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# IDENTITY-BOUND EMPLOYERS AND LIMITATIONS OF EMPLOYEES' FUNDAMENTAL RIGHTS

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## 1. INTRODUCTION

In the Netherlands, the exercising of fundamental rights by employees is always limited by the employment contract. As defined in the Dutch Civil Code, the employer has the right to instruct the employee regarding the performance of the duties under the employment contract. This is, self-evidently, a limitation following from the contract itself. On this basis, a physiotherapist should not, during treatment, trouble the patients of the hospital where he is employed by trying to spread the Word of God or with attempts to proselytise;[1] a croupier, employed by a casino, cannot refuse a client's bet due to his conviction that gambling is in violation of the Bible.[2] On the other hand, the employer is not entitled to instruct the employee with regard to his personal activities outside of working hours. Or is he? For some employers, private conduct of their employees is of great importance. Employee conduct deviating from the employer's norms could undermine the employer's credibility. But is the employer entitled to influence the employee's private life? And what is the significance of the employer's aims with regard to this? Is the employer entitled to have certain normative viewpoints and to require the employee to act on them in his private life? And if the employee does not behave according to the identity and persuasion of the company, does that justify dismissal? These questions are a matter of discussion in Dutch labour law, as will be explained below. However, it will be clear that these questions cannot be answered unequivocally.

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1 Cantonal judge Hoorn, 23 November 1997, *JAR* 1998/68.

2 Cantonal judge Roermond, 8 March 1994, *JAR* 1994/138.

## 2. THE IDENTITY-BOUND EMPLOYER AND THE 'TINTED' EMPLOYER

Some employers are entitled to bind consequences to the employment contract pertaining to certain private convictions or conduct. This applies to employers who focus on a religion or ideology and to cases concerning equal treatment laws. The ban on discrimination based on religion, principles, political persuasion, sexual orientation, or civil status, does not apply to public or private organisations founded on religion or conviction.[3]

Such employers are called 'identity-bound'.[4] If such employers make distinctions on the grounds of religion, principles and so on, they are not considered to be in violation of the law. This leaves a judicial examination of a decision pertaining to labour law, made by such an employer, principally intact. To deem an employer as an 'identity-bound employer' leads, therefore, to the applicability or non-applicability of several rules, but not to a different legal relationship between the employer and the employee.[5]

I, therefore, preferably refer to the employers, falling outside of the legal provisions pertaining to this, as 'tinted employers', in order to distinguish them from the 'authentic' identity-bound employers. With the term 'tinted' employer, I allude to employers who embrace an identity, a profile or a 'colour', which is society, politics or conviction-oriented, and which falls outside the strict framework of the Equal Treatment Directive. The incentive for the colour may be social, political or religious, but may also be solely commercial. In the case of the former, the colour is virtually, without exception, fiercer than with regards to the latter. What subsequently makes the employer a tinted employer is that such an employer imposes, to a larger or lesser degree, his colour onto the employee, and also onto the employee's private conduct.

## 3. THE POSITION OF THE 'TINTED' EMPLOYER

As far as labour law is concerned, the legislature considered it unnecessary, either to give these tinted employers special attention, or to explicitly protect the employees

3 Based on the European Directive 2000/78/EG.

4 By, among others, Vermeulen, B. 'The functioning of the Dutch Equal Treatment Act, especially with regard to churses and confessional organizations', in Institute Canon Triest (ed.), *Anti-discrimination*, Gent, IICT, 2004, pp. 55–83; and Cuypers, D. 'Prohibition on discrimination and identity-bounded enterprises', *Journal for Education Law and Education Policy (Tijdschrift voor onderwijsrecht en onderwijsbeleid)*, 2008–09, pp. 44–70.

5 See, for a detailed analysis, Zondag, W.A. *The limits of Labour Law*, speech 2004, pp. 29 *et seq*. A Jewish butcher is employed on the basis of an employment contract (see Cantonal judge Amsterdam, 14 December 1994, *JAR* 1995/10), just like a pastor (see Cantonal judge Lelystad, 2 February 2005, *JAR* 2005/58).

working for them.[6] The Dutch right of dismissal is insensitive to the demand for an admissible reason for dismissal. There, the lack of a statutory regulation in the case of an employee's private conduct clashing with the employer's chosen colour, is less, or even completely not, problematic in Holland. Due to the absence of a specific statutory regulation and the authority of the arbiter to examine the reasonableness of sanctions imposed on, and certainly, the dismissal of, an employee, a judgement encompassing all the circumstances of the case can be passed.

In a collective employment agreement, relevant clauses could be incorporated, which could assist a tinted employer in influencing the private life of an employee. Limited study shows that collective employment agreement parties are extremely reserved, if not altogether adverse to accepting regulations. Frequently present in the available agreements is the general obligation demanding that the employee must best promote the interests of the employer, even without a specific demand to that effect. Also frequently present is a ban on extracurricular duties without the consent of the employer.

There is still the possibility that the employer, based on an agreement or on his right to instruct, imposes certain obligations on the employee with regard to the employee's private conduct. Whether this occurs often escapes my observation, but I assume it happens regularly. According to my observations, 'house rules', which include regulations affecting private life, prevail in employees' manuals. I am not aware of any research of the prevalence of this. There are few judicial cases in which such a contractual agreement[7] or regulation for the right of instruction[8] were reported.

## 4. DO 'UNTINTED' EMPLOYERS EXIST?

The admissibility of such agreements or obligations based on the right to instruction must, therefore, be judged according to all the circumstances of each case. These circumstances obviously also include the interest of the employer in a specific private conduct or way of life of the employee, or their prevention. The employee's importance in conducting himself as he wishes outside of working hours will generally be guaranteed by a fundamental right. The employer, on the other hand, especially one of a pale colour, is less liable to appeal to a basic right.

This is partly because progressively, more employers assume a 'corporate identity', or because their organisation adopts social objectives. 'Corporate Social Responsibility' is booming, or, better said, socially responsible enterprise is booming, especially since the publication, in July 2001, of the European Commission's green paper, 'Promoting

6 Cuypers, D., see footnote 4.

7 See the *Hyatt* judgement, The Dutch Supreme Court, 14 September 2007, *JAR* 2007/250.

8 Just like a law firm's investment arrangement, see District court Rotterdam, 28 September 2004, *JAR* 2004/268.

a European Framework for corporate social responsibility'.[9] In this green paper, the social role of companies is stressed, and a call is made for the improvement of employees' health and safety. It is striking that this social policy is always associated with competitiveness. Under 2. of the green paper it is written:

> 'Going beyond basic legal obligations in the social area, e.g. training, working conditions, management-employee relations, can also have a direct impact on productivity. It opens a way of managing change and of reconciling social development with improved competitiveness.'

Besides that, the employer may, even unexpectedly, become coloured by his employees' beliefs, although, in such a case, I would not refer to the employer as coloured. There are several examples of this, which often receive media attention, because they are so striking. The papers reported on 26 June 2004, on an American truck driver who was fired because he refused to pick up a load at a brewery:

> '(…) He is suing his boss for religious discrimination. Trucker Ibrahim Barzanji is a Muslim: the Koran forbids any involvement with alcohol. The carrier is threatened with a sentence from the American commission for equal rights. The commission sustained Barzanji's charge. (…)'[10]

## 5. IS JOINING A COMPANY AN ACKNOWLEDGEMENT OF COLOUR?

More than twenty-five years ago, the government declared to be of the opinion that it may be expected of an employee to subscribe to the colour of his employer. In the words of the government:

> '(…) that it may be demanded that a prospective employee declare to be favourable to and/or a clear follower of the organisation's identity, as they are defined in the statutes or code (…)'[11]

I am of the opinion that it is irrelevant whether the employee wholeheartedly supports the identity of the employer.[12] He is obliged to conform to the interests of the company, to participate in the realisation of the objective, and not to harm the identity. I hereby stress that the parliamentary discussion is about strongly coloured employers. The more

9 Brussels, 18 July 2001, COM(2001) 366 final.

10 The case was recently filed, see *Reedy v Schneider National, Inc.* (E.D. Pa. filed 15 October 2010). About this case: www.volokh.com/2010/10/25/does-trucking-company-have-a-legal-duty-to-accommodate-muslim-employees-religious-objections-to-transporting-alcohol-or-tobacco/.

11 Official report II 1980/81, 15 360, pp. 18–20.

12 Schuijt, G.A.I. *Werkers aan het woord,* 1987, p. 193.

the employer's colour diminishes, or the more the colour is dictated by commercial motives, the less relevant the government's intended endorsement becomes, and the less the acceptance of the objective.

The greater the commercial interests of an employer in a specific private conduct of an employee, the greater the need for the employee to privately behave in certain ways in order to hold footing in the balance of interests.

An employer, who, indeed, portrays himself as commercial, but, also, as extremely socially engaged, may lose much credibility if his employees, in private, do not adopt an attitude loyal to the company's outlook. The issue here is not so much the protection of commercial interests, as the view that trade and the collective exercising of basic rights can be combined, and that these rights deserve protection. An employee working for such an employer can be expected, more than one working for a company with solely commercial interests, to display a certain amount of loyalty to the views of his employer, even in private life.

In considering this, all circumstances of the case have a role. This is in the interest of the employee's exercising of basic rights. If the only interest, while exercising these rights, is the expression of a personal opinion about, say, the qualities of the employer, this will bear less weight than if it concerns a socially related statement.

## 6. ADMITTANCE OF COLOUR UNDER CONTRACT?

Many of the regulations introduced by corporate social responsibility concentrate specifically on the employer's conduct, or are largely generic so that they may influence the private conduct of employees, only to a minimal degree. This often concerns regulations to which no one would be opposed. It is, however, conceivable that this value is subsequently agreed upon with the employee so that he actually commits himself to act on this value. This could change the situation. The most famous judicial case on this subject is the drugs-free policy of the Hyatt Hotel in Aruba. More information on 'Hyatt's Family of Responsible and Caring Employees (F.O.R.C.E.)' can be found on Hyatt's website, but not about the 'policy' imposed on the employees.[13] In my opinion, the judgement to summarily dismiss an employee for violation of this policy too easily ignored the basic rights to which she was entitled.[14] I consider of importance that Hyatt justifies the policy with mostly commercial goals. This does not concern an employer who is – unlike the freedom of ownership, which isn't anchored in the Dutch constitution – entitled to an appeal to a basic right. The examples above repeatedly show that an evaluation of the admissibility of contractual agreements or instructions by the employer regarding the private life or conduct of

13 See www.hyatt.com.

14 See my annotation at The Dutch Supreme Court, 14 September 2007, *NJ,* 2008, 334. In a firmer tone of voice: Roozendaal, W.L. 'Het fundamentele recht om te snuiven' ('The Fundamental Right to use Drugs or the Limits to Authority Jurisdiction'), *ArA,* 2008/1, p. 43 *et seq*.

employees demands weighing all the circumstances of the case. In that sense, it seems, such a contract carries some weight, but the inherent agreement is defeated by the interests protected by basic rights.[15]

## 7. A BALANCE OF INTERESTS…

It has already been made clear that, in my opinion, the employer having a colour, is a concern that has to be considered when evaluating whether the employee is expected to accept limitations, imposed by his employer, on his private life or conduct. Commercial concerns bear less weight, in my opinion, than the interests associated with the proclamation of a political, ideological or social outlook. The weight of aforementioned interests can be justified by stressing that employers with a strong colour are nothing more than the collectivised exercising of the basic rights of individuals. This justifies an important difference in evaluating a limitation imposed on an employee of a commercially coloured employer, on the one hand, and, on the other hand, a limitation imposed on an employee of a solely commercially coloured employer. Is this consideration reflected in law?

It appears, in fact, that an employer's colour based on a commercial outlook bears less weight than a colour based on social, ideological and political views. This distinction has been expressly made by the CGB (Equal Treatment Commission).[16] This thought is also expressed in law. A hairdresser may not refuse access to labour (employment) to a hairdresser solely because it fears that her headdress, which she has recently started to wear, will lead to a diminishing appeal (clientele).[17] The previously mentioned *Hyatt* judgement was contrary to this, showing that there is no consistent course in law. This disparate judgement was most probably led by the employer's basically respectable policy, and the judgement by the Court of Appeal in the Netherlands Antilles, who, based on the specific circumstances, came to a different decision than, I feel, a Dutch judge would have.

I find this position very understandable: when the basic rights of the employee are at stake, they must not be easily subordinated to the interests of the employer. Without considering the interests protected by basic rights, Dutch labour law will quickly wind up in urban history (or myth) with cases such as the dismissal of Rick Bronson. This American worked for twelve years as a truck driver for Coca Cola,

15 For further details, see Mak, C. 'Fundamental Rights in European Contract Law' (diss UvA), 2007, pp. 86–96; Verhulp, E. *Vrijheid van meningsuiting van werknemers en ambtenaren* (*Employees' Freedom of speech)*, 1996, pp. 44–45.

16 See CGB Recommendation concerning Labour, religion and equal treatment, 12 August 2004, CGB Recommendation 2004/06, especially 3.4.1.

17 Cantonal judge Alphen aan de Rijn, 22 March 1994, *JAR*, 1994/82.

and was fired in 2003 after being seen with a can of Pepsi.[18] This is not an attractive prospect.

[18] Some pass this case off, now and then, as an 'urban myth', even though the story is attributed to *Reuters* 13 June 2003.
See, also, ww.indiaresource.org/news/2003/444.html. This report mentions Bronson's trade union activities, and states that was the actual reason for this dismissal.