02/07/2014 RAP/Cha/NLD/7(2014)Add

EUROPEAN SOCIAL CHARTER

Addendum to the
7th National Report on the implementation of
the European Social Charter

submitted by

THE GOVERNMENT OF THE NETHERLANDS

(Articles 2§3, 2§5, 26§1 and 26§2
for the period
01/01/2009 – 31/12/2012)

Report registered by the Secretariat on
3 July 2014

CYCLE 2014

Article 2§3 Right to just conditions of work - Annual holiday with pay

With reference to the report, the Committee asks for details and examples concerning the number of unused statutory leave days that may be carried over to the following year and the limitations applicable in practice. In particular, the Committee asks whether and under what circumstances annual holidays exceeding two weeks might be postponed after the year during which they were accrued.

Answer:

There are no limitations concerning the number of statutory leave days that may be carried over to the following year. As already mentioned in our report-2013, the statutory leave days will lapse six months after the end of the year in which they were accrued. But if the employee was not reasonably able to take the remaining days because of long-term sick leave, the limitation period will be five years. By written agreement the period of six month after the end of the year in which the leave days are accrued can be enlarged.
For example: the annual statutory leave of a full-time employee is 20 days. These days will be available on January 1st of the year. During this year he will take 15 days. The remaining 5 days may be carried out to the next year and have to be taken before July 1st of that next year. If the employee only has taken 7 days in the first year, 13 days will be carried out to the next year.
The government has no signs of limitations or practical problems concerning the possibility to carry over leave days to the next year and the possibility to take them within the mentioned period of six month.

Article 2§5 Right to just conditions of work - Weekly rest period

The Committee notes that, according to the ILO database (Netherlands working time 2011), after a 5-day working week, the worker is entitled to a rest period of 36 uninterrupted hours and that a longer working week may be scheduled, provided that the worker enjoys a rest period of at least 72 hours every 14 days; this 72-hour period may be split into two separate periods, neither of which may be shorter than 32 hours. The Committee recalls in this respect that the weekly rest period may be deferred to the following week, as long as no worker works more than twelve days consecutively before being granted a two–day rest period. In the light of the information above, it asks for clarification as to whether and under what circumstances a worker might work more than twelve days consecutively before being granted a rest period. In particular, it asks whether the granting of a 72 hours rest period every 14 days implies that the employee might work for 14 days before taking a weekly rest or whether it means that the 72 hours rest should be granted within any given period of 14 days (meaning that the employee would work up to 11 days before being granted 3 days rest).

Answer:

If the Committee refers in their observation to Dutch legislation, their statement is not in conformity with the Dutch 'Arbeidstijdenwet' ('Working Hours Act'). According to the Dutch Working Hours Act (article 5:5), the maximum amount of days of consecutive working is 11. Thereafter 72 hours (i.e. 3 days) rest are obliged. This is the general rule of the Working Hours Act.
However, the Working Hours Act, offers the opportunity to formulate deviating rules for specific sectors (e.g. transport sector, mining industry). These deviating rules are formulated in the 'Arbeidstijdenbesluit' (Working Hours Decree) and the 'Arbeidstijdenbesluit vervoer' (Working Hours Decree in the Transport sector).
As far as the mining industry (oil/gas) concerns, there is the opportunity to work via rosters of 14 days work and 14 days rest. In case of work on land, the employer must have the consent of the workers representatives; in case of offshore work, this consent is not necessary. After 14

days of work at a location, the next 14 days of rest have to be spent elsewhere then at the location.
Finally, it can be confirmed that, in line with the Dutch Working Hours Act, the granting of a 72 hours rest period every 14 days means that the 72 hours rest should be granted within any given period of 14 days (meaning that the employee might work up to 11 days before being granted 3 days rest). Nonetheless other arrangements are also possible, in which the 72 hours are spread in a different way, provided that the minimum length of a rest period is 32 hours).

Article 26§1 Right to dignity in the workplace - Sexual harassment
The Committee asks for updated information on the preventive measures (information, awareness-raising and prevention campaigns in the workplace or in relation to work) in order to combat sexual harassment, in particular those taken in consultation with social partners with a view to informing workers about the nature and behaviour in question and the available remedies.
It furthermore asks what protection, if any, is provided to victims of sexual harassment against retaliation for upholding their rights.

Article 26§2 Right to dignity in the workplace - Moral harassment
The Committee asks for updated information on the preventive measures (information, awareness-raising and prevention campaigns in the workplace or in relation to work) in order to combat moral harassment, in particular those taken in consultation with social partners with a view to informing workers about the nature and behaviour in question and the available remedies.
It asks to clarify how moral harassment is defined and prohibited and what legal remedies, if any, are available to victims of harassment; it also asks for specific information about any specialised bodies which register and investigate complaints of harassment such as mediation services and advice centres. The Committee furthermore asks to indicate whether employers can be held liable towards persons working for them who are not their employees (sub-contractors, self-employed persons, etc.) and have suffered psychological harassment on their business premises or from employees under their responsibility. Moreover, it asks whether the liability of employers towards workers (whether employees or not) also applies in cases of psychological harassment suffered by persons not working for them (such as customers, visitors, etc.).

Answer:
The Dutch Working Conditions Act (WCA) stipulates the term 'Psycho Sociale Arbeidsbelasting (PSA)', 'Psycho Social Workload' (for English text, definitions and scope of the WCA see https://osha.europa.eu/fop/netherlands/en/legislation/index html). This term is a container for several issues, more specific, work pressure, sexual/moral harassment, bullying, agression, violence, discrimination etc. that produce work-related stress.
In May 2014 the Ministry of Social Affairs and Employment has launched a Multi Year Programme (duration 2014 – 2018) to reduce PSA in companies and other institutions. The programme is specifically targeted on awareness-raising of workers, Works Councils and employers at work the floor level. Furthermore on intermediate parties such as sectoral organizations of workers and employers, osh-services etc. The programme contains (amongst others) the following elements:

- an awareness-raising campaign;
- stimulating that PSA is on the agenda on the work floor;
- network meetings and activities (social partners, branches, experts, professionals etc.);
- development of adequate facilities and instruments to tackle PSA;
- making relevant knowledge accessible to companies, sectors and the larger public;

- yearly emphasis on a specific element of PSA (as far as harassment this will be in the third and fourth year).

Finally, is should be emphasized that the ministry and the European Occupational Safety and Health Agency (EU-OSHA), are partners in their efforts to promote the European Campaign on Work-related stress. Therefore EU-OSHA is involved in the aforementioned programme.

Article 26§1 Right to dignity in the workplace - Sexual harassment
As regards the burden of proof and Article 26§1 requirements in this respect, the Committee notes that, according to the report, both the Equal Treatment Acts provide for a shift in the burden of proof. It notes however from another source (European Network of Legal Experts in the field of Gender Equality – Harassment related to Sex and Sexual Harassment Law in 33 European Countries, 2012 – http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement_en.pdf) that this is not the case as regards civil procedures on sexual harassment under general civil law, for example tort law or labour law. It asks for comments in this respect, particularly as regards any change envisaged and relevant examples of case-law.
It furthermore asks for comprehensive and updated information on the relevant case-law concerning sexual harassment, including information on the damages awarded, and to clarify whether reinstatement is possible when employees have been forced to resign because of the hostile atmosphere resulting from sexual harassment.

Answer:
The shift in the burden of proof is imposed by European directives. These directives are implemented in the relation between an employer and an employee. Under the Equal treatment act and labour law there is a shift in the burden of proof in cases of sexual harassment between an employer and employee.
In cases between two employees the 'normal' burden of proof applies. If there is a reason to make a shift in the burden of proof, the court may do so on the basis of the principles of reasonableness and fairness.

There is no separate registration of cases of sexual harassment. It is therefore not possible to provide relevant case-law.

Article 26§2 Right to dignity in the workplace - Moral harassment
As regards the burden of proof, the Committee recalls that a shift in the burden of proof might be required under Article 26§2 in order to allow an effective protection of victims and asks what is the situation in this respect in the Netherlands, concerning moral harassment cases.
The Committee furthermore recalls that victims of harassment must have effective judicial remedies to seek reparation for pecuniary and non-pecuniary damage. These remedies must, in particular, allow for appropriate compensation of a sufficient amount to make good the victim's pecuniary and non-pecuniary damage and act as a deterrent to the employer. In the light thereof, the Committee asks for information and examples of case law concerning the remedies available to employees who suffered from harassment at work and compensation awarded for material and moral damages before civil or administrative courts or reinstatement in the event of unlawful dismissal.

Answer:
In cases of moral harassment with a discriminatory nature there is also a shift in the burden of proof just like in cases of sexual harassment

In other cases of moral harassment the ‘normal’ burden of proof applies. If there is a reason to make a shift in the burden of proof, the court may do so on the basis of the principles of reasonableness and fairness.

In cases of moral harassment a person can start a case based on tort law. Such a case can lead to both material and immaterial damage.

There is no separate registration of cases of moral harassment. It is therefore not possible to provide relevant case-law.