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## *The Concept of ‘Employee’: The Position in the Netherlands*

GUUS HEERMA VAN VOSS

### I. THE CONTRACT OF EMPLOYMENT AND THE EMPLOYMENT RELATIONSHIP

#### A. The Contract of Employment: Basic Definition, Formal Requirements and the Effects of Invalidity of the Contract

**T**ITLE 10 OF Book 7 (in short: Title 7.10) of the Netherlands’ Civil Code<sup>1</sup> regulates the contract of employment (*arbeidsovereenkomst*). Article 7:610, paragraph 1 provides the definition of a contract of employment:

A contract of employment is a contract whereby one part—the employee—undertakes to perform work in the service of the other party—the employer—for remuneration during a given period.<sup>2</sup>

According to this definition, three components are of significance in determining whether an employment contract exists: (1) performance of work, (2) in the service of the employer, and (3) in exchange for remuneration. In the following, these three elements will be further explained by the relevant case law.

Regarding the first element of ‘work’, it has been established that this element does not necessarily mean that the employee works actually all (agreed) working hours. According to the settled case law, even sleep (an employee’s periods of inactivity during which his or her services are not required) can be considered as work.<sup>3</sup>

<sup>1</sup> *Burgerlijk Wetboek*.

<sup>2</sup> For an English translation of the Netherlands’ Civil Code, see HCS Warendorf, R Thomas and I Curry-Summer, *The Civil Code of the Netherlands*, 2nd edn (Alphen aan den Rijn, Kluwer Law International, 2013).

<sup>3</sup> HR 15 Maart 1991, NJ 1991/417 (*Jebliouazanni v Stichting Casa Migrantes*).

One specific issue is the position of trainees. The *Hesseling v Stichting De Ombudsman* case is considered the benchmark judgment of the Supreme Court (Hoge Raad). A student of the Social Academy pursued a traineeship at the Foundation of a Private Ombudsman (*Stichting De Ombudsman*). After completing his traineeship, the student alleged that he had an employment contract with the foundation, since he had performed work in a relationship of authority in exchange for remuneration. The Ombudsman, however, argued that the claimant had not worked according to the definition of the contract of employment, since the trainee's activities were aimed at broadening his own knowledge and experience. The Netherlands' Supreme Court ruled in favour of the Ombudsman and held that in the given case, the traineeship had primarily been aimed at broadening the knowledge and experience of the trainee within a regular education programme, and that there was no contract of employment.<sup>4</sup>

Interestingly, in the *PhD Students v University of Amsterdam* case, it was decided that although the work of PhD students, who are working towards completing a PhD thesis at the university, is primarily aimed at obtaining a doctoral/PhD degree, their work was considered 'work' under the definition of the contract of employment. The outcome was justified by the fact that the university received a premium from the Ministry of Education for every PhD completed.<sup>5</sup>

As a general rule, the employee's duty to perform work cannot be enforced through a fine or detention due to the freedom of labour.<sup>6</sup>

The employer's obligation to provide work to the employee is based on the assumption that a good employer is obliged to provide work on the basis of the employment contract. This is not explicitly mentioned in the Netherlands' Civil Code, but should be one of the employer's duties under the general requirement of good employership:

The employer and the employee shall be obliged to act as a good employer and a good employee.<sup>7</sup>

In the 1965 *Walsweer v Acmesa* case, the Dutch Supreme Court refuted the idea that the contract of employment implied that the employee was in principle entitled to be provided the agreed work. This right has to be decided on a case-by-case basis and is dependent on the nature of employment, the

<sup>4</sup> HR 9 October 1982, NJ 1983/230 (*Hesseling v Stichting De Ombudsman*).

<sup>5</sup> HR 14 April 2006, NJ 2007/447, JAR 2006/119, RAR 2006/74 (*Beurspromovendi v UvA*).

<sup>6</sup> Article 7:659, para 2 Netherlands' Civil Code, which is inspired by ILO Conventions.

<sup>7</sup> *ibid*, art 7:611. See on this provision GJJ Heerma van Voss, *Goed werkgeverschap als bron van vernieuwing van het arbeidsrecht*, Reeks Vereniging voor arbeidsrecht no 29, 2nd edn (Deventer, Kluwer, 1999); MAC de Wit, *Het goed werkgeverschap als intermediair van normen in het arbeidsrecht*, Monografieën Sociaal Recht no 14 (Deventer, Kluwer, 1999); DJB de Wolff, *Goedwerknemerschap*, Monografieën Sociaal recht no 44 (Deventer, Kluwer, 2007).

agreed work and the specific circumstances of the concrete case.<sup>8</sup> However, the lower courts usually accept the principle of the right of the employee to be provided the agreed work, except in cases where the employer has a valid reason to refuse the provision of work. Valid reasons include lack of work, misconduct of the employee or conflicts at the work site.

In later cases, the Supreme Court acknowledged specific circumstances under which the right to the provision of work is justifiable. In the *Possemis v Hoogenboom's Bewakingsdienst* case, the employee had concluded an on-call contract as a security guard. The Supreme Court decided that the employer was obliged to provide the employee with work, since the employee had also obliged himself to perform work on every call.<sup>9</sup> In such a case, a mutual obligation exists. In *Chelbi v Klene*, the Supreme Court ruled that the employer was to keep the possibility open for an employee who had been suspended from work to return. The employee has to claim this option within a reasonable time period.<sup>10</sup>

The second element, 'remuneration' (or wage), is not defined in the Netherlands' Civil Code. However, the Netherlands' Supreme Court has construed it as the agreed payment in return for the work performed.<sup>11</sup>

The wage component can be established on a factual base and does not need to be explicitly agreed upon. For example, in the *Bethesda v Van der Vlies* case, the claimant provided care for elderly persons and had worked full-time for about 30 years at a home and nursing institution. In exchange, she received room and board, a small amount of holiday pay and a small Christmas bonus. While the nursing institution considered the work performed to be of a voluntary nature and did not consider the claimant's room and board to be a wage so as to deny an employment contract, the caregiver claimed that she actually had an employment contract with the nursing institution. The Netherlands' Supreme Court ruled that the room and board were to be considered a wage, and since the parties had entered into a de facto contract of employment, the nursing institution had to pay the claimant remuneration for the last five years with retrospective effect and in compliance with the collective agreement applicable to staff of nursing institutions.<sup>12</sup>

The third element 'in service of' means that the employee must follow the employer's instructions. For this reason, this element is usually indicated with the term 'authority' in the Netherlands' literature. This notion is quite close to the concept of 'subordination' as used in other countries. They represent two sides of the same coin. The difference is that the term 'authority'

<sup>8</sup> HR 26 Maart 1965, NJ 1965/163 (*Walsweer v Acmesa*).

<sup>9</sup> HR 25 January 1980, NJ 1980/264 (*Possemis v Hoogenboom's Bewakingsdienst*).

<sup>10</sup> HR 12 May 1989, NJ 1989/801 (*Chelbi/Klene*).

<sup>11</sup> HR 18 December 1953, NJ 1954/242.

<sup>12</sup> HR 12 October 2001, NJ 2001/635, JAR 2001/217 (*Bethesda v Van der Vlies*).

denotes the employer's side of the concept. In the Netherlands' system, the subordination of the employee is addressed in section 7 of the employment contract on the obligations of the employee. Article 7:660 in this context states:

An employee must observe the rules governing the performance of work and those designed to promote order in the undertaking of the employer issued to him, by or on behalf of the employer, whether or not at the same time as issued to other employees, within the limits of generally binding provisions or of a contract.

The fact that the employer has control over the work and gives work instructions today is not always as obvious as it used to be in the past, when traditional factories with unskilled workers were dominant. Nowadays, many employees work autonomously and are not given (that many) work instructions throughout the day. According to the case law, it suffices for the employer to be entitled to give instructions on job content.<sup>13</sup> Thus, in principle, it is not necessary for instructions to actually be given by the employer. The criterion has changed from 'giving instructions' to 'being entitled to give instructions'. The exercise of authority is being reduced in some cases from applying to job content as a whole towards being limited mainly to organisational and disciplinary aspects of the job. This reduction in the scope of the employer's discretion depends on the degree of the worker's independence in the particular job. In certain highly professional jobs, the employer has less influence than in more traditional blue-collar jobs. This applies, for instance, to jobs involving specific professional standards, such as medical work, legal work and accounting. It also applies to professions in which a certain degree of freedom is inherent, including in the arts, journalism (at times within the limits of an editorial statute) and religious workers.

Thus, as confirmed in the *Imam* case,<sup>14</sup> a religious function carried out to a large extent in a discretionary manner can also be regarded as being exercised under a contract of employment. In other words, according to the Netherlands' Supreme Court, a contract of employment can be considered to have been established whenever the employer has the possibility to decide on certain aspects such as working time and holidays, even though the employee is free to choose how to carry out the religious aspects of his or her function. This element will be discussed more extensively in section IV.A below.

Article 7:610 of the Netherlands' Civil Code additionally requires the employee to work 'during a given period'. It can be said that the majority of the case law and scholars do not consider this component to be a distinctive feature of employment contracts. Accordingly, it has been argued that the provision does not specify the notion of a 'given period' and this requirement is

<sup>13</sup> HR 28 September 1983, NJ 1984/92.

<sup>14</sup> HR 17 June 1994, NJ 1994/757, JAR 1994/152 (*Iman*).

therefore of minor significance in comparison with the element of authority. It is generally accepted that this component is met even when only a few hours of work are agreed in the contract.<sup>15</sup> However, in some social security cases dealing with occasional work, this component was used to determine whether an employment relationship could be assumed to exist.<sup>16</sup>

In the past, a few scholars considered working during a 'given period' to be a relevant component, arguing that the presence of 'authority' today is often difficult to recognise and the duration of work has therefore assumed more relevance.<sup>17</sup> Surprisingly, this reasoning, along with the rise of flexible employment relationships in which the periods of work are unsure, motivated the legislator to keep the element as part of the definition of 'employment relationships' in the revised title of the Netherlands' Civil Code on the contract of employment. The Supreme Court of the Netherlands considers the element of 'authority' to be characteristic of the employment contract. The view that the component of 'authority' continues to be essential dominates legal regulations as well. It is generally argued that replacing this with other criteria would conceal the crucial importance of the employer's discretionary power.<sup>18</sup>

Another requirement, which is not explicitly mentioned in the definition of the employment contract, is that the work has to be carried out personally by the employee (*personal performance*). The principal source for this requirement is Article 7:659, paragraph 1 of the Netherlands' Civil Code:

An employee must perform the work himself; he may not arrange to be substituted by a third party, except with the consent of the employer.

The requirement of personal performance of work is considered subsidiary to the three basic elements mentioned earlier and is included in the duty of

<sup>15</sup> AR Houweling (ed), C Loonstra and WA Zondag, *Arbeidsrechtelijke themata*, 5th edn (The Hague, Boom juridische uitgevers, 2015) 131; GJJ Heerma van Voss, 'Arbeidsovereenkomst' in C Asser (ed), *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Bijzondere overeenkomsten*, 3rd edn, part V (Deventer, Wolters Kluwer, 2015) no 25.

<sup>16</sup> CRvB 6 April 1972, RSV 1972/214; CRvB 31 March 1981, RSV 1981/165; CRvB 2 May 1986, RSV 1987/155; CRvB 15 December 1993, RSV 1994/169; CRvB 23 October 1995, AB 1996/78; CRvB 10 July 2003, RSV 2003/255.

<sup>17</sup> WF de Gaay Fortman, 'De onderneming in het arbeidsrecht', PhD dissertation, Free University Amsterdam, 1936; FJHM van der Ven, *Over de aard der arbeidsovereenkomst*, farewell lecture, University of Tilburg (Alphen aan den Rijn, Samsom, 1972); GHA Schut, 'Medezeggenschap en het gezag van de werkgever' (1977) *RM Themis* 233; WCL van der Grinten, 'Boek 6 van het nieuwe BW' (1976) *NJB* 1197; SCJJ Kortmann, LJM de Leede and HO Thunnissen, 'Opdracht, arbeidsovereenkomst, aanneming van werk' in C Asser (ed), *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht, Bijzondere overeenkomsten*, 7th edn, part V-IIIb (Zwolle, WEJ Tjeenk Willink, 1994) no 14–21.

<sup>18</sup> Heerma van Voss (n 15) no 25; Houweling (ed), Loonstra and Zondag (n 15) para 4.4, 160–67. See also T Koopmans, *De begrippen werkmán, arbeider en werknemer* (Alphen aan den Rijn, Samsom, 1962); and PF van der Heijden, 'De definitie van de arbeidsovereenkomst in art. 610 boek 7 NBW' in PF van der Heijden (ed), *De arbeidsovereenkomst in het NBW, Sociaal- en arbeidsrechtelijke reeks* no 26 (Deventer, Kluwer, 1991) 41–55.

the employee to perform the work.<sup>19</sup> The statutory provisions state that the employee can only be replaced by someone else provided that the employer agrees. Performing work personally is crucial, as follows, for instance, from cases where the Netherlands' Supreme Court ruled that a distributor of newspapers and a deliverer of periodicals respectively were not working on the basis of an employment contract since neither was contractually obliged to personally carry out the work.<sup>20</sup>

The employment contract must be distinguished from the contract for services (*overeenkomst van opdracht*), which is defined in Article 7:400, paragraph 1 of the Netherlands' Civil Code which reads as follows:

A contract for services is a contract whereby one party, the provider of services, obliges himself to carry out tasks for another, the client, which lie outside the contract of employment, other than the manufacture of tangible products, the safeguarding of objects, the publication of work, or the delivery or transportation of persons or things.

In principle, the two contracts exclude each other.<sup>21</sup> The essential difference between the two is the requirement of employer 'authority' (*gezag*) over the employee in the case of an employment contract ('in the service of the other party' in Article 7:610 of the Netherlands' Civil Code).

Article 7:750 of the Netherlands' Civil Code defines a more specific form of contracts for services for the construction industry—the 'contract for works' (*overeenkomst tot aanneming van werk*). Besides this, specific forms of contracts for services are regulated in Book 7 of the Netherlands' Civil Code, such as contracts relating to mandate, agency, commercial agency, medical treatment and tour operators (travel contract). Furthermore, contracts of carriage and goods are regulated in Book 8 of the Netherlands' Civil Code on the Law of Delivery and Means of Transport. In essence, all these types of contracts differ from the contract of employment based on the lack of authority of one party over the other.

The statutory law in the Netherlands does not provide for formal requirements on concluding a contract of employment. In practice, especially in small firms and certain branches, oral employment agreements are still being used. This is also the case with respect to marginal employment relationships, for example, part-time jobs for students. However, it should be mentioned that as a consequence of EU law, the employer is obliged to inform the employee in writing about certain aspects of the contract,<sup>22</sup> but

<sup>19</sup> Houweling (ed), Loonstra and Zondag (n 15) 129–30; Heerma van Voss (n 15) no 23.

<sup>20</sup> HR 13 December 1957, NJ 1958/35 (*Zwarthoofd v Het Parool*); HR 21 March 1969, NJ 1969/321.

<sup>21</sup> Although it is theoretically conceivable that a person could have a contract of employment combined with an additional contract for services for different hours with the same employer, this is not seen in practice.

<sup>22</sup> Article 7:655 of the Netherlands' Civil Code transposing Council Directive (EEC) 91/533 of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288.

this is not a prerequisite for the validity of the contract. In addition, the Netherlands' Civil Code may require certain provisions to be made in writing in order to be valid, for instance, a clause containing a probation period (Article 7:652, paragraph 2) or a competition clause (Article 7: 653, paragraph 1).

Notably, even if the parties have not explicitly concluded a contract, the parties' factual behaviour may lead to the conclusion that a contract of employment has been established.

Collective agreements (*collectieve arbeidsovereenkomst*) may set further requirements for the conclusion of contracts of employment, yet this is not regular practice. Regardless, collective agreements may require certain provisions to be concluded in writing, for instance, in case of the fixed-term of contracts.

A contract of employment may be void or voidable when it is contrary to good morals or public policy. Pursuant to Article 3:40 of the Netherlands' Civil Code:

- (i) A juridical act which by its content or necessary implication is contrary to good morals or public policy is null.
- (ii) A juridical act which violates a mandatory statutory provision is null; however, if the provision is solely intended for the protection of one of the parties to a multilateral juridical act, the act may only be annulled; in both cases, this applies to the extent that the provision does not provide otherwise.
- (iii) Statutory provisions that do not purport to invalidate conflicting juridical acts are not affected by the preceding paragraph.

In principle, under the Netherlands' Civil Code, an illegal juridical act is void, but when the rule primarily serves to protect one of the parties, it is only voidable by that party or by the court upon request of that party. In labour law, the employee is usually seen as the protected party. Consequently, an illegal juridical act becomes voidable. For example, the Netherlands' Supreme Court decided that a contract of employment that had been concluded with an immigrant who was not entitled to work in the Netherlands was valid, even though it violated a mandatory provision. The reasoning was that the obligation to apply for a work permit rests upon the employer. An employer is not allowed to provide an illegal immigrant with work and therefore he may end the contract of employment for this reason once he has attended to this. However, according to the applicable case law, the employer must pay wages as long as the work is performed, because the employer bears the risk that the illegal immigrant is granted a work permit.<sup>23</sup>

<sup>23</sup> HR 27 March 1981, NJ 1981/492 (*El Araichi v Roemo Total Care*); HR 20 December 1985, NJ 1986/713 (*Hotel Ibis v Elbouk*).



It is my assumption that in the case of criminal activities, such as selling weapons without a permit or trafficking, the contract of employment will be void since the legal provision in place does not aim to protect the employee. Yet in the case of an employment contract with a child entered into in violation of the regulations against child labour, one could argue that the provision aims at protecting the employee and the contract is therefore voidable. In the case of an employee of a coffee shop selling 'soft drugs' (which is tolerated by the Dutch authorities despite being illegal according to the Netherlands' Criminal Code), it could be discussed whether such a contract of employment is void or voidable.

In all these cases, the validity of the contract can be determined by the court. Nullification usually only affects the future. This means that the employer has to pay wages for work carried out before the nullification of the contract becomes effective.<sup>24</sup> Special protection for illegal (foreign) workers is foreseen in the Labour Immigrants Act.<sup>25</sup> Article 23, paragraph 2 of the Act stipulates that an employer who has employed an illegal immigrant is presumed to have employed him or her for at least six months against the wage established in Article 2, paragraph j of Directive 2009/52/EC and for working hours typical for that sector. The above-mentioned provision of Directive 2009/52/EC states that an illegally employed worker must be paid the equivalent of what a legally employed worker would have earned in the same situation. The presumption is rebuttable. An illegally employed worker can also claim wages from a higher-ranking employer in a chain of employers in the event that his or her claim against a lower-ranked employer was unsuccessful.

## **B. Employment Relationship: Basic Definition**

A specific notion of 'employment relationship' as such does not really exist in the Netherlands' labour legislation. The Minimum Wage Act uses the term 'labour relationship' (*dienstbetrekking*). The basic definition in the Act refers to the employment contract, but the Act extends to employee-like persons (see further section XI.A below).

The same applies to social insurance and tax legislation.

It can be said that the Netherlands' labour legislation is increasingly based on the definition of the employment contract. Nearly all forms of employment against remuneration may fall under this definition, with the result that additional provisions are barely relevant.

<sup>24</sup> Heerma van Voss (n 15) no 51.

<sup>25</sup> *Wet arbeid vreemdelingen*, Act of 21 December 1994, *Stb* 1994.

## II. EMPLOYEE AND EMPLOYER

### A. Employee: Basic Definition

There is no separate definition for 'employee' in the Netherlands' Civil Code. However, this definition can be derived from the above-mentioned definition of the contract of employment. An employee is thus a person who undertakes to perform work in the service of the employer in exchange for remuneration during a given period.

Other Acts provide more specific definitions, such as:

- (i) Article 4 of the Netherlands' Minimum Wage and Minimum Holiday Allowance Act;<sup>26</sup>
- (ii) Article 1:1 of the Netherlands' Working Hours Act;<sup>27</sup>
- (iii) Article 1, paragraphs 1 and 2 of the Netherlands' Health & Safety Act;<sup>28</sup>
- (iv) Article 3 of the Netherlands' European Works Council Act;<sup>29</sup>
- (v) Article 3 of the Netherlands' Unemployment Act;<sup>30</sup>
- (vi) Article 3 of the Netherlands' Sickness Act;<sup>31</sup>
- (vii) Article 8 of the Netherlands' Disability Act.<sup>32</sup>

Most of these provisions are largely based on Article 7:610 of the Netherlands' Civil Code, but differ slightly. For instance, Article 4 of the Netherlands' Minimum Wage and Minimum Holiday Allowance Act defines 'employee' as a natural person who is employed, whereas Article 2 of this Act defines 'employment' closely with the definition elaborated in the Civil Code. The above-mentioned social insurance acts include not only employees with an employment contract under civil law, but also civil servants appointed under public law.

The Minimum Wage Act as well as the three above-mentioned social insurance acts extend their scope to certain groups. The extension to 'employee-like' persons is discussed below in section XI.A.

The Working Hours Act defines an employee in relation to the definition of 'employer'. The definition covers every person who works under the authority of another, as well as persons who are made available to work for another. Article 2:7 of the Working Hours Act opens the possibility to

<sup>26</sup> *Wet minimumloon en minimumvakantiebijslag*, Act of 27 November 1968, *Stb* 1968, 657.

<sup>27</sup> *Arbeidstijdenwet*, Act of 23 November 1995, *Stb* 1995, 598.

<sup>28</sup> *Arbeidsomstandighedenwet*, Act of 18 March 1999, *Stb* 1999, 184.

<sup>29</sup> *Wet op de Europese ondernemingsraden*, Act of 23 January 1997, *Stb* 1997, 32.

<sup>30</sup> Unemployment Act (*Werkloosheidswet*), Act of 6 November 1986, *Stb* 1986, 566 (WW).

<sup>31</sup> Sickness Act (*Ziektewet*), Act of 5 June 1913, *Stb* 1913, 204; 1999, 22 (ZW).

<sup>32</sup> Work and Income (Capacity for Work) Act (*Wet werk en inkomen naar arbeidsvermogen*), Act of 10 November 2005, *Stb* 2005, 572 (Wet WIA).

include self-employed persons under the scope of the Act. The Health & Safety Act entails comparable definitions.

The Netherlands' Works Council Act does not include a definition of employee, but refers to the term 'persons working in the enterprise' (Article 1, paragraph 2).<sup>33</sup>

## **B. Employer: Basic Definition**

There is no separate definition of 'employer' in the Netherlands' Civil Code. However, as in the case of 'employee', this definition can be deduced from the already-discussed definition of 'contract of employment'. An employer is therefore a person in whose service the employee undertakes to perform work in exchange for remuneration during a given period.

Notably, under the Netherlands' social security law, some provisions provide an elementary definition of the term 'employer'. For example, according to Article 9 of the Netherlands' Unemployment Insurance Act and Article 9 of the Netherlands' Sickness Benefits Act, an employer is the public employer or the natural person or body for whom one or more natural persons work in employment.

In the Working Hours Act and the Health & Safety Act, a definition of 'employer' is provided and related to the definition of 'employee' in these Acts.

Labour law does not define 'groups of employers'. In specific cases, the courts must determine which employer in a group is the contracting party to the employment contract.

The law on works councils envisages specific bodies being established in groups of employers to represent employees: the groups and central works councils.

## **III. SUB-TYPES OF EMPLOYEES AND WORKERS**

### **A. The Establishment of Sub-types of Employees**

The definition of 'employment' is meant to be useful for every type of employer and employee: it builds on a 'one-size-fits-all' principle. Nevertheless, in recent years, there has also been a tendency to differentiate and create deviating rules for specific groups of employers and employees.

The specific sub-groups of employees in the Netherlands' labour legislation constitute board members, persons working in private households, civil

<sup>33</sup> *Wet op de Ondernemingsraden*, Act of 28 January 1971, *Stb* 1971, 54 (WOR).

servants, employees of churches and private schools with a specific denomination, commercial representatives, temporary agency workers and seafarers.

Board members (*Bestuurders*), whose employment relationship falls within the scope of Article 7:610 of the Netherlands' Civil Code, are employed on the basis of a contract of employment. However, the Code explicitly stipulates that the contract with the member of the board of a corporation whose shares are available on the stock exchange cannot be a contract of employment (Article 2:132, paragraph 3 of the Netherlands' Civil Code).

The purpose of this exception, which was introduced by an amendment of the Members of Parliament to the Act on Governance of Legal Persons,<sup>34</sup> is to preclude enormous severance payments for board members who have been discharged. In practice, this objective will not materialise because the current law does not stipulate any limits to such payments.

The protection regular employees enjoy, especially with regard to protection in the case of dismissal, does not apply to members of the board according to the Netherlands' Civil Code. The court cannot order the employer to restore the employment of members of the board.<sup>35</sup> This is explained by the fact that shareholders should be able to determine the course of the company in the case of divergent views between shareholders and members of the board.

Persons working in private households (*huishoudelijk personeel*) for less than four days per week are, as a general rule, employed on the basis of a contract of employment. They are exempt from dismissal protection and social security rights in certain provisions. Dismissal is permitted without a preventive check to determine its reasonableness and they are not insured through social insurance. The purpose of these exceptions is to reduce the administrative burden on private households and to promote domestic services.

Civil servants (*ambtenaren*) have a special statute under public law regulated in the Civil Servants Act.<sup>36</sup> They are appointed by unilateral decision of the government and therefore have no contract of employment under the Netherlands' Civil Code.

However, Parliament has accepted a proposal to change this status quo.<sup>37</sup> According to the new Act, civil servants shall be employed on the basis of contracts of employment under civil law. Additionally, specific provisions in the Civil Servants Act will apply. Only those civil servants working in

<sup>34</sup> *Wet inzake toezicht en bestuur van NV's en BV's*, *Stb* 2011, 2758.

<sup>35</sup> Netherlands' Civil Code, arts 2:134 and 2:244.

<sup>36</sup> *Ambtenarenwet*.

<sup>37</sup> Act on Normalisation of the Legal Position of Civil Servants of 9 March 2017, *Stb* 2017, 123.

the military, police and members of the judiciary will keep a completely separate statute under public law. The Home Minister has announced in a letter to Parliament of 20 January 2017 that the entering into force of the new Act will require adjustment of a large amount of legislation. The planning is that this will be completed—and thus the new Act will be introduced—by 1 January 2020.

Furthermore, certain lower public authorities, such as local communities and provinces, also occasionally work with contracts of employment. Article 7:615 of the Netherlands' Civil Code makes a general exception of the applicability of Title 7.10 of the Netherlands' Civil Code to contracts of employment with public authorities. This implies that public authorities that conclude contracts of employment must determine their own rules for this category of employees. However, they can choose to apply Title 7.10 or parts thereof.

Employees of churches are generally supposed to work under a contract of employment. This issue raises some controversies, particularly when internal church regulations that apply to employment relationships conflict with secular law. Thus, certain exceptions are envisaged in relation to dismissal and the equal treatment law to allow the churches to exercise religious freedom, which is guaranteed in the Constitution and in international law.

Employees of denominational private schools (*bijzonder onderwijs*) (such as Catholic, Protestant, Jewish and Islamic, but also Dalton, Montessori, Jenaplan and others) fall under the general rules of contracts of employment. However, certain exceptions in the law on dismissals and in the equal treatment law apply to these employers in order to allow them to exercise the constitutionally guaranteed freedom of education.

Section 10 of Title 10 of Book 7 of the Netherlands' Civil Code contains specific provisions for employees who are commercial representatives (*handelsvertegenwoordiger*). Article 7:687 of the Netherlands' Civil Code reads as follows:

A contract for commercial representation is a contract of employment under which one party—the commercial representative—is contracted by another party—the principal—in exchange for remuneration consisting wholly or partly of commissions, to act as an intermediary in the conclusion of contracts and to possibly conclude them in the name of the principal.

This means that there is an employment relationship between the commercial representative and the principal, but some provisions that usually concern agents are applied to this type of contract in addition to the rules for contracts of employments. This concerns, for instance, some rules with regard to the calculation and payment of commission.

Section 11 of Title 10 of Book 7 of the Netherlands' Civil Code contains specific provisions on temporary agency workers (*uitzendkrachten*). Their contract with the temporary work agency (*uitzendbureau*) is called

a temporary agency contract (*uitzendovereenkomst*). Article 7:690 of the Netherlands' Civil code defines it as:

[A] contract of employment within the scope of a professional or business establishment of the employer whereby the employee is placed by the employer at the disposal of a third party to perform work under the supervision and direction of the latter by virtue of a contract for services concluded by the latter with the employer.

So-called 'payroll companies' (*payrollbedrijven*) are a recent phenomenon in the Netherlands and, like temporary work agencies, exercise the role of employer, although the employee does not directly work for the payroll company, but for a hiring company. The difference between such companies and temporary work agencies is that the payroll employer does not play an intermediary role on the labour market. The payroll company does not search for employees, but only acts as their formal employer. The legal status of such companies raises some problems. The Supreme Court decided that payroll contracts can be considered temporary agency contracts since they are covered by the definition of Article 7:690 of the Netherlands' Civil Code as quoted above. It argued that in the event of the use of this type of contract contrary to the purpose of this Article, the courts can remedy this.<sup>38</sup>

In recent legislation on dismissals, the position of payroll employees (*payrollwerknemers*) was protected. In Article 1, paragraph f of the Dismissal Regulation,<sup>39</sup> a payroll employer (*payrollwerkgever*) is defined as:

[A]n employer who on the basis of a contract with a third party, which is not established within the framework of providing services for matching demand with supply in the labour market, places an employee at the disposal of and under the supervision and guidance of that third party to perform work, whereby the employer who only places the employee with the consent of the third party is entitled to place the employee at the disposal of another party.

The payroll employee is defined under paragraph g in the same Article as 'the employee intended under f'.

Section 12 of Title 10 of Book 7 of the Netherlands' Civil Code covers the employment contracts of seafarers (*zee-arbeidsovereenkomst*). The employment contract of seafarers is defined in Article 7:694, paragraph 1 as:

[T]he contract of employment, including temporary agency contracts, whereby the seafarer undertakes to perform work on a sea vessel.

The provisions in this section explicitly distinguish contracts of employment for work on sea vessels partly because such work is performed in different countries. The provisions are mainly based on the Maritime Labour

<sup>38</sup> HR 4 November 2016, *JAR* 2016/286 (*C4C/StiPP*).

<sup>39</sup> Regulation of the Minister of Social Affairs and Employment of 23 April 2015 to enact regulations on dismissals and the transition payment (Dismissal Regulation—*Ontslagregeling*), *Official Gazette (Staatscourant)* 11 May 2015, No 12685.

Convention 2006 of the International Labour Organization (ILO) and partly on customary practices in the sector. As a general rule, the contract of seafarers has to be agreed in writing.<sup>40</sup> Violations of this provision do not invalidate the contract, but it may be voidable.

In section 12A of Title 10 of Book 7 of the Netherlands' Civil code, specific rules are established for contracts of employment for sea fishing. This section stipulates specific rules for this group of employees, such as their rights in the event that they are entitled to part of the catch. It is expected that the implementation of ILO Convention 188 on Labour in the Fishing Industry will lead to further legislation on other groups of fishermen.

## **B. The Establishment of a Specific Category of 'Workers'**

The category of 'workers' does not exist in the Netherlands.

### IV. SUBORDINATION: CRITERIA AND INDICATORS/ ECONOMIC DEPENDENCE

#### **A. Criteria: Work Instructions, Work Control and Integration**

The third component of the definition of contract of employment, namely authority, often gives room for discussion. As mentioned above, according to the case law in the Netherlands, the principle of authority does not necessarily imply that work instructions should be given on a regular basis. It suffices for the employer to be entitled to give work instructions.

The level of education of employees has been rising, and the nature of work has generally changed to the extent that it relies more often on knowledge, new technologies and communication than on actual material production. More qualified/independently working employees are therefore being sought. As a result, it has become more common for the employer to not give instructions related to the content of the work (the employer may not be able to or may not even be allowed to do so). This, for instance, is the case in hospitals, where the board has no medical knowledge, or at a newspaper, where journalists' freedom of the press is guaranteed by an editorial statute. In any case, however, the employer is still allowed to give instructions on disciplinary aspects and on working conditions (working hours, administrative requirements, holidays, disciplinary measures and dismissal), which suffices to constitute the required authority.

<sup>40</sup> Netherlands' Civil Code, art 7:697, para 1.

Aside from the competence to give work instructions, the concept of authority also includes the exercise of control over the work and the competence to integrate the employees' various activities into the company.

## B. Indicators

As simply giving orders is no longer decisive, it can be difficult to distinguish a contract of employment from a contract of services. To this end, the case law in the Netherlands has made use of several criteria to identify employment relationships. Accordingly, the courts assess the employer's authority the position of the employee within the organisation and who bears the risk of the work. These are all relevant criteria necessary to determine whether the given individual is employed by another person. These criteria are weighed by the courts. The individual criteria are not decisive in themselves. Notably, the decision whether the criterion 'authority' is met is made on the basis of a 'holistic approach'<sup>41</sup> in which all relevant circumstances are weighed in connection with each other.

Indications for self-employment are as follows:<sup>42</sup>

- (i) The worker has several customers, not just one contract partner who provides work.<sup>43</sup>

The worker meets the formal requirements related to the contract of services. For example, a self-employed person must present invoices which are subject to VAT and should be registered with the (regional) Chamber of Commerce.<sup>44</sup>
- (ii) Freedom of the worker to determine his or her work plan.
- (iii) Remuneration is related to concrete services. Accordingly, if invoices are issued for specific services, a contract of services is indicated. Conversely, if the same amount is paid to the worker every month, it points to a contract of employment.
- (iv) Remuneration directly paid by the clients to the worker.
- (v) The worker bears entrepreneurial risks. In the event that the worker is only paid once the work is completed and in the event that the payment is related to the profits made by him or her, self-employment is implied.

<sup>41</sup> The term used by Advocate General Huydecoper in his conclusion before HR 14 April 2006, NJ 2007/447, JAR 2006/119, RAR 2006/74 (*Beurspromovendi v Universiteit van Amsterdam*).

<sup>42</sup> The list of indications is mainly based on the commentary on art 7:610 BW by GJJ Heerma van Voss and FG Laagland, 'Commentaar op artikel 610 Boek 7 BW' in LG Verburg et al (eds), *Arbeidsovereenkomst* (Deventer, Kluwer (online)) para 1.2.

<sup>43</sup> CRvB 17 July 2003, USZ 2003/277 accepted self-employment, though there was eventually only one customer in the case of start-ups.

<sup>44</sup> In HR 13 July 2007, NJ 2007/449, JAR 2007/231, RAR 2007/123 (*Thuiszorg Rotterdam v Stichting Pensioenfonds PGGM*), the non-existence of bills and VAT payments contributed to the conclusion that the person was an employee.



- (vi) The worker supplies the raw and ancillary materials as well as the tools himself or herself.
- (vii) Payment is not continued during holidays, sickness or days off.
- (viii) No other work is performed aside from the agreed work.
- (ix) Incidental character of the work.

It is not essential for the work to be carried out on the premises of the employer. Home working cannot only be carried out within the scope of self-employment, but also under the authority of an employer, depending on the circumstances.<sup>45</sup>

### C. The Relevance of ‘Economic Dependence’

Economic dependence may be a factor in decision whether a contract of employment exists or whether the person is working in a self-employed capacity. This is illustrated in the *Groen v Schoevers* case.

In this case, Groen had his own practice as a tax consultant. In addition, he gave lectures for a couple of hours per week at the Schoevers’ school for secretaries. Groen stated that he did not want to have an employment relationship with the school and that he wanted to be paid per hour. However, when Schoevers terminated the contract with Groen, he claimed that the contract between both should be qualified as a contract of employment. The Supreme Court of the Netherlands addressed in this case the question whether the parties had intended to enter into a contract of employment and how they executed this contract in practice. In answering this question, the position of the parties in society was taken into consideration. That led to the conclusion that a contract of service was entered into in this case.<sup>46</sup>

In fact, the Supreme Court, by referring to ‘the position of the parties in society’ (*de maatschappelijke positie van partijen*), probably means the economic position and the level of education of the parties. This implies that the courts can decide on a case-by-case basis whether the employee is the weaker party who needs protection against the employer or not. This can be understood against the background that Groen, being a tax expert, had initially preferred to work as a self-employed person, but later changed his attitude towards concluding an employment contract once this type of relationship became more attractive to him. Apparently, the Supreme Court did not reward these calculating tactics.

<sup>45</sup> HR 17 November 1978, NJ 1979/140 (*IVA v Queijssen*).

<sup>46</sup> HR 14 November 1997, NJ 1998/149, JAR 1997/263 (*Groen v Schoevers*).

## V. THE PRINCIPLE OF PRIMACY OF FACTS

In the Netherlands, the principle of the 'primacy of facts' is recognised in the legal doctrine, but is not always a conclusive factor. The legal nature of the contract will be defined by both the intention and practices of the parties.

The principle is named differently in the Netherlands. At times, the phrase 'the veil is being pierced' (*doorprikken van de constructie*) is used, while at other times the phrase 'essence goes before appearance' (*wezen gaat voor schijn*) is used.<sup>47</sup> The *Agfa v Schoolderman* case demonstrates the principle in practice. In this case, the Supreme Court explicitly recognised the long-standing tradition in labour law of recognising practice as an important criterion which shall be taken into account when determining the legal nature of a contract.

Hendrika Schoolderman worked for years for the Agfa company on the basis of various types of contracts, including fixed-term, zero-hours and employment agency work. After 10 years, she asked to be remunerated on an equal footing with her colleagues who were performing the same job, but were employed on a permanent basis. The Netherlands' Supreme Court considered that the practice of Agfa of using temporary employees was in itself not unlawful, although the payment was not equivalent to the payment permanent employees received. However, in the view of the Court, the original character of the relationship had changed. This means that an employment relationship had practically been established between Schoolderman and Agfa as regards the relevant aspects, and could not be distinguished from an employment relationship of comparable permanent employees of Agfa. The Supreme Court considered that the initially agreed labour conditions were not decisive, but what was also of significance was the way in which the parties implemented the contract of employment in practice and thus gave it another content. According to the requirement to act as a good employer, Agfa was obliged to apply the labour conditions in terms of the pay of the permanent staff to Schoolderman. The judge was obliged to apply<sup>48</sup> the generally accepted principle of law that the same work under the same circumstances should be paid the same, unless there is an objective justification for a difference in pay.<sup>49</sup>

In the already-discussed *Groen v Schoevers* case, the parties had a certain degree of freedom to choose a contract for services, but Groen was in a much better economic position and able to make a truly free choice. It seems

<sup>47</sup> GJJ Heerma van Voss, 'De ontsluiting van het sociaal recht' in CJ Loonstra and AR Houweling (eds), *Het sociaal recht uitgedaagd, Een bundel arbeidsrechtelijke oraties 1997–2013* (The Hague, Boom juridische uitgevers, 2014) 34–54.

<sup>48</sup> Article 3:12 of the Netherlands' Civil Code states: 'In determining what reasonableness and fairness require, generally accepted principles of law, current juridical views in the Netherlands and the societal and private interests involved in the case must be taken into account.'

<sup>49</sup> HR 8 April 1994, NJ 1994/704, JAR 1994/94 (*Agfa v Schoolderman*).

that in the *Agfa v Schoolderman* case, the primacy of facts was decisive because of the employee's position of economic dependence.

Another situation in which a court may allow the primacy of facts is when the parties' intention was to circumvent social security obligations. This issue was addressed in *Thuiszorg Rotterdam v Stichting Pensioenfonds PGGM*. In this case, the Pension Fund PGGM requested the employer Thuiszorg to pay pension contributions for its director. Thuiszorg, however, claimed that the director was working on the basis of a management contract. The Netherlands' Supreme Court ruled that in order to determine whether a contract of employment existed between the two parties, it was not only of relevance what the parties had in mind when they concluded the contract, but also the implementation of the employment contract. In the given case, the director had to perform the work personally and his remuneration by Thuiszorg could be considered payment in return for the work performed. The Supreme Court consequently concluded that the director was employed on the basis of an employment contract within the meaning of Article 7:610 of the Netherlands' Civil Code.<sup>50</sup>

## VI. QUALIFICATION IN FULL

In the Netherlands, labour law does not recognise the concept of 'qualification in full'. However, the opinion that a contract of employment is not 'divisible' is widespread. Accordingly, it is not possible, for instance, for the employer to dismiss an employee partly, ie, for a specific number of hours, or to unilaterally reduce an employee's wage. Several court cases have been decided in this respect over the past few decades, though the possibility of a partial dismissal has been defended in the literature.<sup>51</sup>

The principle that a partial dismissal is not possible is laid down in Article 4 of the Dismissal Regulation of 2015,<sup>52</sup> which reads as follows:

No reasonable grounds exist for giving notice of termination of the contract of employment for economic reasons in case the number of employees selected for dismissal is higher than the number of posts to be terminated, unless this is unavoidable and the employer has offered the employees whose working place is partly terminated, in writing, to continue the contract of employment under the same conditions for the remaining part of the agreed working hours.

<sup>50</sup> HR 13 July 2007, NJ 2007/449, JAR 2007/231, RAR 2007/123 (*Thuiszorg Rotterdam v Stichting Pensioenfonds PGGM*).

<sup>51</sup> CJ Loonstra, 'Partiële opzegging en partiële ontbinding van de arbeidsovereenkomst' (1995) *NJB* 204 ff; RLJ van der Meer, 'Partiële ontbinding arbeidsovereenkomst' (1995) *ArbeidsRecht* 6; G van Amstel, 'Partiële ontbinding van de arbeidsovereenkomst' (1995) *ArbeidsRecht* 54.

<sup>52</sup> *Ontslagregeling*, Regulation of the Minister of Social Affairs and Employment of 23 April 2015, *Stcrt* 2015, 12685.

This Article in principle prohibits partial terminations of the employment contract, but on the other hand, it provides for an exception to the principle when a partial dismissal is unavoidable.

In the Netherlands, there have been discussions on the contractual status of work that is performed within the context of the family. Between 1907 and 1997, the Civil Code explicitly declared an employment contract between spouses null and void. At the time, it was principally considered contradictory to spouses' legal equality. However, this Article was abolished in 1997 because there was a need for this type of employment contracts and there were plenty of ways to circumvent the prohibition. It was recognised that spouses can be equal in their marital relationship but still exercise authority over each other in an employment relationship.

Also, children could work for their parents on the basis of an employment contract. However, in some cases, the family character of such a relationship prevails. This was the conclusion in a case referring to the custom in agriculture that children work on their parents' farm without concluding a contract.<sup>53</sup>

The Civil Code does not preclude the parties to an employment contract to also conclude another type of contract. This is established in the principle of freedom of contract.

Employment contracts are occasionally combined with other contracts regulated in the Civil Code, such as contracts for renting a house of the company.<sup>54</sup> In the event that the housing is an essential element of the employment contract (eg, in the case of a gatehouse occupied by the porter of an estate), no rental contract is assumed, but only an employment contract which includes the obligation to live in the given house. This implies that once the job terminates, the house must be abandoned as well.<sup>55</sup>

The legal doctrine has frequently addressed the issue of what happens when two types of contracts are combined and the legal rules that deal with these two types of contracts conflict with one another. This is explicitly addressed in Article 7:610, paragraph 2 of the Netherlands' Civil Code, which reads as follows:

If a contract fulfils both the definition of paragraph 1 and that of another special type of contract regulated by law, the provisions of this Title and the provisions governing the other type of contract apply in conjunction. In the event of a conflict, the provisions of this Title apply.

This paragraph first applies the rule of 'cumulation': the rules on both contracts are equally applicable. In the case of conflict between the two rules,

<sup>53</sup> HR 27 February 1952, *NJ* 1953/362.

<sup>54</sup> Heerma van Voss (n 15) no 46.

<sup>55</sup> HR 17 March 1961, *NJ* 1961/237; HR 19 December 1975, *NJ* 1976/240; HR 16 April 1982, *NJ* 1982/88; HR 19 March 1976, *AA* 1976, 399.

the paragraph gives ‘priority’ to employment law. However, the question is whether this actually is often the case. If a company house is rented by the employee, his or her dismissal does not preclude him or her from continuing to rent the house. The protection of renters envisaged in rent law can also be applied. While continuing to live in the company’s house despite ending his or her job, the employee’s protection as a renter can be applied without conflicting with employment law. In this respect, it makes no difference whether the employee was dismissed or resigned.<sup>56</sup> He or she is only protected if he or she acts in good faith.<sup>57</sup>

Frequently used combinations of contracts are apprenticeship contracts annexed to employment contracts. In that case, it is a combination of part-time training on the job and part-time work as an employee. The relationship between an apprentice and the respective company is not regulated by law. Often, the trainee’s school ensures that solid contracts between all parties are concluded. In case the situation is unclear, the court may have to determine whether a (partial) employment relationship or only an internship exists. The Netherlands’ Supreme Court is reluctant to accept the existence of an employment contract if it is not explicitly agreed in advance.<sup>58</sup>

## VII. LIMITS TO THE FREEDOM OF CONTRACT

The principle that the parties cannot alter the legal nature of their contract/legal relationship is controversial in the Netherlands. As already mentioned, according to the case law of the Netherlands’ Supreme Court, the question whether a contract of employment has been concluded must be decided on the basis of the parties’ intention, but also on the way it is implemented in practice.<sup>59</sup> Whether the parties can alter the legal nature of their relationship is decided on a case-by-case basis and it is difficult to formulate general rules on this.

The problem was illustrated in the *Van Houdts v BBO* case. The bus driver, Van Houdts, worked until 1995 for the bus company BBO. In that year, he and three other bus drivers concluded an agreement for the establishment of a commercial partnership that was officially registered, and BBO became their most important client. The commercial partnership ended in 1997 since not all the required licences were obtained. Starting from that year, BBO employed the four bus drivers again. Van Houdts, having argued that he had factually continued his employment contract between 1995 and

<sup>56</sup> HR 8 January 1965, NJ 1966/138 (*Neleman/Ten Hagen*); HR 3 December 1965, NJ 1996/195.

<sup>57</sup> HR 8 March 1968, NJ 1968/142.

<sup>58</sup> HR 28 June 1996, JAR 1996/153 (*Verhoeff/Van Zuijlen*).

<sup>59</sup> HR 8 April 1994, NJ 1994/704, JAR 1994/94 (*Agfa v Schoolderman*) and HR 14 November 1997, NJ 1998/149, JAR 1997/263 (*Groen v Schoevers*).

1997, claimed payment of his due remuneration. Interestingly, the Supreme Court of the Netherlands upheld his claim on the basis of the primacy of facts, even though the diverging legal situation had been formally established and clearly documented.<sup>60</sup>

The rule that parties are free to enter into a Contract of Employment has not been adopted in the Netherlands. The primacy of facts is also applied the other way round. A good example of this is the *Van der Male v Den Hoedt* case, where a disguised contract of employment was not recognised. The parties constituted a married couple who eventually divorced. Probably for fiscal reasons, they decided that the marital settlement agreement would assume the form of an employment contract. Accordingly, the former wife became the employee and the former husband's limited company became the employer. The former wife was paid a 'wage', but did not perform any work in exchange. When the former wife found a new partner and moved in with him, her former husband stopped paying her 'wages'. According to the Netherlands' family law, moving in with a new partner is a ground to cease paying alimony *ex lege*. The former wife nonetheless requested the continuation of 'wage' payments because the contract of employment had not formally been terminated. She also claimed statutory compensation for delayed payments of her wage. The Netherlands' Supreme Court decided that the essential elements of a contract of employment, namely of 'work' and 'in service of', were not fulfilled, since it was apparent that the former wife ('employee') was not obliged to perform work from the conclusion of the contract. Therefore, it was ruled that no contract of employment existed, but rather a contract *sui generis*. Nevertheless, the former husband was ordered to continue paying her wages, because he had never issued a proper notice of termination of the contract. The statutory compensation associated with contracts of employment was, however, denied.<sup>61</sup>

The question whether an employee states can be wired, is a rather controversial issue in the Netherlands.<sup>62</sup> The definition of the employment contract is considered a provision of public order and can therefore not be set aside by a contract.<sup>63</sup> As already mentioned, the case law qualifies a contract as a contract of employment on the basis of the parties' intention at the commencement of the contract as well as how it is implemented thereafter. In certain cases, such as in *Groen v Schoevers* discussed above, the Supreme Court accepted that a person may deliberately choose a contract of services over a contract of employment. One could argue that this can only be an option when

<sup>60</sup> HR 15 December 2006, NJ 2007/448, JAR 2007/19, RAR 2007/26 (*Van Houdts v BBO*).

<sup>61</sup> HR 10 October 2003, NJ 2007/446, JAR 2003/263 (*Van der Male v Den Hoedt*).

<sup>62</sup> For a review of this discussion, see Houweling (ed), Loonstra and Zondag (n 15) 147–50.

<sup>63</sup> See a note of the Netherlands' Ministers of Social Affairs and Justice of 23 June 1997 on 'Developments in Employment Contract Law': *Ontwikkelingen in het arbeidsovereenkomstenrecht*, Kamerstukken II 1996–77, 25 426, No 1, 23.

the situation is unclear and both definitions could be applicable. The parties should then make a choice. However, one could also argue that by accepting this reasoning, the Supreme Court leaves the choice between a contract of employment and a contract for services to the parties. The legal doctrine on this issue in the Netherlands is ambiguous. It seems that the Supreme Court only leaves this option open in the event that the employee's societal position indicates that it may be assumed that he or she has freely taken the decision.

## VIII. COLLECTIVE BARGAINING, ESTABLISHED CUSTOM AND PRACTICE

### A. Social Partners

Collective agreements cannot set aside the statutory definition of the contract of employment. Although the legislation does not explicitly stipulate that this definition is mandatory, it is assumed to be a provision of public order.<sup>64</sup>

Yet it is possible to distinguish certain groups of employees in a collective agreement, for instance, weekend workers in the catering branch,<sup>65</sup> whose entitlements differ from those of regular employees. This in principle concerns rights granted within the collective agreement itself. In some cases, statutory law allows collective agreements to deviate from mandatory law for certain factors. This, for instance, is the case with respect to the number of fixed-term agreements permitted.<sup>66</sup>

In addition, collective agreements in some companies envisage dispute resolution mechanisms, like arbitration procedures with regard to the interpretation of the contract. In such cases, an arbitration board can play a role in interpreting the definition of the contract of employment.

### B. Custom and Practice

Custom and practice play no specific role in the Netherlands with regard to the contract of employment. The most important reason seems to be that the contract of employment is already extensively regulated by legislation and the established case law.

<sup>64</sup> *ibid.*

<sup>65</sup> HR 28 June 2002, NJ 2003/111, JAR 2002/168 (*Buijsman/Akersloot*).

<sup>66</sup> Netherlands' Civil Code, art 7:668a. In the Netherlands, this method is indicated with the notion 'three-quarter mandatory law' (*driekwart dwingend recht*).

IX. LEGAL PRESUMPTIONS AND THE SHIFTING  
OF THE BURDEN OF PROOF

**A. Presumptions**

In the Netherlands, legal presumptions on the status of the employment relationship have existed since 1999. Since then, two provisions have been introduced, namely Articles 7:610a and 7:610b of the Netherlands' Civil Code, which aim to ensure that both parties share transparent and fair information with each other at the beginning of their contractual relationship.

Article 7:610a of the Netherlands' Civil Code provides that:

A person who, for the benefit of another person, performs work for remuneration for three consecutive months, weekly or for not less than twenty hours per month, is presumed to perform such work pursuant to a contract of employment.

This Article is applicable either when the type of contract is not explicitly agreed upon or when the type of contract agreed upon is not in conformity with practice. Accordingly, if a person has worked for more than three months—with a minimum number of weeks or hours—in exchange for remuneration, he or she can claim that this work has been carried out on the basis of a contract of employment.

However, this legal presumption can be rebutted, provided that the person who provides the 'employee' with work can, first and foremost, prove that it was not the parties' intention to conclude a contract of employment. In addition, the 'employer' must prove that the parties have not actually implemented the contract in such a way that would imply that it is a contract of employment. In any case, the 'employee', can rebut those arguments.

The reason why the legislator introduced this provision is that the legal status of the relationship in many so-called 'flexible employment relationships' (eg, on-call contracts) is rather vague. Thus, the provision provides the worker with some degree of protection in the event that the employer tries to avoid concluding a contract of employment, although practice indicates the existence of a contract of employment. For instance, when a painter is hired to paint the walls of a factory, it is usually assumed that the work is being carried out under a contract of services. But if the painter continues to work for the same principal for a longer period of time, it is up to the latter to provide evidence that no contract of employment exists.

Article 7:610b of the Netherlands' Civil Code provides:

Where a contract of employment has lasted for at least three months, the contracted work in any month is presumed to amount to the average working period per month over the three preceding months.

The purpose of this second legal presumption is to ensure that the employer—in the event that the existence of a contract of employment is



assumed—cannot claim that a lower number of working hours was agreed than actually worked. Consequently, after three months of working a higher number of working hours, the employee can claim that this is the agreed number of working hours. The employer can also rebut this presumption. For instance, he or she could argue that there was a temporary increase in work. Still, the employer must provide evidence for this.

## **B. The Burden of Proof**

The principal rule on the division of the burden of proof under the Netherlands' Civil Code is as follows:

The party relying on legal consequences of its alleged facts or rights carries the burden of proof of those facts or rights, unless a different burden of proof arises from a special rule or from the requirements of reasonableness and fairness.<sup>67</sup>

From this rule, it follows that it is basically up to the alleged employee to prove the existence of an employment contract in the event that this is denied by the pretended employer. In the case of a written and signed contract of employment, the issue can quickly be resolved. In the absence of such a written contract, other means of evidence could include pay slips, bank statements of paid wages, statements by colleagues etc. The problem mostly arises in cases of flexible, irregular work. To this end, the law foresees legal presumption, as discussed above in section IX.A.

## **X. SPECIFIC PROCEDURES**

The most important government bodies that may have to determine whether an employment contract exists are the Tax Office, the social security authorities and the Immigration Office. Although the legal basis for such a decision is of an administrative nature, the civil law position will also be taken into consideration. The decisions on these matters may be subject to the judgment of the administrative courts. The approach of these courts does not differ significantly from that of the civil courts. However, with a view to the prevention of abuse of social welfare provisions, they may slightly differ for that reason. For instance, they may take a more active approach to checking whether the parties' activities are in line with the information they have provided.

One of the objectives of fiscal and social security provisions is to determine who falls within the scope of specific provisions related to the status of employee. To avoid uncertainty in this respect, in May 2016 a special

<sup>67</sup> Netherlands' Code of Civil Procedure, art 150; *Wetboek van Burgerlijke Rechtsvordering*.

provision was introduced in tax law for persons who, for fiscal purposes, seek to be recognised as self-employed persons. This was introduced by the Act on Deregulation Judging Labour Relationships.<sup>68</sup>

The provision contains the principle that the Tax Administration Service will consider a labour relationship as a contract for services when it is based on a model contract for services, designed by the social partners in the specific branch. However, during 2016, the Act caused great confusion for self-employed persons, who feared that they could be taxed as employees. On the basis of an evaluation report prepared by a committee under the presidency of the Leiden Labour Law Professor Gerrard Boot, the government decided in November 2016 to postpone the implementation of the Act until at least 2018 and during this period not to enforce this Act with repressive means.<sup>69</sup>

## XI. THE EXTENSION OF RIGHTS

### A. 'Employee-Like' Persons

The instrument to extend the definition of employee to 'employee-like' persons is used in the Netherlands' labour law to a certain extent. In this context, two forms of 'employee-like' persons can be distinguished.

First, the application of labour law is in some cases extended by specific provisions to contracts other than contracts of employment.

For instance, Article 7:655, paragraph 5 of the Netherlands' Civil Code on the duty of the employer to provide information to the employee (implementing EU Directive 91/533, which covers employment contracts as well as employment relationships) extends the application of the provision to other specific relationships:

Paragraphs 1 to 5 apply, *mutatis mutandis*, to contracts that regulate the conditions of one of several contracts of employment the parties will enter into if work is performed on demand as well as to contracts entered into other than a contract of employment, whether or not followed by similar contracts under which one party, being a natural person, undertakes to perform work for the other party for remuneration, unless this contract is entered into in the name of a profession or business.

The second concept of 'employee-like' persons is used under the social insurance and tax legislation. Accordingly, certain types of work fall within

<sup>68</sup> Act of 3 February 2016, *Stb* 2016, 45 (Wet DBA).

<sup>69</sup> Letter to Parliament of the Deputy Minister of Finance, Mr Wiebes, of 18 November 2016, 'Tweede Voortgangsrapportage Wet DBA'. Annexed is the Evaluation Report on the Act of the evaluation committee presided by the Labour Law Professor Gerrard Boot (Leiden University): Eindrapport Commissie (model)overeenkomsten, Amsterdam, November 2016.

the scope of this legislation, even if they might not fall under a contract of employment per se. They are referred to as ‘fictitious employment’ (*fictieve dienstbetrekking*).

The Netherlands’ Acts on Unemployment,<sup>70</sup> Sickness<sup>71</sup> and Disability Benefits<sup>72</sup> state that a government decree can provide that small building contractors, certain intermediaries, home workers, musicians, artists, athletes and others who personally work for remuneration are deemed to work in employment (Article 5) under certain conditions. The related ‘Decree to assign cases in which employment is considered a labour relationship’<sup>73</sup> provides more details. Categories of workers that fall within the scope of this Decree are covered by social insurance legislation for employees. On this basis, authorities can more easily claim social security contributions from employers in the case of doubt over the existence of a contract of employment with the worker. For the workers involved, it forms the basis of a claim if they become unemployed, sick or disabled. For instance, in the case of artists, including them prevents discussions with theatres, at which they may only perform occasionally, about the need to provide them with social security protection.

The same principle is applied in Articles 3 and 4 of the Wage Tax Act of 1964.<sup>74</sup> The extension partly covers the same groups as those covered in social insurance legislation. This is partly because the Tax Office collects both income tax and social security contributions from employees. Furthermore, it is an effective way to collect taxes from every worker, and furthermore serves to prevent employers from defining contracts as contracts for services instead of contracts of employment to circumvent the duty to withhold taxes from employee wages.

Article 3 of the Minimum Wage and Holiday Allowance Act also offers the possibility of extension by the Decree to ‘employee-like’ persons. This extension applies to those who work for remuneration on the basis of a contract for at most two others, unless this contract is carried out within the scope of a profession or business. The work must be performed personally or exclusively with the help of the spouse or of family members who live in the same residence as the contracting party. In addition, the employment relationship should last at least three months and the work should last at least five hours per week.<sup>75</sup> The extension primarily targeted home workers

<sup>70</sup> Unemployment Act (*Werkloosheidswet*), Act of 6 November 1986, *Stb* 1986, 566 (WW).

<sup>71</sup> Sickness Act (*Ziektewet*), Act of 5 June 1913, *Stb* 1913, 204; 1999, 22 (ZW).

<sup>72</sup> Work and Income (Capacity for Work) Act (*Wet werk en inkomen naar arbeidsvermogen*), Act of 10 November 2005, *Stb* 2005, 572 (WIA).

<sup>73</sup> *Besluit aanwijzing gevallen waarin arbeidsverhouding als dienstbetrekking wordt beschouwd*, Decree of 24 December 1986, *Stb* 1986, 665 (usually called ‘Rariteitenbesluit’ in the Netherlands).

<sup>74</sup> *Wet op de Loonbelasting* 1964.

<sup>75</sup> Decree of 2 September 1996, *Stb* 1996, 481.

and other flexible employment relationships, but since they often already fall under an employment contract in accordance with the Civil Code, the Decree does not seem to have been very influential.

## B. Equality and Anti-discrimination Law

The Act on Equal Treatment of Men and Women<sup>76</sup> states that the rules for equal treatment of men and women in employment is explicitly applicable to persons who work under the authority of a natural person, a legal person or competent authority (Article 1c), besides employees to whom civil law applies and civil servants. The reason for this is that the basic rules on non-discrimination of men and women in employment are regulated in the Netherlands' Civil Code under the title contract of employment.

Other legislation on equal treatment (ie, the General Act on Equal Treatment,<sup>77</sup> the Act on Equal Treatment on the Grounds of Disability or Chronic Disease<sup>78</sup> and the Act on Equal Treatment on the Ground of Age)<sup>79</sup> does not provide for such an extension of the scope of coverage, because these Acts already take a far-reaching approach. They encompass all types of work and are not restricted to contracts of employment.

<sup>76</sup> *Wet gelijke behandeling van mannen en vrouwen*, Act of 1 March 1980, *Stb* 1980, 86; repaired by Act of 27 April 1989, *Stb* 1989 168 (*Reparatiewet gelijke behandeling van mannen en vrouwen*). This Act transposed Council Directive (EEC) 76/207 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, [1976] OJ L 039, and was actually replaced by Directive (EC) 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204.

<sup>77</sup> *Algemene Wet Gelijke Behandeling*, Act of 2 March 1994, *Stb* 1994, 230. This Act served to transpose Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 30 and Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180.

<sup>78</sup> *Wet gelijke behandeling op grond van handicap of chronische ziekte*, Act of 3 April 2003, *Stb* 2003, 206. This Act partly implemented Directive (EC) 2000/78.

<sup>79</sup> *Wet gelijke behandeling op grond van leeftijd bij de arbeid*, Act of 17 December 2003, *Stb* 2004, 30. This Act partly implemented Directive (EC) 2000/78.

