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 1

The Legal Status of Persons Performing Work Personally: The Topic of This Book

Claire Bosse and Frans Pennings

1. INTRODUCTION

The regulation of the employment relationship goes back to the nineteenth century, when factory workers in industrialising countries were working many hours a week in unsafe and unhealthy conditions. Their situation was often one of exploitation and poverty. To redress this abuse, national governments adopted laws and regulations in order to protect the weaker party in the employment relationship.[1]

Over the years, this protection became stronger and stronger and a 'building' of labour law emerged, accompanied by another 'building' of social security law.[2] However, only workers in a formal employment relationship have full access to these two buildings. Self-employed persons and informal workers are not entitled to the advantages of labour law, and are supposed to create their own safety net in case of illness, unemployment, disability or old age.

1. 'The main object of labour law has been, and . . . will always be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship', Sir Otto Kahn-Freund, *Labour and the Law*, Hamlyn Lectures (London: Stevens and Sons, 1972), 7.
2. The idea of labour law as a building is inspired by P.F. van der Heijden, *Naar een nieuwe rechtsorde van de arbeid*, Hugo Sinzheimer Institute (Den Haag: SDU Uitgevers, 1999), 4.

Frans Pennings & Claire Bosse, *The Protection of Working Relationships*, pp. 1–4.

Currently, in most legal systems, workers are divided into two major categories: those with an employment contract or employment relationship (also called 'employees') and those without such a contract/relationship (also called 'autonomous workers', 'independent contractors' or 'self-employed persons'). Persons in the first category are protected by labour law; those in the second are not, although they may be protected by commercial or civil law. This is an important distinction, because employees are much better protected than other workers. An effect of this is that employees are therefore also more expensive.

Since the 1980s, businesses felt a growing need for more flexible working arrangements due to the globalisation of the economy. The number of temporary workers, on-call workers and cross-border subcontracting agreements grew considerably. These arrangements do not always fit in the existing legal framework, in which employed and self-employed persons (or own-account workers) are treated differently. The first are protected by labour law, as we have seen above, the second by civil or commercial law, in which the contracting parties are considered to have equal bargaining power. This means that the rules on minimum wage, maximum working hours, protection against dismissal, etc., only apply when an employment relationship exists. By giving the working arrangement an 'independent look' businesses try to avoid the rigidity of labour law and the price-tag associated with labour law and social security.

New forms of labour often represent a mix of dependent and independent work and/or involve more than two contracting parties. This creates a 'grey area' outside the building of labour law, in which it is not clear whether the worker should be classified as an employee or as an own-account worker.

This uncertainty gradually undermines the existence of labour law and social security law, especially in countries with a large informal economy. Some even argue that 'the erosion of the employment relationship and the failure of labour law to keep pace with evolving labour market issues is the most important industrial relation issue of our time'.[3]

A very important issue is the problem of a grey zone between dependent work and self-employment where it is not clear whether a contract is an employment contract or not. It has already attracted the attention of several authors, whose analyses and proposals will be discussed in Chapter 2. Progress in this area seems, however, to be slow and it is hard to find consensus on particular proposals.

In addition, in 2006 the International Labour Organisation (ILO) adopted a Recommendation on this topic, the Employment Relationship Recommendation (Recommendation 198). The objective of this Recommendation is to guarantee effective protection for workers who perform work in the context of an employment relationship. The Recommendation will be discussed in more detail in Chapter 3. It mentions some criteria for bringing hidden forms of employeeship under the protection of labour law.

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3. Ibrahim Patel, workers' spokesperson at the ILO conferences of 2003 and 2006 and currently Minister of Economic Development, Republic of South Africa. See ILO 2003, Provisional Record 26, 26.

This Recommendation triggered this study, as it asked ILO Member States to undertake action to reduce disguised employment relationships. It also mentioned an interesting series of instruments to distinguish employment relationships from other contracts and to ensure that those really working in an employment relationship are actually given the corresponding legal status.

In order to contribute to this discussion, we undertook a study of the developments in a number of EU countries. These studies were made by the national labour law experts, thus ensuring an in depth study of the developments that are put in the relevant context. The studies are certainly not limited to the contents of this Recommendation, but take more generally into account which measures are undertaken and which instruments are used to disclose the bogus self-employed and to cover persons performing personal work by an employment contract.

This study addresses the topic at two different levels. One is that of international organisations, in particular the ILO (Chapter 3) and the European Union (Chapter 4).

The other level is that of country studies (Chapters 5–10), in which national labour law experts describe which developments have taken place in their country and which instruments are used in order to ensure the protection of labour law to dependent workers.

The reason for the double level approach is that it appears to be very difficult to take measures for increasing the protection of dependent workers at the international level. Political support for such measures at these levels is very limited. Therefore the study also discusses the question at which level which measures could be taken.

2. RESEARCH QUESTIONS

In this study we will address the following research questions:

(1) Which proposals have been made by the ILO and EU in order to ensure the protection of labour law to persons performing work personally?
(2) Which methods are used or proposed in order to extend the coverage of employment protection, both by the international organisations and in the selected countries?
(3) Which conclusions and recommendations follow from these findings?

3. THE CONTENTS OF THIS BOOK AND ACKNOWLEDGEMENTS

In order to obtain information from single countries we asked academics from a number of countries to contribute to the discussion. The selection of the countries is, as always, somewhat arbitrary, and restricted to European countries. Although this can be seen as a limitation, this selection is useful since in these countries

labour law has been developed to a high level, and in these countries in particular the undermining of labour law seems serious. For this reason we can expect here new roads for realizing labour law protection for dependent workers.

With the results in hand we are convinced that the selected countries are representative for the various ways in which labour law has developed in the EU.

The country chapters include contributions on:

- Belgium by Patrick Humblet and Isabel Plets;
- France by Isabelle Daugareilh;
- Germany by Wolfgang Däubler;
- the Netherlands by Frans Pennings;
- Poland by Andrezj Świątkowski;
- the United Kingdom by Alan Neal.

The chapters on the international organisations were written by the editors of the book. As part of the research we interviewed Mr Bertrand Muller-Schleiden, working at the DG Employment, Social Affairs and Equal Opportunities of the European Commission, and Ms Alette van Leur, Director of the Department of Partnerships and Development Cooperation of the ILO and Chair of the Conference on the Recommendation on the Employment Relationship. We wish to thank her colleagues at the ILO who were very helpful in providing us with information: Mr Giuseppe Casale, Ms Corinne Vargha, Mr Tayo Fashoyin, Mr Humberto Villasmil and Mr Colin Fenwick. We also talked to Ms Catelene Passchier, working for the European Trade Union Confederation.

The persons mentioned here provided us with useful background information. However, the way in which we used the information in the relevant chapters is of course entirely our own responsibility. We wish to thank all our respondents for their helpful comments.