# Klacht over weigering dispensatieverlening door ILO afgewezen

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ILO Committee on Freedom of Association
25 oktober 2019, Case No. 3346, 337th Session, Geneva, 25 October-7 November 2019
Noot dr. N. Jansen

**Dispensatie. Vrijheid van vereniging. Recht op collectieve onderhandeling.**

[Wet AVV]

*De Landelijke Belangenvereniging (LBV) heeft een klacht ingediend tegen de Nederlandse Staat vanwege het beleid van het Ministerie van SZW van vermeende systematische en willekeurige afwijzing van verzoeken tot dispensatie van cao's die algemeen verbindend zijn verklaard. De LBV stelt dat het Ministerie van SZW door deze praktijk de vrijheid van vereniging en het recht op collectieve onderhandeling van vakbonden zoals LBV en individuele bedrijven beperkt.*
*De Commissie stelt voorop dat haar mandaat er slechts in bestaat te bepalen of het nationale recht en de nationale praktijk in overeenstemming zijn met de beginselen van vrijheid van vereniging en collectieve onderhandelingen en dat de toepassing van het nationale recht op specifieke omstandigheden een zaak is die onder de bevoegdheid van de nationale autoriteiten en uiteindelijk de rechtbanken valt. Het onderzoek is daarom beperkt tot de vraag of de praktijk van het ministerie verenigbaar is met de beginselen van vrijheid van vereniging en het recht op collectieve onderhandelingen. Reeds in een eerdere zaak van LBV en een werkgeversorganisatie is vastgesteld dat het wettelijk kader niet in strijd is met deze beginselen (nr. 2628, 351e rapport, par. 1135-1161). Het wettelijk systeem maakt het mogelijk rekening te houden met gegronde bezwaren van bedrijven met specifieke kenmerken die wezenlijk verschillen van die van de bedrijven voor wie de cao in het leven is geroepen. Bovendien wordt iedere aanvraag voor een algemeenverbindendverklaring gepubliceerd in de Staatscourant en hebben belanghebbenden het recht om bezwaar te maken. De minister houdt bij de besluitvorming rekening met de bezwaren. Verder staan de negatieve beslissingen van het ministerie met betrekking tot de vrijstellingsverzoeken van klagers momenteel onder rechterlijke toetsing. De LBV heeft haar stelling dat het ministerie bij het afwijzen van dispensatieverzoeken in strijd handelt met het recht op collectieve onderhandelingen niet voldoende onderbouwd met de enkele stelling dat sinds 2016 geen vrijstellingen meer zijn verleend. Nu het niet aan de Commissie is om in de plaats te treden van de bevoegde autoriteiten waar het gaat om dispensatieverzoeken en nu reeds eerder is geconcludeerd dat het wettelijk kader voor het verlenen van vrijstellingen in overeenstemming is met de vrijheidsbeginselen, behoeft deze zaak geen verder onderzoek.*

*NB. In «JAR» 2008/296 heeft het ILO-Committee op een eveneens door LBV ingediende klacht geoordeeld dat het alleen verlenen van dispensatie van een algemeen verbindend verklaarde cao in het geval dat de specifieke bedrijfskenmerken van de ondernemingen voor wie dispensatie wordt gevraagd op essentiële punten verschillen van die van ondernemingen die tot de werkingssfeer van de avv-cao worden gerekend, niet in strijd is met de beginselen van vrijheid van vereniging en het recht op collectieve onderhandelingen. In onderhavige zaak kon het ILO-Committee dan ook naar zijn eerdere oordeel verwijzen.*

Complaint against
the *Government of Netherlands*,
presented by
*Landelijke Belangenvereniging (LBV)*.

451. The complaint is contained in communications dated 28 December 2018, 4 February and 2 July 2019, submitted on behalf of Landelijke Belangenvereniging (LBV).
452. The Government sent its observations in communications dated 8 May 2019 and 11 September.
453. Netherlands has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), and the Collective Bargaining Convention, 1981 (No. 154).

*A. The complainant's allegations*

454. In its communication dated 28 December 2018, the LBV alleges that the Ministry of Social Affairs and Employment (hereafter, the Ministry) has changed its policy in the application of the framework implementing regulations (Declaration of Universality Binding Status Collective Labour Agreement Provisions Assessment Framework) (hereafter the Assessment Framework) in the sense that, in practice, dispensation from the application of the provisions of a collective agreement that have been declared generally binding in a sector is no longer granted on substantive grounds and this means that companies with specific characteristics can no longer apply company collective labour agreements (hereafter company CLAs) concluded prior to the Declaration of Universal Binding Force (hereafter AVV) of certain provisions of a subsequent sector agreement in so far as they are inconsistent with the minimum provisions of the latter. The complainant alleges that through this practice, the Ministry violates the right of unions such as LBV and individual companies to freely conclude company CLAs as it is no longer advantageous for companies to conclude such agreements if they can be overruled at any time by an AVV CLA. Furthermore, as unions such as LBV that are not sector unions are deprived of the realistic opportunity to find employers willing to invest money, time and energy in a company CLA, their right to exist and recruit members is at risk.

455. The complainant presents itself as an association of employees and jobseekers formed in 1969 and registered at the Chamber of Commerce in Rotterdam, the Netherlands. Its current membership is approximately 11,000. Pursuant to its statute LBV has the capacity to conclude CLAs within the meaning of the Collective Labour Agreements Act and is currently party to 21 CLAs the scope of which covers approximately 955,000 employees and 2,800 companies. Among the ongoing CLAs concluded by the LBV, 11 apply within a sector/industry and ten are company CLAs. The sector agreements include two agreements with the Dutch Association of Intermediary Organizations and Temporary Employment Agencies (NBBU) and one with the Federation of Private Employment Agencies (ABU) that are the two employers' organizations active in the employment agency industry. The ABU CLA is declared universally binding, keeping in mind that dispensation was granted within the agreement to the NBBU CLA. The company CLAs also include four agreements with employment companies or agencies including the Tentoo CF&F, the Connexie Payroll, the DPA and the Persoonality-Payrolling. The complainant specifies that the above-mentioned four company CLAs only apply to temporary employees of the employment agencies and adds that Tentoo CF&F, Connexie Payroll and the DPA support its complaint. Furthermore, each time AVV was requested for the ABU CLA, the complainant requested dispensation from the Ministry for the above-mentioned four company CLAs.

456. The complainant further explains the rules governing the AVV declaration and dispensation requests and the Ministry decisions on them. It indicates in this regard that the effect of AVV is that the relevant CLA is binding for all companies active in the relevant sector irrespective of whether those companies and/or employees are members of the union or employers' organization party to the CLA. The AVV CLA sets aside prior company CLAs unless schemes to the benefit of the employees that deviate from the AVV CLA are agreed therein. However, it is possible for the parties to a company CLA to obtain dispensation from the AVV, in the first place by requesting the parties to the AVV CLA to grant them dispensation. This type of dispensation is usually granted on the basis of criteria that are included in the AVV CLA itself and is stated in the AVV request addressed to the Ministry by the parties to the AVV CLA. Where dispensation is not integrated within the AVV CLA, the parties to the company CLA can request the Ministry to grant a dispensation based on article 7 of the Assessment Framework which provides for rules governing the assessment of such requests. The Assessment Framework provides for a formal assessment that concerns the formal existence of a prior company CLA and the independence of the trade union party to it. It also provides for a substantive assessment based in particular on the criterion that the application of the AVV CLA cannot be reasonably required in the company at issue in view of compelling arguments. Compelling arguments would concern in particular the specific company characteristics that differ in essential respects from those that could be considered to come under the scope of the AVV CLA. The complainant indicates that the Ministry grants dispensation

merely upon the satisfaction of formal requirements unless the parties to the AVV CLA submit an objection against the request for dispensation. Such an objection entails a substantive assessment on the part of the Ministry. The manner in which this substantive assessment is conducted is the object of the present complaint.

457. The complainant alleges that the "company-specific characteristics" criterion gives the Ministry so much leeway that it can practically reject any request for dispensation, and it has effectively and systematically done so over the past years, rejecting requests where dispensation was obtained previously, although facts and circumstances remained unchanged. LBV indicates, in particular, that between 2004 and 2015, it had repeatedly submitted requests for dispensation on behalf of the four employment companies with which it had concluded company CLAs and those dispensations were always granted by the Ministry, however, for the first time, by decisions dated 22 March 2016, the Ministry rejected dispensation requests by LBV concerning those company CLAs. It adds that an appeal against those negative decisions is currently pending before the Council of State. The complainant further alleges that since 2016, in all cases in which a substantive assessment of the dispensation request has been conducted in view of the objections submitted by the parties to the AVV CLA, the Ministry has rejected the dispensation requests, and this is not restricted to the requests concerning the employment agency industry, neither to company CLAs. The complainant further alleges in this regard that a dispensation request concerning the subsectoral CLA between LBV and the DI-Stone employers' organization was recently rejected by the Ministry, based on the argument that the CLA governing the building finishing contractors industry has expanded its scope to include natural stone activities, making the latter a subsector of the former.

458. The complainant further states that in previous national proceedings the Ministry had contested its claim that dispensations are no longer granted in practice whenever objections are submitted against them. It indicates that the Ministry produced figures showing that between 2007 and 2016, 38 per cent of the requests for dispensation were granted. LBV adds that, in order to verify the figures produced by the Government, together with several employer parties it requested data from the Ministry on the basis of the Government Information (Public Access) Act. LBV alleges that the data so obtained presented an image entirely different from the one drawn by the Government. The complainant argues in this regard that according to the data it has obtained, between 2007 and 2016 only 30 per cent of the dispensation requests led to a positive decision, which is 36 per cent of the requests that were decided as decisions were made on 170 out of 209 requests submitted. The complainant adds that if only the number of dispensations that were granted after a substantive assessment – which constitute the object of the present complaint – is considered, these percentages fall to 19 per cent and 23 per cent respectively. Finally, the complainant adds that no requests for dispensations have been granted since April 2016, and it draws the conclusion therefrom that currently the right to dispensation exists on paper but not in practice and that this means that the realization of custom solutions by companies that differ essentially from those that come under an AVV CLA is apparently no longer possible.

459. LBV emphasizes its acknowledgement that the granting of dispensation to a company CLA must not lead to competition based on terms of employment in the sense that if the packages of terms of employment of an AVV CLA and a company CLA are compared, the latter should not prove less favourable to employees and affirms that, as a trade union, it is not inclined to conclude CLAs which are less favourable to employees. The complainant adds that it should however be possible to compose the package differently and shift focus in a way that strengthens the employer's competitive position. In the end, the possibilities offered by dispensation also benefit the employees both as regards terms of employment and employment and LBV therefore wishes to conclude such company CLAs and to continue to do so. The LBV alleges that the practice of the Ministry makes the granting of dispensation entirely dependent on whether the AVV CLA parties do or do not submit an objection and so gives them extensive power to turn a company CLA into a dead letter and marginalizes the Ministry's own role to implement regulations adequately in order to ensure respect for the right to freedom of association and collective bargaining. The complainant finally recalls that the Assessment Framework does not allow a comparison of terms of employment between the AVV CLA and the

company CLA and hence such a comparison must not have any role in the assessment made by the Ministry.
460. The complainant alleges that in view of the policy change described above, it is no longer useful to conclude company CLAs, as each time a sector CLA is declared universally binding the effect of the company CLA will cease to a large extent and the switch to the AVV CLA has to be made immediately, which is harmful to business operations that focus on continuity and makes the conclusion of a company CLA a business risk. Thus the AVV CLA acquires a monopoly position at the expense of the company CLAs. It further adds that the criteria applied by the Ministry for deciding whether there are sufficient company-specific characteristics on the basis of which dispensation may be obtained are not clear as company-specific characteristics that were previously acknowledged may suddenly lose their importance, for example, on the basis of the argument that there are new relevant environmental factors. While the Ministry considered only a few years ago that the International Labour Organization (ILO) Conventions implied that company CLAs could not be restricted in any way, it has now turned to an overall limitation of the effective right to have company CLAs in so far as they are inconsistent with the minimum provisions of a subsequent AVV CLA. The complainant alleges that the current policy of the Ministry puts the companies with their own CLAs in a situation of great legal uncertainty. This policy does not provide any starting points for the assessment of whether dispensation can be obtained in a particular case and employers and trade unions are therefore unable to estimate in advance whether their company CLA does or does not qualify for dispensation. The complainant alleges that this means in practice that company CLAs are no longer concluded, consequently, parties smaller than industry partners lose the freedom to conclude their CLAs independently, while, according to the complainant, the freedom of bargaining should have as much weight for a company CLA as for an AVV CLA. The complainant states that its right to exist and its importance to the labour market are prejudiced if dispensations are invariably rejected and adds that a solution to these problems may lie in a clearer description of the criteria when dispensation can be obtained so that parties that wish to conclude a company CLA are enabled to predict with a higher degree of legal certainty whether their agreement may qualify for dispensation in due time in case of subsequent conclusion of an AVV CLA.
461. The complainant further indicates that it does not call into question the right to conclude an AVV CLA neither is it concerned with the regulations within the Assessment Framework. Recalling that the compatibility of the Assessment Framework with ILO Conventions has already been examined and confirmed by the Committee in a case brought by itself and the employers' organization Altro Via [Case No. 2628, 351st Report, paras 1135-1161], the complainant emphasizes that the present case concerns the practical application of the Assessment Framework by the Ministry with respect to requests for dispensation. LBV further adds that judicial correction offers insufficient relief in connection with the Ministry's implementation practice regarding company CLA's as courts are not allowed to review policy. It admits that that policy is indeed laid down in the Assessment Framework and the implementation practice can merely be assessed for reasonableness. It specifies that its complaint concerns the overall picture, the image of not just the individual case, but of all cases jointly, where the Ministry always finds that there are insufficient grounds for dispensation. The complainant argues that the facts described above violate Articles 2 and 3 of Convention No. 87, Articles 2, 3 and 4 of Convention No. 98, and Articles 5 and 8 of Convention No. 154, as they have a chilling effect on collective bargaining at the company level and as such threaten the existence of smaller unions who negotiate and conclude such agreements.

*B. The Government's reply*
462. In its communication dated 8 May 2019 and 11 September, the Government indicates that LBV concludes for the most part company CLAs or CLAs that cover groups of companies. Additionally, LBV is one of the employees' organizations engaged in the negotiation of the collective agreement covering a significant majority of the persons active in the staffing industry.
463. With regard to the system of the declaration of universally binding status for a sectoral collective agreement, the Government indicates that when employers' and employees' organizations conclude an agreement covering a significant ma-

jority of the persons active in a certain industry, they may apply for an order of the Minister of Social Affairs and Employment declaring certain provisions of this collective agreement universally binding. The Government indicates that under such an order, those provisions of this collective agreement would apply to all employers and employees in the industry concerned provided that the companies carry out activities falling within the scope of the agreement. Consequently, provisions of other collective agreements concluded in the industry which are less favourable for the employees cannot be applied. The Government further refers to the possibility of exclusion of certain company or subsector collective agreements by the parties to the AVV CLA themselves and the possibility of obtaining exemption from the generally binding effect of the sector CLA through application of the parties to the company or subsector CLA to the Minister. The Government further indicates that a declaration of generally binding status is intended to support establishment of collective agreements on employment terms and conditions with a view to preventing that non-bound employers and employees compete by undercutting each other on employment terms and conditions.

464. The Government further adds that any application for an AVV is published in the Government Gazette and interested parties have the right to raise objections. Objections are, as a rule, submitted to the parties applying for the order and may also be submitted to the Labour Foundation, which is a consultative organ of management and labour, consisting of representatives of central employees' and employers' organizations. The Minister takes the objections and the responses from the parties to the agreement and the Labour Foundation into account in the decision-making process.

465. With regard to exemptions from the AVV, the Government indicates that they are intended to offer a way out in cases where companies and subsections of an industry can in all fairness not be required to be bound by provisions that have been declared universally binding. Granting an exemption, therefore, consists in making an exception to the general rule. It further adds that the legislation specifies neither an obligation for the Minister, nor a right for applicants when it comes to a declaration of universally binding status or an exemption. It endows the Minister with a discretionary power. The Government refers to two other regulatory texts concerning the AVV and exemptions from it: Notification of Collective Agreements and Applications for Declarations of Universal Binding Status Decree and the Assessment Framework. The Decree contains more detailed rules on the application for an AVV. It requires both specification of the relevant provisions of the collective agreement and the period for which the universally binding status is requested for them. Parties must also state if any companies or subsections of an industry should be excluded. The Decree also lays down rules on how parties to a company or subsector CLA may apply for exemption. The Government further indicates that the Assessment Framework contains policy rules. Its paragraph 7 concerns exemptions, stipulating that any application for exemption can only be submitted by employers or parties that have concluded a legally binding collective agreement. It is also required that those parties be independent from each other so as to prevent employees' organizations being incited to conclude a separate collective agreement in order to be able to apply for exemption. Exemption is granted by the Minister if compelling arguments make it clear that application of the provisions to be declared universally binding for an industry cannot reasonably be required of certain companies or a subsection of an industry. Compelling arguments concern, in particular, the specific characteristics of the companies that make them, on essential aspects, different from those for which the provisions to be declared universally binding are meant. The Government finally specifies that in this framework the Ministry does not assess the separate employee benefits packages.

466. In response to the complainant's allegations, the Government first recalls that LBV submitted a complaint to the ILO regarding an amendment to the Assessment Framework which added consideration of specific circumstances of a case to the process of deciding whether or not to grant exemption from an AVV order [Case No. 2628, 351st Report, paras 1135-1161]. The Government further recalls that this amendment ended the situation where an exemption was granted more or less automatically when the applicants fulfilled the formal requirements of having concluded their own CLA and being independent from each other. It then affirms that, despite the complainants' allegations, the way in which applications for exemption are assessed has not changed. The as-

sessment is made based on current regulations, the policy framework, jurisprudence, the possible relevant developments that have taken place in, for example, the industry or sector to which the application relates. It further indicates that in the assessment process it is verified whether applicants have concluded their own legally binding CLA and are independent from each other, and whether the specific characteristics of the company/ies or the subsection applying for the exemption differ on essential points from those of the companies that are part of the target group for the industry agreement to such a degree that application of the provisions declared universally binding cannot be required from the company requesting exemption. The Government further emphasizes that objections raised following an application for exemption are taken into consideration but are not decisive in their own right. The decision of the Minister on the exemption is not made subject to these objections. The Government further indicates that in the assessment process the contents of CBAs are not compared to each other. An exemption granted is valid through the expiry date of the relevant AVV order and every time a new AVV order is issued a new application for exemption must be submitted, therefore, having been granted an exemption previously is not a decisive factor in assessing a later application for exemption.

467. With regard to the assessment of LBV's exemption requests mentioned in the complaint, the Government indicates that there have been several relevant developments in the national jurisprudence as well as in the segment of the labour market on which LBV's activities are focused. The Government refers to the appearance at the beginning of the twenty-first century of payroll companies – or payroll service providers – that take care of human resources-related matters for an employer by entering into employment contracts with the employees who work for that employer, and by handling all associated functions, including wage payment. The employees work under the supervision and direction of the employer, who is billed by the payroll company for all human resources related services provided. The Government further indicates that these companies were initially assumed to be separate from the staffing industry in view of the fact that they did not engage in recruitment and selection and did not employ intermediaries. This perceived separation was well reflected in the fact that in 2006 a special interest group for payroll companies, Vereniging voor Payrollondernemingen (VPO) established its own collective agreement. At the time, the parties to the CLA for the staffing industry exempted the members of the parties to VPO's CLA from the subsequent AVV orders concerning their CLA. Also, at the time other payroll companies who submitted requests for exemption were granted exemption by the Minister on the basis of the fact that the specific company characteristics differed from those of companies that on average came within the scope of the CBA of the staffing industry, namely the conventional temping agencies. The Government adds however, that the perception that the activities of payroll companies differ substantially from those of temping agencies changed gradually over time. It indicates in this regard that the last VPO CBA expired in 2012 and VPO itself was dissolved in 2016 and its members joined the largest employers' organization in the staffing industry which assumed responsibility for looking after the interests of employers who provide staffing services without recruitment and selection.

468. With regard to national jurisprudence, the Government indicates that, in a decision dated 4 November 2016, the Supreme Court of the Netherlands ruled that all triangular relationships under employment law are to be defined, as specified in sections 7:690 and 7:691 of the Netherlands Civil Code, regardless of whether the work performed at the third party is temporary, or whether it involves an active allocation role. This means that all employment contracts where the employer seconds the employee to a third party, as part of a contract awarded to this employer, to perform work under the supervision and direction of the third party are to be considered staffing contracts. The Government states that it has thus been confirmed that there is no substantial difference between the activities of a temping agency and those of a payroll company.

469. The Government affirms that the labour market and legal changes mentioned above prompted the Ministry to change its decisions on exemption requests related to the AVV CLAs in the staffing industry. It indicates that in order to avoid a sudden change without prior notice, companies that were previously granted an exemption based on the perception that their specific company characteristics differed from those of the aver-

age companies that came under the scope of the CLA for the staffing industry were granted a temporary exemption with the notice that any future decisions on the granting of an exemption would take legal and other developments into account.
470. With regard to the interpretation of the statistics showing a clear drop in the number of applications for exemption over the past few years, which the complainant puts down to the categorical rejection of exemption requests over that period, the Government considers that no conclusions can be drawn about the policy for granting dispensation on the basis of the figures alone. The Government states that the drop can be due to the fact that most exemption applications submitted over the 2007-18 period related to the business services sector, with the majority relating to the staffing industry within that sector and that due to the change in the definition of the activities of payroll companies and the associated case law, many parties felt that they did not need an exemption anymore. The Government further indicates that the drop can also be due to the fact that when an AVV order is not requested for an industry-wide collective agreement the number of exemption requests would automatically drop. The Government indicates that the rejection of an exemption application may also be decided on the basis of formal grounds. With regard to the complainant's allegation that the figures provided by the Ministry were not accurate, the Government indicates that an application submitted in one year may not entail a decision in the same year, meaning that the number of applications may differ from the number of decisions. The Government furthermore points out that the "Objections Report 2018" also shows that initially unfavourable primary decisions were reversed after additional information regarding specific company characteristics had been provided during the objection procedure, which led to another judgement. The Government finally indicates that in 2019 (up to July) three dispensation requests were granted and one refused (for late submission).
471. The Government affirms that the regulations concerning AVV orders and exemptions thereto and the way they are implemented in the Netherlands are not contrary to ILO Conventions Nos 87, 98 and 154 and refers in this regard to the Collective Agreements Recommendation, 1951 (No. 91), allowing for broadening of the scope of collective agreements subject to certain conditions, which it then argues are all respected in the Netherlands, as an AVV order is issued at the request of the parties to a CLA and the Minister cannot unilaterally decide to declare provisions of a collective agreement universally binding. It further explains that the provisions of the CLA relating to certain terms and conditions of employment that have been declared universally binding through an AVV order cannot subsequently be deviated from in a way that is to the disadvantage of the employees. These provisions are made by employers' and employees' organizations jointly and those same organizations also determine which companies are to be considered part of the industry governed by their CLA and fall under the scope of that agreement. In defining this scope they can exclude certain companies and subsections of the industry, but if they do not, the Minister can make use of his/her authority to grant exemption. This authority is based on the necessity of taking into account the fact that while in most cases an AVV serves its purpose of preventing competition on the basis of employment terms and conditions, it may in some cases lead to well-founded objections from certain companies because of their substantially different situation. The Government only provides a possibility to get an exemption in cases where companies and subsections of an industry can in all fairness not be required to be bound by provisions that have been declared universally binding.
472. The Government further indicates that the parties to a subsector or company CLA have and retain full freedom to agree their own employment terms and conditions and more favourable provisions in a subsector or company CLA which are generally left intact by an AVV. Therefore, the Government concludes, the claim that its actions are standing in the way of the establishment of collective agreements in untenable and its unchanged policy with respect to the granting of exemptions from an AVV order is in conformity with the ILO Conventions cited by the complainant.
473. The Government finally gives an overview of the procedures concerning the non-granting of an exemption involving the complainant that are currently pending in the Netherlands. It refers to a total of 11 such procedures, nine of which concern payroll companies and are pending before courts (three appeal proceedings) or the Dutch Council of State's Administrative Justice Department (six further appeal cases). Two other proce-

dures are objections to the rejection of exemption applications for companies that process natural stone and are currently being processed at the Ministry. The matter under review in these procedures is whether the characteristics of these companies differ from companies governed by the CLA for the building finishing contractors industry on essential points, given that the companies in question process natural stone at a workshop, while finishing contractors process stone on site, where a building is being fitted out and finished. The Government indicates that the Ministry has not yet made a decision on these objections.

*C. The Committee's conclusions*

474. The Committee notes that this case concerns the practice of the Dutch Ministry of Social Affairs and Employment regarding the granting to certain companies or subsectors exemptions from the extension of certain provisions of sectoral collective agreements. The Committee recalls that, in a previous case brought by the complainant and an employers' organization, it had examined the legal framework governing the granting of such exemptions since January 2007 [see Case No. 2628, 351st Report, paras 1135-1161] and had found on that occasion that this legal framework was not in violation of the principles of freedom of association and collective bargaining. The Committee notes in this regard the complainant's emphasis that the present complaint is distinct from the previous one, in that it concerns not the law, but its practical application by the Ministry.

475. The Committee notes in particular that the complainant alleges that the Ministry's policy in this regard has changed over time, shifting from considering that the ILO Conventions implied that company CLAs could not be restricted to an overall limitation of the effective right to have company CLAs in so far as they are incompatible with provisions of a sector CLA declared universally applicable. The Committee notes that the Government, while admitting that the amendment of the Assessment Framework in January 2007 adding consideration of the specific circumstances of the case to the process of deciding whether to grant an exemption ended the situation where exemptions were granted more or less automatically upon fulfilment of formal conditions, affirms that it has not changed its policy on granting exemptions since the law changed.

476. The Committee notes in particular the complainant's allegation that since March 2016, whenever the parties to the sector agreement who have applied for the declaration of universally applicable status for certain provisions of their agreement object to a request for exemption, so triggering a substantive assessment of the exemption request on the basis of the criterion of the specific characteristics of the company, the Ministry systematically rejects the exemption request. The Committee notes the complainant's allegation that the number of requests submitted, as well as those granted, have decreased over the years, a decline that was first noticed in the employment agency industry and then in other industries. According to the complainant, from the 206 exemption requests submitted between 2007 and 2016, decisions were made on 170 applications. Out of those, 39 exemptions were granted after a substantive assessment which makes up for 19 per cent of the applications submitted and 23 per cent of the applications decided. Since March 2016 no requests for exemption have been granted following a substantive assessment. The Committee notes that relying on these figures, the complainant alleges that by systematically rejecting exemption requests whenever the parties to the sector agreement submit objections to them, the Ministry is practically giving the exclusive power to those parties to decide when an exemption can be granted to a company or subsector CLA and is thus discouraging the conclusion of company CLAs.

477. The Committee notes that the Government does not challenge the figures presented by the complainant, however it rejects the allegation that the decline in the number of exemption requests submitted to the Ministry and positive decisions on them is attributable to a new policy of categorically rejecting those applications. The Committee notes in particular the Government's indications that the falling numbers of exemption applications can also be due to the fact that most exemption applications submitted over the 2007-18 period related to the business services sector, and in particular to the staffing industry, where the shift in the definition of the activities of payroll companies and associated case law may have brought the concerned parties to the conclusion that they did not need an exemption anymore. As regards the rejection of the complainant's exemption requests, the Committee notes the Government's explanations regarding the change in the

labour market and the national case law that have made the initial distinction between payroll companies and average temping agencies irrelevant and how these changes have informed the decisions of the Ministry and produced a shift from positive to negative decisions on exemption requests concerning companies that had previously obtained exemptions. The Committee further notes the complainant's allegation that a request it had submitted for exemption related to the building finishing contractors industry was also rejected by the Ministry, and the Government's reply that an objection to this negative decision is currently under examination at the Ministry.

478. The Committee recalls that its mandate consists in determining whether national law and practice complies with the principles of freedom of association and collective bargaining, while the proper application of national law to specific circumstances is a matter within the competence of the national authorities and ultimately the courts. It therefore will confine its examination to whether the practice of the Ministry as it emerges from the submissions of the parties is compatible with the principles of freedom of association and the effective recognition of the right to collective bargaining.

479. The Committee recalls that the question of extension of collective agreements in the Netherlands was already examined by the Committee in Case No. 2628. On that occasion [351st Report, 2008, para. 1158], the Committee recalled that paragraph 5 of Recommendation No. 91 provides:

(1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

(2) National laws or regulations may make the extension of a collective agreement subject to the following, among other, conditions:

(a) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative;

(b) that, as a general rule, the request for extension of the agreement shall be made by one or more organizations of workers or employers who are parties to the agreement;

(c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations.

480. Recalling that it has previously found that the legal framework establishing a system for extension of collective agreements in the Netherlands is in conformity with the principles of freedom of association and collective bargaining, the Committee underlines that this system allows for the extension of application of certain provisions of collective agreements when they cover a significant majority of the persons active in a certain industry to the whole industry, but also allows for taking into account well-founded objections from certain companies with specific characteristics that differ essentially from those of the companies for which the collective agreement to be extended was initially established.

481. The Committee understands from the concordant submissions of the complainant and the Government that while the legal framework has not changed since 2007, the number of positive decisions with regard to exemption applications that were objected to by the parties to the AVV CLA have declined and that, in particular, no such exemptions have been granted since March 2016. The Committee notes, however, that the complainant and the Government disagree on the causes of this decline: while the complainant alleges that the Government has suddenly changed policy and, instead of fulfilling its role of guardian of the rights of all parties, is systematically deferring to the parties to the AVV CLA in their opposition to the exemption, the Government explains its recent negative decisions with reference to the changes in the national jurisprudence and market environment and, in particular, the shift in the general perception of what can be qualified as "specific company characteristics" within the staffing industry. The Committee further notes that the Government emphasizes that the legislation specifies neither an obligation for the Minister, nor a right for applicants when it comes to a declaration of universally binding status or an exemption. The Minister has discretionary power in this regard and objections raised following an application for exemption are taken into consideration, but are not decisive in their own right and the decision on an exemption is not made subject to them.

482. The Committee notes the complainant's allegation that, even if they are given an opportunity to submit their requests for exemption, in practice the authority with the decision-making competence – namely the Ministry – does not seem to give any weight to the request in cases where the parties to the AVV CLA object to the granting of the exemption. The Committee further observes, however, the Government's indication that any application for an AVV is published in the Government Gazette and the interested parties have the right to raise objections. Objections are, as a rule, submitted to the parties applying for the order and may also be submitted to the Labour Foundation, which is a consultative organ of management and labour, consisting of representatives of central employees' and employers' organizations. The Minister takes the objections and the responses from the parties to the agreement and the Labour Foundation into account in the decision-making process. The Committee further observes that the Ministry's negative decisions regarding the complainants' exemption requests are currently under judicial review.
483. The Committee notes that the complainant does not substantiate its allegation that the Ministry rejects requests for exemption out of deference to the objecting parties and contrary to their right to collective bargaining beyond indicating that, since 2016, no exemptions were granted in case of the objection of the parties to the AVV CLA. It further notes that the Government not only rejects this allegation, but also indicates a number of factors that have informed the Ministry's decision to no longer grant the LBV the exemptions in the specific cases related to the payroll companies and staffing industry.
484. Recalling that it is not for the Committee to substitute itself for the competent national authorities in their application of exemption requests under national law, and considering that it has already found that the legal framework governing the granting of exemptions is in conformity with the principles of freedom of association, the Committee considers that this case does not call for further examination.

*The Committee's recommendation*
485. In light of its foregoing conclusions, the Committee invites the Governing Body to decide that the present case does not call for further examination.

**NOOT**

Sinds haar oprichting in 1919 is de ILO een tripartiet overlegorgaan van werkgeversorganisaties, vakbonden en overheden en dat overleg heeft in een eeuw tijd geresulteerd in talloze ILO-conventies- en aanbevelingen die gezamenlijk de *International Labour Code* vormen. Het 100-jarig bestaan van de ILO heeft in de eerste maanden van 2019 veel aandacht gekregen met conferenties (bijvoorbeeld op 7 februari 2019 in het Academiegebouw in Leiden) en publicaties (in het eerste nummer van *TRA* in 2019 zijn verschillende bijdragen gewijd aan de ILO en het 100-jarig bestaan). Met deze bijdrage grijp ik de kans dit feestelijke jaar voor de ILO mede uit te luiden door de nadrukkelijke aandacht en hulde te vragen voor het belang van de ILO(-conventies) voor het systeem van collectieve onderhandelingen en daarmee voor de positieve sociaaleconomische ontwikkeling van samenlevingen (N. Jansen, *Een juridisch onderzoek naar de representativiteit van vakbonden in het arbeidsvoorwaardenoverleg*, Deventer: Kluwer 2019, p. 6 en 7). 'De ILO is en blijft een belangrijke internationale organisatie die de waardigheid van de werkende mens als uitgangspunt neemt en zich realiseert én in de praktijk brengt dat het leveren van een wereldwijde bijdrage aan fatsoenlijk werk voor iedereen daar onontbeerlijk voor is', aldus Van der Heijden en Erkens (P. van der Heijden & M.Y.H.G. Erkens, '100 jaar polderen', *TRA* 2019/2), en zo is het.

De vrijheid van vakvereniging en het recht op collectieve onderhandelingen vormen gezamenlijk een van de door de ILO benoemde en gepromote fundamentele kernwaarden in het streven naar sociale rechtvaardigheid. De vrijheid van vakvereniging en het recht op collectief onderhandelen zijn nader uitgewerkt in de ILO-conventies 87 en 98 (en aanbeveling 91) en deze conventies zijn door Nederland geratificeerd. Art. 11 van Conventie 87 verplicht de staat alle noodzakelijke en passende maatregelen te nemen om te waarborgen dat werknemer en werkgevers het recht zich te kunnen organiseren vrij kunnen uitoefenen. De vrijheid van onderhandelen is uitgewerkt in Conventie 98 en art. 4 bepaalt dat de staat maatregelen moet nemen die geschikt zijn om de volledige ontwikkeling en het gebruik van

het stelsel van vrijwillige onderhandeling tussen werkgevers en werknemers aan te moedigen en te bevorderen. Het recht op collectieve onderhandeling uit Conventies 87 en 98 behelst dus niet alleen een belemmeringsverbod voor de overheid, maar ook een verplichting een systeem van collectieve onderhandelingen te bevorderen (International Labour Conference, 101st Session, ILC.101/III/1B, 'Giving globalization a human face' (General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a fair Globalization, 2008), Report III).

Met betrekking tot de correcte naleving van staten van Conventies 87 en 98 is door de ILO het Committee on Freedom of Association (CFA) opgericht. Werkgeversorganisaties en vakbonden kunnen bij de CFA klachten indienen tegen staten of sociale partners over de mogelijke schending van voornoemde Conventies. Als de CFA van mening is dat sprake is van een schending, dan doet het aanbevelingen over mogelijke oplossingen. Het doel van de klachtprocedure is niet om overheden te straffen of te bekritiseren maar om bij te dragen aan een constructief tripartiet overleg over het bevorderen van de positie van vakbonden in het recht en de praktijk (*Compendium of rules applicable to the Governing Body of the International Labour Office, Geneve*, maart 2009, p. 38 e.v.).

Deze zaak (of dit rapport) van de ILO betreft de klacht van de Nederlandse vakbond LBV over de wijze waarop de Nederlandse Minister van Sociale Zaken en Werkgelegenheid in de praktijk uitvoering geeft aan zijn bevoegdheid dispensatie te verlenen van verbindend verklaarde cao-bepalingen. Sinds 1 januari 2007 gelden de volgende dispensatiecriteria: dispensatie vragende partijen zijn gebonden aan een eigen cao; de partijen die de eigen cao zijn aangegaan, zijn onafhankelijk van elkaar; en dispensatie wordt alleen verleend indien vanwege zwaarwegende argumenten toepassing van de bedrijfstak-cao redelijkerwijze niet van partijen kan worden gevergd. Zwaarwegende argumenten zijn aanwezig wanneer de specifieke bedrijfskenmerken op essentiële punten verschillen van de ondernemingen die tot de werkingssfeer van de avv-cao gerekend kunnen worden. Weging van de verschillende arbeidsvoorwaardenpakketten vindt in het kader van een dispensatieverzoek niet plaats (N. Jansen, *Een juridisch onderzoek naar de representativiteit van vakbonden in het arbeidsvoorwaardenoverleg*, Deventer: Kluwer 2019, paragraaf 7.3.3.). In 2008 heeft de CFA eveneens naar aanleiding van een klacht van vakbond LBV overwogen dat het Nederlandse systeem van verbindendverklaring en de wijze waarop is voorzien in uitzondering via dispensatie (en de hiervoor genoemde dispensatiecriteria) niet in strijd is met ILO-conventies 87 en 98 («JAR» 2008/296).

De huidige klacht van LBV heeft geen betrekking op het juridische systeem van verbindendverklaring maar op de wijze waarop de minister uitvoering geeft aan het dispensatiebeleid. Volgens LBV brengt dit beleid sinds 2016 – kort gezegd – mee dat wanneer de partijen bij de avv-cao bezwaar maken tegen een dispensatieverzoek, dat dan ook geen dispensatie meer wordt verleend, waardoor vanaf 2016 geen dispensatie meer is verleend. Ter onderbouwing van haar klacht heeft het LBV verwezen naar de afgewezen dispensatieverzoeken van een aantal payrollondernemingen in de uitzendsector en cijfers over ingediende en verleende dispensatieverzoeken. Volgens LBV werd in de periode tussen 2007 en 2016 rond de 20% van de dispensatieverzoeken verleend ondanks bezwaar van partijen bij de avv-cao en vanaf 2016 zou er geen enkel verzoek meer zijn gehonoreerd. De Nederlandse overheid heeft betwist dat de Minister van SZW dispensatieverzoeken stelselmatig afwijst indien partijen bij de avv-cao tegen die dispensatie bezwaar hebben gemaakt. De daling van de cijfers heeft de Nederlandse overheid toegeschreven aan het feit dat veel dispensatieverzoeken betrekking hadden op de uitzendsector en afkomstig waren van payrollondernemingen. De Hoge Raad heeft in 2016 in het *Care4Care*-arrest de definitie van uitzendovereenkomst in de zin van art. 7:690 BW zodanig uitgelegd, dat *payrolling* als uitzenden kwalificeerde. Het gevolg hiervan is dat *payrolling* en uitzenden juridisch aan elkaar gelijk werden (vanaf 1 januari 2020 krijgt *payrolling* een eigen juridische definitie in het BW), waardoor *payrolling* kwam te vallen onder het bereik van de uitzendcao's en payrollondernemingen niet meer op essentiële punten verschilden met uitzendondernemingen, zodat aan payrollondernemingen geen dispensatie meer werd verleend van de uitzend-cao. Het ILO-Committee over-

weegt dat de LBV in het licht van dit verweer van de Nederlandse overheid haar klacht onvoldoende heeft onderbouwd, waardoor verder onderzoek naar de klacht niet is aangewezen.

dr. N. Jansen
Universiteit van Amsterdam

# 298

**Vernietigbaar concurrentiebeding in tijdelijk contract geldig na voortzetting voor onbepaalde tijd**

Voorzieningenrechter Kantonrechter Rechtbank Amsterdam
11 september 2019, nr. 7898598 KK EXPL 19-677, ECLI:NL:RBAMS:2019:7645
(mr. Van de Poel)
Noot mr. C.C. Zillinger Molenaar, deze noot heeft betrekking op «JAR» 2019/298 en «JAR» 2019/301

**Ongemotiveerd concurrentiebeding in tijdelijk contract vernietigbaar, niet nietig. Indien niet vernietigd, dan mogelijk geldig in voortgezet contract voor onbepaalde tijd.**

[BW art. 7:653]

*De werknemer is op 12 februari 2018 voor drie maanden bij de werkgever in dienst getreden. In de arbeidsovereenkomst zijn een concurrentie- en relatiebeding opgenomen. Na afloop van de arbeidsovereenkomst is de werknemer werkzaam gebleven zonder dat over voortzetting is gesproken. Op 12 juni 2018 zijn partijen opnieuw een arbeidsovereenkomst aangegaan voor drie maanden. Na 12 september 2018 is de werknemer werkzaam gebleven zonder dat partijen over voortzetting hebben gesproken. Op 28 december 2018 hebben partijen een vaststellingsovereenkomst gesloten met als beëindigingsdatum 1 februari 2019. Het relatiebeding, het concurrentiebeding en de boeteclausule zouden van kracht blijven. Op 1 april 2019 is de werknemer bij een concurrent in dienst getreden. De werkgever heeft de werknemer gesommeerd zijn werkzaamheden te staken en de contractuele boetes te voldoen.*

*De werknemer verzoekt schorsing van het concurrentiebeding.*

*Naar het voorlopig oordeel van de kantonrechter leidt een eventueel vernietigbaar, want onvoldoende gemotiveerd concurrentiebeding in een arbeidsovereenkomst voor bepaalde tijd niet tot een ongeldig concurrentiebeding wanneer de arbeidsovereenkomst later voor onbepaalde tijd wordt voortgezet. Anders dan bij een van meet af aan nietig beding, geldt voor een vernietigbaar beding immers dat dit, indien de werknemer zich niet vóór dat moment op de vernietigbaarheid heeft beroepen (en ervan uitgaande dat aan alle overige voorwaarden is voldaan), deel is gaan uitmaken van de arbeidsovereenkomst voor onbepaalde tijd toen deze daarin werd omgezet. Omdat bij een arbeidsovereenkomst voor onbepaalde tijd geen motivering vereist is, kan een eventueel ontoereikende motivering niet meer tot vernietiging van het beding leiden. Ten overvloede geldt dat de motivering van de werkgever wel afdoende is. Dat het concurrentiebeding na het einde van de tweede schriftelijke arbeidsovereenkomst voor bepaalde tijd opnieuw schriftelijk had moeten worden overeengekomen in verband met het schriftelijkheidsvereiste, is evenmin aannemelijk geworden. De vordering tot schorsing wordt afgewezen.*

*NB. In de wetsgeschiedenis is opgemerkt dat een concurrentiebeding in een arbeidsovereenkomst voor bepaalde tijd nietig is als een motivering geheel ontbreekt en vernietigbaar als er sprake is van een niet toereikende motivering (Kamerstukken II 2013/14 33818, nr. 7, p. 27-28. Nu er in casu wel een motivering was, is er dus geen sprake van nietigheid. Omdat de werknemer geen beroep heeft gedaan op de vernietigbaarheid, lijkt het beding inderdaad in een rechtsgeldig beding te kunnen converteren in de arbeidsovereenkomst voor onbepaalde tijd. Was het beding nietig geweest, zoals in «JAR» 2019/301, dan ligt dat anders.*

De *werknemer* te (...),
eiser in conventie,
gedaagde in reconventie,
gemachtigde: mr. M.J. Goedhart,
tegen
de besloten vennootschap *Droomhuis360 Facilitair BV* te Amsterdam,
gedaagde in conventie,