

# The employment relationship and the employee

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Universiteit  
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Bij ons leer je de wereld kennen

# **Employment relationship and employee**

- 1. European context**
- 2. Employees and employee-like workers**
- 3. ? Purpose of labour law**

# 1. European context

## Historical (1)

- **Before industrial revolution late 1900**
  - Self employed
  - Servants
  - Apprentices
- **During the industrial revolution late 19th - early 20th century**
  - Rise of ‘precariousness’ – of work and in work
  - Rise of idea of “security of and in work”, including uniform labour law for all workers
- **After WW II**
  - Employment contract “for life” – birth of the employee
  - Development of social welfare states

# 1. European Context

## Historical (2)

- **Characteristic for the employment relationship**  
= subordination of the worker to the employer

- **Social context**

- Rise of solidarity and collectivism

- **Legacies of labour law**

- ILO: “labour is not a commodity”

- Hugo Sinzheimer: “guardian of human beings in an age of unrestrained materialism”

- Van der Heijden: “inequality compensation”

# 1. European Context

## Historical (3)

- **mid 20th century – typical worker**
  - Male breadwinner under a full-time contract of employment
- **Early 2000 – typical worker**
  - is a woman in a service industry working part-time and on a fixed term contract hired through a private temporary works agency
- **A-typical** has become the norm –on call; zero hours; teleworking; homeworking; etc.
- **Key characteristic = subordination**

# 1. European Context

## Importance to qualify as an employee?

### 1. Protective provisions of labour law

- Incl. Dismissal protection; liability protection; equal treatment; working conditions (like working time; minimum wage); etc.

### 2. Access to social security benefits

- Incl. Unemployment benefits
- Pension schemes

### 3. Information and consultation rights

- Incl. Wages and working hours
- Incl. Collective dismissals; restructuring companies; insolvency; etc.

## 2. Employees and employee-like workers

### Definition of employee

- Not one common definition within Europe
- Not one that is definite – need for further interpretation by judiciaries (not even that of the ILO!)
- In general (ECJ Case Lawrie Blum):
  - Certain period of time
  - Person performs services for and under the direction of another person
  - In return for remuneration

## 2. Employees and employee-like workers

Definition of self-employed

- Not one common definition in Europe
- Not one that is definite – need for further interpretation by judiciary

In general (ECJ Fisheries case):

- Sharing commercial risk of the business
- Freedom for a person to choose own working hours
- And to engage his own assistants



# 2. Employees and employee-like workers

## What is the difference?

### Employee

1. Employment contract
2. Subordinated to the employer
3. In person
4. Labour law, social security and tax law
5. Mandatory provisions
6. Fixed wages / remuneration

### Employee-like worker

1. Contract to provide service
2. Subordinated / independent ?
3. In/by person
4. Ordinary contract law, company law
5. Freedom of contract
6. Non-negotiable fee

### Self-employed

1. Contract to provide service
2. Independent
3. By person
4. Ordinary contract law, company law
5. Freedom of contract
6. Negotiable fee

## **2. Employees and employee-like workers**

### **Tests to distinguish employees from self-employed workers**

- Various / not one single decisive test
  1. 'actual control' test
  2. Employer's ability to exercise control
  3. Is the individual part of the organisation / subordination
  4. Economic dependency test

# 2. Employees and employee-like workers

## Dutch approach

### Case 1 Groen/Schoevers

- "essence goes before appearance"
  - Title of the contract
  - The way in which the contract is executed (in person; payments; etc.)
  - What could be expected from parties to be understood (esp. employee)

### Case 2 Imam

- Subordination
  - by content of the work (actual control test)
  - on formal aspects (employer's ability to exercise control)

### Case 3 Post Nl

- Subordination
- Economic dependence
  - In person (2x)
  - By person (1x)

# 2. Employees and employee-like workers

Approach by the EU

## Commission:

- Accepts in between category of workers
- But acknowledges 'bogus' self-employees, which are to be distinguished from genuine self-employed

## ECJ test – Case FNV KIEM

### Undertaking

- as defined in competition law
- Determine conduct independently on the market
- Dependence is not bearing risks in activity of the principal

### Employee

- context of free movement of workers
- Subordination
- No share in commercial risks of the employer
- Forms integral part of the employers undertaking

## **2. Employees and employee-like workers**

### **Consequence ECJ FNV KIEM case in The Netherlands**

- Double test instead of single only
  - Subordination (labour law)
  - Economic dependance (competition law)

### **Dutch High Court ruled:**

Musicians working as *remplançant* in an orchestra are employee

? What is the market they are taking financial and economic risks?

- The principal – no ... or maybe ...
- That of *ramplançants* - yes

# 3. Purpose of labour law

- Need for a reappraisal to face some problems

Problem 1 employee = based on traditional characteristics (control test)

Problem 2 employers are evading labour laws (Post NI case busses; uber; deliveroo)

Problem 3 employers mystify true nature of employment relationship (e.g. Zero hour contracts in the UK)

Problem 4 exclusion of non-traditional employment relationships by the system of labour law (e.g. 12 month probationary period)

Problem 5 employee-like workers (e.g. ramplançant musicians)

Problem 6 lack of decisive tests

→ Builds on need for labour law to protect given the unique characteristics of the employment relationship

# 3. Purpose of labour law

Reappraisal - the European approach:

## Flexicurity (?)

Next time:

15 December 2016

18.30hrs