Employment. Or not?

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An employment contract or not - the question now from the perspective of the Netherlands and the Netherlands legislation. The contract of employment under the Netherlands law is laid down in section 7:610 of the Netherlands civil code or so-called Burgerlijk Wetboek (BW). And elements of the definition are familiar. One of the parties involved is working in exchange for wages remuneration under the authority of the employer.

Those elements are similar to the elements used in other countries, other systems, and for instance also in the law of the European Union. So the basic essential elements are the same. So the problems in defining and understanding whether or not there is a contract of employment is similar to those set out in the other video.

But I'll go into the specifics of the Netherlands legislation, the Netherlands case law, and also into some recent developments in the case law and in the legislation. Turning to the case law about the elements of the employment contract. There has been discussion on the question, whether or not the tasks performed by someone constitute work.

For instance, there was a case Hesseling against the Ombudsman about an intern who said, well, I was working at an office, performing tasks, similar to the tasks performed by the employees of Ombudsman. And therefore I'm an employee too, and I should be treated like that. In that case, it was decided that in order to qualify as work, the performance of the tasks needs to be in the interest of the employer. And not mainly in the interests of the education, the furthering of the education, of the worker. And that was the case in the case of Mr. Hesseling. It was a three-month internship, which was part of a formal education. So in that case, it was not mainly in the interest of the employer, but in the interest of the education of the employee, or the not employee. There was no work there, even though Mr. Hesseling performed certain tasks at the office of Ombudsman.

And the interest of employer test can also be seen in the case of sleeping on call, where students slept in a residence for the elderly. If all went well, they didn't have to do any work during the night. They were there in order to be able to help the residents if they hit the alarm buzzer, and then they would have to come into action. If not, they could stay in their bed in the residence.

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But in the end, the presence of them, even though asleep, at the premises of the care home was deemed to be work. Even though they were not active.

Remuneration is usually payment in money, but it can also be in kind, which is the case in the Bethesda/Van der Vlies case where the worker in question was provided with food and a roof over her head and performed tasks. And it was said, this is remuneration even though it's not usual, it might be remuneration.

And therefore, for instance, organizations working with volunteers might touch upon this problem. If they give them some kind of rewards in kind that might constitute remuneration and wages, and therefore an employment contract might arise from that. Even though the salary is very low, it might still count as remuneration, as long as the payment is not a mere reimbursement of costs, but is deemed to be a reward, however small, for the tasks performed.

And the authority criterion. That's the most difficult of the three, but it can be that there is no substantive authority over the tasks performed, which was shown in the Imam case. A religious leader, who stated that he was working under the authority of the mosque who hired him. And the mosque said we don't have authority over our religious leader. And the judge in the end drew the conclusion. Yes, of course he is free how to and what to preach but he has to be there every Friday to preach, and he has to visit the sick. He has to call in sick when he's sick himself. He has to apply for holidays. So he's under the organizational authority of the mosque and therefor employed.

And even workers working from home, it's quite topical example now but the case dates from the 1970s, again, even though the employer is not present to give instructions at the home of the worker involved Ms. Qeissen was deemed to be an employee because she had to meet certain production targets. She had to meet certain standards and just like the imam, she had to call in sick and had to regulate her holiday. So again, authority may be there even though the employer does not give substantive directions about the tasks performed.

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Just some examples to show that discussion is possible about the three criteria, work, wages and authority.

And to make it even more complicated, the essential part of the Netherlands labour law is the theory of substance over form. Whatever the parties involved in a contract may write or state, the definition of the relation between them is not decisively decided by what the parties involved have written or what they have said to one another. It's how they work together in reality.

So the written contract is not decisive. This follows from the Agfa/Schoolderman case and from the Groen/Schoevers case it follows that you have to take into account the intentions of the parties involved. And those intentions are not just shown by what they say and what they have written down, but also, and more importantly, especially by the way they executed their relation.

Even though they say something along the lines of that they don't have a labour, an employment contract, if they behave themselves as if there is an employment contract, the contract is deemed to be an employment contract. And also in this Groen/Schoevers case the Supreme court of the Netherlands decided that the social position, the dependency of one of the parties to one another may be taken into account, when dealing with the question, is there an employment contract or not?

And there is a help tool laid down in the Netherlands legislation, paragraph 7:610a which contains a presumption of the employment contract if a worker works for three months or more in exchange for remuneration, there is the legal presumption that he or she is working under an employment contract. And it's up to the one who hired that person to show that the presumption is not valid in this case.

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And now on to recent developments.

But just before that, what's the problem. Again, the criteria wage and work, they seem to be clear, but even those criteria can be called into question. Authority is an especially difficult criterion because sometimes the employer does not have to execute its authority or to give substantive directions in order to show that there is an employment contract. And the criteria can be vague and hard to test, and the criteria can be manipulated. So it's rather difficult to judge from what the parties say to one another, and what the parties have written down that it is an employment contract or not. There is a certain distrust from the courts and from the legislation towards what workers and their contractors have stated because the criteria can be manipulated or they're likely to be manipulated.

What's written down is not decisive. Authority is a very, very difficult thing to establish. In all the legal systems this is the case. And in the Netherlands the system is no different.

Recently in the Netherlands the Supreme Court on the 6th of November, 202 had a landmark decision on the definition of the employment contract. Now, what was the case about? A social assistance recipient (bijstand) had to perform work in order to keep her right to social assistance benefits. She received the benefits from the local council of Amsterdam and on the basis of what's called a plaatsingsovereenkomst, placement or positioning agreement, she was obliged to work at the very same local council of Amsterdam. She performed her work there in the local council. And she saw that the people around her were employed. She applied for a real job at the local council, but she was turned down because of budgetary reasons. And then she went to the court and said, I get paid. I am obliged to work at the local council and I'm performing the same tasks as the people around me. So I have an employment contract. The lower courts in this case decided that there is no employment contract. Since the local council did not have the intention to conclude an employment contract.

The Supreme Court decided as follows. The Supreme Court held that the intentions of the parties involved are irrelevant in so far as the question is concerned, whether or not a contract constitutes an employment contract.

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If a contract contains the elements wages, work, and authority, it's an employment contract, irrespective of what the parties involved want. Their intentions, what they want is relevant in so far as to determine whether or not a payment constitutes a wage, whether or not a task performed constitutes work, whether or not directions given constitute authority. I refer back to one of the first slides: even though you receive payments, it may not all be wages. Even though you don't receive payment in money, it can still be wages, work. It can be that it's just an internship in your own interest, not in the employer's interest and therefor no work. It can be that it is work. And authority, again, the difficult problem arises again here. In the end, the Supreme court held in this case that even though the lower courts have used the wrong criteria in deciding whether or not there was an employment contract, they attached too much value to the intentions of the parties involved. But the Supreme Court held that social assistance benefits do not qualify as wages as article 7:610 of the Dutch civil code requires.

And now for something completely different. Under the Netherlands law, there has been a lot of discussion about the distinction between the employment contract and a contract of freelancers, or the self employed.

Until 2016 a tool was used by the tax authorities. The so-called VAR. People performing work could, based on their own estimation of their turnover and number of clients, gain a VAR from the tax authorities. And under this VAR if that VAR led to the conclusion that you were performing your work as a self-employed not an employee, the people who hired them had a guarantee they weren't obliged to pay taxes or social insurance premiums, even though it was possible that in hindsight, the worker involved, wasn't a real self-employed person at all. But just based on the estimation of the worker, a wrong estimation, you could get a VAR and the clients of the worker involved were guaranteed that they didn't have to pay taxes or social insurance premiums for that worker, even though that worker would in the end, be defined as an employee.

This system was abolished in 2016 under the wet DBA, the DBA act, and this act abolished the certainty, the no taxes, no social insurance premiums guarantee. Instead the tax authorities proposed modelovereenkomsten or standard agreements. The tax authorities published several specific agreements or for specific jobs. And even for individual cases.

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And the idea was if a worker uses such a standard agreement and behaves accordingly, then there's the guarantee that he or she is deemed to be self-employed not an employee.
But this system was abolished very soon. It was introduced in April, 2016 and abolished or put on hold in November of the very same year. It wasn't working.
The disadvantage of the VAR system was it worked so well that anyone could get such a guarantee of no taxes, no tests involved. You got the certainty, but everyone could get it. And that led to bleeding of the tax revenue.
The wet DBA was too complicated. And here's just an example of a model agreement in the artistic sector. To conclude some remarks.

What's the case for now? The legislation has been put on hold, and that means that fines and retro retroactive levying of taxes and premiums are limited to cases of fraudulent intentions. So someone working on the assumption that he or she is self-employed may be deemed an employee by the tax authorities. From that moment on the taxes and social premiums according with that position are due. But not retroactively. That's only the case when the tax authorities can show fraudulent intentions. The tax service (Belastingdienst) has published a Handreiking Arbeidsrelatie where you can check whether or not you're self employed or not. And it's more or less breaking news at this moment. The system of VAR was abolished. It was too generous. The system of the model agreements was too difficult and is therefore, was therefore never put in place in reality.

It will be exchanged for a system of the Opdrachtgeversverklaring, contractors' statement, which can be filled in along the Handreiking, the guidelines given by the tax authorities. And a web module is about to start where you can self-check whether or not you're self employed or an employee.

A web module will be launched at the beginning of January, 2021. And for a six months period, this website will give advice. It's not legally binding. You cannot derive rights or claims or certainties from it. But if you fill in the characteristics of your organization and the characteristics of the worker involved and the work involved, the website will advise you on the status of the worker. And it is the idea that in the autumn of 2021, the web module will be giving legally binding advices.

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But the system still has to be evaluated in the summer of 2021.

And basically the web module goes into more details, but basically the web module contains, in more detail in more elements, the eight steps laid down in the Checklist employment contract or not. So you might want to try the official tax man's web module. You might also try to work with a checklist downloadable on this website.

Well. It's very difficult, perhaps it might be a little bit too legal to your, for your taste, but I want to say, well done! My compliments for ending this task, this video, thank you for your attention. And I'm very curious to know whether or not this was a helpful video.