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### The employment contract as an inclusionary and exclusionary device

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## CHAPTER 8

# THE EMPLOYMENT CONTRACT AS AN INCLUSIONARY AND EXCLUSIONARY DEVICE

ROBERT KNEGT

In the last century the employment contract has become the dominant model used to give legal form to employment relationships. This holds true not only for European countries, whether their legal tradition is based on Continental law or common law, but also for most of the world. The employment contract has become the 'legal atom' that forms the basis for the 'chemistry' of industrial relations. Simple compounds have come to form the foundation of the system, but increasing regulation by organised and independent employers, employees themselves and governments has embedded those simple compounds in networks of normative obligations that can be compared with complex protein molecules, insofar as the metaphor can be stretched.

Simplicity within a complex structure – these characteristics are determinant to the discussion on employment contracts. Simplicity involves the employment contract being extolled by both friend and foe for its abstract character, through which it has 'freed' the employment relationship from all kinds of social bonds. As the legal form of a market transaction, the employment contract contributes to a great degree of flexibility and dynamism to the labour market. Simplicity is however also the reason why it is so criticised by those who argue that it systematically ignores the very social relationships in which it is embedded; it individualises that which has an essentially social character, thereby giving free play to social inequalities.

This complexity results from the fact that, in most countries that have undergone any degree of industrial development in the course of time, organisations and governments have linked an increasing number of rights and obligations to the employment contract with the intention of re-establishing its 'embeddedness' in social relationships. In many countries the

responsibilities related to shaping socio-economic relationships have been allocated amongst employers, employees and governments in such a way that the employment contract is the point of departure for various normative agreements. A wide variety of matters are incorporated into employment contracts – so many that some feel that the above-mentioned abstractness and flexibility have been all but lost. Although the employment contract, as a normative device, is intended to achieve simplicity by excluding certain aspects of employment relationships, it generates a high degree of complexity, which is a consequence of the social need to nonetheless link certain aspects of those relationships to the employment contract.

The employment contract has been the focus of this book, and the question has been posed on the extent to which the character of employment contracts has changed in the last 25 years. Do the boundaries of what it includes and excludes still apply, or do they have to be drawn differently than they were in the past? To what extent has the division of responsibilities between employers, employees and governments changed? What is the relation between the attachment of all kinds of normative rules to employment contracts and the characteristics of the employment contract as the legal form given to a market transaction? What consequences does this have for the use of employment contracts and for the categories of workers that fall inside and outside the scope of their regime?

These questions are posed within a tradition of academic and social debate regarding the legal regulation of employment relationships and the consequences of that regulation for socio-economic relationships. They are relevant for the discussion about employment relationships in many European countries, and most likely outside Europe as well. We have answered these questions primarily on the basis of the developments in the Netherlands and have referred to developments in other countries only indirectly. One of the reasons for this approach is the obvious fact that the authors, as researchers affiliated with the Dutch-based Hugo Sinzheimer Institute, which deals with matters related to work and the law, are most familiar with the developments in the Netherlands. An equally important concern is the fact that, with respect to a number of issues, there are developments underway in the Netherlands that have not arisen in other countries – or in any event have arisen to a much lesser degree. Thus, we are convinced that an analysis of those developments and an evaluation of their meaning in the light of the foregoing questions can contribute to the discussions in other countries.

Each of the last four chapters was primarily dedicated to the developments on one specific topic. The present chapter attempts to integrate these issues and answer the above questions on the basis of the material presented.

## 8.1. DEVELOPMENT OF THE CHARACTERISTICS OF THE EMPLOYMENT CONTRACT

Although we have limited the scope of our investigation to roughly the last 25 years, a broader view is needed in order to understand the underlying characteristics of the employment contract and its subsequent development. Chapters 2 and 3 explained the development of the legal form of labour relationships, which can be summarised in three phases.

In the first phase (from the 13th to the 18th centuries), traditional labour in the cities was embedded in guilds, institutional structures which organised much of social life. Most of the regulations governing labour relationships came from the guilds themselves. There was also wage labour in rural areas and in cities to varying degrees, more so in the Netherlands and England than in other European countries.

With the Enlightenment and the civil revolutions at the beginning of the 19th century, a second phase began which formally eliminated the old institutional structure and replaced it with an abstract, contractual freedom that was polemically mobilised against the old relationships of authority under the *Ancien Régime*. This institutional demolition was revolutionary from a legal perspective, but did not have the same radical consequences everywhere. It was not until the industrialisation of the Netherlands in the second half of the 19th century that the real commercialisation of employment relationships commenced and the consequences of that demolition were experienced as such. This quickly led to the third phase, in which a return to the old arrangements and the creation of new ones became the subject of social and political battles. The abstract nature of the employment contract created a new category of labourers/employees, enabling for the first time solidarity and the struggle for a general legal status. The common characteristic of the arrangements that arose in the early 20th century was their attempt to reconcile the discontinuity of salaried work, coordinated through the market in a 'job', with the continuity of a working career and social existence.<sup>347</sup>

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<sup>347</sup> Cf. Supiot, 2001.

With the transition towards a more service-oriented economy, a fourth phase began in which employment relationships appeared to be based more on commercial loyalty than on hierarchy; arrangements for social security schemes became less collective by nature and focused on reintegration at work rather than on compensation of income. In terms of mutual obligations, it appears that the employment relationship has become more intense than was customary in industrial-era relationships.

## 8.2. DEVELOPMENTS ON FOUR AREAS OF REGULATION FOR EMPLOYMENT CONTRACTS

The developments on four areas of regulation, all related to employment contracts, were analysed in Chapters 4 to 7. In addition to a high degree of continuity, all four areas involved changes that can be considered a break with the past. This occurred to the smallest degree with regard to pensions: these experienced no change in regulations but, under the influence of developments in the capital market and an ageing population, a change was made to the system used to calculate the pensions (from the final pay scheme to the average earnings scheme). In the Netherlands, an increasing portion of the working population came under its coverage, and national and international coordination problems, which might have formed an impediment to worker mobility, were gradually eliminated. A new development in this area is the 'life-course savings scheme', which entered into effect in the Netherlands in 2006 and which can be used, among other things, for early retirement. This scheme was discussed briefly in Chapter 7. It is still too early to say anything about the practical effects of the life-course savings scheme.<sup>348</sup>

Dutch regulations governing income compensation for ill employees underwent a peculiar development, which had two noteworthy characteristics. First, the collective nature of the efforts aimed at having the employee return to work were increasingly abandoned and the government was able to impose more and more of these responsibilities on the employer and the employee. Second, the means for accomplishing this was to expand the financial consequences of illness for employers – and for employees who failed to cooperate in their own reintegration – to a much higher degree than

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<sup>348</sup> For more information about this scheme, see Chapter 7.

in other European countries. In just over ten years, the nature of those regulations has been changed fundamentally.

A somewhat similar change occurred in the area of training, but other developments were also underway in that respect. Deindustrialisation and a trend towards greater flexibility led to technical training being provided to a lesser degree by companies, as more responsibility was given to the individual employees. Collective arrangements focused primarily on the bottom of the labour market, with access to the labour market as a high policy priority. Most training is given to persons who have already received a higher amount of training, relatively speaking, and who have already acquired a position in the labour market; this 'insider effect' was further reinforced by the above-mentioned developments.

Finally, the regulations governing work and care were also radically amended, although those changes did not always coincide with similarly radical changes in practice. In the Netherlands, the comparatively lower percentage of women participating in the labour market in the 1970s resulted in attempts to 'catch up' in the 1980s and the first half of the 1990s. Whether it is possible to speak of a 'Dutch miracle' or not, it is clear that the concurrence of a number of circumstances has led to a redistribution of jobs in which women, usually working part-time, have come to play a larger role. This development has placed the combination of paid work and care, primarily with respect to the care of children, on the social and political agendas. When it perceived that the consultations between employers and employees had not yielded sufficient results, the government – rather than prioritising deregulation the way it did in other areas – intervened actively by imposing statutory regulations governing work and care on the social partners that constitute a significant innovation in employment contracts.

Of the four areas under discussion, the developments in the area of illness and disability and in that of work and care were such that they can be said to have developed differently in the Netherlands than in other West European countries. With respect to the first area, the degree to which employers were called on to acknowledge their duty to make efforts to reintegrate ill employees (and the related long-term duty to continue paying those employees' salaries) drew the most attention; for the second area the same holds true regarding the degree to which employers must take into consideration their employees' care duties, and in particular what to certain extent is a materially unilateral ability of employees to adjust the scope of the working week.

Regulations governing the above-mentioned areas, which are largely linked to the employment contract, were discussed in Chapter 1 from two perspectives: the division of responsibilities between employees, employers and the government, and inclusion and exclusion. How can the developments analysed above be evaluated in those terms?

We have differentiated between three types of inclusion and exclusion: on the basis of the form and the content of the employment contract and on the basis of the employee categories covered by the employment contract. This will be discussed in section 8.4 below, but first we will address the consequences for the division of responsibilities.

### 8.3. CONSEQUENCES FOR THE DIVISION OF RESPONSIBILITIES BETWEEN EMPLOYEES, EMPLOYERS AND THE GOVERNMENT

A survey of the four areas in relation to the division of responsibilities shows first and foremost that in the recent past employees have been given more responsibility. Employees' pensions are under pressure due to the trend towards converting defined benefits systems into defined contribution systems. Employees' duty to make efforts to reintegrate after illness has been reinforced. No longer being able to perform their 'own work' is not sufficient anymore for an entitlement to financial compensation; employees are now expected to be more versatile in terms of the work to be performed, possibly for a different employer. The new responsibility for protection against dismissal in the event of illness functions as a significant incentive for employees to comply with their best-efforts obligation. Changes in the pattern of labour participation have increased the pressure on employees to combine care and paid work, and as a result employees are now responsible for 'arranging' this with their employers. Finally, the responsibility for training has also been placed with employees to a greater extent.

However, it appears that the nature of the shift in responsibilities is different in the areas of pensions and training on the one hand and work, illness and care on the other. With respect to pensions and training, it appears that employers are attempting to shift the risks and responsibilities from the company to the employees. For pensions, in addition to economic and demographic developments this relates primarily to developments in the reporting rules that govern listed companies. For training it is primarily socio-

economic developments, a decreased significance of the internal labour market and a transition towards more competence-oriented training which have led employers to withdraw and leave the matter of training to current and potential employees. In both areas, the government plays only a background role.

The same does not hold true for the areas of illness and care, where the government has not left it to the parties to arrange matters but has instead intervened in order to realise a new distribution of responsibilities. With regard to illness, the government deliberately relinquished the role that public agencies formerly played in the reintegration of ill employees and gave employers and employees their own responsibility for reintegration. That responsibility has been emphasised for employers by de-collectivising the income compensation rules and imposing a duty on individual employers to continue paying ill employees' salaries for an extended period of time. With regard to work and care, the government's intervention was prompted by a new policy on employment participation and – in the government's view – by the failure of the social partners to make arrangements in this respect. In terms of both areas, employers have been confronted with statutory obligations that imply that within the context of the employment relationship covered by the employment contract they must take into consideration employee circumstances that exceed the scope of the 'job'. This will be discussed in more detail below.

In the area of pensions and training there has been a shift at the expense of collective facilities arranged at the company level. These have disappeared in favour of market-regulated services, particularly in the area of training. Socio-economic developments have resulted in less interdependence between employers and employees. At the same time, a labour market policy that is aimed at increased participation has led to more government involvement in the level of qualification.

In the areas of illness and care, on the other hand, interdependence between employers and employees has actually increased, and it was the government that ultimately compelled this when the social partners were unable to come to an arrangement (in any event quickly enough). In that context, it is the employment contract that is the starting point for statutory regulations. It can thus be concluded that the government has taken a more proactive approach when in its view the socio-economic developments have generated new goals – for example when a need for greater flexibility and the goal of more participation in the labour market require a policy aimed at maximum

integration of citizens in the labour market. In such cases the government does not hesitate to compel the social partners to make arrangements, despite its tendency – particularly with respect to areas in which it played a comparable role in the past – to withdraw, arguing that regulations in those areas can safely be left in the hands of the social partners.<sup>349</sup>

## 8.4. CONSEQUENCES FOR INCLUSION AND EXCLUSION

### 8.4.1. CONSEQUENCES FOR THE EMPLOYMENT CONTRACT AS A LEGAL FORM

An employment contract sets its own boundaries: it regulates certain relationships and excludes others. As was noted in Chapter 1, with respect to inclusion and exclusion the most far-reaching consequence of the developments in the regulations governing employment contracts would be if they had changed the essential characteristics of the employment contract as a legal form. This relates to characteristics such as the employment contract's bipartite and dual nature (which excludes other parties), its nature as a reciprocal and, in principle, voluntary agreement, its temporal limitation to the period in which labour is performed in exchange for a salary (which implies that there are essentially no obligations outside that period), and the relationship of authority (which essentially gives employers the unilateral authority to determine the work to be performed by employees).

Recent developments have placed pressure on the legal form of the employment contract in two ways: with respect to its temporal boundaries and to its reciprocity. The new Dutch rules governing the responsibilities in the event of an employee's illness or disability imply that an employer must be involved in that employee's reintegration and must continue to pay the employee's salary up to two years, or even longer, after the last day on which the employee actually performed work. That obligation is linked to the existence of an employment contract, but at the same time detracts from the limitations that confer upon it its simplicity and flexibility as the legal form of a market transaction. In positive terms, this means that there is now legal acknowledgement that the employment contract implies a relationship that entails mutual obligations which significantly exceed the scope of the 'duty to

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<sup>349</sup>. Cf. the deregulation operations in the 1990s and more recently the memorandum entitled '*Bruikbare rechtsorde*', *Kamerstukken II*, 2003-2004, 29 279, no. 9.

provide labour', and that in particular the employer's legal position entails obligations that exceed the scope of the business and that are much more collective in nature. In this regard, a duty has been imposed on the employer to assist in realising long-term working careers for its employees. The underlying policy theory is inspired by legal economics, based on the adage that the most efficient means is to allocate liability to the party that is best able to prevent damage or be responsible for compensation. The discussion on the extent to which the employer has thereby become the proper target for the legislature led to a fierce debate in the 1990s on the basis of earlier measures, and that debate has not yet abated. The reciprocity of the agreements made within the framework of the employment contract is open to question in the context of both work and care and reintegration after illness. Employees' care relations have not yet led to actual discussions on the bipartite nature of the employment contract, but it is clear that other parties with whom the employee has a social relationship (family, neighbourhood, etc.) are knocking more loudly on the still-closed door than in the past. The legislature has taken those interests into consideration by giving employees a different procedural position for decreasing or expanding the scope of the working week. This procedural position (the employer is obliged to comply with such a request unless the company's interests give rise to weighty objections) leads to a certain material one-sidedness regarding the determination of the scope of the working week. However, as soon as the employer approves the change requested by the employee, willingly or reluctantly, formally speaking there is once again an agreement so that the principle of *pacta sunt servanda* is not formally undermined. This would be formally different if it appeared that the employer could expect an employee to perform completely different work than that agreed upon in the employment contract within the framework of reintegration after illness. In positive terms, this constitutes an acknowledgement in case law that the employment contract comprises the entry into a relationship that is in part institutionally determined rather than determined by them as private contractual partners; its mutual rights and obligations imply that both parties undertake to continue their relationship also under unexpected, changed circumstances and to adapt to those changed circumstances.

For all three issues, the rights and obligations related to the relationship that is entered into by the parties through an employment contract are interpreted, more than previously, in an institutional context. This implies first and foremost that formal boundaries – on the agreed duration or nature of the work or the scope of the working week – must yield to considerations related to the permanency of the relationship that require of both parties that they

come together and adjust to the changed circumstances; this includes matters that previously used to be left outside the scope of the employment contract because they formed part of the employee's 'personal life'.

A second implication is that the government expects private parties to orient their acts to a longer term than that of the individual employment relationship and to thus, to a certain extent, contribute to the promotion of collective interests (employability, reintegration, participation in the labour market and reducing the number of benefit claimants).

#### 8.4.2. CONSEQUENCES FOR THE CONTENT OF THE EMPLOYMENT CONTRACT

An employment contract is a deal governing paid work, *i.e.* making labour available in exchange for a salary. It sets boundaries and excludes other matters and relationships. Its limitation to agreements governing work for pay is thus one of its characteristics (to the exclusion of other spheres, such as the 'personal sphere').

In the course of time, various regulations have detracted from this basic assumption. We can distinguish between regulations that are related to the employment contract, such as laying down financial obligations, but which do not have any consequences for the organisation of the work (such as duties to pay premiums on the ground of regulations governing social insurance or pensions), and regulations that do have consequences for the organisation of the work.

The developments in the area of work and care referred to above show that employers are expected to take into consideration their employees' other activities more so than in the past. Such activities are often also of an 'obligatory nature' and thereby could fall under the broader definition of work used by Supiot.<sup>350</sup> To put it differently, this relates to the extent to which an employer can still assume that he enters into a contract governing paid work to be performed by the employee, and that he can simply ignore the employee's other obligations. That is the case to a lesser degree. The Working Hours Act (*Arbeidstijdenwet*) obliges employers to take into consideration employees' care duties when determining their working hours; this is a general duty that is not sanctioned separately, in light of which it is as yet

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<sup>350</sup> Supiot, 2001: 54.

unclear to what extent it will actually be implemented in collective and individual agreements. Employers are obliged to allow employees who are confronted with family care duties to take care leave and to continue paying their salary up to a certain maximum during that leave. Finally, on the basis of the procedural rules described above, the legislature has given employees a certain amount of leeway to adjust the scope of the working week. These rules normatively create such a different basic position for employees that to a certain degree they can materially and unilaterally limit or expand the scope of their working week.

The mutual best-efforts obligations for reintegration after illness referred to above also imply an expansion beyond the provisions governing 'work and pay'. The Dutch policy is inclined to hold both employer and employee jointly responsible for the employee's 'employability', as a result of which both parties will have to gear themselves not only to the work related to a particular position, but also to what is necessary to ensure that the employee remains sufficiently 'employable'.

#### 8.4.3. INTERDEPENDENCE AND TEMPORAL PERSPECTIVE

These developments and those noted above, on the basis of which employers and employees are expected to orient themselves to a longer term than that covered by the concrete employment contract (the 'job'), can be explained, at least partially, by the increased interdependence of the participants in the labour market. Increased interdependence of the participants in a social area generally implies that they must attune their actions to each other to a greater extent and in a broader geographic and temporal perspective.<sup>351</sup> In this context, increased interdependence is involved in at least three ways.

First, the transition from a society in which industrial production is predominant to a 'service society' implies a different division of labour where the content of the labour is less pre-programmable and determined hierarchically, and must be more closely attuned to the flexible expectations of others. The quality of the product is more dependent on the quality of the employees' efforts, and as a result employers are more dependent on the professionalism and loyalty of their employees. This leads to other relationships as well as, to a certain extent, to other types of agreements between employers and employees than were customary in industrial

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<sup>351</sup> Cf. Elias, 1991; De Swaan, 2001; Collins, 1999.

relationships. Second, due to a number of developments that include ICT and globalisation, the content of the work available within the individual working career is more subject to change. This implies that employees' non-company-related competencies have come to play a more important role in terms of their chances of improving themselves and continuing to be active in the labour market after their current jobs end. The interdependence of their activities within consecutive employment relationships is thereby reinforced. As the chance of a job change increases, the need for the employee and the employer to take into consideration the further course of the employee's working career within the current employment relationship also increases. This requires a broader temporal perspective, and the scope for such a perspective does not usually arise spontaneously. Once again, it is the government that is responsible for creating conditions such that it is also in the interests of the individual participants to orient themselves towards a broader spatial and temporal horizon. Third and finally, the interdependence between paid work and other areas of social activities is increasing, in part due to the significant increase in the participation of women in the labour market.

#### 8.4.4. CONSEQUENCES FOR THE RELEVANT EMPLOYEE CATEGORIES

The developments related to employment contracts also have consequences in terms of inclusion and exclusion for the employer categories whose employment relationship is covered by the legal model of the employment contract.

In addition to workers who have employment contracts there are also self-employed persons; in the Netherlands, approximately one out of 12 workers have that status. For 'self-employed persons with no staff', the material position is often quite comparable to that of employees, but the regulations linked with employment do not apply to them. In the Netherlands, the self-employed cannot take advantage of regulations governing work and care. They are deemed to be responsible for their own training, for taking out insurance against risks and for their own 'employability'. Although having the status of 'self-employed' means that a worker is not obliged to pay social insurance contributions, that exception is not inviolable; where appropriate, the benefits agencies responsible for social insurance schemes – and persons on whom the status of being self-employed has been imposed – can argue that the situation involves a disguised salaried employment relationship for which insurance is compulsory. In such cases there can be differing views regarding

the type of contract that applies, hence a court may have to give a definitive answer.

The dividing lines do not relate solely to the limits of the ‘employment contract’, however: there are also internal differences with regard to the areas that we have analysed. The differentiation between employees with a permanent employment contract and various types of employees who have fixed-term employment contracts and flexible workers, is particularly relevant in this respect. This is especially true with regard to the regulations governing illness and reintegration. For an employer, the duty to continue paying an employee’s salary during illness is an incentive only if he knows that the employee can demand that the employment relationship be continued, *i.e.* if the employee enjoys protection against dismissal. If the employee has a fixed-term employment contract, however, the employer can simply wait until the contract’s term has lapsed and leave the reintegration efforts to the public sector. A differentiation must also be made regarding training between employees with a permanent contract, who receive training despite their relatively high educational level, and temps, who have far fewer entitlements in this regard.

As noted above, the participation of women in the Dutch labour market has increased dramatically, partially under the influence of agreements made within the context of the tripartite consultations between employers, employees and the government in the early 1980s. In that sense, when working on the basis of an employment contract women are being ‘included’ more than before. This has significantly contributed to the inclusion of regulations governing work and care in arrangements for employment contracts. Still, as was noted above, there is another side to this inclusion which primarily involves a redistribution of the work available; the burdens related to combining work and care must be borne predominantly by the women themselves.

## 8.5. IS THE EMPLOYMENT CONTRACT STILL AN ADEQUATE DEVICE FOR REGULATING EMPLOYMENT RELATIONSHIPS?

Having summarised the developments analysed above and their consequences for employment contracts, what can we conclude about the suitability of the employment contract as a device for regulating employment relationships? On

the one hand, the conclusion that it has proven to be extremely flexible seems unavoidable; the employment contract has held its position despite considerable changes in employment relationships in terms of economic production. On the other hand, that was possible only because the contract could act as the 'atom' in ever more complex structures that were built around it and which, partly in response to the institutional 'demolition' that took place at the beginning of the 19th century, had to re-establish the institutional embedding.

The legal construction of the employment contract is under continual, structural tension in two ways. That tension can be compensated but not eliminated. First there is the tension between form and content: its form as a free, autonomous consensus opposes its content of partial relinquishment of that autonomy, of the transfer of control over one's own activities to another. The second is the tension between exclusion and inclusion: its intended nature of formalising an individual, market transaction with a limited scope opposes the socially required embedding of the work, both in organised production and in social existence. For more than a half a century, both types of tension have given rise to a great deal of social struggle and political discussion; with respect to both issues, legislation has significantly contributed to compensating those types of tension. However flexible the employment contract has appeared to be up to now, the possibility that socio-economic changes will undermine that compensation and bring those types of tension to light is always present.

The last question raised in Chapter 1 was to what extent, in the light of the developments analysed and their consequences, can the employment contract still be considered an *adequate* instrument for regulating work and work-related relationships? Of course, the answer requires a specification of the basis on which that adequacy can be determined. In Chapter 1 a differentiation was made between four types of conditions that an employment contract must meet in order to be deemed adequate: (1) formal, (2) formal-functional, (3) material-functional and (4) public conditions (see section 1.3). The question can now be answered as follows on the basis of these criteria.

The formal conditions (1) relate to the 'sharpness' of the delineation created by the normative model of the employment contract, including (a) who are the parties to the contract and (b) the parties' mutual powers and claims. It was determined above that parties other than the employer and the employee are increasingly attempting to exert an influence on the agreements made

within the employment relationship, but this does not mean that they are formally admitted to the employment contract. With respect to the four areas that form the subject of this book, the 'sharpness' of the delineation of the parties (a) is not really under pressure, but it must be noted that generally speaking the employment contract is being increasingly confronted with secondment constructions and with 'virtual employment' that affects its character as a bipartite contract. The clarity of the powers and claims (b) has decreased somewhat in the Netherlands regarding two issues: on the part of the employer as a result of the powers that the employee has been given to unilaterally adjust the working hours agreed in the contract, and on the part of the employee due to the case law on the work that must be accepted within the framework of reintegration (which can differ from the parties' contractual agreements).

The predictability of the consequences of the use of the employment contract (2) were at issue in the Netherlands when employers were obliged to pay partial compensation (a financial penalty) if one of their employees became disabled and claimed benefits under the relevant social insurance schemes (see Chapter 4). That penalty was considered an unpredictable financial burden that was not substantively related to the employment relationship, particularly if the cause of the employee's disability lay outside the employer's sphere of influence. That rule applied for only a short period of time. However, under the current rules the mutual obligations in the event of an employee's illness also apply for a period of time that can far exceed the last moment at which the employee performed work for pay, in which context the intended temporal boundaries of the employment contract are significantly exceeded. Finally, a general note should be made of the problems that arise from the retroactive effect of collective labour agreements (that were entered into at a late stage), as a result of which the content of the mutual obligations under an employment contract that has already been entered into become clear only in retrospect.

Of the above-mentioned functional conditions, it is the material conditions (3) which are primarily at issue in this context. The framework of the employment contract changes in this regard, because employers are obliged to take into consideration the care duties of their employees (see Chapter 5) and to make efforts to enable ill employees to return to work, if necessary for another employer (see Chapter 4). Is this change of such a nature that the functionality of the employment contract is affected?

It is clear that to a certain extent these changes affect the hallmark of the employment contract – extolled by many – that it abstracts from other relationships, including this one. Employers are now obliged to take more circumstances into consideration for some employee categories. This makes the employment contract a less flexible device. It can lead to a ‘differential use of types of contracts’ insofar as the obligations regarding employees with permanent contracts differ from the obligations regarding those who are employed on a temporary basis. For example, it can lead to broader use of fixed-term contracts or to contracting out work to freelancers, which in turn can have consequences for the relevant employee category. A clear case of a problematic apportionment of the burdens among employers and employees is the duty to continue paying an employee’s salary in the event of illness, which is linked to the continuation of the employment contract (see Chapter 4). Insofar as that obligation is considered a burden it gives rise to the use of alternative forms of formalising the employment relationship, as in that case the employer no longer runs that risk after a fixed-term employment contract lapses and the risk is excluded entirely if the parties enter into a commission contract. Employers can also choose to insure the risks related to the duty to continue paying an ill employee’s salary; whether that is an attractive option will depend on the size of the company.

Finally, the public conditions (4) imply that employment contracts are adequate insofar as they contribute to the realisation of public objectives, such as those related to the public order, public health or labour market policy. Those public objectives are at least partially subject to changes that are closely related to socio-economic developments. One of those changes is that the interest in state regulation of social insurance schemes is being increasingly eclipsed by the interest in optimal or maximum participation of the population in paid work. A second, closely related change is the increasing pressure that the government places in its socio-economic policy of promoting flexibility and mobility in employment relationships.

## 8.6. THE EMPLOYMENT CONTRACT AS A DEVICE TO IMPLEMENT POLICY MEASURES: THE PARADOX OF INCLUSION AND FLEXIBILITY

For the government, the employment contract acts to a certain extent as a device to apply rules intended to implement socio-economic policy. The types of tension referred to above, which arise from the structure of the

employment contract, offer the government the possibility to do so because in a sense they require an authority that stands above the parties to play a regulatory role. As a third party the government can take on the duty of reconciling discrepancies and compensating tensions. At the same time it thereby acquires the ability to mobilise the employment contract in favour of its own public objectives.

When the government uses the employment contract to realise public objectives there is a tendency to diminish the abstract nature of the contract. Such a government measure can give rise to reactions from the parties involved as those parties attempt to keep its consequences under control or avert them, but can also influence the relationship between the two parties. The degree to which the boundaries of the employment contract are expanded or exceeded through such a measure can vary. In Chapter 4 it was noted that the expanded duty to continue paying an employee's salary in the event of illness significantly exceeds the temporal framework of the employment contract, which is based on its nature as a formalisation of a market transaction. The question is, what will the effects be of such a government measure: will employers politically oppose it, will they avoid it by making greater use of flexible workers, will they set off the risks by taking out insurance, or will they incorporate elements to deal with prevention and reintegration in their personnel policy? These various options also show the many different ways in which the parties can deal with the risks created by the government's intervention. However, measures such as the extended duty to continue paying an ill employee's salary also have unintended consequences that cannot be easily removed or compensated; in the areas of illness, disability for work and work and care, interdependence of employers and employees is increasing and the parties will have to take each other into consideration to a greater extent in their mutual dealings. This also changes the concepts of mutual rights and obligations in the context of the employment contract, but without the legal concept itself becoming a subject of discussion.

At the same time, it seems that a policy dilemma is arising, as the device that the government is using to implement its policy is at odds with the stated objective of making the labour market more flexible.

Insofar as the government is using the employment contract as a device to implement its policy, it is also assuming that the employment contract has a certain degree of permanency and that it offers a certain degree of protection against dismissal. The extended duty to continue paying an employee's salary

in the event of illness is primarily meaningful as long as the permanent employment contract is dominant and the employee enjoys legal protection against dismissal. Only then are employer and employee 'stuck with each other' and bound by the joint duty to make reintegration efforts. This policy will be ineffective insofar as employers can use contracts for a limited number of months or other types of contracts, as in that case the employer need only wait until the term of the contract lapses to be free of the duty to continue paying salary and reintegrate an ill employee. Hence the policy assumes a strong sense of conditionality with respect to an employer's possibility of dismissing an employee.

At the same time, the Dutch government considers making the labour market more flexible to be of paramount importance. It has increased the possibilities of flexible appointments and has announced that it wants to ease the protection against dismissal.<sup>352</sup> The more it implements that policy, the more it undermines the conditions for the use of the employment contract as a device to realise public interests. The implementation of the government's legitimate desire to have the social partners bear the responsibility for solving work-related problems by forcing them, as it were, to act jointly is confronted with the importance of flexibility as a condition for the labour market to function properly. In order to effectively impose that joint responsibility on the social partners, the government must be able to embed it and include it institutionally in the obligations related to the employment contract. Such institutional inclusion assumes a degree of continuity of employment relationships that is opposed to the essentially flexible and exclusionary nature of the employment contract as a formalisation of a market transaction.

What are answers to this dilemma? It will suffice to indicate the two extremes. One extreme is the choice for exclusion, in which case the institutional arrangements are separated from the employment contract entirely and the need for work-related facilities is met via the private sphere (individual insurance and hiring services) or, if necessary, via the public sphere by calling on 'citizenship'. On the other end of the spectrum there is Supiot's proposal for complete inclusion: expansion of the institutional status to include all persons who perform socially useful work, regardless of whether they are paid for that work.<sup>353</sup> The choice for the latter solution would mean giving up employment as we know it in favour of a new device.

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<sup>352</sup> Cf. Chapter 3, section 3.13.

<sup>353</sup> Supiot, 2001.