

**SUMMARY OF THE CHANGES  
IN DUTCH DISMISSAL LAW  
*(Wet werk en zekerheid)***

**BarentsKrans Employment Law Department**

**April 2015**

## **CONTENTS**

**Introduction**

**Part I: Current System**

**Part II: New Rules**

**Part III: Transitional Provisions**

**Part IV: Summary**

**Annex:** Examples - comparing ABC Formula,  
transition compensation pre-2020 and  
transition compensation post-2020

## INTRODUCTION

In 2014, Parliament adopted two laws collectively known as WWZ (*Wet werk en zekerheid*).<sup>1</sup> WWZ amends Dutch dismissal and unemployment law quite radically.

WWZ essentially represents the conversion into law of an agreement (*sociaal akkoord*) reached on 11 April 2013 between the principal associations of employers and employees (the “social partners”). It aims to:

- abolish the system whereby an employer desiring to terminate an employment contract can choose between two different types of procedure (“dual” dismissal system);
- increase income protection for employees on a “flexible” contract, such as agency workers, zero hours workers and workers on a fixed-term contract;
- reduce the enormous disparity between permanent and fixed-term employees;
- simplify dismissal law;
- increase the incentive for unemployed persons to seek re-employment.

The majority of WWZ will come into effect on 1 July 2015, but some provisions came into force on 1 January 2015 and a few will not come into effect until 2016. In this memorandum we will set out the principal changes, including the crucial transitional provisions. We will place the changes in the context of the current law (and summarise that where relevant). If you already know current Dutch dismissal law well, you may wish to skip Part I of this memorandum (“Current System”) and go directly to Part II (“New Rules”).

The full text of the law as amended by WWZ has yet to be published by the government. It has, however, been published in a booklet, co-authored by our partner Max Keulaerds and professor Ruben Houweling (Erasmus University Rotterdam). The booklet, which is in

---

<sup>1</sup> Wet werk en zekerheid, Stb. 2014, 216; entry into force through ministerial decree, Stb. 2014, 274 and Verzamelwet SZW 2015, Stb. 2014, 504 amending WWZ; entry into force through ministerial decree, Stb. 2014, 516.

the Dutch language, can be ordered via BarentsKrans or from the publishers at [www.bju.nl](http://www.bju.nl) (enter “Wet werk en zekerheid (WWZ)”).

This memorandum concludes with a summary.

## Part I: Current System

### Termination methods

There are five main ways in which an employment contract can come to an end:

1. expiry of a fixed-term contract
2. resignation of the employee
3. agreement by the parties to terminate
4. dismissal of the employee by the employer
  - a. by giving notice
  - b. during a probationary period
  - c. summarily for cause
5. “dissolution” of the contract by the court.

In this memorandum we shall begin with method 4 a. (“regular dismissal”), for two reasons. First, it is the rules governing this type of termination that makes Dutch law unique. Secondly, regular dismissal is often difficult and this difficulty influences the other ways of termination.

### Regular dismissal

Regular dismissal is where an employer unilaterally terminates the employment contract of a “permanent” employee, that is to say an employee who has been hired for an indefinite (as opposed to fixed) period of time, by giving notice of termination.

It is, as a rule, unlawful to dismiss an employee in the absence of a dismissal permit (*ontslagvergunning*). An employee who has been dismissed by an employer who lacked permission to do so may, and usually does, claim the dismissal was ineffective (*vernietigbaar*). The result is that the dismissal is deemed not to have taken place. This in turn results in his status as an employee, and his entitlement to all terms of employment

including salary, continuing.<sup>2</sup> The prohibition against dismissing an employee in the absence of a permit, also referred to as the “dismissal prohibition” (*ontslagverbod*), is the cornerstone of Dutch law on dismissal and, indeed, the foundation on which much of Dutch employment law rests. Indirectly, it has a profound influence on the day-to-day working relationship between management and staff and between employees amongst themselves and, consequently, on the culture of Dutch organisations.

At present, the dismissal prohibition is to be found, not in the Civil Code (*Burgerlijk Wetboek*), where the remainder of Dutch employment law is regulated, but in a separate Royal Decree known as the *Buitengewoon Besluit Arbeidsverhoudingen 1945*. It is commonly referred to as the BBA.

The BBA was adopted by the Dutch government in exile in London just after the end of World War II. It was preceded by several similar laws adopted in the period 1940-1944 using emergency executive authority. Although the BBA was intended to be a temporary measure, to be repealed as soon as the economy had recovered from the war, it has remained in force until this day. Several attempts to repeal the BBA have failed.

The dismissal prohibition was originally designed as an economic measure, allowing the government to regulate the labour market. However, in the course of time, its purpose has changed, becoming a social measure aimed at protecting employees (the weaker party) against unfair dismissal by their employer (the stronger party).

There are certain categories of employees who are excluded from the BBA’s scope. They may be dismissed without a permit. The most relevant categories are managing directors<sup>3</sup> of an NV, BV or a similar foreign entity (*bestuurders*), civil servants and teachers. These individuals may be dismissed freely.

---

<sup>2</sup> Provided the employee offers to continue, and is capable of continuing, to perform his contractual duties.

<sup>3</sup> A managing director (*bestuurder*) is someone who has been appointed as such by the shareholder(s) and who is an employee of the legal entity to which he or she was appointed managing director.

A certain category of foreign nationals<sup>4</sup> may also be dismissed without a permit, even though they are not explicitly exempted from the BBA's scope. Briefly stated, this category consists of employees who are not dependent on the Dutch labour market, for instance, because they can be expected to return to their country of origin following dismissal. Depending on a number of factors, such employees can be dismissed without a dismissal permit or a court order, regardless of whether their contract is governed by Dutch law. This is because the BBA has its own scope rule, independent of the employment contract.

How does an employer obtain a dismissal permit? This is done by filing a written application with a semi-governmental body known by its acronym UWV. The application sets out the reason for the proposed dismissal. UWV does not deliver its decision until it has heard the employee's view. Once it has heard both sides of the story, UWV decides whether or not to grant a permit. This decision is taken on the basis of a Ministerial Decree (*Ontslagbesluit*) and UWV Guidelines (*Beleidsregels*). The UWV Guidelines are regularly amended and updated. They can be accessed (in Dutch only) at [www.werk.nl](http://www.werk.nl).<sup>5</sup> The most recent (2013) hard copy version of these guidelines comprises over 300 pages. Briefly, a permit application can be based on either (i) redundancy or (ii) reasons having to do with the employee, such as underperformance or medical issues.

As a rule, the process following a permit application lasts between three and eight weeks, but particularly in cases where medical factors play a role, this period may be (much) longer.

The vast majority of permit applications are successful. It is difficult to put a meaningful percentage on the success rate, for several reasons. One is that the rate varies depending on the reason for the application. Permit rejections are not uncommon, for example, where the reason for the application is underperformance, given that UWV requires strong documentation about the underperformance and evidence that the employer has done all it reasonably could to improve performance. There is no appeal.

---

<sup>4</sup> Strictly speaking, not only foreign nationals, but it is rare for a Dutch national to satisfy the requirements for the exemption.

<sup>5</sup> Enter: [werk.nl](http://werk.nl) → voor werkgevers → informatie en tips → ontslag → Beleidsregels Ontslagtaak UWV.

A decision by UWV to reject a permit application, particularly one based on underperformance, can be disruptive and/or costly for the employer. A second attempt is usually not possible within a reasonably short time span. An employer faced with a rejection can, however, attempt to obtain dissolution of the employment contract by a court, as outlined below.

If and when a dismissal permit has been granted, and assuming there is no “dismissal obstacle” (about which, see below), the employer is free to give notice of termination, observing a notice period usually varying between one and three months. During the notice period, the employee continues to be eligible for all terms of employment.

### **Dismissal obstacles**

Even if the employer has managed to obtain a dismissal permit, it may not be possible to make use of it. This is because, besides there being a general dismissal prohibition, there are, additionally, what are known as dismissal obstacles (*opzegverboden*).<sup>6</sup>

The law prohibits giving notice of termination in certain situations. The most common of these is where the employee is unable to perform his work (fully) for medical reasons; the impairment existed before the permit application; and the impairment - usually sickness - has not lasted longer than two years (in some cases up to three years). Other examples are pregnancy and where the employee is or recently was a member of the works council, one of its committees or the board of a pension fund, or where the notice is on account of the transfer of an undertaking.

---

<sup>6</sup> The Dutch term *opzegverbod* means: prohibition against dismissal. This memorandum translates *opzegverbod* as dismissal obstacle so as to highlight that it is not the same as, but comes on top of, the general dismissal prohibition (*ontslagverbod*).

## **Dissolution**

An employer that wishes to terminate an employment contract without having to apply to UWV for a dismissal permit has the alternative option of requesting the competent court (*rechtbank*) to terminate the contract. This is called dissolution (*ontbinding*). Such requests are almost always heard by a single judge.

In 1907, when the concept of dissolution was introduced, this method of terminating an employment contract was designed for rare, specific cases, such as where a fixed-term contract with a long term needs to be terminated prematurely. However, starting in the 1980s, employers began to utilise the “dissolution route” as a normal alternative to the “BBA route” outlined in the previous paragraph. At present, roughly one third of terminations initiated by employers against employees who do not agree to leave voluntarily are effected by means of dissolution and two thirds via the “BBA route”.

There is no appeal against a court order dissolving an employment contract.

## **BBA versus dissolution (the “two routes”)**

As already mentioned, an employer can follow either of two procedures for terminating the contract of a permanent employee who elects not to resign or to enter into a severance agreement: the BBA route or the dissolution route. Each route has advantages and disadvantages.

An advantage of the BBA route is cost. The procedure is free and informal. Employers routinely follow the procedure themselves without the help of a lawyer. Once a dismissal permit has been granted, and assuming there is no dismissal obstacle, the employer is free to give notice. The employment contract ends at the end of the notice period without any severance compensation being required. Admittedly, the employee can then bring unfair dismissal proceedings (*kennelijk onredelijk ontslag*), but this rarely happens. Having said this, employees who have been dismissed with a dismissal permit based on

redundancy are frequently offered severance compensation anyway, either pursuant to an agreement with one or more unions (under a *social plan*) or for another reason.

By contrast, the dissolution route is expensive. A court will rarely terminate an employment contract without awarding the employee compensation, more often than not on the basis of a formula, commonly referred to as the “ABC” or Lower Court Formula (*kantonrechttersformule*), in which case the employee is usually awarded the equivalent of anywhere between one and two months’ average salary (including holiday bonuses and often also an average bonus) per year of service. This can make dissolution costly. Awards equalling two or more years of average salary are by no means exceptional. Moreover, an employer electing to pursue the dissolution route will find it difficult to do so without the help of a lawyer.

Why then, do employers follow the dissolution route? One reason is that judges are not bound by the UWV Guidelines. Although most judges apply them by analogy, many do so less strictly than does UWV. This is particularly the case where the employer alleges underperformance. Judges frequently terminate an employment contract for that reason where UWV would have rejected a permit application on the same grounds, reasoning that it would be counterproductive to force an employer to continue employing someone it does not wish to employ. In such cases, the courts often compensate the lack of a strong reason to terminate with higher than normal severance compensation. This practical approach is sometimes referred to as oiling the machine (*smeerolie*).

Generally speaking, where the reason for termination is redundancy or long-term medical disability, employers usually take the BBA route. Where the reason is underperformance or has to do with the employee personally, employers usually go down the dissolution route.

### **Fixed-term employment**

A fixed-term employment contract expires by operation of law. For example, someone can be hired for one year from 1 April to 31 March. In such a case, if the employer does not

wish to continue employing the individual beyond 31 March, it need not do anything further. The contract simply ends on that date. There is no need to give notice and hence no need for a dismissal permit. No compensation is owed. What this means is that a “fixed-term” lacks dismissal protection. It is for this and other reasons that Dutch law, in compliance with EU law, has limited the use of fixed-term contracts. The mechanism to do this is what is known as the “chain system” (*ketenregeling*).

Under current law, the chain system works using what is sometimes referred to as the “3x3 rule” or the “3/3/3 rule”. In brief, and leaving out certain details and exceptions, the chain system provides that there may be no more than three consecutive fixed-term contracts between the same (or closely-related) parties with a total duration not exceeding three years. Breaks of three months or less in between contracts are considered as continued employment. As soon as there are more than three consecutive contracts (three links in the chain), or two or more contracts exceeding a total duration of three years, the most recent contract converts automatically into a permanent contract.

A fixed-term contract may include a provision allowing for premature termination, but an employer wishing to use this option will require a dismissal permit or court order. In the absence of this, neither party may terminate the contract before it expires.

## **Agency workers**

Approximately 10% of the Dutch workforce consists of workers who work for people other than their formal employer. This category of workers includes, in particular, temporary agency workers (*uitzendkrachten*), commonly known in English as ‘temps’. Payroll workers and employees who have been assigned by their employer to work elsewhere also belong to this category. In this memorandum, we do not address the special aspects of these three-party arrangements.<sup>7</sup>

---

<sup>7</sup> Note that in general terms, WWZ will improve the legal status of temps slightly.

## **Collective agreement**

The vast majority of employees and a majority of employers in The Netherlands fall within the scope of a collective agreement entered into between, on the one hand, one or more employers or associations of employers and, on the other hand, one or more trade unions. Such a collective agreement is called a “CAO”. Most collective agreements contain provisions that replace the general law with a special rule. The rule may be more favourable to the employees concerned, for example limiting the maximum number of links in a chain of fixed-term contracts to two instead of three, or it may do the opposite, for example allowing the employer to offer four consecutive fixed-term contracts. This memorandum, except where stated otherwise, assumes that the employer is not covered by any relevant provisions in CAOs, i.e. that only statute applies.

## **Unemployment**

An employee who loses his job is normally eligible for unemployment benefits (“WW”), payable by UWV. The benefits equal 75% of last-earned salary for the first two months and 70% thereafter, in both cases calculated as a percentage of no more than the “maximum base”, which is currently about € 52,000 gross per year. The maximum duration of the benefits varies from three to 38 months, depending on how long the employee has been insured.

## Part II: New Rules

Although much of what was outlined above in Part I will remain, certain crucial elements of the law on dismissal will change, as explained in what follows. The principal changes relate to:

- exempt categories
- the “chain” system of consecutive fixed-term contracts;
- the (non-)extension notice;
- the exhaustive list of grounds for dismissal;
- the strict separation of “UWV grounds” and “dissolution grounds”;
- appeals;
- employees at or over retirement age;
- severance compensation;
- increased role of the unions;
- unemployment benefits.

Other changes include restrictions on the use of restrictive covenants (non-compete clauses) and a shift in the burden of proof in wage claim cases.

### Exempt categories

As of 1 July 2015, the BBA will cease to exist. All dismissal law will from then on be contained exclusively in the Civil Code (*Burgerlijk Wetboek*). This means that, if a contract is governed by Dutch law,<sup>8</sup> the rules on dismissal outlined below must be followed. The exception for employees who are not dependent on the Dutch labour market, for example because they can be expected to leave the country upon termination of their contract, will disappear.

---

<sup>8</sup> This memorandum does not address the issue of when Dutch law applies: for within the European Union, see Regulation 593/2008/EU on the law applicable to contractual obligations (“Rome I”).

The exception for teachers will also disappear. A school, university or other educational institution wishing to dismiss one of its staff will in future require a dismissal permit or court order just like every other employer.

The exemption for managing directors from the dismissal prohibition (not from the dismissal obstacles) will be retained.

### **Fixed term contracts**

The 3/3/3 rule (no more than 3 consecutive contracts, etc.) is being replaced by a 3/2/6 rule. Barring a different arrangement in a collective agreement (see below), the chain system as from 1 July 2015 will be:

- no more than three consecutive contracts;
- the total duration of which may not exceed two years;
- breaks in between contracts of six months or less being considered as continued employment.

Any contract exceeding these limits automatically becomes a permanent one. For example, the new rules will allow three consecutive fixed-term contracts of eight months each, or two one-year contracts, but no longer three one-year contracts. A period of over six months, e.g. six months and one day, is needed to “break the chain” and allow the parties to start afresh.

Another novelty is that the employer must as a rule (though there are exceptions) inform a fixed-term employee in writing no less than one month before the end date of the contract about whether the contract is to be extended and, if so, under what conditions. The penalty for failure to give timely notice is monetary compensation equal to the salary for the unobserved period. For example, if the employee is informed on 10 July that the contract will not be extended beyond 31 July, he or she will be entitled to compensation equal to  $10/31 \times 1/12$  of annual fixed earnings. In theory, this compensation is also owed

in the event the employee is informed too late that the contract will be extended, but few employees in such a situation will be likely to claim the compensation.

A non-compete clause will also no longer be permitted in a fixed-term contract unless it is demonstrably required for compelling business reasons. In addition, a fixed-term contract with a duration not exceeding six months may not include a probationary period.

### **Grounds for termination**

The BBA is being replaced. However, its contents are to be incorporated into the Civil Code, which is to be amended as follows. Dismissal is only allowed if (i) there is a reasonable ground (*redelijke grond*) for dismissal and (ii) there is no possibility of retaining the employee in a suitable alternative position, following retraining where appropriate.

There are no more than eight “reasonable grounds”, namely:

- a. headcount reduction for business reasons (redundancy);
- b. long-term (two year) disability;
- c. frequent and disruptive sickness absence;
- d. incapacity to perform the contractual work other than for a medical reason (i.e. underperformance), provided (i) the employer has informed the employee of the performance issue in good time; (ii) the employer has taken sufficient steps to enable the employee to improve the performance; and (iii) the underperformance has not been caused by insufficient efforts by the employer to train the employee or by poor working conditions;
- e. serious misbehaviour;
- f. refusal to perform contractual duties for reasons of conscience (conscientious objections);
- g. working relationship that has broken down (*verstoorde arbeidsverhouding*), provided the impairment is so serious that the employer cannot reasonably be required to continue the relationship;

- h. other reasons that are of such a nature that it cannot reasonably be expected that the employer should continue the employment relationship.

This list of grounds for termination is exhaustive and the grounds cannot be combined. A judge who decides to terminate an employment contract must select one (and only one) of the eight possible grounds for termination.

The government has stressed that ground **h.** (“other reasons”) is to be construed restrictively and cannot be used as a catch-all for cases falling outside the scope of the list. Only truly exceptional cases will be accepted as being within the meaning of category **h.** Given this limited use of ground **h.**, it is not unlikely that employers will resort to ground **g.** in underperformance situations, where the requirements of ground **d.** have not been satisfied - as is frequently the case.

However, there is some debate about whether the courts will go along with such attempts. On the one hand, it is the legislator’s intention that courts should turn down dissolution requests in the absence of one of the eight reasonable grounds. On the other hand, the courts may be reluctant to prolong an employment relationship that is likely to deteriorate even further. Be this as it may, the courts will lose their ability to dissolve an employment contract on grounds other than those listed, even where the parties are in agreement that there is no longer any reasonable hope that their working relationship will start to be productive.

A new feature of the rules is that the employer may dismiss an employee with effect from, or after he or she has reached, retirement age, without requiring a dismissal permit or court order, or indeed a reasonable ground.

The Minister of Social Affairs and Employment will issue more detailed rules, including rules in respect of the seniority principle in the event of redundancies.<sup>9</sup> It is widely

---

<sup>9</sup> Essentially, and leaving out certain details and exceptions, the seniority principle (*afspiegeling*) requires selection for dismissals for business reasons to be on the basis of length of service per interchangeable position and within each of five age groups. The government has announced that it will, under strict conditions, allow redundancy selection

anticipated that these rules will be identical or almost identical to those already within the UWV Guidelines.

Dismissal on ground **a.** (redundancy) or ground **b.** (disability of at least two years) requires a dismissal permit.<sup>10</sup>

The local court may, at the employer's request, terminate (dissolve) an employment agreement on grounds **c.** to **h.** In contrast to the present situation, it will be possible to appeal a court order, both in the event the court has dissolved the employment contract and in the event it has declined to do so. This will reduce the attractiveness of the "dissolution route" even further.

The new law puts an end to the present situation, where an employer may choose to pursue either the BBA route (dismissal permit followed by notice) or, alternatively, the dissolution route (court). There is no longer a choice. An employer wishing to terminate an employment contract on ground **a.** or **b.** must follow what was formerly the BBA route. The courts can no longer dissolve a contract on these grounds.<sup>11</sup> An employer wishing to terminate a contract on grounds **c.** to **h.** must apply to the court for dissolution. It will no longer be possible to obtain a dismissal permit on these grounds. What is more, the courts will have to apply rules similar or identical to those presently contained in the UWV Guidelines.

An employee who has been dismissed without his or her consent in the absence of a dismissal permit, or in breach of a dismissal prohibition, may ask the court to annul the dismissal or to award compensation.

---

processes that depart from the seniority principle, if a collective agreement provides for this, for up to 10% of the workforce.

<sup>10</sup> One side effect of this is that it will no longer be possible to terminate an employee who is redundant while he or she is on sick leave. Although UWV will issue a dismissal permit for such an employee (assuming he or she satisfies the seniority principle), the employer cannot make use of the permit. Under present law, the employer can apply for dissolution. This possibility is disappearing.

<sup>11</sup> Except if an application on ground **a.** or ground **b.** has been rejected or if a fixed-term contract is to be terminated prematurely.

An employee who has been dismissed pursuant to a dismissal permit may apply to the court for reinstatement or compensation.

In practice, the fact that judges will be under an obligation to abide by the rules currently contained in the UWV Guidelines is anticipated to become a major difficulty for employers. If they take this obligation seriously, the means of “oiling the machine” will be gone. It will no longer be possible to obtain termination of the contract of an underperforming employee without his or her cooperation unless the employer demonstrates, to the court’s satisfaction that: (i) it has informed the employee of the performance in good time, i.e. that the underperformance has been adequately documented over a reasonably long period of time; (ii) it has taken sufficient steps to enable the employee to improve his or her performance (this tends to be the hardest requirement to fulfil); and (iii) the underperformance has not been caused by insufficient efforts by the employer to retrain the employee or by poor working conditions. It is expected that requests for court-ordered terminations will be turned down more often than is now the case, regardless of how much compensation the employer offers. Clearly, this fact will reinforce employees’ negotiating position.

The rules summarised above do not apply where the employee voluntarily enters into a written termination agreement, provided the agreement mentions the employee’s right to cancel it within two weeks. The employee need not state a reason for cancelling it. If the employer fails to inform the employee of his or her right to cancel the agreement, the period during which the employee can do so is extended to three weeks.

### **Collective agreements**

One of the aims of WWZ was to empower the social partners further, by allowing them to depart from the normal rules of dismissal in the event they agree to alternative arrangements. The social partners are, on the one hand, the employer or the association of which it is a member and, on the other hand, the relevant union(s). In future, a collective agreement may provide for:

- consecutive fixed-term contracts up to a maximum of six with a total duration of four years, provided this is a demonstrable necessity within the sector;
- an independent committee that can issue dismissal permits;
- redundancy criteria other than the seniority principle;
- special criteria for severance compensation.

### **Severance compensation**

Under the new rules, every termination (other than following retirement or for serious cause) - including termination as a result of non-extension of a fixed-term contract that has lasted for two years or longer - will give rise to an obligation to pay the departing employee “transition compensation” (*transitievergoeding*). The compensation will be equal to 1/6 of the last-earned average month’s pay for the first twenty half-years<sup>12</sup> of service and 1/4 of the last-earned average month’s pay for each additional half-year of service. However, employees aged 50 or over with no less than ten years of service are, until 2020, entitled to half a month’s salary for each half-year of service beyond the age of 50.<sup>13</sup>

Certain expenses that the employer has paid during the final five years of employment with a view to increasing the employee’s employability may be deducted from the transition compensation.

The mandatory nature of the transition compensation is a major departure from the existing system in which:

- employees who had been dismissed based on a dismissal permit had no statutory right to any compensation but could (though rarely did) attempt to obtain compensation in subsequent unfair dismissal proceedings (even though the amount of such compensation, if awarded, was highly unpredictable);

---

<sup>12</sup> The calculation is changing from whole years to periods of six months to reduce the impact of “rounding off” periods.

<sup>13</sup> This exception does not apply for companies and organisations employing less than 25 people, although the government has the possibility to determine otherwise with regard to certain businesses.

- a court order dissolving an employment contract almost always included an award of severance compensation based on the ABC formula, the amount of which - although somewhat more predictable than that in unfair dismissal proceedings - was nevertheless uncertain.

In future, almost all involuntary separations will yield standardised transition compensation that, except for any deduction for “employability expenses”, will be completely predictable. Only in extreme cases will the employee be able to claim an additional award (*billijke vergoeding*). The government has stressed, and it is widely accepted, that such additional awards will be exceptionally rare.

The transition compensation is on average equal to approximately one third of the yield of the ABC formula. The **Annex** to this memorandum provides some examples to illustrate how much lower the transition compensation is than the ‘neutral’ ABC Formula, that is to say, the result of that calculation in cases where the employer is not to blame for the need to dissolve the employment contract. Thus, perhaps paradoxically, whilst the employee’s ability to resist termination has increased, the amounts paid by way of severance compensation will drop significantly.

It is widely anticipated that the replacement of the ABC Formula by the much lower transition compensation will have a downward effect on negotiated severance payments. The result is something of a contradiction:

- on the one hand, employees will have more bargaining leverage, in that it will become harder to dismiss a permanent employee, particularly for performance-related reasons, and this will tend to raise the asking price;
- on the other hand, lower severance amounts will probably become the norm.

### **Restrictive covenants**

It is quite common in Dutch practice to insert a non-competition clause (*non-concurrentiebeding*) in an employment contract. This can be a prohibition against working

for a competitor and/or a prohibition against working for the employer's clients (*relatiebeding*) during employment and for a certain period, commonly one year, following termination. In theory, this practice will remain unaffected by the WWZ, except that a fixed-term contract may no longer include such a clause unless it specifies the compelling business reasons that make it necessary. However, given that many, if not most, permanent contracts were preceded by a fixed-term contract, and that employees who are hired without a non-compete clause in their contracts are often not asked to sign one later on, this change of law is likely to have the practical effect of greatly reducing the prevalence of non-compete clauses.

### **Unemployment benefits**

A major concession by the unions in the negotiations on which WWZ is based, was to agree to a sharp reduction in the maximum duration of unemployment benefits. At present, an unemployed person is, as a rule, eligible for those benefits for between three and 38 months, depending on how long he or she has been an insured employee. This is to be reduced to 24 months. Moreover, the rate at which employees accrue the right to these benefits will drop from one month for every year of insured service to one month for the first ten years of employment plus half a month for each additional year of service. These reductions will reduce the level of social security contributions owed by employers and, hence, the cost of labour.

The unions have announced their intention to "repair" the reduction in unemployment benefits by means of collective agreements.

The most generous unemployment benefits for employees who lose their job at or after age 60 (*IOW*), which are not financed by employers, are to remain until at least 2020. The special unemployment benefits for those who lose their jobs on or after age 50 (*IOAW*) will be phased out.

The rules regarding what types of work a person on unemployment benefits may refuse are to be tightened up.

## **Wage claims**

Currently, an employee who does not perform his or her contractual duties, other than on account of sickness, bears the burden of proof that he or she was able and willing to work and that the employer failed to make use of an offer to work. Under the new rules, the burden of proof with respect to salary for periods during which the employee performed no work, or no more than partial work, other than through sickness, will shift to the employer.

## Part III: Transitional Provisions

On 1 January 2015 the following new rules came into force (amongst other provisions):

- a restriction on collective agreements covering entitlement to salary for periods during which no work, or only partial work, was performed other than for medical reasons;
- a limitation on employers' ability to include a probationary period clause or a restrictive covenant in fixed-term contracts;
- the requirement to inform an employee in good time about whether his or her fixed-term agreement is to be extended and, if so, on what terms (*aanzegverplichting*).

Most of the new rules will come into force on 1 July 2015 including, in particular, the following:

- the 3/3/3 rule is replaced by the 3/2/6 rule for consecutive fixed-term contracts;
- the new rules on dismissal and dissolution;
- the mandatory transition compensation;
- the right of employees who have entered into a voluntary termination agreement to cancel the agreement within two (or three) weeks.

The old 3/3/3 rule will continue to govern contracts entered into before 1 July 2015. For example, a second one-year contract that runs until 30 June 2015 may be followed by a third one-year contract that is entered into in writing on or before that date.

Existing collective agreements will – as a rule – be respected, including deviations from pre-WWZ legislation, but only for their duration, and no longer than 1 July 2016.

Proceedings to obtain a dismissal permit from UWV and dissolution proceedings at the court which have started before 1 July 2015, will continue to be governed by pre-WWZ legislation. This implies, for example, that in the event that a dismissal permit is obtained

in August 2015 as a result of an application filed with UWV before 1 July 2015, the employer can dismiss the employee without an obligation to pay the transition compensation, regardless of the fact that the dismissal took place whilst the WWZ legislation had already taken effect.

The shifting burden of proof with respect to entitlement to salary for non-work periods will be in force as from 1 April 2016, along with an amendment to the Unemployment Benefits Act (*WW*) that will reduce the maximum benefit period from 38 to 24 months.

## Part IV: Summary

The principal changes in a nutshell are:

- consecutive fixed-terms: maximum two years and timely notice of intent to extend or not;
- headcount reductions for business reasons: procedure unchanged, but statutory compensation significantly lower;
- underperformance: more difficult, longer uncertainty because of the option to appeal and employee's bargaining position reinforced;
- severance compensation significantly lower;
- greater role for collective agreements;
- all foreigners with Dutch contract covered by dismissal protection;
- unemployment benefits reduced, but unions likely to attempt (partial) "repair".

# ANNEX

## Example 1

Date of birth	1 January 1960
Hiring date	1 January 1990
Termination Date	1 January 2016
Average gross monthly salary	€ 5,000

<b>Neutral ABC formula</b>			
Years of service	Multiplication factor	Salary	Total
5	1/2	€ 5,000	€ 12,500
10	1	€ 5,000	€ 50,000
10	1 1/2	€ 5,000	€ 75,000
1	2	€ 5,000	€ 10,000
<b>Total severance payment</b>			<b>€ 147,500</b>

<b>WWZ pre-2020</b>			
Half years of service	Multiplication factor	Salary	Total
20	1/6	€ 5,000	€ 16,667
20	1/4	€ 5,000	€ 25,000
12	1/2	€ 5,000	€ 30,000
<b>Total severance payment</b>			<b>€ 71,667</b>

<b>WWZ post-2020</b>			
Half years of service	Multiplication factor	Salary	Total
20	1/6	€ 5,000	€ 16,667
32	1/4	€ 5,000	€ 40,000
0	1/2	€ 5,000	€ 0
<b>Total severance payment</b>			<b>€ 56,667</b>

## Example 2

Date of birth	1 January 1992
Hiring date	1 January 2013
Termination Date	1 January 2018
Average gross monthly salary	€ 3,000

Neutral ABC formula			
Years of service	Multiplication factor	Salary	Total
5	1/2	€ 3,000	€ 7,500
0	1	€ 3,000	€ 0
0	1 1/2	€ 3,000	€ 0
0	2	€ 3,000	€ 0
<b>Total severance payment</b>			<b>€ 7,500</b>

WWZ pre-2020			
Half years of service	Multiplication factor	Salary	Total
10	1/6	€ 3,000	€ 5,000
0	1/4	€ 3,000	€ 0
0	1/2	€ 3,000	€ 0
<b>Total severance payment</b>			<b>€ 5,000</b>

WWZ post-2020			
Half years of service	Multiplication factor	Salary	Total
10	1/6	€ 3,000	€ 5,000
0	1/4	€ 3,000	€ 0
0	1/2	€ 3,000	€ 0
<b>Total severance payment</b>			<b>€ 5,000</b>

## Example 3

Date of birth	1 January 1958
Hiring date	1 January 2009
Termination Date	1 January 2017
Average gross monthly salary	€ 6,000

Neutral ABC formula			
Years of service	Multiplication factor	Salary	Total
0	1/2	€ 6,000	€ 0
0	1	€ 6,000	€ 0
4	1 1/2	€ 6,000	€ 36,000
4	2	€ 6,000	€ 48,000
<b>Total severance payment</b>			<b>€ 84,000</b>

WWZ pre-2020			
Half years of service	Multiplication factor	Salary	Total
16	1/6	€ 6,000	€ 16,000
0	1/4	€ 6,000	€ 0
0	1/2	€ 6,000	€ 0
<b>Total severance payment</b>			<b>€ 16,000</b>

WWZ post-2020			
Half years of service	Multiplication factor	Salary	Total
16	1/6	€ 6,000	€ 16,000
0	1/4	€ 6,000	€ 0
0	1/2	€ 6,000	€ 0
<b>Total severance payment</b>			<b>€ 16,000</b>