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CHAPTER 4

SICKNESS AND DISABILITY: GOING DUTCH AS A CURE FOR A ‘DUTCH DISEASE’

ROBERT KNEGT & MIES WESTERVELD

An employee’s inability to perform the agreed work leads to a number of problems that must be resolved, for example in the form of compensatory measures. The central question in this Chapter is how the consequences of an employee’s incapacity for work are regulated, the role that the employment contract plays in this respect, and the changes that have occurred in recent years. Much has elapsed in the Netherlands since the 1980s with respect to illness and disability. The statutory provisions that applied at that time were strongly criticised. The number of employees in the Netherlands who received replacement income due to illness and disability was so much higher than the figures in other European countries that there was talk of a ‘Dutch disease.’¹ Even more noteworthy are the changes that have been made regarding the responsibilities of employers and employees in an attempt to turn the tide. Among other things, under the amended rules the individual employer must bear the salary costs of an ill employee for many years. Curiously enough, this individualisation of the burden of bearing collective obligations has been referred to as ‘going Dutch’ in the English-speaking world. In this chapter, the above-mentioned changes will first be substantively described and then analysed within the framework of the issues raised in this book.

When an employee becomes unable to perform his own work there are several consequences, both for himself and for those professionally related to him. Four of those consequences are relevant in this respect. Physical or psychological dysfunction may require medical treatment, which naturally involves costs. Discontinuity in the employee’s income is another consequence; if the failure to work leads to a loss of salary, the employee will require compensatory income. If the disability does not resolve itself, facilities may be necessary to reintegrate the employee to his position. Finally, the

¹ Aarts, Burkhauser & de Jong, 1996.

party that assigns the work may be required to replace an employee who is unable to work. This analysis, in which the employment contract is the central issue, will concentrate on the second and third consequences, compensation of income and reintegration.

These and other consequences of an employee no longer being able to participate in the work process generate socially accepted notions in which the 'how' and 'why' of an employee becoming incapacitated is linked to the 'who should be doing what.' Through those notions, the responsibility regarding incapacity for work and the related consequences are specifically allocated to certain social actors. This allocation relates to three different aspects that, in practice, are often closely related but which must be differentiated for analytical purposes.

The first aspect relates to the question of whose acts or omissions have contributed to the employee becoming disabled. This relates not only to an objective form of *causality* but also to *essentially normative notions*: actual causality and normative responsibility are directly linked to each other in a manner that is not legally exceptional. The responsibility can consist of a best-efforts obligation to prevent an employee from becoming disabled in the future, but if prevention is not considered a viable alternative it can also be translated into an obligation to compensate the person affected. This leads to the second aspect, *i.e.* how the burdens related to the consequences of an employee becoming disabled can be distributed among various social actors. This relates primarily, but not necessarily solely, to financial expenses – the loss of salary as a source of income. In this context the responsibility can take the form of an obligation of results to compensate for lost income. The third aspect relates to the division of responsibility for the employee's recovery and reintegration into the work process. This responsibility takes the form of a best-efforts obligation to contribute to the employee's reintegration.

In the course of the development of modern employment relationships, and also recently, these attributional and distributional notions have been subject to a great deal of change. Since the 1890s, the consequences of industrial accidents and the conditions under which they arise have been a matter of concern for the government, manifest in legislation and policies on compensation of income in the event of an accident and on the quality of employment conditions.

In the Netherlands, compensation of income in the event of an industrial accident has been included in collective schemes since 1903. Since 1930 the

same holds true for illness. Benefits are provided for through social insurance schemes to which employers and employees contribute with premiums. This is regulated by the Sickness Benefits Act (*Ziektewet*) for incapacity for work lasting up to 52 weeks; in the event of continuing disability, the employee will subsequently be entitled to benefits on the basis of the Invalidity Insurance Act (*Wet Arbeidsongeschiktheid* or WAO).² The financial expenses are thus borne collectively. For a long time, reintegration of employees into the work process was primarily the responsibility of semi-public benefits agencies; the employer bore little or no responsibility for the employee's reintegration into the work process. The relation between company policy and the occurrence of absence due to illness and disability was well-known but had no practical significance within the context of collectivisation. It was not translated into terms of redistribution of financial burdens or responsibility for recovery. After the Second World War it was argued that employees had a best-efforts obligation to keep the duration of their dependence on benefits as short as possible, but that position did not result in positive or negative sanctions pursuant to the Sickness Benefits Act or the Invalidity Insurance Act.

This gradually began to change in the mid-to-late 1980s. At first this was done gently: the semi-public benefits agencies attempted to convince employers with high absentee rates that it was in their own interest to improve working conditions. Later on, the government came down harder by passing on the costs to individual employers and obliging them to make efforts to reintegrate their ill employees. This was done on the basis of notions that had essentially not changed since the implementation of the Industrial Injuries Insurance Act (*Ongevallenwet*): a certain average risk is unavoidable, but just beyond the scope of that risk employers can clearly influence the extent of the risk, and thus can make a contribution to preventive efforts.

If we distinguish between three periods, delineated by the implementation of social insurance facilities in the late 19th century, the expansion of that system in the mid 20th century and the turn in the 1980s, the relevant changes can be depicted schematically as seen in the following table:³

² In 1967 the Invalidity Insurance Act succeeded the Invalidity Act of 1919 (*Invalideitswet 1919*). See Chapter 3, Section 3.3. Unlike the Invalidity Act, the Invalidity Insurance Act is a form of risk insurance that offers compensation for lost earning capacity, regardless of the length of the insured past.

³ Table 4.1. obviously reduces the complexity of the developments in question drastically. The turn in the Netherlands in the 1890s was extensively analysed by Schwitters (1991).

Table 4.1.: Developments in attributional and distributional concepts regarding accountability of employers and employees for sickness and disability

Concepts regarding:	Second half of the 19th century:	Social security system 20th century:	After turn in system in the 1980s:
(1) attribution of accountability for the occurrence of sickness/disability	none, 'Act of God' except in case of human intent or gross culpability	none, except 'Act of God', and provided compliance with health & safety provisions	employer accountable for prevention of sickness and disability
(2) distribution of burdens resulting from sickness/disability	liberal principle: 'everyone ought to bear his own damage'	employer accountable for industrial causes; otherwise collectivization by social insurance	employer (partly) accountable for compensation of income loss
(3) attribution of responsibility for undoing the consequences/reintegration into the work process	employer and employee each for 'own' consequences	Public and semi-public agencies responsible for reintegration of employees into the work process	employer and employee jointly responsible for employee's reintegration into the work process

How the consequences of illness and disability are dealt with varies depending on the legal form of the parties' relationship. If that relationship takes the form of salaried employment, it is qualified as an employment contract for legal purposes. If the employee becomes disabled, mutual rights and obligations are activated, which can vary historically and nationally. For those who are not salaried employees, the consequences are comparable in some respects but the division of responsibility is substantively different.

4.1. DUTCH METHODS IN A EUROPEAN CONTEXT

Currently in Europe, governments customarily attempt to exert an influence on the conditions under which labour markets operate mostly in two ways. The first, prevention, is aimed at reducing the number of employees who become incapacitated for work due to illness or accidents. That method will not be discussed in this chapter. However, it is worth noting that regulations

to that end, which are often based on European law, can have a major effect on the nature of employment contracts. The second method, which will be the primary concern of this chapter, is the promotion of reintegration. This method is aimed at giving persons with physical or psychological limitations better chances of finding a job, or retaining the job they had when they became incapacitated for work.

Broadly speaking, in the arsenal of policy options there are three different methods for helping job seekers and employees with work limitations to find or keep a job: quotas, incentives and individual rights. A quota obliges employers to ensure that a certain portion of their workforce consists of disabled individuals. Incentives are measures intended to induce employers, by means of positive (rewards, subsidies) or negative stimuli (sanctions), to hire and continue to employ such persons. The third method, granting individual rights, is aimed at strengthening the legal position of the employee or job applicant in order to improve his chances of finding or keeping a job. The latter method has more consequences in terms of the nature of the employment contract than the other two.

A comparison based on international sources of the degree to which these methods are applied leads to the following conclusions:

1) The *quota* system is used in Italy (norm: 7% of the workforce), France (6%), Poland (6%), Germany (5%), Austria (4%) and Spain (2%). To the degree that it is effective, it appears that mainly 'insiders' benefit from it, *i.e.* disabled employees retain their work but job seekers with limitations find new jobs only to a very limited extent.⁴ However, the effectiveness of this method is dubious and largely dependent on supervision and inspection, and effective enforcement when businesses are in default.

2) *Incentives* are used in Sweden, Norway, Denmark, Belgium, Spain and the Netherlands. This method adjusts the parameters of the labour market in order to promote actions that contribute to hiring (or reemploying) partially disabled workers.

3) Granting *individual rights* is a form of legal empowerment that leaves it up to the employee's or job applicant's own initiative to take action. There are two forms of individual rights. The first form, *civil rights*, is based on the principle of antidiscrimination: citizens can enforce their right to access to

⁴ Organisation for Economic Development, 2003a: 105.

work even if this means that the employer will have to modify the position. This method is predominant in countries like the USA, the UK, Canada and Australia. The second form involves creating and improving *employment rights* within an existing contractual employment relationship. Examples include the right to be reintegrated into another, suitable job or a prohibition against terminating the employment contract due to or during a certain period of illness.

In the Netherlands, a choice was made to combine the second and third methods. Although the legal possibility of introducing a quota system was created some time ago, such a system was never actually implemented. The system of premium differentiation and the facility through which the expenses related to income compensation can be imposed on the individual employer form part of the incentives.⁵ In addition, specific rules apply to both parties, *i.e.* employer and employee, with respect to reintegration. Those rules were originally developed in case law and subsequently worked out and laid down by the legislature.

The method of imposing very specific obligations on employers with respect to reintegration is uncustomary at the international level. Apart from the Netherlands that has been done only in Sweden, initially in the form of an obligation to draw up a reintegration plan.⁶ The Netherlands is also one of the few countries that has a policy of imposing a financial burden directly on employers in the form of a long-term obligation to continue paying an ill employee's salary. The way in which various countries have distributed the relevant burdens is shown in Table 4.2.:

⁵ The latter option can be imposed on individual employers in a number of ways. The employer can allow the first two days of illness to be on his account. The benefits under the Sickness Benefits Act amount to 70% of the employee's daily wage, which is also subject to a maximum. As a result, all employees will be subject to a 30% decrease in their income; well-paid employees in particular are threatened with an even greater loss of income in the event of illness. However, for most people this is all theoretical; in practice, all these gaps were eliminated by means of arrangements in collective labour agreements.

⁶ Organisation for Economic Development, 2003a: 107.

Table 4.2.: *Employer's statutory duty to continue making wage payment, statutory waiting days and customary maximum duration of benefits in the event of an employee's illness*

Country	Cont. wage payment - weeks	wait-ing days	max. dura-tion - month	Country	Cont. wage pay-ment - weeks	'wait-ing days'	max. dura-tion - month
Austria ¹	12	3	12	Latvia	2	1	12
Belgium	4.3	1	12	Lithuania	0.4	0	4
Cyprus	0	3	6	Luxembourg	15 ³	0	12
Czech Rep.	0	0	12	Malta	4
Denmark	2	0	12	Norway	2.3	0	12
Estonia	0	1	6	Netherlands ⁶	104	0	24
Finland	2	1	12	Poland ⁴	4.7	0	6
France ²	0	3	12	Portugal	0	3	36
Germany	6	0	18	Slovakia	1.4	0	12
Hungary	3	0	12	Slovenia	4.3	0	12
Iceland	4.3	14	12	Spain	2	3	18
Ireland	0	3	12	Sweden	1.8	1	12
Italy	12	3	6	Switzerland	3	3	24
	28	3	12	UK ⁵	28	3	12

Sources: European Commission (DG V), 2005 (*MISSOC database*); Organisation for Economic Development, 2003a.

¹ Austria: between 6 and 12 weeks, depending on length of service; subsequently, for a period of four weeks employees are entitled to payment of 50% of their salary (supplemented by 50% sickness benefits).

² France: no statutory duty; duty to supplement sickness pay based on collective agreement.

³ Luxembourg: statutory duty applies to white-collar workers.

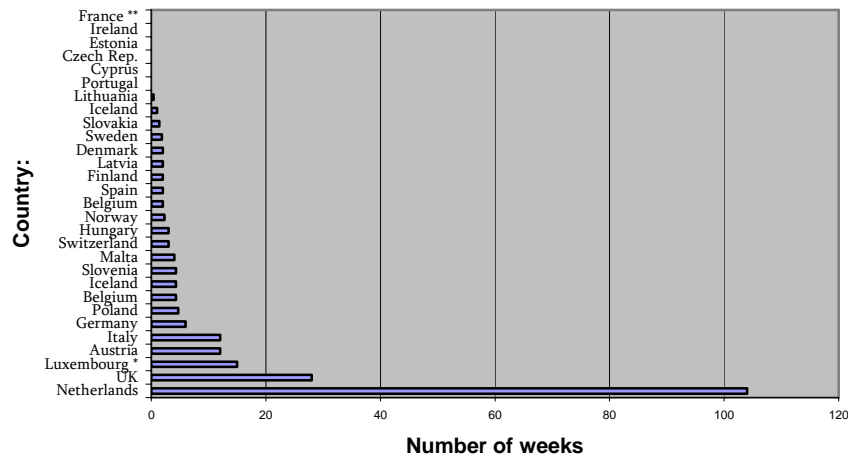
⁴ Poland: continued wage payment for 33 calendar days of illness in a given calendar year.

⁵ UK: employer provides non-income-related, flat-rate sick pay.

⁶ Duty of continued wage payment can be expanded to a maximum of 156 weeks by the social security administration if an employer has made insufficient efforts to replace or find another job for a partially disabled employee.

In addition, as Figure 1 shows, the duration of the obligation to continue paying an ill employee's salary in the Netherlands is unprecedented in the rest of Europe:

Figure 1: Employers' statutory duty to continue wage payment in case of illness of an employee



* Luxembourg: statutory duty applies to white-collar workers.

** France: no statutory duty; duty to supplement sickness pay based on collective agreement.

The development of regulations in this respect has not been unequivocal. In fact, in some countries the period during which the employer is required to continue paying an ill employee's salary has even been reduced. In other countries proposals were made to extend that period, but failed due to political or social opposition. Only in Sweden have the burdens for employers been increased somewhat, first from two weeks in 1992 to four weeks in 1997, which was subsequently brought back to two weeks in 1998; in 2003 a compromise of three weeks was reached. In addition, since 2005 employers in Sweden must pay 15% of the costs for the remainder of the period during which the employee is entitled to benefits.⁷ The social partners rejected a proposal by the government to expand that obligation to 60 days.

Comparable developments may be found in Norway, where the obligatory period in which the employer must continue paying an ill employee's salary is 16 days and a proposal (made by a government commission) to have the employees pay 20% of the expenses and the employer pay 20% of the remaining expenses during the first year of illness failed due to objections raised by the social partners. During the Kohl administration in Germany

⁷ Cf. Rae, 2005: 29; www.oecd.org.

there was an intention to eliminate the obligation to continue paying an ill employee's salary, but it was reversed by the red-green coalition. In Italy, until the Biagi legislation is implemented, there is an obligation to continue payment for six months.⁸

Thus, it would not be going too far to say that the duty in the Netherlands to continue paying an ill employee's salary for two years is unique. Within the context of the main topic of this book it is interesting to see how this obligation arose and how it fits in with the Dutch approach to the distribution of responsibilities between government, social partners and individual employers and employees.

4.2. 1980-2006 – DEVELOPMENTS IN THE LEGISLATION ON COMPENSATION FOR ILLNESS AND DISABILITY

In 1989 the Dutch government instructed the Tripartite Workgroup on Policy on Volume of Invalidity Schemes (*Tripartite Werkgroep Volumebeleid Arbeidsongeschiktheidsregelingen*) to come up with proposals to limit claims under disability schemes and promote the reintegration of partially disabled individuals. A year later the Workgroup issued its report, which gave the initiative for a carrot-and-stick policy.

One of the first measures to be taken on the basis of the recommendations contained in that report was the premium differentiation contained in the Sickness Benefits Act (1993), pursuant to which companies with a high absentee rate pay higher premiums than companies in the same sector that are able to keep absenteeism at a low level. Shortly thereafter, the bonus/penalty system was implemented under the Invalidity Insurance Act, pursuant to which a company that hires a partially disabled individual receives a certain number of months' salary as a reimbursement, and an employer that has an employee who starts collecting disability benefits will owe a penalty, also equal to a certain number of months' salary. However, the penalty appears to be legally vulnerable due to the punitive nature of the measure. A few years later, upon instigation of employers complaining that penalties were being imposed on them on the basis of something that they had nothing to do with and over which they had no control, a court ruled that the measure was contrary to the fair-trial rule contained in Article 6 of the European

⁸ EIROnline, <http://www.eurofound.europa.eu/eiro/2000/10/feature/no0010109f.html>; European Commission (DG V), 2005: 401 ff

Convention for the Protection of Human Rights and Fundamental Freedoms.⁹ The Dutch government then revoked the penalty,¹⁰ but this did not mean that the instrument of premium differentiation on the basis of absenteeism figures was given up. In 1998 a system of premium differentiation was introduced that cannot be as easily traced to the individual, hence the system is less vulnerable in terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That system was introduced through the Dutch Invalidity Insurance (Differentiation in Contributions and Market Forces) Act (*Wet premiedifferentiatie en Marktwerking in de Arbeidsongeschiktheidverzekeringen* or *PEMBA*).¹¹

A second method of inducing employers and employees to focus more on prevention is to remove the collectivisation related to the risk of illness.¹² This was also prompted by the implementation of a limited excess for employers in the Sickness Benefits Act in the early 1990s. Again, this developed gradually, by 'learning on the job' as it were, beginning with the implementation of a relatively limited period of six weeks for regular companies and two weeks for smaller employers. Subsequently, before anything was known about the actual effects of the measure, the employers' risk was expanded to the first full year of illness in 1996 with the Extended Compulsory Sick Pay Act (*Wet Uitbreiding Loondoorbetalingsplicht bij Ziekte*), which is somewhat misleadingly referred to as the 'privatisation of the Sickness Benefits Act'. The qualification is misplaced because the government has not actually withdrawn from the employee insurance schemes. The Sickness Benefits Act remains intact in terms of its form and content, but for employees whose employer is obligated to pay them salary, the right to sick pay yields to the right to continued payment of their salary.¹³ The operation was concluded with the implementation of a law intended to complete employers' and employees'

⁹ Central Appeals Tribunal, 15 February 1995, PS 1995, 132. In Knegt, 1995.

¹⁰ This was done by means of the Abolition of Penalties and Promotion of Reintegration Act (*Wet afschaffing malus en bevordering reïntegratie* or *AMBER*, Stb. 1995/132). (*N.T.*: Stb. (*Staatsblad*): Bulletin of Acts, Orders and Decrees.)

¹¹ That Act also gives employers a certain ability to opt out, thus enabling them to shirk the regime of the public implementing body, which many considered an insufficient incentive. The period in which the employer bears his own risk is five years, after which the public system takes over once again.

¹² Prevention involves more than merely preventing employees from becoming unable to work due to illness; it is also about making specific efforts at reintegration in order to prevent employees who are already unable to work due to illness from claiming disability benefits.

¹³ The 30% gap in employee insurance (see note 5) is also present in terms of the obligation to pay salary in the event of illness. As long as that gap is covered by a collective agreement, the intended incentive for the employee will basically remain theoretical.

cultural shift on absenteeism due to illness: the Gatekeeper Improvement Act (*Wet Verbetering Poortwachter*, officially Eligibility for Permanent Invalidity Benefit (Restrictions) Act), which was passed in 2001.¹⁴

The Gatekeeper Improvement Act introduced an ingenious set of rules for employers and employees in the event that an employee's inability to work due to illness threatened to become structural, and included a number of sanctions in the event of inadequate performance or failure to perform altogether. For example, if an employer has not cooperated sufficiently during a period in which he was required to pay an employee's salary during illness, at the end of that period he may be informed of the obligation to continue paying the salary. An employee who fails to cooperate in the efforts towards reintegrating him into his job risks being dismissed, even during a period in which he would normally be protected by the special prohibition against dismissal during illness.¹⁵ As soon as it appears that an employee's inability to work due to illness could become structural, all of the parties' attention and efforts should be aimed at having the employee return to work as quickly as possible. That can be in the employee's own position, for example with adjusted working hours or using job assistance facilities, or in another, modified position if necessary. It is also possible to post the employee elsewhere. The Gatekeeper Improvement Act contains a special provision in that respect, pursuant to which the employment contract with the company where the employee worked before he became ill will be maintained. That company thus 'lends' the employee in question to the other company.

This part of the Gatekeeper Improvement Act was based on case law in which the courts had already realised that the solution to structural absenteeism had to come from the workplace.¹⁶ The law expanded the complex of obligations aimed at reintegration that was developed in the relevant case law to also include partially disabled employees. Such employees are also expected to make specific efforts to reintegrate by doing other work, and this obligation to dutifully cooperate forms part of the arsenal of obligations implied by their duty to act as diligent employees. However, even under the Gatekeeper

¹⁴ Gatekeeper Improvement Act is the literal translation of this law's Dutch name (although not its official designation). We use the gatekeeper name to emphasise its meaning of an improved gatekeeper to disability benefits by way of enabling the body implementing employee insurance schemes to fill that role better than it had in the past. See Barentsen, 2003.

¹⁵ See Chapter 3, section 3.7.

¹⁶ The first case law in this respect was *Roovers v. de Toekomst* (HR, 3 February 1978, NJ 1978/248). Other relevant case law includes *Van Haaren v. Cehave*, (HR 8 November 1985, NJ 1986/309) and *Goldsteen v. Roeland* (HR 13 December 1991, NJ 1992/441).

Improvement Act the exact meaning of both concepts – involving required efforts of both employers *and* employees towards reintegration – remains a question of interpretation and thus casuistry.¹⁷

With the implementation of the Gatekeeper Improvement Act it appears that the revision of the system of regulations relating to work disability has been completed. The employer's and employee's rights and obligations are now statutorily grounded and refined, and we must await the concrete results of the intended cultural shift. That has not gone completely as planned. In the same year that the Gatekeeper Improvement Act was enacted, the government was given a recommendation that will form the basis for much more extensive reforms.¹⁸ In addition to the risk of illness in the first year, the Donner report¹⁹ addresses the lackadaisical Invalidity Insurance Act. The report starts with an analysis of the problem and the determination that the business community is responsible for the number of new disability benefits claimants: it is where absenteeism due to illness occurs, and is the only place where it is possible to prevent such absenteeism from becoming structural. The report proposes curing the 'Dutch disease' by further strengthening the labour-law relationship between the employer and his employees who are unable to work due to illness until those employees reach retirement age. The report also proposes doubling the duration of the duty to continue paying salary in the event of illness and a radical reform of employee insurance schemes with respect to long-term disability. The report reads easily, almost like an essay, and expresses great faith in the possibility of achieving its proposed goals. 'If we work together we will succeed' is how F. Noordam, a professor of social insurance law, characterised the tone of the report: 'The upbringing ideal of the 1950s to deal with a complicated social problem.'²⁰

¹⁷ See *e.g.* Court of Utrecht, the Netherlands, 20 April 2005 (*JAR* 2005): the longer the employment relationship lasts, the more stringently interpreted the duty to act as a diligent employer is. But it does not extend so far that an employer must dismiss another employee who has worked there for a shorter period of time in order to be able to offer that position to the employee who has limitations. See also Court of Rotterdam, the Netherlands, 23 July 2004 (*JAR* 2004, 216). On the other hand, an employee who refuses to play the game according to the rules also takes an inordinate risk; a refusal to return to the job doing suitable work can result in dissolution of the employment contract without any severance pay due to the changed circumstances as is customary in such cases (Court of Tilburg, the Netherlands, 24 June 2004, *JAR* 2004, 179).

¹⁸ Adviescommissie Arbeidsongeschiktheid, 2001.

¹⁹ Named after its *auctor intellectualis*, Piet Hein Donner. At the time of the changes made to the system in 2004-2006 he was Dutch Minister of Justice; in early 2007 he became the Minister of Social Affairs and Employment.

²⁰ Noordam, 2002. See also Klosse, 2005.

Although academic circles were skeptical of the report, it was given a positive reception in policy circles. For the first time in years the Dutch Social and Economic Council (*Sociaal-Economische Raad* or SER) gave a unanimous recommendation, in which the recommendations contained in the Donner report were largely adopted and elaborated into more concrete proposals.²¹ There are two reasons for the remarkable unanimity on a subject about which the parties had been diametrically opposed until then. First, it was clear to everyone that after so many years of endless discussions something had to be done to deal with the persistent 'Dutch disease.' Second, the employees' representatives in the Council saw in elements of the Donner report the perfect chance to regain control over the implementation of employee insurance schemes that they had lost several years before.²² The recommendation does refer to a number of issues that needed to be considered further, the most important being the position of temporary employees. A duty to continue paying salary to temps for two years was considered disproportionate. On the one hand, because the temporary employment sector is often a good starting point for employees who have limitations to get back in the labour market; there is a need for a certain degree of leniency with respect to a duty to continue paying the employee's salary in the event of illness. On the other hand, in providing incentives that sector should not be left out of the picture entirely, given that temporary employment has a particularly poor reputation in terms of absenteeism. The causes are not cut and dry, however. This will be discussed in more detail below, in connection with the issue of insiders and outsiders.

The Council's recommendation, entitled *Werken aan Arbeidsgeschiktheid* ('working on fitness for work'), had a decisive influence on the subsequent legislative process, in part due to the unanimity with which it was presented.²³ It laid the substantive basis for a very different facility for persons who are permanently disabled for work, which, as the government put it, is no longer based on what someone cannot do but rather emphasises what he still *can* do. The difference is apparent from the title of the recommendation: employees

²¹ SER, 2002.

²² This was due to the Work and Income (Implementation Structure) Act (*Wet structuur uitvoeringsorganisatie werk en inkomen*, Stb. 2001/624). The change in the system implemented at the time was the result of a parliamentary inquiry of 1996 in which the social partners were given blame for the fact that the problems relating to disability benefits had 'gotten out of hand'. See Sol, 2003.

²³ Incidentally, not all of the social partners' wishes were met. The facility to be discussed below for persons who are partially fit for work is not handled exclusively by private parties, as the recommendation had proposed.

who have suffered a loss of income are no longer considered partially *disabled* for work; they are partially *fit* for work. The title of the law no longer refers to *insurance* for disability; the new Act is called the Work and Income (Capacity for Work) Act (*Wet werk en inkomen naar arbeidsvermogen*).

The Work and Income (Capacity for Work) Act differentiates between employees who are fully and structurally disabled for work after having been ill and receiving continued payment of their salary by their employer for a period of two years, and employees who no longer can perform the work that they used to but who are capable of performing other suitable work. The latter fall under the Resumption of Work (Partially Fit Persons) Regulation (*Regeling Werkhervatting Gedeeltelijk Arbeidsgeschikten* or WGA), and employees who are fully and permanently disabled for work can claim benefits on the ground of the Full Invalidation Benefit Regulation (*Regeling inkomensvoorziening volledig arbeidsongeschikten* or IvA). For employees who are deemed to be partially fit for work, the loss of part of their earning capacity no longer automatically leads to compensation based on their salary. The employee will receive that compensation only after he has sufficiently reintegrated, *i.e.* at least 50%. The compensation to be granted until that time has the character of a wage supplement that is calculated on the basis of the principle ‘work should be rewarded’: the greater the actual reintegration, the lower the difference between the former salary and the current earnings plus wage supplement. For employees who are unable to reintegrate, applicable regulations are akin to the regular Unemployment Benefits Act (*Werkloosheidswet* or WW). Like the Unemployment Benefits Act, the Resumption of Work (Partially Fit Persons) Regulation provides for temporary benefits based on the employee’s salary, which are paid out only if the employee has worked for a certain period of time prior to becoming disabled. That part of the regulation is problematic from a legal perspective for persons whose partial disability was caused by an industrial accident or occupational disease, as the minimum benefits to which those who do not meet the requirement are entitled may not constitute ‘effective income protection’ within the meaning of ILO Convention 121 (social protection after an industrial accident or in the event of occupational disease).²⁴ The government is aware of this possible conflict and submitted the question as a point of law to the International Labour Standards Department of the ILO, which subsequently passed it on to its Committee of Experts.

²⁴ See Pennings, 2004.

After completion of the changes to the system made between 2003 and 2006, a large portion of the responsibility for both the financial consequences of illness and disability and the reintegration of employees who are unable to work was transferred to the business community. Henceforth, the solution to the problem of permanent inability to work will have to come from the workplace itself. If no such solution is found, no further compensatory or income-protection measures will be taken, in any event insofar as they would exceed the regular protection against unemployment. If the parties are able to effectively reintegrate an ill employee, the employee will be rewarded with a system of supplements to the proportionately lower salary. The only exception to the principle that no extra compensation will be given for loss of income as a result of disability applies to a very select category of employees who can be deemed permanently and fully disabled for work.²⁵

4.3. ALLOCATION OF RESPONSIBILITY AND THE PERMANENCY OF THE EMPLOYMENT CONTRACT

This Chapter began with an analytical differentiation between three aspects of responsibility: responsibility for an employee's inability to work, responsibility for the resulting expenses and responsibility for the reintegration of the employee into the work process. A review of the developments in the policy and regulations that have been analysed shows that the causal aspect has faded into the background, while reintegration has become increasingly dominant compared with the income compensation aspect.

Upon completion of the reforms discussed above, a large portion of the responsibility for both the financial consequences of illness and disability and the reintegration of employees who are no longer able to work was transferred to the employee's own employer. In that context, issues relating to causality have been left aside rather than explicitly discussed. Although it is clear that to a certain degree incapacity for work arises from working, exactly to what

²⁵ In 2006 there were 4,000 persons who fell within that category, but that figure does not properly reflect the structural development. Introductory effects and the expected transition from the Resumption of Work (Partially Fit Persons) Regulation to the Full Invalidation Benefit Regulation give rise to the expectation that the number of persons who fall under the Full Invalidation Benefit Regulation in 2007 will increase at a higher rate than it did in 2006, while the number under the Resumption of Work (Partially Fit Persons) Regulation will decrease. It is expected that 11,000 persons will receive benefits under the Full Invalidation Benefit Regulation in 2007 (*Uitvoeringsinstantie Werknemers Verzekeringen*, 2007).

degree that is the case need not be addressed because policymakers have taken the position that the solution to the problem must be found at the workplace. A pragmatic approach has become predominant: *because* employers and employees are deemed to be in the best position to effectuate prevention and reintegration, they have been given most of the responsibility for those two aspects.²⁶

Employers and employees are expected to give form to that responsibility within the framework of their continuing employment relationship. This implies that continuation of the employment contract is a condition relating to the employer's duty to achieve results in connection with compensation of loss of income (the duty to continue paying an ill employee's salary) as well as both parties' duty to make efforts to ensure that the employee reintegrates. In that context, the right of dismissal and the conditions attached to dismissal at the employer's initiative have become essential to the efficacy of the policy on illness and disability.²⁷ This also means that this policy offers very different options for employees with an open-ended employment contract than for those with other types of contracts, such as fixed-term, flexible work, etc. Since the temporal scope of the latter contracts is limited, employer and employee can be obliged to make efforts to reintegrate the employee only for a proportionate, shorter period of time.

The permanency of the employment contract is a new condition for policy compared with a prior phase in which compensation of loss of income and reintegration fell under collective, public facilities. Thus, it appears that the individualisation of income compensation and reintegration obligations has increased the pressure on the individual employment contract. This leads to the first evaluative question within the framework of the subject of this book: to what extent have the shifts in responsibilities described above had consequences for the form and content of employment contracts?

²⁶ Roozendaal, 2005.

²⁷ The recommendation of the Donner Commission to make an employee who is partially fit for work the responsibility of his own employer until he retires was not included. Dismissal remains possible if the employee has not yet reintegrated after two years of illness and it has been established that that will not be possible within a reasonable period of time.

4.4. FORM AND CONTENT OF THE EMPLOYMENT CONTRACT

The government has attached obligations to individual employment contracts that, as we have seen, arise from a policy based partly on pragmatic considerations. The new policy has been criticised from the perspective of the law of obligations: critics argue that it does not correspond with the relevant legal principles in three ways. First, with respect to the proportionality of the performances: Van der Heijden and Noordam posed a question in a preliminary recommendation to the Dutch Lawyers Association (*Nederlandse Juristenvereniging*): is the duty imposed on employers to continue paying an ill employee's salary *proportional*? How can such an obligation be justified unless, as they argue, it is balanced by a proportionate performance on the part of the employee?²⁸ The earlier collective schemes, under which employers made a contribution to the compensation of loss of income in the event of illness by means of premium payments, have been converted into an individual duty to compensate that loss of income. At the same time, it is questionable to what extent it is still adequate to assess that duty in terms of the law of obligations. It takes the form of promoting a public interest and, as both authors argue, the employer's responsibility has been given such a programmed and socially conditioned character that in many ways the government is still holding the reins as tightly as it did under the collectivised regime of the Sickness Benefits Act. In that sense, privatisation must be considered a 'government policy using other means' and must be assessed as such.

The second point of criticism relates to the relationship between liability and fault. From the perspective of liability law, Hartlief objected to a development in which an erosion of social protection is simultaneous with the introduction of liability without the necessity of a breach and regardless of the aggrieved party's own fault. 'There is a great deal of emphasis on protecting the aggrieved party, apart from the actions of the party that caused the injury and regardless of the aggrieved party's own fault. That party's own responsibility has been lost sight of completely'.²⁹ Such a development may be alarming from the perspective of liability law, but its relevance when it comes to employment relationships is questionable. In 1901 the Industrial Injuries Act had already broken away from the liberal view of such relationships and accepted seeing risk as based on average chances. In a recent case involving an

²⁸ Van der Heijden & Noordam, 2001: 149. See also Vas Nunes, 2004.

²⁹ Hartlief, 2004.

employer's liability (towards a smoker who had lung cancer and who was also exposed to asbestos), the court accepted the doctrine of what Kortman referred to as *partial* liability: an employer that acts wrongfully is liable for all the damage minus the theoretical portion that can be attributed to the employee.³⁰ In this respect it should be noted that the employer has also been given an arsenal of options in order to give form to his responsibility, in part due to the increased sanctions imposed on employees who do not cooperate in their own reintegration, so that they can avoid anything that exceeds the average damage. Nonetheless, it cannot be denied that employers have been given a certain degree of responsibility with respect to circumstances for which they generally cannot be blamed and upon which they cannot always exert any comprehensive influence.

Policy developments since the 1980s have presented an underlying idea that the system under the Sickness Benefits Act and the Insurance Act offers the relevant parties too many opportunities to shift expenses to collective arrangements. Although that argument certainly is not a new element in the discussion, in the last 20 years it was primarily inspired by the neo-liberal economy, which argues for allocating such expenses to every extent possible to the parties involved, as they are in the best position to exert an influence on the conditions related to the occurrence of risks. And this means that it is primarily employers who are now deemed to be in the best position to influence the prevention of illness and disability through working conditions policies and proper guidance on absenteeism. At the same time, employees' responsibilities are also subject to stricter sanctions; the degree to which they are protected against dismissal depends in part on the degree to which they actively cooperate in their own reintegration.

Third, due to these shifts the employment contract has become further removed from the classic paradigm of private law, *i.e.* an agreement is an agreement. The shifts in duties, rights and responsibilities have introduced a new element into labour law – a new element in the essence of the employment contract. Such a contract no longer exclusively implies the employee's right to continued payment of his salary as long as the agreed work is performed, and the employer's duty to offer the agreed work and pay the agreed salary. In the event that the employee cannot perform his own work he is now entitled to perform other work, or in any event entitled to the

³⁰ Kortmann, 2006, in his comments on a Dutch Supreme Court pronouncement (*HR* 31 March 2006, *RvdW* 2006: 328).

employer's efforts to make such work available for him. The concept of agreed work has thus become a less essential element of the employment contract.

At the same time, the employee's obligations can imply that he must perform work other than the work the parties originally agreed on. Hence the parties may find that they have other obligations than those they thought they had accepted when they entered into the contract. Finally, the obligations exceed the timeframe of the employment contract as a legal form of market transaction; there are also mutual rights and obligations outside the period during which work is performed in exchange for a salary, and those rights and obligations may continue long after the employee has last performed work for the employer.

Expanding the scope of responsibilities gives rise to substantive issues in addition to the formal issues discussed above, as the duties related to reintegrating ill employees exceed the substantive scope of the employment contract (*i.e.* provision of work in exchange for a salary). It is more akin to the government's imposing an obligation on individual market parties to promote a social benefit (participation in the labour market and continuity of the employee's career development). The increasing link between work and other areas of an employee's life implies that the parties cannot simply ignore this issue.

As we have seen, although the legitimacy of the duty to continue paying an employee's salary in the event of illness may be a subject of academic discussion, as far as the political players are concerned this duty is no longer open to discussion, particularly after the implementation of the Gatekeeper Improvement Act. The Continued Payment of Salary during Illness Act (*Wet verlenging loondoorbetalingsverplichting bij ziekte*) was passed without any problem by both the Lower and Upper Houses of the Dutch Parliament at the end of 2003. The Work and Income (Capacity for Work) Act was not subject to any major social objections either when it was passed in 2005.³¹ Three years after implementation of the extended duty to pay salary, a fairly jubilant analysis of the results of the measure appeared. The government claimed that the measure had worked on virtually every front. The number of benefits recipients decreased dramatically under the Invalidity Insurance Act and the Work and Income (Capacity for Work) Act, and companies 'that in practice

³¹ The Social Democrats did vote against the Act, but it was primarily because they considered yet another change in the system to be comparatively undesirable at that moment and not because they rejected the basic ideas underlying the new system.

set a good example with respect to dealing with absenteeism due to illness and reintegration confirm the impression that the Continued Payment of Salary during Illness Act has had a positive effect on absenteeism due to illness and on reintegration. The practical experts who were consulted also indicated that the principle underlying the Continued Payment of Salary during Illness Act is a good one'.³² In other words, the government is full of self-confidence on the correctness of the approach that has been taken, *i.e.* putting a greater burden on the individual employment contract (sharing the burden) as a remedy for the complex issues related to the 'Dutch disease'.

4.5. INSIDERS AND OUTSIDERS: SHIFTING RELATIONSHIPS?

It is clear that the above-mentioned shifts are relevant – or are relevant to this degree – only if the employment relationship has a permanent character from a legal perspective, *i.e.* if there is an open-ended employment contract. Hence the shifts have a slightly different character in the event of a fixed-term or a flex contract, or for temps. This observation leads to the second topic: the matter of insiders and outsiders with respect to the employment contract. In this regard, two categories are relevant: temps and the self-employed.

Temporary employment takes place partly within the context of a fixed employment relationship, in particular since 1999.³³ However, the employer's position is divided and incomplete; the employee has an employment relationship with a temporary employment agency, but it is the company that engages the employee which is responsible for the employee's direct management and supervision. The agency thus bears the financial consequences of absenteeism but is less able to influence the circumstances under which the work is performed than other employers can. Such an agency does not have alternative positions for employees either, as it is dependent on its clients to find another suitable position. The sector itself refers to the social importance of temporary staffing, particularly with regard to issues that the government considers important. Job seekers who cannot find work in another manner can often get a foot in the door through temping. The composition of the workforce might better explain the relatively high

³² Evaluation of the Continued Payment of Salary during Illness Act, dated 20 December 2006, Kamerstukken (Parliamentary Documents) II, 2006-2007, 30915, 1.

³³ Since the implementation of the Flexibility and Security Act (*Wet Flexibiliteit en Zekerheid*); see Chapter 3.

incidence of employees being unable to work than any shortcoming in the absenteeism policy. This argument is considered convincing: it was noted in policy documents, referring to the comments of the Social and Economic Council on this point, that the obligation to continue paying an ill employee's salary was disproportionate for the temporary employment sector and that this would be mitigated. That was done a year later, in time to be effective;³⁴ the extended duty to pay salary entered into effect on 1 January 2004; the rules on maximisation a year later, just before the extension became effective for employers.

In spite of all the plausible explanations of the relatively high absenteeism figures in the temporary employment sector, this sector still has problems in terms of preventing illness. It appears from investigations that employers do not apply their own working conditions policy to temps who work within their organisations, or in any event they do not do so without applying further conditions. They often leave it to the temporary employment agency to explain the absenteeism procedures, and the agencies often fail to do so. The same applies to taking measures to prevent or decrease absenteeism. In addition, these agencies are not always properly informed about the circumstances under which the employees work.³⁵

In 2003, consultations between the parties involved were initiated to see how matters could be improved. Those consultations resulted in a four-party covenant between the government, the social partners and the body implementing employee insurance schemes in its capacity as a quasi-employer.³⁶ It is interesting to note that the employer obligations referred to in the covenant do not focus solely on the formal employer: the party that engages the employee and which actually determines the working conditions also bears some of those obligations. There are also obligations to make efforts

³⁴ Act Maximising the Expense Safety Net - Sickness Benefits Act for the Temporary Employment Sector (*Wet maximering lastenvangnet-ZW voor de uitzendsector*), Stb. 2004/731.

³⁵ Arents, 2003.

³⁶ See http://docs.minszw.nl/pdf//111/2003/111_2003_4_20615.pdf, *Arboconvenant Uitzendbranche inzake de aanpak van arbopreventie, ziekteverzuim en vroegtijdige reïntegratie*, 2003: under the Work and Income (Implementation Structure) Act (*Wet structuur uitvoeringsorganisatie werk en inkomen* or *Wet SUWI*), it is the UWV benefits agency, the body implementing employee insurance schemes, which is responsible for the reintegration of job seekers who receive benefits under these schemes. Hence the benefits agency also has some of the duties of an employer.

to reintegrate 'safety net employees',³⁷ which the body implementing employee insurance schemes undertook to comply with the covenant. Both elements are intended to put temps and/or insured persons who do not have an employment contract in a position somewhat comparable (in terms of their chances of reintegration) as that held by individuals who have a fixed, one-to-one relationship with an employer.

The second category that is relevant in terms of inclusion and exclusion is referred to as 'self-employed with no staff' (in Dutch *zelfstandige zonder personeel*, often abbreviated as ZZP). In the relevant literature this category is often used to denote pseudo-self-employed individuals – people who appear to work independently but are actually employees. There are estimates that one out of three ZZPs are actually pseudo-self-employed individuals. This definition is especially problematic in sectors characterised by intensive labour, a high demand for labour, low entry thresholds and a great need for flexibility. Sectors such as construction, transportation, business and private services, journalism and the paramedic sector are familiar with categories of self-employed individuals whose legal status in all probability fails to match their socio-economic position.³⁸ For this particular category, the gap in social protection compared with salaried employees was increased by the elimination in 2004 of social insurance for long-term disability for persons working outside salaried employment.³⁹ Also relevant, partly within the context of Chapter 7, is the fact that the elimination of occupational disability insurance for independent workers also led to the elimination of pregnancy and maternity benefits, which had been included in that facility. Female independent workers must depend on the private insurance market for their income in the period before and after they give birth, which leads to numerous problems (such as exclusions in the initial insured period).⁴⁰ This

³⁷ This term refers to persons who were insured employees when they became disabled but who are not (or are no longer) entitled to continued payment of salary, for example because the employment relationship has ended.

³⁸ Aerts, 2007.

³⁹ That facility, a scheme for independent workers that was analogous to the system under the Invalidity Insurance Act, replaced the more comprehensive General Invalidity Benefits Act (*Algemene Arbeidsongeschiktheidswet* or AAW) in 1998. This put an end to the only form of social protection to which independent workers had been entitled since the implementation of the AAW in 1976. The Dutch Act Ending Access to Insurance under the Invalidity Insurance (Self-Employed Persons) Act (*Wet einde toegang Waz-verzekering*, Stb. 2004/324) shut off access to this form of insurance for new entrants.

⁴⁰ See Westerveld & Grünell, *Calls for reinstatement of public maternity benefits for self-employed*, <http://www.eurofound.europa.eu/eiro/2006/country/netherlands.html>, 6 January 2006. This measure has led to some commotion; the EOC found it to be contrary to European law and the UN Convention on the Elimination of All Forms of Discrimination against

measure has led to a further widening of the gap in income protection between workers who have an employment contract and those who do not.

Under the classic post-war system, workers who had an employment contract and certain equivalent worker categories had a well-protected income position in the event of illness and disability lasting a longer period of time. Shifts in the last 15 years have led to changes in the definition of the risk that is being protected and in the nature and scope of the protection. Previously, loss of income was the primary risk related to incapacity for work, and the protection primarily took the form of compensating that lost income. In this view, linked to the industrial regime, work had mostly the quality of a burden on health that was assessed in mechanical terms of a balance between capacity and burden. If that balance were lost, the intention was for the worker to be exempted from the duty to work so that he could regain his health privately.

Since then, the inability to participate in paid work has become the primary risk and compensation of income has taken second place. From a participatory view, work is no longer a duty but is more closely related to the domain of life fulfilment, which is far more integrated with the private sphere that it was in the past. Protection now comprises primarily help in reintegrating, which must take place to every extent possible in the work situation rather than in the shelter of the private sphere. This principle has resulted in extra benefits for individuals who are able to successfully avail themselves of that help instead of unconditional compensation of lost capacities.

At the same time, with respect to income protection the *open-ended* employment contract – more than an employment contract in and of itself – has become the standard for being considered an insider. The dividing line between insiders and outsiders is no longer one between workers who have an employment contract and legally equivalent worker categories on the one hand and other worker categories on the other; it is now one between workers who have an open-ended employment contract (in the sense of a contract that is for an indefinite period of time, not temporary and not hopelessly disturbed⁴¹) and everyone else. Even if the contrast has remained more or less

Women, and the FNV trade union commenced legal proceedings against the Dutch State in order to have the measure reversed. The court has not yet ruled on that case.

⁴¹ In March 2006 there were articles in the Dutch newspapers about an investigation aimed at showing that employers are generally able to pass off their employees as disabled on the basis of a distorted employment relationship. The government – both the ministers and the Parliament – was horrified by these reports, which threatened to destroy the chances of the new system's succeeding before it had even gotten off the ground.

the same, the dividing line between persons who are protected and those who are not is now different. Flexible work and early career work do not lead to the clear protection that is still offered – to a certain degree – to workers with an open-ended employment contract. The obligations linked to such a contract imply a risk that employers will be inclined to use other forms of contracts, such as those related to flexible work or jobs on commission. The government has attempted to give temps the same protection enjoyed by regular employees. The degree to which this has been successful is open to discussion.

4.6. SHIFTING RESPONSIBILITIES AND THE CHARACTER OF EMPLOYMENT CONTRACTS

In an employment contract, one party undertakes to enter the other party's employment and perform work for a salary. Under Dutch labour law such contracts have been fortified in favour of the party being employed by setting limitations on the possibility of freely terminating the contract. Although the parties are free to a certain extent to enter into a fixed-term employment contract, if they leave this open or once the duration of the contract is automatically deemed to be 'permanent' by law, the employer can no longer terminate the contract at its own discretion. This limitation is even greater if the employee is unable to perform his work due to illness or infirmity; there is a statutory prohibition against terminating a contract in the first two years of illness or infirmity. Under the classic system, the risk of employee incapacity for work was dealt with through collectivised forms of social insurance. Under the current system this takes the form of the employee's right to continued payment of his salary or an opportunity to perform other work. Thus, more than previously was the case, an employee's illness has become a risk for which two parties, the employee *and* the work organisation, are responsible. Both parties are expected to do everything possible to prevent incapacity for work due to illness, and if that is unavoidable to limit the consequences to every extent possible.

At times the formation of policy, in which context fixed-term employment contracts are used as a vehicle to ensure that employees who are disabled stay in the loop, is at odds with another, fairly dominant policy goal: that of making the labour market more 'fluid' by liberalising legislation that governs termination of employment, as such a policy is possible within the context of illness only if there is an employment relationship between the parties. If that

relationship is broken, the employer can no longer be induced to offer, or if necessary create, suitable work. A flexible in-and-out system renders this control mechanism impossible, since it can be successfully applied only if based on an open-ended employment contract.

This paradox was aptly expressed in a number of measures that entered into effect around the same time as the Work and Income (Capacity for Work) Act. Within the framework of the changes being made to the unemployment system and those intended to make legislation on termination of employment more 'flexible',⁴² the sanction against employees who cooperate in or fail to sufficiently defend themselves against termination of their employment has been eliminated. The government considers this mitigation to be desirable for the sake of judicial efficiency; each year the culpability test leads to the submission of countless *pro forma* petitions to local courts to dissolve employment contracts between parties who had already reached agreement regarding the termination and could thus have handled the termination between themselves without a need for the court's intervention. The only reason they did not do so was, as noted above, to obtain certainty regarding the employee's right to unemployment benefits as a foundation underlying their termination agreement. Lawyers considered the culpability test to be the 'great lie' in legislation on employment termination, comparable to the old rule under family law pursuant to which a spouse had to allege adultery in order to obtain a divorce.

At the same time that the culpability test was eliminated for unemployment benefits, it was once again applied for ill employees. The Sickness Benefits Act imposes a punitive cut on benefits of employees who fail to contest the termination of their employment during the first two years of illness and who thereby place a burden on the fund from which the sickness benefits are paid, because they have thereby disadvantaged that fund. The government explains that difference – through which the same action is *not* culpable if a healthy employee becomes unemployed but *is* culpable if the employee has limitations due to illness – by referring to the basis underlying the two provisions. The limitation of the culpability test under the Unemployment Benefits Act is

⁴² The quotation marks are used to stress the relative nature of the measures. For many years, employers and certain political parties have very much wished to see flexibilisation of such legislation, but every attempt has met with a great deal of resistance from the trade unions, who believe that the government and employers want to have it all: a more flexible way of getting out from under employment contracts and more limited protection of income in the event of unemployment. Thus, the positions taken on this issue do not appear to be moving forward.

intended to liberalise the rules governing dismissal of an employee. According to the Dutch Minister of Social Affairs and Employment, applying this principle of imposing limited sanctions on employees who cannot work due to illness could undermine the incentive for employers to reintegrate ill employees.⁴³

Thus, maintaining the obligations of employers and employees with regard to illness and disability requires reinforcing the permanency of employment contracts and curbing the parties' dynamics. At the same time, the policy is intended to make the employment relationship more flexible and remove limitations in the law governing termination of employment. This leads us back to the core of the problem related to the employment contract as a contractual form of a market transaction that, at the same time, is being mobilised for public purposes – not without problems. We will have to wait and see to what practical results and consequences this policy paradox leads.

⁴³ Kamerstukken I, 2005-2006, 30 370, E: 16-17.