On the Labor Front: The Problem of the Fictitious Employee

By Jasper Doomen

Abstract

The increase of fixed-term work has led to diminished job security. It appears that the different types of employees do not evenly work on this basis. Young employees, women and poorly educated employees relatively often have a temporary labor contract. The role of the unions has proved to be important in this respect, consolidating the interests of their members. They have little to gain from increased flexibility in the dismissal legislation; fixed-term workers, by contrast, benefit from such changes as their chances to be employed on a permanent basis increase. The various interests can only properly be balanced by changing the law in such a way that employees' contracts depend on their capabilities rather than on irrelevant factors.

Introduction

It has become difficult to speak of employees as a homogeneous group. Traditional labor contracts are on the decline; employees who spend their entire working life in the service of only one or two employers have gradually become rare. Such contracts have been replaced by temporary ones. An employer may be satisfied with an employee, but not offer him or her a contract for an indefinite period for reasons unrelated to the employee's performance. Such a reason is the insecurity that may exist about the economic outlook. Another reason, which will feature prominently in this paper, is the downside in terms of costs and procedures for an employer who wants to terminate a permanent contract; if economic conditions are decisive for the motivation to terminate it, the first reason is relevant here as well, of course.

I will argue that the protection from being dismissed which employees who have become employed on the basis of an open-ended contract enjoy and which is absent in the case of temporary workers has led to an unwarranted dichotomy between two types of employees. As a consequence, the burden of the negative effects of economic setbacks is not evenly shared by the workforce as a whole, which has various undesirable outcomes.

Traditional (or 'normal', or 'regular') employees are those employees who work a fixed number of hours a week on the basis of a labor agreement for an indefinite

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period. They can presently be contrasted with, amongst others, temporary agency workers, those who work as a pseudo-independent contractor (a pseudo-self-employed person)[1] and (actual) independent contractors who work on that basis merely because they are unable to find work as employees. I will focus on employees working on a temporary basis here, but much of what is observed here also applies to others, such as temporary agents.[2] (Such workers are also employees, but they are not employed by the person or company in whose service they work.)

I will argue that some categories of employees have a greater chance than others to work on a temporary basis and are, accordingly, relatively often affected by the – negative – consequences of temporary labor contracts. On that basis, a crucial reason why important differences between open-ended and fixed-term contracts exist is presented, namely, the position of trade unions in negotiating collective agreements. In some cases their influence extends further, which adds to the issue of whether their position is still legitimized. Finally, I will present the outlines of a possible solution to resolve the issue of the different treatment of the categories of employees.

1. Flexibility on the rise

The labor market has, as a result of various economic and technological developments, gradually become erratic and disordered. This situation has led employers to resort to temporary contracts, on which they have increasingly come to rely. Those who are employed on this basis have come to be known as 'fixed-term workers'. A 'fixed-term worker' is defined as follows: "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."[3]

The present-day labor market is characterized by various sorts of employment contracts. This situation has adverse consequences for many employees: "[…] the emergence of new types of employment relationships has meant that fewer and fewer workers in the advanced economies are covered by standard employment contracts. The result is that more and more workers are experiencing greater job insecurity and its adverse consequences."[4]

The following data with respect to the Dutch labor market confirm this picture: "[…] it appears that the incidence of nonstandard employment, calculated over all those with (dependent) employment contracts, has doubled from 4.1 to almost 8.5 percent between 1983 and 1993 and again doubled to 17.3 percent in 2010 among dependently employed men age fifteen to sixty-four and has risen from 25 percent to 33 percent during the same period among women in the same age span."[5] Consistent with this development, the number of transitions from fixed-term contracts to open-ended contracts in the Netherlands has decreased significantly.[6] This process can be observed more generally in Europe as a whole,[7] Canada[8] and globally.[9]

This process is not limited to those who are privately employed; as a result of the economic crisis and a policy to replace public servants by others, in most European countries fixed-term contracts have become the norm in the public sector.[10]

It is clear that fixed-term contracts, while attractive for diverse reasons, have a downside for employers: employees' work morale may suffer, especially if they already know that their contract will not be prolonged. This is of course at the same time a reflection of the downside for that group: employees are affected by the temporary character of their employment. The issue of their insecure prospects is perhaps the most import one to note here, but other problems are involved as well: "[…] with the development of nonstandard forms of employment, the classic risk of unemployment has been outflanked by other difficulties: insecurity about regularity of an income sufficient to produce predictable earnings; the lack of adequate protection in the event of sickness, accident, maternity, invalidity, or old age; the risk of being unable to acquire or update skills, or have them recognized in different work contexts; the lack of clear career prospects, or easy access to the know-how and technological resources necessary to improve them; the risk of discrimination or of being unable to compete on equal terms and conditions with workers on other types of contracts; and the risk of not having one's interest properly represented. These risks can be grouped into three categories: risks of future unemployment and earnings insecurity, risks of limitations on human capital development, and risks of reduced rights and entitlements."[11]

It is important to address the problems, but relativizing observations in the evaluation of these developments must also be mentioned: "At the start of the career, the effect of flexible employment on occupational status attainment is strongest […], but after some three years in the labour market […] it has disappeared entirely and then becomes, surprisingly enough, positive."[12] Still, while such an outcome may be said to mitigate the problems, it does not derogate from the fact that fixed-term employment, with the prospect of an automatic termination if the contract is not prolonged, is, on the whole, unappealing. In addition,

specific negative effects may be observed. In Finland, "[…] involuntary temporary and involuntary part-time workers' experiences of their job quality are weaker with respect to core job quality indicators […] such as training possibilities, participation in employer-funded training, career possibilities, possibilities to learn and grow at work, job insecurity, and job autonomy, compared to permanent and full-time workers."[13]

The insecurities with which those who are employed on a temporary basis are faced result in lower levels of job satisfaction compared with those employed on the basis of an open-ended contract[14] and lower levels of social well-being.[15] Furthermore, "[…] fixed-term and temporary agency employment are negatively associated with social well-being."[16] It may be remarked here, incidentally, that a lower affiliation to society is experienced by temporary agency workers than by fixed-term workers.[17] Employees with an open-ended contract appear to experience relatively much stress when job effort is concerned, while relatively high stress levels are experienced by employees with a fixed-term contract with respect to job promotion and job insecurity.[18]

Given this state of affairs, it is not unwarranted to presume that employees would prefer (*ceteris paribus*) an open-ended contract to a fixed-term one. As Davies puts it: "Fixed-term work is inherently precarious and, given the choice, it is hard to envisage a worker opting for a fixed-term job over a job of indefinite duration (given that it is generally easy to resign if a better opportunity comes along)."[19]

It is clear from the foregoing data that the differences between the sorts of employment contracts lead to significant differences. It remains to be seen whether the negative outcomes of those differences are evenly distributed among all employees, or whether certain categories are more affected than others. This will be the focus of the next section.

2. The fictitious employee

One would not expect employers to be incited to hire employees who can be replaced by others relatively easily (particularly those employees who are poorly educated) and of whom there is usually no shortage on a *permanent* basis; offering such employees an open-ended contract has few advantages and many disadvantages. An advantage for the employer would consist in increasing the chance that he will profit from their services over an extended period of time, while the main disadvantages consist in the obligation to pay (part of) the wages during a period of sickness or disability and the problem that dismissing employees may be difficult and/or expensive.[20] In the case of relatively easily replaceable employees, the advantage is presumably outweighed by the disadvantages.[21]

Research confirms that employees belonging to the first category are the most likely workers to be employed on a temporary basis.[22] In addition, this situation proves to apply conspicuously often to female employees.[23] Age appears to be another relevant factor:[24] for relatively young workers, stable jobs are ever more difficult to attain.[25] As Gumbrell-McCormick observes: "[…] there has been an expansion of fixed-term or short-term contracts across Europe in the past two decades, particularly affecting new entrants to the labour market. Whereas many countries have traditionally possessed strict legal constraints on the use of such contracts, often restricting them to genuinely temporary job vacancies, such rules have been widely relaxed in recent years. In Germany, for example, over 80 per cent of employees aged under 20 are on fixed-term contracts; in Sweden, almost 60 per cent of those aged under 25. This process has led, in France, to much talk of a 'precarious generation'; despite policy makers' arguments that temporary work can provide a bridge to permanent employment, only a minority of younger workers move on to a 'normal' employment contract. There has been a similar trend in Italy […]."[26]

It has been pointed out that relatively young employees tend not to seek a long-term commitment to an employer.[27] Still, even if that is the attitude of many of such employees, an open-ended contract would in general seem preferable. After all, employees can (normally) terminate an open-ended contract should they wish to do so, the only minor obstacle they face being a term of notice. In addition, it appears to depend on the level of education how one estimates being employed on a fixed-term basis.[28]

It would be illusory to think, with the above-mentioned results in mind, that a universal conception of 'the employee' could still be used with respect to the labor market as it functions today. Those considered to be traditional (regular) employees[29] can relatively easily be classified. They can presently be contrasted with the groups mentioned in the introduction. I will focus on the employees working on a temporary basis here, but much of what is observed here also applies to others, such as temporary agents.[30]

To be sure, the term 'employee' can still be used, but only in a general, abstract way. An example is the following, in the field of working time regulations: "Member States shall take the measures necessary to ensure that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24-hour period."[31] One can speak of the employee in this sense if the mere capacity of being employed is concerned. Only in situations in which employees share a collective interest, for example in the

field of working time (or working conditions in general) can the concept of 'employee' in the abstract sense still aptly be used. Insofar as *different* interests are involved, the concept cannot be applied, especially if those interests are also conflicting.[32]

It is not unwarranted, then, to consider 'the employee' a fiction. Legal fictions are widely applied; the best-known is perhaps that of legal personality.[33] Important problems are involved, however, in the case of the employee. The differing interests that exist between different groups of employees even divide them, as I will argue. An example is the issue of an obligatory pension scheme, and more in particular to what extent negative investment results should affect the benefits. (Simply put, those employees who (still) contribute through premiums benefit from low premiums while those (by now former) employees who receive the benefits profit from high premiums if this means that this removes the need to lower the benefits.)[34] Another example that may be mentioned here is the introduction of the possibility of paid parental leave; in this case, the interests of childless employees differ from those of employees with children.[35]

With the advent of legislation to insure safe working conditions and other measures to improve the position of employees – such as minimum wage legislation and the introduction of the entitlement to paid vacation – the number of domains for potential conflicts between employees and employers gradually decreased, while the significance of the conflicts that *could* still arise waned. At the same time, this created room for employees to refocus the conflicts. Gradually, on the basis of the differing (and conflicting) interests, various groups of employees could be discerned. In some respects, a chasm has gradually emerged between them to such an extent that is not inapposite to distinguish between insiders and outsiders: "[…] a worker is an insider to the extent he or she has managed to obtain permanent worker status and benefits. A worker is an outsider to the extent that he or she lacks a permanent contract and fringe benefits."[36]

It is important to realize that the situation in which the different sorts of employees can be distinguished is the result of a historical process. Once the basic rights mentioned above had been realized, employees could focus on other, less urgent aspects of the labor relation, such as protection against dismissal. Legislation was passed to protect traditional employees, who could in time, once the other species of employees was identifiable, be dubbed 'insiders', the other species at that point being identifiable as 'outsiders'. For some employers, it became unattractive to have a large part of the work force employed on a permanent basis. After all, at times of economic decline it is disadvantageous to have a great number of people employed who all have to receive compensation on account of being dismissed. With respect to employees who become ill, economic circumstances are not even necessarily a relevant factor; the costs involved in paying the wages during the time no work is performed, the employer not profiting in any way, must be qualified as economic loss.

It becomes appealing, then, to hire a substantial part of the work force on a temporary basis. To be sure, it is still beneficial to have a number of people employed on a permanent basis in that their presence could have a stabilizing effect, being able to profit from their extensive experience. It is at this point that the differences between the insiders and outsiders become clear. In fact, it could be argued that this is a case of a zero-sum game: a benefit for one of these two groups constitutes a downside for the other. To illustrate this point, I merely refer to the fact that making it more difficult and/or expensive for employers to dismiss employees brings with it that new employees will not easily be hired on a permanent basis.[37] It may be countered that such new employees would ideally want a permanent contract with strong protection against dismissal, but they would prefer a permanent contract with limited protection to one that ends in any event, simply because the term has expired.

As the benefits for employees with a permanent contract increase, it becomes ever more unappealing for employers to offer new employees such a contract. Depending on the precise state of affairs, which depends in turn, of course, on the legislation in place in a specific country, the chasm between the various sorts of employees mentioned above means that a permanent contract has become an unrealizable ideal for some of them. The chasm metaphor seems apt as many nontraditional employees aspire to become traditional ones, which is difficult to realize if such a position is unattractive for employers. This has indeed become a reality in cases where it is difficult for employers to dismiss employees.

3. The role of the unions

The unions have played a crucial role in consolidating the traditional employees' interests. At a time when employees shared the same interests (outlined in the previous section), the unions could claim to represent the employees as a collective. This claim has become ever more difficult to maintain, especially in the wake of the waning willingness of nontraditional employees to join a union.[38] The declining number of union members means that the legitimacy of the prominent position they take in negotiations with employers on behalf of the employees they purport to represent has increasingly come under pressure.[39]

As unions negotiated measures to protect employees against the employer, flexible contracts became increasingly appealing: "[…] in the areas of part-time work, fixed-term, and temporary work, the use of semi-mandatory laws has led to negotiated deviations from legally set standards that go more in the direction of flexibility rather than security. This could be a result of union weakness. Alternatively, it might be explained by the hypothesis that, in decentralized negotiations, unions use their declining bargaining power first and foremost for the defense of insiders – their ageing membership with standard employment contracts."[40]

The latter of the two options sketched here appears to be the most compelling. From the perspective of the unions, the best strategy is to focus on the traditional employee. Union members relatively often work on the basis of an open-ended contract. From that position, they may not be opposed to an increased flexibility for *some* employees.[41] For example, they won't be affected if fixed-term contracts are not continued. One employee's security may, then, come at the expense of another's employment.

It is obvious how the unions may respond to such objections, arguing that nonstandard workers are unwilling to join a union.[42] It may indeed be argued that by joining a union, the interests of nontraditional employees, by joining a union, will have their interests properly represented. Still, given the situation from which they must start (namely, that relatively many members are employees with an open-ended labor agreement), it will in some cases take a great number of additional employees to become members for such an outcome to be realized. That is, of course, no principled argument. It may also be adduced that such an invitation would in fact constitute a form of coercion, or, put less dramatically, that it curtails the negative right not to join a union.

Furthermore, employees working on the basis of a fixed-term contract are not sure who their next employer will be, and their next labor agreement may very well be covered by a different collective labor agreement (closed by a different union) than is presently the case.[43] In any event, Emmenegger's observations seem apt: "Given the overrepresentation of workers in standard employment relationships among the union rank and file, unions are more likely to agree to reforms that increase labor market flexibility at the expense of atypical workers if this implies that they can prevent reforms that disadvantage their core clientele, workers on open-ended contracts."; "[…] in the case of job security regulations, *both* organizational and representational interests point to the same conclusion: under pressure to allow for labor market flexibility, unions assent to the deregulation of temporary employment in order to protect their organizational and representational interests."[44]

Notwithstanding the abovementioned analysis, the fact that unions promote the interests of their members is not problematic as such. This assessment is, however, predicated upon the unions' traditional role – their power being restricted to the mandate given to them by their members. It is possible, and at that point the legitimacy of their position *may* be considered problematic, that their influence extends to the process leading to new legislation.

This is what became apparent in the Netherlands. The position of the unions is clear: "Dutch unions have a long history of opposing temporary work, as they have tended to regard temporary employment as a threat to the secure, long-term employment relationships that they sought to protect."[45] Although this attitude seems to have changed slightly recently, unions' primary goal is still the protection of the interests of permanent workers.[46] What is particular to this country is the possibility to reach a so-called central agreement, which means that (inter alia) the (contours of) the employment conditions are settled by organizations of employees (unions) and employers (with the endorsement of the government), to be adhered to by the individual employers.

It is not unusual to reach such a central agreement. Indeed, this is one of the features of the consensus-based 'polder model' in this country. The latest central agreement, of 2013,[47] has proved to be very influential on the legislation process. An amending bill, the Work and Security Act, was passed; the contents significantly correspond. This may not seem to constitute a problem: organizations of employers and employees may consult with the government and reach an agreement. Still, it is dubious whether the required employee representation is reached.[48] If the interests of those who are represented differ from those who are not, the existence of such representation must be questioned.

Such a diversion is, I think, indeed the case. Union members, who relatively often work on a permanent basis, do not benefit from reforms on the labor market if such reforms mean that it will become easier for employers to dismiss them. They do not profit from the fact that those reforms may bring with them that a threshold is removed to employ *new* workers on a permanent basis, for they already work on such a basis and the value of such a contract in terms of protection can only diminish. To this may be added the consideration that employing additional workers on a permanent basis, resulting in a relatively great number of the workforce being employed on that basis, may have significant consequences with respect to the dismissal policy. If one or more employees are to be dismissed as a result of economic decline, the first step (under Dutch law) is not to prolong the temporary contracts. Only if this measure does not result in a

sufficient reduction of employees will the employer turn to the permanent employees and inquire how many of them have to be dismissed.

It is clear that (*ceteris paribus*) in the first scenario, traditional employees are better protected against dismissal than in the second.[49] Those who have concluded the central agreement may maintain that such reforms – which they blocked – would have adverse effects for employees, but only by clinging to an abstract notion of the employee, using the fiction identified above. A number of the non-union members, namely those employees who work on a temporary basis, would benefit from the reforms so long as they have no prospect of a permanent contract. A permanent contract with diminished protection is preferable to a temporary one – or unemployment. The position of the unions in blocking the reforms has proved to be decisive: under the Work and Security Act it has not become easier to dismiss employees but even more difficult.

It is important to realize that facilitating dismissing employees does not entail a greater number of dismissals; whether people will actually be dismissed depends on economic factors,[50] so it will rather mean that the issue of *who* will be dismissed will be approached in a different way. If great thresholds are in place to dismiss employees, the group of temporary workers will be minimized during times of economic decline; if, after some time, the demand for employees rises, new temporary workers (some of whom may previously have been employed) will be hired, who will lose their jobs in time or in some cases be employed on a permanent basis to replace permanent employees who have retired, died or left the employer on their own initiative.

A rigid system of dismissal results, in times of economically hard times, in employers minimizing the number of temporary employees by not prolonging their contracts; after all, no costs or special procedures are involved here, in contrast to what is the case with permanent employees, who actually have to be dismissed.[51] This has the adverse effect that the employees who will keep their jobs are not necessarily the most qualified ones, for these are not the proper selection criteria to realize such an outcome. Permanent employees with a poorer performance than certain temporary ones will remain employed for improper reasons, namely, the costs and procedures just mentioned employers seek to avoid. This means that the burden of the danger of becoming unemployed is divided unevenly between the species of employees.

Unions are faced with a split. If they persist in defending the interests of permanent employees (their traditional backers), they will (further) alienate themselves from the other employees, which becomes increasingly problematic as ever more permanent employees are replaced by the latter group due to retirement or death.[52] If, by contrast, they include the interests of temporary employees in their negotiating strategies, they will have to balance the various interests: since a zero-sum game is at play here (cf. section 2), a concession to temporary employees will come at the expense of permanent ones. It is not inapposite, then, to speak of a union dilemma here:[53] "Temporary employment […] poses a dilemma for unions. On the one hand, there is a growing recognition among unions of the importance of equal rights for – mostly not unionized – temporary workers. On the other hand, temporary workers can be considered competitors of the permanent, unionized workers."[54]

It may by contrast be argued that "Collective bargaining can first have an equality effect balancing the power relations between individual workers and their employers by collectivizing the power of workers. Secondly, it can foster greater equality between workers across companies and sectors."[55] This is true insofar as wages (or rather wage scales) are concerned, but these considerations do not apply to all aspects of the labor relationships. In addition, it presupposes shared interests between employees, which is, as I have argued, not always the case.

With respect to young employees in particular, it is clear that different interests lead to different strategies: union members are often middle-aged and have an interest to preserve the benefits of existing open-ended contracts. Union members may simultaneously belong to a category that is especially affected insofar as flexibility in the labor market is concerned (the level of education is an important factor to mention here), but that is no issue as long as they remain employed on the basis of an open-ended contract. The issue *does* become relevant once they lose their jobs – while an open-ended contract offers, *ceteris paribus*, more protection than a fixed-term contract, it is no guarantee against unemployment. Once the situation emerges that they lose their jobs, becoming outsiders themselves, it appears that their interests would change, preferring an open-ended contract to a fixed-term contract, the position that applies to outsiders in general. It may be argued, then, in terms of being 'insured' against being employed on a fixed-term basis, that even insiders might benefit from reforms; whether it is also realistic to think they will embrace this perspective is another matter.

4. The alternative to the game of musical chairs

The various interests of the different sorts of employees have been described in the previous sections. Simply put,

those who are employed on a permanent basis have an interest in rigid dismissal legislation while those who are employed on a temporary basis consider a permanent contract an improvement, even if it the protection from dismissal is diminished. With respect to the Dutch situation, it has not become easier to dismiss employees, as was the original intention of the legislator, but – due to the central agreement of 2013 – more difficult, while the efforts to make the transition from a temporary contract to a permanent one more attractive for employers have resulted in the contrary outcome. This means that the dichotomy between insiders and outsiders on the labor market will for the time being persist. In France, similar reforms have been proposed in 2016, which were met with disapproval. It is not surprising that French unions did not applaud them; whether the young employees who protested against them have properly balanced the pros and cons can be questioned.

Rigid dismissal legislation results in temporary employees becoming unemployed and being replaced by others who end up in the same situation. An important negative effect for the employer consists in the fact that ever new groups of employees have to get used to the organization and have to master new tasks, which is a loss of time in economic terms. In addition, it may be pointed out that these employees face a lack of continuity. They are reluctant participants in a game of musical chairs, taking each other's place in theory (and in the long run, to some extent, in practice).

The costs that result from frictional unemployment are another relevant issue to mention here. In countries in which employees are entitled to unemployment benefits (and/or other social welfare), it is evident that the costs involved are significantly reduced if employees are no longer forced to move from one employer to the next, the benefits that have to be paid during transitional periods in between no longer being an issue. Realizing stable jobs by making it attractive for employers to hire employees on a permanent basis is, then, likely to result in such a reduction. It may be objected that making it easier to dismiss them will have just the opposite, undesired effect, namely an *increase* of frictional employment. This presupposes, however, that employers would intend to dismiss employees in the first place. If there is indeed a need to do so – so if there is a factor which has nothing to do with the issue of *which* employees should have a job but which raises, instead, the question how many employees are needed at all – this is not the domain to settle such an issue. It is not a government task to stimulate hidden unemployment.[56]

An additional benefit would be the absence of diminished work morale of temporary employees who know that their contracts will not be continued (cf. section 1). To be sure, the same behavior is likely to occur with permanent employees who learn that they will be dismissed, but with an increased number of employees working on a permanent basis the total number of dismissals will decrease, as the obligatory game of musical chairs will become less prominent or, ideally, disappear.[57] The danger that, on the contrary, permanent employees may start slacking off is dispelled by the very fact that it will become easier to dismiss employees.

If the initiative to find a proper balance between the interests of the different sorts of employees is not forthcoming from the unions, the dismissal legislation needs to be changed so as to motivate employers to hire those employees not adequately represented by the unions on a permanent basis. If a greater share of employees are permanent workers, employers no longer need to fear that their loyalty will be slight on account of their working on a temporary basis. It should incidentally, in my opinion, still be possible for employers to initially hire employees on a temporary basis (as a sort of extended 'trial period').[58]

An employee's loyalty should be based on the employment conditions and work fulfillment rather than on the form of the labor agreement. It may be added here that those who are already employed on a permanent basis – and have something to lose – are not motivated to look for another job they might enjoy better (or is more suited to them) if the new job would be a temporary one, since this might in time mean – if the temporary nature of that new job is not changed into a permanent one – unemployment. This is also an unwelcome outcome of the dichotomy between the types of employment, which may be removed by reforming the dismissal legislation.

There is of course no guarantee that employers will decrease the number of fixed-term contracts, but employers have an interest in using open-ended contracts as they are more likely to assure employee loyalty and productivity than fixed-term contracts. Removing the main thresholds to realize open-ended employment is justifiable in that light.

Conclusion

It is hard to believe that the division between insiders and outsiders on the labor market will disappear if the initiative is left to the unions. They face the dilemma of keeping representing those whose rights they have traditionally defended or promoting the interests of new generations. In the first case, they risk losing the necessary support, increasing the issue of the legitimacy of their prominent place in labor negotiations, while it is unclear in the second case whether those they would seek to represent still feel a need for such representation.

It is the legislator, then, who is to stimulate employers to make the necessary changes by making permanent contracts more attractive and, in time, the norm. Given the appeal of a temporary contract in times of economic uncertainties, this means that it must become easier to dismiss employees. There is a danger that employers will abuse the new possibilities to get rid of employees – whether they be union members and/or works council members or not – who are justifiably critical of certain company policies. In many countries, legislation is already in place to prevent such an outcome; *in this respect*, no changes are to be made.

As far as legitimate reasons are concerned to dismiss employees, the problems may be relativized. If an employer dismisses an employee because of economic circumstances it will be difficult to argue that the decision is without justification. If the employee is dismissed because he or she does not function optimally, the employer may have just cause; it may be warranted to obligate employers in such circumstances to give employees one or more opportunities to remedy the situation. In any event, one may presume that employers will not lightly dismiss employees in cases in which they must be replaced by others, given the pains of hiring and training new workers, without knowing in advance whether they will suffice.

Rigid dismissal legislation is a relic from a past in which employees shared common goals and had to be protected against unsafe working circumstances and exploitation. The advent of legislation to curtail employers' power has made it necessary to reconsider dismissal legislation. Rigid rules in this domain still serve the interests of some employees, but this comes at the expense of others; temporary workers may be said to be the victims in this case. Legal reforms are the best way to remedy this situation.

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ENDNOTES

1 In this case, there is no formal employment contract, but the work is performed in such a way that the contractor is dependent on the client to such an extent that their relation is de facto one of employee and employer.

2 Nele de Cuyper, Guy Notelaers and Hans de Witte, "Job Insecurity and Employability in Fixed-Term Contractors, Agency Workers, and Permanent Workers: Associations with Job Satisfaction and Affective Organizational Commitment", p. 194; Mia Rönnmar, "Flexicurity, Labour Law and the Notion of Equal Treatment", pp. 169, 170, 180.

3 Directive 1999/70/EC, Clause 3, par. 1.

4 Katherine Stone and Harry Arthurs, "The Transformation of Employment Regimes: A Worldwide Challenge", p. 3.

5 Jelle Visser, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", p. 139, 140. The term 'nonstandard employment' encompasses those forms of labor that differ in one or more respects from traditional employment (basically a full-time contract for an indefinite period of time). The most important forms of nonstandard work arrangements have been identified as "[…] part-time work, temporary agency and contract company employment, short-term employment, contingent work, and independent contracting." Arne Kalleberg, "Nonstandard Employment Relations: Part-time, Temporary and Contract Work", p. 342.

6 Jelle Visser, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", p. 151.

7 Mia Rönnmar, "Flexicurity, Labour Law and the Notion of Equal Treatment", pp. 157, 167; Thomas DiPrete, Dominique Goux, Eric Maurin and Amelie Quesnel-Vallee, "Work and pay in flexible and regulated labor markets: A generalized perspective on institutional evolution and inequality trends in Europe and the U.S", p. 323.

8 Guylaine Vallée, "Pluralité des statuts de travail et protection des droits de la personne: quel rôle pour le droit du travail?", p. 298.

9 Katherine Stone and Harry Arthurs, "The Transformation of Employment Regimes: A Worldwide Challenge", pp. 3, 10. The use of temporary agency work adds to this problem (Nele de Cuyper, Guy Notelaers and Hans de Witte, "Job Insecurity and Employability in Fixed-Term Contractors, Agency Workers, and Permanent Workers: Associations With Job Satisfaction and Affective Organizational Commitment", p. 194).

10 Markus Sädevirta, "Regulation of Fixed-Term Employment Contracts in the EU, France, Finland and the United Kingdom: A Comparative Analysis", p. 228.

11 Ida Regalia, "Regional and Local Experiments for Labor Market Policy in Europe", pp. 157, 158. Japan provides a clear illustration: Japanese employees under nonstandard employment arrangements have a greater chance of losing their job than employees under standard employment arrangements and the average wages of the former are over 30 percent lower than those of the latter (Hiroshi Tarohmaru, "Income Inequality between Standard and Nonstandard Employment in Japan, Korea and Taiwan", p. 54).

12 Marloes de Lange, Maurice Gesthuizen and

Maarten Wolbers, "Consequences of flexible employment at labour market entry for early career development in the Netherlands", p. 425.

[13] Merja Kauhanen and Jouko Nätti, "Involuntary Temporary and Part-Time Work, Job Quality and Well-Being at Work", p. 795.

[14] Luz Karime Abadía Alvarado, "The Effects of Fixed-term Contracts on Workers in Colombia", p. 443.

[15] Stefanie Gundert and Christian Hohendanner, "Do fixed-term and temporary agency workers feel socially excluded? Labour market integration and social well-being in Germany", p. 142.

[16] Stefanie Gundert and Christian Hohendanner, "Do fixed-term and temporary agency workers feel socially excluded? Labour market integration and social well-being in Germany", p. 143.

[17] Stefanie Gundert and Christian Hohendanner, "Do fixed-term and temporary agency workers feel socially excluded? Labour market integration and social well-being in Germany", p. 142.

[18] Mariko Inoue, Shinobu Tsurugano and Eiji Yano, "Job Stress and Mental Health of Permanent and Fixed-term Workers Measured by Effort-reward Imbalance Model, Depressive Complaints, and Clinic Utilization", pp. 96-98; "One of the most serious stresses for fixed-term workers is widely believed to be job insecurity. Previous studies have shown that job insecurity is associated with poor mental health." Ibid., p. 99.

[19] Anne Davies, EU Labour Law, p. 182.

[20] It must be observed that the extent to which these problems manifest themselves depends on the legislation of the state in question.

[21] This may also be the case with employees the employer would not replace by others, but to a lesser extent.

[22] Jelle Visser, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", p. 151.

[23] Jeff Kenner, "New Frontiers in EU Labour Law: From Flexicurity to Flex-Security", p. 288; Riitta Martikainen, "Equal pay through collective bargaining? Experiences from Finland", p. 230; Luz Karime Abadía Alvarado, "The Effects of Fixed-term Contracts on Workers in Colombia", p. 438.

[24] Luz Karime Abadía Alvarado, "The Effects of Fixed-term Contracts on Workers in Colombia", p. 438.

[25] Morley Gunderson, "Changes in the Labor Market and the Nature of Employment in Western Countries", pp. 26, 27.

[26] Rebecca Gumbrell-McCormick, "European trade unions and 'atypical' workers", pp. 295, 296.

[27] Rebecca Gumbrell-McCormick, "European trade unions and 'atypical' workers", p. 298.

[28] Marloes De Graaf-Zijl, "Job Satisfaction and Contingent Employment", pp. 214, 215.

[29] As indicated in the introduction, traditional employees can be considered to be those who work a fixed number of hours a week on the basis of a labor agreement for an indefinite period.

[30] Cf. Nele de Cuyper, Guy Notelaers and Hans de Witte, "Job Insecurity and Employability in Fixed-Term Contractors, Agency Workers, and Permanent Workers: Associations with Job Satisfaction and Affective Organizational Commitment", p. 194; Mia Rönnmar, "Flexicurity, Labour Law and the Notion of Equal Treatment", pp. 169, 170, 180.

[31] Directive 2003/88/EC, art. 1.

[32] Cf. Luigi Burroni en Maarten Keune, "Flexicurity: A conceptual critique", p. 84: "[…] workers and employers cannot be treated as homogenous groups: flexicurity strategies may serve the interests of some workers or employers but not of others."

[33] An influential analysis of this notion can be found in Hans Vaihinger, Die Philosophie des Als Ob, pp. 257-259 (cf. pp. 46-49).

[34] I say 'simply put' as there are other factors to take into consideration, such as the fact that lowering the benefits usually has the same effect for those currently still employed once they themselves become pensionable. The weight that should be attributed to this factor depends on the degree to which the alternative of having the freedom to have the part of one's income that would otherwise obligatorily be paid at one's disposal is considered attractive. The alternative's appeal to young employees would presumably correlate with their confidence that their interests will be taken seriously. A pension scheme can arguably be characterized as a zero-sum game between different generations of employees, and in the gloomiest scenario – depending on demographic factors – as a pyramid scheme.

[35] This issue is admittedly somewhat complex: the productivity (in the long run) and the atmosphere in the workplace may profit from realizing such an arrangement as parents are likely to experience an improved work-life balance.

[36] José Alemán, "Labour market dualism and industrial relations in Europe", p. 256.

[37] I readily grant that in some other cases, the issue is somewhat more complex. For example, the right to receive payment during periods one is unable to work because of illness applies to both sorts of employees.

[38] Cf. Anne Davies, EU Labour Law, p. 180.

[39] Cf. Hajo Holst, Andreas Aust and Susanne Pernicka, "Kollektive Interessenvertretung im strategischen Dilemma – Atypisch Beschäftigte und die "dreifache Krise" der Gewerkschaften", p. 161.

[40] Jelle Visser, "Flexibility and Security in Post-Standard Employment Relations: The Netherlands", p. 151.

[41] Cf. Brian Burgoon and Damian Raess, "Globalization and Working Time: Working Hours and Flexibility in Germany", p. 561.

[42] Cf. Keisuke Nakamura and Michio Nitta, "Organizing Nonstandard Workers in Japan: Old Players and New Players", pp. 257, 258.

[43] Cf. Jeroen de Jong, René Schalk and Tobias Goessling, "An Institutional Employment Position of Temporary Workers in the Netherlands", p. 502: "The insecure and short-term character of temporary employment is one cause of the low level of unionization among temporary employees." A case in which nonstandard workers are not properly represented is clear is Japan: "[…] 70 to 80 percent of enterprise unions still do not represent nonstandard workers within their enterprise." Keisuke Nakamura and Michio Nitta, "Organizing Nonstandard Workers in Japan: Old Players and New Players", p. 258.

[44] Patrick Emmenegger, "The Politics of Job Security Regulations in Western Europe: From Drift to Layering", p. 96.

[45] Jeroen de Jong, René Schalk and Tobias Goessling, "An Institutional Employment Position of Temporary Workers in the Netherlands", p. 501.

[46] Jeroen de Jong, René Schalk and Tobias Goessling, "An Institutional Employment Position of Temporary Workers in the Netherlands", pp. 501, 502.

[47] Dubbed "Perspectives for a social and entrepreneurial nation: leaving the crisis, with decent work, on the way to 2020."

[48] It may, incidentally, be questioned whether the influence of the central agreement of 2013 on the legislative process is desirable from a democratic point of view, but discussing that issue would necessitate an unwarranted digression.

[49] For completeness it must be added that the duration of the contract is taken into consideration once it must be decided which contracts are to be terminated, but even with this requirement in place, employees' protection against dismissal is diminished.

[50] Leaving the other grounds for dismissal here.

[51] The costs and procedures depend on the country in question. To be fair, in the Netherlands an obligation has recently been implemented for employers to pay all employees, even those whose contract is not prolonged, a sum, the amount depending on the period they have been employed as long as that period covers at least 24 months. It may be questioned, however, whether the desired effects will be realized. Several employers are now advertising jobs for a period of 23 months, which is if course no coincidence.

[52] It is difficult to assess to what extent this will be a problem. This depends, inter alia, on whether employers will replace the permanent employees by new permanent or temporary employees and whether, in the former case, those new permanent employees will consider themselves represented adequately by a union. They may, having grown up under a different labor regime than the previous generation, hold a different view in that respect.

[53] Jeroen de Jong, René Schalk and Tobias Goessling, "An Institutional Employment Position of Temporary Workers in the Netherlands", p. 499.

[54] Jeroen de Jong, René Schalk and Tobias Goessling, "An Institutional Employment Position of Temporary Workers in the Netherlands", p. 501.

[55] Maarten Keune, "The effects of the EU's assault on collective bargaining: less governance capacity and more inequality", p. 481.

[56] Or 'overstaffing', to use the vernacular.

[57] This insight has, incidentally, not reached the Dutch legislator, who, from the consideration that temporary workers will sooner be employed on a permanent basis if the period during which they may be employed on a temporary basis before they are by law employed on a permanent basis is shortened, has changed that period from 36 to 24 months, which has up to now mainly resulted in such employees losing their jobs after 24 instead of 36 months.

[58] Cf., in a similar vein Pascale Lorber, "Regulating Fixed-term Work in the United Kingdom: A Positive Step towards Workers' Protection?", p. 125.