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Mandatory training: free of cost? (NL)

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Summary

This is the first judgment in the Netherlands regarding training costs and repayment arrangements since implementation of Directive 2019/1152/EU on transparent and predictable working conditions in the European Union (the 'Directive'). The subdistrict court ruled that the training did not qualify as mandatory training, in light of the employee's position and the agreements that were made. According to the subdistrict court, the repayment arrangements were legally valid: the employee was obligated to repay the training costs.

Legal background

Article 13 of the Directive obligates Member States to 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 free of cost, shall count as working time and, where possible, shall take place during working hours. By offering workers compulsory training free of cost, the Directive seeks (*inter alia*) to encourage labour market adaptability. This obligation does not cover vocational training or training required for workers to obtain, maintain or renew a professional qualification, defined in Directive 2005/36/EC on the recognition of professional qualifications (the 'Qualification Directive'), as long as the employer is not required to provide the training by Union, national law or collective agreement.

As at 1 August 2022, Article 13 of the Directive has been implemented in Article 7:611a (2) of the Dutch Civil Code (the 'DCC'). Article 7:611a (2) DCC applies to training that the employer is obligated to offer under applicable Union or national law, a collective agreement or a regulation by or on behalf of a competent administrative body (mandatory training). The national Dutch law (Article 7:611a (1) DCC) stipulates that the employer must allow the employee to undergo training that is necessary for the performance of the employee's position. Thus, in the Netherlands, any training that is necessary for the position of the employee qualifies as mandatory training within the meaning of the Directive and Article 7:611 (2) DCC.

Facts

In this case, the employee was employed by a company that provides accountancy and administration services. When entering into employment on 1 January 2021, the parties agreed on a training agreement which included repayment arrangements. The employee – who intended to undergo the training for further career development – requested the employer to fund the training. The employer agreed on the condition that the training costs should be repaid immediately upon leaving employment within three years after completing the training (irrespective of the reason thereof).

On 16 August 2022, the employee terminated his employment contract effective 31 August 2022. In a conversation shortly following the notice, the employer approached the employee with the repayment arrangements that were made and proposed a repayment scheme. The employee, thinking that his training costs would be waived, attempted to revoke his termination of the contract and reported sick. However, on 29 August 2022, the employer immediately dismissed the employee as it suspected he had established a competing company, for which the employee refused to provide an explanation. The employee started proceedings in order to nullify the dismissal. The employer then made a counterclaim and requested repayment of EUR 41,779.31 under the training agreement.

Judgment

Firstly, the subdistrict court ruled that there was no urgent reason for immediate dismissal and that as a result the employee was entitled to compensation. Secondly, the subdistrict court assessed the validity of the training agreement. The employee argued that the

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repayment arrangements included in the training agreement were void as they were in breach of Article 7:611a (2) DCC. According to the employee, the training qualified as 'necessary training' within the meaning of Article 7:611a (1) DCC, and therefore also as mandatory training within the meaning of the Directive and Article 7:611a (2) DCC. The employee argued that he was hired with the intention of performing work as a registered accountant and this position required the training so that he would gain the authority to sign certain documents. The employer disputed this by stating that – although it would make sense for the employee to work as a registered accountant in the future – no agreements to this end were made.

The subdistrict court ruled that there was no evidence that the employee was hired with the intention of becoming a registered accountant, nor that the training was necessary for his position. It was the employee himself that requested the employer to fund the training, which was also mentioned explicitly in the agreement. In addition, the subdistrict court ruled – in line with the employer's argument – that it was not certain that the employee would become authorized upon completion of the training in light of the small size of the company. The conclusion of the subdistrict court was that the training did not qualify as necessary training, and therefore also not as mandatory training. Therefore, the employer was not obliged to provide the training free of cost, meaning that the repayment arrangements were validly agreed upon. As a result, the employee was obligated to repay the training costs.

Commentary

The implementation of Article 13 of the Directive in Article 7:611a (2) DCC has led to significant changes in Dutch employment law practice, as it was very common for an employer and employee to agree on repayment arrangements for training or education undergone by the employee. These arrangements were usually included in the employment contract or in a separate agreement (a training agreement). As from 1 August 2022, repayment arrangements regarding compulsory training in breach of the new Article 7:611a (2) DCC are void. There is an ongoing debate about the scope of Article 7:611a (1) and (2) DCC, in particular due to the open norm in Article 7:611a (1) DCC. Which training is in fact necessary for fulfilling the position and must be provided free of cost?

This is the first Dutch judgment regarding training agreements and repayment arrangements since the implementation of the Directive. The subdistrict court attached great importance to the circumstances under which the arrangements were made, such as the parties' intentions when entering into employment and the wording of the training agreement. The court sufficed to note that the training was not necessary in order to fulfil the position of the employee. We feel that it is a missed opportunity as the court has not given some clarity as to the ongoing debate about the interpretation of 'necessary' along the lines of Article 7:611a (1) DCC. Additionally, the court did not make use of the opportunity to clarify if positions listed in the Qualification Directive may be considered as 'necessary' to perform work in the context of Article 7:611a (1) DCC and should therefore be offered free of cost.

A second judgment on the new Article 7:611a (2) DCC was recently published (ECLI:NL:RBOVE:2023:336). In this case the subdistrict court ruled that the employee's position required the employee to undergo the training, as his position was a regulated profession along the lines of the Qualification Directive. Therefore, the training could not be considered as 'mandatory training'. Hopefully, future case law will settle the ongoing debate.

Comments from other jurisdictions

Finland, Janne Nurminen (Roschier, Attorneys Ltd): Article 13 of Directive 2019/1152 on transparent and predictable working conditions in the European Union was implemented in the Finnish Employment Contracts Act (55/2001). The wording of Finnish law corresponds closely to Article 13 of the Directive.

Already before this new legislation, if training is necessary for an employee to carry out the work for which he or she is employed and there is a legal requirement for an employer to provide this training, such training has typically been provided to an employee free of cost.

On the other hand, if the training is extensive both in terms of cost and length, is more in the interests of an employee personally (improving the employee's professional competence, e.g., an eMBA degree) and is sponsored by the employer voluntarily, it is common to make an agreement (training/sponsorship agreement) between the employee and the employer. In these agreements it is typically agreed that if the employee leaves his or her employment, e.g., within two to five years after the end of the training, the employee is obliged to repay (a part of) the training costs to the employer. These training agreements are still available in Finland, regardless of the new legislation, since and to the extent they concern training that is sponsored voluntarily by the employer.

Romania (Teodora Mănăilă, Andreea Suciu, Suciu – Employment and Data protection lawyers): From a national point of view, while we have encountered cases concerning the reimbursement of costs associated to professional training, such distinction between mandatory professional training (i.e., required for the performance of the job description) and vocational professional training (which is rather considered to be more oriented to career development) was never analysed or verified in court. The focus has rather been on specific cases that

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may or may not constitute professional training. For example, MBA or university courses that are paid by the employer are not to be considered professional training and can be subject to reimbursement of costs in case of early termination.

On the other hand, we agree that when dealing with this type of subject it is important to corroborate the wording of the clauses with the actual intentions and expectations of the parties in order to understand the intended shared scope as well the profile of the performed job role.

We also consider that the challenges encountered by Dutch employers may also be shared by Romanian employers. The Romanian Labour Code provides that the scope of the professional training is (a) to adapt the employee to the work conditions, (b) to obtain a professional qualification, (c) to improve professional training for the basic occupation, (c) to retrain due to socio-economic restructuring, (d) to prevent the risk of unemployment and (e) for career development.

Thus, the scope gradually progresses from providing the necessary skills to perform the current role to developing the skills necessary to advance to a higher function. However, no additional criteria are used to separate which costs can be conditioned for reimbursement by the employer. Thus, we cannot exclude similar cases not making their way to Romanian courts as well.

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