METHODS OF ACCOMMODATING WORK ORGANISATION AND WORKING CONDITIONS BY LABOR LAW IN THE NETHERLANDS[1]

Introduction

As in all industrialised countires changing production methods, new techonologies and higher demands for flexibility caused by the globalisation of industrial markets lead also in the Netherlands to new requirements for work organisation and working conditions. It is said that industrial society is now being replaced by a high-tech or information society. In the meantime,the labour population is changing due to demographic developments.

As a result, Labour Law is in a phase of change. The changes refer to(1)legal concepts, (2)methods to change work rules and (3)the role of the judge. In this paper developments in the Netherlands in these three fields will be described.

The development to more flexibility in Labour Law must be distinghuished from the deregulation tendency in the beginnning of the eighties. In 1982, the new center-right Cabinet in the Netherlands installed various committees to draft deregulation proposals, partly with regard to labour relations. This process ended with very marginal results. For instance, regarding dismissals it was originally proposed to abolish the requirement that the employer needs the approval of the Director of the Regional Labour Office for most dismissals. The Social-Economic Council, an influential advisory body in which the national employers' associations and trade unions are represented,advised in the end government to keep up this system. Only minor changes, mostly bringing some more flexibility and modernisation in dismissal law, were unaimously proposed and are now under discussion in Parliament[2]. This process was continued by the center-left coalition that took over goverment in 1989.

1. Changes in legal concepts

It seems that in the changing working environment many traditional concepts of Labour Law come under discussion. More specifically, I think of the concepts that are used to define(1. 1)the company, (1. 2)the employment contract and(1. 3)job security.

1. 1. The company

Traditionally, the legal concept of the company was in conformity with the real form of a company. Today, many companies in the Netherlands are part of a larger conglomerate of legal entities. (f. i. concerns or holding companies). And besides that, many small companies are now organised in the form of 'limited private companies'from which the shares are being held by only one person or some members of a family.

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1 By Gustav J.J. Heerma van Voss: Associate professor of Labour Law, University of Limburg,Maastricht, the Netherlands.This paper gives the state of the Law until june 1991.

2 Draft bill on reviewing dismissal law, no. 21 479.

The form of these constructions is being designed in the interest of the company and its shareholder, but may more or less ignore the interests of the workers. Well-known are the following constructions:

- multi-national concerns make their top uninfluencable for the works councils;
- companies that have to reorganise bring for this purpose their strong and weak parts under separate legal forms; then the weak parts go bankrupt, while the stronger parts are kept alive;
- companies that are divided in separate entities in which one is carrying the capital and another one holds the workers; if something happens to the company it is more difficult for the workers to claim wages and damages from the company.

There may be several good reasons to choose such constructions. But Labour Law usually protects the worker only against a single company and not against a conglomerate. So, when the company structure in practice is going to differ from the legal structure, Labour Law has to do this too, in order to guarantee the employee the same amount of protection as before.

Dutch Labour Law is not very well equipped to deal with these matters. For instance, the Netherlands do not have specific legislation with regard to concerns; only some specific aspects have been regulated; especially in individual Labour Law, there is hardly any statutory rule dealing with the matter.

Since many companies today have or seak an international position, it would be expected that European regulations would be made to deal with multi-national enterprises. However, up to now the EC-Member-States are not able to agree on regulations of co-determination[3].

There is an EC-directive from 1977 regarding the safeguarding of employees' rights in the event of transfers of undertakings[4]. This directive initiated a change in the employment contract – title in the Dutch Civil Code.In 1981 four articles were added that state that as a result of a legal transfer of an undertaking, rights and duties towards all employees are transferred automatically to the new employer[5]. Thus, it is only possible to reduce the number of employees in relation to a transfer or merger by following the regular procedures.

> If, for instance, one enterprise is transferred to another employer the latter might have a redundancy.It is possible to dismiss redundant personnel after the transfer. But in that case, for the selection of the workers that are eligible to be dismissed, the personnel of both(former)undertakings have to be taken into account. This might result in the situation that an employee from a company that was doing well has to be dismissed in order to give job protection to an employee with higher seniority from the company that was doing badly.

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3 The very recent proposal for a Council Directive on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees(Official Journal of the EC, no C 39, February 15, 1991, p.10)will take many years to become effective if it will be possible to agree on it at all. Cf. Roger Blanpain, Labour Law and Industrial Relations of the European Community, Deventer/Boston 1991, p. 189 – 196.

4 Directive no. 77/187, Official Journal of the EC, March 5, 1977, no. L 61.

5 Articles 1639aa – 1639dd Civil Code.

To make Labour Law more accurate in these situations, the legal concept of the company within Labour Law has to be regarded more flexible. More general there is a tendency within Labour Law that the legal construction of the company is becoming less essential, and the factual construction is getting more important.This could imply, for instance in a dismissal case that the employer should try to find another job for the worker not only in the same company but also within other companies of the same conglomerate. In Japan some companies have agreed in collective agreements with their unions that such steps will be undertaken[6]. Also in the Netherlands in some collective agreements such clauses exist, but they are still quite exceptional.

Of course, such a new definition of company will not only be in the advantage of the worker. It also implies that the worker could be asked to work in another part of the concern against his will. Whether that can be asked from the worker could be the subject of a legal dispute and could lead to new case-law. In Japan there is a large discretion of the employer to transfer the worker to related firms[7], even if this implies that the contractual employer will be replaced by another employer[8]. In the Netherlands such constructions are not yet accepted without the consent of the employee.

However, in some respects the image of a new concept of the company exists already in Dutch Labour Law.

- Many labour Acts have their own definition of company that is designed to adjust the Act to the situation in practice. For instance, the Labour Act of 1919 (Arbeidswet), that regulates working hours, the Health and Safety Act of 1980 (Arbeidsomstandighedenwet) and the Works Councils Act of 1971 (Wet op de Ondernemigsraden)have such specified definitions. The last Act considers every unit that is operating socially independently as a company. When a sufficient number of employees is working there, the employer must install a separate works' council. However, these concepts of 'company'do not have a wider scope than the legal concept of company.
- In case of dismissals Dutch Labour Law protects the worker's seniority with regard to the term of notice in case of changes in the employer's name or legal identity. The Civil Code demands the employer to include in his calculation of the term of notice all the time that the worker was working consecutively for different employers who must resonably be considered to be each other's successors in relation to the employee's work[9]. This was regulated in 1953 when dismissal law was reviewed.
- The same principle was applied by some courts in cases in which the employer used a dispatching office to avoid the application of job protection law. A worker who was working subsequently as dispacthed worker and as temporary worker for some periods was considered to have worked for the same employer and job protection was granted to him as if he had been working under subsequent

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6 See Tokyo High Court, October 29, 1979, 30Rominshu 1002(Toyo Sanso Case).

7 Nagoya District Court, March 26, 1980, Rouminshu, Vol. 31, no. 2, p. 372(Kowa Company Case).

8 Chiba District Court, May 25, 1982, Roudonhanrei no. 372, p. 49(Hitachi Seiki Company).

9 Article 1639k Civil Code.

contracts for fixed terms[10].

- In another case, the worker was dismissed during his probation period of two months after being transferred from another undertaking of the same concern. The Supreme Court ruled that if the employer could reasonably be regarded as the successor of the former employer, the stipulation of a new probation clause would be so unjustified as to render the stipulation null and void[11].
- If a dispatched worker gets injured at work he can hold two 'employers' liable: the dispatching agency(being the formal employer), or the hiring company(as the factual employer). Against the formal employer he can claim a breach of the employment contract. According to a special clause in the Civil Code, the worker's burden of proof is than relatively light(article 1638x BW). When he holds the hiring company liable it is a tort-procedure(art. 1401 Civil Code/6: 162 New Civil Code). However, the Supreme Court considered that in the last case the same principles with regard to the burden of proof are applicable as when the formal employer would have been sued[12].

1. 2 . The employment contract

With regard to flexibility within the employment contract I will deal with(1. 2. 1)the form of the contract, (1. 2. 2)the worker's tasks, (1. 2. 3)the conclusion of new contracts and(1. 2. 4)the adjustment of the workplace to the worker.

1. 2. 1 Flexibility in form of contract

Dutch employers have found many ways to bring more flexibility in the employment contract.Especially the use of a typical labour relations has grown remarkably during the last decade. Dutch Labour Law has found various solutions for the problems raised by this development.

Temporary contracts are in the Netherlands hardly restricted as such. But a renewed contract for a fixed term can only be ended by giving notice[13]. This implies that the employer needs permission from the Director of the Regional Labour Office to dismiss the worker. Also a term of notice has to be observed. Since this is also required for regular workers this

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10 Local Court Amsterdam March 27, 1986, Periodiek Sociaal 1987, p. 1248; Local Court Haarlem Oktober 25, 1989, Praktijkgids 1990, no. 3176; District Court's – Hertogenbosch May 18, 1990, Periodiek Sociaal 1990, no. 514; Local Court Amsterdam November 3, 1989, Nederlandse Jurisprudentie 1990, no. 283; District Court Amsterdam February 6, 1991, quoted by D.J. Buijs, Sociaal Recht 1991, p. 119. However, in some provisional measures courts decided in an opposite way: President District Court's – Hertogenbosch February 10, 1989, Kort Geding 1989, no. 103; High Court's – Hertogenbosch December 14, 1989, Kort Geding 1990, 54. In the mean-time regulations for dispatching agencies are changed to prohibit cooperation with this practice.

11 Supreme Court October 24, 1986, Nederlandse Jurisprudentie 1987, no. 293; Supreme Court May 1, 1987, Nederlandse Jurisprudentie 1988, no. 20.

12 Supreme Court June 15, 1990, Rechtspraak van de Week 1990, no. 127(Stormer/VOC).

13 Article 1639f, 3 ° Civil Code. A contract is regarded as renewed when the second contract is following the first one within one month.

form of job protection is relatively strong. If the employer is not in time with fulfilling these requirements the contract is renewed automatically for the same term[14] with a maximum of a year[15].

Employers often claim that workers with so-called flexibile contracts('call' contracts, dispatched workers, home workers etc.) do not have an employment contract under the definition of the Civil Code. In the concept of the employment contract it is assumed that the employer exercises'authority'over the employee. Employers used to claim that this element is missing because these contracts imply that the worker can refuse their orders at any moment. In order to cope with this argument the courts began to interprete the concept of'authority'more flexible than before. In many cases in which the place of the worker in the company in practice was comparable with that of regular workers the courts declared the contract a contract of employment, no matter what was formally agreed on that. It is already a long standing case-law that the courts do not only look at the formal(written) contract, but also at practice. It was new, however, that the court not only examines whether the employer can give concrete orders to the employee at any moment, but tests more in general whether the employee is dependant on the company for his work and not working as a self-employed person. Nevertheless, as a result of the specific aspects of these types of work the position of these workers is in practice still much weaker than that of regular workers.

In some cases labour regulations or collective agreements treat part-time workers differently, but generally they are treated as all other employees[16]. Some Acts are not applicable to workers who work less than one-third of normal working time(Minimum Wage Act, Works Councils Act in many respects), others for part-time workers in private households(job protection by the Labour Office, Social Insurance for unemployed and sick workers). Today, these differences are less accepted than they used to be. Part-time work has become a normal way of working. It is especially popular under women who want to combine their work with the care for children. Since the overwhelming majority of part-time workers are women, it is also often regarded as a indirect form of discrimination, when part-time workers are treated less fabourable. Several cases have been brought before domestic courts. Since

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14 It is allowed to agree on a clause that makes it possible to dismiss or resign within the fixed period. In this case the complete job protection(notice and approval of the Director of the Labour Office)is applicable.

15 Since this is regarded as quite rigid the government has recently proposed to change this. A renewal of a contract for a fixed term that is not done in writing will be changed in a contract for an indefinite term, (draft bill no. 21 479 on reviewing dismissal law). It is also proposed in this bill that an extension of the fixed term for six months that is done written will become possible without the requirement that the employer have to give notice when he does not want to renew it.

16 The term 'part-time workers' refers in the Netherlands just to the fact that the worker has less working hours than usual. Different from Japan, part-time workers are often regarded as regular workers at the same time. The distinction between regular and non-regular work does not refer to the amount of working hours but to the status of the contract. Many part-time workers are working for many years in a stable position within the company and are generally treated similarly as their full-time working colleagues.

EC-legislation on equal treatment of men and women is predominant they have to follow the case-law of the EC-Court of Justice. This court considers unequal treatment of part-time workers as discrimination of women, unless it can be justified by special needs of the company[17] . However, proposals for direct EC-legislation on this point have not yet been accepted[18].

1. 2. 2 Flexibility in worker's tasks

The task of the worker is today often less concrete than it used to be. In many cases the task can change and the worker is expected to be ready to change his activities during his working life more often than before.

First, it must be noted that in the Netherlands in many cases the legal problems are not the biggest to overcome when a worker has to be transferred to another place. Problems of mentality turn out to be more important. Since workers are not used to be transferred often, there is a high level of resistance against any change in tasks. Partly, this is due to the high involvement in local social life of many blue-collar workers. But also there is no guarantee of life-time jobs and a change in working environment may maintain higher risks of job security which often cannnot be overseen by the worker himself.

The actual expectations of the employees and the usually narrow job descriptions are reflected in the Dutch legislation, which is not very equipped for problems that might arise from this development. The Civil Code does not provide for a change of the employment contract in case of changed circumstances. If the scope of the employment contract is not wide enough, in principle, it cannnot be asked from the employee to change his job structurally without his consent. Whether it can be asked within the scope of the employment contract or incidentally beyond it, has to be judged on general principles of Labour Law. The Civil Code provides for the duty of the employer to act as 'a good employer'in the same circumstances would do. The employee has to behave as 'a good employee'. This is the translation to Labour Law of the general principle of good faith from the Civil Code[19]. In many cases during the last decade the Courts were asked to give a provision in case a worker objected against a transfer to another workplace[20]. Generally, the Dutch courts seem more willing than the Japanese courts to accept objections of the worker against reassingnments.

Theoretically, it is possible to ask the judge to dissolve the employment contract[21], offering

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17 EC-Court of Justice May 13, 1986, Case no. 187/84, Jur. 1986, p. 1607; International Encyclopaedia for Labour Law and Industrial Relations I,A,b,93(Bilka/Kaufhaus GmbH).

18 Draft EC-Directive of January 5, 1983. Recently some new draft-Directives were proposed by the European Commission, Official Journal of the EC September 8, 1990, nos C 224/4, X2416, 224/8.

19 Articles 1638z (good employer), 1639d (good employee) versus 1374 Civil Code(New Civil Code article6:2).

20 R. C. Gisolf, Ander werk, Arnhem 1987.

to replace it by a changed contract.

Partly dissolution of the labour contract was recently used in order to reduce working hours without consent of the worker, in case of business necessity. The procedure is also followed if the worker does accept the necessity but wants to safe his entitlement to an unemployment benefit for the hours he will lose his job for. There is a discussion whether partly dissolution of the employment contract should be allowed. Courts and legal doctrine are divided on the matter.

Under the new Civil Code (of which the general parts on contracts will enter into force by January 1992) a possibility is offered to ask the court to change a contract for reason of serious change of circumstances.

1. 2. 3 New contract

A legal problem that often arises when a worker gets new tasks, is whether the change has to be regarded as a new employment contract or only a modification of the original one. For instance, a wage raise might be considered as no change in the identity of the contract. But a promotion would mean that a new contract is concluded. This question might be important for the validity of certain stipulations, like a probation period or a competition clause.

When employer and employee decide to make up a new employment contract it could also include a new probation period. The Civil Code declares a probation period for longer than two months (or a second probation period that makes the total period longer than two months) null and void. The reason for the strictness of this rule is that during these two months both parties are entirely free to end the job on any moment without any reason[22]. The Supreme Court nevertheless agreed on a second probation period when it was concluded in a new contract, provided that the new task requires new abilities or responsibilities in which the employer could get no insight during the former job[23]. This decision has been criticised because it may undermine job protection legislation. For instance, in one case the within a part-time taxi-driver changed his job for a full-time position the same company and got a new contract with a second probation period. He was fired during this second probation period and contested the validity of the clause. The Supreme Court found the reasoning of the lower court acceptable that the new job justified a second probation period because a full-time job requires heavier responsibilities than a part-time job[24]. Government now has proposed to change the Civil Code to abolish this

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21 Under article 1639w Civil Code it is possible that the judge dissolves the employment contract for reason of changed circumstances. This article was used more frequently during the eighties, due to the long periods that Directors of District Labour Offices needed to decide on approval for dismissal, as a result of the high amounts of requests in this period. In 1985 the procedure for the Labour Office was shortened. The dissolution procedure is also used for cases in which there is a legal prohibition to dismiss(f. i. sick or pregnant employees, members of works council), or to let the judge decide on the severance payment that has to be rewarded to the employee.

22 Article 1639n Civil code. Recently, some courts seem to change this attitude in this way that clearly unacceptable reasons of employers to dismiss during the probation period are answered with the obligation to pay damages, for instance in cases of dismissal based on pregnancy of the new employee.

23 Supreme court, September 14, 1984, Nederlandse Jurisprudentie 1985, no. 244.

Supreme Court-doctrine[25].

Also some decisions were made on the status of the competition clause in case a worker's tasks were changed. The Civil Code requires that such a clause is written down in the employment contract[26]. The following case-law was made on this subject:

- if the contract with the worker is tacitly transferred to another employer a new competition clause must be written down[27];
- however, if the company as a whole has been transferred to another employer all the rights and duties of the employment contract are taken over by the latter automatically, including the competition clause[28];
- if, as a result of a changing task of the employee, the competiton clause is weighing seriously heavier on the employee than before, the clause can lose power[29].

1. 2. 4 Adjusting workplace to the worker

In some cases it is the employee himself that wants to be transferred to another job or workplace. This is possible, for instance, when the worker gets handicapped. He might no longer be able to work full-time, but would wish to be employed on a part-time basis. He also might not be able to perform his old job or all former tasks and would like to change these tasks for others. On this point, the Supreme Court has given two landmark decisions:

- when the worker is only able to perform his former job on a part-time basis the employer has to accept such a change, unless this cannnot be asked reasonably from the latter, the employer has to pay an appropriate portion of the wages[30];
- when the worker is no longer able to perform some of his tasks any more, but wishes to perform the other previous tasks to which he is still able on a full-time basis, the employer has to reshuffle tasks within the company to make this possible, unless this cannnot be asked reasonably from him; when the worker cannnot do any of his former tasks anymore, the employer has to give the worker another job that he indicates he is able to do, unless this cannot be asked reasonably from the employer[31].

This last decision puts the burden of proof that the employee cannnot be replaced on the

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24 Supreme Court, June 13, 1986, Nederlandse Jurisprudentie 1986, no. 715.

25 Draft bill on reviewing dismissal law, No. 21 479.

26 Article 1637x Civil Code. The employee must also have reached the age of 18. It is accepted in case-law that the clause is part of a collective agreement.

27 Supreme Court, October 23, 1987, Nederlandse Jurisprudentie 1988, no. 234.

28 Supreme Court, October 23, 1987, Nederlandse Jurisprudentie 1988, no. 235.

29 Supreme Court, March 9, 1979, Nederlandse Jurisprudentie 1979, no. 467.

30 Supreme Court, February 3, 1978, Nederlandse Jurisprudentie 1978, no. 248(Roovers/de Toekomst).

31 Supreme Court, November 8, 1985, Nederlandse Jurisprudentie 1986, no. 309(Van Haaren/Cehave).

employer. Only the worker still had to indicate which tasks in the company were suitable for him. However, in recent guidelines for dismissals it was put on the employer to show that he has tried to replace the worker. The social security offices are testing whether this duty is fulfilled[32]. The social security legislation has been changed in the eighties in order to oblige the employer to adjust working places to make them usable for handicapped workers and to help him finance this[33].

All these decisions, guidelines and legislation must be seen against the background of a rapidly increasing number of social security benefits for disabled persons.An important problem in this respect is the growing number of psychologically disabled workers, as a result of the heavier production requirements that are put on them.

Another example is a case in which the worker by disciplinary measure of the employer was placed in an isolated office where he could have no contact with colleagues. Stating that the employer was destroying the well-being of the worker and therewith violated the Health and Safety Act[34],the court ordered the employer to replace the employee in his normal working environment[35].

1. 3. Job protection

The changes that can be seen in the system of job protection are not simply question of changing legal concepts. Moreover, they result out of changing needs of the worker. Job protection can no longer be guaranteed by protection at the moment the decision to dismiss is taken. In many cases changes in working conditions have to be anticipated. Partly, this can be done by regular changes in tasks in order to make the worker more flexible. This was oirginally already a policy in many companies with regard to staff employees, but seldom for blue-collar workers. In the Netherlands, training-on-the-job is less developed than in other countries. Many employees expect to stop training for the rest of their life after they leave school.

Especially blue-collar-workers who had bad result at school are quite reserved against education during their working life. Many employers think that the public education system is

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32 Guidelines for dismissals as from January 1, 1991, by the Minister of Social Affairs and Employment(Staatscourant 1990, no. 252). The Guidelines are directed to the Director of the Labour Office to be used for the decision to give permission for dismissals. They are based on the Extraordinary Decree on Labour Relations 1945. This emergency decree was never replaced by regular legislation. Directly after World War II it upheld this system of preventive checks on dismissals,that was introduced under the German Occupation. Originally being meant to prevent labour market from distorsions, it later became a measure of job protection for workers.

33 This so-called 'Handicapped Workers Employment Act'(Wet Arbeid Gehandicapte Werknemers) intended originally to force employers to employ 3 to 7% handicapped people within the workforce of their company. However, as a result of heavy resistance of the employers' associations and the problems to enforce this goal in practice(also for the goverment itself), this obligation was not yet imposed.

34 The Health and Safety Act 1980 of the Netherlands also provides for the protection of the well-being of the workers in relation to their work. Because of this extended scope it is formally called the 'Labour Conditions Act' (arbeidsomstandighedenwet).

35 President District Court Breda, December 9, 1985, Kort geding 1986, no. 28.

not sufficient, but demand government to pay for vocational training. As a result, training within companies is not very developped. This now has to change as a result of new technologies that require more skills from the workers. However, this may disadvantage older and foreign workers.

An actual case in which this was demonstrated is the Pally-case. A biscuit company changed production methods. With the new machines less workers were needed. The new machines required higher educational skills. The employer organised a test to determine who would be able to work with the new machines. In order to make the test acceptable for the Director of the Labour Office when it would come to a collective dismissal, the Labour Office was asked for advice. The test was found valid by the psychologic expert of the Labour Office. The blue-collar-workers of the company were subjected to the test. One worker refused to take the test because he was convinced the test was inappropriate to him as a foreign worker. The result of the test was that ten foreign workers were unable to learn to work with the same machines. The foreign workers contested the result, stating that the test was discriminatory because it was easier to accomplish a good result for Dutchmen than for foreigners. Besides that, they demanded a chance to try to learn to work with the new machines. The Director of the Labour Office nevertheless gave his permission to dismiss the ten workers involved. The dismissed workers instituted collectively law suits against the company as well as against the State. The State was held liable for the decision of the Director of the Labour Office. In the unfair dismissal-case against the employer, the District Court of Utrecht accepted the test because the employer had done everything that could possibly be asked from him to make the test objective. On the other hand, the ten foreign workers (except for the one that refused to take part in the test) had to be paid severance payments because of the long period they had worked for the same employer and the hardship of getting unemployed in a time when it would be difficult to find another job, low skilled and aged as they were[36].In the Case against the State[37], the District Court of The Hague found that the dismissed employees had not made clear that they had suffered other damages than those that were already granted in the unfair dismissal-procedure in Utrecht[38].

It may be concluded that those who are untrained and unable to work with new technics are less protected than before. During decades the principle of seniority was predominant in collective dismissal cases in the Netherlands. The seniority principle now gradually seems to make place for more various criteria in which capacity plays a more prominent role. To provide workers with job protection in this situation, especially the ones with lower changes to begin

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36 District Court Utrecht July 5, 1989, case no. 1829/88 HB, not published.

37 This case was also a landmark-case in the Netherlands because the District Court of The Hague accepted on grounds of article 6 European Convention of Human Rights the right to challenge a decision of the Director of the Labour Office before the court, being it not a fair dismissal-trail in itself. See District Court The Hague, Intermediate decision, July 11, 1989, NJCM-Bulletin 1989, p. 181.

38 District Court The Hague, final decision, February 14, 1990, case no. 87. 6234, not published.

with, labour unions, and works councils will have to take action in an earlier stage, in order to safeguard access to vocational training. Of course, this will imply that a worker who wants to prevent himself against dismissal has to comply with demands to participate in training and accept changes in tasks and workplace. The result will be, that workers will have a harder time than they were used to.

2. Changing of work rules

2. 1 Formal requirements

Changes in working environments may also lead to changes in work rules. The place of work rules in Dutch Labour Law has been eroded over the past decades.

In the beginning of this century many companies had work rules containing labour conditions as well as disciplinary rules. The employment contract — title in the Civil Code(article 1673j), that dates from 1907, requires that in order for workers to be bound by work rules, the following requirements should be satisfied:

a) that the worker agrees to the rules in writing(but a refusal is considered as a resignation),
b) that the rules are given to the worker,
c) that the rules are deposed at the Local Court and
d) that the rules are posted in the factory.

However, since the twenties labour conditions were increasingly regulated by collective agreements. The remaining part of work rules, generally dealing with descipline, could mainly be regulated without fulfilling the formal requirements according to the principle of managerial discretion. For that reason many 'work rules'existed without the conditions of the Civil Code being fulfilled.

The second development that eroded the system of work rules was the acceptance by the Supreme Court in 1956 of the possibility that work rules were part of the employment contract when it was agreed so in that contract[39].

An attempt to make the constitution of work rules more bilateral was undertaken by the legislature in 1979 when it made work rules as indicated in the Civil Code subject to the right of the works council to give consent[40]. Unclear was whether the consent of the works council was also necessary for the work rules that met not all requirements of the Civil Code but was practically applied in the company. The Supreme Court decided in 1988 that there were two types of work rules, depending on the purpose of the employer. If the purpose of the employer was to implement work rules through the employment contracts of each individual worker — along the lines of its decision from 1956 — such a work rule did not need the approval of the works council. If the purpose of the employer was to implement work rules through other way they needed the consent of the works council indeed[41].

This decision is interpretated as an invitation to employers to include work rules in the employment contract. They may — according to the decision — even agree with the employee that future changes of the work rules may be decided upon by the employer unilaterally. In such a situation — the Supreme Court considered — the employer's discretion to change work rules unilaterally is only restricted by the principle of good faith. The decision is heavily

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39 Supreme Court, May 4, 1956, Nederlandse Jurisprudentie 1956, no. 299.

40 Article 27, sub la Works councils Act.

41 Supreme Court,October 7, 1988, Nederlandse Jurisprudentie 1989, no. 355(IBM).

criticised by Labour Lawyers, because it seems contrary to the idea of a balance of power between employer and employees. Every form of control by workers' representatives is excluded and even the protection that the legislature formulated in 1907 in the Civil Code is neglected[42].

On the other hand, it may be repeated that most working conditions are actually not regulated in work rules. Novertheless, many large companies have nowadays a 'personnel handbook' with many smaller or larger regulations on many aspects of working life. Except for disciplinary rules one can also find in these handbooks matters as fringe benefits(f. i. travel expenses). If an employer wants to change these rules without having agreed on its right to do that in the employment contract, he still needs the consent of the works council[43], if the company has one (companies with at least 35 workers are statutory obliged to have one). Besides that, the change may not be contrary to the employment contract. For instance, in case of changing the fringe benefits downwards, the employee could claim that this needs his consent because it was an(implied) element of his contract. In that case, as was said before, Dutch Labour Law does not priovide for a suitable way for the employer to bring changes in the contract. When the question is regulated in the collective agreement the employer can of course try to change the matter in this collective agreement once it is renewed.

Dutch Labour Law on changing working conditions is, as was indicated above, quite complicated. Partly, this is due to the diverse sources of law that are involved and the changing role of these sources. Now employers want to decentralise the decisionmaking on many labour conditions and decide upon them in the company rather than on an industry level, it should also be considered how regulations within the enterprise can be made in a balanced way and what the role in this must be from the works council. A proposal of government to delete the rules with regard to work rules in the Civil Code will not solve this problem[44]. It is in the Dutch Law system first a task for the legislature to change law. But if the legislature will fail to bring the necessary flexibility in the employment contract, it must not be excluded that courts will do it themselves.

2. 2. Retirement age

One of the most important aspects of changing working conditions at present is the adjustment of the retirement age. In the Netherlands the retirement age has been 65 for many years. Once an employee reach the age of 65, the Dutch Old Age Pension Act grants minimum pensions to all inhabitants. Special retirement systems on company or industry level usually supplement this. During the seventies and eighties many systems of voluntarily early retirement were developped. They were often used in cases of restructuring companies to make the workforce younger and deal with employment problems.
However, in the future these systems may become too expensive and also it may be needed that

42 Article 16371 Civil Code states that a declaration of the worker that he agrees in advance with any future work rules, or any change of existing work rules is null and void.

43 If the works council refuses to give its consent, the employer can ask the Local Court to give permission to take the decision that he wanted to take. The court will do this only if the refusal of the works council is unreasonable or the decision that the employer wants to take is urged by heavy weighing reasons of company-organisational, company-economic or company-social nature.

44 The goverment asked advice in this proposal from the Social-Economic Council.

workers work up until a higher age, due to demographic changes in society. For this reason, many employers try to raise the early retirement age, for instance from 60 to 62. These questions are usually negotiated with the trade unions and form part of collective agreements.
In many companies the retirement age of women was set at 60, to give them an additional protection because of their often double tasks: at home and at work. Now some women (but not all women) prefer to work until they are 65, like the men. In the case of a Dutch woman, based on the principle of equal treatment of men and women, the EC-Court of Justice decided that the woman had indeed the right to an equal retirement age as men[45]. As a result, retirement schemes with different ages for men and women have to be changed. However, other women would sometimes like to keep the right on early retirement. And if the employer would grant them a right to choose, the men would claim this right too on the basis of equal treatment.

This might cause a conflict of duties for the employer: his duty to follow the principle of equal treatment and that to respect vested rights. It is now proposed that the Law will state that the possibility of early retirement only for women may be kept up at request of those who had reached the age of 50 by 1986 and who are already entitled[46].

This discussion also gives rise to the question why no system of flexible retirement is introduced, in which the employee himself chooses at what age he retires: 60, 65 or even older. Mainly due to the system of pension schemes such a choice now is very unattractive for workers. The employers' associations and trade unions cannot agree on how to change these systems that differ from branch to branch. The solution for this question might have to come from another development.

As a result of demographic changes, more and more attention is being paid to the elderly. They get more self-conscious and bring under discussion whether it does not form a discrimination that almost all people above 65 are forced to leave their jobs. For this reason, it is possible that the courts in the future will decide that a mandatory retirement at 65 is discriminatory. If such a development would occur, it might provoke the development of systems of flexible retirement for which is being asked from many sides at this moment.

3. The role of the judge

Several developments lead to a more important role of the courts in Dutch Labour Law.

Firstly, in the seventies legal aid became available at little or no cost to those who cannot afford to pay for the services of a lawyer. People with low incomes became more conscious of their legal rights. Students organised law shops, later followed by official Legal Aid Offices in many big and mediumsized cities, where they could get advice.

Secondly, courts were asked more often for a provisional decision. In many cases, the provisional decision is never followed by a regular procedure, because the provisional measure settles the question. Most importantly is that a compromise is indicated by the judge. Less important than the legal doctrine that is applied, is in these cases that the solution is practical.

But also the role of the judge is changing as a result of the tendency to have more flexibility in concepts of Labour Law. This leads to the use of vague terms that have to be interpretated. Was the decision to dismiss right or were alternatives available? Was the

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45 EC-Court of Justice, February 26, 1986, case no. 262/84, jur. 1986, p. 773, International Encyclopaedia for labour law and industrial relations 1, A, 6, 87 (Beets – Proper/Van Lanschot Bank).

46 Draft bill no. 20 890 on equal treatment of men and women in company pension schemes, article III.

decision to transfer the worker acceptable or were his interests more important? Was the employer right by denying the right of the employee to take part in training? All these questions are not easy any longer to deal with in general rules and can be judged differently, depending on many circumstances and the personal opinion of the decisionmaker. Thus, the role of the judge has became more central in Labour Law. Proposals to improve systems of complaints within companies were opposed by employers associations[47].

As a reaction to the growing role of the judge, which can lead to unexpected decisions, employers more and more try to settle cases themselves with the employee. In dismissal cases large companies tend to seek alternative measures like transferring within the company. If that is not possible, they try to reach a settlement with the employee. In recent years the instrument of outplacement became quite popular. The employer hires a specialised agency or appoints a special department of his company, to help the employee to find work elsewhere.

In some recent dismissal-cases courts even asked the employer to hire an outplacement agency for the worker. Whether this is legally acceptable is not clear yet. In case the employer would refuse to follow such an order, he would probably be forced to pay more to the employee, because his refusal would damage the changes to find work for the employee. It is a challenge for Labour Lawyers to develop the appropriate conditions under which the use of outplacement will not hurt the interests of the employee in a dismissal-case.

4. Conclusion

Through many different ways the tendency to more flexibility is changing Dutch Labour Law gradually. The changes are not a result of a systematic policy, but generally based on case-law that responds to new demands that are raised in practice. It seems desirable that the legislature gives a more comprehensive regulation for these new developments, but there are no indications that such steps are under way. In the draft version of the employment contract-title in the new Civil Code (which title should be implemented in one of the following years) the old lines of 1907 are predominant[48]. Therefore, it may be expected that in the next future case-law will still be the most important factor in adjusting Dutch Labour Law in the described phase of change.

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47 Government has now proposed a draft bill on complaints of workers (no. 21 514). The bill is very short and only requires that the employer answers to complaints of workers. It also prohibits the disadvantageous treatment of workers, who file a complaint or help a colleague to do so.

48 The Dutch social-economic council was asked for advice on the employment-contract title (7. 10) in the New Dutch Civil Code on July 25, 1989, by letter of the Minister of Justice, nr 353/689.