The Netherlands

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(TOO) LONG WAITING PERIOD FOR AN INVALIDITY BENEFIT FROM THE NETHERLANDS

The Netherlands has an invalidity scheme that differs fundamentally from the invalidity systems in other EU countries and the rest of the world. This in itself does not have to cause any problems. However, there are two issues with the invalidity scheme. Firstly, this system, which is based on the WIA Act, is very strict, relies also on theoretical criteria and is not always fair[1]. Secondly, it has a long waiting period namely 104 weeks. Therefore, it has attracted much criticism since its introduction in 2004. It is not only at the national level that the disability system of the WIA Act appears to create barriers, but also in cross-border situations.

This contribution sheds more light on the current legislation and the obstacles, but also on the influence of the Vester case (C-134/18) in cross-border invalidity situations.

To set the framework, this contribution starts with some clarification about the invalidity scheme in the Netherlands **(I)**. After analyzing the main problems **(II)**, the attention shifts to the concrete, latest plans of the legislator and to the change in policy for cross-border situations **(III)**.

The terms invalidity, incapacity and disability are interchangeably in this contribution.

I - WIA ACT – LONG TERM INCAPACITY SCHEME FOR EMPLOYEES

There is a plea for a new disability system for quite some time. Calls for change have come from all corners of society: from affected employees to politicians, implementing agencies, courts, doctors, academia, lawyers and employers. The system has been under scrutiny since its introduction in 2004. In addition, over the years, the criticism has grown stronger. In November 2022, the Minister of Social Affairs appointed a special committee (OCTAS) to examine the controversial law and come up with alternatives[2]. In February 2024, the OCTAS-committee presented her report to the Minister and the public. It is now

1 WIA Act stands for « Wet Werk en Inkomen naar Arbeidsvermogen » (Wet WIA). The English translation would be : « Act Work en Income related to Working Capacity ». So it is not the *disability* that is the leading factor, but the remaining *capacity* to work.

2 OCTAS stands for « onafhankelijke commissie toekomst arbeidsongeschiktheidsstelsel » meaning « independent commission future incapacity scheme ». See also: https://www.rijksoverheid.nl/ministeries/ministerie-van-sociale-zaken-en-werkgelegenheid/organisatie/commissies/octas

uncertain what, if anything, the new government (installed July 2024) will do with these proposals for change.

A brief sketch of the Dutch legal framework concerning sickness and invalidity is necessary to understand the issues of the WIA Act. A main characteristic, and similar to other countries, is of course the distinction between short term and long-term incapacity for work.

A- Short-term incapacity for work

In the Netherlands *the short-term incapacity* for work - called « sickness » - can last for maximum 2 years. In these 104 weeks, the employer is responsible for the continued payment of the salary. The legal minimum of the amount is at least 70% of the salary but in practice, many employers pay 100% in the first year and then diminish the amount to 90%, 80% or 70%. The exact percentage is set in the collective or individual agreement.

A second obligation for the employer is to set up a re-integration plan and to support the employee during his sickness in order to return to work. The company doctor plays a crucial role in this reintegration process, although officially it is the employer who takes the lead rather than the doctor.

The employee, for his part, is obliged - in return for continued payment of his salary - to cooperate with the employer (read: the doctor) and the reintegration officer in order to be reintegrated into the workplace. The preferred option is to return to the previous job, but adjustments can be made and even working in a different job with a different employer is an option to be explored.

The scheme of the continued payment during illness is based on the employment contract between the employer and the employee (civil law) and is therefore sometimes referred to as the privatized sickness scheme. There is also the public scheme, which is provided by the state and acts as a safety net. Only employees who have no employer (anymore) can rely on the Sickness Act. This law is implemented by UWV, which is the official public body responsible for sickness, unemployment and invalidity benefits in cases where the employer is no longer involved[3]. Income replacement under the Sickness Act is set at 70% of previous salary, as opposed to the usual 100% from the employer.

If the short-term incapacity to work is close to 104 weeks, UWV takes over and invites the sick person to a medical and employment examination. A UWV doctor conducts the medical examination, while an expert who is familiar with the job opportunities on the labour market conducts the work-related examination.

3 UWV stands for « Uitvoeringsinstituut Werknemersverzekeringen » and is the public agency that is involved in all employee schemes. The Tax Office is responsible for the collection of all employee insurance premiums.

B - Long-term incapacity for work

It is only after the medical and work-related examination that UWV decides whether the sick employee can be admitted to the WIA scheme.

If UWV decides that the sick employee does indeed meet the strict conditions of the WIA Act, the WIA Act comes into effect. This law is known for his complexity. The law is even described as « a maze » since people sometimes do not know whether they are entitled to benefits and for how long[4]. This is because the WIA Act is characterized by theoretical measurements, by reemployment requirements and also by the offsetting of the WIA-benefit against other income.

A short enumeration of some typical characteristics allows for a better understanding later of the issues (under II):

1. Two main conditions have to be met:
2. A person cannot perform his job properly or at all due to illness and
3. A person cannot earn the same salary as before due to illness.
4. The minimum incapacity percentage is 35%
5. The measurement of the disability rate is theoretical and based on economic grounds. This means that UWV does not test how much incapacity a person suffers but how much « remaining earning potential » there is. This has the controversial effect that a person with a high income will theoretically lose more income than a person with a lower income but exactly the same illness or accident. Hence, the person with the higher income will get a higher benefit.
6. The WIA benefit consists of two parts: IVA and WGA[5].
7. The criteria for eligibility for the IVA are an incapacity rate between 80 and 100% and « not being able to work now or in the future »[6]. The inflow of IVA is low due to these strict requirements. There is no re-integration obligation in the IVA. The IVA benefit can last until the pensionable age and offers 75% of the last salary.
8. The criteria to be eligible for the WGA, the other part of the WIA, are focusing on the durability of disability[7]. If there is a change to work again in the future, UWV then decides to pay the WGA.
9. Everyone who receives a WGA benefit has a reintegration obligation. Failure to do so has financial consequences.
10. Within the WGA scheme, there are three different benefits. It would go too far to discuss them here. However, it is good to realize that the different obligations and conditions of these three benefits add to the complexity of the WIA system.

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4 See the OCTAS report : https://www.rijksoverheid.nl/actueel/nieuws/2024/02/29/octas-presenteert-varianten-om-arbeidsongeschiktheidsstel-te-vereenvoudigen

5 IVA stands for « Inkomensvoorziening Volledig Arbeidsongeschikten » (Totally *Disabled* Income Provision); while WGA focuses on the remaining ability to work. WGA stands for « Werkhervatting Gedeeltelijk Arbeidsgeschikten » (Partially *abled* people return to work).

6 Art. 4 of Wet WIA.

7 Art. 5 of Wet WIA.

II - MAIN PROBLEMS

A- In national situations

In her report of 2024, OCTAS confirms and analyses the current overly complex sickness and disability system[8]. OCTAS also addresses more bottlenecks than expected, for people with no (recent) work history or low income jobs and for the self-employed.

B- In cross-border situations

As mentioned, the waiting period for the invalidity benefit in the Netherlands differs significantly from other countries. In a purely national situation, the period of sickness and the period of disability are aligned. This means that a sick employee is not left in a vacuum waiting for disability to take effect, without any benefit.

However, if an employee finds himself in a cross-border situation in case of invalidity, then he might be left in a vacuum. Indeed, in the case of disability (and old-age) benefits, the main rule is that all countries involved pay their share of the benefit[9].

An employee who has been working in different countries and applies for an invalidity benefit has therefore to deal with the laws of different countries. There is no harmonization of the waiting periods. This means that an employee who turns ill in another country while being insured there trough work, and who has also worked in the past in the Netherlands has to accept the different waiting periods for the incapacity benefit. So, it might happen that the foreign sickness benefit ends after one year while the Dutch WIA benefit is only paid after two years. The employee faces then a year without benefits. Moreover, the longer the employee has worked in the Netherlands, the higher the WIA benefit and the greater the income gap.

III - LEGISLATIVE, POLITICAL AND POLICY ACTIONS FOR THE INABILITY-TO-WORK SCHEME FOR EMPLOYEES

A- At national level

Rather than designing an entirely new system, the OCTAS committee proposed three options that could simplify the current complex sickness and disability system. Within these variants different measures are presented, like lowering the 35% to a 25% threshold, diminishing the variety of benefits within the disability scheme, introducing a practical rather than theoretical assessment, abolition of the durability criterion, more re-integration options without sanctions, better guidance for people navigating the maze of rules in the WIA Act and fewer reassessments when people (re-)enter the labour market. These proposals are very much within the realms of possibility, in the short term. OCTAS also makes a number of proposals to address bottlenecks for people with no (recent) work history.

8 OCTAS, *Toekomst van het arbeidsongeschiktheidsstelsel*, 29 februari 2024.

9 Art. 50 of Coordination Regulation 883/2004.

B - In cross-border situations

Despite the long waiting period and the income gap of employees in cross-border situations, the Dutch legislator did not intervene (yet). It was only with the Vester ruling that things were shaken up and action was taken by the implementing body, not the legislator.

The European Court of Justice ruled in 2019 that Ms Vester could not be required to go through the long two-year waiting period before receiving the Dutch WIA benefit[10].

1- The facts of the case

Ms Vester was working in the Netherlands while living in Belgium from 1997 to 2015. In April 2015 she got an unemployment benefit in Belgium, according to the rules of the coordination regulation 883/2004. Only a few days later she fell ill and applied for a sickness benefit in Belgium. Again, according to the coordination regulation she received that sickness benefit from Belgium. One year later, in April 2026, the sickness benefit expired - according to the Belgian rules - and Ms Vester accordingly applied for an invalidity benefit in Belgium. The Belgian doctor indeed declared her disabled (long term incapacity). However, she had (almost) no insurance record in Belgium and therefore no right to a Belgian invalidity benefit. Ms Vester asks the Dutch authority, UWV, for the Dutch invalidity benefit as she worked for almost two decades in the Netherlands. UWV rejects her application, telling Ms Vester that she will have to wait another year. In April 2017, she may have fulfilled the two-year waiting period for the WIA. Ms Vester finds herself in a financially precarious situation for one year without any income and she wonders if the free movement of persons could expect her to ask for social assistance during that waiting period.

2- The ruling

The European Court of Justice ruled that the application of the Dutch rules on a migrant worker (Ms Vester) is not compatible with the goal of article 45 TFEU. In fact, non-migrant workers, who stay in the Netherlands, receive during 104 weeks an income replacement[11]. According to the Court, it is therefore the Dutch legal framework which is the valid point of reference, within the meaning of the case law. The Court states that it's up to the competent national authority (UWV) « to determine the most appropriate means for achieving equal treatment of migrant and non-migrant workers »[12]. In short, the Court finds that, in accordance with Articles 45 and 47 TFEU, the Netherlands should grant a migrant worker in Ms Vester's position a benefit for incapacity for work during the second year of incapacity for work.

3- The reaction in the Netherlands

From January 2021, a modified UWV policy is in place (only) for situations where the 104-week waiting period cannot be met in full[13].

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10 Vester, C-134/18, 14 March 2019 ECJ.

11 Vester, consideration 42.

12 Vester, consideration 48.

13 UWV note on the Vester case, January 2021.

So it is not the legislation that changes and shortens the 104 weeks, but the implementing body, UWV, that applies a changed policy in some situations. This new policy matches the foreign waiting period in individual cases by shortening the waiting period for WIA benefits. In the case of Ms Vester this would mean that the Dutch authority responsible for the invalidity benefit after the 104 weeks waiting period, accepts a deviation from the Dutch legal framework and will shorten that waiting period to one year.

This change from a two-year to a one-year waiting period now applies, based on UWV-policy, only to specific cross-border situations, but could in future also apply to domestic law, if based on a legislative adaptation.

Conclusion

The disability system in the Netherlands has been under fire for some time. So a committee was set up to look at the system and come up with alternatives. The OCTAS committee has proposed three alternatives to the Minister of Social Affairs. However, with the arrival of the new government in July 2024, it is unclear what and how this report will be dealt with. At the same time, it is clear that the long waiting period of 104 weeks for disability benefits has led to major problems and unequal treatment in cross-border situations. The Vester case of 2019 has led to an adjustment of the UWV policy and in some cases allows a reduction of these 104 weeks.