DIFFERENT TYPES OF CONTRACTS IN DUTCH EMPLOYMENT LAW*

Nicola Gundt**
Maastricht University, The Netherlands

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RESUMEN

Esta aportación trata sobre la utilización del derecho de obligaciones y contratos en el Derecho holandés del Trabajo. Desde su aparición tras la revolución industrial, el Derecho del Trabajo se ha debatido entre la libertad de empresa y la ordenación de las relaciones de trabajo atendiendo a la protección de los trabajadores económicamente dependientes. A este respecto, el artículo aborda las posibilidades del Derecho de obligaciones y contratos y sus límites en el ámbito del Derecho del Trabajo. El punto de partida para este análisis es el contrato de trabajo estándar; a saber, el contrato indefinido a tiempo completo. Aquí, las reglas generales referidas a la autonomía de la voluntad de las partes a la hora de llegar a acuerdos parecen encajar con la obligación legal de protección de los trabajadores. A continuación, se abordan diferentes tipos de contratos no estándar, en los que se detecta un muy diferente equilibrio entre protección y flexibilidad. En tercer lugar, se aborda la figura del convenio colectivo, un pacto contractual de diferente orden pero de importancia primordial en el Derecho contractual del trabajo holandés. En este caso, el artículo se centra en la utilización, fuerza obligatoria y justificación de los pactos colectivos. Finalmente, las conclusiones tienen por objeto ofrecer un conciso resumen de los resultados obtenidos.

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** Assistant Professor Social Law

ABSTRACT

This contribution discusses the use of contract law in Dutch employment law. Since its inception after the industrial revolution, employment law has been torn between freedom to run a business and to arrange the employment relations according to that need on the one hand and the protection of the economically dependent employee on the other hand. Therefore, the paper focusses on the possibilities of contract law as well as its limits. The starting point of the analysis will be the standard employment contract, meaning the permanent, full-time position. Here, the general rules concerning freedom to make arrangements as one deems fit and the mandatory protection by law, can already be seen clearly. Afterwards, different types of non-standard contracts will be discussed. There, the balance between flexibility and protection is very different, and the question then is, why this should be possible. In the third place, the collective agreement will be discussed. It is a contractual arrangement of a quite different order, but of paramount importance in Dutch employment contract law. Here, the contribution will focus on the use, binding force and justification of collective agreements. Finally, the conclusion aims at offering a concise summary of the findings.

Palabras clave: libertad de contratación, flexibilidad, protección

Key words: contractual freedom, flexibility, protection

INTRODUCTION

This paper deals with different types of employment contracts in Dutch employment contract law, including triangular employment relations and collective agreements. This means that the public law aspects of Dutch employment law will not be discussed, even though they offer vital protection.[1] The contribution aims not only at describing the different types of contracts, but will also elaborate on some of the more intricate issues of employment contract law like (unilateral) modification of contracts, specific clauses and some of the more contractual aspects of the law regarding the termination of contracts.

The standard contract of employment will be the starting point of the analysis. There, the main elements of employment contracts will be discussed, as will be the possibility to (unilaterally) modify the content of the employment contract. Afterwards I will discuss the non-standard forms of employment contracts, including part-time, fixed-term and zero-hours con-tracts as well as agency work and payrolled work. Finally, the role of collective agreements in Dutch employment contract law will have to be addressed. As collective agreements are hier-archically higher norms than individual employment contracts, they can substantially alter individual contracts and therefore need to be discussed. Furthermore, the possibilities to dero-gate from (protective) legal provisions by means of a collective agreement also need to be taken into account when discussing contractual freedoms and their limits in employment law.

Throughout the whole contribution, the tension between contractual freedom as core principle of private law in general and the protection of the employee as core principle of employment (contract) law will be at the centre of attention. Where possible, I will try to show that the legal changes that took effect on July 1st 2015 also reflect this tension. While the law on Flex-ibility and Security from 1999 offered a lot of possibilities to derogate from the law by means of a collective agreement, the new Act on Employment and Security reins in these (collective) contractual freedoms, particularly in sectors where trade unions are weak.

[1] Aspects of public law protection are e.g. working time and working hours (*Arbeidstijdenwet*), minimum wages (*Wet op het minimumloon en minimum vakantiebijslag*) or health and safety regulations (*Wet op de Arbeidsomstandigheden*).

1. THE STANDARD CONTRACT OF EMPLOYMENT

In the Netherlands, the employment contract is a civil law contract, based on mutual agreement between two persons, the employer and the employee stating that the latter will work for and under the direction of the former in exchange for remuneration.[2] In order to be valid, no specific requirements have to be fulfilled, as the employment contract is a consensual contract. Generally speaking, most employment contracts are (at least) confirmed in writing, because the employer is legally obliged to offer this confirmation.[3] However, as there is no sanction on non-compliance with this obligation, in fact, it offers less protection than e.g. the (rebuttable) legal presumption of the existence of an employment contract in article 7:610a BW (*Burgerlijk Wetboek,* Civil code) and the agreed scope of the work in article 7:610b BW.

Notwithstanding the general rule of consensualism, formal requirements often do apply where specific rights or obligations become part of the contract. As they are not part of the core employment contract, many of them need fixation in writing. Some of these clauses will be dis-cussed in more detail below.

1.1: The employment contract

The employment contract is often called the ticket into the world of employment protection. All private and public law employment protection depend in essence on the employment contract.[4] The employee must be at least 16 years of age in order to be able to conclude an employment contract without being represented by his guardian. However, if a minor of below 16 years of age enters into an employment contract and keeps working for at least four weeks, he is deemed to have his guardian's permission to do so and will generally be treated as if he was 16 or older.[5] A contract can, in theory, be invalidated by invoking a defect of consent, but this does not happen a lot.[6] These defects of consent, e.g. error or duress, are invoked regular-ly, however, when it comes to the termination of the contract by mutual agreement.

If an agreement, whether oral or in writing has been concluded that includes the agreement that one party agrees to work under the direction of the other person for a certain period of time in exchange for remuneration, the contract is by law considered an employment contract, regardless of the name the parties give to that agreement. This means that, although the re-quirements for a valid employment contract are few, and generally, both parties are free in their choice of the contents of the contract and the contracting party, once it is established that the contract is indeed an employment contract as defined by art. 7:610 BW, all the private and public law employment regulation will be applicable to the contractual relation.[7]

Obligation to work (personally)

According to the legal definition in article 7:610 BW, the employee has to agree to do work under the direction of the other contracting party. The notion of 'work' is very broad. It can include anything that is of value to the employer.[8] This excludes work that is done within the framework of an education, e.g. an internship, as there, the learning objectives are paramount,[9] but includes periods in which an employee waits for customers or sleeps at the hospital in order to be ready

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[2] Art. 7:610 BW (*Burgerlijk Wetboek,* Civil Code).
[3] Art. 7:655 BW.
[4] This needs to be slightly nuanced e.g. with regard particular groups of small self-employed that may have access to employment protection and sickness insurance.
[5] Art. 7:612 BW.
[6] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridi-sche Uitgevers, Den Haag, 2015,p. 110.
[7] *Arbeidsrecht, Tekst & Commentaar,* Kluwer, Deventer, Art. 7:610 BW aant. 1 (E. Verhulp).
[8] J.M. van Slooten, *Arbeid en Loon*, Kluwer, Deventer 1999, p. 148
[9] HR 29 October 1982, *NJ* 1983/230; HR 28 June 1996, *JAR* 1996/153.

to answer a call.[10] If, due to illness, no work is being done, the employment contract remains intact.[11] However, if neither party had the intention of work being carried out, the contract cannot be qualified as an employment contract.[12]

As the employment contract is a contract *intuitu personae*, the employer has to do the work personally and cannot let someone else do his work without the employer's consent.[13]

Remuneration[14]

The second necessary element of the employment contract is the remuneration. It must come from the employer and must be due in return for the work the employee performed. The re-muneration must amount to at least the statutory minimum wage, but may also be –complete-ly or in part– in kind.[15] For example, if a person caring for elderly in a residential home is offered food and shelter this can be considered remuneration, if there is a connection between the benefits and the work.[16] Tips and other extras that are not offered by the employer but by clients or customers are not part of the contractual remuneration.[17]

For a certain time

This criterion is generally thought to be of little use, because, if work is to be done, it will always take time to do that work. However, as will be discussed below, if no clear obligation to offer work or to accept a work offer has been agreed, the contract will not (yet) be consid-ered an employment contract, but rather an 'on-call-contract' or 'zero-hour contract'.[18]

Under the direction of

This last criterion is the most heavily debated one as it is the least clear and the most distinctive one, distinguishing the employee from the person rendering services on the basis of a contract for services.[19] Being under the direction of another person describes the economic dependency of the employee. The employer's right to give instructions, which is the counterweight to the employee's submission to the employer's direction, means that the employer can instruct the employee on formal as well as material aspects of his job. Particularly with highly skilled or specialised employees, the possibility to give formal instructions concerning discipline or health and safety regulations often is the only possibility to establish the link of subordination necessary in the employment relation.[20] The degree to which the employee's work is part of the normal functioning of the enterprise or working place can also be taken into account.

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[10] HR15 March 1991, NJ 1991, 417.
[11] Art. 7:629 BW, but see infra for the specific problems concerning temporary agency workers.
[12] HR 10 October 2003, *JAR* 2003/263. In the case, a married couple, upon divorce made up an agreement titled 'employment contract' under which the (ex)wife was to work for 15 hour a week in an administrative function in her (ex) husband's firm. She had been exempted from the duty to work since the beginning, had never worked and by all means neither party intended that. When the wife claimed employment protection after her ex-husband terminated the contract due to her having found a new partner, the HR decided the contract was not an employ-ment contract, despite the name given to it by the parties.
[13] Art. 7:659 BW.
[14] Art. 7:616-7:633 BW.
[15] See art. 7:617(1) (b)-(e).
[16] HR 12 October 2001, JAR 2001/217.
[17] HR 8 October 1993, JAR 1993/245. Confusingly, tips are included in the definition of the statutory minimum wage, though, see art. 6 WMM *(Wet op het Minimumloon en Minimumvakantiebijslag,* Act on minimum wages).
[18] See section 2.2.
[19] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag, 2015,p. 135-138.
[20] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom juridische Uitgevers Den Haag, 2015, p. 133 with further references, including case law.

Holistic approach:

In case of doubts, the judiciary still applies the rules stemming from a famous ruling of the *Hoge Raad* (Dutch Supreme Court in civil and criminal matters).[21] According to the *Hoge Raad* the starting point of the analysis should be the intention of the parties at the time the contract was concluded and the way the contract was subsequently put into practice. Then, the different elements of the contract, e.g. the way payment is agreed, coverage by social insurance or pension schemes, provisions concerning holiday and leave, exclusiveness of the employment relation and other aspects need to be taken into account when establishing the nature of the contract. It may also be that, even though the contract is quite out of the ordinary, an evident link of subordination exists, which overrules the (material) peculiarities of the contract. Finally, the position of the employee can be of importance. In the Groen/Schoevers case, the "employee" was a self-employed tax advisor and had proposed the way of payment himself. He fully knew what he was doing and it was something he was used to do. On the other hand, a bus driver who was made "associate" by a bus company, even though his employment relation did not change, had no clue what this meant, had agreed to a proposal made to him by the other associates did not fully comprehend the legal construction and therefore, the factual situation remained decisive.[22]

If all criteria are met, the contract will be considered an employment contract and all the employment legislation will be applicable, including e.g. the rules regarding working time, holi-days, minimum wages, health and safety and, of course, termination of the contract. Here, the protective face of employment law can be seen very clearly. If a person agrees to work under the direction of another person in exchange for payment, this person is economically depend-ent on another person and therefore needs to be protected against abuse of that economic su-periority. This also –in the eyes of the legislator– justifies the mandatory protection. It ap-plies, whether parties want it, deem it unnecessary or cumbersome.

1.2: Specific contractual clauses

As said before, employment contracts come into being as soon as consensus exists between two persons about the fact that one of them will be working for and under the direction of the other in exchange for remuneration. No written form is needed, although specific clauses usually necessitate writing, because they change the balance of the rights and duties of the contractual parties, usually to the detriment of the employee.[23] The requirement of the written form therefore serves to make sure the employee realises that something is added to the em-ployment relation, that he incurs extra duties or obligations. Below some of the most frequent-ly used clauses will be described in more detail.

1.2.1: Probationary period

In the Netherlands, it is completely normal that an employment contract (or an applicable collective agreement) contains a probationary period. During this period, employer and employee will be able to test whether the employment relation is likely to be successful, whether the employee fits in the team, is up to the job, whether he likes it etcetera. During the probationary period, both parties to the employment contract may terminate the contract with immediate effect. No justification or reason needs to be given.[24] From July 2015 onwards, the rules on the prohi-

[21] HR 14 November 1997, *JAR* 1997/263 (Groen/Schoevers).
[22] HR 15 December 2006, *JAR* 2007/19 (Van Houdts / BBO International).
[23] See e.g. article 7:652 (2) on the probationary period, article 7:653 (1)(b) on non-competition or art. 7:613 BW on unilateral modification, described below in section 1.2.
[24] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag, 2015,p. 287.

bition of termination because of a certain situation or criterion, like sickness or pregnancy are fully applicable during a probationary period.[25] As the probationary period offers no protection against termination of the employment contract, this period of complete insecurity, according to the legislator, has to be short. In order to protect both parties from long-term insecurity, the absolute limit of the probationary period is fixed at two months. This limit applies to contracts that are concluded for a period of at least two years. In contracts for less than two years, the probationary period is limited to one month, and in contracts for up to six months, it is completely forbidden. The legislator hereby tried to offer some security for employees working on short-term contracts. If the maximum period is overstepped, no conversion will take place. Instead, the whole clause will be held invalid.[26] Because of the great insecurity, no leeway is given to the contracting parties. Mandatory rules are applied in order to protect the weaker party and prevent "employment law light" from emerging for a longer period and thereby establishing itself as more or less normal while in reality it is and should be the exception.

Article 7:652 BW furthermore states that a probationary period has to be equal for both sides, if the employer wishes to be free to test the employee, the employee must be given the same right. Here, once again, it can be seen that employment law aims at protecting the weaker contracting party. This time the chosen mechanism is not just a prohibition. Instead, the law re-quires an equality of arms.

1.2.2: Non-competition clause

Another frequently used clause is the non-competition clause, regulated in article 7:653 BW. This clause is interesting in so far as it creates obligations for the employee after the employment contract is terminated, thereby extending the parties' duties beyond the contractual period. The clause forbids the employee to have a certain job or exercise specific functions, during a certain period and / or in a specific area, in order to protect the employer's business in-terests. If the clause is reasonable and justified but prevents the employee from working law-fully, the former employer will have to offer a compensation, to enable the former employee to provide for his living costs.

Since the recent changes in July 2015, a non-competition clause is only valid in permanent contracts and deemed to be invalid in temporary contracts.[27] However, the employer may in-sert a non-competition clause into a fixed-term contract, if he can substantiate and justify its use by referring to important business interests. This motivation must be provided with the clause itself, in order to enable the employee to check whether the employer really has justi-fied reasons for its use. Here, once again, the legislator shows his concern for a new balance between rights and obligations in atypical contracts. Either an employee constitutes an added value, because the job is so specific that he needs to know the business in depth, in which case he should be given a permanent contract, or the employee's knowledge or manpower is not as important to the enterprise as to justify a restriction of employment possibilities after the contract expired.

1.2.3: Agency clause

A very interesting clause is the so-called agency clause laid down in article 7:691 (2) BW. It allows for immediate termination of the employment contract in case the user terminates the contract of services on which the employee is provided by the agency. This clause is a standard clause in the generally applicable collective agreements for temporary agency workers, and therefore applies to (more or less) all agency workers. The agency contract will be discussed in more detail in paragraph 2.4 below.

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[25] Compare the old article 7:670b (1) BW with the new article 7:670a (2)(b) BW.
[26] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata*, Boom Juridische Uitgevers, Den Haag, 2015,p. 299-302.
[27] Article 7:653 (1) (a) BW.

1.2.4: Modification clause

A fourth clause is the so-called modification clause (*eenzijdig wijzigingsbeding*) laid down in article 7:613 BW. This clause allows the employer to unilaterally modify the employment contract, if he can show an important interest (*zwaarwegend belang*) in the modification. It is generally agreed that mere financial or organisational problems are insufficient.[28] The problems have to be of a nature to justify the use of a contractual competence allowing for a unilateral change of contractual agreements to which both parties agreed.

The unilateral modification is a peculiar clause in (employment) contract law. Not only does it offer great powers to the employer, it also seems to be at odds with general principles of contract law such as mutual agreement and the binding fore of the contract.[29] So, why do em-ployment contracts allow for this unilateral adaptation? One of the reasons is that, originally, the clause was meant to be used in cases of changes to generally applicable rules in the enterprise, such as working schedules, break times, bonus policies and other collectively applicable secondary or tertiary employment and working conditions.[30] Changes to these internal rules might become necessary due to changing production processes, new health and safety regulations or economic interests. In these cases, the employer as businessman needs the possibility to react to external and internal developments. Modifying each and every contract individually would be too tedious and time-consuming to be efficient. The clause thus is a compromise between the binding force of the contract on the one hand and the need to be able to react to external developments without terminating the contract. For employers, it is interesting to reach an agreement regarding the modification with either trade unions or the works council. If he succeeds, his important interest will be presumed to exist and the individual employee will have a difficult time refusing the modification.[31] However, nothing in the law suggests that the clause can only be used in case of collective modifications. On the contrary, an amendment in the Second Chamber of Parliament explicitly laid down that the clause needed to be agreed upon individually[32], which would provoke the question why an individually agreed clause should only be applicable in collective modifications. Still, due to a relatively recent ruling from the Hoge Raad, it seems that the unilateral modification clause is intended mainly for use in situations in which many contracts have to be adapted in the same way.[33] This was, in fact, what had been argued in much of the literature for a while.[34] Considering these details, the clause already seems less odd. It is meant to offer the possibility of adapting many contracts in exactly the same way, therefore, it has to be seen as a compromise solution between the principle of mutual agreement and binding force of contracts and the employer's need to be able to run the enterprise effectively.

1.3. Modification

Generally speaking, with the exception of the unilateral modification clause discussed above, contracts cannot be modified unilaterally, because they are the result of an agreement between two parties and are binding between them as if they were law.[35] However, in labour law one of

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[28] N. Gundt, *Wijziging van de arbeidsovereenkomst: een instrument voor interne flexibiliteit?*, Kluwer, Deventer 2009, p. 55-60

[29] A.F. Bungener, *Het wijzigen van de arbeidsovereenkomst in vermogensrechtelijk perspectief,* Kluwer, Deven-ter 2008, p. 22.

[30] *Kamerstukken II*, 1995/96, 24 615, nr. 3, p. 22

[31] R.M. Beltzer, De schier onontwarbare kluwen van 611, 613 en 248, *AI* 2004/2, p. 32-33.

[32] *Kamerstukken II,* 1996/97, 24 615, nr. 15.

[33] HR 18 March 2011, JAR 2011/108 (Wegener)

[34] See e.g. L.G. Verburg, het beding van artikel 7:613 BW: toepassingsgebied, de relatieve zwaarte van de '613-maatstaf'en het vereiste van schriftelijkheid, ArA 2012/1, p. 31.

[35] A.F. Bungener, *Het wijzigen van de arbeidsovereenkomst in vermogensrechtelijk perspectief,* Kluwer, Deven-ter 2008, p. 22.

the peculiarities is that the contract is supposed to last long and therefore adaptation of the contract to changing requirements or situations in the enterprise might be necessary. Here, the general principle of the binding force of contracts clashes with the specific needs of long-term contracts. One of the main ideas in Dutch labour law seems to be that before termination of the contract is considered, the possibility of modification should be taken into account. This is due to the fact that employer and employee have to behave as good employer and good employee towards each other.[36] This means that the employment contract in the Netherlands is less rigid than e.g. an employment contract concluded under French law. There, the contract is the agreement between the two parties, and whatever the circumstances, this is what both par-ties can demand.[37] Furthermore, in the Netherlands an employment contract is never considered to be self-sufficient, but always has to be considered against the background of the enterprise.[38] In Dutch law, therefore, employment contracts can be adapted to changing circum-stances rather easily. According to the *Hoge Raad,* this obligation to behave as a reasonable employee means that the employee should react in a positive manner if the employer, due to a change of circumstances proposes a reasonable modification of the employment contract. The employee may, however, reject an offer, if acceptation cannot be asked of him due to personal circumstances. The obligation to at least consider the proposal in good faith does not depend on the kind of circumstances.[39] It applies to circumstances that come within the employer's sphere of risk (e.g. change of production methods) as well as to changes that come within the employee's sphere of risk (e.g. partial incapacity necessitating adaptations). Since 1998, the *Hoge Raad* has consistently held this line of reasoning and has refined the reasonableness test.[40] To establish whether a modification based on reasonableness / good faith is possible, the employer has to prove a change of situation in the first place. He has to show a reason why he wants to change the agreement between the two parties. However, according to Dutch case law and literature, this requirement is easily satisfied.[41] Among the reasons for a proposal to modify the contract that have been accepted are the restructuring of the enterprise[42], the fact that the employee's job has changed significantly or that it does not even exist anymore[43], but also the fact that the employee is not (longer) able to fulfil his job.[44] Even changes in leg-islation have been accepted as change of circumstances.[45]

In the second place, the offer concerning the modification has to be reasonable. This requirement refers to formal as well as material requirements. The employer has to consult with the employee and must give him all the information the employee needs, even with regard to secondary consequences like changes in pensions if the employee accepts a job in which he is paid less.[46] Likewise, the employee is obliged to enter into consultations.[47] He cannot just bluntly re-

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[36] This general obligation is laid down in art. 7:611 BW, which aims at transposing the general concept of good faith into employment law (see *Kamerstukken II,* 1993/94, 23 438, nr. 3, p. 15).

[37] N. Gundt, *Wijziging van de arbeidsovereenkomst: een instrument voor interne flexibiliteit?,* Kluwer, Deventer 2009.

[38] In the Netherlands this is referred to as "institutional" theory, see e.g. A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag, 2015, p. 543-544; A.F. Bungener, *Het wijzigen van de arbeidsovereenkomst in vermogensrechtelijk perspectief,* Kluwer, Deventer 2008, p. 191-200.

[39] HR 26 June 1998, *JAR* 1998/199 (Taxi Hofman).

[40] HR 11 July 2008, *JAR* 2008/204 (Stoof/Mammoet).

[41] See e.g. S.F.H. *Jellinghaus, Harmonisatie van arbeidsvoorwaarden: in het bijzonder na een fusie of overname,* Kluwer, Deventer 2003, p. 213; J.M. van Slooten, Arbeid en Loon, Kluwer, Deventer 1999, p. 163.

[42] Hof Arnhem 26 June 2006, *JAR* 2006/239.

[43] Ktr Utrecht 21 April 2004, *JAR* 2004/126.

[44] Ktr Rotterdam, 17 February 2005, *JAR* 2005/91.

[45] Ktr Leiden 9 August 2006, *JAR* 2006/219.

[46] N. Gundt, *Wijziging van de arbeidsovereenkomst: een instrument voor interne flexibiliteit?,* Kluwer, Deventer 2009, p. 49-50, with further references.

[47] Ktr Hilversum, 16 October 2002, *JAR* 2002/282.

fuse, but should actively participate in finding solutions.[48] Concerning the material aspects of the offer, the first important question is, which element of the contract is at stake. If the modification concerns primary elements of the contract, like wages or working time, a modification is deemed reasonable only in extremely rare cases. This is logical, as any modi-fication of primary elements touches the very core of the contractual agreement. Therefore, e.g. changes to the salary generally are deemed unfair,[49] whereas changes relating to bonus systems may be justified by policy changes, the need to save money or different enterprise sales or production priorities.[50] Interestingly, the job itself is not considered to be one of the core elements of the employment contract. Consequentially, modifications to the work the employee does are relatively easy to achieve, as they will be deemed reasonable if certain requirements are met. The most important of these is the requirement that the employer leaves –at least for a certain time– the other elements of the contract as they were. Thus: if the em-ployer wants to change someone's job, because the production processes changed, the person in question is not up to the job or due to sickness has do make adaptations, and he keeps all the other employment conditions, like wages, working hours, schedules, place and the like as the used to be, a change will generally be judged acceptable.[51] Doctrine holds that after a cer-tain time, regression schemes will be reasonable.[52] A final aspect that is taken into account is the sphere of risk. A said before, even though the modification has been triggered by an event that comes within the sphere of risks the employer has to bear, an employee cannot just refuse to cooperate. On the other hand, if the modification is necessary because of changes in the employee's sphere of risk, even more radical changes will be deemed acceptable.[53]

In the third stage, the employee has the possibility to rebut the presumption that he should accept the reasonable modification offer. Personal circumstances can justify the refusal of a reasonable offer. In one of the most famous cases, the *Hoge Raad* accepted that a change of schedule, requiring night shifts and irregular working hours is harder for older workers than for younger ones, indicating that older workers, due to personal circumstances did not have to accept this change.[54]

Another possibility, which might offer even more leeway to the employer, is the insertion of a variation or modification clause as defined in article 7:613 BW into the employment contract (supra). This clause allows for a unilateral modification of the contract. Unlike in e.g. Belgium[55], these clauses are perfectly valid in Dutch employment law, even if they refer to primary employment conditions. However, the employer can only use the clause if two conditions are fulfilled that both figure in the legal provision. In the first place, the employer needs to show an important interest (zwaarwegend belang) concerning the modification. Whether or not this important interest is a stricter criterion than the change of circumstances needed for the bilateral modification according to article 7:611 BW, is a much debated issue. In practice, article 7:613 BW is mainly invoked in situation dealing with collective modifications. In these cases, a legal presumption

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[48] Ktr Heerenveen 27 July 2003, *LJN* AI0483

[49] Ktr Utrecht 5 March 2008, JAR 2008/102; Ktr Rotterdam 28 October 2004, *JAR* 2005/73

[50] Ktr Rotterdam 28 October 2004, JAR 2005/73; Ktr Amsterdam 12 June 2001, *JAR* 2002/48

[51] W.A. Zondag, Wegen en wikken bij het wijzigen van arbeidsvoorwaarden. De betekenis van gezichtspunten in de (lagere) rechtspraak, ArA 2006/3, p. 61; S.F.H. Jellinghaus, *Harmonisatie van arbeidsvoorwaarden: in het bijzonder na een fusie of overname,* Kluwer, Deventer 2003, p. 214; J.M. van Slooten, Arbeid en Loon, Kluwer, Deventer 1999, p. 166.

[52] Y. Konijn, *Cumulatie of exclusiviteit. Een onderzoek naar de invloed van privaatrechtelijke leerstukken op de arbeidsovereenkomst,* Den Haag, Boom Juridische Uitgevers, 1999, p. 281; J.M. van Slooten, *Arbeid en Loon,* Kluwer, Deventer 1999, p. 166; W.A. Zondag, Werktijdverkorting. *Over plaats en functie van een arbeidsmarktinstrument in het arbeidsrecht,* Gouda Quint, Arnhem, 2000, p. 49.

[53] W.A. Zondag, Wegen en wikken bij het wijzigen van arbeidsvoorwaarden. De betekenis van gezichtspunten in de (lagere) rechtspraak, *ArA* 2006/3, p. 49.

[54] HR 28 April 2000, *JAR* 2000/120 (Guitoneau/Midnet Taxi)

[55] See art. 20 and 25 Belgian Law on Employment Contracts (*Arbeidsovereenkomstenwet, AOW*)

concerning the existence of the grave interest can be invoked if the employer reaches an agreement with either the trade union(s) or the works council.[56] In the second place, the decision to modify the contract must be reasonable. This means that the employer must have prepared his decision carefully, have investigated other, maybe less radical changes and offered the employees a period in which they can get used to the new conditions.[57]

To conclude: the modification of an employment contract on the basis of reasonableness offers employers a lot of flexibility, at least if the modification does not concern primary contractual elements. Still, according to the *Hoge Raad*, the modification on the basis of reasonableness is a modification by agreement, not a unilateral modification, as the employee agrees to a reasonable offer whereas the modification on the basis of article 7:613, the modification clause, is a truly unilateral modification. If considered from a purely private law perspective, the whole paragraph must seem slightly odd. However, in employment contracts, being intuit personae and permanent in character, it might be useful to offers some flexibility in order to save the contractual relation.

1.4: Termination

As can be seen, Dutch employment law offers many possibilities to keep the employment relation intact by adapting the contract. This flexibility may make the termination of contracts less urgent in cases where the work does not disappear but merely changes in content or scope or is moved to a different location. However, there are situations in which one of the parties decides to terminate the employment contract. Due to the possibly harsh consequences con-cerning income, security and self-esteem, however, the termination of employment contracts is strictly regulated. The main protective measure is that the employment contract can only be terminated in the ways described in the law. Here, contractual freedom is completely set aside in order to protect the economically dependent employee. Secondly, the employer cannot, by his will alone, terminate the contract. He needs the acceptance of either the employee or (de-pending on the reason given) an administrative authority or the district judge. If this prior consent is lacking, the termination is null and void if the employee claims the nullity within two months.

By contract

In the first place, the employment contract can be terminated by contract.[58] This possibility is the easiest as the termination contract offers a lot of freedom concerning its content. Because of the contractual nature of the “rupture” the rules of dismissal do not apply, as, technically speaking, the rupture is not a dismissal. This contract must be in writing. Since July 2015, the employee has the right to dissolve the contract within 14 days of the contract being concluded. He does not need to give reasons for this, and any clause that is meant to limit this right is invalid as of law.[59] As this right to dissolve the contract of termination is brand new, it is not yet clear how this new possibility for the employee to dissolve a contract will affect the general use of contracts as a means to terminate employment relationships. It is possible that this new requirement leads to a drop in termination contracts, but already now doctrine discusses the possibility of concluding the first contract merely to have it dissolved and thus to create legal certainty for a second contract of termination.[60] One of the reasons to keep using this form of termination is that, technically speaking, it is a contract, not a dismissal and therefore the rules concerning dismissal, like the limited number of reasons, the periods of notice or the duty to pay compensation (infra) will not apply.

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[56] *Kamerstukken II* 1996/97, 24 615 nr. 10; nr. 28, p. 34; *Kamerstukken I* 1997/98, 24 615, nr. 81a, p. 9

[57] N. Gundt, *Wijziging van de arbeidsovereenkomst: een instrument voor interne flexibiliteit?*, Kluwer, Deventer 2009, p. 61.

[58] Article 7:670b BW.

[59] Article 7:670b (6) BW.

[60] L.G. Verburg, Schikken in het nieuwe ontslagrecht: bedenkt eer ge begint, *ArA* 2014/2, p. 23.

By accepting the offer of termination

A second possibility, which is completely new, is the employee's written acceptation of the dismissal by the employer.[61] It has already been made clear that this acceptation will not lead to a loss of unemployment benefits, as long as the reason for the employer to propose the termination is not an urgent reason justifying summary dismissal. Just as described above with regard to the contractual termination, in the case of accepting a dismissal the employee has 14 days to withdraw his acceptance, in which case the employment contract will not be terminated.[62] However, as this is a dismissal, all the rules applicable to dismissals, e.g. periods of notice, the requirement to show one of the reasons for dismissal, the prohibitions and the obligation to pay the statutory compensation (infra) will be applicable.[63] At the moment, doctrine is rather at loss as to the practical use of this provision.[64] It is generally deemed unnecessary and hard to distinguish from a contract or uncontested termination by the employer.

Unilateral dismissal

The unilateral dismissal procedure in the Netherlands is, even after the recent changes, quite unique. Unlike in all other countries that I know of, the Dutch employer does not have the right to terminate the contract without prior consent of the employee (art. 7:671 BW supra), an administrative authority (*Uitvoeringsinstituut Werknemerverzekeringen,* UWV) or the district judge. This is known as the general prohibition of dismissal.[65] Whether the prior consent has to be given by the UWV or the district judge, depends on the reason for the dismissal.[66] Dismissals for economic reasons and dismissals after an illness of more than 104 weeks will be dealt with by the UWV, all other dismissals will come before the district judge.[67] The UWV and the judge will both first assess whether the employer can prove the existence of the reason for termination and then will try to assess whether reassignment of the employee within the enterprise is possible. The employer will have to offer retraining facilities if these are necessary in order for the employee to redeploy. One of the most interesting questions will be the period of time which the retraining for the new job may take. So far, it seems that retraining that can be done within the period of notice that would apply in case of termination, is definitely a reasonable period.[68] Concerning the possible reasons for dismissal, the law now contains a limited number of reasons, enumerated in article 7:669 (3) BW. One of these reasons has to be proved, in order to be able to dismiss the employee, otherwise the UWV will refuse its permission, and the judge will not dissolve the contract.[69]

In specific situations, dismissal is prohibited, during a certain period, e.g. the first two years of sickness / incapability to work, pregnancy or membership in a works council[70] and because of certain characteristics of the employee, e.g. being a trade union member.[71] Under the new

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[61] Article 7:671 BW.
[62] Article 7:671 (2) BW.
[63] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag, 2015,p. 654.
[64] E.M. Hogeveen, De opzegging met instemming, de beëindigingsovereenkomst en de bedenktermijn: nieuwe wegen vol valkuilen, AR 2015/48; P. Hufman, J.H. Bennaars, De opzegging met instemming of toestemming, in: L.G. Verburg e.a. Wetsvoorstel Werk en Zekerheid, *Commentaar en aanbevelingen werkgroep ontslagrecht VvA,* Kluwer, Deventer 2014, p. 71-72.
[65] This *"algemeen opzegverbod"*, derives from German occupation rules during WWII and could, until July, be found in article 6 BBA.
[66] Before July 1st 2015, the employer had the choice of procedure. For a comprehensive analysis see D.M.A. Bij de Vaate, *Bijzonder ontslagprocesrecht,* Kluwer, Deventer, 2015.
[67] Article 7:669 (3) BW jo 7:671a BW and 7:671b BW.
[68] Article 10 (1) Decree on dismissal (Ontslagregeling).
[69] R.A.A.Duk, Art. 7:669 Wetsvoorstel Werk en Zekerheid: de rechter als bureaucraat, TRA 2014/26
[70] See e.g. art. 7:670a (1)-(4) and (10) BW.
[71] This differentiation between the so-called "during" (*tijdens*) and the so-called "because" (*wegens*) reasons is important for the answer to the question whether the employment relation can be terminated at all.

law, it becomes virtually impossible to dismiss a sick employee during the first two years of sickness. The legislator made this conscious choice, because he considers re-integration of employees to be the employer's responsibility. Here, it can be seen that sometimes policy choices may have effects on very different issues. Employers are given extra responsibilities and therefore rules must be made to ensure that the responsibilities are taken. And therefore, due to mandatory rules that apply, less room is given to contractual arrangements.

Concerning the selection criteria for dismissal, an employer alone does not enjoy any freedom to derogate from the selection criteria specified by secondary legislation. The general principle is that the dismissals have to be spread pro rata amongst all age groups, and in each age group, those with the lowest seniority have to leave first.[72] However, it is possible to derogate from these rules by collective agreement. In a first option, the employer may reserve the option of exempting 10% of those to be dismissed according to the age group and seniority rules from dismissal and instead select employees on the basis of the quality of their work, their capacities and future prospects. However, if he wants to use that option, he must have a general policy concerning quality assessment and training facilities and these policies and options as well as the possible consequences of getting a bad evaluation have to be communicated to the employees in advance. The second possibility is a collective agreement which completely derogates from the rules, but in that case, the trade unions have to meet extra requirements in order to guarantee and the employer has to install and maintain an independent body that examines the dismissals[73].

Finally, the employer has to respect the period of notice, which is reduced by the time that was needed for the prior authorization procedure. Still, at least one month of notice has to remain[74]. This last requirement has been strengthened in order to facilitate transition from one job to another.

Transitory compensation

An interesting aspect of the new law on termination is that even in case of a lawful dismissal, the employer must compensate the employee for this lawful action. According to article 7:673 BW, the employee who completed at least 24 months of employment with his employer, is entitled to a compensation, officially labelled "transitory compensation". It is intended to help employees to find a new job after the old one finished, to pay for training or a move, but also intends to compensate the loss of the job.[75]

Considering this obligation from a purely contractual perspective, it seems somewhat out of place. After all, the contract has ended, all laws and regulations have been adhered to and thus the obligations of the contracting parties come to an end. Still, the employee is offered com-pensation. Why there should be compensation in case of a lawful dismissal, does not become clear from the Parliamentary History. It seems that in employment law, due to its personal and long-term nature, a certain duty of care is expected even after the contract has finished. One of the reasons for this (supposed) need for compensation may be that the employee has, by doing the work, also offered himself as a person, as the person and the work are inseparable. This view might explain the possibility of deduction of (re)training costs from the compensation.[76] An employer who, during the employment relation, makes sure that the employees' skills are up to scratch, offers these employees better perspectives on the labour market. As this is part of what

[72] Article 11 Decree on dismissal, (Ontslagregeling: *Stcrt* 2015 nr. 12685).
[73] See paragraph 3 below for the discussion of the rules concerning collective agreements.
[74] Article 7:672 BW.
[75] *Kamerstukken II*, 2013/14, 33 818, nr. 4, p. 10-11.
[76] Decree on subtracting costs made for retraining (*Besluit voorwaarden in mindering brengen kosten op transitievergoeding,* Stb. 2015/171).

the transitory compensation wants to achieve, it seems logical that the employer will not have to pay doubly. However, it remains puzzling that the duty to compensate the employee for the lawful termination of the employment contract has been introduced with so little fundamental discussion concerning its nature and logical basis.

2. NON-STANDARD CONTRACTS OF EMPLOYMENT

In addition to the standard contract of employment, describing a full-time and permanent employment relation with one contracting party, several other types of employment contracts exist. Non-standard contracts differ from standard contracts in so far as they generally lack some of the protective measures, which is traded for greater flexibility concerning working hours, working time or termination. The most frequently used types of non-standard contracts are part-time contracts, including zero-hours and min-max-contracts, fixed-term contracts and agency work, including payrolling.[77]

2.1 Part-time contracts

In the Netherlands, part-time contracts are a widespread phenomenon, and as such are generally accepted. Since December 2001, employees who have been with their employer for at least one year, even have the statutory right to ask for a reduction (or increase) of their working hours.[78] The request must be made at least four month before the planned adaptation takes place and must specify the reduction (or increase) as well as the desired schedule. In principle, the employer has to agree to a request for reduction of working hours and can only refuse in case of grave difficulties such as safety concerns or impossibilities with regard to filling the vacant hours. This means, that in principle, there is a statutory right to work part-time.

Concerning the applicable rules, all mandatory labour law applies to part time contracts. This means that all the aspects discussed earlier concerning requirements for the contract, contents, modification and termination also apply to part-time contracts. The same counts for the public law employment law, like health and safety or minimum wages. However, wages, specifically overtime rates, but also elements of remuneration in kind can lead to problems. How is the 21st working hour of someone working on a 20 hour contract to be remunerated? (Why) Should this be more than the 21st hour of someone working on a 40 hour contract? Unlike many other systems, the Dutch provision on equal treatment in relation to working time is formulated neutrally, in the sense that it does not only protect part-time workers from discrimination, but also offers protection to those in full-time employment. Accordingly, the comparator is not always easy to be found. Furthermore, even though part-time work has become more popular among men in the last 15 years, still much more women than men work part-time. Consequentially, often an action based on discrimination on the grounds of working hours, therefore can also be an action based on indirect discrimination on the ground of sex.[79] The most difficult question proved to be how differences in treatment would have to be reme-dies. According to the discussion in parliament, equal treatment could be reached in at least three ways, and which one was to be used, depended on the type of employment condition that was at stake.[80] The possibilities mentioned are a pro rata approach, identical treatment and any other behaviour that is in accordance with the principles of equal treatment. Unfortunately, the minister did –neither at the time nor later– specify which approach fits which em-ployment condition. However, the Court of Justice of the EU offered some clarification con-cerning the approach in regard of remuneration. After originally

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[77] Furthermore, specific rules apply to the statutory director of a legal person and persons helping in the household.

[78] Act on the adaptation of working hours (*Wet aanpassing arbeidsduur, Stb* 2000/114).

[79] When making the law, the Dutch legislator saw the problem, but did not change the law, *see Kamerstukken II,* 1995/96, 24 498, nr. 3, p. 13.

[80] *Kamerstukken II*, 1995/96, 24 498, nr. 3, p. 8-9.

opting for a formal approach in *Helmig*[81], in *Elsner-Lakeberg*[82] the court adopted a pro-rata approach concerning overtime, meaning that someone working 50% is entitled to overtime payments after half the extra time required by full-time employees before they are paid overtime. On the other hand, a pro rata approach would be nonsensical, if applied in situations where the extra payment is due to the hard conditions of the work, like heat, cold, night shifts etc. These conditions are as hard for part-timers as for full-time employees and therefore have to be fully compensated.[83]

2.2: On-call contracts

A particular form of the part-time contract is the so-called on-call contract. This contract is characterized by the fact that no working hours or schedules have been agreed upon. The employer calls upon the employee only when he needs him. In doctrine, two forms of this type of contract have to be distinguished. In a first form, employer and employee agree on the em-ployment conditions which will apply if the employee accepts an offer to work. However, the employer is not obliged to offer any work and the employee is not obliged to accept an offer. As there is no obligation on either side, this contract is described as a pre-employment con-tract (voorovereenkomst); the employment contract as such only starts when the employer accepts the offer to work.[84] The contract ends at the end of the period for which the employee accepted the offer. Consequently, the "employee" has no right to remuneration and cannot claim sick pay if he falls ill during a period in which the "employer" does not call him up.

The second type of on-call contracts is the so-called contract with delayed realisation (met uitgestelde prestatieplicht). In this case, employer and employee accept certain obligations towards one another. The employer is, in principle, obliged to offer suitable work to the on-call employee, while the latter, in principle, is obliged to accept this offer.[85]

If no working hours have been agreed upon, the contract is called a *zero-hours contract.* The employee then has no security concerning the amount of work that he can expect, and, accordingly has no security concerning the salary he will earn. However, in order to offer some se-curity to employees who in reality are part-time employees rather than flexible workers, art. 7:610b contains a (rebuttable) legal presumption with regard to the amount of hours worked. If the employee has worked for more than three months, the average hours worked during the last three months are presumed to be the contractual working hours. As long as the employer does not rebut this presumption, the employee can claim wages for the presumed hours of employment. In the future, claiming wages over these hours will become easier, as one of the core provisions concerning the right to wages, art. 7:628 BW, is changing. Before July 1st 2015, it was possible by collective agreement to exclude the risk of paying wages in case there was no work completely and for an unlimited period of time. This led to a lot of financial insecurity, even in relatively stable flexible employment situations. From July 1st 2015 onwards, therefore, the rules have been changed. It is still possible to exclude the risk to pay wages in case there is no work, but this is limited to a maximum of 6 months.[86] Afterwards, the employer has to bear the wage risk.

Another form of part-time contracts are the so-called *min-max contracts.* They are contracts in which the employer guarantees a minimum of hours of paid employment and has the possibil-ity to call upon the employee up to the maximum. These contracts are a mixture of part-time

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[81] ECJ, 15 December 1994, Case C-399/92 (Helmig).
[82] ECJ, 27 May 2004, Case C-285/02 (Elsner-Lakeberg).
[83] *Kamerstukken II,* 1995/96, 24 498, nr. 3, p. 11.
[84] E. Verhulp, *Flexibele arbeidsrelaties,* Kluwer, Deventer 2002, p. 119.
[85] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag, 2015, p. 180.
[86] There is an exception for jobs that are truly incidental, see art. 7:628 (7) BW.

and on-call contracts and therefore share their characteristics. This also means that an em-ployee working on a min-max contract for 8-32 hours a week, has a right to pay for those 8 hours, but if he can show that the average hours worked is higher than that, he can invoke the legal presumption of art. 7:610b BW. If the claim succeeds, the contractual hours are adjusted accordingly. However, the mere fact that the employer makes use of a min-max contract is an indication of flexible working hours and therefore the employee's case has to be stronger than in the case of a zero-hours contract.[87]

Even though it is perfectly possible to have a permanent zero-hours contract, generally speak-ing, on-call contracts are fixed term contracts. This means that the employees lack an important part of employment protection, being the protection against dismissal as the employment contracts expires as of right at the end of the period that was agreed. It is possible to include a clause in the contract that allows (for both sides) to terminate the contract prema-turely, but in that case the complete law of dismissal, including the necessity for a valid rea-son, the prior consent of employee or UWV, respectively district judge, the need to pay the transitory compensation and the like. Therefore, what happens more often is that the employer does not call up the employee any longer, offering no chance to come working. The employee can then claim wages on the basis of the legal presumption of art. 7:610b BW if necessary. The employer has to pay the wages, but after three months, the relevant reference period will show zero hours of work and therefore zero hours right to wages. A min-max contract or a contract with a presumed average working time can thus be reduced to a zero-hours contract. The contract is not officially terminated, but has become an empty shell. In practice, therefore, it could be argued that another way of ending the employment relation, at least factually, as arisen.

2.3: Fixed-term contracts

Another form of flexible employment has already been mentioned above. Fixed-term contracts are contracts that expire at a given date or upon completion of a specific project. They are thought flexible, because they do not offer the employee protection against dismissal. However, Directive 99/70 obliges the Dutch legislator to prevent the abuse of consecutive fixed-term contracts. To this end, article 7:668a BW limits the parties' possibilities to con-clude successive fixed-term contracts. Until July 2015 chains of fixed-term contracts could consist of a maximum of three contracts within 36 months. If one of these limits was over-stepped, the contract by law became a permanent one. Compared to other EU countries, these rules are already quite lenient. However, some employers obviously think, they are not lenient enough and look for ways around them.

A common form of circumvention became the so-called revolving door construction between periods of fixed employment and periods of unemployment benefits. The minimum period of unemployment benefits after three years of work coincided with the minimum break needed between two contracts in order to break the chain. Some employers therefore offered their employees to top up the unemployment benefits and to take them back on fixed-term con-tracts after the three months break.[88] In 2014, an employer tried to get round the employment protection rules of art. 7:668a BW by offering the employee a fourth contract, which had to be a permanent one. So he called the contract permanent, and inserted a clause into the permanent contract, which specified that both parties had agreed to terminate this permanent contract at a given date.[89] The appeal court held this construction to be valid, because termination contracts could

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[87] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag, , 2015 p. 184-185.

[88] Rechtbank Amsterdam, 11 May 2012, ECLI:NL:RBAMS:2012:BW6495.

[89] This is the so-called *vaststellingsovereenkomst,* a contract that allows the parties to set aside mandatory rules in case of a dispute or insecurity concerning the legal situation. It is regulated in article 7:902 BW.

exclude the applicability of legal provisions in order to terminate a legal dispute or to clarify an unclear situation.[90] However, the *Hoge Raad* struck down this ruling and declared the construction invalid. In the present case, there was no dispute concerning the legal situation and neither was the situation unclear. Therefore, as the conditions for applicability were not fulfilled, the general civil law provision of the termination agreement could not be used.[91] For employment law, of course, this ruling was an absolute gift, as otherwise the whole law on termination of contracts would have become obsolete.

As can be seen from these two examples, contractual arrangements in order to circumvent the mandatory employment law protection are common. This, of course, triggered a reaction from the legislator. Like several other provisions that have already been discussed, article 7:668a BW has been significantly changed in July 2015. The maximum limits of fixed-term contracts have been reduced to three contracts in 24 months, and the period that ruptures the chain has been doubled from three to six months.[92] The government hopes that employers will offer permanent positions more quickly. However, doctrine fears that employers will merely exchange one fixed-term employee for another after two years instead of three.[93] This is quite likely, as unlike in many other countries, no objective reason needs to be given for the use of fixed-term contracts, and thus, a lot of permanent work is done by interchangeable fixed-term employees.

Content-wise, fixed-term contracts do not differ much from permanent contracts, but January 1st 2015 saw some interesting changes concerning the possibility to include contractual clauses. Here also, it can be seen that the legislator wants to offer more protection to persons em-ployed on fixed-term contracts and to nudge employers to offer permanent contracts quicker. The result, however, is that the possibilities to agree feely on the contents of the fixed-term contracts have been reduced. Once again, contractual freedom is put aside in order to offer more security. Since January 1st, for example, it is no longer possible to include a trial period in contracts that are concluded for a maximum of six months.[94] Non-competition clauses are generally prohibited in fixed term contracts. If the employer wants to insert a non-competition clause, he needs to justify its use in each particular case.[95]

The main difference between the fixed-term and the standard employment contract is that the former expires as of law, without necessitating any action by one of the parties. In order to offer the employee some security concerning his contractual situation, the new article 7:668 BW since July 1st 2015 contains the obligation of the employer to notify the employee of his intentions concerning prolongation or termination of a fixed-term contract at least one month before the contract expires. This obligation intends to make the employee aware of the fact that he'll need to make arrangements for the future. However, what seems to be happening in practice is that already when they are made up, fixed-term contracts include an explicit clause stating that the employer has no intention of prolonging the fixed-term contract. The first rul-ings on these new techniques hold them to be valid, even though by using them, the aim of the provision is undermined.[96] It will be interesting to see what happens if both parties, in spite of the clause in the contract, keep working together after the contract has finished. So far, there are no clear leads regarding the direction which the case law might take. Fixed-term contracts can be terminated prematurely, if this possibility has been agreed upon by contract or collective agreement, but then the complete protective law of termination applies.[97] This means the employer needs to

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[90] Article 7:902 BW.
[91] HR 9 January 2015, ECLI:NL:HR: 2015:39.
[92] As elsewhere, exceptions by collective agreement are possible, but in comparison to the law before July 2015, the limits are much stricter and better defined.
[93] A.R. Houweling, Wetsvoorstel Werk en zekerheid en de arbeidsovereenkomst voor bepaalde tijd: over het nieuwe jaarcontract van acht maanden, TAP 2014/1, p. 30.
[94] Article 7:652 (4) BW.
[95] Article 7:653 BW.
[96] Ktr. Utrecht, 13 May 2015, ECLI:NL:RBMNE:2015:3201.
[97] Article 7:667 (3) BW.

show one of the reasons for termination, must make sure no prohibitions apply and must get the approval of either the UWV or the district judge. Compensation in the form of the transitory compensation discussed above will be due, if the employment relation has lasted for at least 24 months. Combined with the rules on the maximum chain of fixed-term contracts, these new rules will lead to chains of a maximum of 23 months in order to avoid costs and obligations stemming from contractual relations of more than 24 months.

2.4: Agency work including resolutive conditions

Another non-standard contract of employment that needs to be discussed is the agency contract. This contract is defined in article 7:690 BW. It is the employment contract between the agency and an employee according to which the agency sends the employee to a user firm. The employee works under the factual direction of the user firm, but the contractual links are with the agency. Originally, agency work was meant to facilitate the match between those looking for work and those looking for workers. The agency would play an allocative role, bringing together demand and supply of work. This implies that the agency, not being able to employ the employees it allocates, must be reasonably free in terminating contracts. This has led to what in scholarly discourse sometimes is dubbed 'employment law light' or 'diluted labour law'[98] because of the lack of protection it offers. For example, agency workers can be offered fixed-term contracts during the first 78 weeks in which they are working. Afterwards, a second phase starts, in which during a maximum of 48 months, 6 fixed-term contracts may be offered. Only after that period is also completed, the employee is offered a permanent contract with the agency. This already implies long-term insecurity for the employee. However, the truly problematic clause is the agency clause that has already been mentioned above. This clause, laid down in article 7:691 (2) BW states that the employer –the agency– may terminate the employment contract, if and as soon as the user firm indicates that it does not want to make use of the agency worker any more. Due to the clause, by rupturing the services contract between the agency and the user, the employment contract between the agency and the em-ployee is also terminated. Literature tends to qualify this clause as a resolutive condition.[99] The fact that an unforeseeable act happens, leads to the termination of the employment con-tract as of law. Originally, there were some doubts about the legality of this resolutive clause, but as it fulfils the criteria laid down in case law[100], it is now deemed to be valid. However, the way this resolutive clause is used in agency contracts, leads to bizarre results. The clause, as it is used in the collective agreement on agency work, is meant to allow employers to dodge one of the most fascinating provisions of Dutch labour law, being the obligation to pay sick pay. Article 7:629 BW obliges the employer to pay wages to employees who are sick for up to two years (104 weeks). If the employment contract terminates before the end of that period, the obligation terminates as well.[101] This may well be the one main obstacle to more permanent employment contracts in the Netherlands. Politics now seem to realise this, as a reduction to 52 weeks is discussed again. Still, in order to avoid these wage costs for sick agency workers, the collective agreement for agency work states in article 14 (4) in conjunction with article 53 that employees have to call in sick in case they are unable to work. This report is then deemed to be the user's declaration that he does not want to make use of the employee any more. This, in turn, means that the resolutive clause is fulfilled and the employment contract between the employee and the agency is terminated. Until July 2015, the clause was

[98] J.P.H. Zwemmer, *Pluraliteit van werkgeverschap,* Kluwer, Deventer 2012, p. 95-96,

[99] E. Verhulp, De ondergeschiktheid, het belemmeren en de ziekte van de uitzendkracht, SR 20101/4, p. 104; S.W. Kuip, Uitzendovereenkomst onder ontbindende voorwaarde, *ArbeidsRecht* 1998/10, p. 62; differently: F.B.J. Grapperhaus & M. Jansen: De uitzendovereenkomst, Kluwer, Deventer 1999, p. 25, 34-36.

[100] HR 6 march 1992, *JAR* 1992/10 (Mungra).

[101] There is now a law trying to redress some unwanted side effects, but as this is social security, I will not discuss that law here.

debated, but not thought to be against the law, as the law allowed for a derogation of the prohibition of dismissal during the first 104 weeks of sickness. The new law, however, does no longer allow for this derogation. Whether this means that the clause stating that calling in sick is deemed to have fulfilled a resolutive clause will be contrary to law, is as of yet unsure. Technically speaking, a resolutive clause does not lead to a dismissal, but to a termination as of law. Therefore, the legal prohibitions concerning dismissal are not applicable. Nevertheless, allowing a resolutive clause that states that the condition to be met –the sickness– is actually a reason for which termination is prohibited by law, leaves me with an uneasy feeling of circumvention of legal obligations by the employer even though it may be technically allowed.

2.5: Payrolling

A second form of triangular employment relations that has to be discussed is payrolling. In case of payrolling, an employee is selected by the intended user, but gets a contract with a third party acting as formal employer. The employer then undertakes to offer this employee, chosen by the user, exclusively and permanently to this user. So, unlike in agency work, there is no allocative function of the agency. Therefore, the question is, whether applicability of the agency clause would be justifiable.[102] This may seem an academic debate, but is decisive for the applicability of article 7:690 BW. This legal definition of the agency contract, that triggers applicability of article 7:691 BW and the agency clause, is an obligatory legal definition which cannot be adapted to the parties' intentions.[103] Therefore, whether or not the third party fulfils an allocative function will be decisive for the applicability of not only article 7:690 BW but also 7:691 BW including the agency clause. After all, the fact that the agency merely acted as intermediary between the job and the job seeker and does not offer jobs itself was the main justification for the derogation from many protective legal provisions. With payrolling, where the user not only selects the employee but also demands that this employee is at his permanent and exclusive disposal, while not bearing the juridical and financial risks of being the formal employer, the question really is whether applicability of 'dilated' labour law can be justified. Concerning sick pay, the user will definitely have an advantage, as it will be the formal employer who will have to pay. However, in the contract for services between the user and the payroller, this financial risk can be apportioned according to the parties' preferences. The main advantage of payrolling so far was the relatively easy termination. The user would terminate the services contract, and the formal employer could ask the administrative authori-ty (UWV) to allow termination of the contract, because the job was no longer available. From July 2015 onwards, however, even though no definition of payrolling will be made available, at least the rules on dismissal will be adapted to reality. When deciding whether or not the job of the employee in question really does not exist anymore, instead of the situation in the payroll-enterprise, the situation at the user enterprise will be decisive.[104] This means that in case of dismissal for economic reasons, employees working on a payroll-contract will have to be treated exactly the same as employees working on employment contracts for the user enter-prise.[105]

2.6: Conclusion

Non-standard forms of employment generally show the tension between flexibility and securi-ty; employers' ideas of how labour law should be and the employees' needs for stability in order to be able to combine employment with other responsibilities like care-giving. Both contractual parties and the social partners were offered a lot of leeway to negotiate and fix the level

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[102] See e.g. E.M. Hoogeveen, De inlener en het werkgeverschap, *ArA* 2007/3, p. 10; Y.A.E. van Houte, Uitzen-ding en payrolling: overeenkomst en verschil, ArbeidsRecht 2011, 8/9, p. 10-11.

[103] J.P.H. Zwemmer, *Pluraliteit van werkgeverschap,* Kluwer, Deventer 2012, p. 136.

[104] Paragraph 7 Decree on dismissal (*Ontslagregeling, Stcrt* 2015, nr. 12685).

[105] This trend had already been set by the lower courts, see e.g. Rb. Overijssel 11 March 2014, ECLI:NL:RBOVE:2014:1214; Rb. Leeuwarden 12 October 2012, ECLI:NL:RBLEE:2012:BY0861.

of protection by the 1999 act on Flexibility and Security. This led to a huge surge in the use of flexible contracts, particularly fixed-term and agency contracts. As such, this would not have been a problem, but it became clear quickly, that the balance between rights and duties had been lost. Employees on non-standard contracts were supposed to bear more risks than either fair or desirable, and, more importantly, for longer periods than envisaged. This also meant, that these exceptional contracts became more and more normal and standard. Non-standard contracts became a dead end, leaving employees with poor employment conditions, little or no training and no security, not even after a substantial period of time.

3. COLLECTIVE AGREEMENTS

Collective agreements concluded between one or more employers or employers' associations and one or more trade unions[106] are another very important type of contract in employment law. Its main feature is that it extends its binding force to non-contracting persons on the basis of representation. As this contribution deals with private law, public law instruments like ex-tension of applicability will not be discussed in great detail.

3.1: Parties

Collective agreements must be concluded by one or more employers or employers' associations on the one side and trade unions on the other side. Trade unions and employers' associations must be associations of private law and have full legal personality, meaning that their articles of association have to be confirmed by a notary.[107] Trade union articles of association must also state that the aim of the association is to conclude collective agreements. This re-quirement is meant to protect members of the association. They must be able to know whether membership of the association leads to consequences.

In Dutch employment law, no specific requirements concerning legitimacy and representa-tiveness of trade unions apply. Any association of employees with full legal personality can conclude legally binding collective agreements. The Act on Employment and Security, how-ever, requires two more criteria to be met in case the collective agreement is meant to derogate from the legally binding selection criteria in case of dismissal.[108] These requirements are identical to those in the Act on collective dismissals.[109] In order to lawfully conclude a collec-tive agreement containing different selection criteria for dismissal on economic grounds, the trade union must be active in the sector and must have full legal personality for at least two years. No reason for these extra requirements is given, although it seems that the legislator aims at ensuring a certain representativeness of the trade unions in order to forestall claims of employees that they are bound to unfavourable provisions which have been agreed upon by trade unions (infra). The advisory committee of the Dutch Order of Barristers and Solicitors (Nederlandse Orde van Advocaten) asked for general requirements of representativeness to be included in the law in order to strengthen trade unions and guarantee their independence. The legislator, while accepting the need for strong and independent trade unions, refused to intro-duce general representativeness requirements.[110] Therefore, the general principle of freedom to choose the contracting party remains intact, but is limited by the extra conditions to be ful-filled by the trade union(s) if the agreement is supposed to include private law selection crite-ria for dismissal on economic grounds.

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[106] Article 1 Wcao (Act on collective agreements, *Wet op de collectieve arbeidsovereenkomst*).
[107] Article 2:26-2:30 BW.
[108] Article 7:671a (3) BW
[109] Article 3(3) Act on collective dismissals (*Wet Melding Collectief Ontslag, WMCO*).
[110] *Kamerstukken II,* 2013/14, 33 818 nr. 3, p. 131-132.

3.2 Binding force and applicability

Collective agreements, in the first place, apply to members of the associations which are con-tractual partners to the collective agreement. They are bound by the normative provisions of the collective agreement because of their membership.[111] Dutch doctrine never cared much about the precise legal construction of the binding force, but it seems to be generally agreed that the membership contract with the association in combination with the association's statutory goals is the basis for binding force and applicability. Thus, eventually, the binding force of the collective agreement can be traced back to a contractual relation. The individual becomes a member of the association, and thereby agrees that the association negotiates the em-ployment conditions applicable to the contract. The normative rules in the collective agree-ment take precedence over conflicting rules of the individual contract and fill in lacunas.[112] The collective agreement may enter into force retroactively and may also have effects after the agreement has expired (nawerking). The agreement remains applicable, but the parties' (and their members') freedom to enter into contracts resurfaces.[113]

The binding force of collective agreements with regard to non-union members is harder to establish. If they are employed by an employer who is bound by the collective agreement, the employer is obliged by law to offer the employment conditions from the collective agreement. However, the individual employee may refuse, as his freedom to enter into agreements is not limited in any way.[114] For the employer, this is an undesirable situation, because it may lead to different employment conditions in the enterprise. Therefore, most employers make use of an incorporation clause. This clause is part of the individual employment contract and merely states that the normative provisions (or those that the clause specifies) apply to the employment relation. If the employee accepts, he is contractually bound to the collective agreement, by his contractual acceptation, the rules become applicable.[115] Also in this case, the collective agreement may have retroactive as well as after-effects.

A non-unionised employee who has not agreed to an incorporation clause in the individual employment contract, is not bound by the collective agreement. This employee is completely free to agree to any employment conditions he desires. The only way to apply the collective agreement in spite of a lack of some kind of contractual acceptation is to make the collective agreement generally applicable. However, this is not something the social partners can do by themselves. They need to send a request to the secretary of state for employment and social affairs, who then decides whether or not the collective agreement will be made generally ap-plicable. The decision is of a public law character.[116] Because this decision made by an execu-tive differs from the voluntary acceptation of being bound, the consequences differ as well. The extended collective agreement will be applicable to those not already contractually bound only from the moment of the extension order and will terminate with the expiry of the collec-tive agreement, at the latest after two years. There is no after-effect, except in case of sick-pay.[117] This decision was consciously made, because of concerns about the infringements of contractual freedoms of those not bound by consent.[118]

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[111] Article 9 Wcao.
[112] Articles 12 and 13 Wcao.
[113] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag, 2015 p. 1143-1144.
[114] Article 14 Wcao.
[115] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag, 2015 p. 1127.
[116] See the Act on the extension of applicability of collective agreements (*Wet algemeen verbindend en onverbindend verklaren cao's,* Wet avv)
[117] HR 28 January 1994, *JAR* 1994/47 (Beenen/Vanduhoo)
[118] A.R. Houweling (ed.); G.W. van der Voet, J.H. Even, E. van Vliet, *Arbeidsrechtelijke Themata,* Boom Juridische Uitgevers, Den Haag,2015, p. 1149-1151.

3.3: So-called ¾ obligatory provisions

One of the peculiarities of Dutch collective employment (contract) law are the so-called ¾ obligatory provisions. These are provisions that allow for derogation in peius from the law by collective agreement. They were introduced in greater numbers by the Act on Flexibility and Security in 1999. The rationale behind this kind of provisions is to allow for flexibility where the social partners think this is desirable. The legislator is of the opinion that the necessary protection of the employee is ensured where the trade union is the contracting party. Howev-er, the developments showed that, particularly in sectors with low union density, like agency work, the balance of powers did not materialise.

Some examples of ¾ obligatory provisions are the former article 7:628 (7) BW, article 7:668a (5) BW and article 7:670a (13) BW. They allowed for complete derogation form the legal provisions, leaving even an absolute bottom level of protection to the social partners. Accord-ingly, as can be seen in section 2 of this contribution, atypical forms of employment emerged, in which little protection was granted. Originally, these forms of contracts were thought to be stepping stones towards more secure forms of employment, but, unfortunately, this greater security never materialised. Eventually, the legislator realised this imbalance and tried to re-dress some of the most extreme cases in the Act on Employment and Security. The legislator recognised that flexibility had overreached itself in the sense that flexible forms of employment had not developed into stepping stones towards more permanent employment, but into a dead end of successive fixed-term or agency contracts.[119] Therefore, in some areas ¾ obligatory provisions have been abolished, like the possibility to derogate from the prohibition to terminate the employment contract during the first two years of sickness. In other areas, the possibility to derogate from the law remains, but new absolute floors of minimum protection have been added. Examples are article 7:628 (7) BW, limiting the transfer of wage risks to a maximum of six months and specific, incidental work or article 7:668a (5) BW, limiting the number and period of successive fixed-term contracts. As already mentioned in section 2.3 and 3.1, however, the new act also offers new possibilities in the field of dismissal law. Where the selection criteria in cases of dismissal on economic grounds used to be fixed by law and secondary legislation, the law now allows for criteria to be agreed upon by collective agreement.[120] In order to be eligible as a contracting partner, the trade union has to fulfil the extra requirements described above.

The main problem with the applicability of collective agreements is, of course, the derogations in peius. Members of the trade unions, if employed by an employer who is bound by the agreement, will be bound by these rules. Originally, there was some discussion concerning the applicability of these derogations in peius to employees who had contractually agreed to the applicability of the collective agreement, but the Hoge Raad quickly made clear that derogations can be applied to employees who are not directly but indirectly bound by the collective agreement.[121] The only requirement is that reference is made to the derogation and the underlying collective agreement.

3.4: Conclusion

In the collective sphere, agreement is once again at the core. A collective agreement is applicable if the employee consciously mandated an association to negotiate in his place and to accept the outcome, if the employee agreed individually to the applicability or, and this is the exception, if the agreement is extended for reasons of employment market stability. However, in

[119] *Kamerstukken II*, 2013/13, 33 818 nr. 3, p. 10-11.
[120] Article 7:671a (3) BW.
[121] HR 20 December 2002, *JAR* 2003/19 (Bollemeijer/TPG)

the last case, where general applicability is deemed necessary, concerns for contractual freedoms have led to a restriction in time which is not found in the situations in which ap-plicability of the collective agreement is based on consent.

Concerning the content of collective agreements, the struggle between offering freedom to the social partners and the need to protect the weaker party is clearly visible. Social partners were offered a lot of freedom in 1999 to derogate in peius from protective legal provisions, but eventually, particularly in those areas where trade unions were weak, the legislator took back the responsibility for guaranteeing a minimum floor of protection. However, social partners have been offered greater flexibility in one field as well, on condition that the contracting partners do have a sufficient standing in the negotiations. Therefore, it seems that the gov-ernment wants to enable contractual relations as much as possible, but is prepared to act if the two parties cannot guarantee an equitable balance between rights and duties due to one party's weak position.

4. CONCLUSION:

From the analysis above, it becomes clear that in Dutch employment law, the contract is the most important legal tool. As it presupposes two equal parties which, through negotiations, reach an agreement, employment contract law often is about guaranteeing these prerequisites of equal bargaining positions and equality of arms. This means that employment law contains many mandatory and relatively few supplementary provisions. The core provision is article 7:610 BW, the definition of the employment contract. Once it is clear that a contract fulfils the requirements of this definition, it is, by law an employment contract, and all employment law will apply. Standard employment contracts offer a stable position in the sense that the employee is protected against a sudden dismissal by mandatory provisions of law. In order to be more flexible, employers have recourse to non-standard forms of employment. The most common forms of non-standard employment offer freedom from mandatory provisions re-garding protection from dismissal (fixed-term contracts) or from the duty to offer work and remuneration (on-call contracts). Furthermore triangular employment relations in which the user does not bear the risk of being the formal employer have become fashionable. In these relations, the formal employer has no work to offer, while the material employer simply sev-ers the contract for services with an agency. This leaves the employee with no job protection. As the government realised that non-standard forms of employment became more and more common and long-term, a reaction followed. The contractual freedom which the contracting parties got by not using standard forms of employment became more standardised, offering more protection to the employee. This trend can best be observed when considering the de-velopments considering the legislative reaction to (ab)use of payrolling contracts by making the standard rules on dismissal applicable to payrolling constructions. The latest trend seems to be the replacement of employees by (bogus) self-employed persons. Due to the fact that self-employed are not mandatory members of employment-related social security schemes, they can offer cheaper work, even if this means that they are not insured against risks such as sickness, invalidity of old age. In order to restore fair competition, one of the leading trade unions tried to extend the collective agreement applicable to orchestra replacements to self-employed replacements, but this was thought to be an infringement of non-competition rules by the Court of Justice of the European Union.[122] Furthermore, the legislator suggested compulsory insurance and old-age pensions, but this suggestion, unsurprisingly, has been rejected by self-employed. It seems that the tension employment law on between contractual freedom offering flexibility and mandatory rules offering security will not be solved for a while and that new balances will have to be found.

[122] CJEU 4 December 2014, Case C-413/13 (FNV Kiem).