Original header of the Dutch version. The remainder of the text has been translated with with www.DeepL.com/Translator (free version).

Summary: in 2012 a dutch cabin attendant visited my medical practise with severe complaints during and after her work as a flight attendant. She was top fit at the start of her career, only to find herself in a severely compromised health condition after 3 years of service. her symptoms fit those described in several scientific documents as Aerotoxic Syndrome.

3 court cases were held about her limited medical condition. Finally, in the highest court in The Netherlands , where no appeal is possible anymore, the verdict was spoken that she was eligible for a partial government payment through incapacity to work, based on the exposure to a “Medical Substrate” during het work.

19/5376 WIA, 20/2 WIA

# Centrale Raad van Beroep

## Meervoudige kamer

Uitspraak op het hoger beroep tegen de uitspraak van de rechtbank Rotterdam van 21 november 2019, 17/707 (aangevallen uitspraak)

Partijen:
E. van den Heuvel te Berkel en Rodenrijs (betrokkene)
de Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Uwv)

Datum uitspraak: 29 april 2021

19/5376 WIA, 20/2 WIA
Centrale Court of Appeal Multiple-chamber
Ruling on the appeal against the judgment of the District Court of Rotterdam of 21 November 2019, 17/707 (judgment under appeal)

Parties:
- E. van den Heuvel te Berkel en Rodenrijs (person concerned)
- The Board of the Uitvoeringsinstituut werknemersverzekeringen Uwv (Employee Insurance Agency)

Date of judgment: 29 April 2021

PROCEEDINGS

S.D. Bakker, lawyer, lodged an appeal on behalf of the party concerned.

The UWV lodged an appeal.

The party concerned submitted a defence document and further documents.

The hearing took place on 18 March 2021. The applicant appeared, assisted by Bakker, Markus, G. Hageman and M.F.A. Mulder. J.H. van Riet represented the Uwv by video call.

CONSIDERATIONS

1. The person concerned last worked as a stewardess for KLM for 40 hours per week. On 20 May 2013, the applicant reported sick with physical complaints and complaints of fatigue, which she attributed to her work during flights (aerotoxic syndrome). On 28 April 2016, the person concerned visited an insurance doctor's surgery in connection with an application under the Work and Income according to Labour Capacity Act (Wet WIA). In a report dated 28 April 2016, the doctor established that the person involved is capable of functioning normally and that there is no question of reduced usable capacity as a direct result of illness or disability. An occupational health expert determined that the person concerned is suitable for her own work and is therefore not unfit for work. By decision of 8th of June 2016, the UWV refused to grant the party concerned WIA benefit from 2 June 2016 onwards after the expiry of the waiting period - which was extended in connection with a wage penalty imposed - because she was found suitable for her own work from that date. In a decision dated 22 December 2016 (the contested decision), the UWV declared the appeal lodged by the party concerned against this decision to be unfounded. The contested decision is based on a report of 22 December 2016 of an insurance doctor specialising in objections and appeals.

2. In the appealed decision, the District Court upheld the appeal lodged by the person concerned against the contested decision, annulled the contested decision and instructed the Uwv to make a new decision on the objection with due observance of the judgment, while ordering the Uwv to pay the costs of the proceedings and the court registry fees incurred by the person concerned. In doing so, the court ruled that the medical opinion of the independent expert insurance doctor J.T.J.A. Klijn (Klijn), who was called in by the court, could be followed. With reference to the medical findings of neurologist G. Hageman (Hageman) of 12 August 2015, Klijn has substantiated insightfully that there is an adequate medical substrate for the assumption of energy restrictions in relation to the person involved. The arguments put forward by the person involved are insufficient to disapprove Klijn's stipulated time limit of six hours per day and 30 hours per week. Klijn has sufficiently substantiated that no restrictions are required in connection with concentration and memory, in view of the neuropsychological examination carried out on the person involved. Klijn has also sufficiently substantiated that the diagnosis is not of decisive importance, because if an aerotoxic syndrome cannot be assumed, the symptoms and restrictions are still based on somatically insufficiently explained physical complaints (SOLK) or chronic fatigue syndrome. The District Court sees no ground for the opinion that Klijn should have assumed more limitations. During the hearing, Klijn furthermore provided sufficient grounds to prove that, in view of the abundance of medical information, consultation with the party's doctors was not necessary.

In the District Court's opinion, his examination was complete and careful. What the party involved and the Uwv have put forward gives no reason to doubt the correctness of Klijn's medical opinion. Since a medical hour limitation of six hours per day and 30 hours per week must be assumed, as well as a limitation for evening and night shifts, the disputed decision is not based on a sound medical foundation and should be annulled. As the Uwv still has to provide further employment substantiation, the court cannot make a decision itself and the Uwv must make a new decision on the objection of the person concerned.

3.1. In appeal the party concerned argued - in summary - that the examination by expert Klijn was careless and that his conclusion to an hours restriction of six hours per day and 30 hours per week was insufficiently substantiated. According to the party involved, Klijn did not base his opinion on the daily working hours on the date in question, failed to carry out additional research into the more limited employability of the party involved on the date in question, did not consult the party involved's therapists and did not include in his opinion the research carried out at the initiative of the party involved and the scientific research she had cited. The Complainant took the position that she has serious complaints of fatigue as a result of aerotoxic syndrome, on the basis of which a limitation of twelve hours per week must be assumed.

3.2. On appeal, the Uwv has requested that the ruling under appeal be set aside and that the contested decision be confirmed. The Uwv took the position that the conclusion of expert Klijn to adopt a restriction on hours cannot be followed and submitted a report of the insurance doctor on account of objections and appeals dated 24 February 2020 in support of this.
24 February 2020 in support. The occupational therapist stated that Klijn had based his findings on the daily history at the time of his examination and not on the daily history at the time of the date in question. The daily narrative used by Klijn differs substantially from the daily narrative recorded by the insurance doctor in the report of 28 April 2016. Furthermore, Klijn ignored the fact that the person involved was caring for a baby both on the date in question and during his examination, and he did not investigate what influence this had. The (earlier) neuropsychological examination did not reveal any complaints of fatigue. The assumption of a rest break early in the afternoon is also not logical and the person involved apparently still has the energy to do sports in the evening.

4. The Council makes the following assessment.

4.1. Article 5 of the WIA - insofar as relevant in this context - stipulates that a person is incapacitated for work who, as a direct and objective medically established consequence of illness, disability, pregnancy or childbirth, is only capable of earning no more than 65% of the normative hourly income. This article is to be interpreted as meaning that there is only incapacity for work if an insured person cannot or is not allowed to perform the qualifying work on medical grounds measured by objective criteria. Furthermore, in special cases, it may be assumed that the latter requirement is satisfied, even if it is not entirely clear to what disease or defect the inability to perform work is attributable. In those special cases, the (minimum) requirement is that the (independent) medical experts have a virtually unambiguous, consistent and medically substantiated and justified opinion that the insured is unable to perform the work in question due to illness or disability[1].

[1] See, for example, the judgment of 17 October 2019, ECLI:NL:CRVB:2019:3287.

4.2. Another principle is that the administrative judge will follow the opinion of an independent expert engaged by him if the reasoning of this expert seems convincing to him. The question at issue in this case is whether the District Court was right to follow expert  He followed Mr Klijn in his opinion that, in connection with her energy limitations on the date in question, 2 June 2016, a medical hour limitation of six hours per day and 30 hours per week and a limitation for evening and night shifts should be assumed.

4.3. The Uwv is not followed in the opinion - only adopted in the hearing on appeal - that Klijn has not given sufficiently convincing reasons for the fact that there is an adequate medical substrate for the energy-related hours restriction of the person involved. In his medical examination report dated 11 February 2019, Klijn, in answer to the question whether the party concerned has restrictions as a result of objectively and directly ascertainable illness and/or disability with regard to performing her own work, stated that, if the existence of an aerotoxic syndrome is assumed, it can be assumed that the party concerned has restrictions as a result of objectively and directly ascertainable illness and/or disability. If an aerotoxic syndrome is not assumed, then the complaints of the person involved can still be based on SOLK or chronic fatigue syndrome. According to Klijn, in view of the medical information provided by Hageman on 12 August 2015, the existence of illness and/or a defect must be assumed. Klijn quoted the following passage from Hageman's letter of 12 August 2015: "The person involved has a remarkable pattern of symptoms with a clear relationship in time between symptoms and flight hours. Laboratory tests show supporting abnormalities for a possible diagnosis of aerotoxic syndrome, with an increased sensitivity to organophosphates. At this time, the diagnosis of aerotoxic syndrome cannot be made with certainty." In a letter dated 26 June 2019, Klijn reaffirmed the existence of a medical substrate for the (hours) restriction in the person concerned: "Based on the medical information including publications in scientific journals and on the basis of the medical information, including publications in scientific journals, and the information from colleague Hageman, I am of the opinion that it cannot be said that there is no medical substrate for the disability in question. Therefore, I consider restrictions plausible as an objective and directly ascertainable consequence of illness and/or disability." At the hearing before the court on 14 October 2019, Klijn stated that based on Hageman's letter of 12 August 2015 and the examinations and abnormalities found, irrespective of what diagnosis should be made, there must be something going on. This was Klijn's reason for assuming an hours restriction for energy reasons.

4.4. During the hearing, the Uwv argued that Hageman's letter of 12 August 2015 and the studies he had cited did not show that there was a medical substrate for the energy limitations of the person involved. This view cannot be followed. In his letter, Hageman cited a number of laboratory tests: 'Phenylphosphate determinations were made in a laboratory in Erlangen, Germany. There was a clearly elevated value of phenyl phosphate of 16.93 (normal values up to 5). In a laboratory test in Weert, a hypersensitivity to toxic substances with the PON-1 gene was examined: in the patient there appeared to be a mutation, with an increased sensitivity to organophosphates.

Finally, there has been research into autoantibodies against brain-specific proteins in a laboratory in Durham: the antibodies against neuronal proteins such as map-2 and nfp and tau proteins were 7 to 8 times higher compared with controls." The results of laboratory tests cited by Hageman in his letter can be found in the pleadings. In a letter dated 31 March 2019, Hageman also mentioned that the results of the laboratory tests in Durham were consistent with brain damage. The fact that Hageman, as argued by the Uwv, did not establish any restrictions for the person concerned does not detract from the findings of the laboratory tests. In his letter of 12 August 2015, Hageman came to the conclusion that laboratory tests showed abnormalities for a possible diagnosis of aerotoxic syndrome.

4.5. Regardless of whether or not there is an aerotoxic syndrome, insurance doctor Klijn has substantiated sufficiently and insightfully that there is a medical substrate. Based on the medical information, including that provided by Hageman and publications in scientific journals, Klijn has assumed that the fatigue complaints and the energy limitations that resulted from them were the consequence of the abnormalities found in the person concerned. In view of the starting point as mentioned under 4.2, the District Court rightly saw no reason not to follow Klijn in this conclusion.

4.6. The District Court also correctly followed Klijn in his conclusion that no restrictions should be assumed for personal and social functioning on the basis of cognitive disturbances, because these could not be objectified in the neuropsychological examination carried out at Bavo Europoort in January 2014. On appeal, the applicant has not submitted any new medical information indicating that, on the date in question, there were limitations other than the energy limitations established by Klijn.

4.7. Klijn set the hours restriction for the person involved at six hours per day and 30 hours per week, and assumed a restriction for evening and night shifts. He based this on the daytime story of the person involved, from which it emerged, according to Klijn, that despite a good night's rest the person involved still gets one or two hours of rest in the afternoon every day. The Complainant and the Uwv rightly argued that Klijn wrongly based this on the daytime story of the Complainant at the time of his interview with the Complainant on 23 April 2018 and not on the daytime story at the time of the date in dispute of 2 June 2016. It is also not apparent from Klijn's insurance examination report of 11 February 2019 that Klijn asked the person concerned about the daily story on the date in question. In view of this, Klijn has not given sufficiently convincing reasons for assuming an hour limitation of six hours per day and 30 hours per week. The District Court wrongly followed the hour limitation established by Klijn.

4.8. Partly in view of the length of the present proceedings and the information contained in the case documents, the Board sees reason to set the hour restriction at seven hours a day, three days a week, with a rest day between the working days and a restriction for evening and night shifts. For this purpose, a connection was sought with the daily story as it can be understood from the insurance doctor's report of 28 April 2016 and the written elaboration of the conversation she had with the insurance doctor on 28 April 2016, submitted by the party concerned on appeal. It follows from these documents that, since 18 April 2016, the person concerned had been performing substitute work three times seven hours a week, on Mondays, Wednesdays and Fridays, with interim rest days on Tuesdays and Thursdays. There is no evidence in the case-file to suggest that the restrictions on working hours are any different.

In the letter of 25 September 2019 submitted to the court by the person concerned, Hageman assumes a maximum of four hours a day, three times a week with a short break after two hours. However, it is unclear on what this hour limitation is based, other than general experience data of patients comparable to the person concerned. At the hearing Hageman also stated that he had not examined the person concerned after his letter of 12 August 2015. There is therefore no reason for an hour restriction of twelve hours per week, as argued by the person involved.

4.9. It follows from 4.7 that both the appeal of the person involved and the appeal of the Uwv succeed. The judgement under appeal should therefore be set aside, with the exception of the order to pay the costs of the proceedings and the order to pay the court fee. Because an occupational health examination still needs to be conducted on the basis of the hour limitation and the limitation for evening and night shifts established in 4.8, the Board sees no possibility for final settlement and the Employer shall be instructed to make a new decision on the objection of the person concerned to the decision of 8 June 2016, taking this judgment into account.

4.10. In view of an expeditious settlement of the dispute, there is reason to determine, pursuant to Article 8:113(2) of the General Administrative Law Act, that an appeal can only be lodged with the Council against the new decision on the objection to be taken by the Employer.

5. There is reason to order the Uwv to pay the appeal costs of the person concerned. These costs are estimated at € 1,068 for legal assistance incurred on appeal.