Universiteit Utrecht

Regulation of Remuneration in The Netherlands

Authors:

Bart Lankman

Wim van Meegdenburg

Chris Noordam

Tessa Rosenberg Polak

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Abbreviations

ACA	Act on Collective Labour Agreements / Wet op de collectieve arbeidsovereenkomst (WCAO)
AGB	Act on Declaring CLA Provisions Generally Binding / Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten (WAVV)
WCA	Work and Care Act / Wet arbeid en zorg (WAZO)
ALTI	Act on the Limitation Top Incomes / Wet Normering Topinkomens (WNT)
AMSS	Act Concerning the Legal Position of Ministers and Secretaries of State / Wet rechtspositie ministers en staatssecretarissen (WRMS)
AMW	Act on Minimum Wages and Minimum Holiday Allowances / Wet minimumloon en minimumvakantiebijslag (WML)
AWC	Act on Work Councils / Wet op de ondernemingsraden (WOR)
CACS	Collective Agreement Civil Servants / Ambtenarencao
-CC	Civil Code / Burgerlijk Wetboek (BW)
-CLA	Collective labour agreement / Collectievearbeidsovereenkomst (CAO)
CSA	Civil Service Act / Ambtenarenwet (AW)
GCSR	General Civil Service Regulation / Algemeen Rijksambtenarenreglement (ARR)
SBA	Sickness Benefits Act / Ziektewet (ZW)
ICESCR	The International Covenant on Economic, Social and Cultural Rights
RDCS	Remuneration Decree Civil Servants / Bezoldigingsbesluit Burgerlijke Rijksambtenaren (BBRA)

Introduction

In this report we will set out the most important aspects concerning the concept of pay in the Netherlands. In Chapter 1 the concept of pay is discussed with regard to various contracts under Dutch Law. Therefore not only the employment contract will be discussed, but also civil servants are touched upon and contracts of services are reviewed. The principle mechanisms for determining the amount of pay will be elaborated on in Chapter 2. Here we will show the remuneration of the employee is defined through three mechanisms: the individual employment contract, collective labour agreements, and legislation. We also consider the position of the civil servants under Dutch law, since their position is fundamentally different in respect of pay. In Chapter 3 we will elaborate on the principle of equal treatment in terms of pay. The principle that equal work should be rewarded with equal pay is laid down in article 7 (a)(1) The International Covenant on Economic, Social and Cultural Rights (ICESCR). With regard to this provision we will discuss the two rulings of the Dutch Supreme Court which further elaborated the principle within the framework of Dutch law. Furthermore, the role of the principle of good employment practices and reasonableness and fairness are significantly important in relation to equal treatment in terms of pay. Variable pay systems and performance pay are addressed in Chapter 4. Dutch labour law offers the possibility to make the amount of remuneration that the employee is entitled to dependent on the performance of the employee, or the performance of the production unit, or company in general. Both the assessment of quantity and quality of work will be elaborated on and also the performance of the company – profit share – will be discussed. In Chapter 5 we will discuss variation of pay in times of crisis. This can be achieved by changing collective agreements or changing individual remuneration by contract amendment. Both ways of changing the employee's remuneration are elaborated on. Finally, in Chapter 6 we will discuss the consequences of non-payment of wages by the employer and enforcement of the obligation to pay.

Chapter 1: The concept of pay/wage

In this chapter we will discuss the three main types of working relationships that exist in the Netherlands. The first working relationship is the most common: the employment contract. In this contract, employees receive a wage. The second type of workers are the civil servants, who receives a salary for their work. Finally, we will look at the contract of services: the contractee receives remuneration for the work performed for the contractor.

1.1 Employment contract

1.1.1 A fundamental right to remuneration?

Neither in the Dutch constitution, nor in any other Dutch law, provide for a fundamental right to wage for employees with an employment contract. However, the definition of an employment contract, article 7:610 Civil Code (Burgerlijk Wetboek; CC), implies that wage is an essential element of the employment contract. Even if parties have not reached an agreement concerning the level of the wage, the employee still has a right to it.

1.1.2 Minimum or sufficient wage

Although the law does not give rules on the level of wages, there are rules on minimum wage. Employees between 23 and 65 have a right to at least the minimum wage, while employees between 15 and 23 have a right to a percentage of minimum wage corresponding to their age,[1] as will be discussed in detail in chapter 2.

According to the Act on Minimum Wages and Minimum Holiday Allowances (Wet Minimumloon en Minimumvakantiebijslag), wage is the financial income resulting from an employment contract (article 6(1) Act on Minimum Wages and Minimum Holiday Allowances). However, a few forms of incomes are excluded. The main ones are: income from overwork, holiday pay, profit shares, payments for special occasions and end-of-the-year payments. According to article 7(4) Act on Minimum Wages and Minimum Holiday Allowances, remuneration the employees receive from third parties for the work they perform for their employer is, as long as it has been agreed upon in the employment contract, considered wage in terms of the Act. E.g. tips are usually not part of the wage, since they are not considered as employment payment in an employment contract.

1.1.3 When is remuneration considered wage?

The CC does not give a definition of wage, but instead contains an exhaustive list of possible forms of wage. According to the Supreme Court, a remuneration is considered wage if three requirements are met.[2] It has to be remuneration, which the employer has the obligation to pay to the employees, for their stipulated or realized work. The following part will discuss the elements of this definition in detail.[3]

[1] Royal Decree of 29 June 1983 on minimum wage for persons under 23, Stb. 1983, 300.
[2] Supreme Court 18 December 1953, NJ 1954, 242 (*Zaal/Gosselink*).
[3] J. M. van Slooten, *Arbeid en loon (Labour and Wage)*, Deventer: Kluwer 1999, p. 78-89.

1.1.3.1 Allowed forms of wage

Remuneration is not limited to money alone. According to article 7:617(1) CC wage can be:

- Money
- Goods, suitable for personal use by the employees and their housemates, with the exception of alcoholic drinks and other products that are damaging to one's health.
- The use of accommodation, including electricity and heating.
- Services, supplies and activities carried out by or paid for by the employer, including education, food and free board and lodgings.
- Securities and vouchers.

Normally, wage is a certain amount of money per period. Other forms of money-wage are:

- Holiday money.
- Allowance for inconveniences.
- Allowance for overwork.
- Share of the profits. Usually, when employees receive a profit share, their wage consists of a fixed part and a part that depends on the result of the company (or a part of the company). This will be discussed in detail in chapter 4.
- Expense allowance. These allowances are wage as long as they are greater than the actual expenses, or if the allowance is for non-work related expenses.

Other allowed forms of wage are wage in kind. Examples of these forms are:

- Board and lodgings.
- Education, which is a service by or on behalf of the employer, article 7:617 CC.
- Clothing.
- Housing: a house can be regarded as a wage, if there is a direct connection between the job and the right to live in the house.[4] E.g. in the case of a caretaker, forester and other persons with a security task. As a result, the right to housing ends with the expiration or dissolution of the employment contract.
- Goods and services the company produces.
- Services, this includes medical care.
- Shares and options: the employee receives shares or options in the employer's company or an associated company.
- Company car: if the car is only used for work, it is not wage. If the car is also for private use, it is partly wage and if the company car is only used in private situations, it is of course completely wage.

Not considered wage are the following:

- Tips from third parties.
- Damage payments.
- Pensions received from third parties.
- Expense allowance, as far as the allowance does not exceed actual expenses.
- Gratifications.

[4] District Court Assen 19 May 2004, JAR 2004, 233

If the remuneration consists of elements that are not an allowed form of wage, employers are not relieved from their duty to pay the full wage to the employees. The employees are still entitled to receive the remaining wage in an allowed form.

1.1.3.2 Obligation to pay

An element of wage is that the employers have the obligation to pay. A voluntarily paid sum of money is not considered wage. Most of the time, the obligation stems from the individual employment contract. However, regularly receiving gratifications could, after a certain period, lead to an implicit obligation, and hence it becomes wage. An obligation to pay these gratifications can also arise through the principle of good employment practices, article 7:611 CC.

1.1.3.3 Payment by the employer

The employers, not third parties, must pay wage. Tips received from customers are not wage as long as the employees receive the tips directly from the customer and the employers cannot interfere. It is uncertain if tips can be considered wage if the tips are collected by the employers who subsequently distributes it to all employees.

Another type of payment that is not considered wage are payments received from special funds with a separate legal identity, but established by the employers for their employees. E.g. a fund that provides educational subsidies and loans to employees. Even though these funds are closely related to the employment, if a separate legal identity donates the money it is not considered wage.

If the employees receive a part of their remuneration from a third party, that part is not wage. This happens for instance in parent-subsidiary company construction, where the subsidiary is the actual employer and pays the normal wage per month, but the parent company pays a yearly share in the profits.

1.1.3.4 Payment to the employee

The wage has to be paid to the employees. This implies that payment to others than the employees, like their family or certain funds, cannot be regarded as wage. There is one exception: where remuneration has to be paid to the employees, but the employers are by law (e.g. wage tax, social security contribution) or by agreement obliged to pay (a part of) the wage to a third party.

1.1.3.5 Payment for the stipulated or realized work

Wage has to be compensation for work that has been done or was required from the employees. Remuneration that is not compensation for work is not regarded wage in this definition. Because of this, any benefits received that do not depend on actual work are not wage. Damage payments cannot be considered as wage, as they are not given as a compensation of work, but as a compensation for damages.

An expense allowance is not wage, as long as the allowance only covers the expenses within the context of work. If an expense allowance is significantly higher than the actual expenses, the part in excess is considered wage. Also allowances for expenses that are not made for work, are wage. The same applies for a company car.

1.1.4 Right to wage in absence of work

The basic rule in this respect is the rule of article 7:627 CC: no wage has to be paid during the time in which the employees actually have not performed their stipulated work ("not worked no pay"). An exception on this rule can be found in article 7:628 CC. This article states that the employees keep the right to wage if the cause of the non-performance of their stipulated work should reasonably be attributed to the employers. There are three situations in which this provision can be applied. The first example of this exception is the situation the employees cannot do their work because the employers runs out of production materials, unless there is a total lack of materials on the market. In practice, this exception of article 7:628 CC does not arise very often.

A second, and in practice most important example is the situation that employees have been dismissed without the permit of the authorities.[5] If the employees are –explicitly- willing to perform their work and the employers do not make use of the offer, the employees have the right to be paid. The third exception is related to the second one. In case of a dismissal because of an urgent reason[6], the employees have the right of continuous pay if the reason has not been proved to be urgent and the employees have explicitly declared they are willing to perform the work and again the employers do not make use of the offer. Since these situations are not exceptional these exceptions occur quite often.[7]

Right to pay during illness

If employees cannot work due to illness, they have the right to 70% of the agreed wage for the first 104 weeks of their illness. During the first 52 weeks this should at least be minimum wage, according to article 7:629(1) CC. Illness in terms of this article has to be objectively medically determined.[8] The cause of the illness is not relevant, unless the employees caused their illness intentionally. It does not matter whether the illness is mental or physical, or the result of work or private circumstances. The employees do not have the right to wage during their illness if they disrupt or delay their recovery by:

- refusing to perform other, suitable work without a good reason for their refusal, or
- refusing to cooperate with reasonable instructions to make it possible for them to do other work, or
- refusing, without good reason, to cooperate with their employer with regards to finding suitable work for them during their illness, or
- having caused their illness intentionally, or
- does not apply for a special illness income.

As long as workers or civil servants have an employer, they are not entitled to benefit under the Sickness Benefits Act (Ziektewet).

The Sickness Benefits Act serves as a safety net only, for *inter alia* workers who do not have a contract of employment anymore and persons assimilated with workers. To the latter category

[5] A general rule of dismissal by the employer in the Dutch law is the obligation for the employer to request for and receive a permit by the authorities (in case the UWV). Without a permit the dismissal is null and void if the employee invokes the nullity.
[6] See paragraph 6.3.1. of the report.
[7] A fourth exception will be dealt with in paragraph 6.2 of the report.
[8] Article 19 Sickness Benefits Act.

belong home workers and persons who help the homeworker.[9] In order to be insured for this purpose the homeworkers need to have an employment relation for at least 30 days and their remuneration must be at least 40% of the minimum wage.[10] If these criteria are met, the homeworkers have a right to sickness benefit. (Article 29e Sickness Benefit Act).

Pregnancy and leaves

The husband or partner of a woman who gives birth has a right to two days leave, shortly after the birth. S/he has the right to the full wages for the duration of this paternity leave.

The employees have a right to paid leave for some very short incidents, article 4:1 Work and Care Act (Wet Arbeid en Zorg). These are:

- Exceptional personal circumstances.
- An obligation enforced by law or government, without financial compensation, that cannot be fulfilled during the employees' leisure time.
- Voting in national and local elections.

Employees have a right to paid leave to take care of close relatives who have become ill for a maximum of two weeks per year.

According to art 7:639(1) CC, employees have the right to their full wage during their holiday leave. At the end of their employment contract, the employers have to compensate the employees for the unused leave days. However, this compensation is limited to the statutory annual holiday leave: employees have a right to a certain number of holiday days per year, which is equal to the number of days they usually work per week, multiplied by four; so if they work five days per week, the amount of annual paid holidays is 20 days.

1.1.5 Who has the obligation to pay wages?

As mentioned before, in an employment contract, wage is remuneration, which has to be paid by the employers to the employees, for their stipulated or realized work. Therefore, in principle, it are the employers who have to pay the wage to the employees. However, in the case where insolvent employers cannot pay wages anymore, the agency responsible for implementing employee insurances (UWV) will pay the wage of the last 13 weeks before the date of insolvency.

1.2 Civil servants

1.2.1 A fundamental right to salary?

According to article 1(1) Civil Servants Act (Ambtenarenwet) a civil servant is a person, who is appointed to work in the public service. Article 125(1)(a) Civil Service Act states that the authorities need to lay down regulations concerning the salary. The Dutch legislator did so in article 12a General Civil Service Regulation (Algemeen Rijksambtenarenreglement). According to this article, civil servants needs to be informed as soon as possible as to their salary, if they have not already been informed at their appointment. Some groups of civil servants are excluded, such as ministers and

[9] Royal Decree 24 December 1986, Stb. 1986, 655, article 1.

[10] If more than two others help the homeworker, the extension does not apply for him/her. Nor does the extension apply to persons receiving a share of the profit from a company. Royal Decree 24 December 1986, Stb. 1986, 655, Article 8; Article 4 Work and Care Act.

mayors. Civil servants of the decentralized government have a right to salary according to article 3:1(1) Collective Agreement Civil Servants (Ambtenarencao). A few groups of civil servants are excepted by article 1:2 (1) Collective Agreement Civil Servants. These groups are for instance civil servants without salary, like voluntary firemen.

1.2.2 Minimum or sufficient salary

The Act on Minimum Wages and Minimum Holiday Allowances does not apply to civil servants (art. 2(3) Act on Minimum Wages and Minimum Holiday Allowances). The parliament has proposed a bill concerning the legal status of the civil servant and making it more akin to that of an employee under civil law.[11] In this proposed Act, article 2(3) Act on Minimum Wages and Minimum Holiday Allowances will be amended so that civil servants will also have a right to minimum salary. At the moment, civil servants receive salary according to the salary scales. Thus, currently, the minimum salary for civil servants is in fact the salary indicated in the lowest salary scale. This will be discussed in detail in chapter 2.

1.2.3 Definition of salary

According to the definition of salary in the Civil Service Act salary is the remuneration civil servants are entitled to, as a result of their appointment, article 115 Civil Service Act. According to article 2 Remuneration Decision Civil Servants (Bezoldigingsbesluit Burgerlijke Rijksambtenaren), salary consists of:

- The remuneration civil servants receive according to the remuneration table.
- Allowances according to chapter III Remuneration Decision Civil Servants. E.g. allowances for overwork.

1.2.4 Payment in absence of work

The main rule concerning payment in absence of work for civil servants is less rigid than for employees with an employment contract. Where the latter have no right to wage if they actually do not work, the former have only no right to salary if they, contrary to their obligations, deliberately neglect to work, article 14 General Civil Service Regulation and 3:1:1(4) Collective Agreement Civil Service. The main reason for civil servants to neglect their work is of course illness. Illness has to be objectively medically determined.[12] Since 2001, civil servants are subject to the same legal regime regarding illness as employees with an employment contract. According to article 76a(1) Sickness Benefits Act, civil servants who cannot perform their work because of illness have a right to payment of 70% of their salary for the first 104 weeks. During the first 52 weeks, the minimum payment is at least the minimum salary that would apply to the civil servant according to the Act on Minimum Wages and Minimum Holiday Allowances. By government directive the employers can be allowed not to pay salary during the first two days of the illness.

Just as employees with an employment contract, civil servants have a right to paid leave for some very short occasions, article 4:1 Work and Care Act. These are:

- Exceptional circumstances.

[11] Bill Normalizing the Legal Position Civil Servants, *Kamerstukken* I *2012/2013,* 32 550, nr. 5..
[12] M.J.S. Korteweg-Wiers, P.M.B. Schrijvers and K.F.A.M. Weijling, *Hoofdlijnen van het ambtenarenrecht (Outline of the Civil Service law)*, Deventer: Kluwer 2003.

- An obligation enforced by law or government, without financial compensation, that cannot be fulfilled during the employees free time.
- Voting in national and local elections.
- Parental leaves.

During their holiday, civil servants receive their full salary, on the basis of article 22 General Civil Service Regulation and 6:1 Collective Agreement Civil Servants.

1.2.5 Who has the obligation to pay salary?

The civil servants are paid by the competent authorities.

1.3 Contract of services

The contract of services is defined as a special agreement in the CC. The provisions concerning the contract of services are separate from those concerning the employment contract and are few in number.

1.3.1 A fundamental right to remuneration?

Under a contract of services there is no fundamental right to remuneration. Only if the contractees are a company or an individual in the pursuit of his/her profession, the contractors are obliged to pay remuneration to the contractees (article 7:405(1) CC). If the contractees are neither a company nor an individual in the pursuit his/her profession, it is assumed it is the intention of the parties that no remuneration is obliged by the contractors.[13]

1.3.2 Minimum or sufficient remuneration

The Act on Minimum Wages and Minimum Holiday Allowances in principle only applies to employees with an employment contract, article 2(1) Act on Minimum Wages and Minimum Holiday Allowances. However, it is possible to increase the group of employees to whom this law applies by ministerial decree on the basis of article 3(1) Act on Minimum Wages and Minimum Holiday Allowances. The Dutch legislator did this for some types of contracts of services.[14] The decree sets some requirements in order for the Act on Minimum Wages and Minimum Holiday Allowances to be applicable to contractees: 1) they are not a company or individuals in the pursuit of their profession, 2) the contractees can only work for a maximum of two different contractors, and 3) the contractees performs their job personally, or with the help of their partner, or relatives living in the same house. In addition, they must have worked for the contractor(s) at least three months, for an average of five hours per week, with a maximum period of interruption of 31 days. As a rule of thumb, contractees whose relationship to the contractor is similar to the employee-employer relationship have a right to minimum remuneration.[15]

Other contractees do not have a right to minimum remuneration. If in the contract of services the obligation to pay has been agreed upon, yet the amount is unclear, the contractors have the obligation to pay remuneration which is customary, or in the absence of custom, reasonable, article 7:405(2) CC. Important for the determination of a customary remuneration is the remuneration

[13] E. Tjong Tjing Tai, *Asser 7-IV* Opdracht, 127, Het loon (The wage)*, Deventer: Kluwer 2009.
[14] Royal Decree of 2 September 1996, Stb 1996, 481, article 1.
[15] Commentary Royal Decree of 2 September 1996, Stb 1996, 481.

employees receive who perform similar labour on the basis of an employment contract.[16] The question what can be regarded as a reasonable remuneration depends on the work and on the customs in the specific line of work.[17] Therefore, it can be argued that there is an indirect right to minimum wage in this case.

1.3.3 Definition of remuneration

The law neither gives a definition of remuneration nor a list of allowed forms of remuneration. Therefore, parties have the freedom to agree on whatever form of remuneration they see fit. The most common form is money, but remuneration in kind, e.g. in goods or services, is also conceivable.[18]

1.3.4 Payment in absence of work

Unlike employees and civil servants, contractees hardly have any right to remuneration in the absence of work. Contractees do not have a right to paid holiday, they have no right to paid leave for caretaking.

One exception can be found in article 3:17 to 3:27 Work and Care Act. According to these articles, women who do not have an employment contract, but instead receive a share of the profit from her company, have a right to payment during pregnancy and after birth for at least sixteen weeks. The payment is calculated according to article 8 Work and Care Act. This means the maximum payment they can receive is the minimum wage.

1.3.5 Who has the obligation to pay remuneration?

It is irrelevant whether the contractor or a third party pays the contractee.

[16] Supreme Court 6 June 1997, NJ 1998, 723.
[17] Supreme Court 19 December 2008, NJ 2011/4.
[18] E. Tjong Tjing Tai, *Asser 7-IV* Opdracht, 126, Het loon (The wage)*, Deventer: Kluwer 2009.

Chapter 2: Mechanisms for determining pay

In this chapter we will discuss the basic mechanisms involved in the determination of the amount of pay. First and foremost we will consider the position of the employee under an employment contract, as it is the most prevalent form of work in the Netherlands. We will also consider the position of the civil servants under Dutch law, since their position is fundamentally different in respect of pay.

2.1 Individual agreements, collective agreements and legislation

The remuneration of the individual employee is determined through three mechanisms: the individual employment contract, collective labour agreements (CLAs) and the law.[19] In some cases custom and practice play an auxiliary role, for example in relation to CLAs and those who are not subject to it.

As is the case with most of Dutch labour law, the core articles have been codified as part of the CC as well as statutes, such as the Act on Minimum Wages and Minimum Holiday Allowances.

Wages are defined as part of the employment contract and are as such agreed upon by employee and employer. The basic articles concerning employment contracts can be found in book 7, title 10 of the CC. Article 7:610 CC gives the definition of an employment contract, from which the concept of wages can be derived: the employment contract is a contract by which one party, the employee, binds himself to work in the service of another, the employer, in return for wages during a certain time. Wages are in this definition therefore simply the remuneration received for the work performed by the employee in service of the employer. Without wages, there can be no employment contract according to Dutch law.[20]

The CC contains hardly any provisions relating to the determination of wages. While it ensures the payment of the agreed wage, the specific amount is in principle left to be agreed upon between employer and employee, unless the wage is determined by collective agreement. Only where no remuneration has been agreed upon the CC provides that the employee is entitled to the customary remuneration, or in the absence of custom to a remuneration that is fair considering the circumstances of the case, article 7:618 CC. As far as fair wages are concerned, this is the only existing legal concept in Dutch law.

The CC includes rules on minimum wages and equal pay for men and women. The CC also contains provisions regarding discrimination on grounds of part-time/full-time work (article 7:648 CC) and the temporary nature of the employment contract (article 7:649 CC). In addition, several acts contain provisions of a more general nature concerning equal treatment on grounds of religion, beliefs, political conviction, race, gender, nationality, sexual orientation, marital status, handicap or illness and age.[21] Finally, article 1 of the Dutch Constitution provides that "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief,

[19] H.L. Bakels e.a., *Schets van het Nederlandse Arbeidsrecht*, Kluwer: Deventer 2011, p. 55

[20] Since 1 January 2013 article 2:132 CC has been amended to specify that if the stock company, the relation between the company and board member will no longer be one of employment, but rather a contract of service, which is outside the realm of Dutch labour law.

[21] Act on Equal Treatment, Act on Equal Treatment for Men and Women, Act on Equal Treatment on Grounds of Handicap or Chronic Illness, Act on Equal Treatment on Grounds of Age in Employment

political opinion, race, or sex or on any other grounds whatsoever shall not be permitted." The concept of equal treatment and wages will be discussed in chapter 3.

In theory, in extreme cases, the *bona fides* (good employment practices) clause of article 7:611 CC might come into play when wages are considered 'unreasonable'. However, because of the existence of the aforementioned legislation, it is highly unlikely that such a situation would arise.

2.2 Collective labour agreements

2.2.1 Basic provisions of CLAs

While in principle the amount of the wages is left to be agreed upon by the employee and employer, within the constraints of the law, in practice it is laid down in CLAs. Usually these agreements contain provisions on the wages associated with a certain job description. Usually, these collective agreements are formed through collective bargaining between associations of employers and trade unions and have as their legal basis the Act on Collective Labour Agreements (Wet op de collectieve arbeidsovereenkomst; ACA). It is also possible that a collective labour agreement (collectieve arbeidsovereenkomst; CLA) is concluded between a union and a single (large) employer on an enterprise level. Legally, it is a special type of contract, which not only binds its signatory parties, but the CLA can also bind individual employers and employees, article 1 Act on Collective Labour Agreements.

In the Netherlands, around 20% of the working population is a member of a union. It would seem that CLAs could only apply to that small group of employees. However, since the Act on Collective Labour Agreementsprovides for a specific system of applicability of CLAs that extends beyond union-membership, CLAs are the foremost mechanism for determining wages and other terms of employment in the Netherlands.

2.2.2 Applicability of CLAs

The applicability of a CLA is not always a straightforward question. Several situations can be imagined depending on who the signatory parties of the CLA are and the membership of employer and employee to an association or union, respectively.

The easiest example is where both employer and employee are members of a contracting party to the collective agreement, or in the case of an employer a contracting party itself. In this case article 9 Act on Collective Labour Agreementsprovides that the CLA is applicable to the individual employment contract. Article 12 Act on Collective Labour Agreementsthen provides that any provisions of the individual employment contract that are contrary to the CLA are automatically null and void and replaced by the relevant provision of the CLA. When the individual contract does not include a provision on a certain subject, yet the CLA does, it is automatically inserted, article 13 Act on Collective Labour Agreements. The provisions actually become part of the individual employment contract.[22] This is usually referred to as the 'blood transfusion' effect. One of the consequences is that the CLA provisions continue to be applicable even after the CLA has reached its expiration date: the provisions live on as part of the individual employment contract, until a new CLA has entered into force.

[22]H.L. Bakels e.a., *Schets van het Nederlandse Arbeidsrecht (Outline of Dutch EmploymentLaw)*, Kluwer: Deventer 2011, p. 250

The wage as specified in the individual contract is simply replaced by the wage as specified in the collective agreement. CLAs often differentiate the amount of wage according to the position of the employee in the enterprise. While some CLAs provide for a fixed amount, most have provisions concerning a maximum and minimum amount of wage. The employer and employee are free to agree upon a wage that is in between these amounts.

The second example is where the employer is a member of a contracting party, or is a contracting party to a CLA itself, yet the employee is not a union-member, or in any case not a member of a union that is a signatory party to the CLA. In this case, the CLA is not directly applicable to the individual employment contract. However, article 14 Act on Collective Labour Agreementsprovides that the employer is also obliged to apply the terms of the CLA to non-organized employees. However, if an employer fails to uphold the obligation of article 14 Act on Collective Labour Agreementsby failing to incorporate the CLA in the individual employment contract, the employee cannot lodge a claim before a court for the nullity and replacement of conflicting clauses by reference to the Act on Collective Labour Agreements. In practice, this is usually done by way of an incorporation provision in the individual employment contract which states that the relevant CLA is applicable. If the CLA is incorporated in the individual employment contract, and yet the employers fails to uphold their obligations, the employee can initiate proceedings on the basis of that individual employment contract. After the expiration of the CLA, the employer and employee can continue to apply the provisions of the CLA, yet can also agree on other terms.

The third example is where neither employer nor employee is a member of a contracting party to a CLA. In this case only the provisions of the CC are applicable, and both are in principle free to determine the amount of the wage by agreement. However, this is one of the few examples where custom can come into play: a non-organized employee may invoke the rights contained in a CLA against an employer by proving that the CLA is customarily applied in their enterprise on the basis of article 6:248 CC (reasonableness and fairness in general contract law). If in practice the employer applies the CLA within the enterprise, regardless of its applicability, this existence of this custom is assumed.

For these reasons, even though the percentage of employees that is a union-member is relatively low in the Netherlands, CLAs play a decisive part in the determination of wages. However, there is even one other instrument of the law which further increases their influence.

2.2.3 Declaring CLA Provisions generally binding

In 1937 the Parliament adopted the Act on Declaring CLA Provisions Generally Binding (Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten). This Act provided the Minister of Social Affairs with the power to extend by request of (one of) the parties to the CLA the scope of a sectoral CLA to all employers and employees in the occupational sector concerned by declaring its provisions generally binding for a certain period. When a CLA is declared generally binding it becomes applicable to an entire business sector and all employers and employees are covered by the CLA by virtue of the law, even if they are not unionized, with the consequence also non-unionized employees can take action before the courts to be provided the rights contained in the CLA, article 3 Act on Declaring CLA Provisions Generally Binding. In principle, the same 'blood transfusion' effect as discussed earlier applies here, yet only for a limited period: until the decree expires and the general binding ends.

The Minister of Social Affairs can only grant the extension if so requested by one or several of the contracting parties to the CLA, article 4 Act on Declaring CLA Provisions Generally Binding, and he may do so only if he is certain that the CLA in question is already applicable to the majority of the employees in the business sector, article 2 Act on Declaring CLA Provisions Generally Binding. In determining this, the Minister will take account of all employees that are covered by the CLA, whether organized (by virtue of article 11 Act on Collective Labour Agreements) or not (by virtue of article 14 Act on Collective Labour Agreements), thereby enabling a CLA to be extended even in a sector where the unionization rate is low.

The decree is valid as long as the CLA has not expired, however not longer than two years, article 2(3) Act on Declaring CLA Provisions Generally Binding.[23] It cannot be applied retroactively, and has no effect after the date of its expiration.[24] The Minister of Social Affairs has the discretion of excluding certain enterprises from the scope of the decree if they do so request, article 7a Act on Declaring CLA Provisions Generally Binding, subject to certain conditions, a major one is that these enterprises have concluded a CLA on an enterprise level with a representative union.

To ensure that indeed every employer upholds the extended CLA, article 10 Act on Declaring CLA Provisions Generally Binding provides that if the contracting unions to the CLA suspect that this is not the case, they can request the Minister of Social Affairs to initiate an investigation. The enforcement is simple: the employee or the trade union can lodge a claim before court that the CLA wage will be paid, article 3 Act on Declaring CLA Provisions Generally Binding.

It is quite common in the Netherlands to extend the scope of a CLA, including the provisions concerning to remuneration. For this reason, CLAs are the major influencing factor when it comes to determining wages.

2.3 Minimum wage

Since 1968 there isa statutory minimum wage for all employees between the ages of 23-64 on the basis of the Act on Minimum Wages and Minimum Holiday Allowances. This law is not only applicable to employees in terms of an employment contract: its scope is somewhat wider as it applies to most situations in which one provides personal labour for remuneration which are similar to that of employment under an employment contract (see chapter 1), article 2-4 Act on Minimum Wages and Minimum Holiday Allowances. However, it is not applicable to civil servants.

The goal of the Act on Minimum Wages and Minimum Holiday Allowances is to ensure that all employees have at least a right to wages that in view of the general welfare situation in the Netherlands is an acceptable compensation for their work .[25]

When the law was first issued, the minimum wage was set at ƒ 682,50 per month, article 8 Act on Minimum Wages and Minimum Holiday Allowances. It has since then often been adapted by ministerial decree and is since 1 January 2013 € 1469,40 per month, € 339,10 per week or if another period of payment is applicable € 67,82 per day.[26] The minimum wage is recalculated as per the first of January and July each year according a formula which takes into account the predicted wages as

[23] If the CLA has been renewed the term of two years starts running again.
[24] Usually the period that the CLA is applicable does not exceed the two years period.
[25] H.L. Bakels e.a., *Schets van het Nederlandse Arbeidsrecht(Outline of Dutch Employment Law),* Kluwer: Deventer 2011, p. 95; Handelingen II 1967/68, 9 574, 3
[26] Amendment statutory minimum wage per 1 January 2013 ,Stc. 2012, 21293

determined in CLAs in the market sector, subsidized sector and civil services sector,[27] article 14 Act on Minimum Wages and Minimum Holiday Allowances. The recalculation cannot lead to a decrease in minimum wage: in such a case the minimum wage simply remains equal to that of the preceding year.

For persons that have not yet reached the age of 23, the minimum wage is lowered by percentage to between 30-85% according to the specific age, article 7 Act on Minimum Wages and Minimum Holiday Allowances.[28]

Table: minimum wage as of 1 January 2013

Age	Percentage of minimum wage	per month	per week	per day
15	30 %	€ 440,80	€ 101,75	€ 20,35
16	34.5 %	€ 506,95	€ 117	€ 23,40
17	39.5 %	€ 580,40	€ 133,95	€ 26,79
18	45.5 %	€ 668,60	€ 154,30	€ 30,86
19	52.5 %	€ 771,45	€ 178,05	€ 35,61
20	61.5 %	€ 903,70	€ 208,55	€ 41,71
21	72.5 %	€ 1.065,30	€ 245,85	€ 49,17
22	85 %	€ 1.249,00	€ 288,25	€ 57,65
23 and up	100 %	€ 1.469,40	€ 339,10	€ 67,82

Art. 10 Act on Minimum Wages and Minimum Holiday Allowances allows for derogation of the minimum wage: on the request of an employer or an association of employers or employees (union), the Minister of Social Affairs can set a lower minimum for a specified period of time, and for a specific undertaking or sector if in his/her opinion the normal minimum wage would jeopardise the continuation of the existence of that undertaking. The minister has to consult the representatives of the employers and employees before deciding upon the matter.

While the Minister of Social Affairs is charged with monitoring compliance with the Act on Minimum Wages and Minimum Holiday Allowances and has the option of imposing an administrative fine, actual enforcement, e.g. by starting a court case, is in practice left to the employees themselves or their representatives.

[27] To be precise the formula takes into account half of the average predicted change in contract wages of the current year and the difference between the predicted change in contract wages for the preceding year and the actual change in the preceding year.

[28] Royal Decree of 29 June 1983, regarding minimum wages for employees under 23 years of age, Stb. 1983, 200.

2.4 Civil Servants

The government employs a quite sizeable part of the labour force of the Netherlands. However, the legal basis for this is not an individual employment contract. Civil servants are appointed to work in the public service sector, article 1 Civil Service Act. The appointment is a unilateral decision, not an agreement as is the case in a normal individual employment contract. Of course, in practice the civil servant to-be must be willing to accept the appointment, yet this is not formally a legal prerequisite. The legal relationship between the government and the civil servant is governed not by civil law, article 7:615 CC. Instead, various public law instruments govern it, the most important one of which is the General Civil Service Regulation,. Strictly speaking, a civil servant does not receive wages but salary for the specific public service rendered, article 14-20e General Civil Service Regulation.

Salary is determined according to a 'scales system', in which the amount of salary corresponds to the position of the civil servant. While the Act on Minimum Wages and Minimum Holiday Allowances does not apply to civil servants (article 2 of the Act), the scales system serves an equivalent function, since the lowest scale effectively indicates the minimum salary. The scales are defined in the Remuneration Decree Civil Servants. There are 18 scales in total; which scale is applicable depends on several factors such as education and experience. Generally speaking, the more demanding the function is, the higher the salary. Each scale consists of several steps, through which a civil servant will usually automatically advance as he gains experience.[29]

The government engages in collective bargaining with civil servant unions with regards to primary and secondary terms of employment. In strict legal terms they are not collective agreements according to the Act on Collective Labour Agreements, but actually they are and function similarly. Currently, 14 different Collective Agreement Civil Servants have been concluded, each for a different sector of civil service; e.g. municipalities, provinces, education, law enforcement, judiciary, etc. It is common for these Collective Agreement Civil Servants to contain provisions concerning annual increases in salary.

Civil servants are not the only type of person employed in the (semi-)public sector, since the sector itself is of course more encompassing than the government itself. Employees of publically funded instances are employed on the basis of an individual employment contract and as such are not bound by the system for civil servants. Since 1 January 2013 a new mandatory norm provides that even though they are not civil servants, their income cannot exceed 130% of the salary of the prime minister.[30]

[29] Additionally, the Act Concerning the Legal Position of Ministers and Secretaries of State determines the salary of ministers and secretaries of state. For this small group the salary is instead a fixed monthly sum.

[30] Act on the Limitation Top Incomes (Wet Normering Topinkomens). This maximum wage was initially introduced in 2006 as a voluntary norm by the Ministry for Internal Affairs.

Chapter 3: The principle of equal treatment in terms of pay

The principle that equal work should be rewarded with equal pay is laid down in article 7(a)(1) International Covenant on Economic, Social and Cultural Rights (ICESCR). In the Netherlands this principle was interpreted in two rulings of the Supreme Court. The Court held that the principle of equal treatment in terms of pay stems from article 7:611 CC: the principle that an employer acts as a good employer and an employee as good employee (hereinafter: good employment practices). This principle entails that an employer/employee should act or refrain from acting as seems fair and reasonable in the situation at hand.[31] It is a variety of reasonableness and fairness specifically tailored to Labour law.[32] We will first discuss the principle of good employment practices. Secondly we will discuss the two rulings related to equal treatment in terms of pay.

3.1 Good employment practices – article 7:611 CC

The individual employment contract is regulated as part of the CC and not, as in other countries, in a separate Act. This entails that, apart from the provisions of the chapter on the contract of employment, also general legal principles laid down in other chapters of the CC may govern situations that fall under labour law.

A legal principle that plays an important role in labour law is that the employer has to act as a good employer, henceforth the principle of good employment practices, laid down in article 7:611 CC. This principle stems from the general legal principle of reasonableness and fairness, which is deeply rooted in the Dutch legal system and occurs in the CC several times.[33]Because there are fairly few provisions that govern the individual employment contract, the principle of good employment practices plays an important role. It is applicable to all situations relating to the employment contract and thus has a dynamic interpretative quality. We will now explain the principle of good employment practices.

3.1.1 Good employment practices

Even though the general principle of reasonableness and fairness is in principle applicable to any situation in Dutch contract law, the Dutch legislator considered that labour law required a separate and independent variant of the general principle. This separate principle not only takes into account the purposes of the parties concerned, but also labour law in general, such as the relationship between employer and employee and the legal developments in that specific field.[34] In the old CC the principle of good employment practices was found in two separate articles, one on the employer, the other on the employee. In the current CC these two are merged into article 7:611 CC. Next to having a dynamic interpretative quality, being the same as the general principle of reasonableness and fairness, it also has other functions. For instance, good employment practices require adherence to generally acknowledged legal principles such as fundamental rights, which, even though they are often not directly applicable in situations between two private parties, can thusly be taken into

[31]Practice guide Labour Law, Deventer: Kluwer 2008, p. 143.
[32]W.H.A.C.M. Bouwens & R.A.A. Duk, *Van der Grinten Arbeidsovereenkomstenrecht (Employment Law),* Deventer: Kluwer 2011 (23ste druk), p. 169.
[33]Article 3:12; 6:2; 6:248; 6:258 CC.
[34]Explanatory Memorandum – found in Text and Commentary on the Civil Code, Good employment practices: article 7:611 CC.

account. Secondly the acknowledgement of legal principles and the current legal conviction bring into the scope of this article the principles of good governance, such as those of due caution and equal treatment. Furthermore, it fulfils a residual function: it ensures that those circumstances not foreseen at the moment of the conclusion of the individual employment contract are still covered by law via this principle.[35]

In conclusion the principle of good employment practices plays a very important role in the field of labour law. It has been elaborated on in court decisions.

3.2 Cases of equal pay for equal work

As stated there are two cases that served before the Supreme Court that relate to the principle of equal pay for equal work.

The first case served before the Supreme Court in 1994. The Court held that in principle equal work in equal circumstances should be rewarded with equal pay, unless there is an objective justification.[36] The case concerned a woman who was employed to develop photographic film and slide film at Agfa on a temporary basis and therefore received a lower hourly wage than those employees employed on the basis of a permanent contract. She argued that she was entitled to the same hourly wage because she had done the same work as those permanent employees during the past nine years. The District Court in Amsterdam concluded that she had indeed performed nearly the exact same work and her situation was very similar as that of an employee with a permanent contract. As there was virtually no difference between the work situation of permanent employees and hers, a temporary employee, the Court held that Agfa was obliged, on the basis of good employment practice, to pay her the same wages as paid to permanent employees.[37] This ruling by the District Court was upheld by the Supreme Court, confirming the principle that equal work in equal circumstances should be rewarded with equal pay, unless there is an objective justification (absent in this case), hereinafter known as the Agfa-principle.

This principle was upheld for ten years, after which a new case served before the Supreme Court where it decided to amend the Agfa-principle. This second case, the Parallel Entry/KLM-case,[38] concerned pilots from Parallel Entry that had an individual employment contract with KLM (KLC-pilots). They stated that they were entitled to the same terms of employment relating to wage and seniority as KLM-pilots. The Supreme Court holds that in cases concerning differentiation in pay the Agfa-principle is not decisive in itself. There are other circumstances that have to be taken into account when evaluating whether or not the differentiation is allowed under the principle of good employment practices. Therefore an employer can justifiably pay different wages for equal work, if the circumstances allow for such a differentiation in pay. The court has to be reserved in determining whether the differentiation is allowed on the basis of the principle of reasonableness and fairness in these specific circumstances.[39]In this case the court considered that the differentiation was allowed.

What should be concluded from these two cases is that there is no general right to equal pay for equal work in the Netherlands. The existence of such a right depends on the circumstances of the case. In the Agfa-case the Supreme Court was lenient as the case concerned an employee in a

[35] Text and Commentary on the Civil Code, Good employment practices: article 7:611 CC.
[36]Supreme Court 8 April 1994, JAR 1994/94 (Agfa/Schoolderman).
[37]Supreme Court 8 April 1994, JAR 1994/94 (Agfa/Schoolderman).
[38]Supreme Court 30 January 2004, JAR 2004/68 (Parallel Entry/KLM).
[39]Supreme Court 30 January 2004, JAR 2004/68 (Parallel Entry/KLM).

relatively weak position. The employee was doing during a period of many years the same work as the permanent employed employees, and the only difference was the type of contract: she had a temporary agency employment contract with hardly any protection in comparison to the permanent employees. However in the second case, where the employees had a relatively strong position, the Supreme Court goes on to state that the Agfa-principle isn't decisive, but the circumstances of the case should be taken into consideration. This last case clearly shows that the right to equal pay for equal work is dependent on the situation at hand.

These two cases are still both very important, providing rules concerning equal pay for equal work, but in two very different situations. The first concerns cases where an employee is employed on the basis of a temporary employment contract and therefore has lesser protection than permanent employees, while performing the same work. The second concerns cases where all employees are in a similar situation and the court has to look at the other circumstances of the case to decide whether the differentiation in pay is allowed.

Chapter 4: Variable pay systems & performance pay

Dutch Labour Law offers the possibility to make the amount of remuneration paid to the employee dependent on the performance of that employee, the performance of a business unit, or the performance of the company in general. This type of remuneration is called performance pay and it is a variable remuneration. The use of such remuneration gives the employer the possibility to decrease the wages during periods of economic downfall. However in using these types of pay, the employee is still entitled to receive the minimum wage as laid down in article 8 AMW as discussed prior in chapter 2.

The first type, dependent on the performance of the individual employee, is divided in two subtypes: one regarding the quantity of work and one regarding the quality of work. The performance pay that is dependent on the performance of the company in general is usually called profit share. Hereinafter these three types of performance pay will be discussed.

4.1 Performance of the employee – quantity of work

The performance pay that is dependent on the quantity of work delivered by the employee is called 'piece wage', the employee is paid for every piece that he produces. The legal basis for this type of wage is article 7:624 CC, which states that wage can be dependent on the results of the work that will be performed. The general rule is that this type of wage has to be paid according to the same time space that is used to pay employees who get paid on the basis of time for the same work(the normal way).[40] However it is possible that employees deliver their work, but it is not yet possible for the employer to determine the value of that work. To ensure that the employees does get paid their wages, Dutch law provides for the option of pay in advance. In calculating the amount of the advance, the average pay of the three preceding months is reviewed. If this is not possible to calculate the wage one has to look at what wage is customary for similar work.[41]Pay in advance is not allowed if it is possible to calculate the wage.[42]

4.2 Performance of the employee – quality of work

Performance pay related to the quality of work is dependent on the assessment of the work of the employee. The legal basis for this type of remuneration is article 7:619 CC. This article states that it is allowed for the wage or part of the wage to depend on data found in the books or other data carriers of the employer. In the case of individual assessment of quality of work a system is required to assess the quality of the work on the basis of objective standards so as to avoid arbitrariness.

The first way to ensure that the system meets this requirement is to obtain the consent of works council on this matter.[43]This means that the employer can set up a system, but then needs the consent of the works council to actually apply the system. This ensures that the employees can (indirectly) influence the design of the system under which the quality of their work will be assessed.

[40] Article 7:624 (1) jo 7:623 (1) CC.
[41] Article 7:624 (2) CC; J. Van Drongelen and W.J.P.M. Fase, *Individueel Arbeidsrecht 1 – De arbeidsovereenkomst, Vakantie en Verlof (Individual Labour Law 1 - The employment contract, Vacation and Leave)*, Zutphen: Uitgeverij Paris 2011, p. 101.
[42] Text and Commentary on article 7:624 CC.
[43] Article 27 Act on Work Councils.

A second safeguard to ensure that the system is objective is through the use of the principle of due caution and the principle of adequate substantiation.[44] These two principles are rooted in the Dutch legal system. Both principles have to be adhered to in all stages: from the creation of the system to the application of the system. The principle of due caution ensures that nothing is done without the needed considerations. The principle of adequate grounds is of upmost importance during the application of the system, as it ensures that employees are informed of the reasons why they do or do not get performance pay and how the amount is calculated in their individual case. The general right to know how the performance pay is calculated is found in article 7:619 CC. It states that the employee has the right to review the evidence that was used to calculate the performance pay. The principle of adequate substantiation ensures that besides the right to review the evidence, the employer also needs to be able to offer a reasonable explanation for the use of the evidence at hand, and the conclusions that he based on it.

Performance pay dependent on the quality of the work has to be paid when the amount can be calculated, and at least once a year.[45]

The performance pay is usually a variable part of the wage of an employee. However it is also possible that the performance pay is not part of the wage, but a remuneration on top of the wage earned by the employee.[46] In the Netherlands this is called a 'gratification'. Gratification is a form of remuneration where the allocation and amount are at the discretion of the employer.[47] This kind of remuneration is not seen as part of the wage, provided that the employer is completely free in giving such a gratification, and employee has no right to be paid the gratification.[48] The possibility to allocate a gratification is usually regulated in CLAs or other pay regulations.[49]

In conclusion, the employer needs to adhere to the principles of due caution and adequate substantiation in setting up and using a system to calculate performance pay. However if the performance pay is not part of the wage, the provision and amount of the pay are under the discretion of the employer.

4.3 Performance of the company – profit share

Profit share is a form of performance pay that isn't connected to the work of the individual, but that of the company as a whole – it is a reward for the entire team. Profit share can be defined as "wage in money of which the amount is dependent on certain, verifiable results on a collective level."[50] The profit share is the variable part of the wage paid to the employee and it is laid down in his/her individual contract or the applicable CLA. As just stated the amount of the profit share has to be dependent on verifiable results. Provided that these results are found in the books or other data carriers of the employer, the legal basis for this type of performance pay is found in article 7:619 CC. Again, it is important that the employees can review the evidence provided by the employer, whether the conditions of the profit share provisions in their individual employment contract are

[44] Arbeidsrechter.nl, chapter 4.1.
[45] Article 7:624 (4) CC.
[46] C.J. Loonstra and W.A. Zondag, *Arbeidsrechelijke themata*, Den Haag: Boom Juridische uitgevers 2010, vierde druk, p. 189.
[47] G.J.J. Heerma van Voss, *Asser 7-V Arbeidsovereenkomst 82, Variable belonging (Employment contract 82, Variable Remuneration)*, Deventer: Kluwer 2012.
[48] C.J. Loonstra and W.A. Zondag, *Arbeidsrechelijke themata*, p. 189.
[49] CLA for hospitals 2011-2014; CLA for Dutch Universities 2010; CLA for Travel Agencies 2012-2013.
[50] J.M. van Slooten, *Arbeid en Loon (Labour and Wage)*, p. 387.

fulfilled. The District Court in Deventer held that it is part of the obligations resulting from the principle of good employment practice to clearly communicate to the employee if the conditions for allocation of the variable wage are fulfilled. This communication should contain the objective data on the basis of which the employer has come to the conclusion that the conditions for allocation have been fulfilled and what amount of variable wage this leads to. The data provided should be clear enough as to enable the employee, or an expert hired by him, to verify them. [51]

4.3.1 Article 7:628 CC

As has earlier been explained, in some circumstances an employee has the right to receive wages even if he hasn't worked, yet the reason is attributable to the employer.[52] In 1941 the Supreme Court ruled that the variable part of the wages does not fall under wage as defined in article 7:628 CC.[53] They stated that article 7:628 CC refers to the situation where the employee can't perform individually. Assuming that profit share is not dependent on the performance of a single employee, but that of the company or business unit as a whole this article is not applicable to variable pay. However, in 2005 the Court of Appeal in Amsterdam considered that since the remuneration systems have evolved so much in the past years, situations have arisen that aren't covered by statute or the judgment of the Supreme Court in 1941. Consequently it found that the rule laid down by the Supreme Court in 1941 can't be upheld in this day and age.[54] It considered that the profit is determined by the collective performances of the employees and the inactivity of other employees. Therefore according to the Court of Appeal, profit share is wage in the sense of article 7:628 CC.

The effect of this ruling is not to be underestimated. It means that, in a situation where the inability to work is attributed to the employer, the employee is still entitled to receive the profit share for the duration of that situation. On the other hand, if employees do not work for a reason attributable to himself, they lose their right to the profit share.

[51] District Court Deventer 30 June 2005, LJN AT8633, para 6.2.
[52] Article 7:628 CC.
[53] Supreme Court 31 Octobre 1941, NJ 1942, 198.
[54] Amsterdam Court of Appeal 27 April 2010, JAR 2010/142, para 5.6.

Chapter 5: Variation of pay in times of crisis

During a financial or economic crisis an employer may consider lowering remuneration by amending CLAs or individual employment contracts. Although such an amendment is exceptional and not often acceptable, it seems to occur more often during times of crisis. The amendment is possible on both the collective and individual level and therefore we will elaborate on both subjects.

5.1 Changing remuneration in CLAs

Parties are free to decide what they want to include in a CLA. One of the most important terms of employment is remuneration and as such it is almost always part of a CLA. Just like every other contract under Dutch law, CLAs can be amended during their term. Most CLAs contain reopening clauses to that effect. A reopening clause determines the conditions that have to be met in order for amendment to become possible. This can mean, for instance, that there must be such a change of social or economic nature that parties reasonably can no longer be obliged to uphold the agreement and therefore a new round of collective bargaining is necessary.[55] During times of crisis more employers or associations of employers shall be seeking to reopen CLAs to decrease the costs of employment.

CLA provisions can only be changed through collective bargaining, however trade unions, naturally, are not keen to lower remuneration. For employers or associations of employers it is often an uphill battle to reach an agreement concerning a decrease in wages. In any case, wages may not go below the level of statutory minimum wage, see chapter 2.

Most CLAs arrange for wage scales related to a certain position. When collective bargaining leads to the change of remuneration certain employees are bound by the newly amended CLA: firstly, the employees who are a member of a trade union which is party to the CLA will be automatically bound by this; secondly, the CLA can be applicable to employees that are not member of a union through the same systems of applicability as described in chapter 2.

5.1.1 Changing collective remuneration through works council consent

The Netherlands has two systems of employee representation: through trade unions and through works councils. When it comes to collective bargaining about (primary) terms of employment, trade unions are the primary negotiation partners for (associations of) employers. As such, primary terms of employment like remuneration are usually arranged by CLA. However, an employer can allocate some powers regarding this subject to the works council.[56] The works council, if present, has the right to be consulted and its consent is needed regarding several subjects established by statute.[57] In addition to these rights other rights can be conferred to the works council by means of an agreement between the works council and the employer, unless the issue has already been regulated by CLA. In that case the CLA has priority, article 32 Act on Work Councils (Wet op de ondernemingsraden). These additional powers conferred to the works council are usually included in an enterprise agreement reached between the works council and the employer. These rights may involve primary

[55] See for instance 1.3 CAO sector ambulancezorg.
[56] H.L. Bakels e.a. *Schets van het Nederlandse arbeidsrecht (Outline of Dutch Employment Law)*, Kluwer: Deventer 2011, p.332.
[57] Articles 25 and 27 AWC.

employment terms like remuneration, but will most often concern other forms of remuneration like a bonus scheme.[58]

The problem with such an enterprise agreement is that, unlike the CLA, it cannot have direct legal effects for third parties and therefore does not automatically apply to individual employees. If the employer, with the consent of the works council, decides to change the employee's pay, consent of each individual employee is still required.[59] The employer could amend the employee's individual employment contract in order to effectuate his/her intended change. This will be discussed below.

5.2 Changing individual remuneration by contract amendment

In some cases it is not possible to effectuate a change in remuneration at a collective level if not all employees are a member of a trade union, or the relevant CLA has not been declared generally binding. In such a case, the employer will need to amend the individual employment contract. In principle, a contract can only be amended with the consent of both parties.[60] This consent can also be given implicitly, however it will not be inferred easily if the amendment is to the detriment of the employee.[61] Dutch labour law provides for some possibilities to amend the individual remuneration without the consent of the employee, which will now be discussed.

5.2.1 Amendment by a unilateral amendment clause (article 7:613 CC)

An individual employment contract can be amended unilaterally if one party, most often the employer, is authorized to do so through a unilateral amendment provision in the individual employment contract, article 7:613 CC.[62] However, some statutory requirement will need to be met in order for him to invoke this possibility.

First of all, the unilateral amendment clause has to be agreed upon in writing; an oral agreement is void. The provision can be included in the individual employment contract itself, but that is not always necessary. According to Dutch case law this requirement is also fulfilled if the individual employment contract refers to an attached document concerning terms of employment, in which the unilateral amendment provision is included.[63] By signing the individual employment contract the unilateral amendment provision has validly been agreed upon. The most important thing is that the employees are aware that the contract includes a provision that could adversely affect their position.

Second of all, the employer needs to have a compelling interest which should prevail over the interest of the employee according to good employment practices.[64] The interest of the employer to implement the change will need to be weighed against the interest of the employees to maintain their old terms of employment. The law imposes the burden of proof on the employers, because they must prove that they have an overriding interest. Such an interest can be the result of several factors, such as economic and organizational reasons.

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[58] H.L. Bakels e.a. *Schets van het Nederlandse arbeidsrecht (Outline of Dutch Employment Law)*, Kluwer: Deventer 2011, p.322.
[59] Ibid, p. 333.
[60] H.A.C.M. Bouwens & R.A.A. Duk, *Van der Grinten Arbeidsovereenkomstenrecht (Employment Law),* Deventer: Kluwer 2011 (23ste druk), p. 37.
[61] Ibid, p. 37.
[62] Ibid, p. 53.
[63] Supreme Court 28 March 2008, JAR2008/113 (Philips/Oostendorpc.s.); Supreme Court 18 March 2011, JAR 2011/108 (Wegener).
[64] Amsterdam Court of Appeal 28 September 2010, JAR 2010/270 (ABN AMRO).

According to the Dutch Supreme Court the unilateral amendment provision can also be invoked when amending several employment contracts simultaneously. The same conditions apply, however whether or not the employer has a compelling interest has to be evaluated on a case to case basis.[65]

5.2.2 Amendment on the basis of good employment practices (article 7:611 CC)

When the individual employment contract does not include a unilateral amendment provision, the employer can still, under certain conditions, amend an individual employment contract. The employer can reduce pay on the basis of good employment practices, which is enshrined article 7:611 CC. The Dutch Supreme Court elaborated on this specific legal provision in relation to contract amendment, and stated that an employee must be willing to accept a reasonable proposal by the employer in case of changed circumstances.[66]

It must be assessed whether the employer, acting according to good employment practices, has a valid reason to propose a change pay and whether that proposal in itself is reasonable. The Court will take into account all circumstances of the case, including the nature of the changed circumstances at work, the nature and intrusiveness of the proposal, and the position of the employee.[67] A 'take it, or leave it' proposal will not be regarded as reasonable.[68]

Subsequently, when the proposal is deemed reasonable the employees may only refuse if, considering their circumstances, the acceptance of the proposal cannot reasonably be required of them. The employee's interests must be sufficiently safeguarded. In Dutch case law –usually case law of the first instance courts- there are only a very few circumstances in which the court accepted a change of the wage by an employer's unilateral decision detrimental to the employee based on article 7:611 CC.[69]

5.2.3 Amendment because of unforeseen circumstances (article 6:258 CC)

The aforementioned possibilities for an employer to amend an employment contract are governed by Dutch Labour Law, which is found in Book 7 of the CC. However, the Dutch Civil Code also provides for more general rules concerning contract law which provide for the possibility to amend a contract. These are found in Book 6, which regulates general issues of contract law. These provisions are in practice subordinate to the provisions of book 7, which regulates special agreements like the employment contract. Nonetheless, the possibility to amend the remuneration in the employment contract on the basis of provisions of general contract law is for the most part a theoretical one since Dutch labour law provides for specific rulings, as explained above.

The possibility to amend a contract because of unforeseen circumstances is laid down in article 6:258 CC. The unforeseen circumstances have to be of such a nature that according to the standards of reasonableness and fairness maintaining the old terms cannot be required of the parties. According to the Dutch legislator it is not a decisive factor that the circumstances could have been foreseen

[65] Supreme Court 11 July 2008, JAR 2008/204 (Stoof/Mammoet).
[66] Supreme Court 26 June 1998, JAR 1998/199 (Van der Lely/Taxi Hofman) ; Supreme Court 11 July 2008, JAR 2008/204 (Stoof/Mammoet).
[67] Supreme Court 11 July 2008, JAR 2008/204 (Stoof/Mammoet) ; Amsterdam Court of Appeal 28 September 2010, JAR 2010/270 (RBS). Both cases were about bonuses and the second case about a dismissal compensation.
[68] Amsterdam Court of Appeal 28 September 2010, JAR 2010/270 (RBS).
[69] In the RBS case the Appeal Court decided that the bank was not entitled to change the amount of money.

while concluding the contract. The judge must be reserved in applying this specific legal provision. In assessing whether the amendment meets the standards of reasonableness and fairness the judge must take into account general principles of law, the prevailing Dutch opinion of law (*opinio juris*), and general social and personal circumstances. According to the Court of Appeal in Amsterdam the standards of reasonableness and fairness require the employer to honour the obligations arising from the employment contract. Therefore, it is not easy for an employer to change individual remuneration based on unforeseen circumstances.

5.2.4 Amendment on the basis of reasonableness and fairness (article 6:248(2) CC)

Another way for the employer to amend an individual employment contract is on the basis of the derogatory effect of reasonableness and fairness, article 6:248(2) CC. In practice it is difficult for an employer to amend an employment contract based on this provision. According to article 6:248(2) CC remuneration can only be amended if maintaining of the current conditions becomes *unacceptable*. This unacceptability-test is very difficult to satisfy but in some cases it was accepted.[70] Compelling circumstances are necessary for the satisfaction of this test.[71] For the interpretation of the concept of reasonableness and fairness I would like to refer to the abovementioned elaboration on unforeseen circumstances.

5.2.5 Amendment in practice - Capgemini

Although Dutch labour law and general contract law provide for legal possibilities to amend an employment contract this is in practice hardly possible when it comes to remuneration. In the Netherlands it is unusual for an employer to be able to decrease wages. A recent example of such an attempt involves the Dutch IT-company Capgemini. Unfortunately, this gave rise to much commotion since the company suggested a wage reduction for up to 30% for older employees. According to Capgemini the wages of the older employees had risen too rapidly compared to the increase in value the individual employees added to the company. Since Capgemini has not concluded a CLA, the company needs individual consent of each employee to implement the wage reduction. Capgemini amended the proposal to a 20% reduction after receiving many negative reactions from the Dutch press, however, it is still unlikely that an agreement can be reached on these terms.

[70] District Court Amersfoort 1 juni 2005, JAR 2005/158. It was a case about the payment of a bonus.
[71] Nicola Gundt, *Wijziging van de arbeidsovereenkomst*: een instrument voor interne flexibiliteit?, p.106.

Chapter 6: Consequences of non-payment of wages by the employer & enforcement of pay

An employer may have valid reasons for not paying the employees' wages. If the reason for non-payment is not sufficient, the employee can initiate proceedings before a court in order to get paid. The remedies before the Court and valid reasons for non-payment will be elaborated on in this chapter. In addition the concept of constructive dismissal, where the dismissal is caused by the behavior of the employer, shall be discussed below.

6.1 Remedies before the Court

According to article 7:616 CC the employer is obliged to pay the wages of the employee at a fixed time. This article also is also applicable to other forms of remuneration, such that the employer must therefore also pay allowances and bonuses at a fixed time.[72] If the employer pays the wages too late the employee is entitled to claim a statutory increase to the amount the employer owes him, article 7:625 CC. This is an incentive for the employer to pay the wages on time. If the employer does not pay the wage while the employee is entitled to it, the employee can submit a wage claim before a court.

The wage claim and the statutory increase are preferential claims on all assets of the employer.[73] This will be of particular importance in case of insolvency or bankruptcy.[74]Any claim for performance of an obligation will lapse after a period of five years after the day the claim came into existence. The general ground for lapse can be found in article 3:307(1) CC. Contrary to this general provision, a wage claim that is based on the annulment of the termination of an employment contract due to a termination prohibition is shorter.[75] Examples of such a prohibition are discrimination on grounds of gender or working hours. In that case the claim will lapse after a period of only six months.[76]

According to Article 7:680a CC the Court can limit the amount of a wage claim that is based on the annulment of the termination of an employment contract. He may, *ex officio*, decide to limit the claim if adjudication in the given circumstances would lead to unacceptable consequences. The judge should be reserved in this assessment and this should be apparent from his/her ruling.[77] He may not limit the amount to less than three months of wages. A wage claim that is not based on the annulment of the termination of an employment contract can only be amended according to the standards of reasonableness and fairness.[78]

[72]H.A.C.M. Bouwens & R.A.A. Duk, *Van der Grinten Arbeidsovereenkomstenrecht (Employment Law),* Deventer: Kluwer 2011 (23ste druk), p. 116.
[73]Article 3:288 under e CC.
[74]H.A.C.M. Bouwens & R.A.A. Duk, *Van der Grinten Arbeidsovereenkomstenrecht (Employment Law),* Deventer: Kluwer 2011 (23ste druk), p. 121.
[75]Articles 7:647, 648, 683 BW, 8 AWGB.
[76]H.A.C.M. Bouwens & R.A.A. Duk, *Van der Grinten Arbeidsovereenkomstenrecht (Employment Law),* Deventer: Kluwer 2011 (23ste druk), p. 21.
[77]Supreme Court 16 April 2010, JAR 2010/124 (Abbès/Balder).
[78]Supreme Court 11 July 2008, JAR 2008/205 (Fianed).

6.2 Valid reasons for non-payment

A wage is the reward for work performed by the employee.[79] As discussed in chapter 1 it is a rule in Dutch law that, in principle, the employee who does not perform work has no right to receive pay.[80] In exceptional circumstances the employee reserves the right to receive pay if the agreed work is not performed because of a reason attributable to the employer,[81] e.g. economic difficulties or suspension of the employee.[82]

A valid reason for non-payment is when the employee is involved in a strike.[83] The right to strike is enshrined in Article 6(4) ESC and has direct effect in the Dutch legal order.[84]

The question is, however, in what situation the employer is obliged to pay the wage of an employee who is prepared to work, but is unable to do so because of a strike at his/her company. In such a case, the Dutch Supreme Court makes a distinction between organised strikes concerning in the context of collective bargaining and wild short-lived protests where just a small number of employees are involved.[85] The first type of strike is deemed a cause attributable to the employees and therefore employees who are prepared to work are not entitled to receive pay. During a strike of the second type, employees who are willing to work are entitled to receive wage as long as they can prove they are not only willing to work and have not agreed to the strike, nor taken part in it.[86]

An employer cannot force employees to return to work by charging a penalty or restricting their freedom.[87] Whenever a strike is qualified as legitimate, there is hardly any room for disciplinary actions on the part of the employer.[88]

6.3 Constructive dismissal

In Dutch labour law constructive dismissal occurs when an employee resigns because the employer's behaviour has become so intolerable that the employee has no choice but to resign.[89] The behaviour may be qualified as an urgent reason for the employee to resign. Employee have the right to terminate the contract immediately on the basis of this reason, article 7:677 CC, or request the court to dissolve their individual employment contract on grounds of article 7:685 CC. Since the procedure before the court takes longer, is it less commonly used in practice in case of constructive dismissal.[90] Both matters are discussed below.

[79] H.L. Bakels e.a. *Schets van het Nederlandse arbeidsrecht (Outline of Dutch Employment Law)*, Kluwer: Deventer 2011, p. 280.
[80] Article 7:627 CC.
[81] Article 7:628 CC.
[82] Supreme Court 21 March 2003, JAR 2003/91 (Van der Gulik/Vissers).
[83] H.L. Bakels e.a. *Schets van het Nederlandse arbeidsrecht (Outline of Dutch Employment Law)*, Kluwer: Deventer 2011, p.284.
[84] Supreme Court 30 May 1986, NJ 1986, 688 (NS-arrest).
[85] Supreme Court 7 May 1976, NJ 1977, 55 (Wielemaker/De Schelde).
[86] Ibid.
[87] Article 7:659(2) CC.
[88] Supreme Court 22 April 1988, NJ 1988, 952 (Veurink/FNV).
[89] H.A.C.M. Bouwens & R.A.A. Duk, *Van der Grinten Arbeidsovereenkomstenrecht (Employment Law),* Deventer: Kluwer 2011 (23ste druk), p.411.
[90] Ibid, p.452.

6.3.1 Termination of the contract because of an urgent reason

According to article 7:677 CC both the employee and the employer are allowed to immediately terminate the individual employment contract because of an urgent reason. What is considered an urgent reason is provided in a non-exhaustive list in article 7:678 CC for the employer, and article 7:679 CC for the employee. According to the second paragraph of the latter article urgent reasons are e.g.

- If the employer mistreats, insults or threatens the employees, their family or roommates or tolerates that other employees do so.
- If the employer seduces the employees, their family or roommates to actions contrary to the law and morality or tolerates that other employees do so.
- If the employer does not pay wage on time.
- If the employer, if agreed upon, does not properly provide for board and lodging.
- If the employer does not provide for sufficient work for the employee whose pay depends on the amount of performed labour.
- If the employer gravely neglects his/her duties resulting from the employment contract.
- If the continuance of the employment contract would cause serious hazards to the life, health, morality or reputation of the employee, which was not foreseen at the conclusion of the contract.
- If the employees cannot perform the agreed labour because of illness, or other causes that are beside their fault.

These are just examples provided by law but the list is not exhaustive. Other reasons may lead to an urgent reason for the employees to terminate their individual employment contract as well. The termination of the employment contract due to an urgent reason is immediate in the sense that the employee does not need to take into account a statutory notice period; usually the employee has to take into account a notice period of one month.[91]

6.3.2 Dissolution of the contract by the court on the basis of a compelling reason

In case of constructive dismissal the employees are, as an alternative to the termination of their contract because of an urgent reason, allowed to request the court to dissolve their individual employment contract. Article 7:685 CC states that the employees may request the court to dissolve their employment contract at any time on the basis of a compelling reason or changed circumstances.

All urgent reasons in the context of article 7:677 CC are considered compelling reasons for the purpose of art. 7:685. Examples of those particular circumstances are already mentioned above. As already mentioned before, the employees are allowed to terminate the contract immediately on the basis of an urgent reason and therefore a request for dissolution of their contract based on a compelling reason is not very common in practice.

6.3.3 Dissolution of the contract based on changed circumstances

In case of changed circumstances employees may request the court to dissolve their individual employment contract. The main difference between dissolution based on a compelling reason or

[91] Article 7:672(3) CC.

dissolution on the basis of changed circumstances is that in the latter case the court can award compensation, article 7:685(8). It frequently occurs that employees requests for dissolution of their individual employment contract because of an upset employment relationship between them and the employer.[92] The amount of compensation will be determined by the court on the basis of reasonableness. In practice the court determines the amount by using a formula (AxBxC)[93] which takes into account the number of years of employment, the pay on a monthly basis, and a correction factor.[94]

The years of employment (A) are weighed. If the years concern a period before the employee has reached the age of 35, they are multiplied by a factor of 0.5. Between the ages of 35 and 45, the years simply count as one; between the ages of 45 and 55 they are multiplied by a factor of 1.5, and finally after the age of 55 they are multiplied by a factor of 2. I.e. if an employee started working when he was 25, and ended his/her employment when he reached 65, the weighed years of employment would be 50 (10 x 0.5 + 10 x 1 + 10 x 1.5 + 10 x 2).

The pay on a monthly basis (B) consists of the gross monthly salary, plus agreed fixed salary components. Agreed fixed salary components are e.g. a company car, expense reimbursements, and structural commissions.

In most cases the correction factor (C) will give rise to a debate before the court. If the reason for dissolution is attributable to the employer, the correction factor will usually be 1 or higher. In case of constructive dismissal it depends on the circumstances of the case, whether the court will use the standard of 1, 1.5 or 2. Case law indicates that when the employer was verbally or physically abusive, and this is a reason for dissolution, the correction factor is likely to be high.[95] If the reason for dismissal is attributable to the employee, the correction factor will be 0.

[92] H.A.C.M. Bouwens & R.A.A. Duk, *Van der Grinten Arbeidsovereenkomstenrecht (Employment Law),* Deventer: Kluwer 2011 (23ste druk), p. 452.
[93] Recommendations of the Circle of Cantonal Judges, JAR 2008/300.
[94] H.A.C.M. Bouwens & R.A.A. Duk, *Van der Grinten Arbeidsovereenkomstenrecht (Employment Law),* Deventer: Kluwer 2011 (23ste druk), p. 473.
[95] District Court Helmond 8 december 2008, JAR 2009/65.