International mediation in employment matters: a Dutch perspective

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Introduction to mediation in the Netherlands

Mediation is gaining importance worldwide as a tool in national and international employment conflicts. There are nuanced national differences in the ways in which mediation is used. These nuances may result in different expectations from mediation, for example for a foreign employer or an internationally seconded employee. It will be useful to explain where these nuances lie in employment cases in the Netherlands. Why is mediation relatively common in employment matters here? And what should be taken into account when using mediation in the Netherlands?

Reasons for mediation in Dutch employment cases

Mediation use is ever more common and has proven successful as a tool for reaching solutions in deadlocked situations. The Dutch Mediation Handbook defines it as follows: 'a form of mediation in conflicts in which a neutral expert, the mediator, guides communication and negotiations between the parties in order to arrive at the best decision-making for each of them, based on their real interests and supported by them both.' Mediation allows parties to identify points in dispute and discuss them, leave these points behind and focus on the future, possibly concluding with 'agree to disagree'.

There are four reasons for mediation being used ever more frequently in the Netherlands. First are the advantages of mediation over litigation, such as lower costs, higher speed (and therefore a quicker end to uncertainty), taking control of the conflict and the permanence of the solution. A more specific reason in the Netherlands is the principle of good employment practices for employers and employees, entailing that parties must jointly resolve problems in their cooperation. Two further reasons result from the strict employment laws in place in the Netherlands. There is often uncertainty whether a dismissal can be effected or a situation arises where an employee suffers from a (situation-specific) illness. I will briefly explain these considerations.

Dutch dismissal law is rigid and dismissing an employee in the Netherlands is difficult. If attempts to reach agreement with an employee on terminating an employment agreement by mutual consent fail, the employer must apply to the UWV (Employee Insurance Agency) (in event of long-term illness or commercial reasons), or to the courts (in event of other reasons, such as inadequate performance or a

damaged working relationship). A dismissal procedure takes time; legal costs are incurred and the outcome is uncertain (can the employee be dismissed and, if so, how much compensation should be paid?). Since 2015, the Netherlands has had a statutory severance payment known as the transition fee. An employee may also be entitled to additional compensation (known as the fair compensation) if the employer has acted in seriously culpable manner. Appeal is possible against a ruling. Parties may then have a long wait for the eventual outcome.

The Dutch system is also rigid concerning illness: for instance, there is the provision that employers have to continue paying a sick employee 70 per cent of their salary for (up to a maximum) of 104 weeks and cannot terminate the employment agreement within this period. A prohibition on notice applies. Besides the statutory obligation to continue paying wages, both parties are obliged to seek reintegration. If they fail, a wage sanction may be imposed, by which the employer is forced to pay the wages for a third year of illness and is not allowed to terminate the employment agreement. In the event of illness, especially if the illness is (partly) work-related, the company doctor will often advise parties to talk with each other, whether or not on a mediation basis. This might already offer the beginnings of a solution. Parties can exchange views in confidence as to whether continued cooperation is possible.

Mediation is also ever more common in discussing cooperation or guiding a process. For example, a works council and director can jointly attempt to give substance to a reorganisation and plan offered to employees. In such case, working arrangements will be made or the process will be guided until a solution is found and supported by both parties.

The mediation process in the Netherlands

Choosing a mediator is the first step. A research report was published by the ZAM (the Association for Commercial Mediation) and the ACB (Foundation ADR Centre for Commerce and Industry) in November 2018, on opportunities and obstacles to commercial mediation among lawyers, companies and judges in the Netherlands.[1] This followed the Global Pound Conference Series 2016-2017, which investigated commercial mediation between lawyers, judges and policy-makers in 30 countries, including the Netherlands. Research in the Netherlands implied both lawyers and companies prefer a mediator with legal knowledge and find it important that a mediator is an associate of a mediators' professional organisation, such as the International Mediation Institute (IMI) or – in the Netherlands – the MfN (Mediators Federation Netherlands) and that the mediator is a member of a mediation firm or partnership. MfN keeps the register of mediators and is responsible for mediation quality policy in the Netherlands.[2] Parties often demand that a mediator is registered in the Netherlands.

In principle, each party must choose its own mediator. Mediators are independent and impartial, but employees regularly have doubts whether this is really so for mediators who have been put forward by an employer. It helps if a mediator only offers to mediate after consultation with the employee. An employer also often invites an employee to suggest three names, from which the employer can choose. Mediation is often paid for by the employer. In practice, I sometimes see employers requiring an employee contribution by way of commitment to mediation.

Prior meetings are held with both parties before mediation starts formally. These discuss what mediation entails and who will participate on behalf of the parties. Attorneys are also welcome to join the mediation if the parties wish. Although it is unadvisable to go too deeply into substantive matters during prior meetings,[3] so as not to jeopardise impartiality, in practice this is hard to prevent. Parties

are eager to tell their story, and as a mediator I like to get a basic picture of the situation. The rules of mediation are explained, such as confidentiality, commitment to reaching a solution during mediation and its voluntary basis. These rules are set out in a mediation agreement to be signed by the parties at the start of mediation. The MfN has prepared a standard agreement, but this is often adjusted by mediators. Such an agreement is also subject to MfN rules and regulations and the MfN code of conduct.

Confidentiality is important. Parties are offered the opportunity to speak frankly about what divides them, what has obstructed a solution so far and what solution directions are possible and imaginable. The parties have to provide insights into the interests behind their views. Parties would probably not do this without confidentiality guarantees. Should a party in mediation also wish to consult third parties, with the other party consenting to this, the third party would also have to undertake to maintain everything in confidence.

Confidentiality still applies if no solution is reached, either because the parties have tried everything and failed to reach a solution or because one of the parties has ended the mediation. The parties are not allowed to share with third parties why mediation failed or who ended it. This can be frustrating, especially if a party has made insufficient attempts (in the eyes of the other party) to reach a solution. Parties are allowed to state that mediation has taken place but not led to a solution. This is why a mediator cannot indicate in a termination notice on whose initiative mediation was ended. A mediator who once did this anyway acted culpably under disciplinary law and was suspended (conditionally) by his Disciplinary Committee.

A solution might be reached in mediation for parties to make working arrangements on how to cooperate in future. Practice shows many mediations result in termination of an employment agreement. If the parties reach a solution during mediation, the solution will be set out in a settlement agreement. Dutch law provides that an employee can revoke their consent to termination within 14 days from agreement. This is the main reason why mediation should not be concluded immediately when an agreement is signed. It is wise to include a clause saying mediation continues and only ends when this term expires with consent not revoked, or that the parties will schedule a new mediation meeting within a few working days if the employee revokes their consent.

Mediation as a compulsory or strategic tool

Mediation is voluntary. This is one of the key points about it, but in Dutch employment law it is a justified issue whether this really is voluntary. An employee or an employer will not readily dare refuse a proposal from the other party to attempt mediation. Under Dutch law, a refusal may have consequences, as an employee and employer are obliged to make efforts to resolve a conflict. An employer striving for termination of an employment agreement due to a damaged working relationship can come away empty-handed unless it tries mediation or all measures to resolve the conflict and avoid it being said that the employment relationship is seriously and permanently damaged. An employee on sick leave due to an employment conflict might lose their right to wages upon refusal to cooperate in mediation. When an employee makes insufficient effort to resolve a dispute, this can result in a ‘no work, no wages’ situation, and not at the employer’s risk.

Mediation can sometimes be used as a strategic tool. If no solution is reached during mediation, this mere fact can be reason for an employer to state that there is (now) a seriously and permanently damaged working relationship. It will then state that, by mediating the conflict it has done all in its

power to solve the conflict, and that apparently this cannot be resolved. If the employer still had insufficient grounds for dismissal before mediation, by going through the procedure it might create such grounds. Mediators do not necessarily mind. Mediation is possible once the parties are at the table. A court will wish to assess whether parties have made sufficient effort in mediation, but the parties will not be allowed to speak about this because of agreed confidentiality.

Conclusion

Employment conflicts in the Netherlands imply obligations to the parties, namely the duty to make an effort to resolve them. The uncertainty of a dismissal or heavy obligations during illness often cause parties to consider mediation. It seems a successful tool and has various advantages over litigation, such as lower costs, higher speed and less uncertainty. Mediation sometimes seems forced on parties. Failure to cooperate in mediation has consequences: for an employer, its application for dismissal will be refused; for an employee, there is the possible loss of wages. Advantages seem to outweigh the disadvantages: if parties have started mediation, the mediator will invite them to set aside their positions and state their interests. This brings the conflict closer to a resolution.

Notes

[1] **www.mediationbedrijfsleven.nl/data/files/ZAM-ACB_onderzoeksrapport_DEF.pdf (http://www.mediationbedrijfsleven.nl/data/files/ZAM-ACB_onderzoeksrapport_DEF.pdf)**

[2] **mfnregister.nl (http://mfnregister.nl)**

[3] Swaab, R and J Brett (2007), 'Caucus with Care: The Impact of Pre-Mediation Caucuses on Conflict Resolution', IACM 2007, Meetings Paper.

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