The Netherlands

Persons without a contract of employment performing work personally

International intensive student seminar European Labour Law 2011

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Section 1: Contract of employment

The employment contract is highly important since this is the so called 'gateway' to protection by the labour code (CC, book 7) and social security protection. Therefore we will first start by determining what is meant by a contract of employment under Dutch law. The definition of the employment contract under Dutch law can be found in the Dutch Civil Code. The definition in this regulation however does not seem to be sufficiently clear. The Dutch Surpreme Court has further defined criteria in various judgements that clarify more the exact scope of the term 'employment contract'. Nevertheless, there still remains a grey zone between contracts of service and contracts of employment. Why there still remains a grey zone and what the different criteria are and how they relate to each other will be discussed in this chapter.

§1.1. Definition

Untill 1907, the employment contract did not exist by law. In the Old Dutch Civil Code, which was introduced in 1838, there were only three provisions set out which were applicable to contracts between servants and employers, nowadays comparable with contracts of service. Therefore, only contracts of services were provided by law. The legal system was based on the freedom of contract-principle and was inspired by the belief that individuals were equal.

However, the urge to protect employees came when industrialization evolved in the Netherlands during the second half of the nineteenth century. During this period of industrialization employees often lived in harsh conditions. This led to a fierce struggle between two who wished to keep te situation the same and those in favour of a better position of the workers. A major stage of this struggle was parliamentary inquirie into child labour. An important stage was the adoption of the 1907 Employment Contracts Act. This development dramatically changed the legal position of employers and their employees.

A major goal of the Employment Contracts Act, implemented in the CC, was to protect the primary goal was to protect subordinated workers against employers, since the latter had a much better bargaining position. The objective of the act was to compensate the workers for their weaker position. The idea behind this goal was that parties to an employment contract cannot be deemed to be equals because of the employee's economic weakness. With economic weakness is meant that the employee has no choice but to accept an employment contract, even when it contains disadvantageous conditions for him, since working is neccessary in order to afford the costs of living.[1] Because of this, protection was realised by law. The Employment Contracts Act was embedded in the Dutch Civil Code and -

[1] R. Knegt, *The Employment Contract as an Exclusionary Device. An Analysis on the Basis of 25 Years of Developments in The Netherlands*, Antwerpen:Intersentia 2008, p. 54-55.

after various amendments and the introduction of the New Dutch Civil Code in 1994 - can nowadays be found in Book 7, title 10 of the Civil Code (*Further: CC*). In this title the terms of determination of an employment contract, the obligation to pay wages, equal treatment, vacation and paid leave are regulated. Of course, the provisions of this title are only applicable if the contract is coined as a contract of employment. The definition of the contract is therefore very important, but the statutory definitions of the employment contract in article 7:610 CC nor the definition of the contract of service in article 7:400 CC define clearly where to draw the line between these two different agreements in borderline issues.

Article 7:610 paragraph 1 CC states that an employment contract is 'an agreement by which one party, the employee, undertakes to perform work during a certain period, in the service of the other party, the employer, in exchange of remuneration'

Before we will discuss the different components of this article, there has to be noted that in cases where there is uncertainty whether or not there is an employment contract, article 7:610a CC could provide some certainty. This article states that there is a presumption of an employment contract if 'an employee has worked for an employer weekly during three successive months or twenty hours per month in exchange of payment.' We will discuss the exact conditions for application of this article in Chapter 4. For now we will discuss article 7:610 CC and the criterion developed by the courts that further define the scope of the employment contract. Article 7:400 CC will be discussed in Chapter 3.

§1.2. Criteria

Following the definition in article 7:610 CC, the main characteristics of the employment contract are *the obligation to perform work*, *during a certain period*, *the obligation the pay wages* and *in the service of* the other party.

Agreement

Before we come to analysing an agreement by the above mentioned criteria, we will first have to determine whether or not an agreement is legally binding. In order to meet the legal requirements of engaging into a legally binding employment contract, the agreement between parties needs to be established by concurrence of wills of the parties and by persons that are capable of acting. Concurrence of wills means that the workoffer made by one party (the employer) has to be clearly accepted by the other party (the employee). The basis of this requirement is laid down in the articles 3:33-37 and 6:217-225 CC.[2]

[2] H.L. Bakels, *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2007, p. 67.

In principle, the employment contract is form free. So parties can make an oral or written contract. However, due to the implementation of a European Directive by article 7:655 CC[3], the employer is obliged to provide the employee with a written statement containing at least particulars such as the names and adresses of both parties, date of commencement of employment, period of time of those services, the position of the employee or the nature of his work, the place where the work is performed, terms of notice, wages, working time, relevant collective agreement and so on.[4]

Obligation to perform work (personally)

The first criterion for a contract of employment is the obligation of the employee to perform work. The scope and nature of the work are not relevant to determination of an employment contract. Work can also be done passively, for example availability services (in bed) in a nursing home. However, internships cannot be coined as employment contracts if they are meant to expand skills and acquire knowledge in the context of a certain education.[5] In the Beurspromovendi case, the court ruled that so called supervision agreements whereby PhD students engage themselves in doing academic research during a period of four to six years, under supervision of a professor, leading to a dissertation can be coined as 'labour' as mentioned in article 7:610 CC.[6]

Furthermore, there must be an *obligation* to perform work the work personally. Workers who can determine themselves whether or not they actually perform work, are not employees in the meaning of article 7:610 CC. Also persons under a contract of services have the obligation to perform work. However, they do not have to do the work personally and that distinguishes them from employees. If a worker can have himself replaced by another person, without permission of the employer, their relationship is considered not to be under a contract of employment.[7] As a result from this definition a legal person who is engaged in doing work cannot be an employee.

During a certain period

This criterion 'during a certain period' mostly does not play an independent nor an important role in the determination whether there is an employment contract. Anyhow the term 'during a certain period' does not refer to the number of hours the employee has to work (according to the contract). It is rather vague term. When the three other criteria are fulfilled, the criterion of 'during a certain period' is also deemed to be fulfilled.[8]

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[3] Pb EG L 288/32 of 18 October 1991

[4] H.L. Bakels, *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2007, p 68-69; A.T.J.M. Jacobs, *Labour Law in The Netherlands*, Den Haag: Kluwer Law International 2004, p. 53

[5] Surpreme Court 29 oktober 1982, NJ 1983, 230; Surpreme Court 10 juni 1983, NJ 1984, 60

[6] Court Utrecht 27 juni 2001, JAR 2001/155

[7] Surpreme Court 13 december 1957, NJ 1958, 35. ; J.M. Fleuren-van Walsem and T. van Peijpe, Gezagsverhouding, de stand van zaken, *SMA* 1995, 7/8, p. 414. ; H.L. Bakels, *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2007, p. 54

[8] H.L. Bakels, *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2007, p. 33

Wages

Also, payment of wages is an essential element for a contract of employment. In exchange of performing work the employee receives payment of wages, which therefore can be considered as the counter-performance of the employer. For the work the employee is entitled to payment by way of contract. The exact amount of the wages can be agreed upon freely. Work performed voluntarily does not make that a contract can be qualified as a contract of employment, nor is a contract which obliges the employee to work for tips a contract of employment. Compensation for travel costs and other compensations are not in exchange of work; therefore a volunteer receiving such a compensation does not receive wage in the meaning of article 7:610 CC.[9] However, when the offered compensation exceeds the actual costs made, the excessive part of the compensation may be classified as payment of wages in the meaning of article 7:610 CC.

In the service of

The requirement 'in the service of' is the most important one when determining whether there exists a contract of employment. Since the term is not quite clear –what is meant by 'in service of'?- it causes a lot of problems. It is not so easy to distinguish this type of contract of work from others, such as the contract of services (article 7:400 CC which can include a certain extent of subordination to the person who has commissioned the service.[10] Nevertheless 'subordination' of the employee to the employer is a key element of the employment contract. According to a series of court decisions the term 'in the service of' is interpreted as the authority of the employer to unilaterally issue binding rules concerning the way in which the work has to be done or how the organisation of the work in the enterprise should have to take place. This control test is the main legal tool used to distinguish a contract of employment from other contracts, however this legal tool appears to be defective. The scope of the employer's right to control may vary from case to case. If, in case of a dispute on the nature of the contract, the worker can prove that he/she is subject to detailed instructions as to the execution of his tasks it is clear that there is a contract of employment. Often this proof is, however, difficult to deliver. There are also important grey areas. Also under contracts of services the principal gives instructions how the job needs to be done. On the other hand, highly trained employees such as medical specialists have a large amount of freedom in how to do their work.[11] The control test ('can the employer give instructions?') therefore does not always directly provide a solution.

Since this control test has become less usefull or distinguishing an employment contract from other agreements that involve the performance of work, the courts have designed a checklist of indicators. The courts assess case-by-case (i) the extent to which the worker is bound to directives, (ii) the

[9] Surpreme Court 3 juni 1981, NJ 1982, 206

[10] For instance the one who commissioned can claim that the service provider has to carry out the service by himself under certain conditions.

[11] A.T.J.M. Jacobs, *Labour Law in The Netherlands*, Den Haag: Kluwer Law International 2004, p. 46-47

freedom of the worker to determine whether to work or not, (iii) who bears the entrepreneurial risks, (iiii) who finances the raw materials and tools, etc.
Therefore, the classification of a contract of employment is often on a case to case basis. The courts base their judgements solely on facts, not on appearances. As a result of this in practice the judge will not regard the qualification the parties themselves of the contract as binding.[12] The actual situation is relevant and decisive.

A standard judgement in which the Surpreme Court had to decide on whether there is a contract of employment is the Groen/Schoevers judgement. Mr. Groen, a tax consultant, performed work through his own legal person, the 'Commanditaire Vennootschap Groen Belastingadviseurs' for a secretary school, Schoevers, on a part time basis. The parties agreed that Mr Schoevers worked as a self-employed person and Mr Groen presented himself as a self-employed person. No social insurances contributions were withheld and no wages were paid if Mr. Groen was ill, which would have been required if he were an employee. However, when Schoevers wanted to bring their agreement to an end, Mr. Groen claimed that they had an employment contract. According to Mr. Groen all the conditions of article 7:610 CC were fullfilled. As to the question whether there was subordination Mr. Groen argued that he was scheduled by Schoevers at fixed days and that he was obliged to attend the school at these days. Schoevers determined the holidays periods and exam schedules and Mr. Groen was not free in coming and leaving when he wished to do so. Also, Schoevers gave Mr. Groen certain instructions that related to how the latter had to do his work. Mr. Groen had to use the prescribed materials and had to teach according to the prescribed curriculum, examination regulations as well as other regulations.
The court in first instance as well as the court of appeal ruled that there was no employment contract between Mr. Groen and Schoevers.
The Surpreme Court confirmed these rulings. It developed some steps which have to be followed to decide whether there is a contract of employment.

The first step was to determine the intention of the parties innvolved. What did parties want to establish by engaging themselves into the agreement and how did they actually implement this agreement, and what eventually was contained in the agreement? [13] thus the intention of the parties is certainly relevant. However the parties' intentions are not decisive.
Thus, as a second step, all different legal effects that parties have connected to their agreement should be taken into account and seen in relation to each other. For instance, the fact that no social insurance contributions were withheld and that Schoevers did not pay wages when Mr. Groen was ill.

[12] A.T.J.M. Jacobs, *Labour Law in The Netherlands*, Den Haag: Kluwer Law International 2004, p. 46-47
[13] C.J. Loonstra en W.A. Zondag, *Arbeidsrechtelijke themata*, Den Haag: Boom Juridische Uitgevers 2004, p 87-88

Thirdly, the nature of the control exercised by the employer on the employee can make that an agreement can be coined as an employment contract, even when the first two questions have been answered negatively. There can thus be an employment contract even when parties label their agreement differently. Subordination can result from certain facts and can exist even outside of the working space.[14] Giving instructions to a worker however does not automatically mean that there is subordination, since also under a contract of services, the principal is entitled to give instructions to the contractor.

The fourth step is the social position of the involved worker. If a person is in a weak (dependent) position, it can be decided that his/her consent to a service contract is less relevant than in case of an economically strong person.

By following these steps the Supreme Court placed the intentions of the parties into perspective. Still, the court took, contrary to the doctrine, the intentions into account, presumably in order to prevent an opportunistic use of labour law which seemed to have been the case in Mr Groen's case. Parties cannot just state that there is an employment contract when it suits them. Mr. Groen tried to do so, but did not succeed in his scam. His initial intention was clearly to be self-employed. This not only derived from the parties' intentions, but also from the facts mentioned above. Therefore the Surpreme Court ruled that there was no employment contract.

Note that the above discussed approach of 'Groen/Schoevers' only applies when there is actually an agreement. In the Malhi case there was no agreement at all[15]. Cleaner Malhi worked for 'De Gast Schoonmaakbedrijven' (cleaning services). At his first day he was employed at the ABN-Amro bank. Mr. Malhi was treated the same as all the other workers at the bank an therefore believed that he worked for ABN-Amro. When a reorganization took place, Malhi's work was terminated and he was told to go back to his employer 'De Gast'. Malhi refused and stated that there was an employment contract between him and ABN-Amro for an indefinite period of time. The Surpreme Court however did not share this view and ruled that there had been no agreement at all between Malhi and ABN-Amro.

§1.3. The Dutch dismissal system

Protection against dismissal is one of the main characteristics of employment law. In that respect it is important to determine whether the employment relationship can be qualified as a contract of employment since that protection is provided for by the law on employment contracts. That means the employment contract benefits from the Dutch dismissal system. The Dutch dismissal system can be marked as a two-way system. The parties have at their disposal two ways of terminating the

[14]Supreme Court 17 November 1978 (IVA/Queijssen)
[15] Supreme Court 5 April 2005 (ABNAMRO/Malhi)

employment relationship: on the one hand by giving notice and on the other hand the possibility getting the employment contract dissolved by the judge. What the difference is between these two possibilities and what the advantages are will be explained below.

Giving notice

The 'normal' way –or in other words: the 'royal' way- of terminating the employment contract is giving notice. But in order to be able –as employer- to give notice the employer needs an approval of an administrative authority. This is regulated in the Extraordinary Decree on Labour Relations (*BBA*). This Decree was initially designed to regulate the emerged situation in the Netherlands that existed after the Second World War. Main goal of the dismissal prohibition was to maintain as much as possible the employment and to promote the economic recovery of our country.[16] However, during the years the Extraordinary Decree on Labour Relations has been given another emphasis. In practice this regulation has become a measure to protect the employee against unreasonable dismissal.

The Extraordinary Decree on Labour Relations (*BBA*) is binding to all employment contracts. It provides a sort of manual from the Minister to the employers to terminate the employment contract legally (article 6 paragraph 3 Extraordinary Decree on Labour Relations). This manual is effectuated in the Dismissal Decree (*Ontslagbesluit*).

Article 6 of the Extraordinary Decree on Labour Relations contains the dismissal prohibition. Without the approval of the UWV (government agency that is responsible for reintegration and assigning employee insurances) it is prohibited to give notice to an employee. If an employer ignores this prohibition and gives notice anyway, then the dismissal will be null and void, provided of course that the employee invokes the annulment of the dismissal. By result the employment contract and relationship has not ended at all and in principle the employer has to pay the wages regularly. According to article 9 of the Extraordinary Decree on Labour Relations the employee will have the opportunity to invoke annulment during six months, counted from the day after the employer has given notice. Article 6 of the Extraordinary Decree on Labour Relations is not applicable neither in case the employment contract ends by law, nor on the basis of an urgent reason (being a summary dismissal) nor in case of dissolution of the employment contract.[17] Also in case of mutual consent there is no approval needed, provided that there is mutual consent before ending the contract. Furthermore, the Dismissal Decree gives exact conditions under which the employer is lawfully entitled to give notice to its employees. When an employer has to give notice to employees because of prudential reasons, then the employer has to make different categories of employees by age when it concerns interchangeable functions. The principle 'last in- first out' applies here (articles 4:1 – 4:5 Dismissal Decree). When it comes to giving notice because of dysfunctioning of an employee, the

[16] In exchange to the maintenance of employment the wages were set on a –comparatively- low level and controlled by the state. It was prohibited to go beyond that level.
[17] Surpreme Court 2 April 1959, *NJ* 1959, 199

employer needs to make sure that this dysfunctioning is plausible and does not come forth out of illness or injury of the employee. Furthermore the employee has be sufficiently notified about this and the disfunctioning has to not be the result of insufficient care of the working conditions by the employer (article 5:1 paragraph 1 Dismissal Decree). Special circumstances are arranged in the articles 5:1 paragraph 2 – 4 Dismissal Decree.

After receiving the approval the employer has to give notice. Giving notice is an unilateral act aimed at the ending of the employment contract. This can be done orally as well as in writing. Giving notice has to be done by the end of the month (article 7:672 paragraph 1 CC).

Irregular dismissal

When giving notice, both parties will have to take into account the prescribed period of notice as mentioned in paragraph 2 and 3 of article 7:672 CC. The period of notice for the employee is one month and the period of notice for the employer depends on the total duration of the employment relationship. The period of notice can however also be arranged by collective agreements. If one of the two parties does not respect the period of notice given by law, collective agreement or employment contract, then this will be qualified as an irregular dismissal. Exceptions are giving notice because of an urgent reason (a summary dismissal) matter and during probation.

Employment contracts for a definite period of time are protected by article 7:667 paragraph 3 CC. This article states that an employment contract for a definite period of time can terminate by expiring of the period of the contract. Termination before the date of expiration is only possible by mutual consent or by a clause in the agreement in writing stipulating that the parties may terminate the contract earlier. If the contract has been terminated contrary to these rules this will be coined as an irregular dismissal. The result is that party who gives notice becomes liable for damages. If the employer gives notice before the employment contract ends then he will at least be obliged to pay wages until the end of the contract (7:628 CC). An exeption is made for cases where there is an urgent matter for a summary dismissal. Also the court can moderate the compensation on the basis of article 7:680a CC.

The existence of an irregular dismissal does however not affect the given notice. Therefore the employment contract will end regardless of the fact that the period of notice was not respected.[18] The result however of this irregular dismissal is that the party that did not respect the period of notice becomes liable for the damages suffered (article 7:677 paragraph 1 and 2 CC). The injured party can therefore claim a fixed compensation or a full compensation by article 7:667 paragraph 4 CC. A fixed compensation equals the amount of money the employee would have received in case the employer would have given proper notice by respecting the prescribed period of notice (article 7:680 paragraph 1 CC). In other words, the fixed compensation consists of the wages that would have been paid in the

[18] Van der Grinten, *Arbeidsovereenkomstenrecht*, Deventer: Kluwer 2008, pag 317

case the employment contract ended properly. In case of an employment contract for an indefinite period of time the compensation will amount to the wages to be paid until the period of notice ends. The fixed compensation only includes wages. In some cases however remuneration consists of more benefits than wages only. One could think of pension arrangements or tips. The injured party can also opt for a full compensation. In that case he has to proof the damages he is suffering.

Prohibition of giving notice

Besides taking into account the period of notice, the employer has to also take into account any dismissal prohibitions. We noted above the requirement of an approval for giving notice. If that is failing there exists in practice a prohibition of dismissal. The dismissal is null and void.
The law provides for more forms of prohibition of dismissal. These can be found in the Civil Code, for instance article 7:670 CC, and various other regulations. The dismissal prohibitions vary from the prohibition of dismissal on the basis of discriminatory reasons to dismissal during illness or pregnancy or membership of a works council, or because of trade union membership and transfer of enterprise.
Of course the employee has to invoke the annulment of the dismissal. The annulment of the dismissal can be invoked until two months after the dismissal by notification to the employer. This is a final term. After the two months the employee's right to annul will be void.

Manifestly unreasonable dismissal

The CC provides for a procedure to claim compensation for the damages suffered in case of a so called manifestly unreasonable dismissal, article 7:681 CC. For example when the employer gives a false reason for dismissal then the dismissal will be coined as manifestly unreasonable. Result is that the injured party can claim compensation for damages suffered or –theoretically- recovery of the employment contract on the basis of article 7:682 CC.

Dissolution of the employment contract

The other possibility to end an employment contract under Dutch law is to request the judge for dissolution of the employment contract. This provision is set out in article 7:685 CC. The employer as well as the employee can request for a certain provision on the basis of changed conditions or on an urgent reason as meant in article 7:677 paragraph 1 CC (summary dismissal procedure). The definition of changed conditions is a very broad one. However, the changed conditions must be so negatively for the requesting party that continuation of the employment contract would be unacceptable. Examples are threatening behaviour, abuse, deception, making trade secrets public, not paying wages on time, etc.
When dissolving the employment contract the judge can grant a compensation to the injured party: article 7:685, paragraph 8. This compensation is based on a formula: the so called 'kantonrechtersformule'(A x B x C). This formula is composed out of the three cumulative factor. A

stands for the total duration of service; B for the gross salary and C is the correction factor (C). The C-factor can vary from 0 to 2, 3 , 4, 5 … depending of the extent the employer or the employee has contributed to the disruption of the relationship between employer and employee. Granting compensation is a discretionary power of the court. The court is not obliged to do so.

Fig 1. Scheme on termination of an employment contract for an indefinite period of time

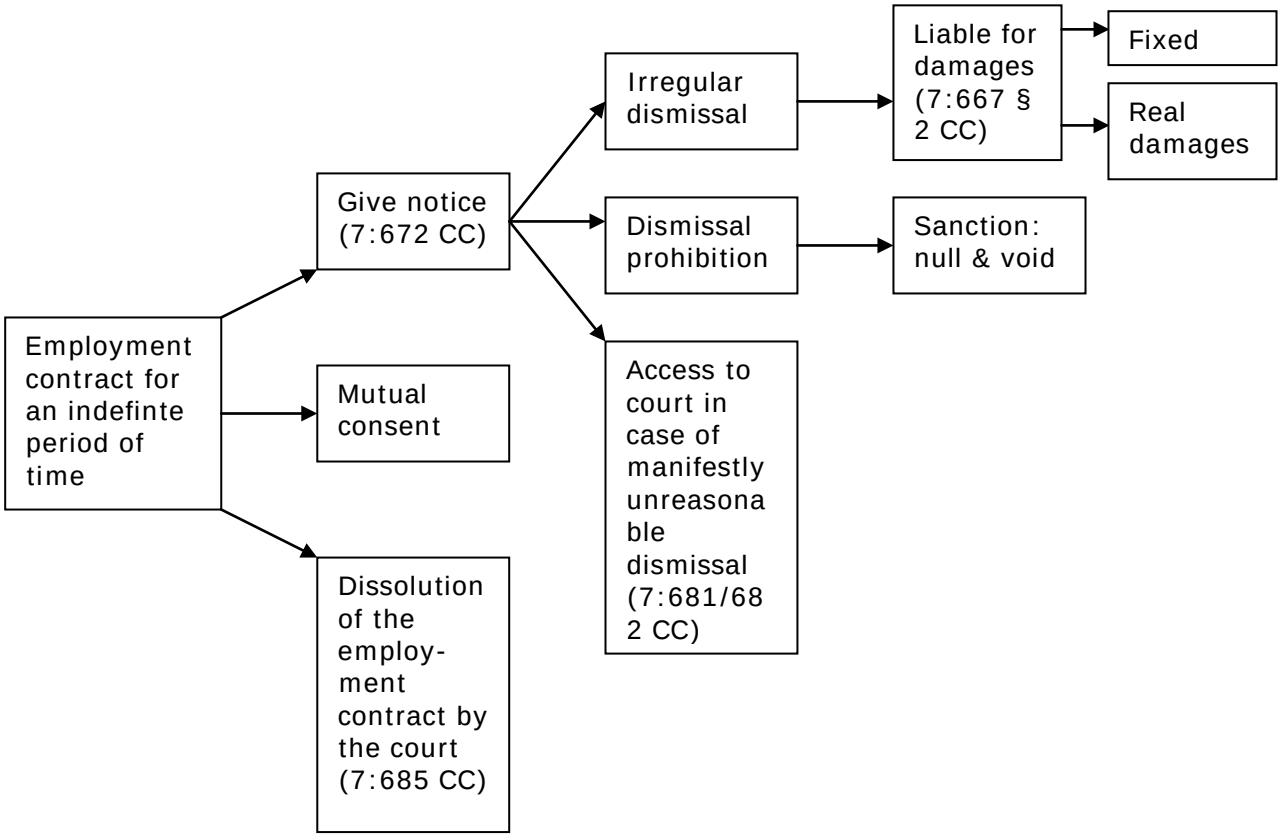
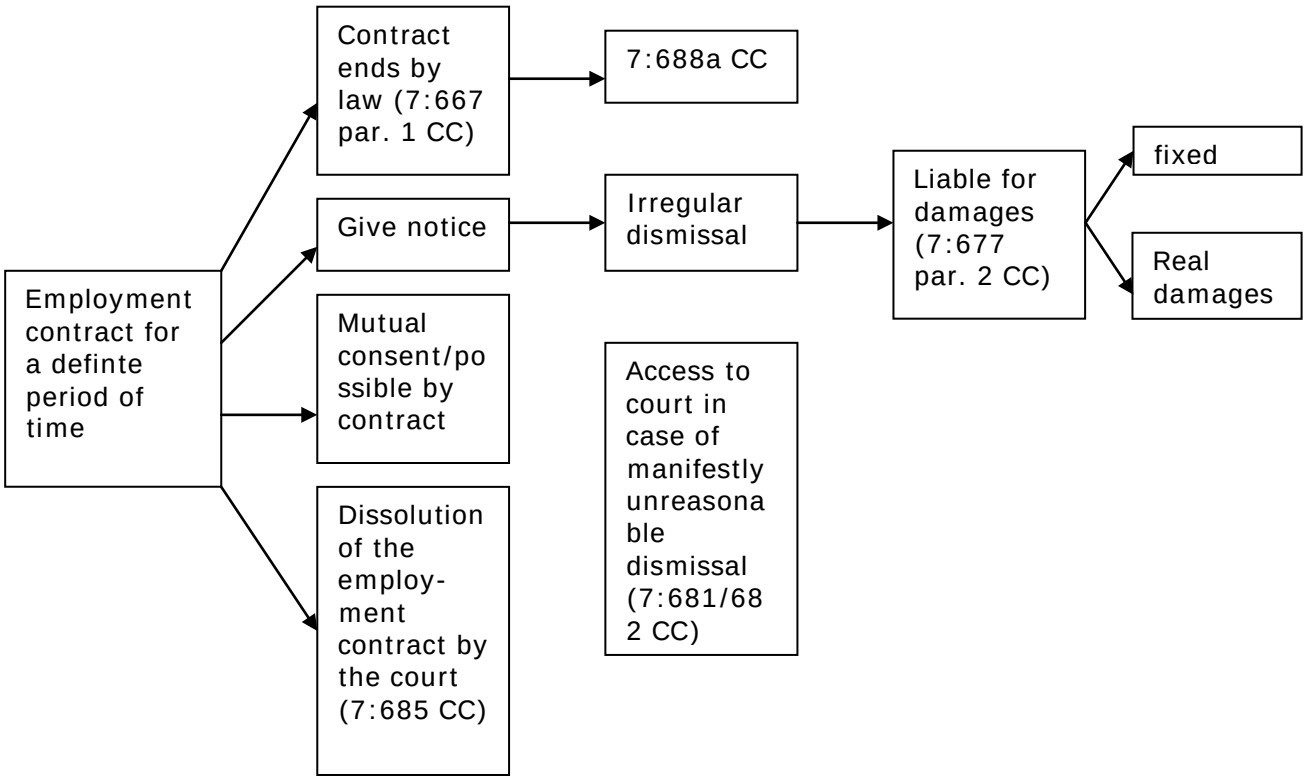


Fig. 2. Scheme on termination of an employment contract for a definite period of time



§1.4. Concluding remarks

In most cases it will be clear that there is an employment contract. However, in some cases there can be uncertainty whether or not the relationship between parties can be considered a contract of employment or not. The main uncertainty is the grey zone between on the one hand contracts of service (7:400 CC) and contracts of work (7:750 CC) and on the other hand contracts of employment (7:610 CC).

Sometimes, parties have not defined their relationship in writing. In these cases the determination of the type of relationship has to be derived from the concrete conditions. It is also possible that parties have in fact defined their working relationship in writing, however it can be considered as an entirely different relationship.[19] Parties can label their working relationships, but that does not mean that the label is correct. When a worker claims that he has a contract of employment he may make use of the presumptions which were introduced by the Flexibility and Security Act: the presumption of article

[19] T. Jaspers, Quasi-employee, quasi-self-employees: more than just a name, Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht 2000, p. 233-249. ; C.J. Loonstra en W.A. Zondag, *Arbeidsrechtelijke themata*, Den Haag: Boom Juridische Uitgevers 2004, p. 86

7:610a CC brought the employees an advantage in the burden of proof. The article states that ‘when an employee has worked for an employer weekly during three successive months or twenty hours per month in exchange of payment, then the relationship is suspected to be a contract of employment’. How this article can be invoked is further examined in chapter 4. For now we can state that in case of uncertainty of the existence of an employment contract, all facts should be taken into account in order to identify the parties intentions. And with the existence of an employment contract also comes the protection of the Dutch dismissal system. Without permission of the Dutch government (through the UWV) an employer cannot give notice to his employees without being liable for damages.

Section 2: Different forms of Employment Contracts

The employment contract is form free, as already stated in Chapter 1. Parties can engage themselves into a legally binding employment contract orally as well as in writing. This is derived from the principle of freedom of contract.
Parties are free to establish employment contracts in any form, as long as the applicable regulations are complied with. Parties can for instance agree upon an exact duration of the employment contract and upon wages. Of course the possibility to agree upon wages is limited by the Minimum Wage Act (WML). This will be discussed later in Chapter 5. Also the parties can add certain conditional clauses or other requirements.
The most common forms of employment contracts are the temporary work agency contract, labour on call agreement, home based work agreement, the part-time agreement and the employment contract for an indefinite or definite period of time. These are all discussed below.
This variety in employment contracts, and especially flexible employment contracts, makes entrepreneurs able to anticipate to changing markets and maintain their competitive position on the market.

§2.1. Contracts of Employment for an Indefinite Period of time

The majority of the Dutch employees perform labour under a contract of employment for an indefinite period of time. In principle this contract is of unlimited duration. Unless of course the employee dies or reaches retirement age, then the contract is intended to terminate. Nevertheless the contract can be ended by parties trough giving notice (7:672 CC) or dissolution of the contract of employment (7:685 CC), as already stated in Chapter 1.

§2.2. Contracts of Employment for a Definite Period of time

By definition a contract for a definite period of time is limited as to the duration of the contract. Parties can set this period by including in the contract a fixed term or by depending the end of the contract to a certain event that they can not influence. The end of the contract has to be an objectively determined event (as long as the sickness of another employee lasts or for the period a project will last). During the duration of the contract, the employee enjoys certain dismissal protection through article 7:667 paragraph 3 CC, as mentioned in Chapter 1 paragraph 1.3.
In Dutch law a limitation does not exist as to the use of a fixed term employment contract. The employer is free to choose. However the consecutive renewals of fixed term contracts are subject to certain restrictions. Article 7:668a CC by which the EC Directive 1999/70/EC of 28 June 1999 concerning fixed term work has been transposed in Dutch law, stipulates that when a fixed-term

contract has been renewed twice at intervals of not more than 3 months or has a total duration of at least 36 months, the new contract is deemed to be a contract of an indefinite period.[20] This is the so called 'chain arrangement'. When article 7:668a CC applies, the contract will not end by law and therefore the employer has to give notice, respecting the Extraordinary Decree on Labour Relations and the corresponding Dismissal Decree. The law permits the social partners to deviate from the ruling of article 7:668a CC by collective labour agreement, even 'in pejus'. Actually this happens.

§2.3. Part-time employment contract

The part-time employment contract can be agreed upon for an indefinite period of time as well as for a definite period of time. The only difference is that with part-time employment contracts the employee does not perform labour fulltime, but for less hours, which are fixed.

§2.4. Labour on Call

The labour on call agreement provides employers the flexibility when needed. In case of illness of employees or vacation periods the employer can call people for work. Labour on call agreements can be divided in two categories; the so called pre-contractual agreements and employment contracts with postponed duty to perform labour.

Pre-contractual agreement

This labour on call agreement is very free in the sense that there does not really exist an employment contract, but some sort of 'pre-contractual agreement'. The employee does not have to obey to the employer, when the latter calls him for work. If the timing simply does not suit the employee or for other reasons, the employee can refuse to show up. The employer is also not obliged to regularly call the employee for work. Only when the employee responds to the call for labour, an employment contract arises.

Employment contract with postponed duty to perform labour

There are two categories of employment contracts with postponed duty to perform labour, 'minimum-maximum' employment contracts and 'zero hours' employment contracts.

A minimum-maximum employment contract is a contract whereby the employer and employee agree that the employee will at least work the minimum agreed hours and this can go up to the maximum agreed hours. In these cases the wages that need to be paid are at least the wages for the minimum agreed hours. So if an employee has an employment contract for at least 8 hours and up to 24 hours, the employer has to pay at least 8 hours.

[20] A.T.J.M. Jacobs, *Labour Law in The Netherlands*, Den Haag: Kluwer Law International 2004, p. 115-116

This is different with the zero hours employment contract. The employee only gets paid for the hours he actually performs labour. However, the legal presumption of article 7:610b CC could be applicable. This will be discussed in Chapter 4.

§2.5. Temporary Agency Work

The temporary agency work agreement is arranged in chapter 11 of title 10 of the Dutch Civil Code. Article 7:690 CC defines the temporary agency agreement as an employment contract wherby the employee is made available to a third party by the employer, under the exercise of profession or business in order to fulfill a certain agreement to provide services.
This agreement is different from the ordinary employment contract since this agreement involves three parties instead of the regular two parties. This triangle of commitments contains two agreements. On the one hand the agreement between the temporary agency worker and the temporary work agency and on the other hand the agreement between the temporary work agency and the user's firm. The relationship between the temporary agency worker and the temporary work agency is considered to be an employment contract in meaning of article 7:610 CC. Presumed is that the temporary agency worker is subordinated to the temporary work agency (article 7:690 CC). The relationship between the temporary agency worker and the user's firm however is explicitly not a contract of employment. It is more like posting of workers. The agreement between the agency and the user firm can be considered as a contract of services (article 7:400 CC).

The so called 'chain arrangement' of article 7:668a CC is also applicable in this case unless a collective labour agreement stipulates otherwise. The protection article 7:668a CC provides to the agency worker is limited: the employee has to have employed and worked for at least 26 weeks (in the same job).

§2.6. Home workers

A last specific category of workers are the home based workers. They can perform work by way of an employment contract (7:610 CC), but that is not necessarily the case. It is quite common that this group of flexible workers perform work on the basis of a contract of services (7:400 CC). The reason can be because the home worker prefer but more often the reason for that is that it is financially advantageous for an entrepreneur. However it can be uncertain whether there exists a contract of services or a contract of employment. In those cases the Groen/Schoevers criteria will be applied by analyzing what the parties intentions were when engaging themselves into the agreement. Also the social position of the worker is taken into account, as mentioned earlier in Chapter 1. The facts determine the outcome.

Section 3: Persons without a contract of employment performing work personally

This chapter will provide an overview of the different categories of persons who perform work personally, but who do not have a contract of employment. We will discuss legal criteria to distinguish these groups and figures on the respective groups will be shown.

§ 3.1 Introduction

There are two groups of people who perform work: those with a contract of employment (further indicated as ***employed***) and the people who perform work without a contract of employment. The traditional way of performing work is to do so under a contract of employment. Together with a contract of employment workers get a certain level of protection, such as against dismissal, codetermination rights, income protection in case of dismissal and also social security protection. Due to the changing economical circumstances the traditional working relations are at risk. The need of flexible workers is growing due to the high competition between companies and changing production systems. Nowadays, everything has to be faster and cheaper in order to make profit. Therefore many companies prefer to hire flexible workers instead of 'normal' employees. This trend, however, is not to the advantage of the workers themselves. This is because when a worker delivers work without having a contract of employment with his principal he will get a lower level of protection than employees enjoy. For example, there are no social security provisions and the worker will not participate in a pension scheme.

§3.2 Civil Law Contracts

In many occasions people perform work for a principal without there being a formal contract of employment between the worker and the principal. However, in these situations parties often enter into a contract governing the main points regarding the assignment, such as the kind of work, the set time as well as the financial compensation. Such a contract is called a 'civil law contract'. These contracts are highly adaptable to the parties' wishes and therefore favourable for principals in times of high economical competition.
Under a civil law contract the worker performs work without becoming in subordination of the counterpart. As said above, this contract does not have the status of an employment contract and therefore the level of protection for the worker is quite low.
Civil law contracts can be divided into two categories: the assignment agreement (*overeenkomst van opdracht*) and the agreement for the realisation of a particular work (*overeenkomst tot aanneming van werk*). First, the assignment agreement will be discussed and secondly the agreement for the

realisation of a particular work. After that, the most important category of persons working under these contracts will be addressed.

The Assignment Agreement

An assignment agreement is a written agreement in which two parties contract for the provision of goods and or services. One party provides the good or service, the other party receives and pays for it. Exactly who, what, when, where and why are all matters left to the parties. The assignment agreement is very much a creation of the parties' design.

The assignment agreement is regulated in title 7.7 of the DCC (article 7:400 DCC and further). With an assignment agreement the service provider commits himself towards the principle to deliver work without being employed by the principal (art. 7:400 DCC). In general, accountants, lawyers, doctors, real estate agents and advisors work on basis of a assignment agreement with their clients. The financial compensation under an assignment agreement can consist of an hourly rate or payment per provided service.

An assignment agreement can have the form of a freelance-agreement.[21] Freelance agreements are neither mentioned nor regulated by Dutch Law. The freelance-agreement is a non judicial qualification and therefore the rules regarding assignment agreements apply to these freelance-agreements. Some freelance agreements are employment contracts, i.e. those which satisfy the conditions of Article 610.

The number of rules regulating the assignment agreement is small. Parties enjoy a lot of freedom in composing their own legal relation. The service provider has to perform the assignment conform the wishes and instructions of the principal (art. 7:402 DCC). This however has to be distinguished from the subordination which follows from a contract of employment. Title 7.7 DCC regulates the financial compensation the principal has to pay the worker as well as the expense allowances and compensation for damages when the agreement is aborted before the set time. On basis of article 7:408 DCC the principal has the right to end the assignment agreement without a notice period. This differs from a contract of employment.

One can be excused for believing that an assignment agreement is basically an employment agreement. Indeed, in certain circumstances, there are virtually no differences between the two types of contracts. The main differences between a contract of employment and an assignment contract is the fact that the subordination relationship is absent in an assignment contract and that under this contract the worker has the right to replace himself by someone else.

[21] C.J. Loonstra en W.A. Zondag, *Arbeidsrechtelijke Themata*, Boom Juridische Uitgevers, Den haag, 2004, p. 85

A recent example which shows this difference very clearly can be found in the case of Select Mail. This case is the result of the fact that nowadays the post sector is a declining one, due to the changing market: more and more emails are sent and fewer and fewer letters. Due to the financial problems resulting from this for the post companies – the post market is partially privatized, so there is also competition - many postmen of the newcomers in this market are given a flexible contract instead of a contract of employment since this is cheaper for the company.
The working relation between Select Mail and its postmen should be qualified as an assignment agreement due to the fact that their workers are allowed to decide when to perform the work between the timeframe of 7:00 – 21:00 (on the agreed delivery dates) and the fact that the work does not have to be performed personally. Under an assignment agreement the worker is allowed to decide when to work (often within a certain agreed timeframe) and can decide when to take a holiday with the obligation of finding a substitute. This is the same in case of illness. There is no obligation to perform the work personally under an assignment agreement.
Because the postmen of Select Mail have the possibility to replace themselves by someone else, they have the freedom to decide when to take holidays/work as well as the absence of a subordination relation, will indicate that this agreement will not qualify as a contract of employment but as an assignment agreement. This issue is further discussed in chapter 7.

Agreement for the realisation of a particular work

The agreement for the realisation of a particular work is regulated in article 7A:1639 DCC. A characteristic of this agreement is that the worker agrees to construct a material piece for the principal. Therefore, this agreement is often used in the construction industry.

A recent development is that former employees in the construction industry have decided over the last decennia to offer their work to principals through their own company; in some cases this was done less voluntarily, these are often self-employed without staff (see below). Both the assignment agreement and the agreement for the realisation of a particular work lack an authority relationship between the worker and the principal.

§3.3 The Self-employed without staff (zelfstandigen zonder personeel)

The people who perform work under a commercial contract are called assignment takers. There are many kinds of persons working under a contract of assignment, but the most important one is the category of the self-employed people without staff.
Sometimes these persons are indicates as a freelancer as well, as was discussed above. There is no legal definition of ‘self employed’ in Dutch law in Social Security law and Labour law’, so the courts had to decide what is meant by this.

Self-employed

When can you speak of a self-employed person? The central criterion is whether the person performing work is independent from its principal. In case the worker performs his work in subordination to the principal, the contract between the principal and the worker is more easily indicated as a contract of employment. In 'the service of' means that there is an authority relationship between worker and the principal, the worker delivers his work in subordination to his principal.
In deciding whether there is subordination or not, and also for social security and tax cases it is relevant whether the person presents himself as self-employed or not. A self-employed could be designated as follows: A self-employed is a person who;

- has autonomy in setting his or her own activities and the execution thereof;
- performs work for its own account and risk;
- thereby has the focus and the perspective of making profit;
- has the publication of entrepreneurship;
- seeks multiple clients/principals.

In assessing the legal independence of a worker all facts and circumstances have to be addressed.

Figures and numbers on the self-employed people in the Netherlands

The reported number of self-employed persons depends on the definition used. According to the CBS (Central Statistics Office) the Netherlands counted 956.000 independent workers in 2009, of which 632,000 self-employed persons without employees. The CBS defines a self-employed person without staff as an entrepreneur who has no employees in service.
Recent studies from the EIM and the SEO however indentify 340,000 up to 400,000 self-employed people, but these studies have solely focused on the 'new category' of the self-employed, those who primarily use their own labour. It is due to this more strict interpretation of self-employed that these research institutions count less self-employed people.

The number of self-employed people has risen sharply in the past decade. According to the CBS the number of self-employed people increased from 400.000 in 1996 up to 632.000 in 2009. Even within the whole part of the working population the number of self-employed people has grown from 6.4 % in 1996 to 8.6 % in 2009.
On the contrary, the share of employed people is still by far the largest and has hardly changed during these years (1996: 79.4 percent, 2009: 79.8 percent).
This increase in self-employed people can be explained by the changing labour relations and trends such as greater flexibility and individualisation.

The group of self-employed people is characterised by a large diversity. The majority of the self-employed people is male. According to figures and numbers published by the CBS, two third of all

self-employed persons is male. The ratio under employed people is much more equal: 54 percent resp. 46 percent. Research has shown that self-employed persons are on average older than employed people. The self-employed are underrepresented in the age group of 15 up to 35 years and over-represented in the age group of 35 up to 65 years. This age difference can be related to the fact that most of the self-employed people used to work in subordination prior to their self-employment. According to research performed by the EIM about 70 percent of the self-employed people starts from a regular job and 10 percent from a social security benefit provided by the government.

The level of education of the self-employed ranges from low to high. However, there are relatively more educated people amongst the self-employed (40 percent) than amongst employed people (33 percent). Over 80 percent of the self-employed is native Dutch. The proportion of immigrants under the self-employed is similar to this proportion under employees. Over two thirds of the self-employed work 35 or more hours per week.

Self-employed people work in all sectors and industries. Research of the EIM shows that more than one quarter of the self-employed is working in business services. Other sectors with a high level of self-employed people is repair and trade, agriculture and construction. In these sectors the number of the self-employed people sums up to half or more than half of all the businesses in this sector. The share of self-employed people can even be big in smaller sectors.

3.4 Figures & Numbers

Figure 1: Comparison between the Self-employed and Employees

1: Man (%)

2: Female (%)

3: Educated People (%)

4: People with a Dutch Nationality (%)

5: People who work more than 35 hours a week (%)

Section 4: Legal Presumptions and employment contract by law

Workers who are self employed are not protected in the same way as workers with a contract of employment. Therefore it is of great importance to explore the (legal) position of persons performing work. This chapter provides an overview of the so called "legal presumptions" relevant to contracts of employment. A legal presumption is a conclusion based on a particular set of facts, combined with established laws, logic or reasoning.[22] *It allows the court to assume that there is a contract until the presumption is rebutted by the weight of the evidence against it. Paragraph 4.2 discusses the legal presumptions of article 7:610a CC with regard to the nature of the contract of employment and paragraph 4.3 discusses article 7:610b CC with regard to the number of working hours. Paragraph 4.4 deals with the issue of these legal presumptions in practice. Paragraph 4.5 will then discuss the legal presumption contained in the legal definition of the temporary agency work (article 7:690 CC) and paragraph 4.6 is about a (exceptional) General decree (Algemene Maatregel van Bestuur) on the position of postmen.*

§4.1 Article 7:610a CC (with regard to the nature of the agreement)

Article 7:610a CC was introduced in May 1998 by the Act "Flexibility and Security".[23] Flexibility was considered to be desirable in order to increase employment while maintaining an adequate level of protection for flexible workers. This increase of (flexible) employment was considered to be necessary in order to realize an economically competitive and social responsible economy.[24] The adequate level of protection is among others provided by a number of articles incorporated the CC, such as the legal presumption(s).

When workers have difficulties in proving that they have a contract of employment article 7:610a of the Civil Code can assist the workers in asserting their claim(s) by providing a presumption on the *nature* of the agreement. This article contains a legal presumption based on the duration and intensity of labour they performed. Article 7:610a CC states:

> "A contract of employment is presumed to be present when an employee works during at least three months, (i) weekly or (ii) at least twenty hours a month for remuneration".

[22] http://definitions.uslegal.com/l/legal-presumption
[23] Act Flexibility and Security 14 May 1998
[24] Nota 4 December 1995 Minister of SZW (24 543)

Thus this article provides for a more advantageous procedural position for workers. The worker has to make plausible and when necessary provide evidence for the existence of the two elements mentioned in the box. It should be noted, however, that when the situation concerned does not meet the requirements mentioned in article 7:610a this does not necessarily mean that there is no contract of employment.

When the existence of certain circumstances has been made sufficiently clear the contract of employment is assumed, unless the employer provides evidence to prove otherwise, the so called reversal of burden of proof. The contract is not automatically converted into a contract of employment,[25] but article 7:610a only provides for a legal presumption which can be refuted. The employer can do so by proving that the worker worked less then twenty hours a month or prove that there is – for instance – a civil law agreement since, for instance, the element of subordination or the obligation to perform work personally is missing. Whether refutation of the presumptions is successful will depend on the assessment by the court of the facts and circumstances (see rulings discussed in chapter 4.2.3).

Exclusions

Article 7:610a CC is not intended to be applicable when the nature of the relationship is sufficiently clear.[26] For instance when it is clear that parties have a civil law contract (article 7:400 CC) or an agreement of temporary agency employment (article 7:690 CC), which can be evident from a written contract, there is no need to check whether presumptions are fulfilled. Nor do presumptions work in such a way that the employer can deny that there is a contract of employment by pointing out that a person has not worked 20 hours a month. Another situation exists if employer argues, by referring to the legal presumptions, that a worker has to do the work at specific times or that he has to do the work personally or that he cannot resign from work at the spot now he (the worker) has a contract of employment. The employer might be inclined to do so if he is in urgent need of a person doing work at that moment, for example in a café during Summer time. It is uncertain whether courts would award such a claim, but in theory it could be possible that also employers benefit from the presumptions.

Furthermore it must be noted that third parties are not allowed to invoke any rights concerning article 7:610a CC. The legal presumption is only applicable between employer and employee.

Rulings of the court(s) on article 7:610a CC

An authoritative ruling on article 7:610a CC by the Supreme Court was “Groen/Schoevers” on 14 November 1997 (see chapter 1). While the elements of article 7:610 CC have not been met the court had to assess whether the appeal to the legal presumptions had to be accepted. In this case the employer has two options to refute the legal presumption he can claim and prove that (i) parties did

[25] Court of Amsterdam 15 March 1999, JAR 1999/80

[26] NV II, 25 263, p. 5; Court of Rotterdam 14 August 2002, JAR 2002/217

neither have the intention to agree upon a contract of employment nor did they act implement the agreement in such way(s) or (ii) although the parties had the intention to agree upon a contract of employment, the actual implementation of the agreement turns out not to be a contract of employment.

Another significant ruling on article 7:610a CC by the Supreme Court was "Beurspromovendi/UVA"-decision of 14 April 2006.[27] This case was about a claim of PhD students at the University of Amsterdam (UvA). They where of the opinion that they had a contract of employment. Parties agreed upon a monthly granted scholarship to enable them to make and finish a doctorate research. The stipendium is intended to meet the cost of living in principle for the entire period of the training and the doctoral research, up to a maximum of four years. Allocation of the stipendium takes place over a year and continuation depends on a positive assessment of the situation by the Director. The court ruled with regard to article 7:610a CC that the PhD students worked for (at least) three months, weekly and for a remuneration as mentioned above and therefore the elements of article 7:610a CC and the legal presumption have been met. Then the court had to assess whether the presumption under the circumstances of the case should be regarded as refuted (reversal of proof). UvA argued firstly that the PhD students were free to organize their work and secondly that the relationship between promoter and PhD student is one of teacher/student and not one of subordination. The court however held that the element of subordination was met because the employer (the UvA) (i) could issue instructions regarding to the work to be done (planning and supervision), (ii) the PhD students were oblige to participate in annual performance reviews, (iii) all provisions applicable to workers with a contract of employment with regard to sickness applied equally to the PhD students and (iv) also the rules with regard to taking holidays vacation days were similar applicable. Therefore the court concluded that the legal presumption was not duly refuted. In case of doubt article 7:610a CC places the risk at the employee by qualifying an agreement as a contract of employment. In this regard the social position (who can be put on a par with an employee in view of his/her social and economical position) of the workers is one relevant aspect to decide to what extent they can be held to their agreement to a civil law contract instead of a contract of employment.

On 3 October 2003 the Court of Appeal 's-Gravenhage[28] considered that the legal presumption has been refuted by the employer. The court of the first instance had decided that article 7:610a had been met. It had to be presumed that the worker had a contract of employment unless the employer proved otherwise. The employer argued that parties had the intention to agree upon a freelance contract. This was not in writing but in court parties agreed that the intention was to work on a freelance basis. The worker was of the opinion that the freelance contract was converted into a contract of employment. Now the opinions differed the court had to consider how parties actually implemented their agreement.

[27] Supreme Court 14 April 2006 (LJN AU9722) (Beurspromovendi/UVA) met nt. Mr. Huydecoper
[28] Court of Appeal 's-Gravenhage 3 October 2003 (LJN AT4359)

Finally the Court of Appeal concluded that the employer has successfully given evidence that employee had a freelance contract.

§4.2 Article 7:610b CC (with regard to the number of working hours)

Article 7:610b CC was also introduced in May 1998 by the Act "Flexibility and Security". When it is assumed that the worker actually has a contract of employment, article 7:610b CC provides for a legal presumption on the content volume of work, the article states:

> When an employee is working during at least three months, the work as to the number of hours worked in the following month(s) is presumed to be equal to the average of work performed in the previous three months.

The scope of this article is to provide protection when the seize of the work is not clear[29] or when the work performed by the employee is structurally higher than agreed upon. This provision is particularly important for wage claims and/or claims of a number of vacation days.[30] However when the employee structurally works more then agreed upon for a period of at least three months the contract is not automatically converted into a contract of employment for those hours.[31]

The employee has to make plausible and when necessary to provide evidence of the existence of a structural situation. Refutation by the employer is possible by proving the opposite. He can prove that the working hours vary considerably, that there is no structural situation, or that there is a special reason for the higher number of hours worked. For example a higher number of hours worked can be explained by the seasonal character of work (work in summer periods can be more intensive). The employer should then refer to a longer lasting so called "reference period" – for instance six months - by which he can prove that the volume of work for those three months were higher but that there is no structural situation. It must be (again) noted that third parties are not allowed to invoke any rights concerning article 7:610b CC. The legal presumption is only applicable between employer and employee.

That the reference period is a dynamical and also difficult concept can be demonstrated by the following ruling. In 2007 the Court of Utrecht had to interpreted the so called "reference period". The facts where as followed: employer (a temporary work agency) and worker agreed upon working 78 weeks for a volume of 33,18 hours a week (between parties referred to as "stage A"). After this period parties contracted for 3 months a working week of 4 hours a week (referred to as "stage B"). During

[29] Court of Appeal Leeuwarden 19 April 2006, RAR 2006/89: in this case the volume of work was clear.
[30] Van der Grinten, arbeidsovereenkomsten recht, Deventer: Kluwer 2008 p. 35
[31] Court Amsterdam 15 March 1999 JAR 1999/80

the first month of stage B worker however worked 32 hours a week. After this month employer ended the relationship. Employer paid 4 hours a week until the end of "stage B". The court ruled that the reference period can be located in the period which covers a direct employment contract prior to the other contract between parties involving the same work and the same hirer. The employee was entitled to enforce payment of 33, 18 hours a week. The courts main argument was that the legislative history[32] according to which article 7:610b CC mainly aims to strengthen the procedural position of employees.

The presumption of article 7:610b CC exists to protect a specific form of flexible contract, namely to protect the on call workers. However case law has shown that any employee can rely on this article. A case concerned a maid working in a so called minmax contract. The Court finds that the substantial margin between the minimum and maximum number of working hours does not mean that working hours are not clearly agreed. As mentioned before since the purpose of article 7:610b CC is to protect labour of which the seize is uncertain, it does not mean that in these cases when there is no lack of clarity as to the number of working hours agreed upon these kind of contracts will and can profit from this legal presumption.

Another clear example is the decision of the Court of Arnhem[33] deciding a claim of an employee who invoked article 7:610b CC. The employer argued that this article was not applicable because the scope of the work was clear and the employee did not work at a higher (hour) level than the originally agreed work. The Court rules in favor of the employer. The contract clearly indicates the intention of parties in terms of nature and scope of employment. The contract explicitly states that the workload can vary and that the worker would only be used in the absence of permanent staff and that worker would not work more than 16 hours a week. So employee was ought to be aware that it could not count on a fixed number of hours (as he also explicitly stated in appearance) and by doing so the employee knowingly accepted this uncertainty. In this situation there is no room for an appeal to article 7: 610b CC which was written precisely for those situations where the size of employment for the employee is not clear.

And finally, another example is the ruling of the Court of Maastricht of 22 March 2006.[34] The worker claims wage from a temporary work agency named "Tence". He worked an average of 149 hours a month for a period of 6 months. The agency is of the opinion that article 7:610b CC is not applicable now that the volume of work was clear and in accordance with the intentions of the parties. Also a wrong reference period was used. The Court ruled on basis of submitted timesheets that article 7:610b CC more than clearly applies. The actual volume of work can be assumed at a structurally higher level than originally agreed then the agreed upon 8 hours a week. The legislative history is to show that a

[32] Explenatory Memorandum by act 25263 (pag. 4-5 en pag. 22-23)
[33] The Court of Arnhem of 7 September 2007 (LJN: BB3232)
[34] Court of Maastricht 22 March 2006 (RAR 2006, 126) (Tence Uitzendbureau)

period of 6 months is meant as a tool to rebut the presumption. Based on the last 3 months the Court calculates an average of 129 hours which can not be refuted.

§4.3 Legal presumptions in practice

The evaluation report "Flexibility and Security" of 2007 by the University of Amsterdam, HSI and TNO states that in practice a consequence of the legal presumption is the caution employers will take in the future when contracting a flexible employee.[35] While one out of fourteen flex-workers reported a dispute with the employer on the number of worked hours, research shows that presumptions are rarely invoked – even less than in 2002[36]- both in law and in practice. Some employees do not want the scope of their employment to be increased and some find it does not fit to the working relationship when an employee confronts the employer with such a claim. Also a few employers (and much fewer than in 2002) report that the presumptions give rise to any problems. The conclusion from the report of 2002, that the presumption has particularly preventive effects, seems to be endorsed. Dutch companies and institutions are employing 63 % temporarily appointed staff, 28% of staff hired trough employment agencies, 30% are temporary workers and 14 % with freelancers and self employed. One of the conclusions of the evaluation was that (in 2007) the number of temporary agency employees halved with the introduction of the Act Flexibility and Security. Furthermore the existence of article 7:610b CC had led to a conversion of contracts. Employers converted for instance an on call contract into a contract with minimum working hours a month.

In his conclusion by the ruling of the Supreme Court on the 15 September 2006 D.W.F. Verkade also analyzes the operation in practice of the legal presumption ex. article 7:610a CC.[37] The article seems to have had little impact in practice. The presumption arises only indirectly and the person who invokes the presumption seems to have no significant probability of success proving the contract of employment than any other who does not.[38] Usually the court directly tackles the "main question" if the weighing of all circumstances gives rise to judge whether or not there is a contract of employment (the elements of article 7:610 CC).[39] On the one hand can be concluded that the legal presumption does not appear to be the "helping hand" to the employee when the alleged existence of employment is questionable. On the other hand is avoided that the legal presumption led to an actual change in the concept of "contract of employment" ex article 7:610 CC which the legislator explicitly not desired.

[35] UvA, HSI and TNO: Evaluation report Flexibility and Security of 2007. See also Smitskam en Kronenburg, Wet flexibiliteit en zekerheid, Deventer: Kluwer 2000, p.29
[36] UvA, HSI and TNO: Evaluation report Flexibility and Security of 2002
[37] Supreme Court 15 September 2006 (LJN AX9396)
[38] Boot, a.w., p. 58 e.v.
[39] 12 September 2006, Court of Appeal 's-Hertogenbosch (LJN BA4879)

Another consequent of the legal presumption is the caution employers will take in the future when contracting a flexible employee[40].

§4.4 The legal definition of the temporary agency agreement

Article 7:690 CC explicitly states that a temporary agency contract is a contract of employment whereby, within the framework of the conducting of a profession or a business, the employee is placed by the employer at the disposal of a third party in order to perform work under the supervision and direction of the latter by virtue of a contract of services granted by the latter to the agency. This means that all the statutory rules on the contract of employment are applicable to temporary agency workers[41]. The main finding in the evaluation report of 2002 on the act Flexibility and Security was that the act was a milestone for the temporary agency world. It marked the political and legal acceptance of this type of work. The uncertainty over the relationship between employee, the employment agencies and the client/user firm came to an end. The agencies became employers (see the definition of article 7:690 CC). Since the Act the agencies have adapted to the new legislation[42]. Few changes can be observed in the extent to which labour relations are continued to an agreement which offers the temporary worker more security. However the report states that the relationship with the temporary agency worker will be more often converted into a more temporary than into a permanent contract. This increase in de number of workers with a flexible contract also appears in the figures from the central statistics office (CBS). In 2005 there where approximately 6.000.000 flex workers but in 2010 the number went up to 6.500.000. The number of workers with a contract of employment went down from 6.000.000 in 2009 to 570.000 in 2010.[43]

§4.5 General decree (Algemene Maatregel van Bestuur) on the position of postmen

In December 2007 FNV Bondgenoten (a trade union) published a so called “black book” concerning the postal market in response to the government wanting to take the final step in the process of liberalizing the postal market.[44] This research showed that the postal delivery staff does not always earn an income equal to the minimum wage (-30% basic level).[45] This was one of the conditions the government set for the market to be privatized. The publication led to a wave of indignation. Therefore the government decided/was forced to set preconditions to the full liberalization of postal markets in

[40] Smitskam en Kronenburg, Wet flexibiliteit en zekerheid, Deventer: Kluwer 2000, p.29
[41] Except two special rules in the area of dismissals and of equal treatment of workers with fixed-term and open-ended contracts.
[42] Almost all temporary agencies now have a pension scheme and the use of the pension has increased
[43] http://www.cbs.nl/nl-NL/menu/themas/arbeid-sociale-zekerheid/publicaties/arbeidsmarkt-vogelvlucht/korte-termijn-ontw/vv-positie-werkkring-arbeidsduur-art.htm
[44] Henk v.d. Kolk, president of the FNV Bondgenoten 2010 (union)
[45] Report “VNF bondgenoten” (is a trade union) , and also research SEO

the form of a general decree (AMVB). [46] The idea was that by taking this measurement the government would be able to ensure that no disproportional high level of competition in postal employment would occur.[47]

The decree consist a special regulation for a group of employees with a specific position in the postal service. The government has adopted a measure in which the –newly established- postal companies are required to offer a certain part of the employees a contract of employment. However postal companies do not have to meet the new requirements if they are under a collective agreement in which agreements are made on contract of employment with postal carriers. This provision makes it possible for the trade unions to take responsibility for employment conditions at new postal companies. In the collective agreement must (at least) be established that within 3, 5 years after opening the postal market 80% of the postal work should be based on a contract of employment.

However the latest research of the FNV Bondgenoten showed that the measures did not lead to the desired result. Many of the postal deliverers would and will not accept a contract of employment. The research pinpoints 5 main reasons: reason 1 (35%): the employer does not pay the minimum wage, reason 2 (64%) the change in working hours, reason 3 (64%) mandatory working in another district, reason 4 (43%) no option for performing additional activities and reason 5 (39%) loss of flexibility. The number can be explained by the fact that most postal workers find the freedom of planning their work crucial for their job is one of part time (for example: students and housewives). So, the desired flexibility and protection of the workers in this area is not yet achieved, but the initiative is there (see for recent developments also chapter 7.2).

[46] General Decree on the position of postmen stb. 2009/418, Kamerstukken II, 2008-2009, 30 536, nr. 90)

[47] Nieuwsbericht | 20-05-2009 overheid.nl

Section 5: The Extensions of Labour Law

This chapter provides an overview of the aspects of labour law that are extended to categories of workers who do not have a contract of employment, in particular the self employed persons without staff. Firstly paragraph 5.2 will discuss the scope of the word employee in the decree dealing with giving notice, the "Extraordinary degree on labour relations of 5 October 1945" (BBA). The BBA is also applicable to some categories of self employed persons. Secondly paragraph 5.3 discusses the "Act on collective agreements" (WCAO) which provides for a form of protection for persons are covered by a collective agreement. Thirdly paragraph 5.4 discusses the "Act on the minimum wage" (WML) and the rule on the wage per call set in article 7:628a CC and the applicability of both provisions on self employed person. Finally paragraph 5.5 will deal with the extension as set in the so called Act on Health and Safety Conditions (ARBO wet)

§5.1 The scope of the "Extraordinary degree on labour relations" (BBA)

The BBA is a decree which complements the CC. The BBA mainly contains public law provisions in case of giving notice. The BBA also applies to some specific categories of self-employed persons[48]. In this decree a self employed person is defined as an employee for this act when s/he performs the work personally, unless it is performed for more than two employers and/or by more than two workers assisting this worker. Thus the extension is limited. For instance when a self employed person works for three employers, s/he will not have the protection by the BBA. When the self employed meets the criteria of the decree[49] the employer is not allowed to give notice without a permit from the "UWV" – the benefit administration which was given the authority to decide on requests for a permit –, previously this was the responsibility of the employment office.
Giving notice is only possible when the employer has received the permit. Implementation rules are set out in the "Dismissal degree" (Ontslagbesluit) which is a general ministerial regulation. Also of importance are the so called dismissal prohibitions (article 7:670a CC). See for further information chapter 1. In this way this category of the self employed person is protected by the extension of the BBA.

§5.2 The scope of the "Act on Collective Agreements"

Another Act relevant to our issue is the Act on Collective Agreements (WCAO). The WCAO is an Act which provides for a system on collective agreements and is in force since 1927. The Act defines which agreements are collective labour agreements and who is authorized to conclude such

[48] Article 1 paragraph 1 sub b "2" BBA
[49] For instance some occupations are excluded, e.g. teachers (article 2 WCAO).

agreements. The scope of the Act is determined in article 1 of the WCAO. Article 1 sub 2 provides that the collective agreement can also be applicable on civil law agreements, which cover categories of the self employed. All the articles in the Act apply mutatis mutandis on the self employed persons. Consequently self employed persons can found an association of employers or an association of employees relevant to this Act. Recently such associations were founded, such as the "FNV self-employed", which is a branch of the largest trade union and "Self employed in the construction sector". [50]

The collective agreements made for the self-employed prompted the NMa (Dutch competition authority) to create and publish a so called "vision document"[51]. In this document the NMA stated that no arrangements on fees or remuneration must be made for self-employed persons in collective agreements (such agreements was made for the metal sector and for replacing orchestra musicians). So, despite the Act, it may be difficult to regulate the wages of the self-employed. The NMa's view is remarkable now that article 1 sub 2 WCAO explicitly states that it is possible to make collective agreements for civil law. However, the view by the NMa is disputed severely and it does not seem to be the last word on the issue. It would be interesting to bring this issue before the European Court of Justice.

Another interesting subject is that the Act on Declaring Collective Agreements generally Binding (WAVV), in force since 1937, has the same type of provision as the WCAO. The WAVV provides the Minister with the option to declare a collective agreement binding for a group or sector. When a self employed collective agreement is declared generally binding the question would arise how this would relate to competition law. Some writers are of the opinion that the collective agreement should be adjusted in the sense that self employed persons should be integrated in the existing framework which seems appropriate for those who are not self-employed by choice and who heavily dependent on a single client.[52]

§5.3 The "Minimum wage Act" (WML) and the minimum wage per call (7:628a CC)

The WML is a lex specialis of section 2 of book 7 CC. This act contains several provisions regarding to minimum wage. The minimum wage applies for persons over 23, for younger persons the level depends on the age category. Also self employed persons may fall under the scope of the WML. Article 3 paragraph 1 of the WML determines that a person performing labour personally, who receives remuneration, who performs this labour on a non incidental basis and who can be put on a par with an employee in view of his/her social and economical position is considered to be an employee.

[50] Nagelkerke, Plessen en Wilthagen, Van arbeidsverhouding naar verhouding tot de arbeid: een paradigmawisseling?, SMA 2008, 11/12

[51] Vision Document NMA "Cao-tariefbepalingen voor zelfstandigen en de Mededingingswet" 's-Gravenhage December 2007

[52] Vegter (*SR* 2008/2,p. 1-2).

So when the self employed worker performs work for a certain principal s/he is protected in the sense that s/he will receive the minimum wage.

The Act "Flexibility and Security" also introduced article 7:628a CC. This article contains a provision that a worker who agreed on (i) working less than 15 hours a week or (ii) whose number of working hours is not defined, will receive for every period s/he worked less than 3 hours the wage for these 3 hours. The legislator found it unacceptable – in the context of the concept of article 7:611 CC – that employee would not be covered for remuneration for an absolute minimum of working hours. The right to receive the wage mentioned in article 7:628a CC is not applicable when the working hours are clearly defined and sufficiently clear (for example: every day from 10.00 to 12.00). The minimum wage claim is also not applicable when the contract of employment, a collective agreement or another type of contract excludes this provision. Article 7:628 sub 1 CC states that a worker retains the right to receive wage when the reason for not performing the work lies in the "risk sphere" of the employer. However this provisions can be excluded by the employer, but this is only possible for the first 6 months (article 7:628 sub 5 CC). What does risk sphere of the employer means? For instance: the employer asks the worker to perform labour. After one hour the employer sends the worker away because there is no more work to do. Does the employer have to pay at least 3 hours? The minister considered that it is impossible to exclude the employer's obligation in this situation because of the mandatory nature of article 7:628a CC.[53] This is a risk within in the sphere of the employer, not the employee. However, when the worker doesn't perform his/her work because he for example is put in jail, this is considered to be a risk which falls in the scope of the employee. The employer is then not obliged to pay wage.
The mentioned option to exclude article 7:628a CC by article 7:628 sib 5 CC is not possible when by an applicable collective agreement is agreed that exclusion would be impossible. Research however showed that only 14 out of 110 collective agreements were adapted. In some collective agreements the period during wage has to be paid is lengthened and in some the period is excluded. Research also showed that 2/3rd of the employers always pay for the wage claim of three hours. Many employers are not aware of the possibility to exclude the claim. Some around 20% of the employers know the rule, but only 5% exclude the claim the first 6 months (in 1999: 16% in 2000: 10% and in 2001: 7%).

§5.4 The extension in the Act on Working Conditions (ARBO wet)

The last major revision of the Act on Working Conditions (ARBO) took place in 1998; the Act was modified in 2005 to meet the standards of the European Framework Directive on Safety and Health of workers at work[54]. This directive regulates the working conditions for workers in the European Union.

[53] Smitskam, Wet Flexibiliteit en zekerheid, Deventer: Kluwer 2000 p. 34
[54] Directive 89/391/EEG

The Act provides rules for employers and employees to the health, safety and welfare of employees and independent entrepreneurs. The aim is to prevent and avoid accidents and illness caused by work. The Act is in the form of a framework which means that the Act doesn't provide for specific rules on working conditions in companies. Article 3 ARBO for example states "The employer shall provide safety and health of workers in every aspect related to work and puts forward a policy that focuses on best working conditions, which he, given a state of knowledge and professional service observes the following (…)". Through article 1 sub 1 sub b ARBO the articles in this Act are mutatis mutandis applicable to self employed workers. Consequently the employer must also provide high-quality working conditions for the self employed. Moreover the rules on liability, such as article 7:668a sub 4 CC, are fully applicable.

Section 6: Social Security

In this chapter we discuss what kind of social security rules exist in the Netherlands and if parts are extended to workers who do not have a contract of employment.

§ 6.1 History

Before the Second World War the employees insurance schemes were developed, for sickness, disability and unemployment. After world war national insurance schemes were introduced for old age, survivors benefits and health care. This means that all residents are insured for old age benefit. As a result a combination of employees insurance and national insurance schemes was established. We will discuss these below in more detail.

§ 6.2 Social insurance schemes

There are two different types of social insurance schemes: employee insurance schemes and national insurance schemes.

Employee insurances
In the Netherlands there are three main employee insurances. The Unemployment Insurance Act (UIA), the Act work and income in accordance with work capacity (Disability act) and the Sickness Benefits Act.

These insurance schemes are in the first place meant for people who have a contract of employment or a similar kind of contract. Also people who are assumed to have a contract of employment are within the scope of these insurance schemes. With people who are assumed to have a contract of employment are meant the workers who do not have a contract of employment on paper, but out of the presumption of article 7:610a Civil Code arises a contract of employment (see Chapter 4). Also recipients of benefits from these insurances are regarded as employee. This means that they are covered in case a new risk materialise.

For each insurance the definition of an employee could be different. The scope of the insurances is set out in the law itself, but general additional arrangements can be found in the Decree ‘Besluit tot aanwijzing van gevallen waarin een arbeidsverhouding als dienstbetrekking wordt beschouwd’, the Decree on extension or restriction of personal scope of employment insurance schemes.

The most general definition of an employee under the employment insurances can be found in the UIA. An employee under the Unemployment Insurance Act is according to article 3 paragraph 1 UIA

an individual who is under 65 years old and in a private or public employment relationship. With 'private employment relationship' is meant a contract of employment as set out in article 7:610 CC[55] (see Chapter 1)
Exceptions from the employee criteria as mentioned in the UIA are persons performing housekeeping, director shareholders and self-employed persons with a VAR-statement (Article 6 UIA). Housekeeping is excepted, because it is impossible and way to expensive for private people, who have a housekeeper to pay the premium for the UIA as employer. Director-shareholders are excluded because they have a special contract with a company. They can be fired through the shareholders, they do not have to be laid of by the normal procedures. Self-employed workers with a VAR-statement have explicit indicated that they want to be classified as a self-employed worker and not as an employee. A VAR-statement is a statement of the tax agency that someone is a self-employed worker.

Article 4 and 5 UIA also mention assimilated employment relationships. These relationships are fictitious because they are not really contract of employment. However due to the social-economic position of the persons involved in these relationships they are in similar circumstances as employees and therefore fall within the scope of the UIA. For example professional athletes. Although some of professional athletes have an employment contract there are also athletes that do not have an employment contract, but receive a grant from the Dutch Olympic committee which allows them to focus on their sport instead of remaining amateur. These athletes are employees as meant in the UIA and thus covered by this act. Another example is an intermediary person. An intermediate is someone that focuses on providing financial services such as insurance and mortgages. The intermediate will normally mediate between the provider and applicant. There are a few requirements for an intermediate before he can qualify as an employee. There must be an agreement between the intermediate and a principal, the objective of that agreement should be to contract third parties, an intermediate is only allowed to negotiate for one principal, they negotiation must be the main purpose, the intermediate can only have two persons assist him and the negotiations finds place through visiting the other party. If all these requirements are fulfilled, the intermediate fall within the scope of the UIA. However, if they are deemed self-employed they do not fall within this scope. So the question whether a person is self-employed still remains. Relevant is, for instance, whether the worker can make use of materials of the principal or has to use his/her own materials. If the self-employed worker is only using his own materials, it is clear that he works as self-employed. (CRvB 18 February 1999 RSV 1999/152). Other features are: is the self-employed worker is taking a business risk, does the self-employed worker makes an investment to perform the work and is there more than one principal. If one of these features is fulfilled, it is assumed that the worker is a self-employed worker and does not fall within the scope of the employee insurances[56].

[55] H.L. Bakels, *Schets van het Nederlandse arbeidsrecht*, Deventer: Kluwer 2007, p. 56-59.
[56] F.m. Noordam. *Sociaal zekerheidrecht.* Deventer: Kluwer 2008, p. 61

So whether a self-employed worker falls within the scope of the employee insurances, depends to a large extent on the circumstances of the case.

Unemployment Insurance Act (UIA)

This insurance scheme guarantees an income if an employee lose his/her job. How long and how high this benefit is, depends on the work history and recently earned salary of the employee. Also there are some requirements the employee must fulfil. So must the employee have worked 26 weeks out of the last 36 weeks before the unemployment. If you are entitled to an unemployment benefit, you get a benefit for at least three months. How longer a person has worked and paid contribution, how longer he/she gets a benefit (Article 42 paragraph 1 & 3 UIA).

Sickness benefit act

This insurance is meant for an employee who gets ill, but only if he/she does not have an employer. If he/she has an employer the latter one has to continue to pay wage in case of sickness according to – basically - the rules of the SBA.

Since the self-employed we consider here do not have an employer, we will discuss the SBA. This is relevant to non-employees if they are covered according to the rules discussed supra.

For employees without an employer, the UWV (employee insurance administration) will be the formal employer.

The employee has the right to a benefit of 70% of his last earned wage for a period of 104 weeks (article 29 Sickness benefit act). The sickness benefit is not without obligation for the employee. For example the employee should contribute to his integration and medical examination.

The definition of the term employee in the Sickness Benefit Act is nearly the same as the definition of 'employee' in the Unemployment Insurance Act. (article 3-8a/c Sickness Benefit Act). Required by the Sickness benefit act is that the work is be done personally. An assignment agreement whereby the contractor can outsource the work will not fall within the scope of the Sickness benefit act. Excepted for the sickness benefit act are workers on unpaid leave.

Disability Act

If an employee is not better after 104 weeks of sickness, he/she can apply for a benefit of the Disability act.

An employee as meant in the Disability act is the same as meant by the sickness benefit act with exception of the employee on unpaid leave. Also as an employee may be regarded an unemployed worker, who does not have the right to an unemployment benefit (article 8 and 9 Disability act).

National insurances

National insurances cover all residents. Residents are all persons who live in the Netherlands. Thus everybody, whatever his position on the labour market, employed and self-employed persons alike, are residents as meant by national insurances. For these insurances it does not matter whether resident can be classified as employees or not.

An example of national insurances is the Old age pensions Act (AOW). Everybody who works pays an amount out of his income for the general retirement benefit. If you reach the age of 65, you are entitled to an old age pension. There is also a scheme for survivors (Anw), exceptional medical expenses (Act on Exceptional Medical Expenses) and Health insurances (Health insurances act).

§ 6.4 Social assistance

Everybody in the Netherlands who cannot provide for his/her own costs of living has the right to support on the basis of the social assistance act.[57] Everyone with a Dutch citizenship or a residence-permit and living in the Netherlands can apply for social facilities. All citizens in the Netherlands pay taxes to provide for these facilities.

The act providing for these benefits is the Act on work and public assistance. For a right to assistance there has to be a situation where a person has come in such circumstances or is likely to come in the circumstances that he/she no longer has the resources to pay for the necessary costs of living. Examples are people who have been out of work for a long time. The financial aid is about the social minimum (article 21-30 Act work and public assistance).

For social assistance there is no difference between people with a contract of employment or self employed people. Everybody who lives legally in the Netherlands can apply for these social benefits.

There is special benefit for self-employed workers. For starters, self-employed workers with temporary financial trouble, self-employed persons, who want to end the business and older persons with an unviable business. In the Decision Assistance Self-employed workers (Besluit Bijstandverlening zelfstandigen) are laid down strict rules to qualify for a benefit. This benefit can be a loan or a supplement to an income. Which of the benefits is granted to a self-employed worker if he/she fulfill all the requirements is depending on the kind of needs. For example if the business is still having a turnover to cover the costs, but there is no profit left for the self-employed worker to live from, their will be a supplement to his/her income. The supplement leads to an income at the level of

[57] Article 20 Constitition

the social minimum. Fro example a loan is provided if the self-employed worker meets all requirements and is temporary unable to pay all the bills for his/her business.

The Act on Income Provision Older and Partially Incapacitated self-employed workers (IOAZ) gives older self-employed workers under stick conditions the right on a benefit till there pension if they close their company. Also this benefit is not higher than the social minimum.

§ 6.5 Insurance schemes for the self-employed

Employee insurance schemes are not meant for self-employed workers. Self-employed workers have to make their own arrangements. They can buy insurance for illness and disability from private parties. There are no private insurance schemes for unemployment.

In some case self-employed workers can voluntarily participate in employee insurances, but only if this is directly after termination of an employment relationship. They have to inform the UWV, that they are willing to pay contributions for these insurances. The insurances that are possible for the self-employed worker to participate in are:

- Sickness benefit act (Ziektewet-verzekering)
- Disability act (WIA- of WAO-verzekering)
- Unemployment insurance act (WW-verzekering).

Note that these insurances are expensive. The self-employed worker has to pay the premium for the employee as the premium for the employer.

Section 7: Recent Developments

In this chapter we discuss the recent development in the Netherlands for the protection of persons without a contract of employment.

§ 7.1 Advice

The Sociaal Economische Raad (SER, Social Economic Council) is an advisory committee on social-economic issues to the Dutch government. It published two reports on the protection of persons working without a contract of employment.

Self-employed workers in the picture

The first report is a comprehensive report on the position of the self-employed worker and his/her protection. In this report attention is drawn to tax incentives, training, assistance, disability, retirement and working conditions.

Tax

Self-employed workers may be eligible for a tax deduction. There is an hour criterion that applies for such a deduction: a self-employed worker must work at least 1,225 hours a year as a self-employed worker before he/she can apply for tax deduction for self-employed workers. The SER advised to replace the hour criterion with a profit or turnover criteria, because the hour criterion works as an obstacle for self-employed workers. A lot of the self-employed workers do not make this threshold. Therefore they do not get the deduction and is it less attractive to work as a self-employed worker.

Training

Research shows that self-employed workers follow less training than employees. The SER advised that self-employed workers must have the possibility to participate in sector training activities, if there are no suitable alternative opportunities available.

Assistance for self-employed workers

As mentioned in chapter 6 of this rapport, the Dutch law provides, under strict conditions, for special assistance for self-employed workers. The SER's view is that the assistance for self-employed workers offers good opportunities for self-employed workers with a viable business in difficult times. But it advises to give better information on the different support options for self-employed workers and more cooperation between municipalities to use existing possibilities more efficiently. It also advices that where existing solutions are insufficient, broader access is needed. One improvement could be that accrued pensions must not be included by the assets test. The pension is meant for later after the

retirement of the self-employed worker. If the accrued pension is included in the assets test, the result is higher while this money is saved for later. The self-employed worker would be forced to al ready use this money. Therefore he/she will get a problem later on in life.

Disability

Almost 50% of the self-employed workers have no insurances for disability. According to the SER, there is a large group of self-employed workers that can make their own arrangements. The SER believes that everybody must have to possibility to buy insurance for disability. Therefore the SER advises better accessibility to the Disability act for self-employed workers and private insurance for self employed workers, who are difficult to insure, for example self-employed workers with health issues. For these self-employed workers there must be a mix between private en public insurances. The SER also stresses that informing self-employed workers about the risk of disability and the possibilities of insurances should be done more accurate.

Pensions

In the view of the SER self-employed workers are responsible for their own pension, but in most cases the pension is inadequate. The SER advises to give self-employed workers the same tax benefit for their pension as employees. Also the self-employed worker must get the possibility to join an industry pension fund. If a self-employed worker has the possibility to join in a pension fund his pension could be higher, because there is a common source where the pension is built up in. Also the risk of loosing the built up pension is lower, because of the common source. The self-employed worker does not have to worry about his/her pension, because they pay a monthly amount to the fund and at their 65th birthday, they will get a monthly benefit.

Another point of the SER report is that awareness must created among self-employed workers about there pension. Most of the self-employed workers are busy with now and not with later.
On March the 4th 2011 an article was published with the titled “Research pensions self employed”. The government wants to know why self-employed workers often do not have their pensions properly regulated. Therefore a study on the extent tot which pension are compatible with the needs of the self employed workers is requested. The idea behind the research is a positive one in the sense that the government encourages entrepreneurship and has the intention to remove all unnecessary obstacles. Earlier this year (February 2011) it was announced that self employed workers soon will be able to obtain advantageous to save for their retirement through the pension fund of their former employer. As of 2012 the self employed will be able to benefit for 10 years from a tax friendly regime that applies for retirement savings form their old branch fund. Note that it is only 3 years now.

Working conditions

In the view of the SER the health and safety conditions must be the same for all workers, i.e. for employees and self-employed workers. This was argued in a special report on this topic, see the next section.

Report on self-employed workers and their working conditions

This report concerns the working conditions of self-employed workers. At this moment not all rules on working conditions are applicable to self-employed workers. This means that self-employed workers are not always working under the same health and safety rules as employees. According to the view of the government, health and safety regulations that set limits or process standards establishing a threshold (such as on noise) must be the same for everyone who works, also for self-employed workers. Through a broader scope of the health and safety limits, there will be an equal level of protection and competition will be avoided.

If all the working conditions would be applicable to self-employed workers there could be undesirable effects and in some cases lead to disproportionate administrative burdens, because self-employed workers are personally responsible for compliancy with these rules.
For this case the equal protection of self-employed workers is limited to two general health and safety standards. These standards are the general duty of care for good working conditions and the risk assessment and evaluation.
The general duty of good care for good working conditions means that there must been taken care of the health and safety of a worker in all aspects associated with work. For example an employer must provide goggles for employees who perform welding. It is a broad concept.
With risk assessment and evaluation is meant that is written down which risk there are when performing certain work. Also is written down what the risk reduction measures are.

The SER advised that an extensive risk assessment and evaluation is not necessary for self-employed workers. The extensive risk assessment is meant for employers who have a duty to care for their employees. This is not meant for the self-employed worker.
The self-employed worker may be able to use digital tools designed for small businesses or the instrument of so-called Last Minute Risk Analysis (LMRA) to make a risk assessment.

Furthermore the SER advised that there must be more information and training for self-employed workers about health and safety standards, in particular on prevention.

§ 7.2 Developments in respect to the general decree on the position of postmen

As already mentioned in Chapter 4, paragraph 4.6, the Postal market in the Netherlands has been privatized and liberalized.

Untill 1 april 2009, postal service company TNT was the only player in the Dutch postal service market and therefore had a monopoly position. After 1 april 2009 however the Postal Act came into force and brought liberalization into the postal market. Other postal service companies as Selektmail and Sandd entered the market and brought competition to the market. Economically very favorable, however there was a need to protect postmen by law before liberalization took place. Postmen at Sandd and Selektmail work predominantly through a contract of services, which is far more favorable for the employer than hiring people on the basis of a contract of employment, since it is cheaper for the employer. With a contract of employment comes protection by labour law as already mentioned in Chapter 1. This protection is needed for postmen, however they do not work by way of employment contract. With the Postal Act there had to come legislation in order to protect those workers from extensive competition that could lead to socially unacceptable working conditions, as for example cutting on contracts of employment.

Former secretary of economic affairs, mr Heemskerk, stated that this protection had to be established through labour law and thus by the trade unions, since they are entrusted with arranging working conditions for employees. Therefore the protection needed would have to be established through collective agreement.
However, the trade unions could not reach to an agreement and therefore the government wanted to obligate postal service companies by general decree from 1 january 2011 on to offer all their employees a contract of employment. This would however be extremely undesirable, since a certain obligation would possibly lead to bankruptcies of several postal service companies. Therefore the paliament appointed mr Vreeman to investigate on a solution that would be appropriate for both parties, employers as well as employees. The commission Vreeman came with various creative solutions that not only were aimed at higher wages for the employees but would also pay for employers. Due to these solutions, employees would be more likely to get a contract of employment. The commission came up with the idea to set up a fund that would have to be supplemented by the postal service companies, and out which they will get a fixed payment in case they agree upon an employment contract with an employee. In order to establish this, the Commission Vreeman gives the trade unions untill 1 april 2011 to come to an agreement. By 1 January 2014 80% of all contracts will have to be contracts of employment.

The Dutch goverment adopted a general decree on the position of postmen (on the basis of article 8 of the Postal Act) and added a provision that contains the requirement for new players on the postal market to offer a certain part of the employees a contract of employment. From this requirement may be waived in case these postal companies are under a collective agreement in which agreements are made on contracts of employment with postal carriers. In the collective agreement must at least be established that within 3,5 years after liberalizing the postal market, 80% of the postmen should perform work through a contract of employment. This decree therefore seems to be a minimum guarantee for enabling socially acceptable working conditions.

The Commission Vreeman also stated that the Postal Act should be adjusted in order to provide a better base for the general decree. The current general decree is being disputed as we speak and will end at 1 january 2013, according to the Postal Act. The general decree only provides protection temporarily. The Commission therefore recommended to reformulate article 8 of the Postal Act in such a way that the general decree would get unlimited validity or to directly adopt a certain provision into the Postal Act. This way, the general decree would be able to get unlimited validity. The Dutch parliament strives to make this adjustment before summer recess.

Section 8 Criticism

As seen in the previous chapters, the position of the people who perform work under a contract of employment is much more secure on certain points than it is for the persons who perform work without a contract of employment. The self-employed people account for the biggest part of the people who perform work without a contract of employment (for example under an assignment contract of the contract for the realization for particular work).Therefore, we will focus on this respective group in this section. This chapter will discuss criticism on various topics by different Dutch legal authors.

8.1 Criticism on the present position of the self-employed without staff

Due to the fact that the number of self-employed without staff is ever growing (6% to 8% over the past 15 years) more attention is given to their present position. Recently the 'Sociaal Economische Raad' (herinafter; *SER*)[58] wrote a rapport on behalf of the government to advise them on the current position of the self-employed without staff. [59] This rapport indicated that the group of self-employed without staff is growing rapidly, but that they are insufficiently protected in comparison to employees on many areas. In addition SER advises (see recommendations) the government on the following topics: fiscal facilities, education, labour condition, assistance, disabilities, pensions and competition (see also chapter 7).[60] For instance, the report states that persons who are self employed have less possibilities with regard to trainings and other forms of education. According to the SER it is desirable to pursue training and development and therefore those options should be facilitated. With regard to labour conditions the SER believes that working conditions, protection and safety at work should be equal for all persons who perform work. In some areas, such as the construction industry, urgent solutions should be taken. And finally – with regard to competition law – the SER finds that the principle of freedom to negotiate should lead to self employed workers setting their own tariffs. SER finds that the solution can be found under the scope of the Competition Act, in particular the "bagatelvrijstelling'[61] and the possibility for the Minister of Economic Affairs to provide the NMa with general (binding) guidance.

In 2008 Vegter also wrote an article about this particular topic.[62] Vegter observes that the legal arguments of the NMa seem strongly, given certain rulings of the European Court of Justice (ECJ)[63]

[58] SER is the social economic council which advises government and parliament on the outlines of the conduct of social economic policy.

[59] The Social Economical Council, the advisory body of the parliament and the government regarding social-economical policies.

[60] The Social Economical Council, the advisory body of the parliament and the government regarding social-economical policies paragraph 12

[61] DeMinimis rule

[62] Vegter, The NMa and the self employed, SR 2008, 8

[63] Case law: Albany and Brentjens

which provides that collective agreements are not affected by the prohibition on competition law (cartel[64]) unless the unions were involved.

However the report in itself also received criticism from legal authors. An example is the article from Grapperhaus named "The independence of the self employed is an illusion"[65]. Grapperhaus does not criticize the recommendations but the fact that the self employed hardly can be called independent if one looks at the profits generated from their business activities. In 2007 675.700 workers were estimated to be self employed. As many as 288.400 (43%) of them generated less than € 10.000 profit and 220.200 (33%) generated even less than € 5000 profit. This leaves no room for investments and is a undesirable development.

Another (legal) author is Posthumus who recently wrote an article in the "TRA" in 2010 about liability of persons who are self employed.[66] In this article Posthumus claims that the self employed worker can be held liable under certain circumstances. However s/he finds that this is no reason for concern while self employed should be aware of these possible liabilities. The first argument to justify the liability is that the self employed workers voluntarily chosen this form of entrepreneurship. The second argument is that liability can be – to a certain extent - excluded or restricted in a contract or terms and conditions. Because of the possibility to exclude liability the gap between the employee and the self employed in all is not very large. And thirdly research showed that the self employed do not often face liability claims which can be explained by the nature of the relationship.

A more general assessment of the self employed workers is made by Jansen. Jansen wrote an article about the self employed being a blessing or a threat[67]. Jansen finds the question difficult to answer as the exact number of self employed is not known. If indeed there are only 200.000 to 300.000 self employed workers on an working population of 7.4 ml people then they are not a threat. Also it depends on how to interpreted the main question. The number of uninsured and workers without a pension definitely are a threat for this will lead to a large group depending on social welfare. However from the perspective of the labour market the flexibility is a blessing. Employers are now able to do quick business and be efficient in their capacity (external flexibility). Jansen also finds the discussion on social and fiscal law with regard to the self employed a blessing. It forces society to consider the position of the self employed. Complementary – with regard to pensions - some lobbyists claim that the government should provide for a minimum rate, because only a sufficient rate can enable the self-employed to insure him or herself against incapacity or to acquire a normal pension.

[64] Article 6 Dutch competition act
[65] Grapperhaus, de zelfstandigheid van een grote groep zzp'ers is schijnzelfstandigheid, TAR 2010. 96
[66] Posthumus, liability of the self employed, TRA 2010, 98
[67] Jansen, ZZP'ers zegen of bedreiging?, WFR 2009/991

Also an interesting topic which is the subject of debate is the so called “zelfstandigenafrek”.[68] This is a rule which enables self employed , who are starting their own business, to maintain there claim to benefit. Required is that they report the hours worked. UWV conducted research over the period 2004 until 2006 using file comparison. Following this study UWV published a report showing that many self employed committed fraud by filing incorrect data. The government – among others - imposed fines. Another research however showed that the information about the number of hours worked was not without errors, so people where disproportionally affected by the actions. The Minister recently announced reassessments. About 1100 workers have indicated the wish to be considered in the review.

[68] Pennings, “Minister Donner and fraudulent self employed”, TRA 2010, 55 and Van Helden, “self employed with a wrong start”, DJ 2010, 6156