Symphonic metamorphoses

Variations on vulnerability: orchestral musicians' employment in times of crisis

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PART III SYMPHONIC VARIATIONS: THE ORIGINAL GIG WORKERS

12. A long and winding road: freelance musicians in a tale of two countries

"The daily existence of an orchestral musician presents difficulties that only the love of music makes endurable."[1187]

Given the precarious nature of freelance work in the orchestral profession, a *movement* devoted to cases in which freelance substitute players took to the courts in attempts to secure permanence in orchestras is warranted. First stop, New York City where the New York City Ballet Orchestra (NYCBO), a premier ballet orchestra and world leader in the specific genre of ballet accompaniment, has been at the center of several musician claims.[1188] "Perhaps the fact that we are located in the Big Apple, home to comparatively many orchestral venues, or perhaps the fact that fulltime employment as a classically trained musician in the city is highly competitive and tough to come by leads to litigation, the need to stand up for one's rights. Or maybe it's the fact that our motto comes from the great choreographer, George Balanchine, 'the music always comes first!'"[1189] In 1985, Janet Berman, an acting principal string player sued the NYCBO in an attempt to bar another violinist from taking on the principal position.[1190] An 'acting principal' in orchestral parlance is a musician who takes on the duties of the principal player without actually having won the official audition for the principal chair. In some orchestras according to unwritten convention, acting principals will not have 'won' the audition for that particular seat. "The acting principal could be a 'move up,' literally an associate or assistant principal who moves up in the section to cover the principal's duties or the position could be filled by a highly qualified section player or even in some instances, a substitute player."[1191] Ms. Berman asserted that the NYCBO had not only retaliated against her but also had denied her permanent promotion under the relevant articles within Title VII of the Civil Rights Act of 1964.[1192] Taking

[1187] Charles Munch. *I am a Conductor* 1955 p.79.
[1188] Ballet orchestras like opera orchestras can be differentiated from other orchestral ensembles in their ability to adjust quickly to onstage occurrences. Another difference is the repertoire that aside from the famed ballet scores of the past (Swan Lake, Rite of Spring to mention just two) consists of contemporary commissions.
[1189] Interview with NYCBO contracted musician, anonymity assured, 2015.
[1190] *Berman v. New York City Ballet Inc.,* 616 F. Supp. 555 (S.D.N.Y. 1985)
[1191] Clarification provided by Jonathan Sherwin, former personnel manager and contrabassoonist the Colorado Symphony; at present, contrabassoonist The Cleveland Orchestra.
[1192] See, Civil Rights Act of 1964 § 7 42 U.S.C. § 2000e et seq (1964).

the advice of her legal advisors, Ms. Berman withdrew the pair of discrimination claims and opted to move for a preliminary injunction to stop the orchestra from appointing 'the other player' until a full investigation by the Employment Opportunity Commission (EEOC) would be undertaken.[1193] The EEOC investigation would have been put in place in order to consider if there was any evidence of discrimination on the basis of sex.[1194]

Ms. Berman claimed that if the NYCBO would overrule her efforts to move from the category of 'acting' to 'permanent' Principal Second Violin by holding an audition, she would have incurred irreparable harm in three categories, namely:

1. Her reputation as a musician would be harmed.
2. She would suffer from loss of employment that spins off from a prestigious principal position.
3. She would lose the only chance for promotion open to a violinist in the NYCBO at that particular time.

Turning to a doctrine that has wend its way through U.S. courts for decades since its earliest articulation in *Bell v. Hood* (1946), the *Berman* court examined the 'substantiality' of the plaintiff's claims.[1195] According to the doctrine, a claim in federal court may be dismissed if it "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous."[1196] While Ms. Berman's claims were certainly not intentionally frivolous considering the tough competition for orchestral principal positions, they were weakened by the fact that the CBA agreed upon by the NYCBO and the musician's union (American Federation of Musicians (AFM) Local 802) had negotiated for specific audition procedures to be followed in such situations.

The court seized upon several defects in Ms. Berman's claims relating to damages. In their view, there was no absolute proof of demonstrable, reputational damage. At the time the litigation took place, Ms. Berman was listed as Acting Principal in all of the NYCBO's published materials giving credence to the argument that she would certainly not 'lose face' within the tightly knit community of New York-based violinists. Furthermore, Ms. Berman had not suffered from loss of either salary or benefits. In a key passage, the court gave its opinion on a correct reading of 'irreparable damages': "if

[1193] Ibid.,
[1194] See, Code of Federal Regulations, *29 C.F.R. §1640.1.*
[1195] *Bell v. Hood* 327 U S. 678 (1946).
[1196] Ibid., at paras. 682-83.

plaintiff prevails upon the merits of her claim, the harm, if any, done to her reputation can be compensated in damages; a harm that can be remedied by payment of damages is not irreparable."[1197]

The court subsequently outlined the steps that Ms. Berman could have taken to 'win' the principal position, in other words, the steps necessary to move from an 'acting' principal to a principal player en route to a permanent contract. Ms. Berman had been invited to participate in an internal audition, open only to players under contract at the NYCBO. Following the CBA-mandated procedure, Ms. Berman would have had to play the audition and receive a minimum of seven Audition Committee (AC) votes in order to win a permanent place in the orchestra. Adhering to the protocol, she took the audition and received a total of six votes. To an outsider, this seems like a very close call, as she missed the golden opportunity of permanent employment by merely one vote. Nothing could be further from the truth. Under the somewhat remarkable vote weighing system employed in the orchestra's internal audition procedure (see **Martin Stoner's struggles**, below) each vote cast by a member of the NYCBO's management team counted for five votes, whereas a vote cast by a member of the orchestra was equivalent to one vote. Robert Irving, the orchestra's conductor, and a member of the management team voted for Ms. Berman, netting her five votes. As Ms. Berman received a total of six votes, only one orchestra AC colleague had cast a vote in her favor. Thus, the conductor and one other colleague had supported her.

Disappointed by this result, Ms. Berman contended that the outcome was the result of an "express or implied conspiracy" without any further elaboration as to what the elements of the conspiracy might have entailed. No mention of gender or any other form of quantifiable bias under Title VII was brought to the fore.[1198] The court dismissed the claim as a speculative charge with no chance of success in further proceedings. Her motion for a preliminary injunction found further judicial disfavor, as the court balanced the consequences of such a motion with the impact it would have had on the other 'internal candidates,' orchestral musicians who had applied to audition for the position. "An injunction would freeze out other potential applicants who are entitled to be considered under the union contract."[1199] The importance of granting other musicians an equal chance at auditioning for an important principal position dealt the

[1197] Citing, *Stromfeld v. Smith* 557 F.Supp.995, 998 (S.D. N.Y.1983); *Patterson v. United Federation of Teachers*, 480 F.Supp. 550,553 (S.D.N.Y.1979 and *Buffalo Courier-Express v. Buffalo Evening News* 601 F.2d 48, 58 (2d Cir.1979).
[1198] See, *Berman* Plaintiff's Reply Memorandum at 2.
[1199] Ibid., District Judge Edward Weinfeld's opinion, closing line.

final blow to Ms. Berman's claims that were dismissed summarily. Discussions with Robert Irving, the former NYCBO conductor who had supported Ms. Berman confirm that communication with regard to auditions was often 'clouded by a lack of clarity.'[1200] This 'lack of clarity' seems to be endemic to auditions regardless of location as the *Goovaerts* case in the Netherlands to be discussed later in the *movement* illustrates.

12.1 Martin Stoner's struggles

Martin Stoner, a 'privileged' substitute, a long-term freelance member of the NYCBO mounted a case that relates to the right to 'automatic entry' into an orchestra. His case was heard before the same federal court (The United States District Court for the Southern District of New York) as Ms. Berman's case. Mr. Stoner was employed as a substitute section violinist by the NYCBO for decades since 1976. Although Mr. Stoner was not a permanent member of the orchestra, his freelance status contained a modicum of priority beginning in 1985, almost nine years following his initial contracts. In mid-1985, the NYCBO classified him as a 'rotator,' a musician placed on 'first-call' to permanent orchestra members in case of illness or other sanctioned reasons for absence.[1201] It is worth mentioning that these categories of substitute players pertain specifically to the NYCBO - orchestras do not use the same nomenclature to refer to degrees of privilege among substitutes (for instance, as previously mentioned in the *FAQ*s, the Metropolitan Opera Orchestra's (MET) coveted status players are Associates). Dutch orchestras do not grant specific appellations to 'regular substitutes' however as mentioned above, all orchestral freelancers in Dutch subsidized orchestras are covered by the contractual obligations found in the CAO voor Remplaçanten van Nederlandse Orkesten (CBA for Substitute Players in Dutch Orchestras).[1202]

As many of the freelancers interviewed expressed, some of them modern-day 'rotators,' it of great importance to emphasize that Mr. Stoner was considered by some of his colleagues, as well as members of the NYCBO management, to be a 'troublemaker' who had meddled in the affairs of the orchestra. To others, he was a veritable hero who had joined other substitute players to petition for better conditions for the privileged core group of freelancers in the workplace.

[1200] Robert Irving in conversation.
[1201] *Martin Stoner v. The New York City Ballet* No. 99 Civ. 0196 (BSJ) (S.D.N.Y. May. 8, 2001) at fn 2, Affidavit Arnold Goldberg.
[1202] The MET and its laudatory approach to auditions as well as Associates is discussed in the *Intermezzo: of competitions* and the *Back in the USA movement.*

In 1982, three years prior to gaining the 'rotator' status, Mr. Stoner had presented the NYCBO's management with a petition for social benefits. At the same time and key to the present case, he joined in the call for his right to be granted a priority position for auditions. Priority mandates automatic placement in the final round of the audition procedure, a place customarily reserved for permanent members who audition to 'move up' either within the section or in the case of a move from a second violin to first violin position, a section promotion audition. According to the record, the group of substitutes who requested these privileges was a mixed group of substitutes including two sets of NYCBO privileged players: the 'rotators,' and the 'necessaries.'[1203]

Mounting a claim of unfair employment conditions, Mr. Stoner contended that to be labelled as a 'necessary agitator' engendered a climate of unfairness and, most importantly, was crucial to the direct causal relationship to the orchestra's 'failure to promote' him. Of comparative relevance to the Amsterdam-based *Pintus* case to be discussed in the pages to follow, Mr. Stoner and other necessaries were obdurate. They refused to back down concerning what they assumed was their right to automatic entry into the permanent core of NYCBO regulars. The plaintiffs maintained that their long-term privileged status entailed special privileges that would allow them to continue to play without taking part in specially arranged auditions.[1204]

12.1.1 Relevant U.S. legislation to Stoner

Mr. Stoner's legal actions were brought under Title VII of the Civil Rights Act,[1205] further bolstered by two claims brought under state-based legislation, the New York State Human Rights Law, and the New York City Administrative Code (the latter of which adopts the same standards to verify employment discrimination claims as Title VII). His litigation ran a peculiar and rather circuitous course as he attempted to claim that the NYCBO failed to promote him[1206] because he had testified on behalf of three female violists in a sexual harassment claim mounted against a fellow NYCBO musician in the 1997 *Pray* case.[1207] Mr. Stoner not only testified against the alleged perpetrator, a musician who had served as the Head of the Union Negotiating Committee, but he also spoke out against another musician involved in purported harassment, the

[1203] Ibid.,
[1204] Ibid., at Facts, see also Deposition of Martin Stoner at para. 113.
[1205] Title VII, Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).
[1206] A wrongful failure to promote occurs when an employee has been passed over for promotion in violation of state and/or federal law
[1207] *Pray v. The New York City Ballet* 96 Civ. 5723 (RLC).

influential Head of the Audition Committee (AC). However admirable his protests might have been in terms of collegial support, the cumulative nature of Mr. Stoner's actions on behalf of the three female colleagues who sued the NYCBO in *Pray* could have been construed as damaging testimony against key members of the NYCBO.

After the NYCBO announced a violin position opening in 1998, Mr. Stoner followed the advice of his legal team and maintained the position that he should be appointed without audition. Relying on CBA audition stipulations and orchestral precedent, the NYCBO insisted that open auditions were the only means to an end for all musicians seeking orchestra employment since 1983. According to the CBA negotiated terms, a joint committee made up of five musicians and certain designated members of the management team served on the AC.[1208] The audition procedure rested on three options to fill the vacancies including options for 'insiders' the substitutes who could pass the 'personal knowledge' criterion:

> *"(1) To appoint a player from the orchestra or from among the players who have substituted for orchestra members on a regular basis without audition, on the basis of personal knowledge; (2) to appoint a player commended to it, but only after a personal audition before the Committee; (3) to appoint a player chosen through open auditions."*

The NYCBO held open auditions for five violin positions in December 1998. Although invited to audition against the other violin 'rotators,' Mr. Stoner did not compete. He also chose not to take part in the audition held one month later to fill a place that remained open after the December auditions. Instead, Mr. Stoner asserted steadfastly that these auditions were intrinsically unfair, as he would not have been given a fair chance to prove his musical mettle because he was the only 'rotator' to have testified against powerful contractually employed colleagues with regard to the aforementioned *Pray* litigation. In an attempt to further legitimize his position, Mr. Stoner submitted evidence that even though he had never served as a 'Basic' (permanent) member of the NYCBO, he had performed in 95% of all required performances. Like most rotators and 'first-call' freelancers in orchestras worldwide, Martin Stoner had performed in the NYCBO more frequently than many of the permanent members of the violin section some of whom who had shown a predilection for calling in sick.[1209]

Although it is possible to speculate that the NYCBO's AC would not have wanted to offer a permanent position to a 'troublemaker,' this assertion is merely speculative and

[1208] The 1993-1994 CBA attached to *Stoner* at Exhibit A, at fn. 4.
1209 Mr. Stoner provided evidence from the 1998-99 season of the NYCBO to back up his claim.

could not be proven in court.[1210] Mr. Stoner's retaliation claim was examined under a tripartite doctrine recognized by U.S. case law in order to meet the standard for intentional discrimination.[1211] To succeed, the plaintiff was required to prove that:

> (1) "his participation in a protected activity was known to the defendant
> (2) an employment action disadvantaged the plaintiff; and there is a
> (3) a causal connection between the protracted activity and the adverse employment action."[1212]

The court found that the NYCBO was aware of Mr. Stoner's key and potentially damaging testimony in *Pray* thus *Stoner* passed the 'knowledge test' established by case law as the first element of the three-part test.[1213] Crucially, however, the court found that Mr. Stoner did not demonstrate that he was disadvantaged by adverse employment actions on the part of the NYCBO. Simply put, he could have availed himself of the opportunity to compete in a specially organized privileged freelancers-only audition to which he had been invited.

Additionally, according to the court, there was absolutely no merit to the supplementary claim in which Mr. Stoner asserted that the NYCBO was required to appoint him as a member based on a letter, a memorandum of understanding (MOU) written by the President of AFM local 802. The communiqué outlined the **possibility** of gaining a job citing the aforementioned procedures.[1214] The Union President, while presenting valuable information in the MOU, was certainly not authorized to bypass NYCBO CBA procedures that mandate the AC as the appropriate channel to make decisions on how to fill vacancies in the orchestra.

To counter Mr. Stoner's claims, the NYCBO brought forward evidence that an open audition procedure was used to fill all openings under the CBA that had been bargained for and adopted in 1983.[1215] The *Stoner* doctrine cited in subsequent cases reads in relevant part, "the plaintiff cannot establish that failure to promote is an adverse

[1210] Author's interviews with several present members of the orchestra give credence to the view that Mr. Stoner was considered by some colleagues to have gone too far in his litigation, claims and complaints. "He could have just stood up and played like the rest of us if he really wanted to" was the consensus taken from interviews 2016.
[1211] For further information concerning the essential core of the doctrine, see *McDonnell Douglas Corp v Green*, 411 U.S. 792, 802-04; *Gallagher v. Delaney*, 139 F.3d 338, 349 and *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1308.
[1212] *Gallagher* at 349.
[1213] See, *McDonnell Douglas, Gallagher* and *Tomka, supra* at fn. 1211.
[1214] Outlining the possibilities for internal auditions and move-up auditions but not citing any possibilities to bypass auditions.
[1215] Ibid.,

employment action where plaintiff failed to apply for a position he claims he was denied."[1216] In fact, Mr. Stoner would have been required to provide concrete evidence that discrimination at the NYCBO workplace created a "hostile environment" that "is sufficiently severe to alter the conditions of the victim's employment."[1217] The question remains as to whether the 'hostile environment' had a direct effect on the violinist's ability to take part in the mandatory audition process. Importantly, the crux of the *Stoner* matter lies in whether or not Mr. Stoner would have been fairly treated at the audition considering the fact that 'insider' auditions organized for substitutes, or in some cases for orchestral members to 'move up'[1218] are not 'blind auditions.' While discussing *Stoner* with professional orchestral musicians beyond the heat of the courtroom, several points come to the fore. As musicians pointed out, it is conceivable that Stoner would have had a difficult time winning the position if a majority of jury members perceived of him as a 'problematic' future colleague, one who "litigates instead of practicing his instrument."[1219] Although the binding force of the established principal of *stare decisis* in the U.S. legal system[1220] only obligates lower courts to follow previous rulings made by a higher court in a 'similar' case, the *Stoner* court would have been well aware of the *Hart* case that involved another dissatisfied New York substitute who attempted to gain a permanent position without playing an audition. Of relevance, *Hart* played out in the same court as *Stoner*, the United States District Court for the Southern District of New York.

Contracted musicians and freelancers on both sides of the ocean hammered on the point that privileged auditions for special categories of freelancers may well be of benefit to an orchestra, as the musicians who occupy such places in the exalted freelance pecking order are 'known musical quantities' who have proven themselves to their fellow musicians. However, the disadvantage of such a system is evident, as delegating positions for even the most trusted 'rotators' or other categories of freelancers placed 'generic' unemployed musicians who were unaffiliated with the orchestra at a marked disadvantage. A priority list that permits the privileged few a special entry path to the orchestra at the expense of 'what the market offers' is discriminatory.

[1216] See, *King v New York City Health & Hosps. Corp.* 2010 NY Slip Op 33967(U) New York Supreme Court April 10, 2010.
[1217] *Harris v. Forklift Sys., Inc.,* 510 U.S. 17,21 1993.
[1218] For example, from a second violin to a first violin position or in the case of orchestras with 'fixed seating' where players do not rotate from the front to the back of the section and vice-versa, internal auditions can be organized in which members can compete 'internally.'
[1219] Quote taken from author's interview with several former colleagues of Mr. Stoner, anonymity assured.
[1220] For a particularly lively discussion of the role of precedent in U.S. courts, see Laurence H. Tribe's *The Invisible Constitution* 2008 p. 208.

12.2 Beyond *Stoner* I: *Hart*

In *Hart*, a discrimination case factually reminiscent of *Stoner* brought against the MET in 1993, a freelance violinist claimed that he was denied a position in the orchestra after two vacancies were announced in both violin sections.[1221] Although the violinist in question based his claim on age discrimination, he had **refused** (emphasis added by the author) to take the required audition, even after he was offered a special chance to play for the orchestra's audition committee. The court dismissed Mr. Hart's claims, stating they lacked *prima facie* evidence of any form of discrimination. Had he come forward with evidence that the MET had in some way denied him access to the audition, his claim would have potentially survived dismissal.

12.2.1 Karo: a single concert as a base for permanent employment?[1222]

The *Karo* case centered primarily on issues associated with union representation for orchestral musicians. However, another element in *Karo* bears consideration here, as it relates to hiring procedures. Mr. Karo, a percussion player was a member of the Musicians Association of San Diego, AFM (Local 325) who had been hired by the San Diego Symphony Orchestral Association (SDS) to substitute for the SDS's regular percussionist for a single concert in 1969. Mr. Karo was never called back to play with the orchestra in subsequent seasons. It might seem logical that he had no reason to mount the case, as it is up to the hiring orchestra to make choices with regard to substitutes. However, after the SDS granted another substitute percussionist who had not gone through any form of audition procedure a permanent position, Mr. Karo took action by filing a grievance with Local 325. On an 'only in America' note, that grievance was registered and officially filed sixteen years after Mr. Karo gave his one and only performance with the orchestra!

Of relevance to *Karo*: the SDS had 15 days to give written notification to Local 325 at the time the orchestral vacancy was announced, and the audition scheduled. While the case revolved on whether or not Mr. Karo had standing to file the claim as a non-member of the union bargaining unit,[1223] the essence of his first grievance was that the SDS and the union had breached their duties because the 'other freelancer' received a full-time contract without having to take part in a competitive 'blind' audition, as stipulated in the SDS' 1982 CBA. The blind audition procedure was outlined with strict measures to ensure impartiality.

[1221] *Hart v. Metropolitan Opera Association, Inc.,* 1993 WL 277200 (S.D.N.Y. 1993)
[1222] *Karo v. San Diego Symphony Orchestra Ass'n* 762 F.2nd 819(9th Cir.1985)
[1223] After the union did not take action, Karo filed a 'hybrid action' claiming that the union had breached its duty of fair representation.

An exception to the CBA, a provision that modified the 1982 SDS CBA, allowed the orchestra to offer a musician with six years of service within a ten-year time period precedent to April 10, 1982, a full contract without an audition. The percussion seat in the SDS was given to a noncontract percussionist who met the service requirement and, as Mr. Karo correctly claimed, had not participated in the audition. Mr. Karo's vociferous protests and grievance with regard to the results of what was in his view an 'unfair' audition practice was not honored by the court, who dismissed the claim: "labor agreements involve policy considerations that sometimes make ordinary contract law inapplicable."[1224]

Resembling the other audition-related cases discussed above, it is likely that other issues lurk beneath the surface in *Karo*. Freelancers consulted pointed out that, after all, the percussionist had only performed once with the orchestra, more than a decade and a half before the contested audition took place. Was this an inconsequential claim or does it shed light on another pressing issue that affects orchestral freelancers? While it is legitimate to ask the question why Mr. Karo was not called to substitute with the SDS save for a sole concert, it is equally legitimate to observe that percussion vacancies in professional orchestras are few and far between. Scrolling through the positions vacant in the major websites devoted to orchestral openings show that, on average, 5-7 positions are open for audition in a three-year period.[1225] "Grit, guts, stamina and a miracle is what it takes to get a percussion job in a major orchestra–there are hundreds maybe thousands out there who want the position, and many, many who are more than qualified."[1226] Top orchestral music, like top sport, sets the stakes high: the field is over-crowded and the chances for a job for 'solo' instruments within the orchestra are extremely limited. If there is a perception that an audition procedure is unfair and/or restrictive, orchestral musician plaintiffs exemplified by Stoner, Berman, and Karo will take action to have their day in court.

12.3 The Dutch take on a labor agreement

To understand Dutch jurisprudence in which freelance musicians have attempted to gain clarity with regard to their employment status, a brief consideration of central aspects associated with the 'Dutch take' on labor agreements will accompany a short reflection on cases as a source of law in the Dutch 'civil law' system to equip the reader

[1224] *Lewis v. Benedict Coal Corp.,* 361 U.S. 459, 470.
[1225] See, Music Job https://www.music-job.com/index.php?id=89&no_cache=1 and Musical Chairs https://www.musicalchairs.info/timpani-percussion/jobs
[1226] Author's interview with percussionist/composer/educator Brian Prechtl who won a percussion position at the Baltimore Symphony in 2003.

with a fuller comprehension of the system. Although neither an employer nor an employee is defined in the Dutch Civil Code (DCC), the employment contract is set forth in Art. 7:610 DCC.[1227] The article brings four significant factors within a general definition of employment to the fore:

1. The employee is subordinate to the employer, works 'in the service of the employer.
2. The work that is agreed upon must take place during a specific, contractually agreed upon period of time.
3. The definition of work is not defined however it entails the activities defined by the agreement to perform work.
4. Payment is an intrinsic factor to the agreement: work is performed in exchange for payment.

Parallels to U.S. definitions of employment that dominate the discussion in *Back to the USA* are discernible. Of greater interest in a quest to comprehend the complexities of the musician-related cases that weave through this study is the way in which a definition works its way through employment-related jurisprudence and legislation. As this *movement* relocates to consider Dutch cases, the question arises as to how, if at all, jurisprudence influences subsequent cases. Conventionally, 'major' differences between the common law and civil law systems center on several broadly presented distinctions. By and large, a common law judge plays an active role in developing rules, and draws abstract rules from specific cases, whereas civil law judges commence with strictly codified rules that are applied to specific cases. Importantly, jurisprudence is a primary source of the law in common law countries, whereas codified statute preponderates in civil law countries.[1228]

Abiding by the European civil law tune, Dutch legal scholars do not give credence to the notion that case law is a valid source of the law. Generally, the civil law system revolves around code and statute; the notion of 'judge-made' law as a leading source was considered to by anathema to the system.[1229] As we soon shall see in relation to cases under discussion, the sharp delineation between the two systems is not as extreme, as Dutch judges respond to influential precedents that give weight to

[1227] Art. 7:610 reads in the original Dutch: "de overeenkomst waarbij de ene partij, de werknemer, zich verbindt in dienst van de andere partij, de werkgever, tegen loon gedurende zekere tijd arbeid te verrichten." Author's translation: 'an agreement under which the employee engages him/herself to perform work in the service of the employer for a specific time in exchange for remuneration.'

[1228] For an interesting appraisal, see, Joseph Dainow "The Civil Law and the Common Law: Some Points of Comparison" 1966 pp. 419–435.

[1229] To quote Oxford library online "The doctrine of *stare decisis* does not apply in the Netherlands, but this is not the same as saying that jurisprudentie (case law) is entirely without normative force." Available at: https://libguides.bodleian.ox.ac.uk/c.php?g=423114&p=2889162

'present' cases with the additional influence of scholarly writings. After the highest court in the Netherlands broke the taboo of 'not quoting precedent' by literally quoting itself in the 1980 *Stierkalf* (Bull calf) case, a shift in terms of the weight of previous cases could be detected.[1230] Even if the Dutch system considered within the civil law spectrum presumes that cases are not an independent source of the law, as Professor H.U. Jessurun d'Oliveira has opined, 'thanks to court practice and scholarly support, jurisprudence is indeed a vital source of the law. Cases are influential in the Netherlands, perhaps not precedential in the strict sense as in the U.S. but certainly influential.'[1231] Of relevance to cases that consider U.S. CBAs and the Dutch CAOs,[1232] a brief look at judicial interpretation relevant to these types of contracts is warranted.

12.4 Contract interpretation: freedom of contract permeates CBA interpretation in the U.S.

In the U.S., freedom of contract is given generous scope and CBA interpretation is no exception. The central role performed by the NLRA to promote 'free' bargaining is spelled out in a leading case dating back to 1952:

> *"The NLRA is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is*
> *encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.*[1233]

Less than a decade later, Justice William O. Douglas, the Supreme Court's longest serving justice (1939-1975) characterized a CBA as: "an effort to erect a system of industrial self-government."[1234] Of late, a unanimous SCOTUS unequivocally reaffirmed that CBAs should be interpreted carefully according to "ordinary principles of contract law"[1235] The paragraphs that follow trace the Dutch Supreme Court's (Hoge Raad, further HR) reflections and decisions concerning CAO interpretation.

[1230] HR 7 maart 1980, NJ 1980, 353 (*Stierkalf*).
[1231] Discussions (in class) with Professor H.U. Jessurun d'Oliveira, University of Amsterdam Law School, translated by the author.
[1232] CBAs = collective bargaining agreements, in Dutch CAOs collectieve arbeidsovereenkomsten.
[1233] *NLRB v. American Nat'l Ins. Co*., 343 U.S. 395, 401-02 (1952).
[1234] *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S.574, 580 (1960).
[1235] See, inter alia., *M&G Polymers USA v. LLC v. Tackett* 135 S. Ct. 926 (2015);
CNH Industrial N.V. v. Reese No. 17-515 2018 WL 942419 (U.S. Feb. 20, 2018).

12.5 Contract /CAO interpretation in the Netherlands: the *Haviltex* standard vs. plain language interpretation

In *DSM/Fox*, an important CAO interpretation case dating back to 2004, the HR attempted to mitigate the tension perceived by scholars and practitioners between two potentially conflicting standards: the *Haviltex* standard with its consideration of parties' intentions and interpretations, and the stricter, 'plain language' CAO standard in which the black letter contractual text takes precedence. The Court explained that the two standards do not necessarily contradict one another but rather, 'merge smoothly.'[1236] Looking back to the 'titan' of Dutch 'contract interpretation' jurisprudence, *Haviltex*,[1237] the Court observed that the intentions of parties when entering into a contract must be considered, advocating an objective interpretation criterion in order to take the interests of third parties and 'generally acceptable societal standards' into consideration. In a case note, Edgar du Perron clarified that the *Haviltex* standard would remain central as an interpretational tool while the CAO standard would stand firmly in the background, in reserve as it were, to apply to agreements that apply to a significant number of third parties who were not directly involved in the conclusion of the initial contract.[1238]

Two HR judgments handed down in HR 2007 applied the *Haviltex* standard while giving pride of place to plain language and linguistic significance especially with regard to commercial contracts in which negotiations between parties took place under guidance from legal professionals.[1239] To answer the question as to what an 'entire agreement' clause means, the Court held that a combination consisting of the circumstances of contract formation (*Haviltex)*, the manner in which the clause was discussed by parties prior to contract finalization, and the wording of the clause (plain language) were cumulatively of paramount importance.

Several years later, in *Lundiform*, the HR turned its attention to weighing the importance of a specific provision within a contract in the context of the 'whole' contract. In its

[1236] *DSM/Fox* HR 20 februari 2004, ECLI:NL:HR:2004:AO1427
[1237] *Haviltex* 13 maart 1981, nr. 11647, NJ 1981, 635. The oft-quoted *Haviltex standard*: "Voor de beantwoording van die vraag komt het immers aan op de zin die partijen in de gegeven omstandigheden over en weer redelijkerwijs aan deze bepalingen mochten toekennen en op hetgeen zij te dien aanzien redelijkerwijs van elkaar mochten verwachten. "Author's translation: To answer the question of interpretation [of a written contract] rests on the meaning that the parties could reasonably expect from one another under the circumstances and on what they could reasonably expect from each other with regard to the contract.'
[1238] See *DSM/Fox* case commentary by Edgar du Perron (in Dutch) NJ 2005, 493
[1239] *Meyer Europe BV /PontMeyer BV* HR January 19, 2007 JOR 2007/166; *Derksen/Homburg* HR June 29, 2007 JOR 2007/198.

decision, the Court held that the 'whole' contract should be scrutinized with a specific intent to flesh out 'what was agreed upon by parties.' [1240] This interpretational focus bears similarity to common law principles of interpretation, exemplified by SCOTUS' holding in a collective-bargaining case (*CNH Industrial*) where the Court dealt the winning hand to an analysis of plain language vs. ambiguous intentions in contract interpretation.[1241]

More recently, in *FNV c.s./Condor*, the HR upheld a nuanced interpretation of a collective bargaining agreement (in Dutch, the CAO). On the one hand, a CAOs raison d'être rests on 'the protection of third parties with regard to an interpretation of a provision that can attribute meaning to a party's hidden intention' and on the other hand, '[there is] the need for a uniform CAO interpretation for all parties bound by the agreement.'[1242] While the 'plain language' within the CAOs text is leading, a 'reasonable outcome' related to the effects of the CAOs articles should be taken into consideration. The Court reiterated that there is no implied contradiction between the *Haviltex* standard and the CAO, but a 'smooth transition' that recalls the *DSM/Fox* standard.[1243]

Our musically infused investigation on Dutch soil continues to examine an interesting twist in freelance contracts: the chain of part-time contracts. A quick summary of the legislative push favoring flexibility in the late 1990s precedes a discussion of how the 'chain rule' caused discord for a freelance musician. Following a discussion of relevant legislation, the *Pintus* case will take pride of place leading to a discussion of other relevant cases. Updated information concerning changes in Dutch legislation that has affected freelance orchestral musicians' status will close the *movement*.

12.5.1 The backdrop I: laws to support labor market transformations

The Flexibility and Security Act (Wet Flexibiliteit en zekerheid Wfz) entered into force on 1 January 1999.[1244] Dutch scholars exposed the problems inherent to 'the flexibility state of affairs,' in which workers moved from one temporary contract to another temporary contract only to be replaced by another phalanx of temporary workers creating a situation in which an increasingly large group of workers found themselves at the brink of precarity with limited chances to move from 'flexibility' to real job

[1240] *Lundiform/Mexx Europe B.*V., Hoge Raad, 5 april 2013 LJN: BY8101
[1241] *CNH Industrial N.V. v. Reese* No. 17-515 2018 WL 942419 (U.S. Feb. 20, 2018).
[1242] In the original Dutch: "de bescherming van derden tegen een uitleg van een bepaling in een overeenkomst waarbij betekenis wordt toegekend aan de voor hen niet kenbare partijbedoeling" en anderzijds "de noodzaak van een eenvormige uitleg voor alle door die overeenkomst gebonden partijen."
[1243] *FNV c.s./Condor* HR 25 november 2016, ECLI:NL:HR:2016:2687 r.o. 3.5 and 3.6.
[1244] Staatsblad van het Koninkrijk der Nederlanden Jaargang 1998 nrs. 300 en 332.

security.[1245] According to statistics released by the Dutch Unemployment Office, the correlation between 'flexicurity' and unemployment could be read by the fact that the ratio of former flex job workers seeking unemployment was four times higher than the former fully employed.[1246]

12.5.2 The backdrop II: European Council Directive 1999/70/EC[1247]

In 1999, the European Council advanced a framework agreement centered on two basic principles: the prevention of abuse arising from a contractual reliance on successive fixed-term contracts, referred to in Dutch legislation as the 'chain rule,' and the principle of nondiscrimination with regard to fixed-term workers. Crafted in concert with European social partners,[1248] the Directive, supported by numerous rulings on the part of the European Court of Justice (ECJ), considers a permanent contract as the be all and end all, the centerpiece of 'positive' labor. According to the underlying current of thought, as espoused by the 'framers,' (the social partners), the agreement seeks to preclude that a chain of partial contracts becomes the norm, a situation that leads to a loss of meaning for a permanent contract. The preamble to the Directive's framework agreement presents the general principles as well as the minimum requirements relating to fixed-term work and recognizes that contracts of indefinite duration are the general form of the employment relationship. The all-important definitions in clause 3:

> For the purpose of this agreement the term "fixed-term worker" means a person having an employment contract or relationship entered into directly between an employer and a worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event.
> For the purpose of this agreement, the term "comparable permanent worker" means a worker with an employment contract or relationship of indefinite duration, in the same establishment, engaged in the same or similar work/occupation, due regard being given to qualifications/skills.

Subsequent ECJ jurisprudence places emphasis on this tenet.[1249] In the *Adeneler* case, the Court pushed further with a full-on admonition against an 'inflexible and

[1245] Paul de Beer, Ronald Dekker, Martin Oltshoorn. *Flexibilisering, de balans opgemaakt 2011. Available at:*https://docplayer.nl/4924585-Flexibilisering-de-balans-opgemaakt-paul-de-beer-red-ronald-dekker-martin-olsthoorn.html
[1246] "UWV Groei van de flexibele arbeid en de gevolgen voor het beroep op WW." *UWV Kennismemo.* 2010.
[1247] Directive 1999/70/EC 28 June 1999. Member States were required to transpose the directive into national law by 2001.
[1248] The Social Partners: the European Trade Union Commission (ETUC); the Union of Industrial and Employers' Confederations of Europe (UNICE) and the European Centre of Employers and Enterprises (CEEP).
[1249] HvJ EG 22 november 2005, nr. C-144/04 (*Mangold*) (r.o.= rechtsoverweging or legal argument) r.o. 64; HvJ EU 10 maart 2011, nr. C-109/09 (*Kumpan*), r.o. 46.

restrictive' definition of the number of successive contracts that could conceivably lead to abuse.[1250] Further, in *Adeneler*, the Court stressed that, although member states are entitled to some sort of margin of appreciation, "the member states are required to guarantee the result as required by Community Law."[1251] Post *Adeneler*, the ECJ has systematically shown its support for anti-discriminatory measures in a wealth of cases in areas running the gamut of unfair dismissals and access to benefits, such as pensions and pay bonuses. An ample number of cases support the Court's opinion that permanent employment should be the norm; employers should not contravene with 'abusive' open-ended contracts, as the *Kücük* decision illustrated.[1252]

Although expressing such a noble sentiment in January 2012, the decision in *Huet* two months later took quite a different tack. *Huet* dealt with an academic contract in which a university employee's fixed-term contract was converted to an open-ended contract at a lower salary.[1253] The ECJ showed caution in a holding that side-stepped an obligation for employers to convert contracts in an even-handed manner. The caveat: the new open-ended contract should not contain material amendments that would be unfavorable to the employee. A determination of a material amendment was left to national authorities. The ECJ relegates such presumably polemic decisions to the hands of national courts: this stripes with ongoing debates in which EU economic and social policy aims are juxtaposed in order to justify changes in labor markets, as flex workers under fixed-term contracts have moved from a position as atypicals to 'typicals' in recent decennia.[1254]

12.5.3 Friction: Council Directive 1999/70/EC and Article 7:668a DCC

The tension between the Dutch chain rule as specified by Article 7:668a DCC and Council Directive 1999/70/EC should be brought into focus. Specifically, the Directive's fifth clause entitled 'Measures to prevent abuse' enumerates:

> 1. To prevent abuse arising from the use of successive fixed-term employment contracts or relationships, Member States, after consultation with social partners in accordance with national law, collective agreements or practice, and/or the social partners, shall, where there are no equivalent legal measures to prevent abuse, introduce in a manner which takes account of the needs of specific sectors and/or categories of workers, one or more of the following measures:

[1250] Case C-212/04 *Adeneler and Others* [2006] ECR I-6057 at 73.
[1251] Ibid., at *61 ,73*.
[1252] See, for example Case C-586/10 *Kücük* ECJ 26 January 2012, ECLI:EU:C:2012:39 at para. 37.
[1253] See, Case C-251/11 *Huet* 8 March 2012, ECJ, ECLI:EU:C:2012:133.
[1254] These oversimplification of the world trend from open-ended to fixed-term contracts, from permanent to flex is articulated in sources ranging from ILO statistics to Eurofound and U.S. government statistics, see relevant listings in the *Recapitulation: Sources*.

(a) objective reasons justifying the renewal of such contracts or relationships;
(b) the maximum total duration of successive fixed-term employment contracts or relationships;
(c) the number of renewals of such contracts or relationships.

Member states can choose to limit a chain in terms of content. The Dutch legislator opted to limit the chain both temporally and numerically. Paragraph 5 allows for derogations from the chain rule under collective agreements (CAOs). Thus, the Dutch legislator essentially permitted an exhaustive reliance on temporary contracts. Research concerning the use of the chain rule in temporary contracts shows evidence of Dutch collective bargaining agreements with no limitation on the chain of temporary contracts, agreements that did not prohibit an 'unlimited' chain of contracts as late as 2006.[1255] What legal mechanism permitted such derogation?

12.5.4 Three-quarters mandatory law

Dutch orchestras fall within the scope of CAOs agreed upon in concert with trade unions and employer's associations. Under Dutch law, CAOs can contain clauses that replace general rules found in the DCC (Dutch Civil Code) to take precedence over the general rules in accordance with the principle of 'driekwart recht' (literally: three-quarter mandatory law). Standard practice in Dutch CAOs shows an application of three-quarter mandatory law with regard to the length of trial periods and the number of contracts that constitute the chain rule. Under the principal, employers may make 'other arrangements' through the legal vehicle of a collective agreement. Reserved for 'exceptional cases 'the three-quarters' allowance was not intended for a circumvention of fundamental obligations. Rather, the three-quarters exception was conceived in response to the specific demands of certain professions, exemplified by sports teams working within the constraints of transfer systems. In the cultural sector, workers in the 'freelance' dance and theater sectors are often employed under temporary employment contracts dependent on the demands of the length of the performance run. Significantly, if a worker employed under a chain of temporary contracts is of the opinion that the manner in which the chain rule has been applied goes against his/her better interests, the worker has the right to petition the court for "objectively justifiable reasons" for the application.[1256]

[1255] See, in Dutch, "De wet Flexibiliteit en Zekerheid, een onderzoek naar de ¾ bepalingen in de cao's van 2006." Ministerie Sociale Zaken en Werkgelegenheid 2006.
[1256] See, Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 22 december 2016 tot wijziging van de Regeling ketenbepaling bijzondere functies Staatscourant 2017, 132, in force the day following publication, January 2, 2017. Text in Dutch available at: https://zoek.officielebekendmakingen.nl/stcrt-2017-132.html

12.6 A particular substitute player's employment in the Royal Concertgebouw Orchestra

The vulnerability of an orchestral freelance substitute musician in the parlance of contract law, a fixed-term employee who performed with one of the world's greatest orchestras,[1257] the Royal Concertgebouw Orchestra (RCO) for approximately five years homes in on what appears to be an irreconcilable difference between what a freelance musician perceives of as a legitimate legal action and the operation of the law itself. Under scrutiny is the 'chain of fixed terms,' its limitations, and the application of fixed term legislation in the orchestral sphere. Our musically infused investigation on Dutch soil scrutinizes an interesting twist in freelance contracts: the chain of part-time contracts.

Atypical contracts in what perceptive scholars refer to as the two-tier labor market, which pits fully employed workers against the freelance workers in terms of benefits, payment, and of course job stability, have generated considerable litigation and legislation in Europe and the United States.[1258] Yet, although the plight of the freelance orchestral musician is certainly not high on any social/legal agenda considering musicians' marginal market share in the labor force, *Pintus* and the 'competition' cases exemplified by *FNV-Kiem* bring a multiplicity of employment-labor issues to the fore.[1259] An examination of the concerns presented in *Pintus* is preceded by a discussion of key ECJ judgments related to the subject.[1260]

12.6.1 Council Directive 1999/70/EC, its reach and articulation in Dutch law

In *Pintus*, the Amsterdam court considered the compatibility of a series of fixed-term contracts within the context of the freelance orchestral sphere in the context of the European Council Directive 1999/70/EC 'Concerning the framework agreement on fixed-term work' and relevant Dutch legislation. Negotiated by leading European social

[1257] Often contested, but still quoted, *Gramophone* magazine's World's Greatest Orchestra poll 2008 gleaned from the opinions of renowned conductors and critics, see https://www.gramophone.co.uk/editorial/the-world's-greatest-orchestras

[1258] Discussions of the term 'two-tier labor market' abound in the scholarly literature as well as on explanatory labor-economics websites, see, https://www.weforum.org/agenda/2015/01/the-trouble-with-two-tier-labour-markets/

[1259] See, Nicola Countouris' insightful appraisal in: The changing law of the employment relationship: Comparative Analyses in the European Context 2016.

[1260] *Pintus* Gerechtshof Amsterdam 26 juli 2007 JAR 2007/243

partners[1261] within the broader context to augment Europe's labor supply, the directive offers barebones codification and places a strong emphasis on equal treatment. Its dual objectives are expressed in the first clause:

> *"(a) to improve the quality of fixed-term work by ensuring the application of the principle of non-discrimination;*
> *(b) to establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships."* [1262]

The Directive finds its articulation in Dutch law in Article 7:668a DCC within the general codification of Employment Agreements found in Book 7:10 DCC and the articles that follow.[1263]

The wide discretion afforded the member states, the oft-criticized 'national discretion imperative' lies in the wording of Art. 288 TFEU: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."[1264] A full-blown discussion of discretion, rules of recognition, and judicial validity taking H.L.A. Hart and Ronald Dworkin's quest for justice lies far beyond the scope of this research, but nevertheless energizes questions related to the outcomes of the cases selected for discussion.[1265] Looking at discretion through a Euro-lens, Josephine Hartmann dissected a series of EU directives and the thorny paths to harmonization by calling into play the push-pull of member states' interests and the larger European ambition with regard to democratic legitimacy.[1266]

With regard to Directive 1999/70/EC , the Court had brought to the fore 'objective grounds' to justify an employer's reliance on a series of fixed-term contracts and even rationalized less favorable treatment of fixed-term employees compared to

[1261] The social partners who concluded Directive 1999/70/EC Framework agreement on fixed-term work: European Association of Craft, Small and Medium-sized Enterprises (UEAPME) were the European Trade Union Confederation (ETUC) the Union des Industries de la Communauté européene (INOCE) now known as BUSINESS EUROPE and the European Centre of Employers and Enterprises providing Public Services (CEEP).
[1262] Council Directive 1999/70/EC clause one.
[1263] See, Section 7.10.9 *End of an employment agreement* and ensuing DCC articles.
[1264] Art. 288 TFEU available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E288
[1265] For a riveting comparison and multi-level critique of both Hart and Dworkin see, Joseph Steiner's "Judicial Discretion and the Concept of Law" 1976 pp. 135–157.
[1266] Moving beyond Ronald Dworkin's critique of discretion per se, Josephine Hartmann's dissertation, *Discretion in EU Directives: Enhancing Political Legitimacy within the Eu's Multi-Level Legal System* (2012) turns her attention to the difficulties of harmonization and political will at the EU and member state levels, available at: http://dx.doi.org/10.2139/ssrn.2328673

their permanently employed 'colleagues.'[1267] Regardless of one's position on what Fritz Scharpf calls the EU's 'integration through law' regime,[1268] regardless if one observes that EU jurisprudence espouses neoliberal market expansionism rather than championing anti-discrimination, most scholars agree that the relationship between directives and national court decisions with regard to contingent/freelance workers is in flux. Before touching upon the topic of the differences between open-ended and fixed-term contracts of employment under the applicable legal regimes, and the compatibility of these contracts with the aforementioned directive, the facts of the *Pintus* case will be outlined.

12.6.2 Pintus ***facts***

Maria Tiziana Pintus, an Amsterdam-based Italian violinist received her advanced performance diploma at the Utrecht Conservatory in the early 1990s and became active on the orchestral freelance scene shortly thereafter. She was invited to perform regularly in both the first and second violin sections in the Royal Concertgebouw Orchestra (RCO) between 1995-2003. The nature of her work in the orchestra was to play the violin under a series of fixed contracts in both violin sections, taking part in all performance-related musical activities: rehearsals, concerts, recording sessions and tours. Preparation for these musical activities was not compensated: substitute musicians akin to their 'regular' contracted orchestral colleagues are responsible to be prepared fully by the time the first rehearsal begins. But unlike the 'regular' players, substitutes do not benefit from the *forfait*, a term that refers to compensated preparation hours.

It is the inner workings and outer applicability of this series of contracts, the duration of the work completed, the differences, or lack thereof, in performing in a first and/or second violin section that lie at the crux of the matter. Ms. Pintus asserted the claim that her regular freelance work contracted through the RCO's Stichting Remplaçanten (Freelancers Foundation) following a fourth employment contract entitled her to a permanent contract.[1269] Yet, without 'winning' an audition for a specific first or second violin position, what type of contract would have answered to her claim?

[1267] See, *Kücük*, *supra* at fn. 1252.
[1268] Fritz W. Scharpf. "The Asymmetry of European Integration, or Why the EU Cannot Be a 'Social Market Economy'" 2010 pp. 211-250.
[1269] In Dutch, 'arbeidsovereenkomst voor onbepaalde tijd', literally an employment contract of infinite duration' or permanent contract.

12.6.3 Dutch employment legislation and Pintus*: consecutive fixed term contracts*

The relevant articles of Dutch employment legislation with reference to the *Pintus* case are found in the Dutch Civil Code *Section 7.10.9. End of an employment agreement*. Under the terms set forth in Article 7:667 DCC, an employment agreement is terminated when either the time period that has been contractually agreed upon or the time period agreed upon by law or 'common usage' expires.[1270] The subsequent article, Art. 7:668 DCC *Tacit continuation of a fixed-term employment agreement* reads in relevant part: 1. If an employment agreement continues after the expiration of a fixed term as meant in Article 7:667, paragraph 1, and parties have not objected to this continuance, parties will be regarded to have entered into a new employment agreement under the same contractual provisions and conditions for the same fixed term as the previous employment agreement…with duration set as a maximum of one year.

And for purposes of the case, the all-important Article 7:668a DCC *the chain of fixed-term employment agreements*:

> 1.Starting on the day that parties have entered into:
> a. two or more fixed term employment agreements that succeed one another at intervals of not more than three months and also if these employment agreements have lasted jointly for a total period of 36 months, including these intervals, the last employment agreement for a fixed term is deemed to be an employment agreement that has been entered into for an indefinite term;
> b. more than three employment agreements for a fixed term have succeeded one another at intervals of not more than three months, the last employment agreement for a fixed term is deemed to be an indefinite term employment agreement (permanent employment agreement).[1271]

The chain of consecutive fixed terms sets the maximum number of contracts and the maximum amount of time between contracts before the 'final contract:' the contract that converts automatically into a permanent employment contract unless otherwise stipulated in a collective bargaining agreement. As of 1 July 2015, the chain of fixed term contracts was modified from a maximum of three contracts in three years with an intervening interval of three months, to a maximum of three contracts in two years with an interval of maximum six months.

[1270] Author's translation, see Art. 7:667 DCC (entry into force 1 January 1992.)
[1271] The 3/3/3 fixed term or chain rule (no more than three consecutive contracts) has been replaced by the 3/2/6 rule effective on 1 July 2015. Under the chain rule the employer and employee may enter into a contract for a total of three consecutive fixed-term contracts ending on an agreed date (by operation of law). The chain of agreement, or ongoing contracts, is broken in cases where there is an interval of more than six months between contracts. Prior to July 1, 2015, the maximum interval between contracts was three months.

According to Ms. Pintus' understanding of the chain rule as expressed in Art. 668a DCC, she was legally entitled to proceed from a fixed contract to an open-ended contract starting on 12 March 2002, the date of her fourth specific term contract as an RCO freelance substitute violinist. Several points call for further clarification. Firstly, as a substitute player at the RCO, she had signed contracts with Stichting Remplaçanten van het Koninklijk Concertgebouworkest (the Foundation for Substitute Players Royal Concertgebouw Orchestra, further: RCO Foundation)[1272] and not the RCO. The RCO Foundation was officially registered at the Chamber of Commerce on 1 August 2001. Secondly, the collective agreement for substitute players, the CAO voor Remplaçanten van Nederlandse Orkesten (CBA for Substitute Players in Dutch Orchestras)[1273] in force during the years Ms. Pintus substituted in the RCO carved out an exemption to the applicability of Art. 7:668a in the CAOs Article 3(2) stipulating that Article 668a DCC was not applicable "waardoor in geen enkel geval een arbeidsovereenkomst voor onbepaalde tijd onstaat"(thus without exception [literally: in no case] an employment contract for an indefinite period of time does not exist."[1274] Ms. Pintus and her legal advisors were of a different opinion based on the nature of the work performed under contract. "Even though we (my legal advisor and I) knew about that exception, we wanted to prove our point that this loophole was simply not fair to orchestral substitutes who perform exactly the same work as the regular contracted musicians."[1275]

The CAO relevant to Ms. Pintus complaint had expired on 31 October 2001. Prior to the CAO-lapse time period, Ms. Pintus had worked at the RCO under five temporary employment contracts (between 1 November 2001 and 1 April 2002) in which the CAO was applicable. If a CAO expires, what could the freelance substitute rely on? The Amsterdam court was strict in its appraisal of the situation holding "there can, however, be no question of the influence this particular CAO exerts. In the case of referral to an expired CAO, no after-effect can be achieved."[1276]

The court further held that the series of employment contracts between the violinist (a.k.a Ms. Pintus) and the RCO Foundation must be qualified as temporary employment contracts. Parties were asked to submit additional information in order

[1272] KCO refers to the Dutch, Koninklijk Concertgebouworkest whereas RCO refers to the English translation, Royal Concertgebouw Orchestra.
[1273] In Dutch, Collectieve Arbeidsovereenkomst Remplacanten Nederlandse Orkesten 1 november 2000-31 october 2001, ongewizgd verlengd tot en met 31 maart 2002
[1274] Ibid., Article 3(2).
[1275] Excerpts taken from discussions with Tiziana Pintus in 2015, 2016.
[1276] Gerechtshof Amsterdam 26 juli 2007 JAR 2007/243, in Dutch (*Maria Tiziana Pintus/ 1. Stichting Remplaçanten van het Koninklijk Concertgebouworkest*)

to determine the correct amount of payment that Ms. Pintus was to receive taking the relevant statute into account. Art. 7:610b DCC reads:

> ***To deduce the number of contracted working hours***
> When an employment agreement has lasted for at least three months, the contracted working hours in one month are presumed to be equivalent to the average number of working hours per month that took place within the three preceding months."[1277] (Author's translation)

12.7 Revisit the distinctive world of the orchestral substitutes in the Netherlands

At the time Ms. Pintus worked at the RCO, the freelance scene for violinists substituting in Dutch orchestras was "open and flexible."[1278] Pintus was invited to substitute at the prestigious RCO in what musicians and personnel managers describe as 'the golden period' of classical music in the Netherlands, prior to the cuts that would impact that domain soon thereafter. "We were so fortunate, those of us who graduated from top programs (Ms. Pintus studied with the legendary Philippe Hirschhorn) because we were in high demand. We had more than enough work, varied and interesting projects, I counted myself as one of the luckiest of orchestral violinists with regular engagements at the RCO."[1279]

Many U.S. orchestras rely on fixed lists of substitute players who are 'screened' either by audition or recommendation by an artistic committee, the music director, and/or a section leader. Unlike the situation sketched in the *Stoner* case appraised above, in which U.S. orchestras are found to observe fairly elaborate and strict priority rules for substitute players in string sections,[1280] Dutch orchestras are more flexible, or as Ms. Pintus observed "arbitrary" in decision-making when hiring substitutes. "If you fit in and the section you are playing in is comfortable with your music-making and your personality, it feels like you are there to stay, well that is until the phone stops ringing, and another musician has taken your place."[1281]

[1277] See, Art. 7:610b DCC.
[1278] Contrasts between the abundance of orchestral employment available to freelancers in the Netherlands from the 1980s to the early years of the 21st century as opposed to the later shrinkage in the availability of work is supported by evidence from freelancers' observations shared in multiple interviews. Two oft-cited reasons to back up freelancers' commentary: the increase in the availability of excellent players (intensified competition); orchestral cuts leaving fewer options for employment.
[1279] Conversations with Tiziana Pintus.
[1280] Rotators was the term used for 'priority' substitutes in the New York City Ballet Orchestra, see the discussion on *Stoner*, above. The Metropolitan Opera Orchestra (MET) works with a salaried group of players, Associate Members who are represented by the American Federation of Musicians, Local 802 in collective bargaining with the Metropolitan Opera Association.
[1281] Ms. Pintus' observation as noted in author's interviews.

Interviews with 'orkestinspecteurs' (known as 'fixers' in the U.K. or 'personnel managers' in the U.S.) shed light on a sketchy situation, a palpable grey zone with regard to string section hire policies. "Basically, once a player was recommended by an orchestra member, often a principal player, but also a trusted section player, if that person 'fit in' to the section and no complaint about their playing and demeanor were registered, we would happily rely on the individual. Frequently, we would ask one person to remain on standby for much of the season, a sort of win-win situation: easy for our planning and our nerves as well as providing steady work for the player. That's the way we used to do things in the past."[1282] When queried as to changes in this relaxed hiring tradition post-crisis, the personnel managers revealed a different consensus. "Nowadays, there are more protocols, more bureaucracy, more people involved in personnel decisions, we used to trust our people skills and listen to the musicians for feedback in the past but now we seem to travel on a more bureaucratic road that combines input from more people, not necessarily a better or easier path to take."[1283] Consensus as to how a particular freelancer is chosen to substitute does not seem to exist adding to the built-in vulnerability of freelancers and their chances for continued employment.

12.7.1 Violinists as a 'special type' of substitute musician

The largest section in the orchestra (the violins) offers the greatest amount of freelance employment 'per capita' based simply on the number of players per orchestra and the chance that tenured violinists may be unavailable for work. As discussed in the *FAQ*s, the violin sections in orchestras are divided into two parts: the first violin section and the second violin section. For violinists at work in the Netherlands, several roads led to freelance work in the top Dutch orchestras. Firstly, a lead player (concertmasters/ principal second violin/associate concertmaster) often is a professor at one or more renowned conservatories in a pedagogical position. Respected orchestral players who play in top orchestras are much in demand as pedagogues at master classes and summer courses worldwide. This translates into a system in which the principals are 'in the loop' concerning potential substitute players. "Think of our positions as guild leaders, the great craftspeople of the past. Rembrandt would offer his student's the opportunity to paint part of a commission, that's how principal players often choose who should replace them either through the audition process or when our personnel managers

[1282] Author's discussions with Theo Berkhout, former personnel manager, RCO; Anneke Peerik, personnel manager, RFO/RKF and Anne-Marie Boeke, former personnel manager, RKO.
[1283] Ibid.,

put together lists of substitute player."[1284] Some Dutch orchestras hold substitute player auditions. Interestingly enough, these orchestras prefer not to divulge how the results of those auditions are put into practice, how the priority lists work, or if in fact these lists are used whatsoever: the majority of orchestral personnel managers queried had no direct answer to the question, "what happens to the players who succeed at substitute player auditions, how are they ranked for eventual placement?" A significant number of freelancers interviewed have expressed frustration at winning a substitute audition and never receiving a call to play in the orchestra.

12.7.2 New kids on the block: the rise of orchestral academies and their effect on orchestral substitution in the Netherlands

An increasing number of European orchestras have established training schools/ orchestral academies and hire players out of the ranks of these schools that have been adopted from models developed by orchestras in Germany and Switzerland. Created by orchestras to serve orchestras, the academies select a few young musicians who receive instruction from orchestra members and play as many as twelve weeks per season in the orchestra as part of their training. While leading orchestral German academies offer a stipend to academicians along with cost-of-living allowances, several of their Dutch counterparts consider their academies to be a vocational training program in which the academicians perform in the orchestra as part of a learning process. To these orchestral employers, the academicians are equivalent to interns and are largely unpaid.[1285]

Within the past decade, the number of academies in the Netherlands has grown exponentially: The Royal Concertgebouw Orchestra, the Netherlands Philharmonic Orchestra, Metropole Orchestra, and the Arnhem Philharmonic (Gelders Orkest) and the Orkest van het Oosten (the latter two reorganized as PHION in 2019, see *FAQs*) posted auditions for academies in 2017. This increase brings opportunities for young future professionals, but nevertheless, as more academicians are accepted to perform regularly, the number of opportunities for 'regular' freelancers decreases. There are no quantitative reports as of yet to back up the observation that the academies have taken their toll on the number of professional freelancers who are employed for substitute work by the orchestras with academies. Of the many personnel managers

[1284] Interviews with two famed principal oboists: Jan Spronk, former principal oboe, Royal Concertgebouw Orchestra and Joseph (Joe) Robinson, former principal oboe, the New York Philharmonic.
[1285] See, information presented by the Karajan Academy at https://www.berliner-philharmoniker.de/en/academy/educational-concept/ and compare to https://www.orkest.nl/english-summary/nedphocva-orchestra-academy

consulted, the overwhelming majority were reticent to share privileged information concerning their hiring practices. The ever-growing cadre of PR and HRM teams who are employed by orchestras are equally tight-lipped concerning what might well be another threat to the already precarious freelance orchestral profession.[1286]

Conversations with freelancers who have worked in the orchestral market for 10-25 years back up the premise that orchestral academies and the use of trainees to fill the ranks of professional orchestras are factors leading to the demise of the freelance orchestral sector. Interviewees underline the ever-shrinking availability of work since the crisis in both the jurisdictions studied. From inside the Gelders Orkest in 2017, "I am a Dutch musician who holds advanced degrees from conservatories and several prizes for excellence. Yet slowly and somewhat inevitably the working freelance orchestral musician is turning into the workless musician. Every two years there are more orchestras disappearing,[1287] the European Union windows have EU opened to musicians from all the member states and academies formed and a saturated market with musicians who are competing for. . . peanuts."[1288] While the aims of academies are laudable, their direct impact on an already precarious labor market for freelance musicians is troubling.

12.7.2.1 An additional unsettling possibility related to academies and 'fully employed' orchestral musicians

From across the ocean, in Atlanta, Georgia to be precise, an unsettling link between orchestral training programs and professional orchestras has been established in relation to the Atlanta Symphony Orchestra (ASO) lockouts detailed in the *FAQs* introduction. As a memory refresher, the ASO musicians were locked out by their management in 2012 and 2014. One of the central points of contention: proposed personnel reductions, cuts in the complement. Relating directly to reflections on academies, in 2013 both the CEO-President of the Woodruff Arts Center, the organization that controlled the ASO, as well as the ASO's CEO-President posted a

[1286] This leads to the obvious observation that future academic research could be carried out to determine the impact of academies on employment.

[1287] The latest in a list of orchestral mergers announced for 2019: the Gelders Orkest (Arnhem Philharmonic) and Orkest van het Oosten (Enschede based) are set to 'fuse' and will reorganize with loss of personnel to be announced. The name of the 'new' reorganized orchestra after rebranding is PHION, a fictional Greek reference that caused derision amongst its musicians ("why pay a fortune to come up with a name that means nothing?)For more on the merger: https://www.cultuur.nl/upload/documents/tinymce/Advies-Symfonische-Voorziening-Landsdeel-Oost-2018-05-28-DEF.pdf

[1288] Interview with Stan Paardekooper, former director of many Dutch orchestras: Radio Philharmonic Orchestra; Het Ballet Orchestra; Brabants Orkest; North Holland Philharmonic and associate director, Netherlands Philharmonic Orchestra.

suggestion as how to effectively reduce the number of full-time tenured orchestral musicians. Adding insult to injury, their 'cost-efficient' and 'politically correct' proposal was to replace ASO full-time tenured musicians with alumni from the ASO's Talent Development Program (an orchestral coaching academy set up by the ASO to find and mentor minority musicians).[1289] Although this ultimate academy backlash was never implemented, it points to the vulnerabilities of not only freelance orchestral musicians, but fully tenured orchestral musicians threatened by 'cost-efficient' academy-related 'remedies' to financial-related problems.

12.7.2.2 A chance for fairness at the academy?

A possible solution to the quandary of establishing bona fide orchestral academies to train young talent without impinging upon freelance employment could be to restyle the academies along the lines of the apprenticeship programs at several British orchestras. At the BBC Wales Symphony, one of the six BBC orchestras in the U.K., academy young musicians receive training and perform at rehearsals but do not play the concerts. By having the trainees work in the orchestra while reserving the concert performances for musicians who are paid for their services seems to offer a compromise to the academy dilemma worthy of further inquiry.[1290] Perhaps the commendable approach to create a balance between training the new generation and protecting their freelancing predecessors could find application in the Netherlands where academies are a comparatively new phenomenon.

12.8 Back to *Pintus*

With heightened comprehension concerning the freelance market, it is time to turn our attention back to the *Pintus* case armed with additional information on the complexities of the many layers of precarity that operate within the orchestral musicians' freelance world. "Most definitely the fact that freelancers have to endure so much competition and do not receive feedback as to how they fit in to the orchestras they 'guest perform' with adds to the high anxiety within the profession and of course the call for recognition and compensation so that there is a feeling of continuity, of a future **in** the orchestra."[1291]

[1289] Jenny Jarvie. "Breaking News: Lockout exposes rift between ASO and Woodruff board members over direction" *Arts Atlanta* October 3, 2014.
[1290] Information concerning the BBC Orchestra academy process gleaned from conversations with John van Lierop, sub-principal bass, BBC Scottish Symphony Orchestra.
[1291] Conversations with Tiziana Pintus.

For extra insight into some of the motivations behind the court's rejection of Ms. Pintus' claims, it is important to take note of the difference between the roles she fulfilled within the orchestra. In the weeks that Ms. Pintus was employed with the RCO, her position as violinist rotated between playing in the first violin section and playing in the second violin section. While both roles call for a high level of professionalism, first and second violin positions are not interchangeable in most professional orchestras. With regard to 'interchangeability' of the two positions within the orchestra the Amsterdam court held:

> *"The parties disagree about the question about the interchangeability of the functions of first and second violinist. This question is important to the extent that if it must be concluded that these functions are so far apart that the employment contracts with which the performance of this work has been agreed cannot be regarded as a successor to the previous contract, there is no way to arrive at an adequate application of Art. 668a DCC. The Court of Appeal finds that Pintus has worked alternately as first and second violinist in the period indicated under 3.3 iii and on the basis thereof - assuming evidence to the contrary - assumes that both functions are interchangeable to a large extent and that consequently there are subsequent employment contracts. The Court noted that successive employment contracts could only be refuted if there was a substantial difference between the work agreed in the contracts."*[1292]

A closer look at what these differences might be and whether or not orchestras equalize the functions is merited.

12.9 Rotating vs. fixed seating violin sections

Dutch orchestras do not opt for a system of rotation between sections in contrast to the New York Philharmonic. The violinists who audition for that particular top-tier U.S. orchestra perform first violin parts during their 'entrance exam.' "Violinists hired by major orchestras usually go directly into the second violin section. Our string sections have rotation, so all second violinists actually end up playing in the firsts at some point during every season – all except the frozen players, who sit on the first two stands of the seconds."[1293] According to the traditions of the profession in the Netherlands, a violinist auditions for a specific section, first or second violin, and if successful, 'wins' a seat in one of those sections. Although the court did not expressly make reference to the difference between the player's functions as a first vs. second violinist, Ms. Pintus adamantly insisted that the fact that she had worked in two sections was a detrimental

[1292] See *Pintus* at r.o. 3.11.
[1293] Former New York Philharmonic concertmaster Glen Dicterow quoted in 2009, available at: https://www.latimes.com/archives/la-xpm-2009-may-17-ca-violins17-story.html

factor with regard to gaining fixed employment. "My lawyer told me that there would be many grey-zone areas related to the court's lack of knowledge concerning a very distinct profession. From the employment point of view, I worked in the orchestra for many years as a violinist, my training was to play the violin certainly not to play the first or second violin. In the context of the law I am wondering, did the section I played in or the chain of sections that I played in matter?"[1294] Yet, objectively the question of equivalence is not based on training: 'first' and 'second' violinists in a professional context receive the same training. The difference in positions as reflected upon above is in the score, the musical parts played. And the real elephant in the room is the fact that to gain any permanent position in a professional orchestra, a musician must make the grade at auditions and pass tenure hurdles successfully.

12.9.1 'Gelijkwaardige functie': defining equivalent positions to determine equal pay

Under the legal principle 'equal work=equal pay' enshrined in Dutch legislation and many pieces of jurisprudence, the *Agfa* case,[1295] and most particularly, *Parallel Entry/KLM* deserve mention.[1296] Although the latter case regarded differences in seniority benefits between airline flight personnel who worked for KLM City Hopper (KLM's short flight subsidiary company) vs. KLM personnel where the personnel performed exactly the same duties albeit for differing lengths of flight time, a fact that does not bear relevance on the divergences between playing a first violin vs. a second violin part, what is of relevance is the HR's observation, "even if it must be assumed in that employees perform the same work in the same circumstances, without the appearance of any objective justification for a difference in pay, this cannot necessarily lead to the conclusion that these employees should receive equal pay."[1297] It could have been possible to assume that flight personnel performed different tasks within the requirements of their employment at the two companies. Turning to the relationship between good employer practices[1298] and the equal pay-for-equal-work principle that played a role in *Agfa* ten years earlier, the Court held that unequal pay must be tested

[1294] Conversations with Tiziana Pintus.
[1295] *Agfa* HR 8 april 1994 JAR 1994/94.
[1296] *Parallel Entry/KLM* HR 30 januari 2004 JAR 2004/68.
[1297] Ibid., Hoge Raad "ook ingeval op zichzelf moet worden aangenomen dat werknemers gelijke arbeid in gelijke omstandigheden verrichten, zonder dat voor een verschil in beloning een objectieve rechtvaardigingsgrond valt aan te wijzen, kan dit nog niet zonder meer tot de slotsom leiden dat zij een gelijke beloning behoren te krijgen."
[1298] Ibid., in Dutch: "goed werkgeverschap."

against other factors, including the fact that the flight personnel operated under a valid CAO, to determine if the employer was fair. This dalliance to HR cases on 'equal work' might shed light on the strict application of criteria used to determine what constitutes equal work, not to speak of the fact that good employer practice rests upon many criteria.

12.9.2 Secondment by Dutch Substitute Players Foundations (SRNOs)

According to the CAO agreements signed between Dutch orchestras and freelance substitute players, the musicians are not hired by the orchestra, but are employed under agreement with the Dutch Orchestral Substitute Players Foundation (Stichting Remplaçanten Nederlands Orkesten), hereinafter, SRNO. The CAO-Remplaçanten (CAO Substitute Players)[1299] is a framework agreement in which the substitute musician is 'posted' or 'seconded' to one of the Dutch orchestras that is a party to the agreement for a production period.[1300]

Under Dutch law, Article 7:690 DCC provides a definition of the 'secondment agreement.'

> *"A secondment agreement (or temporary employment agency agreement) is an employment agreement under which the employer, within the framework of his business or professional practice, places the employee at the disposal of a third party in order to perform work under supervision and direction of that third party by virtue of an agreement for the provision of services between the third party and the employer."*[1301]

The CAO Substitute Players states: "the musician will be available on the basis of a secondment agreement with one of the orchestras listed in Annex 1."[1302] The contract lists the employer as the SRNO and the employee: "the musician who works temporarily for one of the orchestras listed in Annex 1 as a substitute player."[1303] However, it is debatable as to if the SRNO is an actual temporary employment agency, as it operates solely under the authority of one employer.

Common practice holds that the SRNO 'service' contract is either emailed or given to

[1299] See, *Collectieve Arbeidsovereenkomst*. *Remplaçanten* Nederlandse Orkesten. 1 november 2000 - 31 oktober 2001.
1300 Ibid., Annex 1 (Bijlage 1 in the Dutch CAO) lists the eleven orchestras party to the CAO in 2000.
[1301] Translation by the author.
[1302] Ibid., in the original Dutch, Artikel 1 Definities. Detachering: de ter beschikkingstelling van de werknemer op grond van een detacheringsovereenkomst bij een der in bijlage 1 genoemde orkesten.
[1303] Ibid., "Artikel 1. Definities: Werknemer: de musicus, tijdelijk bij de opdrachtgever werkzaam, met wie de werkgever een arbeidsovereenkomst is aangegaan met het oog op zijn inzet as remplaçant binnen een van de in de bijlage1 genoemde orkesten."

the musician at the first rehearsal, literally 'handed over' by the orchestra's personnel manager. Interestingly, the only contact that the musician has with the SRNO is the contract: every other aspect of the working relationship transpires between the musician and the orchestra. For example, with regard to the work that the freelance substitute player undertakes, all musical matters emanate from the orchestra, not the SRNO. The freelance substitute takes cues from the orchestra's leaders, follows the directions given by the music director (or guest conductor) and works at the rehearsal space and/or concert hall run by the orchestra. In terms of administrative details and in case of a dispute concerning payment, the freelance musician is responsible to take up contact with the orchestra's personnel manager. The SRNO is not in the picture for any of the previously reviewed details concerning the musician's work-related activity. Moreover, and importantly, the SRNOs share the same office space and address as the orchestra.[1304] Thus taking into consideration the fact that the 'work relationship' between the freelancer and the orchestra is literally just that, and not a relationship with the SRNO, it is entirely plausible that a freelance substitute without a substantial knowledge of the ins and outs of CAOs would not realize the complexity of the relationship between the orchestra and its SRNO.

Adding to the complexity of the contractual confusion in the mind of the freelancer is the type of SRNO contracts offered to the musician. Three sorts of contracts, "detacheringsovereenkomst; raamovereenkomst; voorovereenkomst" (secondment agreement; framework agreement; preliminary agreement) are on offer by Dutch orchestras.[1305] The question 'what's in a name?" is germane to contracts that state the general applicability of Art. 7:610 DCC the article states the requirements for an employment contract while calling for an exception to Art. 628 DCC. The contracts contain many of the same clauses, however the difference in nomenclature adds unnecessary confusion in the already complex employment experience of the freelance substitute.

12.10 The court weighs in on *Pintus*

In *Pintus*, the Amsterdam court was adamant in its determination that any reference to the expired CAO carried no legal weight: it had no effect with regard to an employment

[1304] The Stichting Koninklijk Concertgebouw Orkest and its Stichting Remplaçanten share the same address as does, for example, the Netherlands Philharmonic Orchestra and its Stichting Remplaçanten.
[1305] For example, see the author's Voorovereenkomst Remplaçanten *Epilogue: Appendix 22*.

agreement signed at a later date.[1306] Decisively, "the employment contract between the violinist and the Remplaçanten Foundation (the RCO's SRNO) must be qualified as a temporary employment contract."[1307] Therefore the aforementioned Dutch legal provisions found in the secondment articles applied. And, significantly, Article 7:691 DCC 'Termination of a secondment agreement,' which assigns a minimum number of weeks for Art. 7:668a DCC to come into effect, was brought to the fore:

> Article 7:668a shall apply only to a secondment agreement once the employee has performed work for a period of more than 26 weeks.

Was the Amsterdam court correct to characterize Ms. Pintus' employment relationship as an "uitzendovereenkomst:" a temporary employment agreement with a 26-week minimum term? If Ms. Pintus was reckoned to work under an 'uitzendovereenkomst,' it could be argued that the contracting party, the RCO's SRNO acts as an 'uitzendbureau' (recruitment/temp/staffing agency). A rigorous examination of the RCO's SRNO proves that this is not true. The RCO's SRNO does not match any of the standard criteria for a recruitment/temp/staffing agency: a commercial enterprise dedicated to placing job seekers into short- and long-term contracted positions with different establishments. In fact, the SRNO hires the freelance musicians for a particular orchestra but does not engage in any other placement activities common to such agencies. According to the court: "the claim against the Concertgebouworkest foundation was wrongly instituted: although this foundation sometimes functioned as a client and sometimes as an employer up to the year 2000, it has neither been stated nor proven that this foundation concluded successive employment contracts with Pintus within the meaning of Article 7:668a DCC. Therefore, Pintus' claims against the RCO were not admissible. Moving forward, only the legal relationship between Pintus and the Remplaçanten (RCO's SRNO) Foundation will be discussed."[1308] That relationship could never reap the benefit of the permanent employment that Ms. Pintus had hoped for: a SRNO does not conduct auditions for the 'host' orchestra, thus the tradition, or what 'us' musicians refer to as 'the customary law of the orchestra' shapes the relationship.[1309]

[1306] Author's translation, original Dutch: "geen nawerking CAO bij later gesloten arbeidsovereenkomst."
[1307] In the original Dutch, "Echter, de arbeidsovereenkomsten tussen de violiste en de Stichting Remplaçanten moeten gekwalificeerd worden als uitzendovereenkomsten."
[1308] See, *Pintus* at r.o. 3.8 (in Dutch).
[1309] In the middle of a meeting with labor-employment lawyer Pauline Sick (Boontje Advocaten te Amsterdam) to discuss possible outcomes of a Dutch orchestra-related case, she exclaimed "what kind of law do you people (orchestras) follow if you do not adhere to your CAOs?" The author's response: 'orchestral customary law' brought a nod of approval.

12.11 Alternative interpretations to *Pintus*: the potential of priority via Article 17 CAO Remplaçanten

Could Ms. Pintus at least have claimed some sort of advantage to gain admission into the orchestra by way of a priority audition akin to the NYCBOs offer in the *Stoner* and other cases involving regular substitutes? An updated version of the CAO Substitute Players contains an article that offers a freelance substitute musician who intends to audition in the orchestra where he/she substitutes regularly the prerogative to play in the second round.[1310] The requirement for the advantage for a substitute player to pass automatically through the preliminary round is that the musician has to have worked a minimum of 50 days with the orchestra.[1311] In retrospect, had the 2000 version of the CAO contained such a clause, Ms. Pintus and her legal advisors would have been able to deduce clearly that if a 'frequent substitute' could gain priority to compete in a second round audition under a provision within the collective bargaining agreement, it would be logical to assume that the audition, and not the frequency of freelance 'chain' employment was the actual prerequisite for permanent employment.

12.11.1 The role played by intention on the part of the employer

Another issue important to a correct reading of the *Pintus* case relates to the intention of the employer. Was there any form of intent on the part of the RCO, or its subsidiary the SRNO to offer permanent work to Ms. Pintus? Or, for that matter, does any highly specialized professional organization with defined points of entry (the audition; the trial period) intend to hire a freelance substitute as a permanent member? Could Ms. Pintus rely on "stilzwijgend voortzetting' (tacit continuation) of her numerous contracts as a substitute violinist in the RCO? Employers and certainly the Dutch courts are cautious about the application of tacit continuation in the context of a service contract.[1312] Ruling in *Emergis*, the HR held that the employer cannot be held accountable to offer an employee a permanent contract without evidence of an "explicit expression" to do so.[1313]

12.11.2 The role of the indispensables: the flexibele schil

As several studies on orchestral organizations in the Netherlands and elsewhere corroborate, orchestras rely on a percentage of players in the 'flexibele schil,' a flexible,

[1310] COLLECTIEVEARBEIDSOVEREENKOMST REMPLAÇANTEN NEDERLANDSEORKESTEN 1 februari 2019 tot en met 31 maart 2020, Artikel 17, p. 12. Available in Dutch at: https://www.sfpk.nl/wp-content/uploads/2019/05/cao-remplacanten-2019.pdf
[1311] Ibid.,
[1312] See, ECLI:NL:HR:2007:BA6755 JAR 2007/284, Hoge Raad, 19-10-2007/ C05/333HR.
[1313] See Evert Verhulp's cogent commentary (in Dutch) in *JAR-Verklaard* 14 oktober 2006 pp. 3-4.

non-core workforce who are 'cost efficient' in comparison to the regular contracted players (an average of €209 per service for regular contracted players vs. €130 per service for freelancers).[1314] Once again it should be emphasized that freelance substitutes, whether categorized as associates, deputies, extras, or regular subs are vital to the very existence of an orchestra. "Without a core of reliable substitutes, the show often can't go on."[1315] The tipping point in an orchestra between the percentage of core member players and substitutes is critical in terms of the orchestra's character, its musical personality, and of course, its sound. "An orchestra is a living, breathing organism. It must be able to balance between artistic goals and efficiency: even the finest freelancers cannot recreate the sound that the core has built over a time. To outsiders, we may sound incredible no matter who is playing, however there is a palpable difference to those of us who really know, and that is what makes each orchestra unique. The crucial issue is that on the one hand you can't keep your traditions with a large complement of freelancers, but on the other hand, no orchestra can survive without them."[1316]

Ms. Pintus opined that a part of the problem concerning her employment in the RCO could be attributed to the role played by the orchestra's personnel manager (orkestinspecteur in Dutch). "Their job is to keep the peace and keep all the members of the orchestra quiet, certainly not easy in a group full of vocal egos! No ruffled feathers, if possible so if you are a substitute player and stand up for your rights, beware. Theo (ed. Theo Berkhout, personnel manager RCO, for almost 50 years) told me that I was 'out' because the concertmasters changed the list of approved players. From my direct conversation with one of the RCO's leaders, I learned that this was simply not the truth."[1317]

In retrospect, Ms. Pintus expressed mixed feelings concerning her litigation experiment. Pointing out the amount of time, energy, and of course expense involved in bringing the case to court, she noted that the frustration factor of 'winning' at first instance but ultimately 'coming home with very empty hands' took its toll. Her reminiscences bear similarity to the observations of U.S.-based orchestral musicians who attempted

[1314] See, for example, the Berenschot study, *Naar nieuwe prestatiemodellen voor orkesten*, *supra* at fn. 750 that took a conservative estimate of 8% and recommended an increase based on the statistic that the average personnel costs for permanent members were EUR 209 per service and the average cost of a freelance player, € 130 per service. Salaries can be found in *Epilogue: Appendix 3*.
[1315] Conversations with Richard Brown, Houston based percussionist (Professor of Percussion, Rice Shepherd School of Music. Contractor and personnel manager Grand Teton Music Festival; contractor for diverse ensembles in Houston and New York.
[1316] Conversations with Wim van Loon, former personnel manager Nederlands Kamerorkest (Netherlands Chamber Orchestra).
[1317] Ibid.,

to gain resolution in cases ranging from age discrimination to freelance equality. "It was not remuneration: it was the desire to stand up for my rights that kept me going even when I realized that the 'system' might not have been ready for a case such as mine. Perhaps I should have gained some sense of satisfaction from the fact that the Amsterdam court agreed with many of my claims, but at the end of the day, I did not gain a position in the orchestra who found me good enough to work continuously."[1318] Despite those observations, Ms. Pintus registered no major regrets concerning her initial decision to assert her rights. The litigation did have a negative impact on her subsequent freelance employment not only at the RCO but, "just after the litigation, several other orchestras were afraid that I would 'make trouble' and did not hire me as usual, fortunately the situation slowly improved."[1319] Disappointed by the final outcome of the litigation, Ms. Pintus still feels strongly that by making a statement, focusing on the lack of clarity that defines the freelance substitutes in contrast to the stability enjoyed by their orchestral stand partners was of paramount importance.

Reactions on the part of colleagues, both within the RCO and fellow orchestral freelancers, were mixed. "While many colleagues supported my case telling me that they were proud that one of their ranks actually stood up to the 'giant' employer, an equal number of colleagues felt that I should not have attempted to fight for my rights. And some employers were afraid to hire me, they put standing up for what is right into the category of 'troublemaking.'"[1320] Opting for an alternative to dwelling on the past, Ms. Pintus has developed several additional career paths involving music and coaching. She passionately supports a new view as to how to solve the pressing issues of precarity regarding orchestral freelancers in the Netherlands by advocating for the establishment of a central freelance consortium of highly qualified musicians with a strict set of minimum tariffs for freelancers who work as substitutes countrywide, which could alleviate some of the vulnerability within the sector.

12.12 Post Pintus updates: exceptions to the chain of fixed-term employment agreements

The importance of the Amsterdam Court of Appeal's holding in *Pintus* paragraph 3.9 bears repetition, as it paved the way to a Ministerial exception:

[1318] Conversations with Tiziana Pintus. References to U.S. comments move beyond the cases reviewed in this *movement* to include the *Bock*, *Rosato,* and *Wetherill* cases discussed in *Back in the USA*.
[1319] Ibid.,
[1320] Ibid.,

> *"In so far as the Remplaçanten Foundation invokes the exception to Art. 668a DCC referenced in Art. 691(1) DCC the Court of Appeal is of the opinion that the employment contracts between Pintus and the Remplaçanten Foundation are a temporary employment contract, to which Article 691 DCC applies. Pursuant to Article 691 (1) of the Dutch Civil Code, Article 668a DCC applies to these employment contracts only if Pintus has worked for 26 weeks. Pursuant to the fourth paragraph, the calculation of the 26-week period includes periods in which work is performed that succeed each other at intervals of less than one year. On the basis of the submitted work agreements, employment and assignment agreements, the Court found that in the period from 1995 to 12 March 2002 Pintus performed more than 26 weeks of work without interruption of more than one year, so that the Remplaçanten Foundation could not be granted the exception of Article 691 DCC."*[1321]

Of special relevance to the application of the chain of fixed-term agreements and its applicability to orchestral substitutes, the Ministerial Regulation set the stage to change the treatment of specific groups of 'special' employees regarding the 'chain of fixed-term employment agreements found in Article 7:668a (8) Book 7 DCC.[1322]

> *"By collective agreement or by special arrangement on behalf of a competent administrative body, this article can be declared inapplicable for certain positions in a specific industry* **if** *the Minister of Social Affairs and Employment has designated an exception for these functions by ministerial regulation. This exception is necessary due to the intrinsic nature of the industry. Thus, it is necessary to perform the work solely on the basis of fixed-term employment contracts, not employment contracts specified as temporary employment contracts referred to in Article 690."*[1323]

The Regulation grants an exception to contracted football (European football, hence, soccer) professionals, and importantly for the scope of this research, to various categories of performers and employees in the cultural sector. *Section sub e.* reads in relevant part: 'the following are designated as positions referred to in Art. 668a(8)(e) Book 7 DCC: substitute players employed by the SRNO or the Dutch Broadcasting Music Center."[1324] How the exception will play out at the orchestral work place remains to be seen, as many freelance substitutes share the concern "although one might think that we gain security through an exception, we fear that our employers, the orchestras could well prefer to switch between freelancers in the large pool of available players than stay true to a core of reliable, long-term players."[1325] A freelance substitute player's

[1321] Author's translation, *Pintus* r.o. 3.9
[1322] Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 22 december 2016 tot wijziging van de Regeling ketenbepaling bijzondere functies Staatscourant 2017, 132, in force the day following publication, January 2, 2017. Text, in Dutch available at: https://zoek.officielebekendmakingen.nl/stcrt-2017-132.html
[1323] Author's translation Art. 7:668 DCC para. 8.
[1324] In Dutch: "remplaçant in dienst bij de door de Nederlandse orkesten opgerichte Stichtingen Remplaçanten of het Muziekcentrum van de Omroep."
[1325] Conversations with freelance substitute violinist Gideon Nelissen.

fear is reinforced by statements made by an orchestra manager who reflected, "this puts us in what might become a difficult place in terms of decision-making as to who we hire and for how long, the personnel issues are tricky to begin with and do not seem to find resolution through legislation."[1326]

12.12.1 Changes in Dutch legislation: from the WWZ to the WAB

While the 'chain' maximums have changed over the years in terms of the intervals between contracts and cumulative periods, the crux of the chain rule principle has remained the same. The 3/3/3 rule (consult, Article 7:668a DCC *The chain of fixed-term employment agreements*) that activates the chain rule after three consecutive contracts was superseded by the 3/2/6 rule in the *Wet werk en Zekerheid* (WWZ) 2015,[1327] where the Dutch legislator limited the possibility to extend the chain rule to six contracts within a maximum of four years.[1328] The WWZ was superseded by the *Wet Arbeid in Balans* (WAB) [the Labor Market in Balance Act] in effect on 1 January 2020. U.S. legal pundits comment critically on the slow-moving pace of reform regarding legislation for the self-employed. [1329] To juxtapose to the Netherlands, criticism might arise that legislative change in the lowlands is fast and furious.

Although both pieces of legislation disclose Dutch law makers' admirable intention to mitigate employment rules for flex workers in an attempt to level the employment playing field between fixed term contracts and permanent employment, implementation is problematic, as cases involving freelance substitute musicians in orchestras illustrate. According to legal advisors active at the Dutch ministerial level and parliamentarians,[1330] the WAB legislation applies to freelance substitute musicians in the Dutch subsidized (BIS) orchestras.[1331] Thus, the WAB is directly linked to the obligation for Dutch BIS orchestras to apply the rates and employment conditions

[1326] Conversations with Roland Kieft.
[1327] *Wet werk en zekerheid*, Stb. 2014, 216; entry into force by Ministerial Decree, Stb. 2014, 274 and Verzamelwet SZW 2015, Stb. 2014, 504 amending WWZ; entry into force through Ministerial Decree, Stb. 2014, 516
[1328] Kamerstukken II 2013/14, 33818 nr. 2 p. 12 (Memorie van Toelichting).
[1329] Criticism centered on the significant amount of time it has taken to implement the 2008 Directive 2008/104/ EG on temporary agency work. See, for example, F.B.J. Grapperhaus "A twist of the equality logic: The directive on working conditions for temporary agency workers and Dutch law" 2010 p. 406-413; and M. Hennevelt, M. Louisse & W. Bijveld. "Nederland en gelijke bezoldiging: in lijn met de Uitzendrichtlijn?" 2011 p. 58.
[1330] Notably Corinne Ellemeet (Groen Links) Green Party and Lodewijk Asscher (PvDA) Labor Party have shown particular interest in the plight of self-employed musicians, see, https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vkjapn1asgxu
[1331] Platform voor Freelance Musici (PvFM) discussions with advocates, members of parliament and several relevant ministries led to this conclusion shared with members of the platform on 29 October 2019. Names have been omitted as the discussions are in a progressive stage.

(both individually and collectively) afforded to contracted permanently employed musicians to freelancers. The challenges that faces the sector embrace questions such as: how do you translate the terms and conditions of employment into a fair rate of remuneration? Who counts among the ranks of orchestral freelancers, all performers or those who play a certain percentage (or number) of concerts per season? What sanctions would be placed on orchestras that do not follow the WAB stipulations? And importantly pre-WAB interviews with orchestra managers brought evidence of skepticism concerning the receipt of funds to equalize pay for freelancers at a time when structural subsidies have diminished incrementally.

12.13 A lower Dutch court's attempt to categorize a freelance orchestral musician

In a 2016 case litigated at a court in the Dutch province of Gelderland, a freelance violinist (hereinafter, the violinist) disputed her tax status arguing that as a self -employed musician, she had the right to receive the tax deductions for the self-employed.[1332] Considering the CJEU's seminal *Allonby* judgment previously mentioned in *En Route to the FNV KIEM case*, a national tax authority decision would not affect her status as a 'worker' under EU law if she could prove that she worked under the supervision and direction of an employer, had no freedom with regard to the choice of the time or location related to the employment, and did not hold the option to choose the content of the work.[1333] In terms of employment history, the violinist had been employed by four regional Dutch orchestras under short-term contracts as a self-employed person under the aegis of the SRNO prior to the cuts and subsequent mergers between several of her employer-orchestras. Since 2000, she had earned between €5,000 and €22,000 as a freelance substitute, an amount significantly below the national median income (in Dutch *modaal inkomen*). In addition, she netted marginal additional revenue from private teaching (approximately €176 in 2010).

In order to prove her status as a self-employed entrepreneur, the violinist was required to meet the cumulative criteria established in Dutch law and jurisprudence concerning entrepreneurship.[1334] Similar to factors that the U.S. courts relied upon in cases such as *Juilliard* and *Lancaster* discussed in *Back in the USA*, the Gelderland court took into account the way in which her employment was carried out with particular focus

1332 See, Rechtbank Gelderland 24 May 2016, 15/3643 and 15/4974 ECLI:NL:RBGL:2016:2699.
1333 See, *Allonby, supra* at fn. 1110 at paras. 71-72.
1334 See, *Wet inkomstenbelasting* 2001 (Income Tax Law) Art. 2.14 para. 1.

on direction and subordination, as well as the extent of purported 'entrepreneurial risk.' To counter the tax authorities' assessment and to benefit from a tax-deduction for self-employed workers, the violinist would have had to prove that there was a close connection between her orchestral employment and her other entrepreneurial activities.[1335] Further, she would have had to establish that there was some scope for negotiation concerning the amount of payment received from her orchestral employers. Freelancers who work as substitutes in Dutch orchestras are not permitted to provide for replacements in the event of illness, as in the deputy system prevalent in the U.K. outlined earlier; the violinist's freedom to operate as an entrepreneur at the orchestra was thus curtailed.

The violinist asserted several claims to counter the findings of the tax authorities to bolster her assertion that she was entitled to self-employed tax deductions. Firstly, she brought forward proof of multiple employers, as she had moved between four orchestras in the capacity of freelancer since the early 2000s. Secondly, she maintained that her activities as an orchestral freelancer were entrepreneurial in nature, as she had to go out and seek work with different employers. Furthermore, she argued that she operated as a 'free practitioner.' Some of her contracts were 'successive' contracts and the totality of her employment with orchestras was short term in duration (projects running from 3 to 15 days). The violinist questioned the legitimacy of paying taxes for benefits that she would never accrue.

Under the orchestra's CAO, permanent members received holiday pay, and a thirteenth month of salary each year that was not paid out to freelancers. Additionally, freelancers did not receive monetary compensation for the prescribed orchestral concert apparel, as opposed to the permanent members of the orchestra whose yearly clothing stipend is part of their CAO-determined package of benefits. As a freelance substitute, the violinist asserted that she had to maintain an unusually high level of performance, and actively communicate with personnel managers to insure 'call backs.' "It's as if we have to always prove ourselves 'double' - that we are better than best in order to gain a

[1335] Ibid, at paragraph 18, "Inkomsten welke een ondernemer al dan niet in dienstbetrekking heeft genoten uit werkzaamheden voor derden, kunnen aan de onderneming worden toegerekend en tot de winst uit onderneming worden gerekend ingeval tussen die werkzaamheden en de ondernemingsactiviteiten een nauwe samenhang bestaat, en die werkzaamheden binnen het geheel van de ondernemingsactiviteiten een ondergeschikte plaats innemen." Author's translation: 'income received by a self-employed individual entrepreneur from activities performed for third parties, can be attributed to the enterprise and can be counted as part of the enterprise assets, if there is a close connection between those activities and the activities of the enterprise, and if those activities occupy a subordinate position within the overall activities of the enterprise.'

small amount of job security."[1336] In her view, the nature of her employment as a freelance section violinist allowed for a modicum of independence in her work. Even though the conductor and, as the *FAQs* detailed, the principals and section leaders exert a significant level of control over 'their' sections, the individual player is free to express his/herself within the boundaries of the musical score. "The métier takes account of freedom within discipline, the bar line, the phrase, the movement, and the score set limits along with the conductor's cues. A good orchestral player whether substitute or tenured performs within the boundaries of directions given and the magical musical freedom of expression."[1337] Nonetheless, this argument wears thin within the confines of a strict interpretation of subordination/direction developed in the case law of both jurisdictions studied; there is always room for 'personal input' in the act of music-making.

The Gelderland court did not bow to the tax authorities or, for that matter to the violinist's claims. In their estimation, she did not present sufficient proof of bearing the risks associated with a self-employed entrepreneurial status. Had she shown evidence of a broader client base, and had she engaged in a greater number of musical projects, for example a range of collaborative ensemble projects with other musicians, she might have been able to sustain a claim of self-employment in an entrepreneurial setting. Finally, and crucially, the court noted that her written contracts were employment contracts covered by collective agreements, any argument to the contrary was moot: "freelance orchestral work is regulated by CAO."[1338]

The violinist's interpretation of her work situation as a freelancer was met with sympathetic responses from fellow musicians in the Netherlands who find themselves facing increasing difficulties in eking out a living. "There are so many reasons why: the shrinking amount of work thanks to the series of reorganizations, the uncertainty in terms of status what with changes in laws and interpretations of contracts and the lack of enforcement for anything that resembles fair practice with regard to payment and our lack of power to negotiate terms. Will the courts help us, will new laws be enforced? Will our status improve if it is explained precisely? We can continue to publicize our problems but finding the path to solutions is more difficult especially when the employers fear that if they hire us as self-employed musicians, they will be paying us a 'disguised salary' as we are not self-employed but. . . false self-employed. The employers

[1336] Comment by Irene Nas, freelance violinist and active member Platform voor Freelance Musici (PvFM).
[1337] Conversations with Nikolaj Szeps-Znaider, internationally renowned violinist and conductor.
[1338] Author's translation: "Ter zake van de remplacantenwerkzaamheden zijn tevens CAO's van toepassing." Rechtbank Gelderland 24 May 2016, 15/3643 and 15/4974 ECLI:NL:RBGL:2016:2699, at paragraph 16.

are not only confused but afraid."[1339] A guide to the perplexed concerning the status of freelancers in the context of the Dutch, or for that matter U.S. tax authorities, has not yet entered into a final stage as real-life situations bear witness to contradictions. Too good to be true for relevance, the Dutch-based musical ensemble *Douane Harmonie* (literally, the Custom's Wind and Brass Band)[1340] employs freelancer musicians to supplement their amateur ensemble. The band pays its freelancers as self-employed musicians, permitting them to send invoices for payment and travel expenses, whereas all subsidized Dutch orchestras, again with one notable exception[1341] prohibit invoicing on the part of freelance substitutes.

Recalling the seminal *FNV KIEM* case[1342] discussed at length in *En Route to the FNV KIEM case*, the ECJ held that freelance substitute musicians in an orchestra are in fact false self-employed workers, and, as such entitled to benefit from collective bargaining, a legitimate 'social exception' to the restrictions of competition law. Before closing this *movement* with more questions concerning freelance substitutes' status than firm answers, another Dutch-based case deserves scrutiny as it involves a combi-issue, the possibility of a noxious mix that brings an assortment of discriminatory patterns to the fore emphasizing the ever-increasing precarity faced by musicians.

12.14 Audition practices and disguised incompatibility: orchestral musicians' showtime colleagues

Turning to litigation in which a Dutch musician took on a powerful employer is noteworthy as it is one of a small number of cases that reached the courts, in comparison to an extensive U.S.-based case load.

> *"I am not the first, several colleagues met the same fate."*[1343]

A keyboard player in his mid-40s, Bernard Goovaerts enjoyed a busy career performing in the musical ensembles associated with the successful long-run musical productions mounted by Dutch entrepreneur Joop van den Ende's internationally acclaimed production company, Stage Entertainment. Importantly, Stage Entertainment holds

[1339] Conversations with Caroline Cartens, a founding member of the Platform voor Freelance Musici (PvFM).
[1340] See, the ensemble's website at: http://www.douaneharmonie.nl/orkest/orkest.html
[1341] Het Ballet Orkest/Dutch Ballet Orchestra is the exception to the rule and as of 2019 still allowed for invoicing on the part of substitute players. "If we would be forced to do otherwise, I do not know how we could survive financially" according to the orchestra's director, Piet van Gennip.
[1342] *FNV Kunsten Informatie en Media v The State of the* Netherlands at the Hague Court of Appeal, 1 July 2015, 343076/HA ZA 09-2395.
[1343] Mr. Goovaerts quoted in court records, in Dutch: "Ik ben de eerste niet, diverse collega's trof hetzelfde lot."

a veritable monopoly on musical productions in the Netherlands and exports its acclaimed theatricals worldwide.[1344] After performing regularly for over two decades, Mr. Goovaerts was not hired (rehired) to perform in a musical, according to his assertions due to discriminatory behavior related to Stage Entertainment's audition procedures. Further, and interestingly in terms of a link to U.S. cases involving discrimination found in other *movements*, Mr. Goovaerts claimed that Stage Entertainment was engaging in a recognizable pattern of questionable employer behavior as it systematically 'traded in' its permanent hires for flex workers.[1345] Stage Entertainment disputed these assertions avowing that the employment contract was terminated due to a 'seriously compromised' relationship between Mr. Goovaerts and certain production directors. Part of the case revolved around Stage Entertainment's legally unsound dismissal application that impacted Mr. Goovaerts benefits allocated by the Dutch unemployment regulation agency (UWV). The specific details of this aspect of the case have been omitted as they do not relate directly to what the court considered to be 'culpable actions by the employer with regard to the method of assessing employees during auditions.'[1346]

As an experienced show-time keyboard professional, Mr. Goovaerts was used to taking part in the normal procedures to gain a position in Stage Entertainment's many musicals. Conventionally, a 'musical supervisor' listens to auditions and choses his/her preferred musician from amongst the candidates invited to audition. According to veteran 'show' musicians, these lists are often 'closed lists' where a few are invited, and more often than not, excellent performance in one show, especially a musical with a 'long run' (i.e., a great number of performances) guarantees employment in subsequent shows.[1347] This description holds true for Mr. Goovaerts' employment track record as a preferred keyboard player for Stage Entertainment for over twenty years.

Welcome to a new age of music supervisors, "young cats replace the older experienced musicians and need to get their 'own' people on the payroll, sometimes at the expense of really great players."[1348] Following company rules, Mr. Goovaerts took the audition to take part in *The Lion King,* a musical blockbuster based on the Disney hit film, scheduled for a long run in the Netherlands. To his utter amazement and dismay, the

[1344] On its website, Stage Entertainment provides details concerning the eight theaters it operates and its multiple national and international productions https://www.stage-entertainment.nl/shows/musical/
[1345] See https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2018:2361 for a reprint of the case, in Dutch.
[1346] Ibid., r.o. 5.6
[1347] Conversations with New York based Broadway musicians and Dutch-based *Soldaat van Oranje* musicians.
[1348] Conversations with Richard Feves, freelance bassist Los Angeles studios.

musical supervisor rejected him summarily stating that his style was "jazzy" and not "groove."[1349] Goovaerts took the brave step to sue for reinstatement and/or damages. The Hague court reasoned that the employer was free to choose musicians at will and observed that there is a substantial measure of subjectivity in that decision-making process. However, the court disputed the fairness of the process observing: "this method of selection, including a subjective assessment (certainly if it is very brief as in the present case), deprives the employee of the possibility to prepare for and/or improve if necessary, which puts him in a disadvantageous and undesirable position**."**[1350] Importantly for the outcome, the court found that an audition conducted in such a one-sided manner was directly related to the denouement of the employment relationship between Mr. Goovaerts and Stage Entertainment. Of relevance, the court stated:

> *"The manner in which, however, should be such that the result of an audition can be measured in a certain way and that feedback and comparison of the measured factors is possible. . .It is not incomprehensible that the employee has been hurt and disappointed. The written statements submitted in that context are also very short, not specific and do not provide any clarity regarding the rejection. It was precisely that short rejection based on subjective elements that formed the basis for the disturbed relationship, which is largely attributable to the employer."*[1351]

Taking Mr. Goovaerts' distinguished and unusually long track-record as a Stage Entertainment employee into consideration, as well as his diminished chances, or better put, non-existent chances for further employment, the court ordered Stage Entertainment to pay a transition allowance, 'an equitable remuneration for gravely culpable actions'[1352] totaling just under €80,000.

12.15 The HR re-examines the nature of the chain

In 2016, the HR tackled the intricacies of a violin docent's employment relationship with the Amsterdam-based Leerorkest,[1353] an organization that organizes music lessons and hires music pedagogues to teach at schools in low-income areas in and around Amsterdam. Based on facts presented to both the Amsterdam Court of First Instance and the Hague Court of Appeals, a violin docent (although the HR case presents the

[1349] In Dutch, see, *Goovaerts* at r.o. 5.12.
[1350] Ibid.,
[1351] Ibid., r.o. 5.13.
[1352] In the original Dutch: "Het musicalbedrijf heeft ernstig verwijtbaar gehandeld."
[1353] *X v Leerorkest* ECLI:NL:HR: 2016:2757 2 december 2016.

plaintiff as 'X', lower courts identified the plaintiff by name - here, his initials, NS, will identify the docent). NS taught for the Leerorkest under a temporary employment contract with payroll agency Tentoo from 2007-2011. Thereafter, NS performed the same duties under fixed-term employment contracts directly with the Leerorkest before his employment was discontinued in July 2012.

Key to the HR's decision was a consideration of the nature of NS's employment, and the determination that the payroll agency contracts fully qualified as temporary employment contracts. NS had in effect performed the same intrinsic work for 'successive employers.'

> *"3.5.4 [. . .] The latter requirement of successive employership is generally met if, on the one hand, the continued or successive contract requires essentially the same skills and responsibilities as the previous contract and, on the other hand, between the new employer and the previous employer there are such ties that the insight obtained by the latter based on his experience with the employee in his qualities and suitability must also reasonably be attributed to the new employer)."*[1354]

NS argued that since he had first performed his teaching duties under an employment contract for an indefinite time period, followed by fixed-term contracts with the same employer, the Leerorkest had not taken the appropriate measures to legally terminate his contract in 2012. The last of these contracts could only be terminated had the Leerorkest given notice under the provisions of Art.7:667 (5) DCC, the codification of what is commonly referred to in Dutch jurisprudence as the Ragetlie rule.[1355]

12.16 Across the puddle: an audition-related case in London

An interesting footnote in the form of an audition-related case offers an exclusionary judicial perspective on the status of freelance substitute orchestral musicians. Aside from the famed BBC orchestras that operate under a traditional top-down management model, many British orchestras and the four major London-based orchestras are self-governing, or in the parlance of labor activists, Worker-Driven Self Enterprises

[1354] In the original Dutch:
"3.5.4 (…) Aan die laatste eis van opvolgend werkgeverschap is in de regel voldaan indien enerzijds de voortgezette dan wel opvolgende overeenkomst wezenlijk dezelfde vaardigheden en verantwoordelijkheden eist als de vorige overeenkomst, en anderzijds tussen de nieuwe werkgever en de vorige werkgever zodanige banden bestaan dat het door de laatste op grond van zijn ervaringen met de werknemer verkregen inzicht in diens hoedanigheden en geschiktheid in redelijkheid ook moet worden toegerekend aan de nieuwe werkgever (vgl. HR 11 mei 2012, ECLI:NL:HR:2012:BV9603, NJ 2013/171)."

[1355] The Ragetlie-rule takes its name from a 1986 HR case: HR 4 april 1986, ECLI:NL:HR:AB8727 NJ 1987/678 (*Ragetlie/SLM*). If a fixed-term employment contract follows an employment contract for an indefinite period of time, with the same employer and for the same work, the Ragetlie-rule, comes into play.

(WDSEs).[1356] In a case brought by a freelancer employed by the London Philharmonic Orchestra (LPO), the two questions to the court were: how should the employment status of freelancers playing in the orchestra be defined, and secondly, should the freelancers be able to avail themselves of the benefits accorded to regular members? In *Addison v London Philharmonic Orchestra Ltd.,*[1357] the court underscored that the LPO operated as a cooperative under the control of its members. Furthermore, the musician members as well as their 'deputies' and substitutes were free to take other sorts of music-related gigs including performances in other orchestras, if their LPO schedules permitted. Consequently, the entire core of LPO musicians, both freelancers and permanent members, were deemed to fall under the category of independent workers. Even though *Addison et al*, had to subordinate themselves to principal players and conductors and show the requisite discipline to perform their musical tasks, evidence of subordination and control, the leading factor was that the freelance musicians could not be equated to employees under the control of an orchestra in a situation in which the orchestra operated under the musicians' own collective authority. Thus, because of its self-operative, collective structure, the LPO's freelancers could not gain the rights they would have been entitled to in a traditional, top-down managed orchestra.

Ludwig, a Dutch based award-winning orchestral collective (Grammy award 2018) founded in the wake of the 2012 culture cuts in the Netherlands could be classified as a cooperative orchestral venture along the lines of the London orchestra. Is it possible to posit that at least hypothetically, questions similar to those raised in *Addison* could arise? Conversations with several *Ludwig* musicians quashed that hypothesis. Firstly, *Ludwig* is project-based ensemble with a focus on innovative programming presented in several high-profile tours on a yearly basis. *Ludwig* offers a select few musicians well-remunerated contracts for very specific, short-term concert series. Secondly, continuity in terms of membership is not guaranteed contractually, as the turnover in particular sections within the ensemble indicates. Discontent on the part of *Ludwig* musicians who were not chosen to 'return' for projects has not led to any form of legal action. To quote a former *Ludwig* regular (on deep background): "It was an honor to participate in such an exciting and celebrated group. To call attention to what could be perceived of as more of a rejection than a dismissal would undoubtedly have a negative effect on my future freelance work and furthermore, those who are not 'asked

[1356] For an excellent appraisal of the inner workings of the London orchestras see, C.P. Mulder's "The London Symphony Orchestra: Still Afloat" 2015.
[1357] *Addison v London Philharmonic Orchestra Ltd* [1981] ICR 261

to return' never receive honest answers as to why. So, at the end of the day, we take our losses and look elsewhere for work."

12.17 An urgent query from the RCO

Closing paragraphs in a *movement* replete with 'sturm und drang'[1358] as freelance musicians' quest for a level playing field continues takes a closer look as to how the latest twist in terms of legislative change could be interpreted in the Netherlands under the *Wet Arbeidsmarkt in Balans* (WAB) [the Labor Market in Balance Act].

It was a given that the introduction of legislation intended to equalize the terms of employment between freelance substitutes and permanent musicians would impact orchestral finances (WAB 1 January 2020). Calling for clarification, the RCO's directors[1359] supported by the director of the Rotterdam Philharmonic, dispatched an urgent query to Wouter Koolmees, the Dutch Minister of Social Affairs and Employment. [1360] Fearful of a significant rise in the cost of hiring substitute players, the RCO argued in favor of a distinction between the employment relationship of a permanent musician and a substitute player, showing a complete disregard of jurisprudence and legislation that reinforces the notion of orchestral substitutes as false self-employed: musicians who perform the same duties as their regularly employed colleagues.

Minister Koolmees alluded to the *Pintus* case in his answer to the question: 'what are the consequences of the WAB in specific relation to the employment regime of substitute players hired at the RCO?' In a sparsely researched response, Koolmees reflected that in order to answer the question properly, the RCO would have to determine whether the orchestra and/or its Foundation of Freelancers (Stichting Remplaçanten, earlier referred to as the RCO SRNO) engaged in payrolling. Explaining the two requirements to establish payrolling under the law, he underlined:

> *"Firstly, to satisfy the payrolling requirement, the formal employer cannot engage in allocation in which selection and hiring is undertaken by the 'hirer (employer). You state in your letter that the recruitment and selection of substitute players are carried out by the Concertgebouw Orchestra (the hirer). The second requirement for payrolling is that an exclusive provision exists that relates directly to the employee (the substitute musician) and the*

[1358] *Sturm und drang* (translated quite literally as 'storm and stress') refers to the proto-Romantic movement in both music and literature in the mid 18th century.
[1359] The RCO submitted the letter on 18 October 2019 and received an answer from Minister Koolmees (translated in part above) on 11 December 2019. The two documents are available in the *Epilogue: Appendices 23* and *24*, respectively.
[1360] The RCO letter was forwarded to the author for interpretation and commentary.

> *Concertgebouw Orchestra. Please note that for an assessment of this exclusive provision, the fact that the substitute musician engages in other work not related to the Foundation and the Concertgebouw Orchestra is of no relevance to this determination. What is key to make a proper determination is the question of whether the RCO's Foundation (SRNO) renders the 'employee' exclusively available to the Concertgebouw Orchestra or whether it offers the services of the 'employee' to other employers to work under different supervision. If both conditions are met, the conditions of payrolling are satisfied."*[1361]

The RCO stated that it is the orchestra itself, and not the SRNO that engages in recruiting and hiring. According to common orchestral practice discussed earlier in this enquiry, the 'custom' at work mandates that certain key musicians, often principal players recommend substitute players. And, sometimes, orchestras hire substitutes from lists of those who have 'almost' succeeded to win a previous audition. "The selection of players should be based on musicianship and 'fit' that can only be determined by musicians, not a Foundation."[1362] The RCO emphasized that its SRNO could not be construed as a clearinghouse for musicians; it does not engage in offering services of substitutes/freelancers to other orchestras. Rather, the SRNO is "an intermediary between the orchestral foundation and the part-time players."[1363] With regard to the second factor, 'exclusivity,' the RCO's SRNO allocated freelance musicians solely to the RCO, an exclusive activity by definition.

To answer the second, crucial question as to whether the RCOs substitute players are entitled to receive the same employment benefits as permanent members of the RCO, the Minister relied on the provisions of the newly enacted WAB legislation.

> *"If payrolling has been established, the WAB legislation will have effect as the law equalizes the position of the freelancer and the regular employee. To quote 'a 'freelance' worker is entitled to the same legal position and employment conditions as employees* ***in the same or equivalent position****s (In Dutch, gelijkwardige functies) who are directly employed by the hirer."*[1364]

Had we come full circle back to the slippery sands of the *Pintus* case in which the first violin-second violin functions were never specified, or could we infer that the freelance substitutes are entitled to the same employment conditions as permanent members? Any musician would comment that the fact of the matter is that indeed, a substitute player is required to blend, join in, and play the same notes at the same time etc., Yet if the 'other' requirements that lie within an orchestral CAO are taken

[1361] See text (in Dutch) *Epilogue: Appendix 24*.
[1362] Conversations with Joel Fried, Artistic director, Royal Concertgebouw Orchestra.
[1363] Conversations with Angela Garland.
[1364] See Minister Koolmees' response *Epilogue: Appendix 24*.

into consideration, a 'permanent member' does have to fulfil other requirements related to their membership in the orchestral organization. Musically speaking, reiterating what colleagues noted in discussions of 'orchestral tradition,' the 'long term' expectations associated with a tenured musician's performance requirements point to admittedly subjective yet distinctive requirements within the realm of orchestral musical participation. *Of Rowe and race* alludes to the discriminatory and contentious downside of such observations in the orchestral workplace in the 'Asians cannot be real Vienna Philharmonic members' section.

12.17.1 Determining equivalence: let me count thy many ways

The RCO cast aspersions on the equivalence factor in both voice and deed.[1365] Minister Koolmees opined that the answer to the orchestra's central question rests on a question of determination. Is the substitute's function equivalent to that of a permanent orchestra member? Yet, the Minister did not provide clues as to how this determination should be made in the most equitable manner. Perhaps a clause in the relevant collective bargaining agreement might provide a suitable clue leading to a persuasive answer? Tellingly, while orchestral CAOs, and for that matter U.S. CBAs, offer detailed descriptions of 'leader-principal' positions, no such details are correlated to section/rank-and-file players, and often there are no additional specifics concerning the section musician's job description within the orchestra.[1366]

A brief encapsulation of relevant articles in the RCO's CAO that point to nonequivalence in terms of function follows. Article 7, (instead of CAO the orchestra opts for the term *Artiestiek Regelement*, AR) specifies the length of trial periods, and the manner of assessment that all new employees undergo in order to receive a regular, tenured employment contract. Articles 11 and 12 provide further details concerning the process including an 'improvement trajectory' that can be put in place in the case of nontenured players who might need to develop additional skills on the road to a permanent position. Chapter 6, Article 34 sets forth the employees' obligations to the RCO.[1367] Paragraph (a) speaks of 'maintaining the values of the Orchestra on a high plain' and 'accepting corrections from principals and the concertmaster.' Such specifications are equally valid for both freelance substitutes and orchestral members. The question may

1365 The RCO's claims throughout the *Pintus* case and statements made to the author by several members of the management team off-the-record for publication purposes lend support to this statement.
1366 The RCO's AR (functions as a CAO) see Art. 2, Karakter van de AR states that it is intended as a supplement to the individual contract (see Chapter II Individuele Arbeidsovereenkomst.)
1367 RCO CAO Hoofdstuk 6 Verplichtingen van de werknemer, Art. 34, Algemene verplichtingen

arise as to in what measure a principal and/or concertmaster would give suggestions to a freelance substitute who is not considered to be a 'real' part of the section. Several paragraphs ((e) (f) and (i)) spell out time-related onstage requirements; (6) details the required concert dress. Thus far, the obligations seem to point towards equivalence. And then, paragraphs (h) (i) and (j) highlight differences between a member and an 'outsider.' Paragraph (h) requires the orchestra member to attend auditions and to keep all information concerning these auditions in full confidentiality. Paragraph (i) calls for complete secrecy regarding all matters of importance within the orchestra and will be discussed in greater detail in the context of the RCO's internationally publicized close encounters with *#metoo,* see *Intermezzo: Singing the #metoo classical blues*.[1368]

AR paragraph (j) requires members to attend no more than four orchestra meetings per annum, nonattendance is penalized, and can have negative effect regarding the approval of an orchestral member's request for free days. The aforementioned paragraphs, 'for members only,' outline obligations that go above and beyond performance requirements and could be considered as factors that lead to nonequivalence. Yet, a troublesome feeling sparked by musicians' comments and *FNV KIEM*'s underscore of the 'false self-employed' status of orchestral substitutes -cum-equals to regularly employed musicians clouds the search for resolution. Considering that the real work of an orchestral musician is making music first and foremost, and functioning well as a 'citizen within the orchestra' takes the second place; is there any validity to a point of view that holds that the job of an orchestral musician encompasses more than meets the ear? "A musician is hired to play, not to attend meetings! Of course a 'regular' member of an orchestra has to satisfy other obligations that go beyond performing for example to attend meetings and participate on audition committees, yet the crux of the matter is that a freelancer who joins an orchestra on a project-basis does the same work as the orchestral member at the most important stretches of time: the rehearsals and the concerts."[1369] Whether or not a freelancer is 'a member of the band' in terms of players' not to speak of management's perceptions does not lead to a definite answer.

Turning to a present-day answer to the question as to how the 'chain of employment contracts' works for freelancers in the WAB era, the RCO queried what the effect of payrolling would be regarding the collective labor agreement for freelancers (CAO

[1368] The story relating to the RCO's chief conductor Daniele Gatti's supposed sexual harassment first broke in the *Washington Post* on July 26, 2018 before reaching media outlets worldwide, see: https://www.washingtonpost.com/entertainment/music/assaults-in-dressing-rooms-groping-during-lessons-classical-musicians-reveal-a-profession-rife-with-harassment/2018/07/25/f47617d0-36c8-11e8-acd5-35eac230e514_story.html

[1369] Conversations with Norma Brooks, former associate principal bass RKO and RKF.

Remplaçanten) with special attention paid to the exclusion from the chain provision under Art. 7:668a DCC. Minister Koolmees responded:

> *"With regard to payrolling, derogations from 'three-quarters law' (such as the chain provision) are only possible if such derogations also apply to employees in equivalent positions based on their CAO. To determine whether a CAO derogation is possible, the second question must be answered affirmatively: do the substitute players 'play' an equivalent function in relation to the permanent members of the orchestra? If their function is indeed an equivalent function, the 'chain provision derogation' does not apply to the substitute players.*
>
> **If the position of substitutes is indeed to be seen as a separate function and is therefore not equivalent to that of permanentorchestra members of the Concertgebouw Orchestra, then a derogation in the CAO for substitute players is permissible."**[1370]

No mention as to how to engage in a process of defining equivalence is given.

Referring to an issue that affected the decision in *Pintus*, namely the status of an expired CAO, Minister Koolmees noted that a prerequisite for the exception to the chain provision would be the existence of a valid CAO. Additionally, emphasis was placed on the fact that the exceptions to the chain provision were limited to the specific orchestral employers listed in the *Ministerial Exception* 2015 mentioned above. Specifically, the substitutes hired by the SRNO (Foundation of Substitute Players)[1371] and those hired by the Muziekcentrum van het Omroep (Dutch Broadcasting Music Center, MCO) could be eligible for the special exemption from the chain provisions. As the RCO had not signed a CAO that agreed to the exemption "a substitute player who is directly employed by the Concertgebouw Orchestra is not covered by the current exception." Leaving the door open to a loophole to enable the RCO to rethink the complex situation with relation to hiring freelance substitutes, the Minister offered a helping hand "naturally, parties to the collective agreement may, if desirable, jointly submit a new request." Nonetheless, the question arises: just because the RCO was not a bargaining partner with regard to the CAO Substitute Players as the only mainstream Dutch orchestra to hold this distinction, does this really translate into a total exception for the RCO? An exception as it were, to the exemption?

Despite for this somewhat optimistic offer of succor, several burning questions (the insinuation of a '*brandbrief*' intended) come to mind. For example, does the legislator purposefully leave the definition of a substitute orchestral musician and his/her equivalence to a regularly employed musician open to interpretation by courts or by managers, the unions, and/or panels of experts? Turning to 'payrolling,' Minister

[1370] Author's translation. See, in Dutch, Minister Koolmees' response in the *Epilogue: Appendix 24*.
[1371] See above, SRNO is the acronym for the Stichting Remplaçanten Nederlands Orkesten (Dutch Orchestral Substitute Players Foundation).

Koolmees underlined the importance of 'consultation' with regard to equivalence and took note of the RCOs insistence on non-equivalence arguments.

> *"If there is a question as to the applicability of payrolling,* **consultation will lead to a determination as to what extent the substitutes' work is equivalent to that of a permanent orchestra member.** *Consideration should also be given to the fact that the parties to the CAO 2015 who requested to exempt substitute players from the chain provision delivered a plausible argument that the substitute 'function' can be differentiated from that of the permanent players. The request to exempt substitutes from the chain determination was honored at that time."*[1372]

The question arises, does the legislator define the concept of payrolling, and if so, how? The *Wet Allocatie Arbeidskrachten door intermediairs* (Law on Labor Force Allocation through Intermediaries (WAADI) defines payrolling as a process:

> *"Payrolling: the provision of manpower on the basis of an assignment agreement that has not been concluded for the purpose of matching supply and demand on the labor market for the performance of work under the supervision and management of the client other than by virtue of an employment contract concluded with the latter under the proviso that the party providing the manpower is authorized to provide said manpower to another party only with the client's permission."*[1373]

Traditionally, Dutch-based substitute orchestral musicians were paid for their services in several ways. Some substitute musicians registered as self-employed musicians (zzp'ers). Notably, the musicians hired to perform with Het Ballet Orkest (HBO) invoiced the orchestra for their services thereby benefiting from work-related tax deductions. HBO created a special title for its substitute musicians: 'guest players,' (in Dutch, *gastspelers*) a fictive title without any legal connotation. "Well, maybe this guest label did serve a purpose, we joked about being 'special', not just regular freelancers in an orchestra but HBO guests. More relevant to our freelance lives was the fact that zzp'ers could invoice the HBO."[1374] The trials and tribulations of a guest player who successfully disputed her status at HBO will be revisited in the *Coda: Quo*

[1372] *Staatscourant* 2015, 17972. The text of the *Ministerial Exception* (*Regeling van de Minister van Sociale Zaken en Werkgelegenheid van 24 juni 2015, 2015-0000159867, tot aanwijzing van functies waarvoor de ketenbepaling buiten toepassing wordt verklaard* referred to here can be found in its entirety at: https://zoek.officielebekendmakingen.nl/stcrt-2015-17972.html

[1373] A difficult article to translate indeed, thanks to the gifted Andrew Faughnan for excellent suggestions. In the original Dutch, "d. payrolling: het op basis van een overeenkomst van opdracht, die niet tot stand is gekomen in het kader van het samenbrengen van vraag en aanbod op de arbeidsmarkt, ter beschikking stellen van een arbeidskracht, om onder toezicht en leiding van de opdrachtgever, anders dan krachtens een met deze gesloten arbeidsovereenkomst, arbeid te verrichten, waarbij degene die de arbeidskracht ter beschikking stelt alleen met toestemming van de opdrachtgever bevoegd is deze arbeidskracht aan een ander ter beschikking te stellen."

[1374] Conversations with Dorine Schoon, formerly regular substitute oboist at HBO. Co-founder Platform voor Freelance Musici (PvFM).

Vadis? Many freelance substitute musicians rely on the services of payroll agencies to process their performance fees. Unlike employment agencies/temp agencies (in Dutch, *uitzendbureaus*) that allocate workers to employers, payroll agencies provide salary administration and related services. The EU's Temporary Employment Directive[1375] sought to equalize the position of temporary workers with 'regular' employees, defined in Art. 1 of the directive as:

> *"(c)a worker with a contract of employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction."*[1376]

The most recent amendments to the WAADI, in keeping with WAB obligations marks a corrective attempt to extend equalization to payroll workers and other workers who are not hired specifically as payrollers, as the *Explanatory Memorandum* (*Memorie van Toelichting*, in Dutch) describes.[1377] Such memoranda provide an explanation of the 'state of the law' for U.S. orientated readers, the Explanatory memoranda somewhat comparable to the Restatements, perhaps Restatement 'light' might be more appropriate.[1378] Payrollers are afforded full equal treatment under the provisions of Art. 8 (a) WAADI following its 'source,' Art. 8 that extends its mandate for equal treatment of employees who have not been made available in the context of payrolling.[1379]

Is the exception to the chain provision set forth in the *Ministerial Exception 2015* linked to the concept of "equivalent position" in the sense of Art. 8a WAADI? Is it possible to read a barely concealed attempt at writing legal history between the lines of the Minister's response as his motivation rests partially on a law left unmentioned? The WAADI that stipulates in Art. 8(a):

> *"The payrollers (workers) made available to an employer are entitled to, at the very minimum, the same terms and conditions of employment that apply to employees*

[1375] DIRECTIVE 2008/104/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 November 2008 on temporary agency work. Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:327:0009:0014:EN:PDF

1376 Ibid., at General Provisions, Art. 1.

[1377] Many references to levelling the playing field between payrollers and workers with reference to, inter alia, WAB Art. 8 see pp. 8-9 (Artikel 8. Gelijke behandeling van arbeidskrachten die niet in het kader van payrolling ter beschikking zijn gesteld) can be found in the Explanatory Memorandum, in Dutch. Available at: https://www.rijksoverheid.nl/documenten/kamerstukken/2018/11/07/wetsvoorstel-wet-arbeidsmarkt-in-balans-inclusief-memorie-van-toelichting

[1378] In the U.S., the Restatements of Law are treatises that flesh out general principles of law with regard to specific areas of the law (international law., etc.,) prepared by eminent legal experts; the Explanatory memoranda relate to specific laws.

[1379] In Dutch, WAADI Art 8. Gelijke behandeling van arbeidskrachten die niet in het kader van payrolling ter beschikking zijn gesteld.

working in **equal or equivalent positions** *in the service of the company at which the payroll posting takes place."*[1380]

12.18 A new movement for freelance solidarity

The paucity of litigated cases related to orchestral musicians' employment difficulties in the Netherlands in comparison to the great number of U.S. cases should not lead to the conclusion that such concepts as equivalence or such rights as collective bargaining are not crucial for Dutch orchestral musicians. A newly empowered alliance between the between the musicians' union Kunstenbond and the *Platform voor Freelance Musici* (PvFM) engenders a synergy that has opened the doors to more cases in an attempt to take the litigation route to resolve freelance substitute employment issues. Furthermore, the initial startup alliance between the PvFM and the Kunstenbond led to increases in union membership: PvFM members were encouraged to take advantage of union benefits.

The proper categorization of workers and 'getting to yes' in terms of fair pay fuel the fires of the PvFM. Since its first Facebook invitational, the group has attracted more than 3000 members from the ranks of freelance musicians, ranging from its core cadre of orchestral musicians to music teachers and vocalists. The phenomenon of the 'free concert' as a means to showcase 'new talent' became a *cause célèbre* and was quickly debunked at the famed Concertgebouw Hall in Amsterdam thanks to input from an active member of the PvFM.[1381] "Every few minutes of music takes hours, weeks, months, even years of work. You aren't taken seriously if you don't get paid. Call a plumber and try to tell them that working for you is 'good for your cv.'"[1382] Importantly in terms of consciousness-raising, the PvFM has played a central role in media campaigns and keeps the heat on through the volume of articles in major Dutch news sources concerned with freelancing in cultural sectors. It espouses a trio of aims: to negotiate for better working conditions for freelancers, to increase mutual solidarity amongst cultural stakeholders, and to generate societal support for musicians. The collective's leaders join with union representatives at the bargaining table and offer

[1380] Art. 8a WAADI as amended by the WAB, 1 January 2020, translation by the author. In the original Dutch, "De arbeidskracht, die in het kader van payrolling ter beschikking is gesteld, heeft recht op ten minste dezelfde arbeidsvoorwaarden als die gelden voor werknemers werkzaam in gelijke of gelijkwaardige functies in dienst van de onderneming waar de terbeschikkingstelling plaatsvindt."

[1381] See in particular quotes given by saxophonist Femke Ijlstra in Sandra Kooke's article in *Trouw* 10 mei 2019 available in Dutch at: https://www.trouw.nl/cultuur/musici-zijn-het-zat-om-voor-nop-te-komen-spelen-~ac878961/

[1382] Quote provided by Dorine Schoon, co-founder PvFM.

support to members on issues associated with freelance vulnerability: how to persuade employers to pay within a reasonable timeframe, and how to galvanize momentum regarding fair practice issues recently codified in the Dutch Fair Practice Code to be further discussed in the *Coda: Quo Vadis?*

Perhaps added clarity will be found in litigation that is in a pre-trial phase as the musician's union Kunstenbond locks horns with the Dutch National Opera to determine the status of freelance substitute chorus singers who like their orchestral substitute player colleagues, take their places alongside permanently employed singers to perform night in, night out.