourages the employer to make rash decisions – and leads to uncertainty, is mostly incorrect. If one reviews the entire playing field, it ought to be concluded that this sub-requirement is clearly elaborated in case law, which generally means that it most certainly will be possible to predict with a more than adequate

degree of certainty whether the immediacy of a summary dismissal was sufficient. If the employer (or his lawyer) keeps the applicable rules of this area in mind, he will not quickly be faced by a successful defence that the dismissal was not immediate.

In relation to the moment when the immediacy period commences, i.e. the moment when a 'suspicion' of urgent cause arises, the clear conclusion to be drawn first of all from the case law of the Supreme Court of the Netherlands *[Hoge Raad]* ("Supreme Court") is that this requirement must be elaborated subjectively. The moment in question is when the official with the authority to dismiss actually became aware of the suspicion, not when he, viewed more objectively, could have – and perhaps even should have – become aware thereof. It seems advisable for the Supreme Court to adhere to that line and not to opt for an objectified approach. A subjective criterion is clearer than an objectified criterion – more debate is possible in relation to when someone possibly could have known something than when he actually knew it – and an objectified criterion moreover promotes unsympathetic defences by employees who are guilty of serious misconduct along the line that their employer should have been more attentive and should have discovered their misdemeanour at an earlier stage. In a case where the inattentiveness of the official with the authority to dismiss, or of other officials within the employer, results in a culture of toleration, that can be remedied by assessing whether there is urgent cause rather than within the framework of the immediacy requirement. The fact is that the existence of such a culture can contribute to the view that there is no urgent cause, albeit that its existence is always only one of the circumstances in the assessment, meaning that its existence does not necessarily preclude the acceptance of urgent cause.

Scant attention has been paid to date in case law and legal literature to the question of which substantive requirements must be set for a subjective suspicion of the existence of urgent cause. The recommendation on this point is to answer that question by stating that the immediacy period only commences if there is a suspicion of urgent cause founded upon a factual basis that is both individualised – with regard to the question of who is possibly guilty of creating urgent cause – and specified – with regard to the facts that could have occurred. In order for there to be a suspicion of urgent cause that triggers (the beginning of) the immediacy period, that suspicion must therefore be based on specific indications that a certain employee has probably done something wrong. In light of Section 7:611 DCC – the provision which obliges the employer and employee to act towards each other in accordance with the requirements of reasonableness and fairness – the Court must assess the presence of an individualised and specified suspicion of the existence of urgent cause with restraint. On the one hand, this provision requires the employer not to be overly rash in suspecting the employee of all types of mistakes because this can place unnecessary pressure on the employment relationship. Having regard to the same Section 7:611 DCC, the employer may moreover have a 'reasonable expectation of good faith' with regard to his employees because that provision requires them to work in a reliable and loyal manner. This means that the Court will have to exercise a reasonable level of caution and restraint when assessing whether the employer had a subjective suspicion of possible urgent cause. The Court may certainly not accept that too

quickly, because this also places pressure on the correct assumption that this suspicion needs to be subjectively elaborated. Put differently, the Court should assess whether, on marginal review, the employer could in all reasonableness not have a suspicion of urgent cause (yet).

A further conclusion – contrary to what has been argued in legal literature – is that there must be no place for 'prescription' of the immediacy of dismissal. No support for such a prescription defence can be found in legislation or case law. If one looks at the statutory framework, the situation in which the suspicion of urgent cause only arises a considerable time after the relevant facts have taken place, is somewhat in keeping with the situation that is laid down in Section 3:52 DCC. Section 3:52 DCC stipulates, among other things, that the party who wants to invoke the nullity of a legal act in court on the grounds of fraud or error may do so within three years after the fraud or error has been discovered. The period mentioned in that rule therefore also only begins to run once the aggrieved party becomes demonstrably aware of certain facts. It would not be a sympathetic outcome for an employee to be able to avoid summary dismissal by concealing his mistakes from the employer for as long and effectively as possible, even though the provisions of Section 7:611 DCC impel him to share any relevant information with the employer. The fact that an employee has been summarily dismissed for 'old facts' that were recently discovered may play a role in the assessment of whether urgent cause exists. However, the 'mature' nature of the contested facts does not preclude summary dismissal, by definition and as such, but rather constitutes one of the circumstances to be taken into consideration in determining whether an urgent cause exists.

A further recommendation with regard to the immediacy requirement is that it seems advisable for the purpose of deliberations on that requirement to divide the period from when a suspicion of urgent cause arises to when the employment contract actually ends into three phases. These are consecutively (i) the phase from when the aforementioned suspicion arises to when the employer becomes aware of the urgent cause and is able to prove the existence thereof, (ii) the phase from that last moment to the notice of termination and (iii) the phase between the notice of termination and the end date. It is advisable to distinguish among these three phases as it follows from case law that the strictness in relation to the immediacy testing in those three phases differs, in the sense that the intensity of the scrutiny increases.

If one reviews the case law, the conclusion to be drawn is that the employer is given a lot of leeway in the first phase to carry out an investigation, gather evidence and seek legal advice, provided that he does so as expeditiously as is reasonably possible within the limitations of due care. The case law of the Supreme Court strongly emphasises that the employer should not be held to account too strictly on this point. As long as a delay is justified by exercising due care, that delay should be tolerated. The fact that providing that scope is in the interests of both parties plays an important role in that regard. Viewed from the fundamental principle of due care, the passage of time that is caused by observing statutory rules during an investigation, such as the rules of the Dutch Personal Data Protection Act *[Wet bescherming persoonsgegevens]*,

any delay due to the application of the *audi et alteram partem* rule and any delay that is caused because the employer only wishes to make objectively justifiable infringements of any fundamental rights of the employee in the course of the investigation, will not lead to the finding that there was a failure to act immediately. Contrary to what has been suggested in legal literature, the immediacy requirement certainly does not force the employer to take rash action or to act without thinking.

There are also signs of a broad doctrine in case law when answering the question of the extent to which causes on the side of the employee – such as holidays and illness – may lead to a delay in the investigation of whether urgent cause exists. If the employer allows the employee to go on holiday pending the investigation, this will in principle not justify the conclusion that the immediacy requirement has not been met. The same applies if the investigation is delayed because the employee is unable to be examined due to illness.

The Supreme Court's balanced approach is lastly confirmed in its attitude to the question of whether the employee should be suspended during that investigative phase. According to the Supreme Court, the question of whether not suspending the employee is compatible with the idea implied in the immediacy requirement that the employer must also show that he really experiences the urgent cause as an urgent cause, depends on the circumstances of the case, such as the nature of the conduct that the employee is accused of, the nature of the work and the situation in which this work must be performed. The conclusion here should also be that this balanced approach does not lead to uncertainty, since the employer already has control over choosing certainty, by always suspending in case of a suspicion of urgent cause, unless that is undesirable from the perspective of the investigation. Whoever follows this advice will not find themselves shipwrecked on the rocks of the immediacy requirement.

Contrary to what has been held in case law in the past, it can be concluded that the employer is free to outsource an investigation into what he suspects is urgent cause. In contrast to what is often thought in practice, however, such 'outsourcing' does not relieve the employer of the requirements and limits implied by the 'immediacy requirement'. However, even in this case, insofar as the due care exercised by the external investigator, on the basis of rules of conduct that apply to him, results in a delay, this delay will generally not produce any inconsistency with the immediacy requirement, provided that the investigator has made a maximum effort within the limitations that such due care involves to make progress with the investigation. If instructions are given for an external investigation before the employer has a suspicion of an urgent cause, the case will be different in the sense that the immediacy period only begins to run when the official with the authority to dismiss becomes aware of the results of the investigation, obviously provided those results justify the conclusion that there is urgent cause or a suspicion of urgent cause. It is therefore of great importance here for both the employer and the investigator to determine at the outset of the investigation whether there are already such specific and individualised facts that a subjective suspicion of urgent cause exists.

Lastly, the fact that the Supreme Court does not impose any unrealistic demands on the employer in relation to the immediacy requirement and puts 'due care before time', is also evident from its doctrine which allows an employer, if an investigation is launched by the government into conduct that may be classified as urgent cause under labour law, to wait for the outcome thereof, provided that the employer indicates to the employee beforehand that his fate under labour law will be linked to the outcome of that investigation. That ruling is presumably also rooted in the belief that it may be generally assumed that such an investigation contributes towards due care. That freedom is however restricted in the sense that if the employer, pending such an investigation, obtains the demonstrable assurance for himself that an urgent cause in fact exists, he may no longer wait in that case to dismiss summarily on the basis of the investigated conduct. The first immediacy phase ends at that moment, namely when the employer has the knowledge and proof of the existence of urgent cause.

It was then held that a clear line, which is stricter than the 'regime' that applies in the first phase, can likewise be distinguished in the second phase of the immediacy period. As soon as the suspicion of urgent cause is converted into the demonstrable assurance of its existence, the dismissal must be implemented without further delay in the Supreme Court's view. According to the case law, that does not mean that the dismissal must always be effected instantly, but that the dismissal procedure must be started immediately. This once again implies that if procedural obligations apply to the employer when he makes a dismissal decision, such as on the basis of the Dutch Works Councils Act *[Wet op de Ondernemingsraden]*, or on the basis of his articles of association or a collective bargaining agreement, the employer must initiate those procedures immediately, but may take his time to complete them. The employer may also take some time to make a termination proposal, in order to terminate the employment contract in a way other than summary dismissal, however this proposal must also be made without undue delay and while informing the employee of the urgent cause that has been ascertained.

It is very important for practice that the obligation to 'initiate' the termination without delay after ascertaining an urgent cause implies that an employer who does not do so at that moment because he wishes to also investigate other possible urgent causes, is taking a significant risk in relation to immediacy. If no new incriminating facts are established in the further investigation, the immediacy requirement will preclude a summary dismissal because of the urgent cause that was established earlier. There will – also in light of the strict requirements laid down in Section 6:2(2) DCC with regard to applying the derogatory effect of reasonableness and fairness – practically be no scope to deviate from that rule, as that would essentially amount to setting aside the statutory requirement of immediacy. This is even more so as the employer can request dissolution for urgent cause in such a case. If the employer has outsourced the investigation into his suspicion of an urgent cause to an external investigator, this rule – as can be strongly argued – also holds good to the same extent. This means that the employer must instruct the investigator to

provide interim updates, whenever (proof of) new incriminating facts that can or do constitute an urgent cause come to light.

A clear conclusion can also be drawn in relation to the third immediacy phase that may be distinguished, namely the phase between the moment of the notice of termination and the end date, in the sense that this phase will only occur at all in very exceptional circumstances. The passage of time is permitted here to an even lesser degree than in the second phase. Leaving aside very exceptional circumstances, the dismissal must commence with immediate effect. This means that distinguishing the third phase is largely a theoretical exercise. Even though any passage of time between the moment of the notice of termination and the date on which the dismissal takes effect can only be justified in emergency situations, those cases cannot be completely ruled out and it thus seems appropriate to distinguish this phase as such.

A clear rule on the duty of assertion and the burden of proof in relation to the immediacy requirement applies, i.e. they both rest with the employer. There is little case law on the scope and meaning of the duty of assertion in relation to the immediacy requirement. In light of the aforementioned findings and while casting a sideways glance on how this is dealt with under German law, it seems that a strong argument can be made for recommending that the employer firstly has to specify the moment when the subjective, adequately specified and adequately individualised suspicion of urgent cause has arisen for the official with the authority to dismiss. The employer will then have to specify chronologically the concrete steps that were taken in the immediacy phases, as distinguished above, including into who took them, in order to demonstrate how the passage of time between the emergence of the suspicion and the moment the dismissal took effect can be justified. If this requirement is not satisfied, the Court may disregard the argument that the immediacy requirement was met as being insufficiently substantiated.

Notification requirement

It should firstly be stated in relation to the notification requirement, which is dealt with in Chapter 3 of this book, that the legislature had a clear aim in mind with this requirement when drafting the Dutch Employment Contract Act *[Wet op de arbeidsovereenkomst]* 1907, in the context of which the procedure for summary dismissal was included in the DCC. That aim served to ensure that the employee can be in no doubt as to why he was dismissed, so that he can assess whether he wishes to legally challenge the dismissal or prefers to resign himself thereto because he acknowledges the stated ground to be factually accurate and an urgent cause. Leaving a few exceptions aside, it can further be concluded that the Supreme Court always kept that basic idea/reasoning closely in mind in its case law of the last century and let it be a guiding principle in its elaboration of that requirement.

The legislative process surrounding the Dutch Flexibility and Security Act *[Wet Flexibiliteit en Zekerheid]* at the end of the last century created confusion and uncertainty as to when an urgent cause must be communicated to the employee under the notification requirement. Until the introduction of that Act, the forerunner of

Section 7:677 DCC provided that the urgent cause could still be communicated 'immediately' after the notice of dismissal, a choice that was made when drafting the Dutch Employment Contract Act in 1907 on principled and correct grounds and which is also in line with the practice in our neighbouring countries. The Dutch Flexibility and Security Act thus amended the legislative text to read that urgent cause can no longer be communicated 'immediately' (after) but must be communicated 'simultaneously with' the notice. It follows from a detailed analysis of the legislative history that no material significance should be attached to that textual amendment. The Dutch Flexibility and Security Act was accepted by parliament on the assumption that it would only involve a confirmation of the prevailing law on the notification requirement, including the applicable rule that an urgent cause should be communicated by no later than immediately after the dismissal.

The case law of the Supreme Court has been practically identical and consistently strict for more than a century as regards which substantive requirements are set for communicating the ground for dismissal. The information initially had to be communicated so that the ground for dismissal was 'completely clear' to the employee, however the Supreme Court has required 'immediate clarity' since the *Bakermans v Straalservice* judgment of 1993. The requirements that the Supreme Court has set are not unnecessarily formalistic and rightly so. The notification has no prescribed form, it can also be communicated orally or even be implied in conduct. The employer may even limit himself to an overall, general indication. However, that freedom is always restricted by the rationale of the notification requirement: regardless of how the message is communicated, it must always result in immediate clarity. This means that cases in which it can be said that the employer, despite not having indicated the ground for dismissal orally or in writing, has still provided the required immediate clarity, are absolute exceptions in the Supreme Court's opinion.

The assessment of whether the employee has been given the required immediate clarity is fundamentally a question of interpretation. Although the linguistic meaning of the wording used – particularly in case of a written statement of the urgent cause – is an important point of reference, attention must also be paid to other interpretation factors, such as the nature of the job and the associated level of training, the seriousness of the facts, any earlier warnings by the employer that certain conduct will be regarded as urgent cause and the passage of time between when the contested conduct took place and the dismissal. If the conduct of an employee, in view of the nature of his job, is particularly serious and he has been warned beforehand by the employer that such conduct will definitely lead to dismissal, he will not easily be able to rely on the fact that the reason for his dismissal was not immediately clear to him, even if the ground for dismissal was vaguely – or perhaps not entirely correctly – formulated. The Supreme Court advocates a realistic approach in this regard too. On the one hand, it can be expected of the employer not to allow any misunderstanding regarding the ground for dismissal but, on the other hand, an employee who is well aware why he is being shown the door cannot 'get away' with a scheming defence that he does not understand what is happening. That is all in line with the rationale behind the disclosure requirement and offers a workable solution in practice.

It was further concluded that the Supreme Court seems to apply a less stringent disclosure requirement when answering the question whether the employee's earlier conduct, which precedes the direct reason for the dismissal, but which the employer wishes to have form part of the stated ground for dismissal, should be taken into account. Earlier conduct/facts may be taken into consideration if it was clear to the employee, at the time that the ground for dismissal was communicated to him, that they were being taken into account, which according to the Supreme Court implies that the employee 'could and should have understood' that the earlier conduct was also a reason for his dismissal. This is a less strict rule than the general notification criterion formulated in the *Bakermans v Straalservice* judgment which requires 'immediate clarity' and for which 'must reasonably understand' does not suffice. It would be advisable to end this difference in testing intensity and to extend the scope of the stringent rule from the *Bakermans v Straalservice* judgment to the assessment of whether it was clear to the employee that he was also being dismissed for 'old facts'. The difference in notification requirements is unnecessarily complex and does not contribute towards the practicality of the procedure of summary dismissal. If the employer bases the summary dismissal on earlier facts, the urgent cause consists of the combination of the direct cause and the background and, for that reason alone, it does not make sense for a less strict notification criterion to apply to the earlier facts. This applies all the more so given that the old facts are often a more important component of the urgent cause than the eventual direct cause, especially when that direct cause is nothing more than the last straw to break the camel's back.

It may be concluded that the Supreme Court is also faithful to the reasoning behind the notification requirement in relation to the 'procedural' side of that requirement. In order to ensure that the employee can proceed on what is given to him as the reason at the time of his dismissal, supplementing the ground for dismissal afterwards is practically never allowed. I am of the opinion that an exception may be acceptable insofar as such supplementing takes place within the time limits of immediate disclosure. In other words, the employer may supplement the ground for dismissal immediately after the dismissal. The room for manoeuvre in this regard would be no more than a matter of days.

It is moreover clear from an examination of the case law that the employer will generally have to prove the stated ground for dismissal in its entirety, which means that if he uses a ground for dismissal that comprises intent or fault, he must prove both the fact and culpability (which is implied by the intentional or negligent act). It may be concluded that the criticism that employers are thus saddled with an 'impossible' burden of proof of which they are not aware when dismissing the employee, is unconvincing. The Supreme Court should adhere to its position in this regard. If an employee is dismissed for theft or embezzlement, he must be able to consider whether that ground for dismissal, including the intent required for that criminal act, exists. It is obvious that a dismissal for urgent cause will rather be used as and when the employee's conduct is more serious, which in turn means that dismissal for something more serious in this area – e.g. embezzlement – does not necessarily mean dismissal in case of something less serious – e.g. a cash shortfall – as

well. If the employer also wishes to dismiss on the less compelling ground, he must make that clear immediately upon the dismissal so that the employee can base his decision of whether or not to challenge the dismissal on this too. If the employer does not do that, then it is not unfair for him to be bogged down by the burden of proof involved in dismissal for a crime. An employer too is deemed to know the law and that applies all the more to an employer who accuses his employee of breaking the law. Moreover, the criticism of this doctrine of the Supreme Court overlooks the fact that it will ultimately seldom make much difference to the outcome of a case whether the employer has dismissed for an urgent cause with intent or fault as an element or because of a more 'colourless' ground for dismissal. In the latter case, any lack of culpability will also play an important role in assessing the lawfulness of the dismissal, namely in the form of a mitigating circumstance to be put forward by the employee.

As an exception to the rule that the stated ground for dismissal must be proved in its entirety, the Supreme Court has accepted that a dismissal may at times also be lawful if only part of the ground for dismissal is established and it has attached certain conditions to that possibility. These conditions entail that a) the part of the ground for dismissal that has been established is in itself serious enough to be classified as an urgent cause, b) the employer states and argues convincingly that he would also have dismissed even if he had realised at the time that he only had the established part at his disposal and c) this was also clear to the employee at the time of his dismissal. Rather blunt criticism has been expressed against this doctrine to some extent. It is argued that summary dismissal would be reduced to 'advanced mathematics' and the doctrine would lead to the unsatisfactory result that a dismissal which is made for both (i) a very serious offence and (ii) a lesser trivial matter can be nullified if only the trivial matter is not established. This criticism is not correct. On the contrary, a strong argument can rather be made that the Supreme Court should pull the strings even tighter with regard to lawful summary dismissal for partially established urgent cause.

Firstly, the criticism that the doctrine of the Supreme Court is too far removed from the interests of the employer overlooks the fact that by considering the possibility of lawful summary dismissal on the grounds of partially established urgent cause at all, the Supreme Court is already making a significant concession to the 'employer's side'. Based on the legislative history of Section 7:677 DCC, the complete rejection of that possibility was highly conceivable. It is moreover evident from case law that the Supreme Court is not in favour of an overly strict application of conditions b) and c). If the part of the stated ground for dismissal that is established is particularly serious and/or if by far the largest part of the stated ground for dismissal is established, the Court may accept without too much ado that those sub-criteria have been met.

The three conditions formulated by the Supreme Court are moreover dogmatically logical and necessary. In that sense, the condition under c) arises mandatorily from the notification requirement in that it aims to ensure that the employee knows right

after the dismissal what he has to legally defend himself against. If it is to be considered permissible for a summary dismissal to stand up to legal scrutiny on the basis of part of the urgent cause stated at the time of the dismissal, the employee must have already known at that time that he was also being dismissed for that part of the urgent cause. The conditions under a) and b) are also no different to those that apply to a normal summary dismissal. After all, such a dismissal can only be lawful if there is an urgent cause (condition a) and the employer also seized that reason to actually dismiss the employee concerned (condition b).

Dogmatically speaking, there is thus nothing to detract from the Supreme Court's approach in this respect. It was concluded, however, that it would be recommendable for the Supreme Court to adapt its doctrine so that *'Gleichlauf'* (harmonisation) is created between condition c) and the criterion from the *Bakermans v Straalservice* judgment. This is because condition c) is in fact a derivative of the aforementioned general criterion. This would mean that condition c) would have to be amended in such a way that it must have been 'immediately clear' for the employee involved that he was also being dismissed (only) for the established part. Admittedly, this is nothing more than a subtle difference, but it is a subtle difference that contributes towards uniformity in the review for compliance with the notification requirement of summary dismissal.

Finally – and this is a recommendation of a more substantive nature – I am of the opinion that a fourth condition d) should be added to the three formulated by the Supreme Court, namely that the established part of the ground for dismissal must also comply with the immediacy requirement discussed above. If the official with the authority to dismiss had already been aware of the 'remaining' part of the ground for dismissal for some time when the dismissal finally took place (as a reaction to the non-established part), lawful summary dismissal on the basis of the established part does not seem possible. If that requirement is not set, the immediacy requirement can easily be circumvented, simply by adding a new, but evidently unfounded ground for dismissal to an old urgent cause and then dismissing instantly as from when that new ground arose.

It was lastly concluded that where the Supreme Court does not allow the stated urgent cause to be supplemented in legal proceedings, a certain degree of elaboration thereof is however permitted. Pending the proceedings, a broadly formulated ground for dismissal may be substantiated with examples that illustrate the general ground for dismissal. Although the Supreme Court has not yet ruled in this regard, it appears to me that this possibility of 'elaboration' is only permitted if it was immediately clear to the employee when the ground for dismissal was communicated to him that the examples in question were (partly) the reason for the dismissal on the generally formulated ground. The employer will, in principle, moreover have to demonstrate in legal proceedings all examples in respect of which the employee was immediately aware that these fall under the generally formulated ground for dismissal, unless the requirements for lawful summary dismissal for partially established urgent cause

have been met. It is only by setting these strict requirements that the rationale behind the notification requirement is satisfied and that that requirement is moreover consistently applied. Elaborating a ground for dismissal with facts/examples that the employer has only become aware of after the dismissal seems to be inconsistent with the rationale of the notification requirement which entails that it must be immediately clear to the employee from the stated ground for dismissal what the reason for his dismissal is based on, according to the employer. Someone who is unaware of certain facts can hardly intend to dismiss because of those facts. Facts that are subsequently discovered may however serve as evidence to support the employer's contention that the facts that he was aware of at the time of the dismissal actually occurred. However, that is not the same as subsequently discovered facts forming part of the stated ground for dismissal.

Finally, there is the clear rule that the duty of assertion and the burden of proof in relation to compliance with the notification requirement rest with the employer. The employer will not only have to assert – and, in case of a reasoned challenge, have to demonstrate – (i) that the ground for dismissal was communicated simultaneously in the sense of immediately, but also (ii) that it was communicated in such a way that the employee had immediate clarity in that regard.

Having taken stock of everything, the final conclusion ought to be that the disclosure requirement is a requirement with a very clear purpose. Both the substantive requirements that the Supreme Court sets for communicating the ground for dismissal and the formal/procedural consequences that the Supreme Court attaches thereto, follow logically and necessarily from that rationale. Adjustments to the case law of the Supreme Court seem advisable on just a few points in order to make the application of the requirement a little more consistent (and at the same time simpler). An important adjustment to the rules which apply to a legitimate summary dismissal in cases in which only part of the urgent cause is established is not so much advisable from the perspective of the notification requirement but from the perspective of the immediacy requirement. The sense of reality shown in the direction which the Supreme Court takes in assessing whether its formulated notification requirements have been met is also very important. Although the requirements that are set for the employer are demanding, an employee who is well aware why he is being dismissed cannot readily hide behind the fact that he did not know what was going on. The employee who feigns ignorance against his better judgement should not count on much help.

Urgent cause

Chapter 4 deals in detail with the last sub-requirement for lawful summary dismissal, i.e. the existence of an urgent cause. This discussion centres once more on the key question of whether case law has shaped and elaborated this sub-requirement to the extent that there is a satisfactory degree of predictability as to when an urgent cause does and does not exist.

It is obviously important here to firstly identify which expectations may exist in this regard: whether case law reaches the standard of adequate legal certainty depends on how high that standard may be set.

An expectation, let alone a requirement of absolute clarity in advance is not a reasonable expectation in this regard and was also never intended by the legislature. The assessment as to whether urgent cause exists is by nature an assessment as to what reasonableness and fairness require. Such a test cannot do without weighing up the circumstances of the case and that is, by its nature, practically never black and white. If one researches the legislative history in this regard, it seems as though there was already a realisation – which was expressly accepted – when the Dutch Employment Contract Act of 1907 came into force that some unpredictability would be unavoidable. The possibility of hard and fast rules was expressly at issue, considered and rejected at the time. That is the background against which it must be assessed whether the case law meets expectations on this point: not aiming for absolute certainty in advance, but aiming for a reasonable degree of predictability. Clarity in broad lines, but one which allows the freedom to deviate in an individual case where this is necessary. The body of more than a century of case law on urgent cause meets that standard in my opinion, even if further improvement is always possible, including here.

In the second half of the last century, the Supreme Court gave a lot of direction to urgent cause, firstly by formulating sub-rules and rules of thumb. Those are rules that specific conduct never qualifies, or in principle does or does not qualify as urgent cause. These rules are very important because they give a significant amount of direction to the debate in cases that fall within their scope of application. In addition, and with some good will, a number of fundamental principles on urgent cause can be developed from the combination of all those rules, of which the most general basic principle – which has sometimes been presented implicitly and at other times more explicitly in the case law of the Supreme Court – is that the existence of urgent cause must only be accepted with extreme caution. That ties in seamlessly with the intention of the legislature when it introduced the provisions on summary dismissal. It may further be deduced from the broad range of rules of thumb (i) that urgent cause can only lie in the actions, conduct or a characteristic of the employee himself and (ii) that urgent cause can only be based on demonstrable facts. There is no room for attributing the actions of another party or for urgent cause that consists of nothing more than a suspicion. A *Verdachtskündigung* (dismissal on grounds of suspicion) as it is accepted in German law is – rightly – not a recognised concept under Dutch law. Lastly, the fact that urgent cause should not, in principle, be accepted *contra legem* (against the law) applies as a fundamental principle. Briefly put, the last three fundamental principles above confirm the accuracy of the first: restraint is key.

The second control mechanism used by the Supreme Court is its 'multi-perspective-based case law', which it first pre-announced in a judgment of 1977 and has repeatedly formulated since 1999. This is summarised in the rule that the assessment of the existence of urgent cause must take all the circumstances of the case into

consideration, firstly in relation to the nature and seriousness of the conduct and then followed, among other things, by the nature and length of the employment, how the employee performed in that job and the personal circumstances of the employee, such as his age and what the consequences of a summary dismissal would be for him.

The Supreme Court thirdly ensures the strict application of its doctrine on this point and sets high substantiation requirements as far as the assessment of the aforementioned perspectives is concerned. Those substantiation requirements are in themselves a third indicator of how the Supreme Court wishes to see urgent cause being assessed. This again implicitly confirms the fundamental principle that a truly serious reason is required for accepting urgent cause and that *in dubio abstine* (if in doubt, do not intervene) applies!

The criticism that the case law of the Supreme Court on urgent cause leads to a great deal of legal uncertainty mainly relates to its 'multi-perspective-based doctrine'. Further examination of that criterion – and its application in case law – reveals that this criticism is unfounded to a great extent, certainly if it is considered against the background of the expectations that one reasonably may have as regards the predictability of an assessment into whether urgent cause exists. Both the content and manner of impact of the various perspectives and their relative weight in the assessment are clear. The key perspective in the assessment is the 'nature and seriousness' of that which is regarded as urgent cause. In that regard, it is firstly evident from evaluating the case law that clear lines can be drawn with regard to the classification of many forms of misconduct, in the sense that some conduct – such as fraud and theft, as well as assault – is by its nature so serious that it will practically always constitute urgent cause, while a contrasting line can be identified in case of other conduct. The matter becomes completely clear if such a line in the case law of the lower courts is reconfirmed by a sub-rule or rule of thumb of the Supreme Court, as happened for instance in the *Vixia v Gerrits* judgment in which the Supreme Court embraced a clear line in the case law of the lower courts that contravening the rules on medical checks during illness does, by nature, not constitute urgent cause. It is further evident from the evaluation of this element in the doctrine that particularly the question of whether the employer gave any form of prior warning is very important when assessing the nature and seriousness of the urgent cause and, as a corollary thereof, when assessing if an urgent cause exists. That line in the case law appears to be completely correct because an employee who is guilty of misconduct after a warning is in fact guilty of an aggravated or double contravention, namely the misconduct and insubordination.

In this regard the question of assessing trivial property offences, i.e. offences which are serious in nature but very minor in extent, which is very important in practice has been examined in detail too. This has proved to be a subarea for which the criticism that urgent cause is unpredictable does in fact hold water. The case law of the lower courts has been too divergent in this regard. Given that there are all types of valid arguments for an employer to be strict even as regards minor property offences in the work environment, it seems possible – and, in order to bring an end to uncertainty in

this area, appropriate – to also formulate a clear rule of thumb on this point. As (i) drawing any limit other than a zero line is arbitrary, (ii) the employer's trust can also be seriously violated by 'petty theft', (iii) it is important from a preventive viewpoint to maintain a strict line and (iv) the employee also ultimately benefits from clarity beforehand, it does not seem unreasonable to pursue a policy in which even a first and minor mistake is regarded as urgent cause. I conclude that it plainly lies within the managerial prerogative of the business owner to apply a zero-tolerance policy with regard to matters such as property offences on the shop floor. However, since there are different opinions on whether a first and minor property offence constitutes urgent cause, it must also be accepted that the employer may not leave any doubt as to which policy he advocates in that regard in his relationship with the employee. Precisely because there is a 'grey' area here, the employer must show his true colours beforehand by means of a clear warning that the policy choice in his organisation is not to turn a blind eye to 'minor' property offences and that any contravention of that rule will result in summary dismissal. If the employer does that and subsequently applies and promotes his policy consistently so that the employee is clearly warned that even a first minor offence, in view of the nature thereof, will be regarded as urgent cause, then I am of the opinion that urgent cause is established, barring in very exceptional circumstances. If an employee is expressly and unambiguously warned that even 'petty theft' within the organisation will never be accepted, the word 'petty' loses its exculpatory character. The Supreme Court handed down a judgment at the eleventh hour for the completion of this document which seems to confirm the correctness of that view.

The factor of culpability also has a clear meaning within the aspect of the nature and seriousness of the conduct. If culpability is part of the stated ground for dismissal, it must also be demonstrated. The absence of any form of culpability will have a significant mitigating effect on the assessment in other cases (i.e. when culpability does not form part of the stated ground for dismissal). In the complete absence of culpability, urgent cause will only be acceptable under very exceptional circumstances. It was further established – contrary to what Kuip has argued in his doctoral thesis – that it does not follow from the legislative history that the intention of the legislature was to regard culpability as a *conditio sine qua non* (essential condition) for urgent cause. The case law in this regard is thus also in line with the legislative history and there is moreover no reason for the Supreme Court to depart from this line. There are cases in which summary dismissal must be possible even without any culpability. After all, summary dismissal is not a punitive but rather a measure to safeguard the order in the employer's company.

It may also be concluded in relation to the second aspect within the multi-perspective-based doctrine mentioned by the Supreme Court, namely 'the nature of the employment', that a clear line can be identified in case law. Exemplary functions and positions of trust have an augmenting effect on the assessment because the nature of the position leads to an aggravated mistake. The employee not only demonstrates the misconduct, but thereby also breaches a contractual obligation to act as an example to his subordinates or co-workers or – in case of a position of trust – to be strictly reliable.

If one examines the case law, the third aspect mentioned by the Supreme Court, namely 'the length of employment and how the employee has performed in that position' features unambiguously for the most part in the assessment of urgent cause. The longer the employee has been employed and built up his reputation, the less likely it is that urgent cause will be readily accepted. Contrary to what sometimes happens in legal literature, it must be concluded that this perspective should be regarded as an inextricable whole. It seems less correct from the viewpoint of the prohibition on age discrimination to regard the length of employment separately from the quality of performance as a mitigating circumstance because, by doing so, an indirect distinction is being made based on age. Taking the length of employment into consideration can only be objectively justified by considering it in conjunction with the quality of the work performed and the reputation that has been built up as a result thereof.

Clear lines can meanwhile also be found in the case law as regards the meaning of the aspect of the 'employee's personal circumstances'. Not only work-related, but also strictly private personal circumstances can be taken into account in this regard. However, a lot can be said for attributing less weight in that assessment to personal circumstances as they become further removed from the employment contract, or as the Germans say, have less *Nähe zum Arbeitsvertrag*. Circumstances that are completely private, and not covered by a statutory prohibition on dismissal from which it is clear that the legislature envisaged that the employer would take this into consideration on dismissal, should generally only carry little weight in the assessment.

The Supreme Court expressly mentions the age of the employee as a special circumstance that is to be considered. As in the case of the length of employment, I am of the opinion that this factor should also not be taken into consideration as a separate assessment factor – thus apart from the question of whether this can be objectively justified – because this too creates an impermissible distinction based on age. If age is to be taken into consideration, an objective justification must be found for this purpose, such as poor prospects in the job market because of that age.

The Supreme Court also takes the consequences of dismissal into account and likewise advocates a broad approach in this respect. According to its case law, it is not only special or atypical consequences that may be taken into account, but also the normal consequences of lawful summary dismissal, such as the loss of the right to unemployment benefits, that are relevant to the assessment. It was concluded that it seems appropriate not to lend too much weight to the negative consequences that the law generally attaches to the presence of urgent cause when assessing whether such cause exists, given that it seems somewhat inappropriate to view that which the legislature deems to be appropriate consequences of urgent cause as reason not to accept urgent cause.

Another conclusion that can be drawn is that the employer has the option of alleviating the consequences of summary dismissal by making an arrangement (financial or otherwise) for the employee, upon that dismissal at the latest, by means

of which he can influence the assessment of whether urgent cause exists in his favour. Making such an arrangement does not by its nature preclude the acceptance of urgent cause. To the contrary: it may help the employer.

A study of the case law of the lower courts again revealed clear lines when examining which other personal circumstances are taken into consideration. Mental impairments often weigh in favour of the employee, which is easy to defend certainly if this factor is also work-related in the sense that the employee is employed in subsidised work because of his mental impairment or if the culpability of the conduct is affected as a result. The levels of education, experience and training of the employee are also relevant circumstances according to the analysis of the case law of the lower courts. The education level of an employee can firstly be taken into account insofar as it reduces the culpability of the conduct because an employee who is less qualified, who still has things to learn, or who has limited experience could not fully grasp that what he was doing was wrong. Being less qualified can also play a role in the sense that it results in an employee having poor prospects in the job market and summary dismissal will thus be harder on him in that respect. Although that argument has not come up very often in case law to date, a lot can be said – if the employer has failed in the area of training during the employment and the employee is difficult to employ as a result – for attaching a great deal of weight to that when assessing whether urgent cause exists. According to the published case law of the lower courts, physical and psychological limitations too are personal circumstances that are often taken into consideration. They feature in two ways. On the one hand, these limitations may result in the employee being more difficult to employ in the job market, as a result of which the dismissal will be even harder on him, while, on the other hand, they can mitigate or even eliminate the culpability of the conduct.

It may lastly be concluded that the impression created by the case law of the lower courts is that the employee's family status and problems, even if serious in nature, will not swiftly lead, in principle, to a finding that there is no urgent cause. This case law confirms that different weight is attached to personal circumstances, when assessing if there is urgent cause, depending on whether or not a link can be established between those circumstances and the job/employment contract.

As a corollary of the conclusion that it follows from case law that there is a difference within the category of the 'personal circumstances' perspective in the relative weight of different personal circumstances, depending on the greater or lesser extent to which they are related to the employment contract, it was also examined whether it can perhaps be stated more generally that there is grading in the relative weight of the aspects listed by the Supreme Court within the framework of its 'multi-perspective-based case law'. It is generally accepted in the legal literature to date that such a ranking does not exist. However, from a close reading of both the manner in which the Supreme Court has formulated that criterion and the application thereof in the case law of the lower courts, there seems to be a strong argument that the Supreme Court's catalogue of aspects should not be understood in this way. In my opinion, the aspects listed by the Supreme Court are not intended to be equivalent. It rather

seems as though there is a ranking in this regard that is broken down into three categories. The 'nature and seriousness' of the urgent cause is the central, and thus always the first, perspective to which the greatest weight is thus also relatively assigned in the weighting and from which the assessment commences. If there is a serious mistake that by its nature justifies serious reproach, then – one could say – the tone of the debate is set to the detriment of the employee. The other circumstances will then not readily affect the existence of urgent cause. There is then a second surrounding 'skin' of perspectives that are directly related to the employment contract. These are also of great importance but relatively of somewhat less importance than the key perspective. The employee's personal circumstances must lastly also be taken into account, but relatively carry the least weight, certainly as they become further removed from the employment relationship.

The aforementioned ranking obviously does not involve a difference in weight among the three categories of perspectives that is always the same and capable of being expressed in hard figures. It is rather a 'thought model' whose purpose is to guide the assessment and to ensure that the focus remains on the crux of the matter, namely to what extent it can no longer be demanded, from the viewpoint of the employer under labour law, to have the employment contract continue. The key question in that regard is into the nature of what the employee did (first 'skin') as viewed against the background of the special characteristics of the employment contract in the specific case, such as the nature and length thereof and how the employee has performed his tasks (second 'skin') and in which the employee's personal circumstances lastly also play a role (third 'skin'), although the latter can only play a less prominent role in the weighting, especially as they become further removed from the employment relationship. This does not alter the fact that in certain distressing cases, certainly those in which the direct work-related circumstances do not already weigh too heavily, such personal circumstances can mean that urgent cause may not be accepted to exist.

In view of the above, it is therefore concluded that the multi-perspective-based case law, as applied by the Supreme Court, has not led to increased uncertainty, but rather created an expedient framework for appraising cases that contributes towards the predictability of the assessment. In my opinion, the criticism that this method of developing the law – the multi-perspective-based approach – has attracted in some other areas does not hold water here. The content of the perspectives listed by the Supreme Court, certainly against the background of the case law of the lower courts, is plainly clear in broad lines and does seem to introduce a certain ranking in the specific weight of the different perspectives. That too contributes towards the predictability of the outcome of the assessment to be performed.

Further improvement is however possible. Firstly, the debate regarding urgent cause can become clearer by dispensing with the distinction made in legal literature and case law between a 'subjective' and an 'objective' urgent cause. This involves a pair of concepts that is currently given all kinds of different meanings – which in itself leads to confusion and a lack of clarity. Regardless of which of those 'doctrines' is followed, the distinction is furthermore inaccurate or at best outdated. The distinction

is outdated if one takes subjective urgent cause to entail the requirement of immediacy, because that requirement does no longer form part of the concept of urgent cause since the Dutch Flexibility and Security Act, which entered into force on 1 January 1999, but is since then a separate statutory requirement that stands on its own legs alongside the requirement of urgent cause. It is included as a separate requirement in Section 7:677 DCC. The distinction is inaccurate if one takes 'objective' and 'subjective' urgent cause to mean that there can only be urgent cause if conduct qualifies both in general (objectively) and in the circumstances of the specific case (subjectively) as urgent cause. This fails to recognise that the Supreme Court advocates an approach in which all that is decisive is whether urgent cause is a given in the concrete circumstances of the case. That can also be the case if the conduct 'objectively' – i.e. generally – does not qualify as such. Few people will accept that eating a handful of peanuts constitutes urgent cause but that may, as the case law has shown, qualify as such in the circumstances of the case.

Secondly, and this is not a purely terminological issue, it would be good if the Supreme Court were able to find its way back to more activism in the area of urgent cause by formulating more rules of thumb and sub-rules in that field than the Supreme Court has done in recent years. It is evident from a study of its case law that the Supreme Court has allowed a significant slackening of the reins in that area, certainly and especially after the catalogue of perspectives was formulated in 1999, in comparison with the 'glory days' of the 1970s and 1980s when the Court set several of such rules each year. However, that catalogue cannot serve as a replacement for creating rules of thumb or sub-rules, for it is precisely through the combination of a clear set of such rules and working with perspectives that there are gains to be made. The two control mechanisms are complementary. Rules of thumb can mainly serve to give direction to the appraisal of the first and most important perspective in the assessment – i.e. the nature and seriousness of the conduct – after which further elaboration and adjustment can take place on the basis of the other circumstances which, as stated, have meanwhile become clear.

If the Supreme Court were to increasingly formulate rules of thumb and sub-rules again, practice would benefit from this in various ways. By first and foremost stating and emphasising a rule of thumb, one can prevent a judgment of the Supreme Court – that remedies a ruling of the appeal court in which, on the basis of the special circumstances of that case, there was a deviation from the main rule that applied to the exhibited conduct (in the case law of the lower courts) – from being misunderstood in practice as a change in or correction of course instead of as an exception that confirms the rule. Secondly, rules of thumb can contribute towards creating clarity and certainty in areas where dissension predominates in the case law of the lower courts regarding the assessment that must be made of certain conduct under labour law, such as for instance in the area of sexual intimidation. Finally, formulating such rules is a good way of preventing long-term dissension in the case law of the lower courts, and the associated uncertainty, when there are new labour law developments. There must be more scope for more activity in this area, particularly at a time when the emphasis of the Supreme Court is on its duty to develop law and the new

possibility of referring questions for a preliminary ruling to the Supreme Court gives judges the opportunity when there is dissension in the case law of the lower courts to end this by means of a question to the Supreme Court.

A third recommendation to further guide and refine deliberations on urgent cause is to increasingly place the assessment of whether urgent cause exists in the context of the principle of good employment practices. It may be argued that the assessment of whether urgent cause exists, just as the assessment of whether manifestly unreasonable dismissal exists, produces a derivative of Section 7:611 DCC – the obligation of the employer and employee to act in line with the requirements of reasonableness and fairness – but it must at least be held that the provisions of Section 7:611 DCC play a very prominent role in that assessment. After all, Section 7:678(1) DCC, i.e. the statutory description of urgent cause, requires a reasonableness test under labour law and the Supreme Court already ruled in the *Parallel Entry* judgment of 2004 that Section 7:611 DCC is nothing more than the labour law derivative of what reasonableness and fairness require. It is therefore obvious that the concept of 'reasonably' in Section 7:678 DCC must be interpreted along the lines of (i) the provisions of Section 7:611 DCC and thus also (ii) according to the principles that feature via that link in the employment contract. The ruling of the Supreme Court in the *Schrijver v Van Essen* judgment, namely that a valid summary dismissal cannot be manifestly unreasonable on account of its consequences (Section 7:681(2)(b) DCC), because that 'consequences criterion' is already entrenched in the assessment of whether urgent cause exists, read in conjunction with the doctrine adhered to by the Supreme Court according to the judgment of the *Van der Grijp v Stam* case, namely that the consequences criterion is a derivative of Section 7:611 DCC, also encourage that approach. To put this even more succinctly, given that the question of whether a dismissal is manifestly unreasonable is, on account of the consequences criterion, a derivative of Section 7:611 DCC and that criterion, in turn, is entrenched in the assessment of whether urgent cause exists, there is thus an inescapable conclusion that Section 7:611 DCC is incorporated in the assessment of whether urgent cause exists.

As a corollary of this, the role played by a number of different legal principles – which are accepted in legal literature and case law to govern the employment contract via Section 7:611 DCC – in assessing whether urgent cause exists, was also examined.

It was stated first and foremost in this regard that the infringement of such a principle generally does not always have to mean that there is 'thus' automatically an infringement of the standard of good employment practices, so that urgent cause 'thus' cannot be accepted. An exception applies in case of an infringement of the principle of proportionality [*evenredigheidsbeginsel*] and with regard to the duty to give reasons [*motiveringsbeginsel*]. As the multi-perspective-based approach prescribed by the Supreme Court for assessing whether urgent cause exists actually boils down, in its entirety, to a review of proportionality, I am of the opinion that urgent cause cannot be accepted if that principle is infringed. The use of the measure of summary dismissal must always be a proportional measure. In other words, compliance with this requirement is not a separate perspective within the assessment of

whether urgent cause exists, but the entire assessment is in fact a review of proportionality. Testing against the duty to give reasons does not take place so much within the assessment of urgent cause, but more within the context of the notification requirement. After all, that requirement impels the employer in case of dismissal to clearly motivate why he is dismissing the employee and to also demonstrate that reason.

However, the other sub-principles of good employment practices that are distinguished in doctrine and legal practice, such as the principle of equality, the principle of transparency of purpose and the principle of legitimate expectation, do produce relevant perspectives within the context of weighing up all circumstances of the case to determine whether an urgent cause exists. What is more, testing against those principles does offer a good framework in which to place and classify questions that regularly emerge in practice when assessing the lawfulness of summary dismissal. For instance, the significance of contractually recording urgent cause can be placed in the context of the principle of legitimate expectation, while the principle of transparency of purpose provides a good point of reference for thinking about the meaning of 'tactical/improper motives' for the purpose of assessing the lawfulness of summary dismissal.

There is finally also a clear framework for the duty of assertion and the burden of proof in relation to urgent cause. This involves the duty of assertion and the burden of proof in relation to urgent cause both resting with the employer. Contrary to what is sometimes argued in literature, this does not mean that the employer has the duty of assertion and the burden of proof in relation to all facts and circumstances that can – and if put forward: must – be involved in the final assessment of whether urgent cause exists. The employer's duty of assertion is determined, in principle, by the combination of facts and circumstances that he puts forward as urgent cause. If the employee does not accept the dismissal, the employer will have to demonstrate the facts and circumstances that he relied on as the ground for dismissal. Translated to the doctrine from the *Schrijver v Van Essen* judgment, this means that the employer will have to assert and – in case of a reasoned challenge – demonstrate all those perspectives/aspects that in his opinion, as evidenced by the ground for dismissal he notified the employee of, provided reason to give notice of dismissal. The employer cannot use more in legal proceedings to convince the Court that urgent cause exists than what the employee was immediately clear about having played a role in the employer finding urgent cause during the dismissal. And at the same time that defines his duty of assertion and burden of proof. The employer does not have to demonstrate more than the actual substrate of relevant perspectives that he put forward as urgent cause. If the employee is of the opinion that there are other perspectives which have such a 'mitigating effect' on the assessment that the stated facts and circumstances no longer constitute urgent cause, he can tailor his defence to that by in turn asserting those facts and demonstrating them, if necessary. That burden of proof will not lead to problems in practice because it will mostly relate to facts and circumstances of a personal nature, or which relate to the length of the employment, and are easy for the employee to demonstrate. If the employee relies on mitigating facts and circumstances that lie

within the employer's domain, for instance the fact that another employee was not dismissed in the past for comparable conduct, resulting in breach of the principle of equality or of legitimate expectation, then it stands to reason – both with reference to the starting point that the employer must demonstrate that the dismissal was legitimate and in light of the compensation for inequality that generally forms the basis of labour law – that the Court will readily assist the employee by burdening the employer with a heavier duty to contest such a point, or even burdening him with having to prove that there has been no inconsistency with the principle of equality or legitimate expectation.

All in all, when viewed across the board, there is a case law structure that applies to urgent cause, which cannot be said to lead to an unacceptable degree of legal uncertainty. In essence, it amounts to the following: while it is true that it cannot always be said in advance with absolute certainty whether or not urgent cause exists, there are a number of distinct basic principles and a well-defined assessment framework with perspectives/aspects whose meaning and relative weight are clear. In many areas, there are moreover clear lines in the case law of the lower courts in relation to the classification of certain conduct under labour law, or rules of thumb/sub-rules of the Supreme Court in relation to certain types of conduct. Further gains can be made if the Supreme Court – certainly where there is a lack of clear lines for the appraisal of a specific form of misconduct – were to become more activist (again) by elaborating the central perspective (i.e. the nature and seriousness of the conduct) by means of rules of thumb, and by placing the assessment of urgent cause more firmly in the context of the principle of good employment practices. Due care must take precedence when using the heaviest weapon of employment termination law and justice can only be done to that if it is also assessed whether the existence of urgent cause is compatible with fundamental legal principles. Yet even if the two aforementioned suggestions are taken on board, there will always be – and must continue to be – a certain degree of uncertainty when assessing whether urgent cause exists. That remaining uncertainty is not a sign of weakness but of strength, namely the strength to be able to depart from the main rule in an individual case if that is necessary for a fair outcome.

The above implies that there is no great, let alone unacceptable degree of legal uncertainty with regard to any of the three sub-requirements for lawful summary dismissal. Nor are these requirements impractical in any other way. The case law does not require any rash decision by the employer and gives him time, based on a framework that is, broadly speaking, adequately clear, to assess whether summary dismissal is possible. Those who only use this measure for its real intended purpose, namely only in truly evident cases, will certainly seldom go wrong, leaving aside the fact that any incidental error in the first instance can be remedied on appeal. The proceedings in which summary dismissal is tested are proceedings on the merits covered by all guarantees, including appeal and cassation. If an employer reserves summary dismissal for extreme cases, he will hardly ever be caught unawares in proceedings. However, the employer that acts without thinking when instantly

dismissing someone, for instance in the heat of the moment over a trivial matter, must look inwardly at himself and not at the judge when he loses in court.

The future of summary dismissal: abolish or retain?

Although the measure of summary dismissal works in an adequately clear and predictable manner, as can be seen from the above, various calls have been made in the last few decades to abolish that form of dismissal altogether. Proposals include replacing the measure of summary dismissal with a system by which an employer who believes he has urgent cause can henceforth only apply in those cases to the court for dissolution on grounds of Section 7:685 DCC. The substantiation of such proposals includes the argument that summary dismissal is a 'form of taking the law into one's own hands' which can lead to unnecessary suffering. By making the decision on the existence of urgent cause subject to prior testing by the court with the power to terminate the employment contract, the defamatory effect of summary dismissal can be brought to an end. There would moreover be definitive certainty, without the possibility of appeal, very quickly. After all, appeal is excluded in proceedings under Section 7:685 DCC. Another objection that is raised to summary dismissal is that it is the employee who must take action afterwards, even though it is the employer who has terminated the employment contract unilaterally. The possibility of termination without a notice period is also argued to be a rather objectionable departure from the normal rules of Dutch contract law. Others have commented that summary dismissal is also an outdated measure. A 'brutal' weapon such as summary dismissal – in respect of which parallels with the death sentence have even been drawn – is said to be incompatible with modern HRM policy. Other authors go even further and argue that summary dismissal can only lead to 'bitterness and criminalisation' both of the employee involved and his financial dependants. Another argument that is made against summary dismissal is that it is a normal business risk for an employer who buys the 'commodity labour' that employees turn out not to meet expectations. According to these last authors, it is nothing more than a normal 'professional risk' if an employer must continue for some time to pay the salary of an employee who has given him urgent cause. These are the arguments of the advocates in favour of abolishing summary dismissal.

If I assess this properly, those in favour of abolition have always remained in the minority. Many authors have argued for retaining summary dismissal. I agree with this. The arguments for retaining the system outweigh those for abolishing it. I summarise my opinion as follows.

Firstly there is the idea that the 'advantage' of only having urgent cause assessed in dissolution proceedings under Section 7:685 DCC, is that this quickly leads to definitive certainty. However, 'every advantage has its disadvantage' and that Dutch proverb also applies here. The disadvantage is the great degree of deficiency in proceedings under Section 7:685 DCC, in which there is no right to produce witness testimony and no possibility of appeal, except in a very limited number of exceptions. The case in which the decision of the court (with the power to dissolve the employment contract) is entirely incorrect or incomprehensible does not fall under

these exceptions. Defective proceedings cannot suffice, especially when a ruling on the question of whether urgent cause exists is so important for both parties. The employee is entitled to expect that an employer who wishes to dismiss him for urgent cause actually furnishes such evidence, whilst the employer is entitled to being given the opportunity to do so. I am also of the opinion that it is moreover not appropriate to take away the possibility of further review on appeal for an employee in respect of a ruling that is so far-reaching and defamatory as the decision as to whether the employee must leave for urgent cause. The nature of such a ruling is so far-reaching that there is a strong need for the possibility of review on appeal. Insofar as the argument that urgent cause should only lead to dissolution proceedings is based on the idea that this can prevent long-term uncertainty about the lawfulness of the dismissal, I do not find that idea – and accordingly also the argument – to be sufficiently convincing. My findings do not point in the direction that the lawfulness of summary dismissal is largely unpredictable.

Another disadvantage of the proposal to only have urgent cause assessed in dissolution proceedings is that the employer will have to continue paying the salary pending the outcome thereof, except in very exceptional circumstances. After all, in the *Van der Gulik v Vissers* judgment of 2003 the Supreme Court held that suspending or placing the employee on leave of absence constitutes a reason for not performing work that falls within the employer's sphere of risk and, as such, the employer is obliged to continue paying the employee's salary. That main rule can only be set aside under very exceptional circumstances, for instance if there is another reason for not performing the work that falls within the employee's sphere of risk, such as if the employee is not only suspended but also arrested, or if it can be argued that a claim to salary is unacceptable according to standards of reasonableness and fairness. The latter can only be successfully argued under very exceptional circumstances. I find this consequence of the proposal to only have urgent cause dealt with in dissolution proceedings to be unacceptable. In fact, it rewards conduct that is unacceptable under labour law: a few months of 'paid leave' as a mandatorily prescribed 'reward' for a serious misstep under labour law. The legislature has never been in favour of such a 'reward' for urgent cause. On the contrary, it follows from the provision of Section 7:677(3) DCC that the legislature rather assumes the liability of the employee for compensation if urgent cause arises because of intent or fault.

Furthermore, the argument made in legal literature that an approach in which urgent cause can only be applied by the Court as a ground for dissolution places an unnecessary burden on the judiciary holds water, as practice shows us that in many cases the employee in fact resigns himself to summary dismissal because he accepts the correctness thereof. This is also entirely in line with the rationale behind the notification requirement that is entrenched in Section 7:677 DCC, which aims to give the employee the chance to consult on whether he accepts the stated ground for dismissal as correct and as urgent cause, or whether he opts to defend himself against it. There is no information available regarding the number of summary dismissals that do not end in proceedings because the employee accepts his dismissal or because the case is settled. However, if my own practice and that of my colleagues at my law firm is

anything to go by on this point in general, I assume that the majority of summary dismissals does not end up in court.

I am further not convinced by the argument, as mentioned above, that the phenomenon of summary dismissal in which one party is entitled to terminate an agreement without due observance of a notice period, and without the obligation to make any further payment, is incompatible with general contract law. This is not because I believe – as some other labour law jurists argue – that labour law should not be approached from an excessively private law angle, but rather because I do not see why termination with immediate effect would be incompatible with general contract law. It follows from the case law on the termination of continuing performance contracts *[duurovereenkomsten]* that the question of whether these can be terminated and, if so, under which conditions if the parties have not reached a contractual arrangement, is governed by reasonableness and fairness. This may imply that a contract can only be terminated if there is a compelling reason, or even urgent cause, to do so. It may also imply that termination is only allowed if a sufficiently long notice period is observed. In light of this, it fails to be seen why reasonableness and fairness cannot result, where there are compelling circumstances, in a continuing performance contract being terminated with immediate effect and without any obligation to pay further compensation. That possibility has therefore been accepted by the Supreme Court. If there is a serious form of breach of the obligations under a continuing performance contract, and one party disrespects the other party's interests, that contract may be terminated without any notice period or the obligation to pay compensation. I would therefore rather turn the argument around: rejecting the possibility of summary dismissal would result in labour law being out of step with general civil law. By retaining summary dismissal, employment termination law remains in line with what applies in the general law of obligations. Certainly for as long as employment termination law is part of civil law and forms part of the layered structure of the Dutch Civil Code, there is much to be said for aiming for such uniformity, unless there are really convincing arguments for departing from what generally applies in civil law. There are no such arguments in my opinion.

I do not share the view that it would be inconsistent with the standards of modern HRM policy for a good and rational employer to summarily dismiss an employee from one day to the next either, just as I do not concur with the rather exaggerated comparison with unrefined punishments, such as the death penalty, that were abolished here many years ago. That summary dismissal is a less 'primitive' and 'outdated' measure than some authors would like us to believe is *inter alia* evident from the fact that this legal concept (with some minor differences) can be found in all labour law systems and – in any event – in the legal systems of our neighbouring countries. This certainly does not give the impression that we are dealing with an archaic, outdated relic from bygone times. If summary dismissal were so completely outdated, it would surely have been abolished in some places. That is not the case and from my examination of the law of our neighbouring countries, I have also not come away with the idea that abolition is on the cards there or that the measure of summary dismissal would not be applied there any longer in practice because it is

regarded as a *lex barbarorum* (barbarian law). The finding that summary dismissal also applies in our neighbouring countries is not only important because it detracts from the credibility of the argument that summary dismissal is an outdated and objectionable measure. Of at least equal importance is the finding that abolishing the legal concept of summary dismissal would result in Dutch employment termination law being out of step with what is internationally accepted and customary and thus (even) less easy to interpret than is currently the case. The fact that – unless an urgent cause exists – permission from the government is generally needed in the Netherlands to give notice of termination of an employment contract is already difficult to understand for foreign companies that are established in the Netherlands (or intending to become established there). That lack of understanding will only increase if an employer cannot dismiss an employee immediately and at no cost when that employee is guilty of gross misconduct, but must instead initiate costly proceedings and continue to pay the employee's salary for months, while he is on leave of absence pending the Court's decision.

I now come to the next important argument against the abolition of summary dismissal. Contrary to what is sometimes argued in legal literature, I do not see what would be 'irrational' about dismissing an employee without any further payment and with immediate effect, where that employee, by entering into the employment contract, has undertaken to loyally serve the interests of the employer and has always received the agreed salary for that purpose, month in, month out, and yet still puts his hands in the till, gives away company secrets to a competitor, assaults a manager or contravenes safety rules. I would rather think that it is irrational to require of an employer not to immediately dismiss such an employee. This has not even primarily to do with the financial side of the matter, but with the fact that the employer is responsible for maintaining proper order within the company, as laid down in the provisions of Section 7:660 DCC, among others. By reason of the employment contracts that he enters into with his personnel, the employer is 'superior' to the employees. That relationship of authority is even one of the essential aspects of the employment contract (Section 7:610 DCC). It is important not to lose sight of the fact that the employer's authoritative power to maintain order within the company does not only serve the interests of the employer's company and its continued existence but also the interests of its personnel. In other words, instructions that are given to promote order in the company on the basis of Section 7:660 DCC generally also serve in the interests of the colleagues of the employee who is given those instructions. The fact that maintaining order within the company must not only be seen as being in the employer's commercial interest applies all the more, given that the employer is subject to a significant statutory duty of care for the safety and welfare of its personnel, partly on the basis of Section 7:658 BW – the statutory obligation of the employer to ensure that the employee does not suffer any harm in the performance of his duties – and partly on the basis of Section 7:611 DCC, the obligation to act as a good employer. In order to be able to comply with those duties of care, the employer must have the power to give instructions to his personnel. The employer can only comply with his obligation to create a safe working environment if he can call his employees to order and prescribe rules which they must observe. This

is obviously very clearly expressed, for instance, when it involves safety rules laid down by the employer, such as a ban on smoking. However, one can also think about rules that prohibit sexual intimidation. But the matter extends further than that. Even in relation to other forms of 'immoral conduct', such as fraud, the employer has the right and interest, on the basis of his duty of care towards the personnel, to take corrective action whenever such misconduct occurs. A lack of action against the spread of immoral conduct within the company can lead to an unhealthy working environment, which may have repercussions for the individual employee. In addition, a company whose workforce is involved in large-scale fraud and other misconduct will generally not be viable in the long term. Minimising that risk not only serves the commercial interests of the employer but ultimately also the interests of the personnel and their jobs.

Viewed from this perspective, maintaining order within a company is not only a right but also an obligation of the employer, which he must also comply with in the interests of his personnel. And that is where summary dismissal plays an important role. The employer namely needs coercive measures in order to be able to credibly maintain order within the company. Just as the right of collective bargaining without the right to strike quickly becomes 'collective begging', the right – and obligation – of the employer to maintain order within the company without credible threats of strict measures will turn into begging to 'please' act as befits a good employee. Case law shows, to say it in rather euphemistic terms, that such polite requests do not achieve the required result in all cases. The threat of a powerful weapon is inescapable. Summary dismissal fits that bill perfectly. The fact is that its use will have a far stronger indirect effect than that of a normal dismissal procedure, such as dissolution proceedings. The opponents of summary dismissal refer to its 'defamatory effect'. Defamation means to expose. I agree with them that this is surely a consequence of summary dismissal. Summary dismissal indeed has a 'defamatory effect' in the sense that it is discussed within the organisation where it takes place. There is generally quite a commotion when someone has to empty his desk from one moment to the next. However, is that a consequence which by its very nature and definition is as undesirable as the critics of summary dismissal want us to believe? On the contrary, the fact that summary dismissal exposes the conduct of an employee, and it becomes the talk of the day, means that the fact that this specific conduct will not be tolerated is firmly imprinted in the minds of the personnel, which in turn helps in the general prevention of future misconduct.

It is precisely by using the weapon of summary dismissal that the employer can show who is 'boss' in exceptional cases. That sounds antiquated, but it is not. As stated above, having proper order in the company is not only in the interests of the employer but also of those who work there. Furthermore, who should the employee who has correctly been summarily dismissed look towards in relation to the defamatory effect of his dismissal? Not the employer, but himself.

In conclusion, it is my opinion that the existence of the legal concept of summary dismissal can also serve a useful function in the sense that it may contribute towards

the employability of especially those employees who have a tarnished reputation, such as – by way of example – former prisoners. Especially in cases where an employer must make the difficult assessment of whether he wishes to offer such an employee a second chance, in spite of the associated risk for the company, the certainty that the employee can be dismissed without further obligations and procedures if he seriously misbehaves – despite all good intentions – may lead to the employer daring to take that risk. In other words, the certainty that there is an 'emergency exit' may contribute towards the employer sooner agreeing to hire somewhat 'risky' employees.

In that regard, I also find the argument that the employer may simply be expected to keep an employee who has given him urgent cause for dismissal employed until a Court rules on that urgent cause, on grounds of it being a 'normal business risk/ professional risk' for an employer to run if he hires personnel, somewhat too simplistic. Leaving aside the fact that the content of that argument is mainly on 'blaming the victim' and is also, as shown above, incompatible with what generally applies to business owners in case of commercial continuing performance contracts, this apparent employee-friendly position will not necessarily lead to socially desirable outcomes. In the absence of the safety net of summary dismissal, 'the commodity labour' can become so unmarketable that the employer may simply decide not to 'acquire' or 'hire' it. With such protection, those who are the least employable will make little progress in the job market.

Having regard to the above, I conclude that there are many strong arguments for retaining summary dismissal in its current form. It is a completely rational way for the employer to enforce his authority and – both in the interests of its company and in the interests of its personnel – to impose order and a sense of values on the work floor. It serves the interests of general prevention. Retaining summary dismissal moreover ensures that Dutch employment termination law does not become out of step – or further out of step – with the dismissal systems in our neighbouring countries and that it remains explainable. Retaining summary dismissal also contributes towards the *Gleichlauf* (harmonisation) of labour law with that which generally applies to the termination of continuing performance contracts. Moreover, and this was instrumental in the introduction of summary dismissal in the drafting of the Dutch Employment Contract Act, it does not make sense for an employer to have to make further payments, such as wages during the notice period, if the employee has given him urgent cause for dismissal. That legal consequence would be anything but fair. In conclusion, therefore, summary dismissal is worth retaining, even if employment termination law were to be amended.