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Date

Subject Direct request Convention No. 121

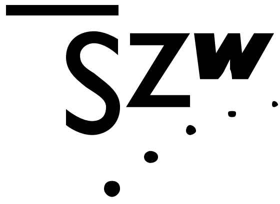
Dear Mrs Doumbia-Henry,

In its Direct Request 2007 on Convention No. 121, the Committee hopes that a full report will be provided for examination at its next session in November 2007-2008, as well as answers to three questions related to the Work and Income (Employment Capacity) Act (WIA).

With regard to the full report on Convention No. 121, we refer to our report on Part VI of the European Code on Social Security for the period from 1 July 2007 to 30 June 2008, which we sent to the Secretariat of the Council of Europe last year.

Before devoting more concrete consideration to the Committee's queries about the WIA, I would like to take this opportunity to sketch the social context for which this legislation was created. The WIA was introduced to improve the existing employment disability system, which was not having a stimulating effect in the Netherlands. The Netherlands distinguished itself from other countries not so much in the total number of those entitled to receive benefits, but particularly in the underlying proportion of those unable to work. It was also expected that the number of people unfit to work would continue to increase if policy remained unchanged, due in particular to the changing composition of the working population on account of the increasing employment participation of women and the ageing of the population. The government and social partners regarded this as a major problem. In society's eyes there is a major difference between people who are unemployed and those who are unfit to work. In this view, the unemployed are temporarily outside the employment process (they find themselves between jobs), while those unfit to work are regarded as having been definitely written off. In many instances this view is incorrect, and in all cases it is unnecessarily stigmatising.

Resulting from a practice which had grown over decades where illness and an inability to work had become an accepted route out of the employment process for people with a range of problems, the existing employment disability system did not sufficiently activate people. This could be attributed to a combination of regulations and circumstances. Illness was the only



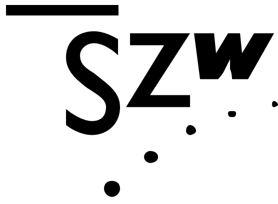
valid grounds for interrupting employment that could not be checked effectively. It was entirely accepted that absenteeism due to illness was therefore used for all possible reasons other than illness. Absenteeism due to illness was also the route to the payment of employment disability benefits. As a consequence of this, all those directly involved placed a strong emphasis on the question as to whether someone was unable to work because of temporary illness or an actual infirmity. The longer the sick leave lasted, the more attractive the employment disability benefits appeared to all those involved when compared to the alternatives, so that the hope of returning to work was abandoned. In this way employees were almost automatically steered in the direction of an employment disability benefit. In most cases this was not a conscious or deliberate act, but simply because the benefits were available, and because their existence meant that nobody was forced to find a more suitable solution to the problem. The combination of absenteeism and employment disability benefit acted as a 'trap', in the sense that temporary illness and difficulties at work often led unnecessarily to long-term absenteeism and entry into the benefits system.

A number of measures were taken from 2001, to enhance the mobilising character of the employment disability system. The first step was the introduction of the Eligibility for Permanent Incapacity Benefit (Restrictions) Act on 1 April 2002. This was followed in 2004 by the Prolongation of Obligation to Pay Salary (Sickness) Act and an amendment to the Assessment (Disability Benefit Acts) Decree. All these laws imposed a heavier responsibility on employers and employees to avoid long-term absenteeism due to illness and ultimate employment disability, by introducing financial incentives and offering tools with which they could achieve reintegration. The WIA links seamlessly with this.

The WIA therefore focuses on what a person is able or unable to do. Giving priority to activating employment suitability is of primary importance to people with limited employability. It is to their advantage that the emphasis is laid on what they can rather than on what they cannot do. It is also important for society as a whole. After all, society benefits from the greatest possible employment of people who can work. This applies particularly to the Netherlands, where until the introduction of the WIA, the employment disability regulations contributed to a disproportionately large number of people being outside the labour market in an international context, due to employment disability.

Work resumption is therefore the key to the WIA. Through financial incentives, employers and employees are encouraged to do everything they can to ensure that those who are still partially capable of employment can find or retain work. At the same time, there is income protection for people who really can no longer work. This is given shape as follows.

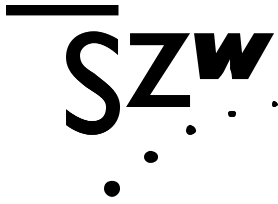
- First a distinction is made between people who are long-term fully work-disabled on one hand, and people who can still work on the other. The first-mentioned group receives a benefit of 75% of their daily wage up to the age of 65.



- Secondly, financial incentives to work have been introduced for the latter group (Return to Work (Partially Disabled) Scheme, WGA). Initially they receive a wage-related benefit in which the unemployment benefit has been incorporated. For those not working this benefit comprises 70% of their daily wage, and if they do work, their total income always increases because only part of the employment income is set against the benefit. And after the wage-related benefit if they are not working, they receive a supplementary benefit related to the employment disability percentage and the legal minimum wage, whereas if they are working, they receive a wage supplement which is higher than the supplementary benefit. In other words, working (more) always pays.
- Thirdly, an extra incentive has been created for employees who have less than a 35% employment disability. For them, employers and employees at the level of the employment organisation itself, or their representative organisations in the sector or line of business are responsible for their reintegration and income protection.
- Fourthly, the implementing institution, the 'Uitvoeringsinstituut werknemersverzekeringen' or UWV, has obtained further financial incentives, because the employer can carry the risk himself or can transfer it to a private insurer. This freedom of choice requires the UWV and private insurers to compete with each other in the field of reintegration.

The WIA has now been in force for almost three years. It has been ascertained that the new employment disability system has been extremely successful so far. The following statistics illustrate this. The number of applications for benefits based on the WIA has halved in terms of its precursor, the Disablement Benefit Act or WAO, to use its Dutch acronym. This decline can be (partly) attributed to the extension from one to two years of the obligation to continue paying wages during illness, and to the greater responsibility of employers and employees towards reintegration.

Reducing the number of applications has led to a substantial decline in intake into the WIA compared to the WAO. Up to 2003, the WAO experienced an annual intake of around 100,000 people. A considerable decline then occurred within a couple of years. In 2006 and 2007, the intake was a little more than 20,000 people, and it is anticipated this will remain limited to around 24,000 people this year. All this leads to the total number of those who are work-disabled (WAO plus WIA) having decreased by some 200,000 people by the end of 2008 compared to 2002. The size of the pool (around 600,000 people) has therefore dropped to its lowest level in the last 25 years.
Of those who receive WIA benefits, the majority are completely work-disabled. Thus in 2007, 38,000 WIA benefits were paid, 31,000 of these for total employment disability. These people receive benefits of 70% to 75% of their daily wage. Half of the partially work-disabled occupy half of the remaining earning capacity. This means that at least 3,500 partially work-disabled people are working. This large number is partly the result of an increase in the number of reintegration trajectories employed by the UWV for the work-disabled. In addition, from 2006 there has been a significantly increase in the number of people who are placed or reinstated



with an employer as a result of the reintegration trajectories. In 2006 the placement percentage was around 30%, and has since then risen to 45% in the first quarter of 2008. This increase is presumed to have been caused partly by the favourable economic developments in recent years, and partly through the effects of learning. All in all, it may be concluded that the new employment disability system meets the expectation that it promotes the employment participation of those who are able to work.

This conclusion has recently been confirmed by the OECD in its report which examines the employment disability systems of four countries, including the Netherlands. The OECD praises the Netherlands because it has implemented the most fundamental changes to the sickness and employment disability regulations:

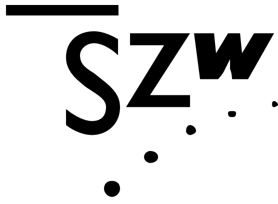
"When it comes to sickness and disability, no other OECD country has such an interesting story to tell as the Netherlands. First, sickness absence fell from 10% in the late 1980s to only 4% today. More recently, the inflow into disability benefit also dropped remarkably, from almost 12 per 1000 in 2001 (and in fact during most of the two decades prior to the turn of the century) to around four per 1000 in 2007. Eventually, from 2005 onwards, the total number of people on disability benefit also started to fall. This success is a consequence of a series of very comprehensive reforms, characterised by a shift of responsibilities to employers and employees, a tightening in benefit eligibility and generosity, and a (partial) privatisation of hitherto public schemes."

In response to the Committee's queries, we would like to make the following comments.

1. The Committee notes that an insured person who becomes ill is entitled to a WGA benefit (pursuant to the Return to Work (Partially Disabled) Scheme, WGA), if the waiting period has elapsed and he is partially disabled. The insured person must also satisfy the eligibility requirement, that is, he must have performed work in at least 26 weeks in the 39-week period immediately preceding the day on which his entitlement to continued payment of wages or benefit pursuant to the Sickness Benefits Act ended. The Committee points out that no conditions with regard to the duration of the employment history or the duration of the insurance may be imposed on the entitlement to benefit (see section 9, second paragraph of the Convention).

Reply
No conditions with regard to the duration of the employment history or the duration of the insurance are imposed on the existence of the entitlement to a WGA benefit. So the insured person who becomes ill on his first working day is entitled to a WGA benefit, as long as the conditions for this are met. These conditions are:

- The insured person must be ill for 104 weeks. During this period he is entitled to continued payment of wages or to a benefit pursuant to the Sickness Benefits Act.



- After these 104 weeks, he must be partially disabled, that is to say he must have a loss in earning capacity of at least 35%.
- No exclusion grounds apply after these 104 weeks, except in case of detention and residence outside the Netherlands.

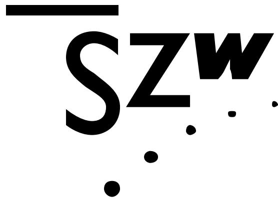
The duration of the employment history or the duration of the insurance is therefore not a condition that determines whether one is entitled to a WGA benefit. The WGA benefit consists of two phases: the wage-related phase and the subsequent phase. It is only in this connection that the reference requirement to which the Committee refers, is important. The individual entitled to a WGA benefit will only initially receive a wage-related benefit, if he complies with the reference requirement. This is for the following reasons.

It is customary in labour disability insurances that the benefit offers compensation to the extent that the loss of earning is a result of illness or deficiency. That is why the amount of a labour disability benefit is usually related to the degree of labour disability, or the labour incapacity percentage. The actual loss in earnings of a partially disabled worker can however be greater than the loss in earnings as a result of illness or deficiency. If and to the extent this is the case, the insured person can be designated as unemployed.

This means that an unemployed partially disabled person must apply for two benefits: a labour disability benefit and an unemployment benefit. This was the situation in the Netherlands until 2006. An unemployed partially disabled person had to apply for both a WAO (labour disability) and a WW (unemployment) benefit. This has been changed with the introduction of the WIA. Since then the individual only needs to apply for a single benefit. In order to ensure that a partially disabled person receives compensation for his loss in earnings as a result of unemployment, the wage-related benefit was introduced in the WGA. The amount of this benefit is calculated so that it is equal to the sum of the WAO and WW benefits that he would have received if he were entitled to these two benefits.

In other words, the WW for partially disabled workers has been incorporated into the WGA. Since entitlement to a WW benefit requires that the aforementioned reference requirement be met, this requirement also applies to the entitlement to a wage-related WGA benefit. After this wage-related benefit the insured person is entitled to a wage supplement or a subsequent benefit on the basis of the WGA. This does not mean however that an insured person is not entitled to a WGA benefit if he does not meet the eligibility requirement. In that case he is immediately entitled to a wage supplement or subsequent benefit on grounds of the WGA.

2. The Committee notes that to have the right to a wage supplement, the insured party must earn an income in one month which is at least equal to 50% of the remaining earning capacity. At the same time, the insured person who has the right to a WGA benefit must register as a jobseeker and must accept suitable work. The Committee notes that the requirement that a

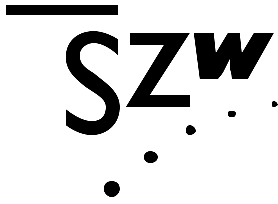


person must utilise his remaining earning capacity, must carry out suitable work, and must earn income for the right to a benefit, is not stated in the Convention. The Committee invites the government to specify the conditions under which the right to a WGA wage supplement exists.

Response
Sustainable employment participation can be stimulated by financial incentives for employers and employees. The WIA therefore has a participation-promoting incentive structure. The benefits system has been shaped in such a way that working (more) pays. The WIA also offers adequate income protection to those who cannot work, and to those who can indeed work but who are unemployed. After the wage-related phase, the WGA's benefits structure therefore takes the following form.

After this phase, the individual entitled to WGA has either the right to a continuation benefit or the right to a wage supplement. If the individual entitled to WGA does not work, he has the right to the continuation benefit. The extent of this is related to the degree of employment disability and the legal minimum wage. More precisely: the extent is 70% of the midpoint of the employment disability class multiplied by the legal minimum wage. Thus for a 50% employment disability level, the continuation benefit will be 35% (70% of 50%) of the legal minimum wage. This complies with Article 20 of the Convention. This Article determines after all, that the extent of the benefit for a fully work-disabled person with a wife and two children amounts to at least 60% of the wage of an adult unskilled male worker, thus at least 60% of the minimum wage, while the benefit for the partially work-disabled should be within a reasonable proportion of that amount. The percentage of 70 in the continuation benefit is above this standard.

The guiding philosophy underlying the benefits regime has been, as stated, that working (more) must pay. This is given shape as follows. If the individual entitled to WGA earns an income which is at least equivalent to 50% of his remaining earning capacity (hereafter: income requirement), then he is entitled to a wage supplement. This wage supplement is generally higher than the continuation benefit, so that working – bearing the WGA's objective in mind – is rewarded financially. It can be expressed another way: in addition to his continuation benefit, the insured party receives a financial bonus if he works. This is in accordance with the recommendations of the employers' and employees' organisations (see SER, 'Working on employment suitability', 2002, publication number 5, page 155):
"For employees with substantial employment disabilities, the council suggests the introduction of a legal wage supplement arrangement. Where there are employment disabilities, this will promote employment participation actually being rewarded for both employer and employee (…)."

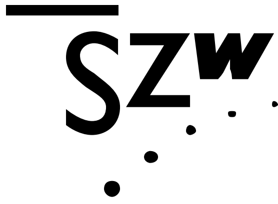


The aforementioned income requirement is the only condition for receiving a wage supplement instead of a continuation benefit. The requirements noted by the Committee, that an individual entitled to WGA must register as a jobseeker and must accept suitable employment, are not requirements for the right to a wage supplement. They are indeed obligations for the WGA-entitled individual. Again mindful of the WGA objective, it may be expected of him that he attempts to utilise his remaining earning capacity. He should make every effort to return to the employment process as quickly as possible. If he does not comply with the obligations, this does not however mean that a right to a wage supplement does not exist. However, a sanction may be imposed upon him.

3. The Committee asks how the protection of victims of occupational accidents or work-related illness is guaranteed for those who are less than 35% work-disabled.

As stated, resumption of work is primary in the WIA. The most effective manner of achieving this goal is to establish the responsibility for prevention and reintegration where it can best be tackled, namely at the level of the employment organisation. The employee and his employer are best placed to prevent or restrict absenteeism due to illness and employment disability. They are therefore primarily responsible for the reintegration of the sick employee. This basic assumption is fully endorsed by the employers' and employees' organisations (see SER, 'Working on employment suitability', 2002, publication number 5, page 155):
"In the council's view, at a local level employers and employees jointly bear the primary responsibility for the optimal utilisation of the working capacity of employees with employment disabilities arising from health impediments. With regard to the income and employment situation of these employees, the council believes that all aspects of the policy must focus on enhancing and utilising their employment market opportunities, and on a continued participation in the employment process, and/or reintegration."

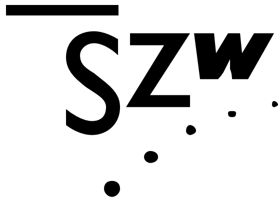
Based on the above, it was decided that during an illness lasting 104 weeks the employer must continue to pay at least 70% of the wage. During this period the employer is also responsible for the reintegration of the sick employee. If employers and employees agree, this period can be extended on request. In this way, employers and employees can take the individual circumstances of the case into account. Lastly, the period will be extended if the employer has not applied his efforts sufficiently to reintegrating the sick employee during the aforementioned 104 weeks. This is also endorsed by the employers' and employees' organisations (see SER, 'Working on employment suitability', 2002, publication number 5, pages 109-110):
"The council's proposal requires that the period for which the employer is legally obliged to continue paying 70 per cent during the illness of the employee will be extended from one year to two years initially (…). Further extension of the period of continued wage payment is possible, for example in the case of shortcomings in the employer's reintegration efforts, or if the employer and employee are in mutual agreement."



After the aforementioned 104-week period, the sick employee may be eligible for benefits on the basis of the WIA. Here, given the difference in employment market opportunities, the WIA distinguishes between employees with a greater or lesser degree of employment disability. Although any threshold is of course arbitrary, on the advice of employers' and employees' organisations, the cabinet decided to set the threshold at a level of 35% employment disability. The SER has made the following comment on this distinction (see SER, 'Working on employment suitability', 2002, publication number 5, page 155):
"With a view to continuing participation in the employment process and/or reintegration, the council believes it is advisable and justified to draw a distinction within the group of employees with employment disabilities. In broad outline this means that those coping with relatively onerous disabilities receive extra support through separate provisions, or are stimulated to find or continue paid employment. Although every threshold has of itself an arbitrary element, the council wishes to set the point at a loss of 35 per cent of the earning capacity. Employees above this threshold are those with major employment disabilities; they must cope with a loss of at least 35 per cent of their earning capacity. Employees below this threshold are those with minor employment disabilities."

The first-named group (at least 35% work-disabled) is entitled to a WIA benefit. The latter group (less than 35% work-disabled) is entitled to a wage if working, and to a WW benefit if not working. This WW benefit is equivalent to the WGA benefit for those not working; the difference is that the WGA benefit is reduced after a certain period (which depends on the employment history), and that the WW benefit ends after the same period. As stated, this is justified by the fact that this group has greater employment market opportunities. In addition, the employers' and employees' organisations have declared themselves prepared to take adequate income provisions at local level (see SER, 'Working on employment suitability', 2002, publication number 5, pages 155-157):
"The council does not propose any specific arrangements for employees with minor employment disabilities. Responsibility for this level lies at the employment organisation level; here there should be a balanced division of responsibility between employers and employees. The basic assumption is that a balanced solution is found at the level of the employment organisation, on expiry of the period of the legally mandatory continuation of wage payments. Important in this connection are the associated reintegration obligations of both employer and employee, as well as the legal dismissal protection. (…)

"As far as the income of the employee on expiry of the mandatory wage payment period is concerned, a variety of situations may arise. Thus the employer may decline to link wage consequences to the impeded work capacity of the employee, either temporarily or not. There is also the possibility that the wage will be adapted to the reduced work capacity. According to the council, this will depend on the degree of the employment handicap, and on issues such as

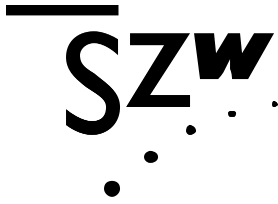


company size, the company's financial position, the length of service and age of the employee. In this context, terms of employment provisions can also play a role.

"In this connection the council also refers to the 'Statement of the central organisations of employers and employees in the Labour Foundation' issued on 22 March 2002. Here the central organisations – also on behalf of their membership – agreed that for the category of employees with minor employment disabilities, customised solutions should be arranged at the level of the employment organisation, including determination of the wage in relation to the working capacity. They also agreed that it is up to the local parties to reach agreements for this group which will guarantee (albeit temporarily) an income level of at least 70 per cent of the previously earned wage for this group."

The primary responsibility of employers and employees for people who are less than 35% work-disabled has been repeated frequently. Firstly, in the so-called '2004 Autumn Agreement', signed by the government and social partners. This agreement provides that for employees with minor employment disabilities (35% or less work-disabled), customised solutions must be reached at the level of the employment organisation. It was also agreed at the time, that the social partners would monitor the reintegration of this group of employees, so that a clear image would arise of the way in which this responsibility is executed, and that an insight into the results would be provided. These agreements between the government and social partners were again confirmed during the so-called 'Work summit 2005' and the 'Participation summit 2007'. The social partners in this latter consultation therefore proposed that they would apply themselves to keeping the aforementioned group of employees in work, or get them into employment. Finally, the Labour Foundation, in its policy conclusions arising from the outcomes of research into the reintegration of employees who are less than 35% work-disabled (January 2007), again indicated that the social partners are responsible for the employment resumption of this group, and that they would fulfil this responsibility themselves.

This policy is beginning to bear fruit. The larger responsibility for the social partners has provided an impulse towards tackling absenteeism due to illness, by both larger and smaller employers. This is firstly apparent from the evaluation of the Eligibility for Permanent Incapacity Benefit (Restrictions) Act and the evaluation of the extension from one to two years of the obligation to continue paying wages. The number of applications for a WAO benefit was therefore around 150,000 in 2002, while the number of WIA applications was only around 40,000 in 2007. Furthermore, the Labour Foundation carried out two investigations into the employment market and benefits position of the group of employees whose WIA applications were rejected. The outcomes of these are extremely promising. From the second study (autumn 2007), it appears that the majority of the respondents (81%) had in fact worked during the first two years of their illness. It also appears that 62% of the respondents worked after the WIA



evaluation. In comparison to the first study (autumn 2006), this was a rise of 16 percentage points.

Copies of the present report have been communicated to the following representative organisations of employers and employees:

- the Confederation of Netherlands Industry - Council of Employers (VNO-NCW)
- the Confederation of Netherlands Trade Unions (FNV)
- the National Federation of Christian Trade Unions (CNV)
- the Trade Union Federation of middle and higher level employees (MHP)

The VNO-NCW and the CNV indicated that they do not have any comments on these answers. We have not received any response from the MHP. The FNV have sent its comments to you separately.

Kind regards,
Minister of Social Affairs
and Employment,

(J.P.H. Donner)