1. Background to severance compensation in the Netherlands

1.1 Dismissal legislation

The Dutch legislation for severance compensation is complicated. This is related to the fact that the Netherlands has a unique, but intricate dismissal legislation. In the Netherlands the contract of employment can be terminated in two ways. For this reason, the term ‘dual dismissal construction’ is used. The first possibility is by means of ‘notice of termination’. If an employer wishes to validate the termination of the contract of employment, then permission is firstly required from a judicial–administrative body, namely the Central Organisation for Work and Income (CWI). A preventive check is involved here. Before the contract can be terminated by the employer, the CWI checks if the employee may be dismissed. The criteria used here are quite broad and mean, in short, that a check is done to determine if there is a good reason for dismissal. This preventive check applies only when the employer wishes to terminate the contract of employment. When the employee wishes to terminate the contract, no prior permission from the CWI is needed. He, as well as the employer, only needs to comply with the period of notice.

The second possibility to terminate the contract of employment, is through a judicial rescission (cancellation). In the event that the judge grants the rescission request, no periods of notice need to be complied with and neither is prior permission required. Apart from these two major routes to termination, there is also the possibility to terminate the contract on account of ‘urgent reasons’ and contracts of employment for a fixed period can be ended legally at the moment that the contracted period has expired. In these situations, in principle, no severance compensation is awarded.

1.2 Severance compensation

For the first method of terminating employment, notice of termination and preventive check, the basic assumption is that no severance compensation is awarded. When the CWI grants permission for dismissal, it may not be coupled to the condition that severance compensation be paid. This does not mean that the parties are prevented from making a mutual agreement to pay compensation and they may also state a resolution to do so. This situation occurs frequently. Furthermore, it is also possible after the termination for the employee to ask the judge for an opinion on the fairness of the dismissal. When the judge is of the opinion that the dismissal is ‘evidently unfair’, for example because of the consequences of the dismissal for the employee, he will grant severance compensation.

The second main road to termination, the judicial rescission, recognises a different point of departure. In the case that the employer submits a request for rescission, severance compensation is awarded in principle. If the employee submits the request, then in principle no compensation is awarded, but if it emerges that the employer is to blame, compensation can still be awarded. Inversely, if it is shown that blame is attributed to the employee as the basis for the employer submitting the request, the severance compensation can be adjusted downwards. Of further importance, is that 80% of the requests for rescission are so-called “pro forma” requests. This means that the employer and employee are agreed about the termination but let the judge rescind the contract, as the employee otherwise runs the risk of not being allowed to claim unemployment benefit. Up to 1 October 2006, the Dutch legislation on unemployment operated a fairly strict criterion for culpable unemployment. In those cases there was no right to unemployment benefit. This ‘culpability test’ has been repealed in the meantime. As a result of this, it is expected that there will be a fall in the number of requests for rescission. At this moment it is not yet clear to what extent that will be.

1.3  Facts and figures

What does the above mean in concrete terms for the Dutch situation? On a yearly basis, there are about the same number of requests to the CWI for dismissal, as requests to the cantonal judge for rescission. For 2005 there were 74,634 requests to the CWI and 67,608 rescission requests to the cantonal judge.²³ For dismissal after permission from the CWI, severance compensation was paid in 42% of the cases. In those cases it mostly involved agreements between the employer and employee, or agreements made in a ‘social plan’ for collective dismissal. With the cantonal judge, compensation was awarded in 85% of the cases. The CWI grants permission for 85% of the requests to that body, and it is estimated that 98% of the rescission requests are honoured. Concerning the level of compensation, in principle the cantonal judge (the majority of requests are submitted by the employer) applies 1 month per year in service, whereby the number of service years is multiplied by 1.5 if the employee is older than 40, and by a factor of 2 if the employee is older than 50. The level of severance compensation in case of dismissal, after CWI permission, is on average lower than with the cantonal judge. Different researches give different results, varying from ½ to 2/3 of the level of the compensation for rescission. Without going into too much detail, it is clear that there is inequality in compensation, in its level as well as in granting it, depending on the chosen route.²⁴ This practice is under pressure. Pleas to uniformise dismissal legislation and the right to severance compensation, can be heard from several sources.

2.  Potential transferability of ‘Abfertigung Neu’

2.1  Advantages

If the ‘Abfertigung Neu’ is introduced in the Netherlands, the advantages will correspond to a great extent with the advantages that the ‘Abfertigung Neu’ offers with regard to the old system. An important advantage is that with the introduction of such a system, worker mobility would probably be stimulated. Because employees do not lose their rights at the time that they

themselves end their employment, they will be more inclined to look for another job. Such a development is very desirable and fits in with the political starting points, which are largely directed towards activating and dynamising the labour market. Another advantage is that implementing the ‘Abfertigung Neu’ will lead to a juster distribution when awarding severance compensation. Not only because compensation is then awarded independent of the question of whether notice has been handed in voluntarily, or whether the employer has handed notice of dismissal to the employee, but also in that case severance compensation will be awarded to those whose contract of employment for a fixed period is legally ended. Moreover, the difference in awarded compensation depending on the chosen route of dismissal will lapse, which in the present political and social climate is deemed to be desirable. Furthermore, implementing the ‘Abfertigung Neu’ will bring about (more economic) security for the employer as well as the employee. For the employer this offers security as to the amount to be paid, for the employee there is security as to the rights he builds up. This combination can contribute to a labour market in which on the one hand there is security and on the other hand worker mobility is promoted. A final advantage is that the ‘Abfertigung Neu’ provides a positive stimulant to the capital market and offers fiscal advantages. Little attention is paid to this within the Dutch system.

2.2 Disadvantages

If a regulation such as the ‘Abfertigung Neu’ is introduced in the Netherlands, one disadvantage is that a number of wishes and developments, within the framework of the ‘Lisbon Objectives’ and the ‘National Reform Programme’, will probably be insufficiently met. This particularly concerns the wish to develop the Netherlands and Europe into a high-value knowledge economy. In relation to this, the Dutch government has developed policy concerning ‘Life Long Learning’ or vocational training and promoting the ‘employability’ of employees. At the moment the question is regularly raised in political debate as to whether such aspects should play a part when awarding severance compensation. Moreover, the ‘Abfertigung Neu’ pays little attention to activating the employees. Hereby one can think of reintegration arrangements for those in the situation of the unemployed. These objections could be resolved by providing incentives for the employer as well as the employee, towards reaching that resolution. For example, an employee’s right to severance compensation could be cut, if he does not take enough initiative in finding a new job, or does not sufficiently take up facilities offered to him for schooling. On the other hand, an employer could be compelled to pay a higher severance compensation if he has not made an adequate effort to assure that his employee remains employable and has failed to invest in ‘Life Long Learning’.25

2.3 Feasibility and Conditions

In the Netherlands considerably higher severance compensations are awarded than in Austria. If the ‘Abfertigung Neu’ is to be implemented, then the salary percentage handed over by the employers will have to be considered first of all. With regard to the Dutch practice, this percentage will probably have to be set higher than in Austria. The question is whether or not such a negotiated result can be achieved within the political situation and between the social partners. Another element that hinders implementation is that in the Netherlands when severance compensation is awarded, attention is (also) paid to fault and culpability related to the dismissal. If

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one is to proceed to (partial) implementation of the ‘Abfertigung Neu’, then it is necessary to take this into consideration and how much or how little weight these elements will carry.

3. Relevant issues and future developments

At the present time, dismissal legislation as well as the right to severance compensation are under pressure in the Netherlands. Abolishing the ‘dual construction’ has already been pleaded for over a long time. It does not appear that there is a good chance that an agreement about this will be reached between the social partners, after a debate that has lasted for years. The social partners, together with expert ‘Crown-appointed members’, are represented in the Social Economic Counsel (SER). Before the end of 2006, it was expected that this advice body of the Dutch government would advise on reviewing the Dutch dismissal legislation, whereby attention would also have been given to severance compensation. For a while it seemed not impossible that advice would have been given to abolish the dual construction and a right to severance compensation would have been proposed, whereby there would have been more attention for schooling and activating the employees. Unfortunately the social partners did not reach an agreement.

As already mentioned, ‘Life Long Learning’ and activation are important points on the political agenda. Also receiving a good deal of attention, is the increase of the ageing population in the Netherlands. To keep the older age group in work, it is necessary to equip these employees for the development of the Dutch labour market into a high-value knowledge economy. Schooling and vocational training are indispensable instruments for achieving this objective. The same applies to women returning to work and young people with low level qualifications, who are mostly at a disadvantage in the labour market. There is also the wish to (further) activate the Dutch labour market. In order to achieve this, research is being done to determine which measures can be taken to promote an active reintegration policy, with regard to the unemployed. In reflecting on this matter and its (possible) form, within the Dutch (political) debate an affiliation with the Danish system is regularly looked for.

Worker mobility is also an important area for attention. The fact that severance compensation plays an important (limiting) role here, has been generally accepted in the meantime. Thus there is a discussion about taking the employee’s age into account when awarding severance compensation. In all probability, this custom reduces the chances of older employees in finding a new job. For these reasons it is expected that in the future, a proposal will be made to abolish taking age into account when awarding severance compensation.

4. Conclusions

That the Dutch legislation for severance compensation is complicated, leads to an unequal distribution and does not contribute to the promotion of worker mobility. The Netherlands, therefore, can learn a number of important lessons form the ‘Abfertigung Neu’. The most important lessons are: increasing worker mobility; a fairer distribution when awarding severance compensation; increased security for the employer as well as the employee; providing a positive stimulus for the capital market. In opposition to these advantages there are a number of disadvantages. The most important objection to implementation of the ‘Abfertigung Neu’ in the Netherlands is that the desired development of Europe towards a high-value knowledge economy
and the desired activation of employees, is insufficiently met. Activation and development towards a high-value knowledge economy, do after all form important goals within Dutch and European policy.

The question is, whether or not the severance compensation is the correct medium to achieve these goals. There is an active debate in the Netherlands about whether the severance compensation can be used to activate and promote employability and hereby increase the knowledge level of employees. It is not improbable that in the future proposals will be made, which incorporate these elements in the legislation for severance compensation. However, this does not exclude the possibility of (partial) implementation of the Austrian ‘Abfertigung Neu’. The percentage level of the salary made over by employers could be linked to the schooling facilities offered, within the framework of ‘Life Long Learning’ and ‘employability’. Inversely, the compensation to be paid to the employee could be linked to the effort made by him to use the schooling facilities and the attempts made to find a new job.

Implementation of ‘Abfertigung Neu’ is difficult (at this moment). First of all, the legislation for dismissal in the Netherlands will have to be uniformised, before one can proceed to the introduction of a fairer right to severance compensation. When that point is reached the salary percentage that is to be made over, will need to be thought about. The average amount of severance compensation awarded in the Netherlands is higher than in Austria. The question is whether or not politicians and the social partners will succeed in reaching an agreement about a relatively high salary percentage, which would be needed to maintain the present level of severance compensation. This will probably not be necessary, because the level of severance compensation in such a structure will be lowered and a separate action for compensation will remain open in the event that questions of fault and culpability play a role.

All things considered, the ‘Abfertigung Neu’ extends many chances and possibilities for the Netherlands. It is recommended that within a new design of the Dutch legislation for dismissal, the Austrian ‘Abfertigung Neu’ be taken as a model and to examine to what extent (partial) implementation is possible, without losing sight (having to lose sight) of other important (policy) objectives.