Labour Law Protection – a Summary

One of the main objectives of Dutch labour law is the compensation of inequality. Legal compensation of inequality of employees is based on the fact that, since employers have a stronger social position than employees, the law should provide employees with guarantees to prevent that the arrangements eventually made between employers and employees reach a level that is unacceptably unfavourable for employees. In the past years, the question was raised repeatedly in legal literature whether high-paid employees really need such protection. Furthermore, freelances and sole traders without staff enjoy very little protection, although their social-economic position is not strong. This gives rise to the question whether it is appropriate to apply compensation of inequality in respect of these people. Finally, freelances and self-employed persons without staff are often confronted with the fact that social security institutions, tax authorities and courts consider them to be employees, which forces their principals883 to withhold premiums and taxes for them, although the freelancers do not wish so.

The question that has to be answered in this study is: what labour law protection do certain groups of workers enjoy, and what protection should these groups be able to claim on account of the background of these regulations? In the various groups of workers, a distinction is made between employers and contractors having a weak and a strong social position respectively. The study on labour law protection is limited to the protection regarding wages and dismissal, employment conditions, working hours and liability.

For purposes of this study, six categories of workers are distinguished: employees having a weak social position; ordinary employees; high-paid employees; directors; contractors having a weak social position, and strong contractors.

Employees having a weak social position are on-call workers and others who are left with the crumbs on the labour market. High-paid employees are defined as employees earning more than five times the statutory minimum wage (in the year 2004, this amounts to more than EUR 6,250 gross per month). Their group represents approximately 1.8% of the total number of employees. That income limit corresponds to the average scope of collective bargaining agreements in the Netherlands. A socially weak contractor is a contractor who has no more than three principals per three months and earns no more on an hourly basis than twice the minimum wage from these principals. When a contractor has less than four principals, he is usually dependent on those principals. When the contractor also earns less than twice the minimum wage on an hourly basis (and in addition misses out on a number of advantages that employees have, such as paid holidays and holiday bonuses, and he bears greater liability), this dependence represents a weak social position. A strong contractor has more principals or earns more.

883 Principal or client, ‘opdrachtgever’ according to art. 7:400 Civil Code
In part 2, civil-law protection in labour law, it becomes clear that it is not possible to indicate unequivocally on the basis of legal definitions, legal history and civil case law whether an employment agreement exists or does not exist. The reasons for this are twofold. Firstly, the uncertainty arises from the statutory description, which contains an open standard. The second reason is that case law does not attach overriding importance to the intention of the party laid down in writing or otherwise. The two reasons are connected. The statutory description has an open, multi-interpretable standard. It is precisely this open nature that causes uncertainty. However, it is imaginable that an unequivocal legal standard is provided. The three parts of the description of an employment agreement currently applicable (relationship of authority, personal labour, wages) do not provide such clarity. The relationship of authority is not an unequivocal criterion. Because of the great diversity of forms of labour, some forms of labour can be performed on a highly independent basis, without any or hardly any instructions being required, whereas on most forms of specialized labour performed by traditional self-employed professionals require or allow for some instructions to be given. When the relationship of authority is applied as a distinctive criterion, the decisive factor – which is not unequivocal – will therefore always be the extent to which there is a relationship of authority or the authority to give instructions, which is not unequivocal.

Personal labour may also be performed by a contractor. The time element as such could be an unequivocal criterion, but this meets with serious objections, as will be explained below. Furthermore, there is great diversity in the payment and methods of payment of wages with regard to both employees and contractors.

It is remarkable that although the case law of the Dutch Supreme Court is far from unequivocal, when we look at different cases concerning the social position of workers, the Supreme Court always labels a worker in a weak social position as having an employment agreement, whereas it does not consider the worker in a strong social position to have worked on the basis of an employment agreement.

As appears from part 3, Social Security Law, the various social security laws that were created in the course of the 20th century show a variable circle of insured persons. The “ordinary” employee is actually always included in this circle, albeit that the Accidents Act 1901 and the Sickness Benefits Act 1930 initially contained a limitation to workers working in an “undertaking”, as opposed to workers employed by a private person. This limitation was later repealed.

The ‘casual worker’ has increasingly been brought under the scope of the various laws, for example in the Disability Act 1919. The question whether higher-paid employees and directors should be covered by the scope of the various laws was looked upon differently over the years. High-paid employees and directors did fall under the Disability Act, but pursuant to this Act a maximum daily wage applied, above which no contributions needed to be paid and no benefits were granted.
The Sickness Benefits Act and the Unemployment Insurance Act 1949 too had a wage threshold until 1967 and 1964 respectively. With regard to the workers/employees, we see that while initially the employees with higher incomes fell outside the scope of social insurance laws, the trend has moved towards a situation in which this income threshold no longer applied, but contributions and benefits were subject to a maximum daily wage. In other words: higher paid employees too must receive some form of protection under these laws, which is neither at a minimum level nor based on the full salary they receive or a percentage thereof. For this reason, the laws contain a maximum daily wage.

Since 1985, a director and majority shareholder is excluded from social insurance laws, although the reason behind this – that he can personally create a situation in which claims to a benefit arise – occurs only with regard to the Unemployment Insurance Act. The self-employed are only covered by some laws, and even then only to a limited extent. The way in which this was decided was usually by applying the fiction that the relevant self-employed person was in fact “employed” by the principal/provider of work. Only in 1976, a national insurance applicable to everyone against long-term disability for work was created, with minimum-level benefits.

On the basis of legislation, policy rules and case law of the Central Appeals Tribunal there is no unambiguity on the question who are the insured under social security law. The government regards this lack of clarity as undesirable for both economic and social reasons. The decision to attach only minor importance to the intention of parties in social security law was inspired by the fear of opting out. However, it has not been proven that this fear is real. Experiences with the relevant industrial insurance boards after the issue of binding declarations of self-employment pursuant to the LISV\textsuperscript{884} Covenants do not point in the direction of any observed abuse.

Case law of the Central Appeals Tribunal shows that a number of criteria are very indicative in the sense that they belong to either qualifying or not qualifying something as an employment agreement. According to the Central Appeals Tribunal, the following are arguments in favour of the assumption that there is an employment agreement: * (i) the performance of work that is essential to the operation of business; * (ii) being part of the employer’s organizational structure; * (iii) being able to correct the employee; * (iv) the employee’s economic dependence. The following are arguments against the assumption that there is an employment agreement: * (v) having the licences required for a self-employed person; * (vi) having made substantial investments that are unusual for an employee; * (vii) running entrepreneurial risk; * (viii) being free to let others replace him. However, it is rare for these elements to be completely decisive.

\textsuperscript{884} LISV = Landelijk Instituut Sociale Verzekeringen (National Social Security Institution)
In 2002, the social security institutions and the tax authorities jointly drew up policy rules to determine whether an obligation to insure exists. If the worker has a declaration of self-employment issued by the tax authorities, there can be no question of a fictitious employment relationship anymore. However, a declaration of self-employment offers no guarantees that the employment relationship cannot still be deemed to be an employment agreement.

In July 2004, a bill was therefore submitted with the purpose of providing the declaration of self-employment with full certainty. From the point of view of legal certainty, the implementation of this bill would be applauded.

In part four, five specific topics are studied in which the position of employees is compared to that of contractors.

In the employer–employee relationship, the latter is protected pre-eminently when it comes to the right to continued payment of wages when working is not possible. In 2003, the Supreme Court ruled in a far-reaching judgment that in the event of an employee’s suspension, his salary payments must always continue, even if the suspension is to blame on the employee. A remarkable thing regarding the contract for services is that the law mostly protects the principal, particularly the non-professional principal. In the present statutory regulations, the contractor having a weak social position receives no additional protection compared to the principal having a strong social position.

Dutch law of dismissal is preventive, which means that dismissal by the employer requires – not counting a number of exceptions – the prior permission of the court or an administrative body. The background of this preventive test is to retain the job for a particular employee. This study does not address the question whether the preventive dismissal system should be maintained or replaced by a repressive system. This question gives rise to discussions that are mostly political in nature. When the court rescinds an employment agreement, it also awards a compensation for dismissal in all fairness. The legal ground for this has been examined. A number of possible legal grounds, such as compensation for services rendered in the past, compensation for any surplus value provided by the employee to the company, and emotional damage) were tested but found wanting. The widest accepted legal ground obliging the employer to pay a compensation for dismissal is found to be the post-contractual good faith vested in the employer. However, this legal ground does not justify the award of compensations up to levels as have become customary since the year 1996 (in neutral situations, one monthly salary per year of service, on the understanding that the years of service between the age of 40 and 50 count as one and a half month per year of service, and the years of service above the age of 50 count as two months), in any case not in situations where little can be blamed on the employer. However, if the employer can be blamed for many things, and has acted unlawfully vis-à-vis the employee, there could be a reason to award the employee a higher compensation than has been customary in the past years. Ordinary employees depend on their income from work for their livelihood (bare necessities of life), which is far less the case for higher-paid employees. Therefore, there is a reason for imposing a less stringent legal system on high-paid employees.
Contractors enjoy very little protection against dismissal. Since they too often depend on their income from work for their livelihood, this situation is not always satisfactory.

In the field of employment conditions, a system of mandatory law protection applies to employees. The reason behind this is that employees usually have no influence, and sometimes no knowledge, of their working environment and working conditions. The Working Conditions Act applies only to a very limited degree to the self-employed, in a small number of situations where their health or safety is seriously at risk. The self-employed too have little or no influence on the existing employment conditions when they perform work at the companies of their principals. This is in accordance with an advice given in June 2004 by the tripartite (composed of employers’ organizations, employees’ organizations and independent members) Social and Economic Council, which advice proposes to protect the self-employed against all hazards seriously threatening their own or others’ health and safety.

Employees are only liable for damage caused by them if they have caused such damage with intent or by gross negligence. Employees do not have to bear the damage that happens to them, except if it was caused by their own intent or gross negligence. Pursuant to the current statutory regulation, the employer is also liable for damage caused by other subordinates than employees. This provision was inspired by the protection of victims: it should not matter for the victim whether the damage is caused by an employee or by a contractor of a company. There is no statutory provision ensuring that (leaving aside cases of intent of gross negligence on the part of the contractor) the principal will eventually bear the damage suffered or caused by the victims.

In addition to his labour-law ties, a director under the articles of association also has company law ties. On grounds of the latter ties, the director is also liable for damage resulting from mismanagement. This means that the director’s responsibilities are more far-reaching than those of ordinary employees.

If an industrial accident happens to an employee as a result of the employer’s negligence, the employer is liable for the resulting damage, even if the accident was partially the employee’s fault. Moreover, the risk of proof that the employer has fulfilled all his obligations is upon the employer. Pursuant to an amendment of the law from 1999, others than employees enjoy this protection from accidents too. However, according to an explanation from legal history, this protection is limited to contractors who perform work that is also being performed by employees of the principal.

The Working Hours Act protects employees from excessive working. The average maximum statutory working week during a period of three months is 40 hours. Within this period, it is allowed to work occasionally a maximum of 45 hours per week. In a collective bargaining agreement with the works council or staff representation, these limits may be raised to 45 and 50 hours per week respectively. These protective provisions do not apply to employees receiving a salary that is more than three times higher than the statutory minimum wage.
and to contractors. However, the risk of excessive work is real for these people, too. Employees are entitled to a minimum of four weeks’ paid holiday per year, in order to share in the prosperity created by them and to recover. The self-employed do not have this right. In practice, however, the self-employed prove to be taking an average of 3 to 4 weeks’ holiday per year.

The question regarding the labour law protection currently enjoyed by employees and contractors has been discussed per aspect (protection against dismissal, wages, protection in the field of employment conditions, holiday and limitation of liability). The conclusion is that the degree of protection per group of workers does not always correspond with the purpose of the relevant regulation, and that the regulations are insufficiently consistent.

Considering the basic principle of labour law, which is the compensation of inequality, there is every reason to continue to award to ‘weak’ and ‘ordinary’ employees the full scale of labour law protection measures. This does not mean that the level of severance payments awarded in practice to employees should not be submitted to a critical review.

Considering the principle of protection of labour law, the legal position of high-paid employees and of directors under the articles of association having a basic salary that is higher than five times the statutory minimum wage, could become more regulatory in nature. The aspects wages and vacation are eligible for the abolishment of part of the mandatory law provisions. In addition, it is precisely for these aspects that the legal ground of severance pays paid in practice is very thin. If an industrial accident happens to a manager or director, the adjudication of employer’s liability will partially be determined on the extent to which the victim himself was responsible for the relevant employment conditions. It is urged to maintain the insurance under social security law of high-paid employees and the director under the articles of association. Only the director and majority shareholder should continue not to be insured under those employee insurances. Based on the idea of compensation of inequality, there is reason to grant more protection to dependent contractors – i.e. contractors earning less than twice the statutory minimum wage on an hourly basis – than they currently enjoy. If working is not possible for reasons in the sphere of risk of the principal, a contractor should get a claim to continued payment of wages vis-à-vis his principal. Furthermore, dependent contractors should be covered under the scope of Section 7:658 Civil Code (industrial accidents) and should not be responsible for damage caused by them, unless this damage is the result of their intent or deliberate recklessness or if the contractors are insured for this. 

In my view, and on the basis of the idea of protection, the applicability of the BBA (the preventive dismissal test by an administrative body, the Centre for Work and Income (CWI)) can be abolished for dependent contractors, but the notice periods to be observed towards such contractors by the principal must be laid down in law (and must be prolonged compared to current practice by 1 to 6 months, depending on the duration of the employment relationship). Seen from the same perspective of protection, a regulatory law regime should apply to independent contractors, on the understanding that the principal is liable for industrial accidents when the activities are inherent to the principal’s business. When the relationship is long-term (more than 3 months), the
principal should also observe a notice period vis-à-vis the independent contractor in case of termination by the principal.

In order to offer the legal certainty now lacking but desirable for legal practice, the distinction between the employment agreement and the agreement for services should be made in a different way than is currently done. The relationship of authority is not suitable as a distinctive criterion. A criterion that could be suitable is one strongly linked to the declaration of self-employment that can be acquired by workers who meet certain criteria. In principle, a person possessing such a declaration of self-employment works under an agreement for services, unless an employment agreement is explicitly agreed upon. A person without a declaration of self-employment always works under an employment agreement, if a certain threshold of hours is exceeded, which I propose to be 5 hours per week; if the number of hours worked is below that threshold, there is an agreement for services, unless the parties explicitly opt for an employment agreement. In my proposal, wherever parties have made or can make choices, these choices are binding. Thus, a system is created in which the idea of protection of labour law continues to be at the forefront, but legal certainty is served better than it is now.