7. Deregulation and Labour Law in The Netherlands

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1. INTRODUCTION

This article describes recent developments of labour legislation and practice in the Netherlands as a result of the trend to flexibilise the Dutch economy and labour markets.

1.1. Political Drive for Deregulation in Labour Law

'Deregulation' was officially declared Government policy in the Netherlands in 1982 when a centre-right cabinet took office under Prime Minister Lubbers. The appointment of this new cabinet came at a time when the budget deficit of the Dutch government had reached its all-time high and unemployment was also increasing rapidly. Reducing the national budget deficit was the most important objective of this cabinet. The goal of 'deregulation' was partly an ideological phrase, following the then newly elected conservative governments in the United Kingdom and the United States. Government wanted to reduce costs, possibly to build confidence in business circles. In practice, the influence of traditional thinking in social policy remained. The influence of deregulation on Labour Law was relatively small. Most of the Labour Legislation was left unchanged, except for some details. On the other hand not much new labour legislation was enacted during this period. More important were cuts in Social Security benefits schemes to reduce Government expenses.

In 1989 a centre-left cabinet under Lubbers took over, but made no important changes in this policy. Since 1994 a left-right coalition under Prime Minister Kok is in power. The term 'deregulation' is not very prominent anymore. 'Deregulation' was relegated to a project, led by the Minister of Economic Affairs, on 'Market Working, Deregulation and Quality of Legislation' but focused on aspects such as closing hours of shops and, with regard to Labour Law, on the competition clause in employment contracts. The policies of this cabinet were a mixture of liberalisation of the Labour markets, with respect for certain guarantees of social protection. Most important in this respect was the introduction of the law on 'Flexibility and Security' by 1 January, 1999. The coalition has continued since 1998 in the Cabinet Kok-II.

R. Blanpain (ed.), Deregulation and Labour Law, 137–146

1.2. Structural Changes in Employment Relations

In the early eighties the Dutch economy was not doing well. There was high unemployment and as a result high consumption of social security benefits. The sickness and disabled benefits schemes were often used to solve problems in labour relations. Employers were reluctant to hire new personnel in economically uncertain times. The tight dismissal restrictions were felt to be a handicap. Discussions on deregulation of the dismissal legislation ended in a stalemate between unions and employers. In practice, employers found a solution in the use of so called 'flexible labour relations':[1] fixed-term contracts, on-call contracts and dispatched workers. The courts accepted these new forms of labour, but also provided for a certain protection of employees working under these conditions. Another element was the introduction of part-time labour on a large scale. For women with children this became a popular form of work, facilitating the combination of work with family responsibilities.

Under the first Kok-Cabinet the budget deficit was finally brought down to an acceptable level to enter the European Economic and Monetary Union and the unemployment was brought down, partly thanks to the new forms of labour. The Act on Flexibility and Security introduced flexibilisation of dismissal protection (especially for fixed-term contracts) and regulated the new forms of labour by more or less codifying the case law of the courts.

As a result, Dutch labour markets appear drastically changed since the early eighties. The concept of the full-time worker with stable and long-term employment contract is no longer dominant. There is a wide range of contracts with different forms of flexibility to serve the different needs of the employer and worker. Sometimes this is a disadvantage for the workers (like being dependent on the available amount of work), sometimes, however, their position is improved (like making decisions about working hours). Labour Law managed to incorporate the new forms of work within its system, equalising the positions of both parties in this new field.

2. DEREGULATION OF LABOUR LAW

2.1. Labour Market Regulations

Employment services

Since 1982 the role of the state in Employment Services has been gradually weakened. The State has no monopoly in this field. In the new Acts on Employment Services of 1990 and 1997 this development was legally recognised. In practice, three types of organisations are active:

a. *The public Employment Offices.* In 1990 the public Employment Organisation became legally independent of the government. Although still largely financed by government, the administration of this organisation was removed from the

1. Wet Flexibiliteit en zekerheid, Staatsblad (Bulletin on Acts and Orders) 1998, 300.

Ministry of Social Affairs and Employment. Organised Labour and Management got positions in the Boards of the Organisation at the central as well as the regional level. Unemployed workers have to register their unemployment with the public Employment Office but cannot often be provided with a new job there. In spite of attempts to compete with other organisations, for instance by starting its own worker dispatching service, the public Employment Office is not very effective in providing jobs.

b. The second group is formed by *private employment services*. These work for either the employer or the worker in order to help them find a worker or a job. Examples are 'head hunters' or specialised agents for artists, professional soccer players, etc. These organisations need a government permit for their activities. A recent phenomenon is the so-called 'outplacement offices' that help workers to find another job with another company, a service often paid for by the former employer.

c. The third group are the *dispatching (temporary work) agencies*. They have become very important because they often provided the best job opportunities for unemployed workers. Formally, they are not seen as employment services because they act as employers themselves. Since today these agencies no longer provide exclusively for temporary work, but also for long-term arrangements as well, the term 'dispatching agencies' seems more accurate than the formerly used term 'temporary work agencies'. In this category one can also identify the 'detachment offices' that maintain long-term contracts with employees who are dispatched to other employers, like in the high-tech industry.

Worker dispatching services

Since 1975 the restrictions on Worker dispatching services have been drastically reduced step by step until they are finally almost abolished. In that year the official ban on these services was replaced by a system of licenses. A worker dispatching service needed a permit from the government for its operations. The government wanted to monitor whether the service was following good practices. It demanded that social security premiums be paid by the agencies, that the administration was run properly and that workers earned wages that were equal to those of ordinary workers in the same company who performed the same job. In some areas (like the construction sector) these services were still banned because of previous bad experiences with uncontrollable 'black work'. In other branches it was eventually permitted to dispatch temporary workers for three months at most. Later this period was prolonged to six months and in the end one year was tolerated.

Over the years this type of work became very popular in the Netherlands. Employers used it to avoid the strict regulation of dismissal law. With the high unemployment during the eighties, this type of work offered for many unemployed the best opportunity to find employment. It was also often the best way to find a permanent job in a company if the worker performed well. Temporary work became a form of 'employee recruiting'. On the other hand, the legal position of temporary workers was uncertain. The temporary work offices denied that they concluded employment contracts with their workers. But the expansion of this type of work and the need by the temporary work business for recognition of its existence led gradually to a change. During the eighties the general trade unions managed to reach a nation-wide collective agreement for temporary workers with the Organisation of

Temporary Work Agencies (ABU). And more and more courts considered that a temporary worker, after starting a job, was working on the legal basis of an employment contract. Finally, the Advocate-General concluded before the Hoge Raad (Supreme Court of the Netherlands) that this was the leading legal opinion.[2] At this point, the ABU left its previous position and in a 1996 Agreement with the unions accepted the principle that temporary workers work on the basis of an employment contract.

In 1999 this was formalised in the Civil Code by the introduction of the articles 690 and 691 of Book 7 as a result of the Act on Flexibility and Security. Article 7: 690 defines the 'Dispatching work contract' as a special type of employment contract. Its flexibility is guaranteed by the exclusion of restrictions on dismissals of prolonged temporary contracts during the first 26 weeks and the possibility to agree on a clause that terminates the contract immediately in case the hiring company ends its assignment during this period. In the case of such a clause, the dispatched worker is also allowed to terminate his work at any time. It is possible to extend these periods of 26 weeks by collective agreement. In the New Collective Agreement for Temporary Workers (1999–2001), this was done: these exceptions are extended to one full year. In return the unions stipulated for the temporary workers the right to training and access to a pension scheme when they work longer than 26 weeks for a Workers Dispatching Agency. It is expected that the larger temporary work offices will hire temporary workers for longer periods in the future.

Since these offices are generally accepted today, the system of permits was abolished on 1 July 1998 under the new 'Act on Allocation of Workers by Intermediaries.'[3]

Temporary work offices are now free to work like any other company. Only two principles were maintained in the new Act: dispatched workers may not be used to undermine a strike, and the wage of the dispatched worker should be the same as that of the worker who does the same work as an employee of the company where the work is done. However, the latter rule may be set aside by collective agreement (either that of the hiring company of that of the workers dispatching agency). The Workers Dispatching Agencies are in favour of such an independent wage policy with the following argument. They see themselves as employers with their own employment policies: sometimes they will hire workers for several years and send them to different companies in consecutive periods. Therefore, they want to give workers with a higher seniority or a better performance a higher salary in order to bind them to their company.

Fixed-term contracts

Fixed-term contracts can be freely concluded in the Netherlands, for whatever purpose and whatever period. In principal, their use is not legally restricted. However, the Civil Code stipulated until 1999 that a second consecutive fixed-term contract could not be ended without notification. This implied the requirement of previous permission of the Regional Director of the Employment Service Organisation (who checks the validity of the reason for dismissal) and the observance of a notice period.

2. Conclusion Advocate-General T. Koopmans 7 April 1996, Jurisprudentie Arbeidsrecht (Caselaw Labor Law) 1996/168. The Hoge Raad did not render a judgment in the case because it was withdrawn.

3. Wet Allocatie van arbeidskrachten door intermediairs (Waadi), Staatsblad (Bulletin of Acts and Orders) 1998, 306.

Since these restrictions are not different from those of a contract for an indefinite period, this legislation was felt to be very restrictive by employers.

There were in principle two ways to evade the restrictions:

a. To observe a period of at least 31 days between two contracts. After this period, the second contract was not seen as a consecutive contract. In practice, they often hired the same worker in the interim for the same job through a Worker Dispatching Agency (so-called 'revolving door construction' – draaideurconstructie). The Hoge Raad (Supreme Court) decided in the 1991 Campina-case that when an employer uses this strategy for several years, a reasonable application of the law implies that the fixed term-contract should be considered a consecutive fixed-term contract in the sense of the Civil Code.[4] If the worker was hired in the first instance through a Workers Dispatching Office and then got a employment contract with the hiring company, the time worked for the Workers Dispatching Office was included in the calculation of the maximum probation period of two months as provided in the Civil Code.[5]
b. To make use of the possibility in the Civil Code to deviate from this rule by collective agreement. Due to the high unemployment during the eighties the unions often accepted exceptions to this rule in collective agreements. In several collective agreements on branch and company level it was agreed that the duty to give notification was only applicable after the worker had worked a certain period (often two years) for the same employer.

Since the first possibility was restricted by the courts, as indicated, the latter option grew in importance. As a result of an agreement between the national organisations of employers and trade unions, the government introduced such a rule in the 1999 Act on Flexibility and Security. This constituted the most important form of deregulation in the Act.

Under the present rule (article 7: 668a Civil Code), it is possible to have three successive contracts that may be ended without having to give notice, as long as they fall within a period of 3 years. The fourth contract or the contract that exceeds a period of 36 months will change automatically into a contract for an indefinite term, which gives the worker the before-mentioned protection against dismissal.

This change is an important form of deregulation that will make the fixed-term contract more attractive for employers.

Dismissal regulations

The Netherlands has quite a unique system of protection against dismissals. In principle notice of termination of an employment contract is not possible without the previous permission of the Regional Director of the Labour Service Organisation. Despite the criticism of the large companies this system will be extended.

The labour unions and the small enterprises are in favour of the system, the unions because of its preventive effect: employers can only dismiss a worker with

4. Hoge Raad (Supreme Court) 22 November 1992, Nederlandse Jurisprudentie (Dutch Case Law) 1992, 707 (Bootsma a.o./Campina).
5. Hoge Raad (Supreme Court) 13 September 1991, Nederlandse Jurisprudentie (Dutch Case Law) 1992, 130.

cause. The small enterprises see the system as a guarantee against lawsuits from employees for wrongful dismissals.

Several measures in the Act on Flexibility and Security are meant to make the dismissal procedure faster. These measures include shortening of notice periods, easier access to unemployment benefits in case of dismissals on economic grounds, and a procedure of 'no objection' in case the worker accepts his dismissal and only claims an unemployment benefit. In order to prevent abuse of rights, the ban on dismissal of sick workers is lifted if the sickness came up after the Regional Director of the Labour Service Organisation received the request for permission to dismiss.

In addition, in practice some deregulation has occurred because many employers avoided the 'permission procedure' by asking the court for dissolution of the employment contract. Although this is only possible on 'serious grounds', for practical reasons the courts made this into a normal dismissal procedure which became very popular. Today, half of the dismissals follow this procedure. The only disadvantage for the employer is that the court can oblige him to make a payment to the worker, which is usually done. In 1997 the 'circle' of competent judges published a recommendation that contained a formula to calculate these payments. The formula is $A \times B \times C$, which stands for seniority times monthly wage times correction factor. In practice this introduces more or less a right to severance payment for dismissed workers at least when this procedure is followed.

In the forthcoming years it seems likely that the dismissal procedures will be continuously under discussion. The Minister of Social Affairs and Employment already promised Parliament to do more research and to install an Evaluation Committee.

2.2. Individual Labour Relations

Flexibilisation of working-hours regulations

In 1994 the new Act on Working Hours (Arbeidstijdenwet) was introduced, replacing the former Labour Act (Arbeidswet) of 1919. In conformity with the 1993 EC-Directive on working time,[6] this Act introduced several aspects of flexibilisation of working hours. The protection of the worker often refers to an average working time during a reference period rather than to identical daily or weekly working time. Most interesting is that the new system distinguishes between legislative and negotiated standards. For instance, the maximum working hours per day under the Act are nine, but it is possible to negotiate in a collective agreement that it be 10 h daily. With this system the Act aims to promote consultation of the unions and works councils with regard to working hours. The role of the labour inspector is reduced, since it no longer has to give permission for overtime.

Lifting of ban on women's night work

The Netherlands had a ban on women's night work in heavy industry. This ban was lifted in 1989 as a result of the 1976 EC-Directive on equal treatment for men and

6. Council Directive of 23 November 1993 concerning certain aspects of the organization of working time, 93/104/EC, OJ 1993, No. L 307/18.

women.[7] This was seen as too restrictive for job opportunities for women in industry. Only the ban on night work for pregnant women was upheld since this offers protection on medical grounds.[8]

Derogation from legal norms

It was already described above that the new Working Hours Act (Arbeidstijdenwet) of 1994 made it possible to derogate from the legislative working hour regulations through collective agreements.

Although it was already possible to derogate from certain legal norms in the Civil Code through collective bargaining agreements, these possibilities were extended in The Act on Flexibility and Security of 1999. For instance, in the new regulations for worker dispatching services, collective agreements weakened certain forms of protection of the workers concerned. In return, the unions realised the introduction of training and pension rights for the dispatched workers who serve during an extended period.

Change clause

The Supreme Court accepted in the IBM case of 1988 the possibility that in the employment contract an employer reserves the right to change this contract unilaterally, as long as he acts in good faith.[9] Following this decision, many employers introduced such a clause in their standard employment contracts. The decision was heavily criticised in the literature because of the danger that it gave the employer too wide a margin of appreciation. As a result of this discussion the rule was codified in the Civil Code in 1998, but in a more restricted form. According to the new article 7: 613 Civil Code, the use of such a clause is only permitted if the employer has such 'serious grounds' to do so that the interest of the employee hurt by the change in the contract should be put aside on the basis of fairness and reason. In principle, this possibility opens room for more internal flexibility in companies. It is up to the courts now to determine how far the discretion of the employer will go in practice.

The outdated articles on work rules in the Civil Code were repealed on the same occasion.

2.3. Collective Labour Relations

Decentralisation of collective bargaining

There is a tendency towards decentralisation of collective bargaining in the Netherlands. During the fifties and sixties wage raises were to a large extent determined on the

7. Council Directive of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 76/207/EEC, OJ 1976, No. L 39/40.
8. See also article 7 of the EC-Council Directive of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, 92/85/EC, OJ 1992, No. L 348/1.
9. Supreme Court (Hoge Raad) 7 October 1988, Nederlandse Jurisprudentie (Dutch case law) 1989, no. 335 (IBM). This case may be compared with the case of the Japanese Supreme Court of 25 December 1968, *Minshu*, Vol. 22, p. 3459 (Shuhoko Buscase).

national level in negotiations between the national associations of unions, employers and government. Although there is still an important national discussion and co-ordination on the topic, the wages are in practice negotiated on the branch level, or in some cases on company level.

Today, the discussion is to what extent a further decentralisation to the company level should be promoted and, in that case, who should be the negotiating party on behalf of the employees, the unions or the works councils. Although the opinion is still dominant that wage negotiations should be the prerogative of the unions, more voices are now heard that the works council should be involved too. In some companies where workers are not well organised in unions (like newly emerged, high-tech industries), there are in practice negotiations with works councils.

Formally, the agreements reached with works councils are not legally recognised collective agreements and therefore not binding for individual workers. However, it is possible to imply a clause in the employment contract that binds the worker to such agreements. In the 1998 revision of the Works Council Act (Wet op de Ondernemingsraden) the notion of 'company agreements' between company and works council was formally recognised. Nevertheless these company agreements continue to have no binding effect for individual workers.

Interesting is also the new collective agreement of 1997 between the association of employers in the printing (graphic) industry and the unions. This collective agreement allows individual employers to negotiate with trade unions on the plant level on specific issues indicated in the collective agreement. The agreements resulting from this process are also binding on plant level. It is not yet certain that this binding effect will be accepted by the courts.

Relation between trade unions and individuals

There has been no formal re-examination of the relation between trade unions and individual workers or their respective bargaining position. However, it seems clear that there is a tendency towards 'individualisation' of relations. Workers are generally better educated than before and demand more room for their individual wishes to be heard in labour relations. For instance, a scheme has been introduced whereby workers can choose either to have a pension scheme for widows/widowers or to have a better old age-benefit scheme. This scheme will be preferred by those workers who are not married, or if both partners work and/or they have no children. This seems to be the first step in the direction of more individual freedom in labour relations.

3. THE DRIVING FORCES OF DEREGULATION

The driving forces of deregulation in the Netherlands include of course several factors. The high unemployment during the eighties was reduced during the nineties. This was partly a result of the growth of part-time work. Many women re-entered the labour market or wanted to reduce their working hours after having children in order to combine working life and family responsibilities. Part-time jobs made this possible and at the same time introduced some flexibility for employers. Other elements that promoted employment were tax reductions and cuts in social security schemes which reduced labour costs. An important factor was the willingness of unions (and their members) to accept moderate wage increases in order to promote economic recovery. The success of this process (the unemployment rate was reduced to 4% at

the end of the nineties) earned the admiration of some foreign governments and it was called the 'Polder model'. This term refers to the Dutch term 'Polder', which stands for land that is regained from the water by building dikes around it and pumping the water away. This romantic idea is that the Dutch culture is formed in the everlasting struggle against the water, which forces the Dutch to cooperate and accept compromises. Today, the 'Polder model' stands for co-operation of employers and unions to serve mutual interests.

The pressure of global competition was of course important as well. As a trading and transport nation, the Netherlands are very dependent on international trade and the ups and downs of world markets. Therefore, the need for a flexible response to global competitors is often stressed. In particular, the influence of the internal EC-market is felt more and more. The Netherlands were not able to maintain a relatively high level of social security benefits for disabled workers, partly as a result of the fact that the level was unique in Europe. Employers stress that with regard to health and safety legislation, for instance, the Dutch legislation should not exceed the European minimum standards. During the implementation of the EC-Directive on European Works Councils[10] there was an agitated discussion in Parliament on how few and minor the issues were where the government proposed to go further than the European Directive required. Even the American and Japanese Chambers of Commerce intervened in this discussion.

Structural changes in industries are important too. There is a tendency towards a service-oriented society. Traditional industries with mass fabrication and low-skilled workers are declining. Workers are supposed to be better trained. Industries are diversifying and rapidly changing to respond to the changing wishes of customers. It is more difficult to set general rules in legislation or even in branch-wide collective agreements. There seems to be a tendency towards procedural rather than substantive rules in legislation. An example is the growing influence of general rules in case law, like human rights and general principles like equal treatment. The Dutch Civil Code contains an article that requires employer and employee to behave like a 'good employer' and a 'good employee'. The 'good employer'-clause was used more and more to deal with problems that were not settled by the legislation or came up for the first time. For instance, the principle of equal pay for equal work was accepted by the Dutch Supreme Court, not only for men and women, but in general. This decision was based on the principle of 'good employership'.[11]

On the other hand, in the recent Taxi Hofman case, the Supreme Court based on the standard of 'good employeeship' its decision that the worker should in general accept reasonable proposals of the employer related to changed circumstances on the job site, and may reject such proposals only when acceptance could not reasonably be asked of him.[12] The decision does not make completely clear whether this is a general rule or a special rule applying to handicapped workers. But it could imply that the employer could ask for a high degree of internal flexibility from the worker.

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10. Council Directive of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, 94/45/EC, OJ 1994, No. L 254/64.
11. Supreme Court (Hoge Raad) 8 April 1994, Nederlandse Jurisprudentie (Dutch case law) 1994, no. 704.
12. Supreme Court (Hoge Raad) 26 June 1998, Jurisprudentie Arbeidsrecht (Case-law Labor Law) 1998, no. 199 (Taxi Hofman).

4. EVALUATION OF CURRENT DEREGULATION

Although deregulation is no universal phenomenon in the Labour Law of the Netherlands, the influence of flexibilisation is important. Nevertheless in some areas regulations have increased, for instance by the introduction of a General Act on Equal Treatment which protects workers (amongst others) against discrimination with respect to race, nationality, religion, conviction and homosexual orientation. With regard to the privacy of workers, the Act on Medical Tests was enacted which prohibits medical tests before hiring personnel, except in extraordinary cases. In those cases, the Act requires doctors and employers to protect the rights of the job applicant who has to undergo a medical examination.

The general reactions to deregulation in the country are reserved. Many people see that the rights of workers are diminishing. For instance the privatisation of sickness payments makes workers more dependent on their employers. On the other hand, flexible forms of work (like dispatching workers agencies and on-call contracts) were accepted after workers found out that they also created job opportunities and that workers got protection when they stayed longer at that job.

One could say that deregulation or flexibilisation is not simply abolishing regulations but replacing outdated regulations by modernised forms of regulations.

Attention to the need for internal flexibility must be greater than before. In this respect it was mentioned above that the introduction of the 'change clause' in the Civil Code and the Taxi Hofman case on good employeeship could promote this.

5. THE ROLE OF LABOUR LAW IN THE 21st CENTURY

The question is raised whether we need a new concept of Labour Law. It seems to me that the role of Labour Law is not changing, but rather the way in which this role is fulfilled. Labour Law has recently taken on an unmistakably more market-oriented approach. But this does not mean that the role to protect workers in their weak position towards the employer has vanished.

The individualisation of Labour Law is very important for many workers and may be necessary to allow Labour Law to survive as a generally accepted set of rules to govern labour relations. The question to be answered in the future is how to respond to new developments and to adapt the concrete rules of Labour Law, all the while preserving the general values of Labour Law and not throwing away its underlying principles. In a world that seems to change rapidly, this question is more current than it has been for some time, but in fact it has always been important. And answering it keeps Labour Law an interesting and important subject.