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Broad application of the training cost rule in the Netherlands

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Abstract
A Dutch court has interpreted the national implementation of Art. 13 of the Directive on Transparent and Predictable Working Conditions, finding in favour of a high level of protection of workers against employers' claims for training cost compensation.

Keywords
transparent and predictable working conditions, training costs, the Netherlands, case law, TPWCD

Case note: Court of central Netherlands of 28 June 2023 (ECLI:NL:RBMNE:2023:3415)

On 28 June 2023, the Central Netherlands District Court ruled on the so-called study costs clause, laid down in Art. 7:611a of the Civil Code, which transposes Art. 13 of Directive 2019/1152 on Transparent and Predictable Working Conditions in the EU[1] (hereinafter the Directive).[2] This is one of the first rulings[3] in the Netherlands in which a substantive assessment has been made of the obligations arising from the Dutch Transparent and Predictable Working Conditions Act. Therefore, the judgment merits a closer look.

1. According to Art. 13, 'Member States shall ensure that where an employer is required by Union or national law or by collective agreements to provide training to a worker to carry out the work for which he or she is employed, such training shall be provided to the worker free of cost, shall count as working time and, where possible, shall take place during working hours.'
2. Directive 2019/1152 of 11 July 2019.
3. Judgments referring to Article 7:611a (new) of the Dutch Civil Code have already been handed down, but have not contained a substantive assessment of the new legal provision and its formation.

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The case

An employee[4] worked for an employer on trial placement organised by the social security body in charge of unemployment insurance (UWV) in September 2019. The employer was a company involved in the inspection, analysis, and documenting of asbestos. It concluded an employment contract with the employee with effect from 10 November 2019. A number of agreements were concluded between the employer and the employee regarding the employee's attendance at training. In September 2019, this included an internal training course to become an asbestos inspector/analyst. The cost of the training was, according to the employer, EUR 5,000. On 29 January 2020, the agreement included an external training course, the cost of which amounted to EUR 2,060, and an internal training course to be held on the same day that cost EUR 15,000. With regard to all these training courses, an agreement was concluded between employer and employee, stipulating, in short, that if the employee left within three years of completing the training,[5] the employee must repay part of the training costs. According to the graduated scale used, 100% of the cost had to be repaid in case of resignation within one year of training, 66% had to be repaid on resignation one to two years following training, and 33% had to be repaid if the employee left two to three years after completing the training. In case of a later resignation, nothing more needed to be paid.

The employee terminated his employment contract as of 1 November 2021. He was then still entitled to back pay and payment for annual leave not taken (totalling EUR 7,778.11), but the employer wanted to offset these claims against the training costs to be reimbursed. The employer also demanded payment from the employee of EUR 5,257.98. The subdistrict court judge granted the employee's claims and rejected the employer's claims.

Commentary

As far as the application of the Directive on Transparent and Predictable Working Conditions and the Act implemented for this purpose in the Netherlands are concerned, the following aspects are relevant.

The Directive provides in Art. 13 that Member States shall ensure that where the employer is obliged under Union or national law or collective agreements to provide his employees with training to perform the work for which they have been recruited, this training will be offered free of charge to employees, will be considered working time and, if possible, will take place during working hours.

Recital 37 to the Directive reads as follows:

> Where employers are required by Union or national law or by collective agreement to provide their employees with training to perform the work for which they are employed, it is important to ensure that such training is provided equally to all employees, also to people with atypical forms of work. The costs of such training may not be borne by the employee or deducted or deducted from his salary. Such training should be counted as working time and should, if possible, take place during

4. The judgment concerned two employees, but I will limit myself to discussing one of the cases.
5. The conditions were not entirely clear: sometimes a period after 'obtaining the diploma' was mentioned; on other occasions reference was made to a period 'after entering employment' or 'enjoying the training' [should this be 'completing the training'?].

> working hours. This obligation does not apply to vocational training or courses that workers are required to follow in order to obtain, maintain or renew a professional qualification, as long as the employer is not obliged to offer it to the worker under Union or national law or a collective agreement. Member States must take the necessary measures to protect workers against abuse in connection with training.

Article 7:611a of the Civil Code with which the Netherlands has implemented this Directive reads as follows (own translation):

> 1. The employer enables the employee to follow training that is necessary for the performance of their job and, insofar as this can reasonably be expected, for the continuation of the employment contract if the employee's job is terminated or they are no longer able to fulfil it.
>
> 2. Where the employer is obliged under applicable Union law, applicable national law, a collective labour agreement, or a scheme by or on behalf of an administrative body competent for that purpose, to provide its employees with training to perform the work for which they have been engaged, the training referred to in paragraph 1 shall be offered free of charge to employees, shall be considered working time and, if possible, shall take place during the times when work has to be performed.
>
> …
>
> 4. A clause under which the costs of training referred to in paragraph 2 are recovered from or offset against financial income arising from the employee's employment is null and void.

There has been discussion in Dutch legal literature of the question as to what training should be provided by the employer free of charge, without the possibility of reclaiming expenses, and as much as possible during working hours. Two responses to that question have been proposed: (answer A) 'only the specific training courses that are mandatory under applicable Union law, applicable national law or a collective labour agreement' [mentioned in Art. 7:611a paragraph 2] or (answer B), in addition, all other 'training that is necessary for the performance of their position and, insofar as this can reasonably be expected, for the continuation of the employment contract if the employee's position expires or they are no longer able to fulfil it' [mentioned in paragraph 1]. In other words: does 'national law' (as referred to in paragraph 2) also include the provision (of paragraph 1) on the basis of which the employer is generally obliged to offer training that is necessary for the performance of the position, or for improvement in performance, or for relocation?

It has been argued, with reference to the specific legislative history in the Netherlands, that the broad approach of answer B should be followed.[6]

The subdistrict court judge in the case at hand agreed with that view, based on the following considerations:

(i) When it comes to internal training, the employer may only claim the actual costs, without a profit surcharge. In this case, the amount of the training costs had not been substantiated.

6. See Gerrard Boot and Joanne van Gool, Wie moet studiekosten betalen sinds de Wet Transparante Arbeidsvoorwaarden? Tijdschrift voor Arbeidsrecht in Context, 2023-1.

(ii) According to older Dutch case law,[7] the employee must be aware of the obligations they undertake when entering into an agreement obliging them to repay (part of) the training costs in the event of early departure. In this case, it had not been shown that the employee, who incurred a debt of more than EUR 22,000 in less than five months, was aware of this.
(iii) The law, which entered into force in the Netherlands on 1 August 2022, contained no transitional provisions and therefore had immediate effect. This meant that an agreement to reimburse study costs that was entered into before 1 August 2022, but for which the study costs incurred were claimed after 1August 2022, would fall under the scope of the new law.
(iv) The training provided by the employer pursuant to Art. 7:611a paragraph 1 of the Dutch Civil Code (concerning general, non-specific training) fell within the scope of paragraph 2, which meant that recovery by the employer of the costs incurred on the basis of paragraph 4 was not permitted. Because this case concerned training that was necessary to do the job properly, according to the employer, the recovery of the training costs by the employer was not permitted.
(v) The exception that applied here according to Dutch parliamentary history, that this case concerned training that employees were required to have when they first started work, did not apply here.

The way in which the Netherlands has implemented the Directive, namely, by enforcing a general legal provision under which the employer is obliged to offer training in certain cases, is unique. By enforcing that general provision, the scope of what has been transposed as paragraph 2 of the Dutch law has been enormously expanded. The Netherlands could probably also have chosen to delete the then existing paragraph 1 when introducing the Act, and to stipulate that the provision by the employer of free training, where possible during working hours, without the possibility of the recovery of costs, was limited to the cases provided for in Art. 13 of the Directive, namely, where such training is necessary based on specific provisions of Union or national law or collective agreements. That, fortunately (at least from an employee perspective), did not happen.

I would like to focus on consideration (v) of the subdistrict court judgment, namely, that its interpretation did not concern training that employees were required to have completed when they first started working. According to Dutch parliamentary history, in the case of so-called mandatory starting qualifications, any training undertaken by the employee may be charged to that employee. Where is the line between a 'mandatory starting qualification' (in which case the training costs can be recovered) and 'other compulsory training' (for which this is not possible)? Suppose an employee is employed by a company as a truck driver, but does not yet have a truck driving licence. If the employer offers to pay the costs for such a licence and to give the employee other work for a while (for which a truck driving licence is not required), does that mandatory truck driving licence constitute a starting qualification, in which case the recovery of training costs would be possible? Does this fall under the exception mentioned in Recital 37 of the Directive ('That obligation does not cover vocational training or training required for workers to obtain, maintain or renew a professional qualification as long as the employer is not required by Union or national law or collective agreement to provide it to the worker')? The subdistrict court judge did not answer that question, because the judge was of the opinion that the cased did not

7. Supreme Court 10 June 1983, ECLI:NL:HR:1983:AC2816, NJ 1983/796.

concern specific functions as included by the Dutch Government in the 'Regulations on the establishment of a list of regulated professions'.

The outcome of the ruling of the Central Netherlands District Court is certainly justifiable. The employee, who joined a company through the employment office, was in danger of being saddled with a debt of several thousand euros after working there for two years. The downside self-evidently relates to the situation of a company making costly investments in an employee's training, just to see the employee, thus enriched, leave shortly afterwards, possibly even to work for a competitor. However, the European legislator has made a choice in this regard: the employer will have to try to retain the employee in a different way, for example, by creating a favourable working environment and offering the employee sufficient prospects for further development. And of course, the latter is only positive.

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