The Protection of Working Relationships

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The Protection of Working Relationships

A Comparative Study

Edited by

Frans Pennings

Claire Bosse

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List of Authors

Claire Bosse	Legal Advisor of a Belgian employer federation, formerly employed as a researcher at the University of Tilburg (Department of labour law and social policy); observer during the ILO-conference on the Employment recommendation 198 of 2006.
Isabelle Daugareilh	CNRS research direktor, COMPTRASEC UMR 5114, Bordeaux IV Montesquieu University, France.
Wolfgang Däubler	Professor emeritus of labour law, civil law and economic law at the University of Bremen; Visiting professor at the University of Shanghai.
Patrick Humblet	Professor at the Law Faculty of Ghent University; Visiting Professor at the University of Antwerp Management School and at the Royal Military Academy.
Alan C. Neal	Professor of Law and Director of the Employment Law Research Unit at the University of Warwick, United Kingdom. He sits as an Employment Judge in London, and is the Convenor of the European Association of Labour Court Judges. Together with a Visiting Chair in the University of Paris II, since 2006 he has held a Lifetime Visiting Chair in the Zhejiang University, PRC, and is a Visiting Professor in the Beijing Jiao Tong University, PRC. He was the founding editor, and is now Scientific Director, of *The International Journal of Comparative Labour Law and Industrial Relations*.

Frans Pennings	Professor of Labour Law and Social Security Law at Utrecht University; Professor of International Social Security Law at Tilburg University. Member of the Central Appeals Court of the Netherlands. Editor of *European Journal of Social Security*.
Isabel Plets	Researcher at the Law Faculty of Ghent University, lawyer at the Brussels Bar (Lydian).
Andrzej Marian Świątkowski	Jean Monnet Professor of European Labour Law and Social Security Law. Jagiellonian University, Krakow, Poland. First Vice-president of the European Committee of Social Rights, Council of Europe, Strasbourg.

Summary of Contents

Chapter 2

The Various Categories of Persons Performing Work Personally

Frans Pennings

1. INTRODUCTION

The limitation of the protection by labour law and social security law of employed persons has been under discussion since the creation of labour law.

It was argued that the newly created discipline of labour law was simply unable to cover all working relationships, and therefore had to focus on the employment relationship. Sometimes the need of employers for flexible workers is also mentioned as a reason for the limitation in protection of persons performing work personally.

In many, if not all countries, persons can be found who perform work without a contract of employment, even though they depend to a large extent on one or only a few work providers for work and income. These workers are often not given a contract of employment, since this type of contract is much more expensive and/or causes more responsibilities for the work provider than engaging them under a civil or commercial contract. No matter what the reason is for not giving them a contract of employment, these workers are in most legal systems not protected by labour law. However, these workers are often just as dependent for income and work on their work provider(s) as employees. Also in respect of income risks following from accidents at work and diseases, they are often as dependent as employed persons.

Frans Pennings & Claire Bosse, *The Protection of Working Relationships*, pp. 5–14.

In this book we will use the terms 'those having a contract of employment', 'employees', 'employed persons' and 'persons working in an employment relationship' interchangeably. Persons who perform work personally are called 'workers'; this is an umbrella term for both persons under a contract of employment and persons not having a contract of employment who perform their work personally.

In some countries social security compensates for the lack of protection by labour law. Certain categories of workers are brought within the scope of disability schemes or old age pension schemes. This does not take away the main problem, which is that workers without an employment contract are often in a position worse than that of employees. To say it in other words: only persons with a formal employment contract have access to the 'buildings' of labour law and social security law.

The categories of workers who fall outside the scope of labour law keep changing through time. In response, countries take measures to provide protection for the new category of workers; the following chapters will give several examples. Work providers, however, soon find new ways to escape the rules of labour law. This is even easier since legislative measures are often ambiguous in their elaboration: on the one hand they are meant to avoid erosion of labour law, on the other they are not too strict to allow employers to remain competitive.

2. THE DIFFERENT CATEGORIES OF PERSONS PERFORMING WORK

In this book we will distinguish the following categories of persons performing work:

- employed persons;
- dependent workers without a contract of employment;
- bogus self-employed;
- 'genuine' self-employed.

2.1. Employed Persons

Employed persons are persons having a contract of employment. The contract of employment is defined by national labour law; there is no EU or international definition. However, the main criteria which national legislations and case law use, in any case in Western countries, are quite similar, as appears from the studies undertaken so far (see section 3). Broadly speaking, under a contract of employment a person is obliged to perform work personally in return for wages under the supervision of another person.

Questions arise, however, especially in borderline situations: when can it be said that a person works in supervision for someone else? How to define exactly that work is to be done personally? When is remuneration considered as wages?

As a result of the application and/or interpretation of these criteria, there is also a group of persons performing work personally, who do not have a contract of employment. We will discuss this category below.

Also some categories of persons with a contract of employment may be excluded from part of, or from all, labour law and/or social security law. This may be on the ground that they have a contract for a definite period, a low income or small number of working hours. It is also possible that persons are excluded because they have a high income or a special position (e.g., director of a company). However, the first categories are the problematic ones since persons in the high income group can provide for their own solutions in case of problems, whereas this is much more difficult for those in marginal employment. Because of their vulnerable position these marginal workers are also mentioned as part of the problem of the limited scope of labour law.

2.2. Workers without a Contract of Employment

The category of persons performing personal work without a contract of employment includes several categories. These persons often have a contract of services or of civil law, which is denied the status of contract of employment. Sometimes they do not have a contract in writing. The extent of the group workers without a contract of employment may vary considerably from country to country and the group as such consists of many subcategories.

If these workers wish to claim labour law protection and argue that, despite the title of the contract, they are employed persons, several problems arise. One problem is that of persons whose relationship with their work provider is uncertain. Do they have to do the work personally and under supervision of the work provider? Traditional examples are persons who are asked only to do work when work is available (on-call workers) and home workers. Another type of problem occurs if it is clear that a particular criterion for a contract of employment is, strictly speaking, not satisfied. An example is that of persons who work for a work provider, but who are paid directly by the customers. Another example is that of persons who are supervised by a person other than the person who pays the wage.[1] A more recent example of this category is that of temporary agency workers. In the case of temporary agency workers, it can be said that they are not working in a supervision relation for the user company and that this company is therefore not their employer. It can also be said that these workers are not working for the agency itself. Therefore, it is argued that they do not have a contract of employment. In the case of freelancers it can also be said that they are not working under the supervision of their user company. That company does not decide on the times of the day they

1. In some countries the national legislation has found a solution by defining that such persons should have a contract of employment too or in the case law a broad interpretation of the criterion is accepted. That does not take away that such uncertainties have, in general, lead to the distinction of the various categories of workers.

work and whether they are assisted by others. Moreover, it is possible that they have more than one principal. There can also be a dispute on whether they are obliged to actually perform work in case they are called to do so. For this reason in the situation of freelancers there can be several reasons to argue that they do not have a contract of employment. In some situations, however, it is assumed that they have a contract of employment.

In some countries it is defined by an Act or decided in case law that one or more of these categories of persons still have a contract of employment. It is also possible that they are treated as specific categories and that the Act provides that part of the labour law applies to them. A common example concerns the health and safety rules. Sometimes they are even protected by collective agreements. Still, if they do not have a contract of employment, the major part of labour law does not apply to them.

2.3. The Bogus Self-employed

A third category is that of the bogus self-employed. These persons differ from the other categories in that they are called self-employed and treated in this way by the work provider. In fact, however, they are wholly dependent on the work provider and their position is not different from that of employed persons. Some of the bogus self-employed accepted this position out of free will, as they expect a higher net income and more freedom than workers. Others were forced to accept this position by the employer by whom they were previously employed, since it is cheaper for the latter to engage these workers in a self-employment relationship.

The bogus self-employed are mentioned here as a separate category, even though one may argue that they are subcategories of the two previous ones. However, they are different from the other two since they have formally an independent position, and therefore the legal approach is different than in the case of the other two categories.

2.4. The Genuine Self-employed

The fourth category is that of the genuine self-employed: persons working on their own account for several work providers. Among this category there may be many subcategories, varying from persons with a weak economic position to those who have been able to protect themselves against the risks and uncertainties of their position.

A recent development is the rapid growth of workers who are self-employed but do not have staff. In other words, they do all the work themselves. Often their position is very similar to workers and they are in an economically dependent position. If they have more than one work provider and equipment of their own they are genuine self-employed; however, their economic situation also closely resembles that of workers and the question arises whether they need some

protection. There are also self-employed who have chosen their new status out of their own free will, as this gives them a higher net income and more freedom and they do not need further protection. These different groups of self-employed make the analysis more complicated.

The real self-employed are as such not the subject of our research, as this is limited to the protection of persons who work for work providers on whom they are dependent. Still this category is mentioned here because of the problem of delineating the various categories.

3. PROPOSALS FOR DISTINGUISHING THE VARIOUS CATEGORIES

It is often difficult to distinguish employed persons and workers, since the criteria for the contract of employment are subject to large margins of interpretation. A university professor, for instance, often has the freedom to decide what research project he[2] undertakes and with whom. He also decides whether he travels to a conference or not and whether he gives advice or does consultancy work for third parties, etc. He is in many respects a self-employed person with a salary.

In many other professions we can nowadays also find examples of highly skilled or educated persons who have a large freedom to perform their work, including medical doctors, lawyers, managers and persons who nurse others at home.

Below I will discuss some of the analyses which have so far been made in the literature. Inevitably, this description is far from exhaustive. The contract of employment is, of course, the basis of labour law and therefore there are numerous publications on this issue. The proposals selected here are those we considered the most fruitful in discussions on extending the protection by the contract of employment. In our conclusions, made in the last Chapter, we will come back to these proposals.

3.1. The Framework Elaborated by Mark Freedland

An interesting framework for looking at the personal work relationships was developed by Mark Freedland.[3] Although he does not give (nor does he intend to do so) new criteria for distinguishing the various categories, his analysis encourages us to look from new angles at the various relationships under which work is done.

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2. For the purpose of making the text more readable, the personal pronouns he and him also refer to she and her, where appropriate.
3. M. Freedland, 'From the Contract of Employment to the Personal Work Nexus', *Industrial Law Journal* 1 (2006), 1. See also, from the same author, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003).

Freeland argues that in the realm of personal work contracts, there is an enormous variety of factual patterns of work arrangements. This means that there may be large variations in the rights and duties that are connected with a particular personal work contract. He therefore suggests that employment relationships must be considered from five dimensions:

(i) that of the worker;
(ii) that of the employing enterprise;
(iii) that of the duration and continuity;
(iv) that of personality and substitutability; and
(v) that of purpose and motivation.

The dimensions are relevant in respect of all types of working relationships, but they are useful to identify the classification problems which occur in relation to a specific type of working relationship and to compare them with types of employment relationships.

The fourth dimension, for instance, of personality and substitutability (iv), is particularly relevant in the case of on-call workers, since in their situation it is disputed whether they really have to do the work personally or can be substituted by another worker. By placing this question in the personality dimension, and comparing it to other types of contract, we have to notice that in employment relationships, work is not always done in the modality of subordination or autonomy of the worker either. Instead there can be a variety of purposes and modalities. Training contracts, apprenticeships, and contracts for writing a PhD at a university are examples of contracts where personal autonomy may be large.[4] This is also true for our example of the university professor.

In this way also the dimension of duration and continuity (iii) may be relevant, particularly in the case of on-call workers and casual workers. In case of temporary work agencies, for instance, the disputed facts lie, in particular, in the dimension of the employing enterprise (ii).

Although the framework is made for analysis and not as a decision model, we can use it as a way to broaden the interpretation of the criteria. For instance, the purpose of a particular working relationship, for example, of writing a PhD thesis, may be to increase the expertise of the person concerned and to add to the increase of knowledge. In this case doubts on whether this person works in all respects in subordination to another person should not – given this particular objective of the contract – be the decisive criterion for whether it is a contract of employment or not. The other dimensions should be more relevant.

Another way of using the dimension approach may be to establish more variations between the working relationships. For instance, fixed-term contracts may as well occur in the form of a contract of employment as in the form of an independent personal services contract. If, from this point of view, these contracts

4. M. Freedland, 'From the Contract of Employment to the Personal Work Nexus', *Industrial Law Journal* 35, no. 1 (2006), 12.

have elements in common (e.g., the uncertainty of work at the end of the contract) the law may treat these forms of contract in the same way.

These dimensions are thus not criteria to be fulfilled, but elements which may be useful to address in a factual situation.

Thus, Freedland does not give the ultimate criteria to distinguish the various categories of work relationship, but his analysis is useful to show that when analysing a particular work relationship we have to consider the various dimensions and take these into account in our description. It does, at the moment, not lead to clear cut solutions but it may be a sound basis for further research.

3.2. The Supiot Report

A study more aimed at analysing the existing working relationships was undertaken by Alain Supiot. Supiot was commissioned with a study for the European Commission on this topic, and this led to a book in collaboration with several labour law experts.[5]

Supiot argued that workers in traditional employment relationships nowadays experience greater operational independence. In addition, the appearance of third parties, that is, subcontractors and temporary work agencies, have led to more complex relations between employers and workers. As a result bogus self-employment and a grey area between dependent employment and self-employment may occur. *Supra*, we already mentioned temporary agency workers and home workers; they also fit in this grey area.

These developments mean that the scope of labour law often does not cover all workers who are in a position comparable to that of employees. This was found unjustified and problematic and therefore Supiot made the following proposals:

1. The European Union has to make a Community definition of the notion of employee (p. 219).
2. In addition the power of the courts to reclassify a civil law contract as an employment contract must be upheld. These proposals intend to ensure that the protection available in labour law will indeed be given to persons working *de facto* in an employment relationship (p. 220).
3. The scope of labour law must be expanded to cover all kinds of contracts involving the performance of work for others. Labour law must not be limited to persons working as employees (p. 219).
4. Certain aspects of labour law must be extended to workers who are neither employees nor self-employed. Workers who cannot be regarded as employed persons, but are in a situation of economic dependence

5. Alain Supiot, *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2005). The original report was published in French in 1999, *Au-delà de l'emploi* (Paris: Flammarion, 1999).

> *vis-à-vis* a principal, should be able to benefit from the social rights to which this dependence entitles them (p. 220).

3.3. The Perulli Report

Another interesting report is by Adalberto Perulli,[6] who was also commissioned by the European Commission to make a study of working relationships. Perulli studied the labour markets of several European countries from the point of view of protection of the economically dependent workers.

He concluded that the following indicators are used in Member States to establish the condition of economic dependency: a person performs mainly personal work; there is continuity in time; the work performance is coordinated with the activity of the client; he performs work mainly for one single client (mono-commitment), which provides a major source of the worker's income.

By and large, Perulli argued, the European countries under study identify self-employment through 'inverse' categorisation, that is, by ascertaining that certain work does not have the characteristics of subordinate work. In other words, what is not considered as subordinate work is self-employment. As a consequence, self-employment does not constitute a general and a unitary category, but a theoretical abstraction which includes multiple and fragmented judicial regimes. It is a complex and diversified phenomenon. He concluded that self-employment is a concept that comprises a growing number of different types of work and legal regimes regulating them. Therefore, it would be a methodological error, he argued, to start from the presupposition that self-employment is a compact and unitary category which can be contrasted with subordinate work.

Perulli added that bogus self-employment is conceptually different from economically dependent work. Bogus self-employed are workers who are treated as self-employed, but who, from the legal perspective, clearly fall within the category of subordinate employment. These two phenomena require different responses from the legal system. The first requires interpretation (or up-dating) of the criteria used for defining subordinate work whereas the second concerns the application of legislation in force.

He also discussed the grey zone between self-employment and subordinate work. New forms of work organisation have been developed such as outsourcing and contracting out. This development led to the emergence of economically dependent work which represents a form of work falling within a grey zone between dependent work and self-employment. This grey zone has, according to Perulli, two different characteristics:

(1) There are forms of work having characteristics of both subordinate work and self-employment and therefore cannot easily be fitted into the binary model (in other words, it is an uncertain status).

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6. Adalberto Perulli, *Study on Economically Dependent Work/Parasubordinate (Quasi-subordinate) Work* (Brussels: European Commission, 2002).

(2) In addition there is bogus self-employment. This is a form of subordinate employment disguised as self-employment.

In his report Perulli developed the following scenarios:

(1) One is to maintain the status quo. For instance, the general contractual principles of civil law and in particular the general clause on good faith and correctness can be applied to economically dependent workers. According to Perulli, however, this is a weak way of ensuring protection. Maintaining status quo leaves economically dependent workers at the mercy of market forces.
(2) A second scenario is to create a new type of work (a new legal category) in-between subordinate work and self-employment. Certain forms of protection would be extended through legislation and/or case law to cover this new type of work. According to Perulli this option should be avoided, for it would create new legal problems related to the qualification of a relationship in one of the categories.
(3) A third suggestion is to redefine (enlarge) the notion of subordinate work: to up-date the notion of subordinate work (by adding other criteria for subordination), so that the notion corresponds with the changed socio-economic context. The objective of this option would be to impede the diffusion of 'apparent autonomy' and to support 'real autonomy'. This solution, however, is not widely supported. Furthermore, the enlargement of the definition of subordinate work could result in the excessive expansion of the notion of the subordination.
(4) A fourth scenario is to create a 'hard core' of social rights which are applicable to all work contracts irrespective of their formal qualification in terms of autonomy (self-employment) or subordination.

4. CONCLUSIONS

The previous sections described that, as a result of changing labour market needs, new forms of work were created which are often not covered by labour law. I made a distinction between the categories involved and discussed solutions suggested in recent studies and reports.

From the categorisation of work relationships and the studies mentioned, we can conclude that there are several topics for study:

– the interpretation of the criteria for the contract of employment are often unclear and/or not adjusted to new forms of work; as a result persons in a similar position as employed persons are not given the protection by labour law;
– there are persons who are treated as self-employed and have a contract to that effect, but their position fits with all the criteria of the contract of employment;

– there are persons in an economical dependent position who cannot be brought under the criteria of the contract of employment, even with a broad interpretation of these criteria, most often on the ground that they have more than one principal.

It is important to keep these distinctions in mind, as the legal position of the distinguished categories varies to a large extent. Also the measures which can be taken to improve their position may be very different. Finally, there may also be differences in political support for extending labour law protection depending on the category concerned.

The proposals suggested were:

– To make a Community definition of the notion of employee and to support the power of the courts to reclassify a civil law contract as an employment contract if the person concerned is working de facto in an employment relationship.
– To expand the scope of labour law to cover all kinds of contracts involving the performance of work for others.
– Certain aspects of labour law must be extended to workers who are neither employees nor self-employed. Workers who cannot be regarded as employed persons but are in a situation of economic dependence *vis-à-vis* a principal should be able to benefit from the social rights to which this dependence entitles them.
– To redefine (enlarge) the notion of subordinate work, (by adding other criteria for subordination), so that the notion corresponds with the changed socio-economic context.
– To create a 'hard core' of social rights which are applicable to all work contracts irrespective of their formal qualification in terms of autonomy (self-employment) or subordination.

In the following Chapters we will first discuss the actions taken by the International Labour Organisation and the EU. Then the actual developments in several EU countries are analysed in order to determine whether the proposals which were suggested were implemented in one way or another and also to determine whether in the national context there are additional developments which can contribute to the objective of clarifying the scope of the contract of employment and possibly extending the protection by labour law.