2019/35

Repairing past mistakes in holiday pay: two cases, two different outcomes (NL)

CONTRIBUTOR Jan-Pieter Vos*

Summary

A number of collective labour agreements unjustifiably have excluded allowances from holiday pay. Recently, social partners have had difficulties in repairing these flaws. Two recent cases demonstrate this, both similar claims but with different outcomes. This leaves social partners with the problem of how to proceed.

Facts

In the past few years in the Netherlands there has been a considerable amount of case law on so-called unsocial hour allowances ('UHA') in vacation pay. UHA's are allowances to wages for work hours which are considered unsocial, such as late evening and night shifts. It was the practice to exclude UHA's from vacation pay in many collective labour agreements (hereinafter also referred to as 'collective agreements').

Since the *Williams / British Airways* judgment of the European Court of Justice [15 September 2011, C-155/10, ECLI:EU:C:2011:588], it is clear that excluding UHA's from vacation pay is contrary to EU law. Nevertheless, it took a few years before social partners became aware of this. As a result, quite a few employees claimed UHA's in respect of vacation pay, mostly successfully. In the face of a high number of claims, employers and their organisations have been looking for ways to minimise the financial risks.

The two judgments in this case report concern Securitas, a private security firm. Securitas was bound by the collective agreement for private security. The 2012-2013 version of the agreement introduced a new payment structure compared to the older versions. This payment structure ought to be cost-neutral. One of the changes was that UHA was excluded from vacation pay, which was contrary to Directive 2003/88/EC.

In 2014, the changes were evaluated. It turned out that the employees on average were in a worse position than before the changes. The removal of the UHA component had led to a salary decrease of 1.34%. However, this was partly compensated by effects of other changes in the pay system – the eventual effect of all changes was that the salaries had declined by 0.34% on average. This worsening of the pay position and the ECJ case law as well as the then upcoming Dutch case law on UHA in holiday pay led to a change in the next collective agreement. UHA again was part of vacation pay. Next to a 'general' wage raise of 2.5%, an additional 0.5% raise was agreed upon to compensate for past financial effects of the remodelling as a whole. The collective agreement also stated that parties had intended the remodelling in the 2012-2013 agreement to be cost-neutral and that with this new agreement all entitlements, both past and future, were deemed to be compensated.

According to the described facts in one of the judgments, the parties to the collective agreement also signed an additional settlement agreement – not having the status of a collective agreement – in which again it was established that any claims were compensated. Also, the unions would not encourage workers to claim the UHA component of vacation pay. Lastly, the settlement agreement contained a final discharge clause.

Nevertheless, some of the employees claimed the UHA component of holiday pay and started proceedings. Similar cases, involving different employees, came before the Amsterdam Subdistrict Court, while another one ended up in the Haarlem Subdistrict Court.

Legal background

The legal background is not very complicated. In accordance with Article 7 of Directive 2003/88/EC, Article 7:639 of the Dutch Civil Code stipulates that employees are entitled to their salary when they enjoy annual leave. It had already been long-standing case law that this is not only the base salary [Dutch Supreme Court 26 January 1990, ECLI:NL:HR:1990:AD1017]. Nevertheless, there were some specific situations in which certain allowances were not included. One example is that weekend allowances would not be included, if

* Jan-Pieter Vos is a lecturer of Labour Law at the Erasmus University Rotterdam, the Netherlands and editor of EELC.

doi: 10.5553/EELC/187791072019004003012

the employee would not have had to work on the weekend in which they took annual leave [Delft Subdistrict Court 29 March 2007, ECLI:NL:RBSGR:2007:BA6430]. In any case, the real catalyst for claims to include allowances in holiday pay was *Williams / British Airways*.

The Dutch law on collective agreements complicates the issue. This legislation on collective agreements is very complex but, put (too) briefly, a collective agreement binds employers and employees who are members of the parties which entered into the agreement. Employers must also observe the agreement with respect to employees who are not members of the collective agreement. On the other hand, employees are not necessarily bound by the collective agreement. This could be relevant if a new collective agreement implies a worsening of a particular employment condition, to which they may object. Case law and legal doctrine are mixed on whether to allow such changes.

A last relevant circumstance is that Dutch civil law in principle honours the *pacta sunt servanda* principle, but there are some exceptions. One example is Article 6:248(2) of the Dutch Civil Code, which can disapply a rule binding upon the parties as a result of the contract "*to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness*." Given the high impact and legal uncertainty arising from the application of this rule, courts apply this Article very restrictively – the word "*unacceptable*" rightly suggests that a very high threshold must be met before this Article can be successfully invoked.

Judgments

The legal issue for the courts was whether the clause in the 2012-2013 agreement was null and void. This was easy, as both courts referred to *Williams / British Airways*. As has been known, the ECJ held that Article 7 of Directive 2003/88/EC must be interpreted as meaning that – in that case –

> a pilot is, during his leave, entitled to not only the maintenance of his basic salary, but also, first, to all the components intrinsically linked to the performance of the tasks which he is required to carry out under his contract of employment and in respect of which a monetary amount, included in the calculation of his total remuneration, is provided and, second, to all the elements relating to his personal and professional status as an airline pilot.

In a similar way, both courts considered that the UHA be intrinsically linked to the tasks of the employment contract, so that they were also due in respect of holiday pay. It was irrelevant that the collective agreement was binding, as this does not apply to a clause which is null and void. According to both courts, the employee was in principle entitled to the UHA allowance in respect of vacation pay.

However, the judgments had different outcomes. In both cases, Securitas had asserted that Article 6:248(2) of the Dutch Civil Code stood in the way of awarding the employee's claim, as this would be unacceptable according to the standards of reasonableness and fairness. The Amsterdam Subdistrict Court held that the potential burden for Securitas – which the latter had stated but not proven to be EUR 29 million – did not make the claim unreasonable or unfair. The Court also dismissed other arguments put forward by Securitas. The collective parties' apparent intention to compensate for various elements including UHA did not end up in the text of the collective agreement, which is the only thing that binds the employee. Neither was the employee bound by the settlement agreement, as it did not qualify as a collective agreement. It held that the employer had to pay the UHA component of the vacation pay of EUR 1600, including statutory interest.

The Haarlem Subdistrict Court came to another conclusion and held that the employee's claim could not be awarded as this would be unacceptable according to Article 6:248(2) of the Dutch Civil Code. It held that the new collective agreement more than compensated for the missed UHA allowances during the 2012-2013 collective agreement. Consequently, the Court found against the employee.

Commentary

These cases demonstrate some difficulties with the impact of Directive 2003/88 and the case law on it. It took a long time – perhaps too long – before social partners started to act in line with the *Williams / British Airways* judgment. The high success rate of employees claiming various allowances as a component of their holiday pay speaks for itself.

The effects can be large, as the *Williams / British Airways* case demonstrates. An employer must follow the rules in the collective agreement – and must be able to trust them. It is not the employer who has drafted the rules, but the employer's association. Moreover, unions should be aware of developments in employment law and case law as well, so part of the responsibility of drafting a collective agreement that respects existing law also rests on them. For some part of the duration of the collective agreement, it was even mandatorily applicable for the private security industry as a whole – also to non-members – so the illegal exclusion of UHA from vacation pay was legally binding. Although there are mechanisms to correct such a mistake and, of course, eventually the burden must fall on someone, these circumstances reflect that such situations require a careful and reasonable approach.

In any case, at some point, parties must rectify the mistakes made in the past. It is not immediately apparent what the best way is. Amending only one clause in the

doi: 10.5553/EELC/187791072019004003012

agreement is difficult, as this disturbs the balance of the bigger trade-off between various clauses. In the cases at issue, it is probable that if the employees had been entitled to UHA in vacation pay in the 2012-2013 agreement, another variable would have been less attractive for them. It is also for this reason that it is too easy to say that employers have not paid enough in the past.

Even if it turns out that the only change should be to compensate for missed UHA in vacation pay in past years, the question is how to do this. Directly compensating employees, perhaps including any statutory interest and increases, could bring employers financial problems – which Securitas' EUR 29 million estimate underlines. Parties chose to repair the past situation – the total salary decrease of 0.34% – by a structural 0.5% salary increase. Apparently, they estimated that this would have compensated the past damage over time – at least for those to which the collective agreement continues to apply.

However, these cases demonstrate that this is not without risk. Looking at the Amsterdam Subdistrict Court judgment, with hindsight it is easy to say that the parties should have explicitly stated that the 0.5% salary increase in the new collective agreement compensated for various elements, including the missed UHA, or to try to grant the settlement agreement the formal status of a collective agreement. Still, there would have been the risk that employees who were not bound by the collective agreement would have claimed the missed UHA component.

On the other hand, the Haarlem Subdistrict Court appears to have found an elegant solution with denying the claim as it would be unacceptable to grant it based on the principles of reasonableness and fairness. Such appeals should only be honoured as an exception to the *pacta sunt servanda* principle. In this case this seems not unreasonable, moreover because another pragmatic solution is very difficult to find and as there *is* a solution entailing compensation for the employees, which both employer *and* employee representatives have approved.

The cases bear some resemblance to the recent ECJ judgment in *Hein* [13 December 2018, C-385/17, ECLI:EU:C:2018:1018]. In that case, the ECJ found a rather complicated holiday pay structure in a collective agreement contrary to Directive 2003/88/EC, as Mr Hein received holiday pay substantially lower than his usual remuneration. Interestingly, Advocate General Bobek had suggested in his opinion [ECLI:EU:C:2018:666] that it would be very reasonable to have unions agree on a collective agreement, which Article 28 of the Charter of Fundamental Rights of the European Union explicitly provides for, and that this often will be a compromise between various interests. He rightly pointed out that there is:

> nothing in either [Article 7 of Directive 2003/88/EC], nor in the case-law interpreting it, which would prescribe how exactly Member States must calculate remuneration for annual leave. The only requirement it states is that any such normal remuneration shall not fall below minimum requirements in a manner that would devoid the right to annual leave of its substance. [paragraph 58]

The Advocate General further suggested that the collective agreement at issue, provided that the core of the right to paid annual leave guaranteed must not be affected,

> be interpreted as being the product of an 'overall balance' and the complex structures put in place mean that the individual rules must not be read in isolation, but as part of a package. [paragraph 63]

Nevertheless, the ECJ in its judgment held that, while there may be measures favourable to workers,

> these cannot serve to compensate for the negative effect that a reduction in the remuneration due for annual leave has on the worker without undermining the right to paid annual leave under that provision, an integral part of which is the right for the worker to enjoy, during his period of rest and relaxation, economic conditions which are comparable to those relating to the exercise of his employment. [paragraph 43]

While it remains to be seen which side the ECJ would choose in the Dutch cases – at least where it concerns correcting past mistakes – the actual effect on workers' salaries would probably be the main battleground.

Comments from other jurisdictions

Germany (Daniel Zintl, Luther Rechtsanwaltsgesellschaft mbH): Two issues of that jurisdiction seem worth a comparison with German legislation: The legal uncertainty by different court decisions in spite of the same legal issue and the imprecise legislation relating to the holiday pay.

Provisions of collective agreements may cause legal uncertainty. But, it is unrewarding to compare the diverse German jurisdiction to what is 'reasonable and fair' and what is not. Both terms are unclear, powered by emotions and open to various interpretations.

Given that, German legislation provides with Section 9 of the Collective Bargaining Act the right of labour courts to declare a collective agreement or parts of it either null and void or valid. However, those actions may be initiated only by the affected unions or the employers' association. In contrast to that in relation to an employee legal action, no court is bound by that decision, even if the collective agreement or parts of it are clearly unlawful.

Germany avoids thanks to the precise legislation in Section 11 para. 1 of the Federal Holiday Entitlement Act and a completing jurisdiction by the Federal Labour

doi: 10.5553/EELC/187791072019004003012

Court (BAG) an unclear legal status: The holiday pay is calculated by the average income of the last 13 weeks. The calculation does not include overtime payments, but comprises compensation for non-cash elements (Sec. 11 para 1 sent. 4 Federal Holiday Entitlement Act) and unsocial hour allowances (BAG, 21 January 1989), unless it is not 'on-call' or 'call-out service' (BAG, 24 October 2000).

Italy (Caterina Rucci, Katariina's Gild): Italy seems to have a quite similar collective agreement system as the Netherlands, with the main difference being that no general principle of good faith or fairness might avoid the application of collective clauses.
Interestingly enough, however, Italy has no statutory provision on holiday pay: the latter is governed for each sector by its own collective agreement.
The relevant CBA provisions generally state that the "actual remuneration" is due for holidays, leaving to other CBA provisions to determine which elements are part of such remuneration, a notion which is used and relevant for a number of purposes additional to holiday pay.
It is presumably due to this quite flexible system that Italy could adapt its collective provisions (or at least those included in the main CBAs) to the principle set by the *Williams – v – British Airways* case: the two main collective agreements provide in fact that the holiday pay will correspond to monthly pay divided by 26 and that it shall include a number of elements as indicated by the same CBA.
Whether this really and always includes or not all elements "intended" by the ECJ is something that could only be made sure of by comparing all definitions of effective remuneration included in the various CBAs.

Subject: Paid leave

Parties: [employees] – v – Securitas Beveiliging BV

Dates: 18 July 2018 (Haarlem) and 21 January 2019 (Amsterdam)

Courts: Haarlem Subdistrict Court, Amsterdam Subdistrict Court

Case numbers: ECLI:NL:RBNHO:2018:11695 (Haarlem) and ECLI:NL:RBAMS:2019:595 (Amsterdam).

Online publication: http://deep-link.rechtspraak.nl/uitspraak?id=ECLI:NL:RBNHO:2018:11695 (Haarlem) and http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2019:595 (Amsterdam)

doi: 10.5553/EELC/187791072019004003012