The Protection of Working Relationships

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The Protection of Working Relationships

A Comparative Study

Edited by

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Summary of Contents

Chapter 7

The Protection of Working Relationships in the Netherlands

Frans Pennings

1. INTRODUCTION

In Dutch law, there are three types of contract under which a person can perform work. The first to be mentioned, the most important one, is the contract of employment. Only persons working under this type of contract are employees and receive labour law protection under, *inter alia*, the *Burgerlijk Wetboek* (BW – Civil Code). The protection by the Dutch Civil Code and other labour Acts and regulations includes provisions regulating dismissals, a restriction of successive fixed term contracts, health and safety and codetermination, and minimum wage protection.[1] Social security protection is also to a large extent linked to the status of employee.[2]

A contract of employment requires, in particular, that a person works in a subordinated position for another person and has the obligation to do the work personally, that is, he cannot ask somebody else to do the work instead.

The other types of contract under which work can be done are the contract for services and the contract to realise a certain work (e.g., a house); under these types

1. See, for an English language overview of Dutch labour law, A. Jacobs, *Labour Law in the Netherlands* (The Hague: Kluwer Law International, 2004).
2. See, on the Dutch law, also Robert Knegt (ed.), *The Employment Contract as an Exclusionary Device* (Antwerp: Intersentia, 2008).

Frans Pennings & Claire Bosse, *The Protection of Working Relationships*, pp. 83–107.
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of contract the work is not done in subordination to another person and the work does not have to be done personally. Work that is done by self-employed persons for a principal is done under one of these two types of contract.

If for a working relationship a contract of services or assignment is made, but the actual circumstances in which the work is done has all characteristics of a contract of employment, such as that work is done in subordination, the contract concerned is considered a contract of employment. Sometimes this is called: 'lifting the veil'; the veil (the name of the contract) is lifted and on the basis of the facts of the case it is concluded that there is an employee relationship.[3]

Through time (the effects of) some escape routes have been closed, limited or mitigated by statutory instruments and/or court decisions. However, this does not mean that now all dependent work is always done under a contract of employment and that the protection is always satisfactory.

In particular in case of flexible workers, it can be uncertain whether they have a contract of employment or not. Examples of flexible contracts under which these workers are engaged are on-call contracts, freelance contracts and homeworker contracts. These contracts may be contracts of employment, but this is not necessarily the case, depending on whether the worker works in subordination to another person or not and whether he is obliged to do the work personally.

A special category of flexible worker is the worker engaged by an agency for temporary work (henceforth: agency worker). Until 1998 it was regularly disputed in Dutch law whether the agency worker was an employee or not; the Flexibility and Security Act (to be discussed in Section 3 *infra*) introduced provisions to regulate his legal status. Agency workers will be discussed in Section 6 *infra*.

Some workers prefer not to work under a contract of employment, as it may give them more freedom and a higher net income to work as 'self-employed'. However, when a particular risk materialises (invalidity, unemployment), or the contract with the principal ends, the person is confronted with the fact that he does not have social security or labour law protection. If this happens, some of these quasi self-employed persons try to be recognised as employee.

A special category consists of self-employed people without staff. A self-employed person without staff is often dependent on his/her principal in a way that to a very large extent resembles the position of employees, since he may be very dependent for his/her income on the work given by this principal. It may also happen that he/she does the same work for this principal as his/her employees.

In view of these different types of legal relationships in which work can be done and given the limitation of labour law in the protection of employees, the research question of this contribution is: how is the labour law protection of dependent work organised and are there gaps in this protection? How is this situation to be assessed vis-à-vis Recommendation 198?

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3. An example from the case law is a judgment of the *Hoge Raad* (Supreme Court) of 17 Nov. 1978, *NJ* 1979/140 (*IVA-ponstypiste*), concerning a homeworker working for a particular enterprise. On the basis of the circumstances the court decided that the worker was to be considered an employee.

In order to be able to answer these questions I will first discuss the criteria which are applied in order to determine that there is a contract of employment or not (Section 2). Then I will discuss the measures in favour of the flexible workers (Section 3), including the introduction of legal presumptions that there is a contract of employment (Section 4). Subsequently, I will discuss the position of persons who are designated as employees on the basis of an Act, that is, the postmen (Section 5) and temporary agency workers (Section 6). In Section 7, I will analyse the position of the self-employed, with special attention to how the protection of workers is or can be extended to them and which are the pros and cons of such protection. Finally, I will analyse the position of the dependent workers in view of the ILO Recommendation.

First I will give some figures on the flexible workers and the self-employed without staff.

1.1. Figures

Since the 1960s there has been an important change from permanent and full-time jobs to more flexible jobs. In 1969, 82% of the jobs were permanent; 14% was part-time and 5% was flexible. The absolute number of permanent and full-time jobs has not changed since 1969, but its share in the total number was reduced to 47% in 2005; in this year the share of flexible work was around 9%.[4] For this purpose, flexible workers are agency workers, on call workers and workers with a fixed-term contract. On call workers predominantly work in middle-sized firms (ten – ninety-nine employees), such as restaurants and cafes.

Flexible workers often work in the health and welfare sector (23%) and commercial services (14%). Relatively few flex workers work in the industrial sector (15%).

Most on call workers work for a relatively long period on basis of the contract (on average 938 days), although often the number of weekly working hours is low (eleven on average).

There are between 250,000[5] and 330,000 self-employed persons without staff in the Netherlands;[6] some assessments give higher figures. For instance, the Central Statistics Office counted in the third quarter of 2009 almost 630,000 self-employed without staff. From research it appears that the large majority (95%) of the self-employed voluntarily chose this status;[7] only 1.2% appeared to be forced by their employer to become self-employed. However, it may also

4. R. Knegt et al., *Tweede evaluatie Wet flexibiliteit en zekerheid* (Amsterdam: HIS and TNO, 2007), 13.
5. See P. Vroonhof et al., *Zelfstandigen zonder personeel* (Zoetermeer: EIM and Bureau Bartels, 2008).
6. Frans Pleijster and Pim van der Valk, *Van onbemind tot onmisbaar. De economische betekenis van ZZP'ers nu en in de toekomst* (Zoetermeer: EIM, 2007).
7. See P. Vroonhof et al., *Zelfstandigen zonder personeel* (Zoetermeer: EIM and Bureau Bartels, 2008).

happen that employers appear to *encourage* their employees to become self-employed. About 3.6% chose this status as they saw no other way to earn an income; these were often persons in receipt of benefits.

2. CRITERIA FOR ADOPTING A CONTRACT OF EMPLOYMENT

Having a contract of employment is essential for an employee; it is not only itself a source of rights and duties, but it gives access to various other rights and duties in the area of individual and collective labour law and social security law. In other words, the contract of employment is the key to labour law.[8] In order to be a contract of employment, the contract must require the worker to perform work, in exchange for wages, during a certain time, in subordination of an employer, and to be done personally (i.e., he cannot have himself replaced without permission of the employer).

The subordination element is the most difficult to assess. Still, it is a very important criterion. Subordination entails that the employee has to obey instructions given by the employer, irrelevant of whether the employer actually makes use of the power to give instructions. It is often difficult to check whether the subordination criterion is satisfied, since many workers have considerable, if not a large, freedom to do their work, on which the employer has little influence. It is therefore hard to prove that there is a subordination relationship (or hard to prove that there is no such relationship).

The two other types of contracts under which work is done – the contract for services and the contract to realise a certain work – are contracts to to perform a certain task respectively and to realise a certain work respectively. Also under these contracts the principal can give instructions on how the job is done; these instructions, however, do not concern the way the person who accepted the mission runs his enterprise, but they concern the actual task to be done. It is obvious that the borderline between areas where instructions can be given can be very narrow.

An important judgment in which the *Hoge Raad* (Supreme Court) gave a set of criteria in order to determine when there is a contract of employment is the *Groen/Schoevers* judgment.[9] The case concerned a Mr Groen, who had his own company (Groen Tax Advisors) and this company made an oral agreement with a private training institute for secretaries (Schoevers Institute) by which it agreed that Mr Groen teaches at the institute. Groen Tax Advisors required payment for the working hours of Mr Groen, on a gross basis plus VAT. The institute did not apply its collective working conditions scheme on Mr Groen and no holiday allowance was paid to him.

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8. C. Bosse, *Bewijslastverdeling in het Nederlandse en Belgische arbeidsrecht* (Deventer: Kluwer, 2003), 47.
9. *Hoge Raad* (Supreme Court) 14 Nov. 1997, *NJ* 1998/149; *JAR* 1997/263.

When the institute terminated the contract, however, Mr Groen claimed that he had a contract of employment with the institute. In his view the contract of service has to be reclassified as a contract of employment, since he worked under a subordination relationship for the institute, he had to teach at specific times and days and he had to take the holiday periods into account. In addition, he was obliged to be present at the times specified; he had to make use of the prescribed materials and he had to follow the teaching programme of the institute.

The *Hoge Raad*, however, decided that he did not have a contract of employment. It argued that the question which type of agreement was at stake had to be decided on the basis of the facts and circumstances of the case. For this purpose, the intention of the parties when they concluded the contract was decisive. The Court added, however, that the way in which the parties elaborated the agreement in practice is also relevant to this. In other words, a practice different from the terms of the contract is important for interpreting the intention of the parties.[10]

The second step in the analysis of the Court was that, after having determined the intention of the parties, the legal effects which the parties have connected with their relationship has to be considered. The Court of First Instance, whose task is to consider the facts of the case, found that the remuneration for the work was so different from what is common for contracts of employment, that this cannot be called 'wages'. For the *Hoge Raad* this finding was relevant to concluding which legal effects were connected with the contract. In addition it also took into account the fact that the working conditions rules were not applied to Mr Groen.

The third step in the reasoning of the judgment was to consider the question whether it could be said that there was still a subordination relationship of such a form and extent that, despite the earlier findings of the case, it had to be concluded that there was a contract of employment. For the answer to the question the *Hoge Raad* found it insufficient that Mr Groen had to be present at fixed times and that he had to follow the guidelines of the training institute. After all, in case of a contract of service the principal can also give instructions. The circumstances mentioned by Mr Groen, the Court continued, had more to do with work discipline and the rules of the organisation as a whole than with subordination of a person to a direct superior. Crucial is, it added, whether the position of the person concerned resembles so much that of the other workers, given the terms of the agreement and the way of functioning, that it has to be accepted that he is an employee.

Finally, the *Hoge Raad* decided that the social position of the worker is relevant. Important in this case was that the form of remuneration was proposed by Mr Groen himself. So in case of persons who can be assumed to be able to make an agreement in accordance with their will reclassification is less likely than in case a person who is highly dependent on the work provider.

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10. In this respect also another famous judgment must be mentioned – i.e., the *Agfa* judgment (*Hoge Raad* 8 Apr. 1994, *NJ* 1994, 704). The worker in this case was given a contract as a temporary worker paid on an hourly basis, but was in fact continuously employed as a full-time worker. She performed the same activities as the other employees working in the enterprise. The Supreme Court considered that the initially agreed conditions are not decisive, but relevant is also how the parties elaborated the contract and thus have given it a different content.

Thus, in the *Groen/Schoevers* judgment, the Supreme Court considered the parties' intention as very important. At first sight this may seem remarkable, as this approach is contrary to the idea that the weaker party has to be protected against the stronger party. As a party may be forced to accept a particular contract because he is so dependent on work, in labour law the intention of the parties and the name of the contract has always been considered with caution. This is also the approach of the ILO Recommendation. The problem was, however, that Mr Groen presented himself as a self-employed person, had more than one principal and benefited from his position by having a higher net income (he was not subject to employee insurance contributions), and did not claim to be an employee until he needed labour law protection. The *Hoge Raad* appeared to be reluctant to accept such an opportunistic use of labour law.

Although the actual circumstances of Mr Groen were decisive for the decision, the relevance of the judgment is much wider: also in later judgments the *Hoge Raad* referred to the criteria of this judgment.[11]

In the application of the *Groen* criteria the position of the worker is relevant, as we saw, and since Mr Groen really acted as a self-employed person and was in an independent position he was not considered an employee. We might then expect that the court will come to a different conclusion in the case of workers in a weaker position having a contract stating that they are not an employee. This is indeed the case, as can be seen in the *Beurspromovendi* judgment. The case concerned persons writing a PhD thesis at a university who were given the status of student with a grant, instead of employee, which is the usual legal status of persons doing this work at a university in the Netherlands.[12] The Court did not confront these PhD writers with the fact that they signed a contract stating that they were not an employee.[13]

Thus many circumstances are important for deciding whether there is a contract of employment. In her PhD thesis, Claire Bosse included a checklist of relevant criteria made on the basis of an analysis of the case law.[14] This checklist has not acquired an official status nor are there other checklists with such status. In other words, deciding whether there is a contract of employment happens to a large extent on a case to case basis.

3. THE FLEXIBILITY AND SECURITY ACT

As we have seen, sometimes it is uncertain whether persons performing work have a contract of employment or not. In 1998 the Civil Code was amended in order to

11. Hoge Raad 10 Oct. 2003, *JAR* 2003/263 (*Van der Male/Den Hoedt*). See also Hoge Raad 10 Dec. 2004, *JAR* 2005/14, *NJ* 2005/239 (*Diosynth/Groot-Veen*); E. Verhulp, 'Een arbeidsovereenkomst? Dat maak ik zelf wel uit!', *Sociaal Recht* (2005), 87 et seq.; C.J. Loonstra, 'De gezagsverhouding ex artikel 7:610 BW', *Sociaal Recht* (2005), 96 et seq.
12. They may also be civil servant, but we will not discuss this here.
13. *Hoge Raad* 14 Apr. 2006, *JAR* 2006/119, *RVDW* 2006/387.
14. C. Bosse, *Bewijslastverdeling in het Nederlandse en Belgische arbeidsrecht* (Deventer: Kluwer, 2003).

improve the position of flexible workers. In this section I will describe the background of this amending law; in the following sections I will describe the changes in larger detail.

The discussion on the need of protection of those providing work under a contract other than a contract of employment dates from the 1970s if not before. In 1972 it was proposed to introduce a provision into the Civil Code containing a refutable legal presumption that work done under particular circumstances was done under a contract of employment.[15] However, this proposal was not accepted.

In the 1990s, politicians and authors became more and more aware that the labour market was to a large extent divided, that is, between persons having a permanent contract of employment, which involved good working conditions, and persons with a marginal legal position. The large difference between the legal position of persons with a permanent contract of employment and flexible workers was hard to justify and, moreover, affected in particular women negatively. Progress in addressing this issue was made when two separate discussions were linked.

The first discussion was the need for a more flexible labour market, as often heard from employers and some economists. The then Minister of Social Affairs, Ad Melkert, presented a Paper, the *Nota Flexibiliteit en Zekerheid* (White Paper on Flexibility and Security),[16] in which he argued that, in order to have the labour force better adjusted to economic needs, more flexibility was required.

The second discussion was on the (bad) legal position of flexible workers.

These two discussions were linked, in that it was argued that if the labour market required more room for employing flexible workers, their legal position has to be improved.[17]

The link which was made between these two discussions allowed the Minister to bring the old issues of a more flexible labour market and a better protection of flexible workers to a higher level. Whereas in previous discussions, proposals for more flexibilisation meant a unilateral reduction of employment protection, now the need to improve the position of flexible workers was also made part of the problem (and solution).

The Minister asked the national employers and employees' organisations to investigate the possibilities of introducing more flexibility for the persons with a permanent contract and improving the legal position of flexible workers. The negotiations led to a unanimous Advice.[18]

The Advice was adopted in the *Wet Flexibiliteit en zekerheid*[19] (Law on Flexibility and Security, which amended the Civil Code) and the *Wet allocatie*

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15. E.M. Meijers, *Ontwerp van een Nieuw Burgerlijk Wetboek* ('s-Gravenhage, 1972), 1040. See also T. Koopmans, *De begrippen werkman, arbeider en werknemer* (Alphen aan de Rijn: Samsom, 1962), 337 et seq.
16. Parliamentary Papers of the Second Chamber of the Parliament 1995–1996, nr. 24 543.
17. The connection between introducing more flexibility and also more security is often referred to as *flexicurity*. See, for more on flexicurity, <www.tilburguniversity.nl/faculties/law/research/reflect/publications/papers>.
18. Advice of *Stichting van de Arbeid* of 3 Apr. 1996, *Flexibiliteit en Zekerheid*, Den Haag 1996.
19. Act of 14 May 1998, *Stb*. (Official Journal) 300.

van arbeidskrachten door intermediairs (Waadi – the Law on allocation of workers by intermediaries),[20] concerning temporary agency work.

The Civil Code was enriched by the legal presumption that if a person has been working for some time, as specified by the Act, he has a contract of employment, unless this presumption is refuted by the employer (this will be discussed in Section 4 *infra*). In addition the position of persons working for a temporary work agency was improved (discussed in Section 6).

In addition the Act introduced more flexibility by allowing a longer chain of fixed term contracts. Before the change the Act provided that if a fixed term contract was followed by another one within a period of thirty-one days, the second one was to be treated as a contract for an indefinite period. Article 668a of the Civil Code, introduced by the Flexibility and Security Act, provides that if fixed term contracts have succeeded each other with periods of interruption of less than three months and the total period taken together lasted more than three years including the periods of interruption, the last contract is considered a contract for an indefinite period. Alternatively, if after three fixed term contracts the next contract is *ex lege* a contract for an indefinite period, unless these contracts are interrupted by a period of more than three months. These rules also apply in the case of successive contracts between an employee and different employers if they reasonably have to be considered each other's successor in respect of the work that was performed. Only collective agreements can deviate from the rules of Article 668a, so deviation is not possible by means of an individual employment contract.[21]

4. LEGAL PRESUMPTIONS

4.1. The System of Legal Presumptions

The introduction of the legal presumption that there is a contract of employment if certain statutory conditions are satisfied was deemed necessary, given the uncertainty I have described in Section 2 on the existence of a contract of employment in particular circumstances. The new provision is a refutable legal presumption, by which is meant that the law connects the rights and duties of a particular legal status to a particular situation. If the other party disputes this, the burden of proof is reversed: the alleged employee can benefit from the presumption and the alleged employer has the burden of proof if he wishes to refute the presumption.

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20. Act of 14 May 1998, *Stb.* (Official Journal) 306.
21. For example, if a person works three times under a contract for employment of six months, the following one is a contract for an indefinite period, even if it was given for six months only.

    If a person first works for three months for an agency for temporary work for enterprise X, and he is then engaged by X for the same work for six months, and then again by the agency for three months for the same work for X and then again by X for three months, the protection of 668a also applies. The same is true in case of three successive contracts with the agency to work for X and then the worker is employed by X itself.

The statutory presumption provides that a contract of employment is presumed if a person has worked during at least three months in any week or at least twenty hours a month for the same employer (Article 7:610a of the Civil Code).

It is to the employer to prove that the conditions for the presumption are not satisfied or that the conditions for the legal status that is presumed are not satisfied.

There were several objectives linked to the legal presumptions in the Flexibility and Security Act. The first one was to encourage employers to avoid uncertain provisions and fake constructions in the future. The second one was to contribute to solving disputes on whether there is a contract of employment and therefore avoiding court cases. These objectives meant to reduce the use of and problems with marginal contracts (prevention). The third objective was to improve the position of persons working under marginal contracts.

4.2. Presumptions of the Existence of the Contract

Since the legal presumption is refutable, the employer can provide proof that there is no contract of employment. The Act does not elaborate *how* the legal presumption can be refuted, but it is likely that the employer has to show that one or more criteria for the contract of employment are not satisfied, that is, he can try to prove that the worker does not do the work personally, for wages, for a certain period and under a relation of supervision. Since the statutory conditions for the presumption mention elements other than the conditions for a contract of employment, it is eminently possible that the employer succeeds in proving that there is no contract of employment.[22] Thus, the presumption did not extend the coverage of the contract of employment by loosening the conditions, but introduced a reversal of the burden of proof and therefore improved the legal position of the worker.[23]

In the *Beurspromovendi* judgment[24] – already mentioned in Section 3 – the *Hoge Raad* decided that courts only have to investigate whether the legal presumptions are refuted. If the court decides that this has not successfully been done, the existence of a contract of employment is to be assumed. In other words, the court does not have to investigate itself whether the conditions of the contract of employment are really satisfied. Thus, in case of weak arguments presented by the employer, the worker is assisted by the law.

A relevant argument of the employer for refuting the presumption can be that the parties did not have the intention to conclude a contract of employment. He can also prove that the parties in reality did not have a relationship which must be considered as one of subordination and in which the worker has to do the work

22. See also J.J.M. de Laat, 'De rechtsvermoedens van het bestaan en de omvang van de arbeidsovereenkomst', *Sociaal Recht* (2006), 266; G.C. Boot, 'Rechtsvermoedens', *Sociaal Recht* (1997), 198; G.C. Boot, 'Weerlegbare rechtsvermoedens', *Arbeidsrecht* (1998), 53.
23. See De Laat, *ibid*., 266.
24. *Hoge Raad* 14 Apr. 2006, *JAR* 2006/119.

personally.[25] The employee for his part can try to refute the arguments of the employer.

The rules on the legal presumptions were made in favour of the employee. It is not clear yet whether an employer can also benefit from these rules. An employer may wish to rely on the legal presumptions, for instance, if he wants an on-call worker to answer the call by saying that he is obliged to do so on the basis of a contract of employment, whereas the worker prefers not to work.

4.3. Presumptions of the Number of Working Hours

Apart from the uncertainty of the qualification of marginal contracts, there may also be disputes on the number of working hours for which the contract was made. After all, if the worker can benefit from the presumption that there is a contract of employment, but the employer denies that there is any obligation to let the worker work during a particular number of hours and in fact no work is given, the worker is not really helped by the presumption that there is a contract of employment. For this purpose Article 7:610b of the Civil Code was introduced.

Article 7610b provides that if a contract of employment has lasted for at least three months, the contracted number of working hours is assumed to be the average monthly number of working hours of the preceding three months.

> For example, if a contract mentions a weekly number of twenty hours, and the worker works thirty hours in June, twenty-seven hours in July and thirty-three hours in August, he can invoke the presumption that he has a contact for thirty hours. The employer can refute this presumption, for instance by saying that this worker has to replace another worker during the summer holidays and that in the rest of the year his average number of working hours is twenty.

Article 7610b does not require that a person has worked for at least three months; relevant is only that the contract has lasted for three months. For instance, if the person has worked for two months and in one month he did not work, the average over these three months is taken.

In the *Tence Uitzendbureau*[26] judgment, the Court of First Instance decided that the legal assumption is not only relevant if the number of working hours is not or not clearly fixed, but also if the actual number of working hours has for a longer period been higher than the number initially agreed on.

Also the legal presumption on the number of working hours can be refuted. In order to be successful in doing so, the employer has to state and to prove that the average number of working hours in the months mentioned by the employee is not a representative sample of the number of hours normally worked.[27] For instance,

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25. Examples of a successful refutation are Court of Amsterdam 16 Jun. 2000, *JAR* 2000/167 and Court of Appeal of the Hague 2 Jul. 2004, *JAR* 2005/20.
26. Ktr. (Court) Maastricht 22 Mar. 2006, *JAR* 2006/111.
27. Ktr. Gouda 19 Feb. 2004, *JAR* 2004/77.

the employer can take a longer period of time which shows a lower average number of working hours. In cases on the legal presumption of working hours the length of the period of reference is frequently disputed; the Act does not give criteria to determine the period of reference. So far in the case law the maximum period of reference has been one year.[28]

4.3.1. Minimum Remuneration per Call

Another improvement for on call workers was that Article 628a of the Civil Code was introduced, which provides that in case a number of working hours of less than fifteen per week was contracted and the working times at which the work had to be done was not defined or the extent of the work to be done was not or not clearly defined, the employee is entitled for each period of less than three hours of work to the wage corresponding to three working hours.

It is not possible to deviate from this article (by individual or collective agreement) to the detriment of the worker. Article 628a is relevant only if a number of working hours is agreed which is lower than fifteen and the working times are not laid down in the agreement.

4.4. Assessment of the Legal Presumptions

4.4.1. Assessment of the Objectives

The first objective of the Flexibility and Security Act was to encourage employers to avoid uncertain provisions and fake constructions in the future. The second objective was to contribute to solving disputes on whether there is a contract of employment and therefore avoiding court cases. From evaluations of the Flexibility and Security Act it appeared that the first two objectives were to a large extent met: as a result of the Act other and better formulated contracts came to be used.[29] This also appeared from a second evaluation of 2007.[30] The presumptions thus have mainly preventive effects, in the sense that employers concluded different types of contracts than before or with more precise conditions.

The following findings are from the 2007 Report. It appeared that since 2000 in particular women who took up work again after having raised their children[31] were no longer working on the basis of on-call contracts. One explanation might be that they found another, better job; it is also possible, however, that after the

28. J.P.H. Zwemmer, 'Rechtsvermoeden, omvang arbeidsduur, een updating', *ArbeidsRecht* (2005), 50.
29. Ministerie van Sociale Zaken en Werkgelegenheid, *Flexibiliteit en zekerheid, Effecten en doeltreffendheid van de Wet Flexibiliteit en Zekerheid. Eindrapport* (Den Haag, 2002), I-20.
30. R. Knegt et al., *Tweede evaluatie Wet flexibiliteit en zekerheid* (Amsterdam: HSI and TNO, 2007).
31. In the past in the Netherlands many women gave up working completely when children were born; this tradition is now changing.

introduction of the Act on Flexibility and Security employers became reluctant to make use of such contracts because of the legal presumptions. Around 2005 the use of this type of contracts was higher, but it was still less than before the introduction of the Act. In 1998 there were 200,000 on-call contracts; in 2006 there were 117,000.[32] At present mainly young persons (under 25) do this type of work; these are predominantly students.

It cannot be determined exactly, the Assessment report concluded, to what extent the decrease of number of on-call contracts was due to economic factors and to which extent to the Flexibility and Security Act. Most employers mention as reason for making use of on-call contracts that they wish to be able to respond to changes in work supply; to try out new workers or to replace ill employees. For these purposes it is not useful for them to offer these workers a higher number of working hours after three months of work.[33] They therefore prefer other types of contracts. It must be kept in mind that effects of the Act may to a large extent be dominated by the economic situation of the time.

The third objective of the Flexibility and Security Act was to improve the position of persons working under marginal contracts. It appeared, however, that the legal presumptions were hardly ever invoked before court, even though figures showed that a large group of the employees work longer than their contracted number for a period of more than three months.[34]

There seem to be three reasons for not invoking the presumptions: workers appeared to prefer some flexibility themselves, in the sense that they did not want to work more hours than offered. A second reason was that the workers did not know the regulations on the presumptions. A third reason is that they did not want to damage the relationship with the employer.

4.4.2. Self-employed

In section 1, I mentioned the situation of the self-employed without staff. Also these persons could, in some circumstances, benefit from the presumptions. Of the persons working as self-employed who were interviewed for the assessment study of 2002, 25% fulfilled the conditions for the presumptions, but hardly anyone of them has invoked the presumptions, as they were either unfamiliar with the rules or they considered their situation as satisfactory.

As regards employers' reactions, it is relevant to mention that where they foresaw that presumptions could lead to problems, they offered a contract for a definite term instead of an on-call contract. Less frequently then in the first years after the Act came into force they asked permanent workers to work more hours or employed agency workers. An effect of the Act was also that the number of home workers and freelancers was reduced.

32. R. Knegt et al., *supra* n. 29.
33. R. Knegt et al., *supra* n. 29, 31.
34. *Ibid*., 37.

4.4.3. The Number of Working Hours

Also as regards the presumption on the number of working hours it appeared that the number of procedures is very low. Still, almost one in ten of the agencies for temporary work has been involved in a procedure in which the presumption on the number of working hours was invoked; these were most often lost by the employee. For the other employers involved in the study (900) there were twenty-two procedures (against some of these employers there was more than one); in the cases where more than one procedure against one employer was followed, they were won by the employee.[35]

4.4.4. Minimum Guarantee

Van den Toren et al.[36] claimed that the guaranteed wages per call rule meant that the organisation of the work was improved. Employers now (in 42% of the cases) applied a minimum period per call of at least three hours. Also the nature of the contracts changed: the type of contract by which it was only provided that a worker could be called to do work was replaced by fixed term contracts or contracts for an indefinite term. Contracts with a minimum and maximum number of working hours were replaced by contracts with a fixed number of working hours.

Almost half of the interviewed employers state that they always pay the guaranteed wage, most often by requiring the employees to work for more than three hours.[37] Fifty per cent of the on-call workers claim that the minimum number of working hours and the periods of work are not defined in their contract. Only 25% of the on call workers on whom the rule applies claim that they indeed receive wage for three hours per call. Thus, the act is often not applied correctly; still 60% of the employers apply contracts in which no number of working hours are mentioned. Thus in that case the legal presumption applies after three months.

5. THE OBLIGATION TO GIVE CONTRACTS OF EMPLOYMENT TO POSTMEN

A new development on the Dutch labour market concerns the position of persons delivering mail. After the (partial) liberalisation of the post market new companies entered the Dutch market and started competition with the former monopolist post company (TNT). The new companies do not offer a contract of employment to most of their staff, but instead the postmen are paid for each piece they delivered. As a result the new postmen are much cheaper than those of TNT; the other side of the coin is, of course, that their wage is much lower, often below minimum wage.

35. *Ibid*., 36.
36. J.P. van den Toren et al, *Flexibiliteit en zekerheid: effecten en doeltreffendheid van de Wet flexibiliteit en zekerheid* (Doetinchem, 2002).
37. R. Knegt et al., *supra* n. 29, 56.

The postmen have to work on two days a week and are free to choose their working times between 7 a.m. and 9 p.m. Their average working time is 5.6 hours a week. They are provided with company coats and bags but are not required to do the work personally. In case one is not able or willing to work one must seek a replacement.

As a result of these conditions it can be doubted whether they have a contract of employment.

After heavy political debates in Parliament and pressure by the unions, a regulation was made on the basis of the Post Act,[38] which provides that the post companies must make use of a contract of employment for their workers, unless a collective agreement is made which satisfies the conditions mentioned in the regulation. The postmen of TNT traditionally have such a contract, so the regulation was meant to create a 'level playing field' by requiring this from the new companies.

Employers and employees' organisations made a collective agreement, in which it was provided that after forty-two months 80% of the workers would have a contract of employment. This target had to be reached gradually. However, in April 2010 the target of 14% had to be reached, but at that time only 0.5% of the workers actually had a contract of employers. Therefore the trade unions denounced the collective agreement.[39]

When the moment on which the obligation for the post companies would become effective approached, it appeared that there was high resistance against the Act by the companies. They claimed to go bankrupt. They also claimed that the postmen did not want to have a contract of employment since that would limit their freedom to work or not and to decide their working times. One of the problems was also that the unions could simply reach their target by denouncing the collective agreement.

Since he situation was not satisfactory, a labour market expert and former union president, Ruud Vreeman, was asked to investigate the situation, which led to his report of January 2011.[40] One element of the advice was that he introduced a system in which the prices for the mail can be increased, so that competition can take place without having to take recourse to too low wages. A second element is that he insists on better consultation of the employers' and employees' organisations. In fact, this is in line with the approach of the ILO Recommendation, which recommends consultation of the social partners before a particular situation is defined as an employment or self-employment relationship.

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38. *Postbesluit 2009, Stb.* (2009), 418.
39. For a critical approach, see A. Veldman, 'Tijdelijk besluit arbeidsovereenkomst post: de goede weg om loonconcurrentie in een geliberaliseerde markt tegen te gaan?', *Tra* (2011), no. 3.
40. *Advies Vreeman betreffende de postmarkt.*

6. THE LEGAL POSITION OF TEMPORARY AGENCY WORKERS

6.1. Introduction

As we saw in section 3, in 1998 the *Wet allocatie arbeidskrachten door intermediairs* (Waadi – the Law on Allocation of Workers by intermediaries) was adopted, which abandoned the previously existing rule that work for agencies for temporary work could be temporary only.[41] Also the permit system for agencies for temporary work was abolished. A rule, still found in the Waadi Act, is that the agency has to pay the agency workers the same wage and compensations as those due to workers in the same or comparable jobs employed by the user company. However, this provision does not apply if in a collective agreement, applicable to an enterprise to which an agency worker has been posted, the wage rates are applicable to agency workers.

The Flexibility and Security Act regulated the legal position of the agency workers. As we will elaborate below there is a connection between these rules and the Waadi. Before the Flexibility and Security Act there was serious discussion on the question whether agency workers have a contract of employment with the agency, with the user company, or no contract at all. The problem was that the agency does not really exercise supervision of the agency workers, but supervision is actually realised by the user company. In academic publications the agreement with agency workers was mostly seen as a contract of employment,[42] but in case law the outcomes of the cases varied.[43]

Furthermore, the Flexibility and Security Act amended the Civil Code in order to apply explicitly to agency workers and to provide that their contract with the agency is a contract of employment. However, also important exceptions were introduced in the Civil Code to the general rules applicable to employed persons and further exceptions were allowed by the Code to be made by collective agreements. Still, this system improved the position of the trades unions in their negotiation on collective agreements for agency workers. Whereas the unionisation of agency workers is so low that unions hardly have the power to convince employers to start negotiations, as a result of the provisions of the Civil Code agencies cannot operate without a collective agreement. Without a collective agreement the general rules of labour law which are also applicable on agency workers would make agency work very difficult. An example is the rule that the employer has to pay wage even if there is no work and the rules on the limitation of successive fixed

41. Agency workers were allowed to work six months or 1,000 hours as a maximum for a particular third person.
42. M.G. Rood and M.J van der Ven, *Flexibele arbeidsrelaties* (Alphen aan den Rijn: Samson, 1988), 23; K.M. van Holten, 'Detachering als alternatief voor uitzendarbeid: een valkuil', *TVVS* (1994), 121.
43. In a decision of the *Hoge Raad* (18 Nov. 1988, *NJ* 1989/344) it was decided that it was presumed that the agency worker had a contract of employment. It was thus up to the agency to show that the presumption was not correct.

term contracts (see Section 3). Collective agreements can deviate from these rules, so these are necessary. As a result of the stronger negotiation powers of unions, it could to a large extent be left to the collective bargaining to regulate agency work and the position of workers in collective agreements. In Section 6.3 I will mention some of the achievements.

6.2. The Provisions on Agency Workers in the Civil Code

The Flexibility and Security Act introduced Article 7:690 of the Civil Code, which provides that: an agency agreement (an agreement between the worker and the agency for temporary work) is the contract of employment by which the employee is made available by the employer, as part of the profession or enterprise of the employer, to a third person on the basis of an order given to this employer, to work under supervision and direction of this third person.[44] Although the wording of this article is – from a grammatical point of view – not very clear, in the explanatory memorandum to the Act the legislature stated univocally that 'first of all in Article 690 the agency agreement is qualified as a contract of employment'.[45] It was indeed the aim of the legislature to terminate the discussion on whether there is a supervision relation between the agency and the agency worker: the fact that a person works for a third person is insufficient to deny that there is a contract of employment with the agency.[46]

Article 690 provides that if a person is made available for a third person or firm, the rules on the contract of employment apply, except for the deviations made in the section on agency contracts of the Civil Code. In this agency contracts section special rules for the agency agreement are given. These special rules apply only for those enterprises which really have an allocation function on the labour market; by this reservation is meant that making workers available for work for a third person or firm is part of their job or enterprise and is not done on an incidental basis only. Thus incidentally posting a worker to a third person by an employer who has completely different professional activities is not governed by the regime on the agency agreement, but by the general rules on the contract of employment. This approach restricts the possibilities of abusing the agency agreement.

Moreover, the agency agreement cannot be used for posting persons within one and the same group of enterprises. As a result, an enterprise cannot escape the provisions of the Civil Code on the contract of employment by sending employees to a daughter firm.

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44. See, for a detailed discussion, F.B.J. Grapperhaus & M. Jansen, *De uitzendovereenkomst* (Deventer: Kluwer, 1999).
45. Parliamentary Papers (*Kamerstukken II*) 1996–1997, 25 263, nr. 3, 33. See, for critical comments, I.P. Asscher-Vonk, 'Flex en zeker: de uitzendkracht', *SMA* (1997), 376.
46. See also W.J.P.M. Fase, 'De uitzendkracht wordt een normale werknemer, al duurt het even', *Arbeid Integraal* (1997), 12; W.J.P.M. Fase, 'De gefaseerd afnemende flexibiliteit van uitzendarbeid', in F.J.L. Pennings (ed.), *Flexibilisering van het sociaal recht* (Deventer: Kluwer, 1996).

The agency agreement allows particular exemptions from the rules on the contract of employment. These exemptions, related to the special nature of agency work, are the following (Article 7:691 of the Civil Code):

- the general prohibition to distinguish between persons on a contract for a fixed term and for an indefinite period does not apply (Article 7:649(5) Civil Code);
- the limitation on successive contracts for a definite period, as provided for in Article 7:668a Civil Code) applies only after the employee has been working for twenty-six weeks for an agency for temporary work;
- during the first twenty-six weeks of work an agency contract may include a provision that the contract ends *ex lege* as the posting relationship ends on request of the third person or firm.

The periods mentioned in Article 7:691 of the Civil Code during which can be deviated to the detriment of the agency workers from the provisions of the Civil Code can be extended by collective agreement.

A collective agreement is also important for agencies in view of Article 7:628 of the Civil Code, which provides that the employee maintains the right to wages if he does not work for a reason which is in all reasonableness for the risk of the employer. Lack of work is, in general, for the risk of the employer. In Article 7:628(5) it is provided that during the first six months of a contract of employment the obligation to pay wages in case of a lack of work can be contracted out by a written contract; after this period this exemption is possible only by means of a collective agreement. This rule is not limited to agency contracts, but for agencies it is essential that the risk that they have to pay wage in case of a lack of work is also taken away after this period of six months.

As I have already remarked, the provisions allowing exemptions from the Civil Code by collective agreement (only) give unions relatively large negotiation powers, since, without a collective agreement, agency work is almost impossible. Moreover, a collective agreement is important to fix the wages for agency workers, and to allow lower wages than provided in the applicable collective agreement for the other works in the industrial section concerned.

As a result, a collective agreement on agency work was made between the employers association and the trade unions in which the legal position of agency workers was elaborated, the so-called ABU Collective Agreement. On the basis of this collective agreement also facilities for supplementary old age pensions and training were organised. It must be added that agencies can evade some of the protective rules by simply ending the relationship with an agency worker just before a threshold is reached after which the legal position would have been improved. Still, there are provisions in the collective agreement which cannot be evaded, such as those on pay.

More recently also other agency organisations and other trade unions have made agreements on agency workers, which have cheaper working conditions for temporary agency workers than the ABU Collective Agreement. Since there is no system in the Netherlands to distinguish representative from unrepresentative

unions such competition is very well possible. An additional problem is that the unionisation rate is so low that it is hard to say which union is representative. This is a weak point in the Dutch system of collective bargaining.

6.3. The System of the ABU Collective Agreement

In order to give an idea of the meaning of the collective agreement for agency workers I mention some main elements of the ABU Collective Agreement (2004–2009). For the first seventy-eight weeks during which a person works for an agency (Phase A) an agency worker can be given an unrestricted number of fixed term contracts. If there is no longer work, the agency can terminate the contract without a period of notice. If the employee still works for the *same* agency after completion of Phase A, the worker receives a fixed term contract. If he is no longer needed for a particular client of the agency, this no longer means the end of the contract between the agency and the worker; and the contract and wage payment continue to exist. Thus the agency has to find new, suitable work for at least the same wage. This is Phase B, which lasts for a maximum of two years or eight contracts.

Phase C starts after the completion of Phase B or if no more than thirteen weeks have passed after the end of Phase B. In Phase C the agency agreement is for an undefined period. It can be terminated only by the application of the general rules of labour law, that is, by a permit of employment office (*Uwv werkbedrijf*), which has to assess the application for the permit on the basis of a regulation of public law. Another possibility, apart from mutual agreement, to terminate the contract is dissolution by a judge.

6.4. Health and Safety

Article 7:658 of the Civil Code concerns the liability of the employer for the damage incurred by an employee in the exercise of his activities. This is also relevant to agency workers. If the employer does not meet his obligations properly, he has to pay the damage incurred by the employee. An exception to this rule applies only if the accident at work is the result of intent or conscious recklessness of the employee. If the agency worker suffers damages in the performance of his job, he can claim damages from the agency for temporary work and also hold the third person, that is, the enterprise which made use of his work, liable on basis of Article 7:658(4) of the Civil Code.

Figures

In 2002 the legal position of the agency workers was assessed.[47] According to the researchers in 2000–2001, 80% and 85% respectively of all agency workers were in phase 1 and 2. In these years 13% and 11% respectively of all agency

47. Berenschot, *Flexibiliteit en zekerheid, effecten en doeltreffendheid van de Wet Flexibiliteit en zekerheid* (Utrecht, 2002) Report II, p. 4.

workers were in phase 3 and not more than 7% and 4% of the agency workers had a contract for an indefinite period.[48]

7. PROTECTION OF NON-EMPLOYEES

In this section I will discuss the position of persons not working under a contract of employment. I will focus on the self-employed persons without staff, as they may be in a position closely resembling that of employees and therefore need special attention.

7.1. Health and Safety

The protection in case of accidents at work and occupational diseases is not limited to employed persons. Article 7:658 BW(4), already mentioned in the previous section, provides that a person who has another person work on a contract other than a contract of employment is liable for damages.[49] This extension of employees' protection concerns assignments for work which is done professionally, provided that these are activities which the principal could also have his employees do in his enterprise or profession.

7.2. The Remuneration

Also the Act on Minimum Wages is relevant to some self-employed without staff. On basis of Article 3 of this Act it is possible to assimilate working relationships with contracts of employment for this Act. The Minister of Social Affairs issued a Decree[50] to assimilate working relationships of a person who works on the basis of a contract of employment for remuneration for at most two principals unless the work performed is done as professional or an enterprise, and the work has to be done personally or exclusively with the help of family members. This working relationship has to last at least three months and the work must take at least five hours per week. This is relevant to some self-employed persons.

The Act on collective agreements can also be applicable on categories of the self-employed and thus give even higher protection than at the minimum level; according to Article 1(2) of this Act a collective agreement can concern contracts for services or assignments. This is relevant, in particular, where (very) low rates apply for a certain kind of work. A well-known example is that of translators and

48. R. Knegt et al., *Tweede evaluatie Wet flexibiliteit en zekerheid* (Amsterdam: HSI and TNO, 2007), 85.
49. Some cases from the case law are Hoge Raad 18 Nov. 2005, JAR 2005/288 and Ktr. Utrecht 4 Feb. 2009, *Ljn* BH2287.
50. Decision of 2 Sep. 1996, *Stb.* (1996), 481.

persons making subtitles for television/films. However, from the point of competition law the question was raised whether it is allowed to fix minimum rates for self-employed persons by collective agreement, since that means, in fact, setting common rates for 'enterprises'. This question became urgent when in the Collective Agreement for persons replacing employees of orchestras, a minimum remuneration was mentioned for others than employees; the Dutch competition authority published its view that the fixed rates were inconsistent with competition law.[51]

Whether this conclusion is correct remains to be seen. In the light of the *Albany* judgment a different approach would certainly be defendable.[52] The *Albany* judgment entailed that collective agreements were not contrary to EU competition law if the collective agreements were made in negotiations and if they served to realise social purposes. It would go beyond the limits available for this contribution to discuss this issue in more detail,[53] but if self-employed persons are in a position very close to that of employees and if on average they have a low income, there are, in my view, reasons to accept social purposes justifying collective agreements also for improving their position. If a category of the self-employed is, in general, able to negotiate rates which realise a sufficient income, competition should, of course, not be hindered. However, if there are strong principals and the rates are very low, there may be a good reason for interfering, in particular if the work done by the self-employed resembles very much that done by the employees of the principal and when the average incomes of the self-employed lie below the corresponding minimum wages. On this issue consensus is still far from being reached.

7.3. Protection against Dismissal

The principal is allowed to give notice at any time, regardless of whether the assignment is for a fixed period or an indefinite period. It is, however, possible to lay down in the contract that giving notice is impossible, except when the principal is a private person. Apart from giving notice it is possible to require dissolution of the agreement when one of the parties fails in meeting the contract's requirements. This possibility cannot be excluded.

Parties can make a provision on the period of notice. Termination of a contract without assuming any notice period by a principal other than a private person can be deemed contrary to the legal principles of fairness and reasonableness.

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51. The view of the Competition authorities is called *Cao-tariefbepalingen voor zelfstandigen en de Mededingingswet* <www.nmanet.nl/Images/Visiedocument%20zelfstandigen%20-%20DEFINITIEF_tcm16-109264.pdf>.
52. Case 67/96, [1999] ECR I-5751.
53. See also Diana de Wolff & Frans Pennings, 'Dienstbetrekking of zelfstandig ondernemerschap, de reikwijdte van de sociaalrechtelijke bescherming van de zelfstandige zonder personeel', in S.S.M. Peters & M.S. Houwerzijl (eds), *Exit: Onderneming, werknemer en het einde van de dienstbetrekking* (Deventer: Kluwer, 2009), 363–388.

Article 7:411 of the Civil Code gives to some extent protection in the case of contracts of service in case of termination before the assignment is completed. If the contract ends before the work is completed or before the time for which the contract was made has expired, and the obligation to pay a remuneration depends on these elements, the worker is entitled to part of the remuneration determined on basis of what is reasonable. The person who accepted the job is entitled to the full remuneration if the end of the agreement is to be contributed to the principal and the payment of the full wage, given all circumstances of the situation, is reasonable.

In addition also the system of the requirement of a dismissal permit by the *Uwv werkbedrijf* can be applicable to a contract for services. According to the applicable Regulation, the *Buitengewoon Besluit Arbeidsverhoudingen*, a person who performs his work personally for another person is covered, unless he does the work usually for more than two principals or if he is assisted by more than two other persons (other than spouse or members of the family) or id the work is of a subsidiary nature for the person.

8. DECLARATIONS FOR SOCIAL SECURITY AND TAX LIABILITY

In the previous sections I discussed the criteria relevant to the existence of an employment relationship. The idea underlying this discussion was that labour law protection was beneficial to these workers and thus desired by them. Self-employed persons without staff often consider their situation differently: they do not want to be an employee and be protected as an employed person by employees' insurance schemes. Coverage under such schemes would mean that they are more expensive for their principals (due to applicable social security contributions) and that they have a lower net income.

Therefore the issue of 'lifting the veil' has different dimensions. When discussing the contract of employment in the previous sections, I mentioned that a self-employed person is considered an employed person if he does the work personally in subordination to another person. If a contract of employment is assumed, the person concerned is insured under the employees' insurance schemes. The suspicion that a self-employed person is, in fact, an employee, rises, for instance, and in particular, if a person resigns from a job, but continues to work for the same employer as self-employed.

In the case of self-employed without staff there is often legal uncertainty. Since this uncertainty was found undesirable, an instrument was introduced to solve this problem, the *Verklaring arbeidsrelatie* (VAR – Declaration on the Working relationship).[54] This declaration was introduced by the legislature; it can be issued by the Tax Office on application.

By various Acts this declaration has been given important legal consequences for the principal who can show such a declaration. One is that the principal will not

54. See also M. Aarts, *De zelfstandige in het sociaal recht* (Deventer: Kluwer, 2007) 213 et seq.

be confronted later by the claim of the Tax Office that a person is not really self-employed and that therefore tax and social security contributions had to be paid by the principal. The declaration thus protects the principal, not the self-employed. For the self-employed person the declaration is attractive as it makes it easier for him to be engaged by the principal since important uncertainties are removed.

In order to be granted the declaration as a self-employed[55] the applicant must have an assignment of at least three principals per year; he must have a subordination relationship with the principal; he has to present himself as an independent company and he must work at least 1,225 hours a year for the enterprise. For the purpose of issuing the declarations, the Tax Office made policy rules.[56] According to the policy rules it is very probable that a person works in subordination to a principal (in which case the declaration is refused) if his activities constitute an essential part of the enterprise of the principal. Examples mentioned are the activities as a driver of a transport enterprise, pizza carriers working for a pizza enterprise, pickers of fruit for a fruit enterprise. These persons are part of driving, visiting or delivery schemes which have to be followed. If an applicant in such circumstances denies subordination, he has the burden of proof. If a former employee is going to work as self-employed for his former employer the Tax Office will often call this situation 'change of the front'; this is assumed if he continues to do the same type of activities as before under comparable conditions for a person he worked for in an employee relationship before.

If a declaration has been issued the principal does not have to deduct taxes and social security contributions. He does not have to do this afterwards when it appears that a person having this declaration is not really self-employed. This is different, of course, if the principal did not act in good faith. Bad faith is assumed, for instance, if an employer forces an employee to work as self-employed.

The Tax Office examines the data of the application for the Declaration. After the Declaration is issued, the Tax office can change or withdraw it if it appears that the data which were mentioned for the application appear to be incorrect. A declaration is valid for a limited period only – one year – and for a new declaration the data are re-examined in view of the conditions for the declaration.

If the Tax Office finds that a declaration is invalid or is used for different purposes then mentioned in it, the situation will be investigated. If the conclusion of that investigation is that the person was working in an employment relationship, employees' contributions have to be paid by the person claiming to be self-employed, unless the principal acted in bad faith (in the latter case the principal has to pay).

As will be clear declarations are issued on the basis of data which are not 100% certain at the time of the application: for instance, the applicant may still not know the number of principals he will have in the coming year. It may also be uncertain whether the workers are actually obliged to do the work personally or

55. Other types of declarations are also possible; these are not discussed here.
56. Policy rules for assessing a working relationship (*Beleidsregels beoordeling dienstbetrekking*), 6 Jul. 2006, *Stcrt.* (2006), 141.

whether they can be replaced in view of their specific expertise. This uncertainty will still remain for the applicant after a declaration has been issued.

In order to work as self-employed a declaration is not obligatory, so also persons whose declaration is refused may still take up such work. They take the risk, of course, that the Tax Office decides, on the basis of the actual circumstances, that they are subject to the employees' insurance schemes.[57]

From investigations it appeared that almost 40% of persons who received a declaration had one or two principals a year and 45% had between three and seven principals. Thus for a quite large part of the holders of a declaration there is doubt whether they really satisfy the conditions for being self-employed and whether they are in fact not rather an employee.[58]

A more recent development is that person without personnel are offered the possibility to make an agreement with a private company, Uniforce, which gives more protection and certainty. Under the Uniforce formula the self-employed person establishes a legal person of which he is the sole shareholder. Uniforce holds 20% of the shares and has the right to dismiss the self-employed person but only in case he does not pay the due contributions. Thus, he is fully in charge of his own work (which is one of the advantages of being self-employed), but subject to the dismissal powers of Uniforce for one issue only, but as a result he is an employee for the employees insurance schemes. The Tax Office has accepted the formula,[59] so the principal can be sure that he does not have to pay the employees contributions. Thus the formula does not give all the advantages of being self-employed – the Uniforce worker still has to pay the employees' insurance contributions (including the employers' part).

The self-employed are not covered for the employees' insurances (sickness, unemployment and disability); there is no disability insurance for the self-employed anymore in the Netherlands. Voluntary and private insurances are possible, but rather expensive.

A condition for the Voluntary Insurance under the statutory schemes is that the person was compulsorily insured for the employees' insurance in the year before he started to work as a self-employed person.[60] If a self-employed person is employed by his own company, for example, in the case of the Uniforce formula, the employer will have to continue to pay wages in case of sickness and in case of lack of work. Insurance is therefore not useful for these contingencies, as in practice the 'self-employed' thus has to pay for them. Private insurance insurers can refuse a person, among others because he has a higher chance of becoming ill or disabled.

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57. Two-thirds of the applicants are considered to be self-employed, J.P. Vendrig et al., *Evaluatie Wet uitbreiding rechtsgevolgen verklaring arbeidsrelatie* (Zoetermeer: EIM, 2007), 26.
58. J.P. Vendrig et al., *Evaluatie Wet uitbreiding rechtsgevolgen verklaring arbeidsrelatie* (Zoetermeer: EIM, 2007), 6.
59. Not to be confused with the Declaration.
60. The contributions for the Voluntary Insurance are relatively high: for 2008, for the disability law it is 6.37%, for unemployment insurance 4.58%, sickness benefit contribution 6.54%.

In July 2008 a statutory scheme was introduced to protect self-employed persons in case of pregnancy and maternity leave.[61] According to the scheme a pregnant self-employed person is entitled to benefit for a period of sixteen weeks around the delivery; its amount depends on the income during the year before the benefit is claimed, subject to a maximum of EUR 1,317 (gross income) a month.

9. CONCLUSIONS

The Employment Relationship Recommendation 198 did not lead itself to much change in the Dutch system. However, the problems addressed in the Recommendation have been addressed by the legislator and various approaches recommended in Recommendation 198 can be found in the previous sections.

The Recommendation requires (Article 2) that the nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. In the previous sections we saw that the most important criteria and their interpretation were developed in the case law. The legislature has a quite modest role, although he was active by introducing the legal presumptions and the law on the agency workers.

In addition the legislature provided guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers (Section 4). The legal presumptions and the law on agency workers were examples of such guidance. Also the declaration for the self-employed can be mentioned.

Interesting are also the more specific provisions on the determination of an employment relationship. Article 9 provides that for the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties.

As we saw in the description of the case law, the Dutch approach is to take all circumstances of the case into account. The name of the contract is not decisive. Remarkable is the case law which took the intention of the parties as a main point of departure. However, since the court takes also the position of the parties into account, the case law may still be consistent with the spirit and objective of the Recommendation. The case law shows also, interesting enough, that in a developed post-industrial economy there may be situations where persons try to make an opportunistic use of labour law.

The Declaration system for the self-employed may be more problematic in the light of the objectives of the Recommendation. The problem here is that, primarily,

61. Act of 29 May 2008, *Stb*. (2008), 192.

it is the self-employed person himself/herself who does not want to be covered by labour law, although we have to remain cautious in respect of situations where the person is very strongly encouraged by the principal to be(come) self-employed. Given the fact that persons with a declaration did not satisfy the conditions after all it is important that the practice of awarding them becomes stricter, or in any case the renewal of the declaration after it has expired.

Article 11(b) of the Recommendation– providing for a legal assumption that an employment relationship exists where one or more indicators are present – is followed in the Dutch system by the legal presumptions of the Civil Code. This is an interesting innovation of labour law. However, it is good to look at the side effects. They entailed that other types of employment contracts became more used, which can indeed be seen as a good development. However, it can mean that particular groups of workers who used to work on such contracts were substituted by others.

The need for flexibility and economic developments entail that employers keep looking for constructions which are less expensive. It can be seen that changes in the laws – like the legal presumptions – do not mean that from now on particular contracts – such as the classic contract of employment – are used but that alternatives are tried. Furthermore, many of the improvements have left escape routes open: for example, by defining on-call contracts more specifically and/or terminating agency contracts before a threshold is reached the statutory improvements can be escaped. Monitoring the developments, as required by the Recommendation, remains therefore very important.