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The 'Tulip Model' and the New Legislation on Temporary Work in the Netherlands[1]

1. INTRODUCTION

On 19 April 1999 *Business Week* announced that 'the bloom may be off the Tulip model', referring to the envious look of Europeans to the so-called 'Tulip model'. The jobless rate of the Netherlands has decreased over the past years to nearly 4% while Germany and France continue to suffer with an unemployment rate of around 11%. The reason for the Dutch success was supposedly the fact that the Netherlands has dropped almost all restrictions on temporary work. However, as a result of new legislation forcing agencies to offer more job security and better benefits, measures to attract more workers to the industry could backfire and result in higher employment costs. Indeed, 10,000 temporary workers were due to be fired and the growth rate of the Dutch economy was already showing signs of slowing down, according to the Brussels reporter of the magazine[2]. In this article, I will give more precise information on the new legislation and its expected results.

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1 This article is partly based on my contribution 'Deregulation and Labor Law in the Netherlands', to the 5th JIL Tokyo Comparative Labor Law Seminar, November 11-12, 1998: 'Deregulation and Labor Law: in Search of a Labor Law Concept for the 21st Century'. The results of this seminar will be published in *The Bulletin of Comparative Labor Law*.

2 W. Echikson, 'The Bloom May Be off the Tulip Model', *Business Week*, 19 April, 1999, p. 26.

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2. THE BACKGROUND OF THE 'TULIP' OR 'POLDER' MODEL

Foundation of Labour

Historically the so-called 'Tulip' or 'Polder' model dates back to the end of World War II when employers' associations, labour unions and Government decided to cooperate very closely at the national level in order to restore the nation's economy. Thus, a private organisation of the national employers' associations and trade unions, the *Foundation of Labour,* was established. This cooperation included a national decision-making process on wage increases. During the 1950s wage levels were kept low in order to rebuild the national economy and to establish a national social security system with a high level of protection and the cooperation also promoted low strike rates. During the 1960s this system gradually weakened as workers asked for higher wages in line with the growth of the economy. In the new Wage Act of 1970 the wage negotiations were almost completely undone due to Government interference. Although a form of national consultation, coordination and orchestration has remained until the present, the negotiators on the branch and company level today decide freely on the level of wages in collective agreements.

Wassenaar Agreement

However, the unions' tradition of modest demands has still remained over the years. The trade unions in the Netherlands have always put great emphasis on items such as solidarity, which includes a high level of social security and wage increases that are in line with the growth of economy in order to protect job creation. During the 1960s the level of social security costs gradually increased and in the 1970s automatic price compensation for inflation was introduced as a general principle in collective agreements. After the two oil shocks of the 1970s these factors then created a high unemployment rate at the beginning of the 1980s[3].

In 1982 in the small village of Wassenaar, near The Hague, the leaders of the most important national trade union FNV, Wim Kok (the present Prime-Minister), and the most important employers' association VNO, Chris van Veen, reached a historic agreement. They agreed to end the system of automatic compensation of inflation in the wages and, alternatively, to start with working time reduction so as to fight unemployment. With this agreement they prevented the Government's

3 The unemployment rate rose from 1.3% in 1971 to 6% in 1980 and 12% in 1983. After 1983 it decreased again. Source: OECD, *Economic Outlook 50*, Paris 1991.

plans to interfere in the wage negotiations using government measures. An important aspect of the working time reductions was that this would be implemented with flexibility: not a general reduction of working time for everybody to, for instance, 36 hours a week, but different forms to be chosen at branch and company level. The impact of the Wassenaar Agreement on Dutch labour relations was important in three ways.

1. During the 1980s the reduction of working hours was achieved with a 38-hour working week as average, but in many different forms (e.g. more free days, some days not scheduled, every 14 days one afternoon free etc.).
2. At the same time the Government started the promotion of part-time work. Due to the strong tradition in the Netherlands for women with children to stay at home to take care of them, the Netherlands had known a relatively low participation of women in the labour market. Therefore, with women striving for emancipation the 1970s, part-time work offered a practical compromise. Many women with children started to work in part-time jobs, thus, the participation rate of women increased substantially.
3. Employers also promoted the external flexibility of their workforce by introducing more temporary contracts and employing more workers through temporary work agencies. The labour unions gradually softened their resistance against this development. Many job seekers found that the ordinary State employment offices could not provide them with work, while temporary work agencies could offer them jobs. Although these jobs were temporary, in many cases a worker, once introduced in a company, could stay on after the first period in a permanent position. Besides this, the so-called 'on-call' contracts became very popular and were accepted by the courts and, generally, also by the trade unions.

The result is that in 1998 only 56% of the workforce in the Netherlands had a regular full-time job, 13% had a fixed-term contract, 37% worked part-time (75% of whom were women).[4]

4 Figures based on W. van Eeckhoute, 'Aspecten van flexibilisering', in F.J.L. Pennings (ed.), *Flexibilisering van het sociaal recht in België en Nederland*, Deventer, Kluwer, 1998, at p. 6.

Flexibility and security

This last point was the reason behind the trade unions' acceptance of a further development during the 1990s. In order to make the labour market more flexible, several different forms of 'flexible work' became popular. Part of this was caused by the fact that the ordinary dismissal procedure for permanent employees was seen as complicated by employers who preferred fixed-term contracts, but the renewal of these contracts is also restricted by statute. Consequently, many employers prefer to work with temporary work agencies and 'on-call' contracts, whenever possible.

In 1996 a new deal was reached by the Foundation of Labour. The central organizations of management and labour agreed upon a report called Flexibility and Security. This report proposed that more flexibility be introduced in the dismissal legislation for contracts of indefinite period as well as those of fixed-terms - meaning that temporary agencies would get fewer restrictions and the position of the workers from temporary agencies would be improved, especially after having worked for a longer period. The same would apply for those workers hired on an 'on-call' basis; the general principle being that employment relations should have flexibility from the beginning, but should also give more job security when they last longer, no matter the form that was eventually chosen. The Government changed the legislation almost completely following the lines set out in the Foundation of Labour's report and, thus, the Act on Flexibility and Security was introduced on 1 January 1999.

The term 'Polder Model' was coined in recent years in the Netherlands for this newly found form of cooperation between employers' organisations and national trade unions. Based on the older tradition of close cooperation on the national level, the organisations understood that labour relations had to be changed in order to cope with the high unemployment and the new demands resulting from the globalisation of industries. The *'polders'* are the pieces of land in the Netherlands that are obtained from the water - building dikes around the land and pumping the water away achieves this. The romantic idea is that the Dutch culture is formed in the everlasting struggle with the water which, hence, forces the Dutch to cooperate and accept compromises. Today, the 'Polder Model' stands for the great ability of employers and unions to cooperate in the interest of both.

3. THE CONTENT OF THE NEW LEGISLATION

The new legislation consists of two Statutes:

The Act on Allocation of Workers by Intermediates of 1 July 1998
The Act on Flexibility and Security of 1 January 1999.

These Acts contain changes in the legislation regarding Temporary Work Agencies (Worker dispatching services), 'on-call' contracts, fixed-term contracts, and dismissal regulations. The position of part-time workers in the Netherlands is legally speaking basically no different from that of full-time workers. Since 1996 the Civil Code has prescribed the equal treatment of part-time and full-time workers, in proportion to the amount of working hours. The implementation of the Part-time Directive of the European Union will not therefore be a big problem in the Netherlands[5].

Worker dispatching services

Since 1975 the restrictions on Worker dispatching services have been step-by-step drastically reduced to the point of almost being abolished. In 1975 the official ban on these services was replaced by a system of licence. A worker dispatching service needed a government permit to operate, as the Government wanted to watch closely whether the service was following good practices or not. It demanded that social security premiums be paid by the agencies, that they keep a proper administration and that workers earn wages equal to those of ordinary workers in the same company who performed the same job. In some areas (e.g. the construction sector) these services were abolished because of previous bad experiences with uncontrollable 'black work'. In other branches, temporary workers were eventually allowed to be sent for a period of three months at most. Later, this period was prolonged to six months and, in the end, one year was tolerated.

However, over the years this type of work became very popular in the Netherlands. Indeed, temporary work became a form of 'employee recruiting'. On the other hand though the legal position of temporary workers remained uncertain. Temporary work offices for example denied that they concluded employment contracts with their workers, but the growth of this type of work and the desire of temporary work agencies to have credibility gradually brought about change. During the 1980s the

5 Directive 97/81/EG of the Council of 15 December, 1997 concerning the Framework agreement on part-time work, *Official Journal* 20 January, 1998, L14, p. 9-14.

general trade unions managed to reach a nationwide 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 to work, 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[6]. At this point, the ABU changed its previous position and in a 1996 Agreement with the unions[7] accepted the principle that temporary workers were working on the basis of an employment contract. In exchange, the unions accepted temporary work agencies as normal employers who, as such, do not require specific Government supervision.

By January 1999 this agreement was formalised in the Civil Code by the introduction of 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/her work at any time. It is possible, however, to extend these periods of 26 weeks by collective agreement. In the New Collective Agreement for Temporary Workers (1999-2001) this in fact was done: these exceptions are extended to one full year and even longer. In return, the unions stipulated the right to training and access to a pension scheme for the temporary workers 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, according to the new 'Act on Allocation of Workers by Intermediates'.[8]

Temporary work offices are now free to operate like any other company. Only two principles were sustained in the new Act: dispatched workers may not be used to undermine a strike and the wage of a dispatched worker should be the same as that of a worker who does the

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

7 This Agreement was concluded on branch level, but connected with the nationwide agreement on Flexibility and security.

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

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 or that of the Workers Dispatching Agency). The Workers Dispatching Agencies are in favour of such an independent wage policy with the argument of being employers with their own employment policies. Sometimes they 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.

On-call contracts

Under the original type of these contracts the amount of hours and the time when the work is to be done are not set in advance. The popularity of this type of contract in the Netherlands is very high. Around 6% of the workforce work under this type of contract. It is used by 16% of the companies and they have on average 17% of their personnel employed on this basis.[9] There is a wide range of contracts - from a low number of hours with a high degree of uncertainty of work to a high number of hours, for instance 20-30 hours a week, with a high level of certainty of employment.

The legal position of workers working on the basis of an on-call contract was often not strong. The more intensive the employment relationship, the earlier it would be recognised as an employment contract under the Dutch Civil Code. This would entitle the worker to demand wages and access to work. Often, courts declared that since the worker had a regular pattern of work, he/she was therefore entitled to work according to the average of the number of hours that he/she worked during the preceding period.

The Act on Flexibility and Security aims to strengthen the position of these workers. In the Civil Code it introduced two so-called 'presumptions of fact':

- Article 7:610a Civil Code determines that when a worker works three days in every week or at least 20 hours a month for another person, it is presumed that this is done on the basis of an employment contract.
- Article 7:610b Civil Code states that in case an employment contract has lasted three months, the agreed number of hours in any month is presumed to be the average number of hours in the three preceding months. This new

9 Figures based on I. Plets & D. de Wolff, 'De oproepovereenkomst naar Belgisch en Nederlands recht', in F.J.L. Pennings (ed.), *Flexibilisering van het sociaal recht in België en Nederland*, Deventer, Kluwer, 1998, at p. 32.

article may have important effects in cases in which the employer reduces the number of hours of any worker.

In both cases it is possible for the employer to prove that it was agreed otherwise, for instance in the case of temporary overtime and seasonal work. The employer has to prove this and this will, consequently, promote a proper composition of contracts and more transparency in working schedules for the worker.

The third measure is that it is more difficult for the employer to contract away his/her obligation to pay wages in case there is no work under his/her responsibility. This obligation may in the future only be contracted away for the first six months of a contract, unless the applicable collective agreement allows doing so for a longer period (article 7:628 Civil Code).

The last improvement for the workers on 'on-call' contracts is the obligation to pay at least three hours of work for any call. This obligation rests on the employer in case of small contracts (less than 15 hours a week and no certainty of the exact hours of work or no certainty of the amount of hours at all). The purpose is that those workers should not be forced to sit the whole day near the telephone waiting to be called for just one hour of work or to travel to work just for a very short period.

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 up until 1999 the Civil Code stipulated that a second consecutive fixed-term contract could not be ended without notification. This implied the requirement of the 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. Since these restrictions are no different from those of a contract for an indefinite period, employers felt this legislation was very restrictive. Thus, to avoid these restrictions in principal two ways were opened:

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, employers often hired the same worker in the meantime 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 arrangement for several years, a reasonable application of the law implies that the fixed-term contract should be considered as a consecutive fixed-term contract in the sense of the

Civil Code[10]. If the worker was hired in the first instance through a Workers Dispatching Office and then got an 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 foreseen in the Civil Code[11].

b. To make use of the possibility in the Civil Code to deviate from this rule by collective agreement. Due to the high unemployment level during the 1980s the unions often accepted exceptions to this rule in collective agreements. In several collective agreements on branch and company level it was therefore 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 courts, as indicated, restricted the first possibility, the latter option became important. As a result of the aforementioned 1996 Agreement on Flexibility and Security between the national organisations of employers and trade unions, the Dutch Government introduced such a legislation in the 1999 Act on Flexibility and Security. Indeed, this may be the most important change of the new Act.

Under the present legislation (article 7:668a Civil Code), it is possible to have 3 consecutive 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 aforementioned protection against dismissal. Contracts that are following each other within a period of three months are considered to be consecutive. This change is an important form of deregulation that is expected to 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 an employment contract is not possible without the prior permission of the Regional Director of the Labour Service Organisation. Despite the critics from large companies, this system is still prolonged.

The labour unions and the small enterprises are in favour of the system. The unions because of its preventive effect: employers can only

10 Hoge Raad (Supreme Court) 22 November 1992, *Nederlandse Jurisprudentie* (Dutch Case-Law) 1992, 707 (Bootsma a.o./Campina).

11 Hoge Raad (Supreme Court) 13 September 1991, *Nederlandse Jurisprudentie* (Dutch Case-Law) 1992, 130.

dismiss a worker on the basis of reason. The small enterprises see the system as a guarantee against lawsuits from employees for wrongful dismissals.

In order to make the dismissal procedure faster, several measures were taken in the Act on Flexibility and Security. 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/her 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 arises after the Regional Director of the Labour Service Organisation has received the request for permission to dismiss.

Besides this, in practice there has been some deregulation because many employers avoided the 'permission procedure' by asking the court for dissolution of the employment contract (Article 7:685 Civil Code). Although this is only possible in cases of 'severe reasons', for practical purposes the courts accepted this as a normal dismissal procedure, which indeed became very popular among employers and lawyers. Today, half of the dismissal procedures are affected this way. The only disadvantage for the employer is that the court can oblige him/her to pay 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 x B x C, (seniority x monthly wage x correction factor). The correction factor is more than 1 when the employer is responsible for the dismissal, and less than 1 when the employee is more responsible. In practice, this, more or less, introduces a right to a severance payment for dismissed workers, at least when this procedure is followed.

Evaluation of the new legislation

The first reaction to the Act on Flexibility and Security is that it makes dismissal regulations even more complicated than before. According to a survey that was held in the first months after the introduction of the new Act many employers were reluctant to work with fixed-term contracts, although the Act aimed to promote this. In order to prevent legal problems, employers often preferred to hire temporary personnel from temporary work agencies, but this is typical for new legislation: it takes time to make the possibilities clear to everybody. The real results are to be seen in the long run. Whether the new legislation will have a backfiring effect can not be seen in a period of only a few months. The slowing growth of the Dutch economy that *Business Week* mentioned was already predicted and has changed in the meantime.

A second phenomenon was mentioned in the article in *Business Week* - a group of workers from temporary work agencies were to get a contract for an indefinite period on 1 July 1999 as a result of the new Collective Agreement in this branch. The group was dismissed before this date. The national labour union, FNV, warned in the Spring that the position of 10,000 workers would be at stake. Later, the branch organisation announced that only 1,500 workers were fired for this reason. This group was not supposed to be employable in the long run. Others were accepted as permanent workers.

The general result of the new legislation seems to be that the dispatching work agencies have a freedom to operate that is quite unique in Europe. Only Sweden has this type of liberal system while other countries still know many restrictions. However, this is compensated for by a collective agreement that improves the position of the workers involved.

The Netherlands now has two systems: the still very strong position of the Government in controlling dismissals of regular workers on the one hand and a high amount of flexibility for other types of employment relationships on the other.

It seems likely that in the forthcoming years the dismissal procedures will continuously be under discussion. The Minister of Social Affairs and Employment has already installed an Evaluation Committee on the 'Dual System of Dismissals', which refers to the control of dismissal of regular workers by Government or by the courts. However, the position of the workers on flexible contracts should be monitored as well. Only in the long run will the effects be clearly identified.

In conclusion, the 'Tulip' or 'Polder' model may serve as an example for other countries. The present British Government is interested in flexible labour markets under reasonable conditions for the workers as well, and the German Government has already introduced something like the Foundation of Labour *(Bündnis für Arbeit)*. More in general though, some Governments will look jealously to the Dutch Government because the trade unions are willing to negotiate on long entitled rights in order to break through a deadlock-situation with regard to unemployment. Also at the European level the cooperation between employers organisations and trade unions is growing, resulting in certain agreements at this level, while in Belgium, France and some other countries the resistance to introduce more flexibility into the labour market is still high as it is feared that it undermines the system of labour law. More debates will no doubt be necessary.

In the Netherlands it seems that the attention is now turning from the so-called external flexibility (flexible contracts, dismissals) to internal flexibility (mobility within the enterprise). More and more workers are demanding that the company find a balance between working and private

life, while companies are requesting that workers be more open to adaptations in the work place.