A Just Cause for Dismissal in the United States and the Netherlands

Een redelijke grond voor ontslag in Amerika en Nederland

A Just Cause for Dismissal in the United States and the Netherlands

A study on the extent of protection against arbitrary dismissal for private-sector employees under American and Dutch law in light of Article 4 of ILO Convention 158

Een redelijke grond voor ontslag in Amerika en Nederland

Een onderzoek naar de mate van bescherming tegen een willekeurig ontslag voor werknemers onder het Amerikaanse en Nederlandse recht in het licht van artikel 4 van IAO Conventie 158

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Dedicated to Hein van Straaten
for the person he was and still is

'[Het] blijft, juist met het oog op de globalisering van de economie, van groot belang dat ook op wereldschaal aandacht wordt gegeven aan het stellen van arbeidsnormen die wereldwijd worden erkend en aanvaard. Eerlijke concurrentie is immers slechts alleen mogelijk als in de wereld min of meer gelijke standaards worden aangehangen ten aanzien van de voorwaarden waaronder arbeid wordt verricht.'

Translated into English*:*

'Particularly in light of globalization, [it] is important that attention continues to be given, also on a worldwide scale, to the setting of labour standards that will be acknowledged and accepted throughout the world. In fact, fair competition is possible only when worldwide more or less equal standards are respected with regard to the conditions under which employment takes place.'

Prof. mr. P.F. van der Heijden, Handhaving van ILO-(minimum)normen, in: Prof. dr. N. Sybesma-Knol, Prof. mr. P.F. van der Heijden, Rol en betekenis van de rechtsontwikkeling in de ILO, Preadviezen, Mededelingen van de Nederlandse Vereniging voor Internationaal Recht (NVIR) No. 119, Kluwer, Deventer, 1999, p. 10.

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Grace van Arkel
Amsterdam, januari 2007

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ABBREVIATIONS

2d	second
3d	third
10th	tenth
13th	thirteenth
14th	fourteenth
15th	fifteenth
25th	twenty-fifth
A.	Atlantic Reporter
ABA	American Bar Association
A.B.A.J.	American Bar Association Journal
ADA	Americans with Disabilities Act of 1990
ADEA	Age Discrimination in Employment Act of 1967
ADO	Adviescommissie Duaal Ontslagstelsel
Ala.	Alabama
Ala. L.Rev.	Alabama Law Review
ALJ	Administrative Law Judge
ALI	American Law Institute
Am. Bus. L.J.	American Business Law Journal
Am. J. Comp. L.	American Journal of Comparative Law
Am. U. L.Rev.	American University Law Review
ArA	Arbeidsrechtelijke Annotaties
ARAR	Algemeen Rijksambtenarenreglement
Ariz.	Arizona
art.	artikel(en)/Article(s)
ATW	Arbeidstijdenwet
AWGB	Algemene Wet Gelijke Behandeling
Bb	Bedrijfsjuridische berichten
B.B.A. / BBA 1945	Buitengewoon Besluit Arbeidsverhoudingen 1945
B.C. L.Rev.	Boston College Law Review
Berkeley J. Emp. & Lab. L	Berkeley Journal of Employment and Labor Law
BJu, bju	Boom Juridische uitgevers
BFOQ	Bona fide occupational qualification
Brooklyn L.Rev.	Brooklyn Law Review
Buffalo L.Rev.	Buffalo Law Review
B.U. L.Rev.	Boston University Law Review
BYU J. Publ.L.	Brigham Young University Law Review
BV/ B.V.	Besloten Vennootschap
BW / B.W.	Burgerlijk Wetboek
Cal.	California
Cal. App.	California Appellate Reports

Cal(if). L.Rev.	Calfornia Law Review
Cal-OSHA	California Occupational Safety and Health Act
Cap.U. L.Rev.	Capital University Law Review
Cardozo L.Rev.	Cardozo Law Review
Cath.U. L.Rev.	Catholic University Law Review
CEP	Centraal Economisch Plan
CFRA	California Family Rights Act
CGB	Commissie Gelijke Behandeling
ch.	Chapter
Cir.	Circuit
Cir.Ct.	Circuit Court
CJL	Cees J. Loonstra
C.J.S.	Corpus Juris Secundum
Co.	Colorado
Colum. Human Right L.Rev.	Columbia Human Rights Law Review
Colum. J. Eur. L.	Columbia Journal of European Law
Comp. Lab.L.	Comparative Labor Law
Comp. Lab.L. & Pol'y J.	Comparative Labor Law & Policy Journal
Conn.	Connecticut
Cornell L.Rev.	Cornell Law Review
corp.	corporated
CPB	Centraal Plan Bureau
CRvB	Centrale Raad van Beroep (Netherlands Court on Social Security)
CSRA	Civil Service Reform Act of 1978
CWI	Centrale Organisatie/Centrum voor Werk en Inkomen
D.	District
D.A.R.	Daily Appellate Report
D.C.	District Columbia
DCC	Dutch Civil Code
Det.C. L.Rev.	Detroit College of Law Review
Det. L.Rev.	Detroit Law Review
Det. Mercy L.Rev.	University of Detroit Mercy Law Review
DIA	Deregulering, Inkomensvorming en Arbeidsmarkt
Dr.	Doctor
Drake L.Rev.	Drake Law Review
Duke L.J.	Duke Law Journal
EC	European Commission
ECHR/EVRM	European Convention on Human Rights/Europees Verdrag voor de Rechten van de Mens
Ed.	Editor

EEOC	Equal Employment Opportunity Commission
e.g.	exempli gratia (example given)
EK	Eerste Kamer
Emory L.J.	Emory Law Journal
Empl.Rts. & Employ. Pol'y J.	Employee Rights and Employment Policy Journal
EPA	Equal Pay Act of 1994
EPZ	Export Processing Zone
ERISA	Employee Retirement Income Security Act of 1974
ESC	European Social Charter
et seq.	et sequentes/et sequential
EU	European Union
EVRM	Europees Verdrag voor de Rechten van de Mens
F.	Federal Reporter
FAA	Federal Arbitration Act of 1947
FCA	False Claim Act
FDI	Foreign Direct Investment
Feb.	February
FEHA	California Fair Employment and Housing Act
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
FNV	Federatie Nederlandse Vakbeweging
F.Supp.	Federal Supplement
Ga. L.Rev.	Georgia Law Review
GAB	Gewestelijk Arbeidsbureau
GATT	General Agreement on Tariffs and Trade
GHvV	Guus Heerma van Voss
Gov.C.	Government Code
Hastings L.J.	Hastings Law Journal
Hfd.	Hoofdstuk
HIV	Human Immunodeficiency Virus
HR	Hoge Raad (Netherlands Supreme Court)
HSI	Hugo Sinzheimer Instituut
IAO	Internationale Arbeidsorganisatie
ICFTU	International Confederation of Free Trade Unions
Id.	Idaho
i.e.	id est (that is)
Ill.	Illinois
ILC	International Labour Conference
ILO	International Labour Organization
ILS	International Labour Standards
IMF	International Monetary Fund

Inc.	Incorporated
Ind.	Indiana
Internat.	International
ISBN	Internationaal Standaard Boek Nummer International Standard Book Number
Iowa L.Rev.	Iowa Law Review
JAR	Jurisprudentie Arbeidsrecht
Jur.	Jurisprudentie
Kan.	Kansas
K.B./ KB	Koninklijk Besluit
KG	Kort Geding
Ktr.	Kantonrechter (Cantonal Court)
Ktg.	Kantongerecht (Cantonal Court)
L.ed.	Lawyers Edition
LISV	Landelijk Instituut voor Sociale Verzekeringen
L.J.	Law Journal
LMRA	Labor Management Relations Act
LMRDA	Labor Management Reporting and Disclosure Act
LN	LexisNexis Academic
Loy.L.A. L.Rev.	Loyola of Los Angeles Law Review
LSGF	Length-of-Service Guarantee Fund
Mass.	Massachusetts
META	Model Employment Termination Act
Mich.	Michigan
Mich. B.J.	Michigan Bar Journal
Mil. & Vet.C.	Military and Veterian Code
Min.	Mining
Minn.	Minnesota
MNE	Multinational Enterprise
m. nt.	met noot
Mo.	Missouri
Mont.	Montana
Mont. Code Ann.	Montana Code Annotated
Mont. Fed.Rpts	Montana Federal Reports
Mr.	Meester
MvT O.D.	Memorie van Toelichting Ontwerp Drucker
n.a.v.	naar aanleiding van
NCW	Nederlands Christelijk Werkgeversverbond
Neb. L.Rev.	Nebraska Law Review
Nev.	Nevada
NJ	Nederlandse Jurisprudentie
N.J.	New Jersey
NJB	Nederlands Juristenblad

NJCM	Nederlandse Juristen Comite voor de Mensenrechten: Nederlands tijdschrift voor de mensenrechten
NJV	Nederlandse Juristen Vereniging
Nl	Nederland(se)
NLRA	National Labor Relations Act of 1935
No.	Number
Nr.	Nummer
N.E.	North Eastern Reporter
N.H.	New Hampshire
NJV	Nederlandse Juristen Vereniging
N.M.	New Mexico
NTBR	Nederlands Tijdschrift van Burgerlijk Recht
NTER	Nederlands Tijdschrift voor Europees Recht
NUR	Nederlandstalige Uniforme Rubrieksindeling
NVIR	Nederlandse Vereniging voor Internationaal Recht
N.W.	North Western Reporter
N.Y.	New York
N.Y.U. L.Rev.	New York University Law Review
N.V.	Naamloze vennootschap
OECD	Organisation for Economic Co-operation and Development
Or.	Oregon
OSHA	Occupational Safety and Health Act
p.	pagina(s), page(s)
P.	Pacific Reporter
Pac. L.J.	Pacific Law Journal
par.	Paragraaf
Pb EG	Publicatieblad Europese Gemeenschap
Ph.D.	Philosophiae Doctor, Doctor of Philosophy
PDA	Pregnancy Discrimination Act of 1974
Pepp. L.Rev.	Pepperdine Law Review
PLO	Palestine Liberation Organization
PP	Tijdschrift Praktisch Procederen
Pres.	President
Prof.	Professor
PS	Periodiek voor sociale verzekering, sociale voorzieningen en arbeidsrecht
RAR	Rechtspraak arbeidsrecht
Rb.	Rechtbank
R.B.A./ RBA	Rechterlijke Beslissingen inzake de Wet op de Losbladige Arbeidsovereenkomst
RDA	Regionaal Directeur van de Arbeidsvoorzieningsorganisatie

REA	Wet op de Reïntegratie Arbeidsgehandicapten
Regent U. L.Rev.	Regent University Law Review
RLA	Railway Labor Act of 1926
Rov.	Rechtsoverweging
RSV	Rechtspraak Sociale Verzekeringen
RvdW	Rechtspraak van de Week
Santa Clara L.Rev.	Santa Clara Law Review
S.C.	South Carolina
S.C. L.Rev.	South Carolina Law Review
S.Ct.	Supreme Court Reporter
S.E.	South Eastern Reporter
SER	Sociaal-Economische Raad
Seton Hall Legis.J.	Seton Hall Legislative Journal
SEW	Sociaal-economische wetgeving: Tijdschrift voor Europees en economisch recht
SGP	Staatkundig Gereformeerde Partij
SM	Sociaal Maandblad
SMA	Sociaal Maandblad Arbeid
So.	Southern Reporter
SR	Sociaal Recht
STAR	Stichting voor de Arbeid
Stats.	Statutes
Stb.	Staatsblad
Stcrt.	Staatscourant
S.Tex. L.Rev.	South Texas Law Review
St.John's L.Rev.	St. John's Law Review
St. Louis L.J.	St. Louis Law Journal
SUWI	Wet Structuur Uitvoeringsorganisatie werk en inkomen
Syraceuse J. Int'l L. & Com.	Syraceuse Journal of International Law and Commerce
S.W.	South Western Reporter
SZW	(Ministerie van) Sociale Zaken en Werkgelegenheid
Tenn.	Tennessee
Tex. L.Rev.	Texas Law Review
Title VII	The Civil Rights Act of 1964 amended in 1991 (Title VII)
TK	Tweede Kamer
TNC	Transnational Corporation
Trb.	Tractatenblad van het Koninkrijk der Nederlanden
TVVS	Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen. Maandblad voor Ondernemingsrecht en rechtspersonen

U.Ark.Little Rock L.Rev.	University of Arkansas at Little Rock Law Review
UCC	Uniform Commercial Code
UCLA L.Rev.	UCLA Law Review
ULC	National Conference of Commissioners on Uniform State Laws (the Uniform Law Commissioners)
U.Mich. J.L.Ref.	University of Michigan Journal of Law Reform
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
U.Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
U.Pa. J. Lab. & Emp. L.	University of Pennsylvania Journal of Labor and Employment Law
U.Pa. L.Rev.	University of Pennsylvania Law Review
U.S., US	United States
U.S.A., USA	United States of America
USAA	United States Arbitration Act
U.S.F. L.Rev.	University of San Francisco Law Review
U.S.C.	United States Code
UvA	Universiteit van Amsterdam
UWV	Uitvoeringsinstituut Werknemers Verzekeringen
v.	versus
VA	Van Arkel (author)
VNO-NCW	Verbond van Nederlandse Ondernemingen en het Nederlands Christelijk Werkverbond
VOC	Verenigde Oost-Indische Compagnie
Vol.	Volume
VvA	Vereniging voor Arbeidsrecht
Vzngr.	Voorzieningenrechter
WAO	Wet op de arbeidsongeschiktheidsverzekering
WARN	Workers Adjustment and Notification Act of 1989 (WARN)
Wash.	Washington
Wash. L.Rev.	Washington Law Review
Wayne L.Rev.	Wayne Law Review
Wet AVV/OVV	Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten
WCAO	Wet op de Collectieve Arbeidsovereenkomst
WDFEA	Wrongful Discharge From Employment Act

WIA	Wet werk en inkomen naar arbeidsvermogen
WMCO	Wet Melding Collectief Ontslag
WIR	World Investment Report
Wis.	Wisconsin
Wis. Women's L.J.	Wisconsin Women's Law Journal
WPA	Whistleblower Protection Act of 1989
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
W.St.U. L.Rev.	Western State University Law Review
WTO	World Trade Organization
WW	Werkloosheidswet

I INTRODUCTION AND CENTRAL QUESTION

1 Introduction

1.1 A just cause for dismissal

1.1.1 Protection against arbitrary dismissal in general

In this thesis, I focus on *a just cause for dismissal*, also referred to as the just cause standard. In practice, the term *just cause* is used interchangeably with the term *good cause*, however, generally refers to the same standard.[1] This standard aims to provide private-sector employees protection against arbitrary dismissal *in general*, by requiring a valid reason for dismissal. This must be distinguished from protection against arbitrary dismissal for *specified* reasons, based on prohibitions on dismissal (*opzegverboden*).[2]

For a proper understanding of the just cause standard, we need to go back to the Industrial Revolution, which started about the 1760s in England with the invention of the steam engine.[3] In what is known as the First Industrial Revolution, the energy potential of coal was exploited. In the Second Industrial Revolution, electric power replaced coal.[4] Due to these new technologies and sources of power, mass production and mass profits became possible. This resulted in a new class of wealthy factory owners, the industrialists, better known as capitalists.[5] The motivation of these capitalists was profits, and whether they be conscienceless exploiters or tender hearted idealists, as Filene stresses, they had to run their businesses on business principles, which conflicted with humane sentiment.[6] Hence, employers benefited from the new sources of power to be applied to the production process at the expense of workers.[7] Consequently, the Industrial Revolution became a revolution of the rich against the poor,[8] bringing together large groups of people in factories

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1 In contrast, civil courts in the United States courts make a distinction between *just cause* as applied in the context of collective bargaining agreements, referring to the interpretation of just cause by arbitrators, and *good cause* as applied in the context of common law exceptions to the at-will rule, referring to the interpretation of just cause by civil courts. See also below under § 11.3.3 and § 12.3.3.

2 The right to protection against arbitrary dismissal may also include the right to appeal, compensation and/or damages, besides the right not to be dismissed without a valid reason. In this thesis, focusing on Art. 4 of ILO Convention 158, the term *arbitrary* refers to the latter only.

3 The (First) Industrial Revolution also affected Scotland and Wales. Therefore, it is also correct to say that the First Industrial Revolution started in Britain. See Hepple 1986, p. 13; Stearns 1993, p. 1; Deane 1996, p. 16, 17 and 19.

4 Stearns 1993, p. 5; Atkeson and Kehoe 2001, p. 1.

5 Woll 1930, p. 101; Stearns 1993, p. 5 and 6, 26.

6 Filene 1930, p. 3.

7 For the Industrial Revolution, see further below under § 1.2.1.

8 Polanyi 1944, p. 35; Stearns 1993, p. 5.

under bad working conditions.[9] Moreover, most countries provided for absolute freedom of contract with regard to hiring and firing, i.e. provided for the freedom of either party to terminate the employment relationship without cause, requiring only prior notification of such an intention.[10] The negative effects of the Industrial Revolution, however, made governments realize that the principle of freedom of contract, in response to the prevailing theories of economic liberalism, had its limits, and that workers should be protected against abuse of employers.[11] Subsequently, most but not all countries enacted legislation on safety, working hours and child labour.[12] Also, a number of countries started to require a valid reason for dismissal, i.e. a just cause for dismissal to protect employees against arbitrary dismissal in general: *a iusta causa dimissionis*.[13]

1.1.2 Dismissal systems in the world

In the course of the second half of the twentieth century, the just cause standard had become widely accepted.[14] Just cause protection did not become *universal*, however.[15] Different dismissal systems saw the light after the Industrial Revolution.[16] When we look more closely at these dismissal systems generally two perceptions prevail. As Summers states

> 'On the one hand, [there are those] who see the world in economic terms. For them, free trade is an inviolable principle that promotes economic development and works for the economic benefit of all. Any regulation limiting that freedom violates that principle and undermines its benefits. On the other side [there are] those who see the world in social and moral terms. They see free trade as needing regulation to protect and promote non-economic values of human rights, the environment, and labour rights.'[17]

Based on these perceptions, a rough distinction can be made between (i) *an at-will dismissal system* that allows a dismissal without cause; and (ii) *a just cause dismissal system* that requires a just cause for dismissal.[18] In brief, under the

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9 Hepple 1986, p. 13; Stearns 1993, p. 5 and 6 and 27; Deane 1996, p. 17.

10 Termination of employment digest, ILO 2000, p. 9.

11 Hepple 1986, p. 6 and 12; Termination of employment digest, ILO 2000, p. 9.

12 Termination of employment digest, ILO 2000, p. 9.

13 Loonstra en Zondag 2004, p. 275.

14 See also Van Peijpe 1998, p. 45, referring to the rules of law regarding a 'socially-justified dismissal' in Germany, 1951; a 'reasonable and serious reason' in France, 1973; an 'unfair dismissal' in Great Britain, 1971; an 'objective and legally-recognized ground' in Spain, 1980. For other countries, see Appendix I.

15 Termination of employment digest, ILO 2000, p. 8-11.

16 See also Appendix I.

17 Summers 2001, p. 7.

18 See Blanpain 2001, p. 14, who refers to different criteria, among which the just cause standard, based on which one can distinguish different systems of job security (in this respect, see Appendix I). For a distinction based on employment protection including social security, see Van Peijpe 1998, p. 49 and 50. One further can distinguish between an open-ended just cause dismissal system and a limited

economic perception, which dominates in an at-will dismissal system, labour is considered as a commodity to be exchanged on the open market; just cause protection hampers this free trade.[19] Under the *social* perception, which dominates in a just cause dismissal system, the idea is that the employee is dependent on the employer in economic and societal aspects, hence, workers need to be protected by the government against abuse of employers.[20]

1.2 The need for protection of workers against abuse of employers

1.2.1 Industrial Revolution

From England, the Industrial Revolution spread to other countries. The first countries affected in the nineteenth century were those that were geographically close to England, e.g. the Netherlands, or in the case of the United States, historically and culturally close.[21] In the *United States*, the Industrial Revolution started in the 1820s with the importation of technological systems from Britain. Textile factories in New England formed the core of the American factory industry.[22] The United States emerged as a strong industrial nation by the end of the nineteenth century, with the burst of growth of automobile plants in Detroit. It had a labor shortage, however. Hereupon, it had no other choice than to import immigrant workers. They were generally treated as racially inferior by many of the American industrialists. Hence, particularly for immigrant workers, the Industrial Revolution led to extremely bad working conditions.[23]

In the *Netherlands*, the Industrial Revolution began in the 1830s. In these years, the first large-scale factories were set up to produce more boats and textiles in order to meet the demands of the Javanese market under the colonial Dutch government. In the 1870s, a period in which employees were still unorganized, the Industrial Revolution reached its lowest point for the Dutch workers, a period better known as the 'Social Question' (*Sociale Quaestie*), characterized by low wages, bad housing and unsafe working environments.[24] Subsequently, the Industrial Revolution further spread to other countries in the world, e.g. Russia and Japan, where workers met the same problems that workers elsewhere had met during *their* Industrial Revolution. In effect,

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(exhaustive) just cause dismissal system. Article 4 of ILO Convention 158 contains a limited just cause dismissal system, however, in practice is open-ended. See below under § 22.1.

19 Rojot 2001, p. 428; Vandenberghe 2004, p. 50-54.

20 Hepple 1986, p. 11; Hepple 2003, p. 7; Vandenberghe 2004, p. 48, referring to P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law*, Stevens, London, 1983, p. 18.

21 Stearns 1993, p. 1 and 41; Hepple 1986, p. 13.

22 Stearns 1993, p. 48.

23 Hepple 1986, p. 13; Stearns 1993, p. 52; Parker 1996, p. 354 and 355, and 364 and 365. See also De Swaan 1989, p. 209, referring to state old age pensions at the time, initiated by employers, which excluded black people and immigrants.

24 Van Zanden 1996, p. 84 and 85; Bakels 2000, p. 5 and 6; De Swaan 1989, p. 216.

worldwide, the negative effects of the Industrial Revolution emphasized the need for protection of workers against abuse of employers.[25]

1.2.2 Economic globalization

In the course of the twentieth century, many of the individual factory owners, i.e. capitalists were replaced by multinationals. As Stearns describes it

> '(…) the explosion of multinationals and their increasing ability to operate a variety of economic activities, from resource extraction to capital transfers, in almost every part of the world constituted the clearest sign that the industrial revolution had entered a new, global phase after 1950 [in which] the globe was treated as a single industrial unit.'[26]

These multinationals are considered as the 'key engines' of what is called the process of *economic globalization*.[27] This process could evolve, due to the opening of markets,[28] as promoted by international organizations as the GATT (General Agreement on Tariffs and Trade), its successor the WTO (World Trade Organisation),[29] the IMF (International Monetary Fund),[30] and the World Bank.[31] More specifically, the OECD (Organization for Economic Co-operation and Development)[32] defines economic globalization as the process in which

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25 Stearns 1993, p. 1, 104, 123 and 124; Munting 1996, p. 331.

26 Stearns 1993, p. 222 and 223.

27 According to Davidsson they account for two-thirds of global trade in goods and services. Davidsson 2002, p. 1. See also Beck 2003, p. 2 and 19; Grapperhaus 2006, p. 4.

28 Clem Tisdell and Raj Kumar Sen in: Economic Globalisation 2004, p. 3.

29 The WTO succeeded the GATT (General Agreement on Tariffs and Trades) in 1995. It aims to reduce trade barriers in order to help producers of goods and services, exporters and importers conduct their businesses. On 11 December 2005, the WTO has 149 members, covering about 90 per cent of world trade, e.g. among the still absent countries are Taiwan and the Russian Federation. See www.wto.org. See also Van Roozendaal 2001, p. 32; Validire 2001, p. 51and 52; Munck 2002, p. 128 and 129; Mandle 2003, p. 12.

30 The IMF is a specialized agency of the United Nations with 184 member states (2007). Its goal is to foster monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty. Kooijmans 2000, p. 187. See also www.imf.org

31 The World Bank is a specialized agency of the UN. The World Bank's mission is to fight poverty and to improve the living standards of people in the developing world. Already, in 1995, the World Bank stated that globalization was likely to continue based on (i) the ongoing technological change that continues to drive down communications and transportation costs; (ii) the decrease of political conflicts in areas ranging from Europe to the Middle East and South Africa that makes moving goods and capital across borders easier; and (iii) developing countries continue to abandon strategy of closing their borders for trade. See Kooijmans 2000, p. 187; World Bank's World Development Report 1995, Workers in an Integrating World, p. 52; www.worldbank.org

32 The predecessor of the OECD (the OEEC: Organisation for European Economic Co-operation) was established in 1948 at the initiative of the US Minister of Foreign Affairs, Marshall in the light of the restoration of Europe after the Second World War. In 1960, it was succeeded by the OECD, which until now has served as an international forum for discussions on economic and social policies. By 2007, it has a global reach and groups 30 member countries sharing a commitment to democratic government and the market economy among which the Netherlands and the United States, with

economic markets, and technologies and communication patterns, gradually exhibit more global characteristics, and fewer national or local ones.[33] Similarly, Blanpain and Colucci speak of an increased international economic integration, involving trade, foreign direct investment and capital flow on the one hand, and the emergence of a knowledge society, going hand in hand with a revolution in the information and communication technology on the other.[34]

In general, one tends to define the process of economic globalization simply as *globalization*. However, the latter is a general term, which lacks an unambiguous definition. Hey, for example, defines globalization as the process by which social relationships, including those of individuals and groups, extend across the globe.[35] Beck, on the other hand, defines globalization as denoting the processes, through which sovereign national states are criss-crossed and undermined by transnational actors with varying prospects of power, orientations, identities and networks.[36] To the extent they indicate that globalization captures elements of a widespread perception that there is a broadening, deepening and speeding up of worldwide interconnectedness in all aspects of life, both are right.[37] Globalization has a number of dimensions, however. In this respect, Beck, without claiming completeness, refers to globalization of communications technology, ecology, economics, work organization, culture and civil society.[38]

This thesis focuses on *economic* globalization, and particularly on the *negative effects* this process has had on workers worldwide since the 1990s, when a large number of developing low-wage countries became involved, either as important exporters of manufactured goods, or as attractors of foreign direct investment.[39] The reason to particularly focus on its negative effects is to demonstrate that workers *still* need protection against abuse of employers, and against arbitrary dismissal in particular.[40] In brief, employers in *developed* countries claim that, due to the entrance of low-wage countries they need to reduce costs of employees by reducing wages, by dismissal at home and/or

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active relationships with some 70 other countries. See Kooijmans 2000, p. 203 and 204. See also www.oecd.org

33 The Internet with a worldwide reach sharply reduced transportation and telecommunication costs and played an important role in the process of economic globalization. OECD 1997, p. 19; World Economic Outlook 1997, p. 45 and 46; Peeters 2001, p. 21-24.

34 Blanpain en Colucci 2004, p. 1. See also Beck 2003, p. 1; Peeters 2001, p. 21; Van der Heijden en Noordam 2001, p. 19; Wailes 2002, p. 34.

35 Hey 2003, p. 3.

36 Beck 2003, p. 11.

37 See www.polity.co.uk/global/executiv.htm

38 Beck 2003, p. 2 and 19. See also Stearns 1993, p. 172. Another dimension, for example, is globalization of crime.

39 World Economic Outlook 1997, p. 45 and 46; Peeters 2001, p. 21-24.

40 See also below under § 23.2.

making use of plants abroad.[41] Van der Heijden and Noordam, for example, refer to the closing of Philips Lighting in Terneuzen, the Netherlands, when Philips decided to have the lights produced in Poland where goods could be produced cheaper because of lower wages.[42] Blanpain and Colucci refer to Siemens in Germany which, in 2003, relocated one-third of its software development to low-wage countries for the same reason.[43] Hence, these countries stress that the entrance of low-wage countries in the process of economic globalization for them has led to either a fall in wages of low-skilled workers and/or a rise in the unemployment rate. Consequently, employers in developed countries (have) put pressure on governments to deregulate dismissal laws to enable them to react more flexibly to changes on the market to strengthen their competitive position in the international context.[44]

In *developing* countries, with the emergence of so-called export processing zones (EPZs), the process of economic globalization has brought negative effects for workers as well. The term *EPZs* refers to specially designated industrial zones or plants that have been established with special incentives or privileges in order to attract foreign investors, ranging from the provision of infrastructure to tax exemptions. To give an idea, in 1998, there were some 850 EPZs worldwide, employing 27 million people, the overwhelming bulk consisting of young female workers.[45]

In particular, governments of developing countries – which are generally most in need of foreign investment – did not hesitate to publicize that their EPZs were excluded from normal industrial relations, wages were low and trade unions were prohibited. A study of the World Confederation of Labour (WCL) shows that the rights of workers in EPZs, in effect, have been put 'for sale' to attract multinationals in the hope for job creation. Trade union rights and gender discrimination constitute the most serious violations of workers' rights,[46] consequently, globalization in this respect is tending to undermine (inter)national protections of basic workers' rights.[47]

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41 Laurence Lasselle, Serge Svizzero and Clem Tisdell in: Economic Globalisation 2004, p. 188; Peeters 2001, p. 38 and 223.

42 Van der Heijden en Noordam 2001, p. 19 and 20. See also *De Telegraaf* 5 April 2006, which announced the closing of Philips Lightning in Weert – involving 250 employees – partly moving its production lines to low-wage countries as China and Poland.

43 Blanpain en Colucci 2004, p. 3.

44 Laurence Lasselle, Serge Svizzero and Clem Tisdell in: Economic Globalisation 2004, p. 188; Peeters 2001, p. 38 and 223.

45 Akpokavie 2001, p. 35 referring to *ILO: Labour and social issues relating to export processing zones*, Report for discussion at the Tripartite Meeting of Export Processing Zones-operating countries Geneva, 1998.

46 Akpokavie 2001, p. 35-39, referring to a study of the World Confederation of Labour (WCL) of EPZs on the compliance with core labour standards (right to join a union and right on collective bargaining; non-discrimination; elimination of forced, and child labour). See *WCL: Export processing zones and international labour standards, Case Studies of Senegal, Madagascar, Mexico, Honduras, Sri Lanka and Indonesia*, Brussels, 2000.

47 Howard 2001, p. 55 and 56.

1.3 International labour standards

1.3.1 ILO

Already, during the Industrial Revolution, industrialists became aware of the boomerang effect massive production had on workers who had become less productive because of bad working conditions. By improving the working conditions for their workers, they exposed themselves to economic disadvantages as the price of their social policy, undermining their competitive position in the international context.[48] Consequently, the Industrial Revolution led to a distortion of the balance of competitiveness among states. Industrialists realized that an international labour body was needed to create humane working conditions to improve productivity of workers, and to correct the pattern of international competition. Subsequently, in 1897, at the initiative of industrialists, a private organization was set up in Brussels, Belgium, the *International Association for the Legal Protection of Workers*, whose main purpose came to serve as a link between the different groups in different industrial countries, necessary to correct the distortions of a free labour market. The functioning of the Association was hampered by the outbreak of the First World War. Nevertheless, after the war their initiative, eventually, resulted in the establishment of the International Labour Organization (ILO), whose goal it was to create international labour standards to establish social justice, and to correct the pattern of international competition.[49]

The entrance of low-wage countries in the process of economic globalization, however, led to a *new* distortion of the balance of competitiveness among developed and developing states.[50] Subsequently, in 1998, the legislative body of the ILO, the International Labour Conference, adopted the Declaration on Fundamental Principles and Rights at Work and its Follow-up (hereafter also ILO Declaration of 1998). This Declaration aims to achieve that workers in the world – through harmonization of core labour standards – equally benefit from the process of economic globalization.[51]

1.3.2 ILO Convention 158

Earlier, in 1982, the International Labour Conference adopted ILO Convention 158, supplemented by ILO Recommendation 166. With this Convention, the Conference aimed to offer a stronger counterweight than ILO Recommendation

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48 Ghebali 1989, p. 2 and 3, 7 and 8.

49 Betten 1993, p. 3-5; Boonstra 1996, p. 11; Gould 2001, p. 2. For the establishment and the goals of the ILO, see further below under § 20.2. For international – universal and uniform – labour standards, see below under § 20.4.

50 See further below under § 20.5.

51 Raynauld and Vidal 1998, p. 65; Velasco 2001, p. VI; Van Roozendaal 2001, p. 72 and 73. For an in-depth discussion of the ILO Declaration of 1998, see below under § 20.5.3.

119 of 1963 it replaced,[52] for the powerful multinationals that emerged in the process of economic globalization.[53]

Primarily, ILO Convention 158 aims to establish *just cause protection* for workers worldwide. Article 4, the core of this Convention, provides an international just cause standard. It requires a valid reason for dismissal connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking. What makes Article 4 unique compared to just cause provisions in other treaties,[54] is that it has a *tripartite* character, i.e. has been adopted by the Conference, consisting of representatives of governments, employers' and workers' associations.[55] Moreover, ILO Convention 158 covers practically *all* countries of the world, including the United States of America and the Netherlands, what makes Article 4 of ILO Convention 158 a perfect gauge to compare just cause protection under American and Dutch dismissal law.

1.3.3 American and Dutch dismissal law in light of ILO Convention 158

At the end of the twentieth century, the Dutch government expressed its wish to ratify ILO Convention 158. This makes it interesting to look at *Dutch* dismissal law in light of Article 4 of ILO Convention 158. The fact that only a minority of states – by 2007, thirty-two member states – ratified the Convention, apparently, is not relevant to the Dutch government. In contrast, the Labour Foundation (*Stichting voor de Arbeid* or *STAR*), advising the Dutch government – among others – on the reform of dismissal law, declared that it was not (yet) convinced whether ILO Convention 158 should be the basis for Dutch dismissal law, due to the low number of ratifications among member states of the European Union.[56] In reply, the Dutch government, however, held that the Dutch *dual* just cause dismissal system is unique in the world.[57] Hence, it may cause inequality in social protection among states, and pursuant thereto may distort the balance of competitiveness among states.[58]

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52 On the legal status of Conventions and Recommendations, see below under § 20.4.2.

53 Termination of Employment at the Initiative of the Employer, Report V (1), International Labour Conference, 68th Session 1982, p. 3 and 4.

54 Article II-90 of the European Constitution and Article 24 of the (revised) European Social Charter of 1996 contain just cause standards. However, the United States is not a member of the European Union and the European Council, respectively. For a discussion of these just cause standards, see below under § 14.3.

55 For an in-depth discussion of the tripartite system of the ILO, see below under § 20.3.2.

56 STAR-Advies 2003/7, p. 7. For ratifications of ILO Convention 158, see www.ilo.org

57 For a review on dismissal laws in the world, see Appendix I. For the Dutch dual just cause dismissal system, see Chapter 3.

58 ADO-Rapport 2000, p. 6, 142 and 151; Fouarge 2002, p. 3. It, however, is disputed that for companies to vest in the country in question, its dismissal system is determinative. Undisputed is that the less restrictive a dismissal system, the more a company will be able to adapt to the flexible changes. HSI 1999/03, p. 10.

As a brief review on dismissal laws in the world shows, the Dutch dismissal system, indeed, is unique in the world.[59] Under the Dutch dual just cause dismissal system, a private-sector employer in the Netherlands who wishes to terminate an employment agreement against the will of the employee must address the government to ask for permission to dismiss the employee, or address court to ask for a dissolution of the employment agreement.[60] ILO Convention 158, in itself, allows member states to offer employees a broader protection.[61] Meanwhile, the Dutch dismissal system has become unique among dismissal systems in the world.[62] Subsequently, in 1999, the Dutch government asked a Committee – which has become known as the ADO-Committee or the Committee Rood – to make a proposal for a Dutch dismissal system in accordance with ILO Convention 158. This proposal, drafted after the example of ILO Convention 158, led to a heated debate which, as today, still endures.[63]

The United States, too, has a unique dismissal system, being one of the few developed industrialized countries in the world that still embraces the *at-will* rule.[64] Under its classic version, a private-sector employee can be dismissed for good cause, without cause and even for a cause morally wrong.[65] Consequently, ILO Convention 158, requiring a just cause for dismissal is *contrary* to the American at-will dismissal system.[66] Hence, the United States has no intention to ratify ILO Convention 158. This raises the question what makes it interesting to look at *American* dismissal law in light of ILO Convention 158.

A reason to look at American – *and* Dutch – dismissal law in light of article 4 of ILO Convention 158 is that Article 19(5) of the ILO Constitution imposes a duty on *non*-ratifying states, including the United States and the Netherlands, to regularly report on the law of the state, and to state the reason why it has not (yet) ratified the Convention.[67] In this respect, it remains interesting to examine where the law stands in the Netherlands *and* the United States. Moreover, it is interesting to look at *American* dismissal law in respect of

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59 Other countries, which, too, require prior authorization of the government to dismiss an employee are Indonesia, the Netherlands Antilles and Surinam which, however, are all former colonies of the Netherlands. Protection against unjustified dismissal, ILO 1995, par. 82 footnote 12. See Appendix I.

60 For an in-depth discussion of the BBA 1945, see below under § 16. For an in-depth discussion of Art. 7:685 DCC, see below under § 18.

61 See Art. 19(8) of the ILO Constitution, which holds that: 'In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any member, be deemed to affect any law, award, custom or agreement which ensures more favorable conditions to the workers concerned than those provided for in the Convention or Recommendation.'

62 See Annex I. See also Grapperhaus 2006, p. 7-9.

63 For the ADO-Committee, see below under § 29.2.

64 See Termination of employment digest, ILO 2000, p. 7, in which the International Labour Office refers to Austria, Belgium, Denmark and the United States as countries with developed economies that do not recognize a general employee's right not to be unjustifiably dismissed. See also Appendix I.

65 For a short history of the at-will rule, see below under § 10.2.

66 Hardin 1997, p. 23.21; Jacobs 2003, p. 22.

67 See also below under § 20.4.2.

just cause protection, because the American judiciary, since the late 1970s, and the early 1980s, has started to accept *just cause* exceptions to the at-will rule.[68] The fact that the United States has approximately 60 million workers who work on an at-will basis, underlines the importance of this development.[69] An examination of just cause protection in the United States is all the more interesting in light of the ongoing debate on dismissal law in the United States. Recently, a discussion has arisen under the (drafts on a) Restatement of Employment Law on the recognition of just cause protection under common law.[70] Furthermore, most research in the Netherlands concentrates on dismissal systems of surrounding countries as Belgium, England, France and Germany.[71] However, in light of the process of economic globalization, it is as important to pay attention to other important players on the international market with whom the Netherlands has to compete.[72]

2 Central question, importance, topic and scope of the research

2.1 Central question and importance of the research

This thesis examines to what extent private-sector employees enjoy just cause protection in the United States and the Netherlands, and where American and Dutch dismissal law stands in respect of Article 4 of ILO Convention 158. Subsequently, through a so-called illustrative comparison,[73] I wish to answer the question *whether* and *what* both countries can learn from each other to overcome bottlenecks regarding just cause protection. The aim of the research is to contribute to the ongoing debate on dismissal law in both countries.

2.2 Topic and scope of the research

As the title of this book indicates, the emphasis of my research is on *dismissal law*. This field of law became recognized as a distinct division of law in most European countries after the Second World War,[74] and can be defined as regulating the relationship between employers and employees regarding termination of employment. What makes this field of law an interesting one is

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68 For judicial exceptions to the at-will rule, see below under § 10.4.

69 For the number of at-will employees, see also below under § 4.

70 For the (drafts on a) Restatement of Employment Law, see below under § 6.4.

71 Van den Heuvel (1983)(England, France, Germany); Luttmer-Kat (1985)(France and Germany); Kuip (1993)(Belgium, England and Germany); Heinsius (2004)(Belgium, England and Germany).

72 Heerma van Voss 1992, p. 20. See De Jong (1) 2006, p. 108 and 109.

73 For the term *illustrative comparison*, see below under § 27.1.

74 In Europe – with the exceptions of Germany and Denmark – labour law before the Second World War was preoccupied with the contract of employment, but less frequently with protective labour law. See Hepple 1986, p. 6; Van Peijpe 1998, p. 45. In the Netherlands, labour law became recognized as a distinct division of law i.e. science due to M.G. Levenbach (1896-1981). See Loonstra en Zondag 2004, p. 25; Jansen en Loonstra 1992, p. 110-132. For the United States, see below under § 6.1.

that an employer and an employee – may – have conflicting interests, but that they depend on each other to reach their goals.[75]

More specifically, the emphasis is on *private* dismissal law, i.e. the rules of dismissal law which apply to private-sector employees, to be distinguished from public employees.[76] The reason to focus on *private-sector* employees is, that this category of workers forms the majority of workers in the United States and the Netherlands.[77] I will concentrate on private-sector employees with employment agreements for an *indefinite period* only. As this thesis reached its completion, the majority of private-sector employees in the United States and the Netherlands work on the basis of employment agreement for an indefinite period.[78] In general, specific legislation applies to those who work on the basis of an employment agreement for a definite period.[79] Also, I will focus on dismissals at the initiative of the *employer* only. This restriction comes forward out of Article 3 of ILO Convention 158, which excludes termination of employment at the initiative of the worker, or termination as a result of a genuine and freely negiotated agreement between the parties.[80] This thesis further concentrates on *individual* dismissals, unless a discussion of collective dismissals is indispensable. One must bear in mind, however, that in a *broad* sense, private dismissal law, too, may apply to collective dismissals, employment agreements for a definite period, a dismissal at the initiative of the employee, or termination otherwise.[81] In this thesis, I will not discuss ILO Recommendation 166, although ILO Convention 158 is inextricably bound up with the latter. The reason is that the debates in the United States and the Netherlands on just cause protection mainly focus on the standard(s) of the Convention.[82]

Furthermore, I have made restrictions in respect of *American* dismissal law. With regard to *state statutory law* – the United States is lacking national just cause legislation – the dismissal law of the state of Montana merits examination,

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75 See also Kuip 1993a, p. 1 and 3; Van Peijpe 1998, p. 5.

76 The term private-sector workers refers to non-government, i.e. non-public employees to distinguish them from public employees who in general enjoy – constitutional and/or statutory – just cause protection against dismissal. For the United States, see Leonard 1988, p. 7; Delmendo 1991, p. 1; Goldman 1996, p. 27 and 85. For the Netherlands, see below under § 14.4.1.

77 For the United States, see Goldman 1996, p. 16-18 (about 120 v. 20 million workers in the public sector). For the Netherlands, see Verhulp 2002, p. 19; Loonstra en Zondag 2004, p. 21 and 22 (about 4 v. 1 million workers in the public sector).

78 For the Netherlands, see Loonstra en Zondag 2004, p. 102; Zijl 2006, p. 113. The Dutch government, in principle, also wishes to maintain the employment agreement for an indefinite period as the main contract. See TK 1996-1997, 25 263, No. 6, p. 4. For the United States, see Goldman 1996, p. 16.

79 For American and Dutch legislation in this respect, see § 9.3.3 (United States: the common law rule regarding employment agreements for a definite period in Montana applies to virtually all of its states), and § 14.4.2 (the Netherlands).

80 Protection against unjustified dismissal, ILO 1995, par. 19.

81 Verhulp 2002, p. 28; Loonstra en Zondag 2004, p. 274.

82 See Sybesma-Knol 1999, p. 84.

as it is the only state in the United States which has enacted a statute with a good cause standard that replaced the at-will rule.

With regard to *state common law*, the emphasis in this research is on the states of California and Michigan. These states were the first to accept good cause protection under the handbook exception and the implied-in-fact (good cause) contract exception, respectively. In discussing these exceptions, I will involve the law of other states, which either accepted or rejected these exceptions. As one can imagine, it is virtually impossible to focus on all 50 states, each having its own state law. Hence, it can be said that the combined effect of the choice for the states of California and Michigan is to give an overview of common law exceptions to the at-will rule in the United States on the one hand. However, account has to be given that a number of states may still reject one or more common law exceptions to the at-will rule on the other.[83] It, nonetheless, seems justified to focus on the states of California and Michigan, in that they are representative in *other* aspects as well. First, *California* is at the forefront of accepting common law exceptions to the at-will rule. With the landmark case of *Foley (1988)*, the California Supreme Court was the first among state courts to take a comprehensive look at wrongful discharge litigation. *Foley (1988)* affected the development of wrongful discharge litigation throughout the United States.[84] Moreover, California has been at the forefront of wrongful discharge litigation for the past decades in other cases. Second, the state of California, too, is representative for being the largest and one of the most important economies of the United States with approximately 30 million inhabitants.[85] Finally, *Michigan*, due to its number of inhabitants, amounting to approximately 10 million inhabitants, is representative for the majority of states, taking the middle course in either accepting or rejecting exceptions to the at-will rule. In brief, these states *reject* the exception of the covenant of good faith and fair dealing, and *accept* the public policy exception and the handbook exception.[86]

3 Method of discussion

3.1 The ILO, the United States and the Netherlands

For my research on *American* dismissal law, I relied on federal and state statutes, legislative history, and literature. For an examination of common law on wrongful discharge, I particularly relied on case law, i.e. decisions of courts. As main sources, I used *LexisNexis Academic* and *Westlaw*. Besides, I visited

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83 For example, the state of New York, in effect, reject all exceptions, i.e. accepted one exception in a very strict sense only. For the latter, see below under § 10.1.

84 Mendelsohn 1990, p. 10.

85 See also below under § 10.1.

86 For the handbook exception under Michigan law, see below under § 11. For the public policy exception under Michigan law, see *Suchodolski* v. *Mich. Consol. Gas. Co.*, 316 N.W. 2d. 710 (Mich., 1982).

the United States several times and conducted interviews with experts in the field of dismissal law. These experts included Professor J.R. Grodin and Professor Theodore J. St. Antoine. Joseph Grodin, 'John F. Digardi Distinguished Professor of Law, University of California, Hastings College of the Law, San Francisco', was appointed to the California Court of Appeal in 1979, and later elevated to the California Supreme Court of which he was a member until 1987. Grodin was the writing judge in *Pugh (1981)*. With this decision, the Court of Appeal of California was the first among American state courts to accept the implied-in-fact (good cause) contract exception to the at-will rule in the United States. Moreover, in 2005, Grodin was appointed member of the Consultative Group to the American Law Institute on drafting a Restatement of Employment Law. Grodin was so kind as to comment on the part on the United States, and on the chapter on the State of California in particular. Additionally, Professor St. Antoine commented on the Chapter on the State of Michigan. Theodore J. St. Antoine, 'James E. & Sarah A. Degan Professor Emeritus of Law, University of Michigan' was the former Dean of this University and was named the Reporter of the Drafting Committee for a Model Employment Termination Act (META). Last, LeRoy Schramm, at the time Chief Legal Counsel for the Montana University System, who was recommended to me by the Montana Labor Department, commented on the Chapter on Montana.

For my research on *Dutch* dismissal law I relied on statutes, legislative history, literature and case law. In a preliminary stage, I, too, conducted interviews with Dutch experts in the field of dismissal law. These experts included P.F. van der Heijden, former Professor in Employment Law at the University of Amsterdam, the Netherlands, at present, among others, Crown Member of the Social and Economic Council of the Netherlands (*Sociaal-Economische Raad* or *SER*), and A.T.J.M. Jacobs, Professor in Labour Law, Social Security and Social Policy at Tilburg University, the Netherlands, regarding his expertise on international employment law, social policy, and American labor and employment law.[87] Moreover, I conducted interviews with Drs. C.A. van der Wijst and Drs. A. Devreese of the SER to discuss the Advice on the Dutch Social-Economic Policy on the Mid-Long Term (*Advies over het Nederlandse Sociaal-Economische Beleid op de Middellange Termijn* or *MLT-Advies*).

In writing the part on the *ILO*, and Convention 158 in particular, I relied on documents of the ILO, among which reports of the Director-General, preparatory reports and records of proceedings. Also, I conducted interviews with experts outside and within the ILO, either through e-mail and/or during my stay in June 2004 when I was fortunate to visit the Annual Conference in Geneva, Switzerland. I, too, conducted interviews with C.C. van der Louw, working at the the Dutch Department of Social Affairs (Foreign Affairs) with

87 See Jacobs 2003.

regard to the ratification of ILO Conventions by the Netherlands, and N. Elkin, an officer in the International Standards Department of the ILO, who was willing to read the final version on the Chapter on the ILO on an informal and personal basis. In a preliminary stage, K. Boonstra, Professor in International Employment Law at the Free University of Amsterdam, the Netherlands, who wrote a dissertation on the ILO, was so kind to comment on the Chapter on the ILO.[88] In writing the thesis, E. Hey, Professor in Public International Law, Erasmus University of Rotterdam, the Netherlands, was so kind to comment on the aspect of (economic) globalization, and F.J.M. De Ly, Professor in International Private Law and Comparative Private Law, Erasmus University of Rotterdam, the Netherlands, on the aspect of comparitive law.

3.2 Outline of the book

In the Chapters 2 and 3, respectively, I will describe American and Dutch dismissal law. In Chapter 4, I will examine to what extent the just cause standards under American and Dutch dismissal law meet the international just cause standard of Article 4 of ILO Convention 158. Through an illustrative comparison, in Chapter 5, I will clarify the similarities, differences and bottlenecks regarding just cause protection under American and Dutch dismissal law. The aim of the comparison is to examine *whether* and *what* both countries can learn from each other to overcome these bottlenecks. Chapter 6, finally, holds conclusions, and suggestions on how to solve these bottlenecks.

The manuscript was finished on 1 January 2007, hence, this book states the law as I believe it to be on this date. Explicit reference will be made to any literature and case law after this date.

A.A. Foster of the Centre for Acadamic English at the University of Leyden, the Netherlands, reviewed the manuscript on the English language.

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88 See Boonstra 1996.

II AMERICAN DISMISSAL LAW

4 Introduction

As this dissertation reached its completion, the United States is one of the few developed industrialized countries in the world that still embraces the employment-at-will doctrine.[1] The American at-will rule in its classic formulation holds that an employee can be discharged for a good cause, no cause or even a cause morally wrong.[2] Under this doctrine, the majority of the private-sector employees in the United States – about 90% of the total private workforce, which is about 60 million people[3] – can be discharged at will by the employer.[4] However, in the mid of the twentieth century, legislative and judicially created limitations have resulted in what is called the erosion, the decline or 'the impending death' of the at-will doctrine.[5] In effect, these limitations to the at-will rule constitute the field of private dismissal law.[6] Still, the general opinion in the Netherlands is that the American dismissal system is a so-called hire-and-fire-system, and, therefore, one cannot speak of dismissal law.[7] This view may be true for the past, but as this Chapter will show, not for the present.[8] As Befort puts it

> 'In 1950, employment law did not exist as an area of legal practice or study. The controlling law of the workplace was (…) the at-will regime, which was no law at all. (…). Much [however] has changed in the world of labor and employment law in the past (…) years.'[9]

In this Chapter, I examine to what extent private-sector employees in the United States can find just cause protection under their system of dismissal law. An overview of private dismissal law in the United States cannot be easily given, however. It constitutes a complicated and incoherent field of law. The United States is lacking national legislation on employment termination. The field of

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1 See above under § 1.3.3.

2 See *Payne v. Western & A.R.R. Co*., 81 Tenn. 507, 519-520 (1884), in which the Tennessee Supreme Court decided that employers could dismiss their employees 'at will, be they many or few, for good cause or no cause, or even for cause morally wrong, without thereby guilty of legal wrong.' Player 1998, p. 2; Befort 2002, p. 3. See also below under § 10.2.

3 Sprang 1994, p. 2; Fisher 1994, p.79. In 1993 Barber estimated that 70 to 75% of those employed in the United States were employed at will. Barber 1993, p. 2.

4 Private-sector employees who are not subject to the at-will rule and generally enjoy just cause protection are those contracted on an employment agreement for a definite period. Jacobs 2003, p. 225. The same applies to about ten percent of the private sector workforce who belong to a so-called bargaining unit. See below under § 7.4.4.

5 Ballam 2000. See also Jacobs 2003, p. 212.

6 With the term private dismissal law, I refer to the rules of dismissal law that apply to private-sector employees, to be distinguished from public employees.

7 For example, VNO-NCW 1995, p. 13.

8 Jacobs 2003, p. 219 and 228.

9 Befort 2002, p. 3 and 4.

dismissal law has to be derived from other fields of law, on federal and state level. Also, to understand the field of private dismissal law, one first must understand the legal system of the United States.[10]

5 The legal system of the United States

5.1 Separation of powers and federalism

In the United States there are fifty states, each with its own executive, lawmaking and judicial power, besides a federal government with the same powers.[11] The federal and state governments are subject to the Constitution of the United States of 1787 (hereafter US Constitution), which still governs the country. The US Constitution reflects the two characteristics of the unique governmental structure of the United States (i) federalism; and (ii) the separation of powers. Both directly affect the legal system(s) of the United States.[12]

The principle of federalism, meaning that there are two levels of government – federal and state – was conceived by the founders of the US Constitution.[13] The founders, i.e. thirteen colonist states, had declared their independency – of the English Crown – through the Declaration of Independency in July 1776. In brief, they wished to have a central government on the one hand, but to maintain their independence on the other. Their first serious attempt at a federal union was in 1781. Through the Articles of Confederation the colonist states had established a Congress which lacked important powers, however.[14] For example, when Congress approved a treaty with England in 1784 to end the War of Independence and many states did not comply with the treaty, Congress could not act. Subsequently, at one of its conferences the colonist states suggested that a convention be held in Philadelphia to discuss a new charter of government. This convention took place in May 1787, in furtherance of which, on 25 September 1787, the Constitution of the United States was signed.[15]

Under the US Constitution, the legislative, executive and judicial powers were vested in Congress,[16] the President,[17] and the Supreme Court of the United

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10 Burnham 1995, p. 1.

11 Klik 1994, p. 11; Jacobs 2003, p. 16.

12 Klik 1994, p. 7; Burnham 1995, p. 1. For examples, see Koopmans, 2002, p. 7 and 8.

13 On 25 September 1787, the Constitution of the United States (US Constitution) was signed and submitted to Congress – consisting of delegates of the 13 colonist states – to become effective upon its acceptance by two thirds of the states, which occurred in July 1788, after which the first President, George Washington, was inaugurated in April, 1789. Farnsworth 1987, p. 3; Klik 1994, p. 7; Burnham 1995, p. 1; Goldman 1996, p. 6; Van Oudheusden 2000, p. 22-25; Boon 2001, p. 2 and 3.

14 Brody 1978, p. 15; Farnsworth 1987, p. 2 and 3.

15 Farnsworth 1987, p. 3; Burnham 1995, p. 1-3.

16 Article 1 Section 1 of the US Constitution.

17 Article II Section 1 of the US Constitution.

States[18] (hereafter the US Supreme Court), respectively.[19] However, to safeguard the independence of the thirteen colonist states, the Tenth Amendment in the Bill of Rights of 1791[20] determined that

> 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'[21]

Hence, it would be more accurate to speak of fifty-one legal systems of the United States. Nevertheless, the creation of a federal governmental structure under the US Constitution justifies speaking of *the* legal system of the United States.[22]

5.2 Federal and state law

5.2.1 Federal and state statutes

State legislatures have not been created by the US Constitution. Therefore, they need not search the US Constitution for their power to make law.[23] In fact, all thirteen colonist states with their own state constitutions, based on which they could enact state law, existed long before the US Constitution was established. Moreover, due to the Tenth Amendment, states did not lose their power to enact *state* statutes. Consequently, state legislatures can regulate any subject matter they choose – the same subject matter as federal legislatures if they like – so long as their state laws do not conflict with federal law under Article VI of the US Constitution, the so-called Supremacy Clause.[24] In general, the state *legislative* branch consists of a house of representatives and a senate, and a chief executive officer with limited veto power over the legislative branch.[25]

Congress, on the other hand, need to search the US Constitution for their power to enact *federal* statutes,[26] and to initiate bills in this respect.[27]

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18 Article III Section 1 of the US Constitution.

19 Burnham 1995, p. 1, 4-9; Goldman 1996, p. 6-8; Koopmans 2002, p. 18.

20 The Bill of Rights, adopted in 1791, originally consisting of ten amendments to the US Constitution holds a list of mainly individual rights against the federal government. Farnsworth 1987, p. 4; Burnham 1995, p. 3 and 4, 24 and 25 and 338.

21 Klik 1994, p. 10.

22 Burnham 1995, p. 1; Rabinowitz 1998, p. 15.

23 As from 1776, state constitutions have been adopted. Farnsworth 1987, p. 3; Burnham, 1995, p. 19

24 Burnham 1995, p. 33; Jacobs 2003, p. 17. For the Supremacy Clause see below under § 5.2.1.1.

25 Burnham 1995, p. 19 and 20.

26 The President also has the power to issue Executive Orders which generally are legislative in character. These are very limited as to private-sector employers. Farnsworth 1987, p. 56; Burnham 1995, p. 14-16. See Jacobs 2003, p. 22 and 131 with regard to employment law, referring to the Executive Order 13807 (1998) of President Clinton, prohibiting discrimination based on sexual orientation of federal civil servants.

27 Article I Section 8 under 18 of the US Constitution. See also Farnsworth 1987, p. 56.

Under the US Constitution, a bill can only become federal law after the House of Representatives and the Senate have agreed upon it.[28] Moreover, the President must approve the bill. However, the President has the right to reject the bill.[29] The presidential power to veto legislation is limited, in that the President's veto can be overridden by a two-thirds majority vote of Congress.[30] The historical background of this limited power of the President is that the founders of the US Constitution feared tyranny from a too powerful executive. On the other hand, they feared that without a powerful executive to counterbalance Congress, there would be legislative tyranny.[31]

5.2.1.1 Conflict

To understand how federal and state (statutory) law and common law relate to one another, and can exist side by side, one must understand Article VI of the US Constitution, i.e. the *Supremacy Clause*. This Clause determines the hierarchy of all sources of law in the United States.[32] More specifically, it determines that the US Constitution, and the federal laws which shall be made in pursuance hereof, are 'the supreme Law of the Land' and that 'Justices in every State shall be bound thereby'.[33] Consequently, under the Supremacy Clause, the US Constitution is superior to federal statutes; federal statutes – but also treaties and federal court rules standing on the same level as federal statutes[34] – are superior to federal administrative rules;[35] federal administrative rules are superior to state constitutions. Within states, state constitutions are the paramount authorities, but are superior to state statutes; state statutes, in turn, are superior to state administrative rules; and, state administrative rules are superior to state common law.[36]

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28 Article 1 Section 1 of the US Constitution. The Congress consists of the House of Representatives and the Senate. The members of the House of Representatives are popularly elected from geographically-structured, population-based, districts established within each state of the United States; in the Senate two senators of each state, irrespective of how large or small in territory or population, are sided. See Farnsworth 1987, p. 57-59; Burnham 1995, p. 4-6 and 38; Goldman 1996, p. 7; Schirmeister 1996, p. 58, footnote 20.

29 Article I Section 7 under 2 of the US Constitution.

30 See also Burnham 1995, p. 7.

31 Burnham 1995, p. 7.

32 Farnsworth 1987, p. 55; Klik 1994, p. 11 footnote 18; Burnham 1995, p. 6 and 37.

33 Farnsworth 1987, p. 55; Klik 1994, p. 11 footnote 18; Burnham 1995, p. 6 and 37.

34 Under Article II Section 2 under 2 of the US Constitution the President can make Treaties, provided two-thirds of the Senators present concur. The US Constitution, however, is superior to these treaties, which are on the same hierarchical level as federal statutes, other than in most other countries. This means that Congress can change a treaty in the same way as a federal statute, by simply passing a contrary statute. See Burnham 1995, p. 38; Boon 2001, p. 70 and 71. Further, the US Constitution is superior to Federal Court Rules, which stand on the same hierarchical level as federal statutes as well. Burnham 1995, p. 38.

35 Presidential executive orders are on the same level as federal administrative rules. See Farnsworth 1987, p. 56.

36 For an overview, see Farnsworth 1987, p. 55-57 and Burnham 1995, p. 37-40. Burnham further distinguishes common law case law from case law interpreting enacted law. They differ in hierarchy:

Consequenty, state law must give way when in conflict with federal law.[37] Moreover, the US Supreme Court has held that, even if not in conflict with federal law, state law must – also – give way if federal law is designed to be the exclusive body of law governing an area of regulation.[38] For example, with regard to *anti-discrimination law*, the California Fair Employment and Housing Act (hereafter the FEHA)[39] and its federal counterpart Title VII[40] can exist side by side,[41] because the FEHA does not conflict with Title VII; nor does Title VII intend to exclusively cover the field of employment discrimination law, i.e. to preempt state law.[42] Consequently, state and federal courts must declare void state statutes, which conflict federal statutes and/or the US Constitution.[43] The US Supreme Court, however, is the ultimate arbiter.[44]

5.2.1.2 Intersection

An employee can base his claim on a federal or a state statute, regulating the matter in question. Federal and state statutes on the same subject matter may exist side by side, because a state had already regulated the subject and/or because the state government deemed the subject and/or remedies adopted by the federal government as inadequate.[45] To continue our example in the previous paragraph, the FEHA and Title VII cover discrimination based on the basis of race, color, national origin, sex and religion.[46] The value added of the FEHA, which was enacted *after* Title VII, is that the California statute also prohibits discrimination based on sexual orientation and marital status.[47] Moreover, it

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case law interpreting enacted law takes on the hierarchical level of the enacted law that it interprets. See Burnham 1995, p. 39. The term common law in this thesis is used in the sense of common law case law.

37 Burnham 1995, p. 6; Boon 2001, p. 115.

38 *Washington v. District of Columbia (1995)*. See also Farnsworth 1987, p. 57 and Goldman 1996, p. 377.

39 Cal. Gov't Code §§ 12940. The 2000 California Employer, p. 31.

40 For Title VII, see below under § 8.2.

41 Section 708 of Title VII in fact explicitly allows for state law so long as it does not require action prohibited by Title VII.

42 For example, the National Labour Relations Act (NLRA) of 1935 intends to exclusively cover the field of collective bargaining in the United States. State legislatures, however, can regulate this subject matter for situations in which the NLRA does not apply. See Klik 1994, p. 11; Jacobs 2003, p. 32. For the NLRA, see below under § 7.1 and 7.3.

43 Ever since *Marbury v. Madison (1803)* was decided, American courts have had the power to nullify statutes enacted by the legislature on the ground that they were unconstitutional. See Van Wezel Stone 2000, p. 359, footnote 28.

44 Van der Does 1990, p. 10; Burnham 1995, p. 6; Rabinowitz 1998, p. 12; Boon 2001, p. 115.

45 Burnham 1995, p. 34.

46 Lindemann and Grossman 1997, p. 4 and 5.

47 The 2000 California Employer, p. 31.

offers *unlimited* compensatory and punitive damages,[48] while Title VII includes a cap for compensatory and punitive damages of US$ 300,000.[49]

The *choice* for a federal or a state statute in a procedure depends on the protection an employee is seeking on the one hand, and the protection the statute provides on the other. For example, if an employee in California feels discriminated against by his employer because of his race, he can rely on the FEHA and/or Title VII. However, when he feels discriminated against because of his marital status, he can base his cause of action on the FEHA only. Moreover, when he seeks for unlimited punitive damages – which usually is the case – he will base his claim primarily on the FEHA. An important aspect further is that the FEHA applies to employers with five or more employees. Title VII applies to employers with a minimum of fifteen or more employees.[50] Of course, an employee can decide to base his claim on *multiple* grounds, hence, can base his claim on a federal statute, a state statute and/or a common law rule.[51] For example, when a discharged fifty-old private-sector employee feels discriminated against because of age, and had been verbally promised that he would be discharged for good cause only, he can base his claim on the ADEA[52], an anti-discrimination state allowing for higher awards,[53] and/or the implied-in-fact (good cause) contract exception under common law.[54]

5.2.2 State common law

State common law is created by the highest courts of states.[55] As derives from the Supremacy Clause, state common law stands on the lowest level of the hierarchy of law, and consistently can be abolished or modified by the federal and/or state legislatures.[56] This, however, does not mean that common law is of

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48 The 2000 California Employer, p. 33. For Title VII, see below under § 8.2.

49 The Civil Rights Act of 1991 amended Title VII. As from then the latter provided punitive damages, however, the total amount of compensatory and punitive damages was subject to a cap that varies with the size of the employer; 15-100 employees: $ 50,000; 101-200: $ 100,000; 201-500: $ 200,000 and more than 500: $ 300,000. See Lindemann and Kadue 1996, p. 231; Lindemann and Grossman 1997, p. 1775; California Labor Law Digest 1997, p. 542 and 543; The 2000 California Employer, p. 33.

50 Lindemann and Grossman 1997, p. 4 and 5; The 1998 National Employer, p. 418; The 2000 California Employer, p. 31.

51 Lindemann and Grossman 1997, p. 682.

52 For the Americans with Disabilities Act (ADEA), a federal statute that bans discrimination of employees of 40 years and older, see below under § 8.3.

53 See *Guz (2000)*, in which an employee was released at the age of 49 when his work unit was eliminated, after which the employee Guz sued his employer alleging age discrimination based on a state statute, and for breach of an implied contract to be terminated only for good cause and breach of the implied covenant of good faith and fair dealing.

54 For the implied-in-fact (good cause) contract claim, see below under § 10.4.4.2.

55 Burnham, 1995, p. 42. In the Netherlands, justices create law, for example, to the extent legislatures use open norms, such as the norm of fairness and reasonability. See Wiarda 1963, p. 161 and 162. Initially, under – English – common law the 'courts of equity' only, hence, not the common 'courts of law', could create law. See Uniken Venema/Zwalve 2000, p. 72 and 73.

56 For the Supremacy Clause, see above under § 5.2.1.1.

less importance than the other sources of law. In fact, everyday transactions affecting most people are governed by state common law.[57] Also, employment agreements are governed by state common law.

Initially, the federal legislature left the power to regulate employment agreements with the states.[58] States, however, left this power to courts, which, in effect, *create* law.[59] In this respect, the so-called *landmark cases* are particularly important. These involve cases which are voluntarily followed by a great number of other state courts for having persuasive authority, hence, has become the law of those other states as well. In employment termination cases state courts, in fact, often follow the decision of a court of another state,[60] persuaded by the arguments of the court's decision.[61]

In principle, state courts need not follow a decision of a – higher – court of another state or of a non-coordinate – federal – court within the state. They only must follow a decision of a higher court in the *same* state. Hence, a decision of the California Supreme Court has binding effect on all other lower state courts in California.

The binding effect on all other lower state courts is called *stare decisis*, also called *precedent*.[62] This term is derived from the Latin phrase 'stare decisis et non quieta movere' and literally means 'to stand by precedents and not to disturb settled points' or, in brief, 'let the decision stand'.[63] The principle of *stare decisis* means that judicial decisions of a higher court within the *same* state control later cases, which involve similar facts. The rationale behind this principle is to limit arbitrariness, and to allow parties to rely with some certainty on how the system has dealt with cases similar to theirs. This is called the *binding* or *mandatory* effect of *stare decisis*.[64] This authority includes decisions of higher courts of the same jurisdiction, and decisions of coordinate – federal – courts.[65] When courts *voluntarily* follow the decision of a court of another state

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57 Burnham 1995, p. 39 and 40.

58 Finkin 1995, p. 167 and 170.

59 See also below under § 10.3.

60 Brody 1978, p. 41; Farnsworth 1987, p. 46; Burnham 1995, p. 66.

61 Klik distinguishes between the reasoning (arguments), the holding (decision) and dictum (additional arguments). The rule is the holding of a case, usually a one or two sentence statement that summarizes the broader, more abstract principle for which the case stands, and for which the case can be used to decide later cases. Klik 1994, p. 16 and 17; Burnham 1995, p. 67; Schirmeister 1996, p. 69 and 70.

62 Burnham 1995, p. 65.

63 Brody 1978, p. 36; Farnsworth 1987, p. 44; Klik 1994, p. 16; Burnham 1995, p. 39 and 64-66; Schirmeister 1996, p. 68 and 69.

64 Schirmeister 1996, p. 69. Uniken Venema is of the opinion that under the Dutch court system there are only persuasive precedents, in contrast with Drion, who is of the opinion that although binding precedents do not exist in theory, they do in practice. See Jessurun d'Oliveira 1973, p. 22 and 42, referring to C.A. Uniken Venema, *Common Law & Civil Law*, 1971, p. 19 and J. Drion, *Stare Decisis, Het gezag van precedenten*, 1950, opgenomen in: *Verzamelde Geschriften* van J. Drion, 1968, p. 168.

65 Farnsworth 1987, p. 46.

or of a non-coordinate court, this is called the *persuasive* effect of *stare decisis*.[66] Under the principle of *stare decisis*, the highest court of a state, too, is bound by its own decisions, although it can decide to overrule its own precedent if there is some overwhelming reason to change that principle.[67]

5.3 Federal and state court systems

The federal court system consists of the US Supreme Court, twelve federal appellate circuit courts, and ninety-four federal district courts of first instance.[68] The US Constitution that established the US Supreme Court gave power to Congress to create lower federal courts,[69] upon which Congress acted with the Judiciary Act of 1789.[70] The reason for a central judiciary – although all states already had their own state court systems based on their own state constitutional provisions[71] – was the need for a uniform interpretation of federal law.[72] *All* federal courts, therefore, have jurisdiction over federal questions.[73] The US Supreme Court, however, is the *ultimate* arbiter over all federal questions, which involve all cases of *federal* law, treaties, and/or the US Constitution.[74]

Federal courts, too, have jurisdiction over *state* claims in so-called *diversity of citizenship* cases – i.e. cases in which citizens of different states are involved – to ensure non-partiality.[75] In these cases, the US Supreme Court is not the ultimate arbiter, in that the US Supreme Court must apply *state* substantive law as declared by the highest court of the relevant state.[76] The highest courts of the states are the ultimate arbiters over state questions. Courts of first instance – going by various names such as trial, district or municipal courts – exist besides courts of appeal and supreme courts. The unsuccessful party in first instance has the right to appeal to an appellate court, which reviews the decision on judicial merits only, not on the facts,[77] after which the unsuccessful party can seek review in the highest court of the state. Generally, the highest court of a state is called the supreme court with the exception of the

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66 Schirmeister 1996, p. 69.

67 Brody 1978, p. 36; Burnham 1995, p. 65 and 66. See also Uniken Venema/Zwalve 2000, p. 75.

68 Van der Does 1990, p. 8 and 11.

69 Article III of the US Constitution. See also Brody 1978, p. 17, 21 and 23.

70 Rabinowitz 1998, p. 9, 10 and 15; Van der Does 1990, p. 7.

71 Brody 1978, p. 23; Van der Does 1990, p. 55.

72 Rabinowitz 1998, p. 9. See also Van der Does 1990, p. 23.

73 Schirmeister 1996, p. 55.

74 For all the cases in which the US Supreme Court has jurisdiction, see Article III Section 2 of the US Constitution. See Brody 1978, p. 17; Van der Does 1990, p. 9, 19 and 20; Rabinowitz 1998, p. 11 and 12.

75 Brody 1978, p. 53; Van der Does 1990, p. 7; Burnham 1995, p. 35; Schirmeister 1996, p. 55; Boon 2001, p. 109.

76 Burnham 1995, p. 35.

77 Klik 1994, p. 15. If a court has granted a motion for summary judgment in which the plaintiff argues that a debate needs to take place on the applicable legal principles only, there is no debate on the facts (yet). See Brody 1978 p. 101; Burnham, p. 246 and 247.

state of New York, whose highest court is established in the Court of Appeals; it does, however, has the same function as the supreme courts of other states.[78] In a minority of states, intermediate appellate courts lack. In these states, there is a direct appeal to the supreme court.[79]

The highest court(s) on federal *and* state level handle only a small number of cases, due to the so-called *certiorari-procedure*. This procedure was introduced by the US Supreme Court after the federal circuit courts of appeal were installed and a case could be heard in two instances.[80] The highest court of a state – with the exception of the states where there are no intermediate appellate courts –, exercises a similar discretionary review as the US Supreme Court.[81]

Under this procedure, the unsuccessful party must obtain a *writ of certiorari* – a request to have the case heard in appeal – before his case can be heard before the US Supreme Court. Unlike the Netherlands Supreme Court, the US Supreme Court, thus, has a *discretionary* authority to grant a request for appeal.[82] Put differently, a review of the case by the highest court in the United States is not a matter of right, but a judicial decision. Generally, it is granted only when there are special reasons, for example, when several federal circuit courts of appeal are in disagreement on a certain principle of law.[83] State supreme courts, too, grant a *writ of certiorari* only when necessary, for example, to give clarity about the state of law after this has become unclear due to a conflict between intermediate appellate state courts.[84]

In employment termination cases, federal and state court systems interact. In general, these cases involve parties of *one* state, in which an employee files a claim under federal and/or state law. If it concerns a state claim, deriving from a

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78 The state of New York has a Supreme Court, which is inferior to the Court of Appeals. Brody 1978, p. 24; Burnham 1995, p. 181; Goldman 1996, p. 8; Schirmeister 1996, p. 57.

79 Van der Does enumerates twelve states, including the State of Montana. See Van der Does 1990, p. 54 referring to footnote 2. In general, Brody states, smaller, rural, states do not have appellate courts, hence, appeals go directly to the highest court. Brody 1978, p. 24.

80 Klik 1994, p. 14, referring to the year of 1925, when the certiorari-procedure was introduced. Van der Does 1990, p. 12 referring to the year of 1891, when the circuit courts of appeal were established and the authority was given by Congress to introduce a certiorari-procedure. For the certiorari-procedure see Schirmeister 1996, p. 55. Under Dutch law, the Netherlands Supreme Court (*Hoge Raad*) cannot refuse an appellate case if this case meets the technical requirements of Article 398 of the Act on the Civil Procedure (Wetboek van Burgerlijke Rechtsvordering). In brief, parties must have followed other forms of appeal first. See Veegens 2005, p. 83 and 84. The Netherlands did consider introducing the US system of granting a writ of certiorari to reduce the flood of - less important – cases – to the Netherlands Supreme Court. See Van der Does 1990, p. 1.

81 Van der Does 1990, p. 9; Schirmeister 1996, p. 55.

82 With regard to the US Supreme Court, a writ of certiorari must be granted, if four out of the nine judges plead for certiorari. Brody 1978, p. 68-70; Burnham 1995, p. 177; Boon 2001, p. 112 and 113. Van der Does 1990, p. 27.

83 Brody 1978, p. 69 referring to footnote 29.

84 Van der Does 1990, p. 60. See, for example, *Cotran (1998),* 17 Cal.4th 93, 95, in which the California Supreme Court explicitly stated that they granted review 'to resolve the conflict among the Courts of Appeal.'

state statute, a state court has jurisdiction and must apply the substantive and procedural law of the state. If it concerns a federal claim, deriving from a federal statute, a state court has jurisdiction as well. It then must apply federal substantive law, but is allowed to follow its own state procedural law.

When an employee brings a federal claim before a state court, the defendant may 'remove' the case to a federal court, which is done, for example, when the defendant is of the opinion that the federal court will be more favorable than the state court, or to win time. Therefore, in general, the employee will bring a federal claim before the federal court, which must apply federal substantive and federal procedural law. Common law exceptions to the at-will rule, which concern state claims, in principle, are brought before state courts.[85]

5.4 Conclusion

To understand the field of private dismissal law – and any other field of law – in the United States, one must understand how federal and state (statutory and common) law, and court systems on federal and state level relate to one another. In sum, the US Constitution vests the legislative, executive and judicial powers in Congress, the President and the US Supreme Court, respectively. Besides, states maintain(ed) their own executive, lawmaking and judicial powers under the Tenth Amendment to the Bill of Rights. This explains that there are two levels of law in the United States, federal and state law, and fifty states in the United States with each state having its own state law and state court system.

Article VI of the US Constitution – the so-called Supremacy Clause – determines the hierarchy of all sources of law in the United States. Under this Clause, federal and state law can exist side by side, unless they conflict with one another upon which state law must give way to federal law. It bears mentioning, that although state common law stands on the lowest level in the hierarchy of sources of law, it is an extremely important source in employment termination cases.

6 American rules on employment termination

6.1 The field of private dismissal law

The decisions of state courts form only part of the field of private dismissal law. For a complete view of this field of law under which private-sector employees enjoy just cause protection, we, too, need to concentrate on federal and state statutory law. As a matter of fact, the first statute to contain an exception to the at-will rule was a *federal* act on labor relations, the National Labor Relations Act of 1935 (NLRA). This Act forbids discriminatory discharge based on union

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[85] Burnham 1995, p. 35.

activity.[86] The NLRA further left space for parties to include just cause provisions in collective bargaining agreements.[87] Additionally, *federal* anti-discrimination statutes forbade discriminatory discharges based on race, color, religion or national origin, age, pregnancy and disability.[88] The Equal Pay Act of 1994 (EPA)[89] prohibits discrimination on the basis of sex with respect to wages,[90] however, does not prohibit discrimination in respect of *discharging.*[91]

State anti-discrimination statutes, too, prohibit dismissals based on – other – specified reasons under state law. State legislatures further undermined the at-will rule by enacting *state* anti-whistleblower laws, prohibiting employers to discharge an employee for 'blowing the whistle', i.e. alerting the public to wrongdoings within the firm.[92] Moreover, as from the late 1970s, and early 1980s, courts started to recognize *common law* exceptions to the at-will rule. These common law exceptions, in fact, induced the state of Montana to enact a wrongful termination statute.[93]

As part of the field of private dismissal law, finally, one may consider the law of retaliation, prohibiting employers from taking adverse action, including termination of employment, against their employees for participating in protected activity or opposing unlawful employment practices, i.e. for exercising their rights under the Act.[94] For example, federal statutes, providing anti-retaliation clauses, are the NLRA, the aforementioned federal anti-discrimination statutes, the Occupational Safety and Health Act of 1970 (OSHA),[95] the Fair Labor Standards Act of 1938 (FLSA),[96] and the Employee Retirement Income Security Act of 1974 (ERISA).[97]

The International Labour Office of the ILO further considers the Whistleblower Protection Act of 1989 (WPA) as relevant for American private-sector employees to the issue of termination of employment.[98] However, this Act applies to public employees only. Apparently, it is included in the list,

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86 For the NLRA (1935), see below under § 7.3.

87 Leonard 1988, p. 2.

88 For a discussion of these federal anti-discrimination statutes, see below under § 8.

89 29 U.S.C. §§ 201 et seq.

90 The 1998 National Employer, p. 418 and 419.

91 Lindemann and Grossman 1997, p. 490.

92 Westman 1991, p. 51-53; Termination of employment digest, ILO 2000, p. 355. For anti-whistleblower law, see below under § 10.4.2.3.

93 Mendelsohn 1990, p. 2; Callahan and Dworkin 2000, p. 2; Befort 2002, p. 9 and 10.

94 Lindemann and Grossman 1997, p. 668 and 669; The 1998 National Employer, p. 2. For a list of federal protective legislation, see Mendelsohn 1990, p. 3 and Appendix A; The 2000 California Employer, p. 16.

95 29 U.S.C. § 651 et seq.

96 29 U.S.C. § 201 et seq. See also Snow 2002, p. 8.

97 29 U.S.C. § 1001 et seq. See also the 2000 California Employer, p. 15.

98 Termination of employment digest, ILO 2000, p. 355. See also Barber 1993, p. 4, referring to the same sources of law.

because it is likely to have a strong impact on state anti-whistleblower laws which apply to private-sector employees.[99]

6.2 Lack of national just cause legislation

Congress can regulate almost any subject matter, including employment matters, under the Commerce Clause, established in Article 1 Section 8 under 3 of the US Constitution.[100] Hence, the argument that there is no federal constitutional basis for a general federal unjust cause statute is unjust. In fact, one may wonder why Congress has never enacted *national* just cause legislation with regard to employment termination.

A federal act on employment termination would not only end the feeling of uncertainty amongst employers and employees as a result of different state causes of action and state remedies applied by various state courts,[101] it would also be the most effective and simplest way to create equal protection against unjustified dismissal for private-sector employees in the United States and uniformity under state courts.[102] It can give clarity on exceptions and limitations, the permissible remedies for unjust discharges, and on what constitutes a just cause for discharge.[103]

Supporters of a bill, however, must have sufficient political power to overcome the opposition to its enactment. The problem with private-sector employees is that not all are organized. Therefore, they do not constitute an effective lobbying group and have no organization to act for them in achieving enactment of a federal just cause statute. Although labor unions with effective lobbying power – their political power has weakened, however, due to the decline of union membership[104] – may be supportive, to them national just cause legislation is not a priority. One of the most persuasive organizing arguments unions have towards workers is that *they* will bring just cause protection against arbitrary action to the work place. In fact, many union leaders believe that enactment of such a law would undermine the very reasons for having labor unions.[105]

Employers, the machine of the economy in the United States, who probably have the power to have a federal statute enacted generally raise the politically powerful argument that they cannot compete in global markets if the

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99 For anti-whistleblower law, see below under § 10.4.2.3.

100 The US Supreme Court's test under the Commerce Clause is that the regulated activity has to affect interstate commerce. This includes an activity that relates indirectly to movement of commerce across state lines, as well as an activity that occurs within a state, and its effect on national economy can be demonstrated as a matter of economic theory. See Klik 1994, p. 11 footnote 17; Burnham 1995, p. 25 and 26.

101 Perry 1992, p. 2; Barber 1993, p. 2.

102 Perry 1992, p. 2; Weinstein 1993, p. 8.

103 Peck 1991, p. 14 and 15; Weinstein 1993, p. 2 and 7; Sprang 1994, p. 3.

104 For the reasons of the decline of union membership, see below under § 7.2.

105 Jung and Harkness 1989, p. 8; Peck 1991, p. 14 and 15.

law is overregulating and restricting them.[106] According to Barber, pressure from employers alone, in effect, keeps national just cause legislation from enactment.[107] Plaintiffs' attorneys, finally, oppose enactment of – national – just cause legislation. They believe that under a national just cause statute, *punitive* damages will be limited, as occurred under the Montana wrongful termination statute, hence, the outcome under – national – just cause legislation will become less attractive for them.[108] In brief, the majority of plaintiffs' attorneys work on a contingency fee basis, i.e. on a *no cure, no pay-basis* on the one hand, but claiming a certain percentage of a possible positive outcome on the other.[109] Consequently, wrongful discharge cases are particularly profitable if an employee can ask for punitive damages.[110] The only purpose of punitive damages is to punish and deter, hence, these damages generally amount to much higher amounts than contract damages.[111]

6.3 The Model Employment Termination Act (META)

In 1991, the National Conference of Commissioners on Uniform State Laws (hereafter the Uniform Law Commissioners or ULC) proposed a model state just cause statute.[112] This quasi-governmental body – that seeks to have state legislatures adopt uniform statutes in areas where uniformity is desirable nationwide[113] – consists of lawyers, judges, legislators and academics, and was established, in 1892, at the initiative of the federal government.[114] These uniform laws are either drafted (i) as *uniform* acts, intended to be adopted by the states without modification; or (ii) as *model* acts, intended to act as a model i.e. a blue print for appropriate state legislation. Well-known is the *Uniform Commercial Code (UCC)*.[115] This uniform act was a joint product of the ULC and the American Law Institute,[116] and was submitted to the legislature of each state in its final form in 1957. By 1967, it had been adopted by every state except for Louisiana, which, however, adopted parts of the Code.[117]

Because of its great influence on American Law it, therefore, was an important moment when the ULC, in their January 1985 meeting, recognized the importance of just cause protection for private-sector employees. It held that the

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106 Corbett 2002, p. 5.

107 Barber 1993, p. 13.

108 Corbett 2002, p. 5.

109 The contingency fee amounts to an average of one-third of the outcome. See Schirmeister 1996, p. 125.

110 O'Connell 1985, p. 59-63.

111 For an in-depth discussion of punitive damages, see Schirmeister 1996, Chapter 3.

112 For the text of the META (Final draft 1991), see Holloway and Leech 1993, Appendix F, p. 951-976.

113 Theodore J. St. Antoine 1994, p. 95.

114 Theodore J. St. Antoine 1994, p. 95.

115 Barber 1993, p. 10.

116 For the American Law Institute (ALI), see below under § 6.4.

117 Farnsworth 1987, p. 122-123; Burnham 1995, p. 397 and 398.

many judicial modifications in the at-will doctrine had created tremendous uncertainty for both employers and employees. This confusion was the major reason leading to its recommendations, initially, to draft a *uniform* act.[118] The ULC found that the underlying assumption of the concept of at-will employment, that all parties are equal to the bargain, rarely applied to the employment relationship in the twentieth century.[119] Consequently, a drafting committee, on which Professor Theodore St. Antoine was appointed Reporter, began work in 1987.[120]

In August 1991, after nearly four years of drafting, the ULC adopted the third and final draft of the proposed Uniform Employment Termination Act, including a good cause provision. The central objective of the META was to achieve a balance between the interests of employers in maintaining efficient and productive operation on the one hand, and the interests of employees to be free from arbitrary treatment in the workplace on the other.[121]

The term good cause was used to distinguish it from just cause, customary in collective bargaining agreements, interpreted by labor arbitrators.[122] Therefore, the term *good cause* was chosen, particularly to emphasize the discretion allowed to management in dismissals based on economic reasons.[123] In brief, employers may dismiss full-time employees – defined as one working twenty or more hours a week – after a one-year probationary period with good cause only.[124] *Good cause* under the META of 1991 is defined as

- a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record; or
- the exercise of business judgment in good faith by the employer, including setting its economic or industrial goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and

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118 Peck 1991, p. 14; Barber 1993, p. 3 and 10; Weinstein 1993, p. 2.

119 Fisher 1994, p. 84 and 85.

120 Fisher 1994, p. 82-84; Theodore J. St. Antoine 1994, p. 95.

121 Theodore J. St. Antoine 1994, p. 96.

122 Fisher 1994, p. 85. See also below under § 12.3.3.

123 Theodore St. Antoine 1994, p. 97; Theodore St. Antoine 2001, p. 7. For the good-faith standard under common law, see below under § 11.3.3 and § 12.3.3.

124 Fisher 1994, p. 85; Theodore St. Antoine 2001, p. 7.

> determining and changing standards of performance for positions.[125]

It may be clear that if unalterally adopted by all states, the META would eliminate the at-will presumption and require that terminations of employment agreements be imposed for good cause only.[126] Subsequently, it would provide almost all private-sector employees – with the exception of probationary and employees working with an employer with fewer than five employees,[127] and employees working less than twenty hours a week protection – against arbitrary dismissal in general by a good cause standard, along with procedures and remedies.[128]

The ULC, however, could not reach consensus on adopting it as a uniform act, and approved the statute as a mere *model*,[129] serving as a guide for appropriate legislation only.[130] In literature, this has been severely criticized. Academics were of the opinion that the ULC compromised too much by changing the uniform act into a model act to be adopted on a state by state basis.[131] By 2007, although several had considered its adoption, none of the states has adopted the META.[132] All this may indicate that the META standards as to unjust dismissal remain controversial in the United States. On the other hand, it, too, may indicate that the political power of employers and attorneys-at-law is of greater influence on the enactment of state just cause legislation, than one primarily assumes. [133]

Several provisions of the Model Employment Termination Act (META), among which its good cause provision,[134] were modeled after the Montana Wrongful Discharge From Employment Act of 1987 (WDFEA).[135] The META, too, shows a striking similarity with ILO Convention 158. It is unclear, however, whether

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125 Holloway and Leech 1993, p. 956-962. See also Barber 1993, p. 10.

126 Perry 1992, p. 2. For the economic impact of the META, see Maltby 1994.

127 Sprang 1994, p. 12.

128 Peck 1991, p. 14; Barber 1993, p. 3 and 10; Weinstein 1993, p. 2.

129 Peck 1991, p. 14; Sprang 1994.

130 Sprang 1994, p. 20.

131 Sprang 1994, p. 3.

132 For example, the states of Delaware, Hawaii, Iowa, Maine, Massachusetts, Pennsylvania, and Oklahoma. See Fisher 1994, p. 88.

133 See below under § 10 to § 12.

134 Barber 1993, p. 10.

135 Schramm 1990, p. 116; Moberly 1999, p. 12. See also Bierman and Youngblood 1992, p. 54 and 55 and 376 as well as Jarsulic 1999, p. 2, pointing out that some provisions of the WDFEA differ considerably from the META. For example, in the WDFEA the probationary period in principle is left to the discretion of the employer, contrary to the META, which restricts this period to a maximum of one year. Further, the WDFEA, unlike META, does not compel arbitration. The META allows an employee to demand arbitration. Moreover, unlike the WDFEA, the META allows an arbitrator to award attorney fees to a prevailing employee. For an in-depth discussion of the WDFEA, see below under § 9.3.

the ULC considered the ILO Convention 158 as a basis for the META.[136] In fact, besides similarities, there are significant differences with ILO Convention 158.[137]

First, the META applies to firms with five or more employees only. *Second*, the META offers an opt-out provision under which an employer can substitute an automatic severance pay package – with a three year cap – in lieu of the good cause limitation, thereby at first sight significantly weakening the good cause standard.[138] It bears mentioning, however, that *employees* only have the right to waive this statutory good cause protection, regardless of cause by an express written agreement, substituting a mandatory severance payment of at least one month's pay for each years of employment up to 30 month's pay.[139] This, in turn, seems in accordance with ILO Convention 158, which does not allow *employers* to buy off just cause protection. [140] *Third*, Barber is of the opinion that under the definition of the good cause standard, the employer is given an opportunity to exercise his business judgment in an unjust manner. In brief, an employer can legitimately discharge an employee by stating that a reduction in the work force would be beneficial to his business. Although she recognizes that this statement is partially alleviated by the requirement that the employer must use good faith when terminating an employee, due to the ambiguous nature of the term good faith, she states, it will be difficult for an employee to prove that his employer had acted improperly in exercising his business judgment.[141] *Fourth*, under the META, only rare employees will have a monetary claim to justify the attention of a lawyer dependent on a contingency fee, in that it requires an outrageous violation of a well-established public policy.[142] *Fifth*, under the META an employee must give up his common law claims against his employer,[143] and can be awarded the remedies specifically enumerated in the META only, of which reinstatement is named as the preferred remedy.[144] Perry in this respect stresses that reinstatement is unlikely to be awarded in many circumstances and when awarded, the deterrent effect will be minimal, because an employer is unlikely to be financially impacted by such a remedy.[145] Additionally, the preference of the ULC for arbitrators over courts and juries has been criticized.[146]

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136 Barber 1993, p. 10.

137 For ILO Convention 158, see below under § 21. For the just cause standard under the Convention, see below under § 22.

138 Perry 1992, p. 5; Weinstein 1993, p. 10.

139 Fisher 1994, p. 85; Theodore J. St. Antoine 1994, p. 99.

140 See also below under § 33.2, seventh suggestion.

141 Barber 1993, p. 11.

142 Theodore J. St. Antoine 1994, p. 95 and 97.

143 Barber 1993, p. 11; Weinstein 1993, p. 10.

144 Perry 1992, p. 5; Barber 1993, p. 12; Weinstein 1993, p. 10.

145 Perry 1992, p. 5 and 6.

146 Sprang 1994, p. 13. For the difference between the procedures under arbitration and civil court cases, see below under § 7.5.2.

6.4 The (drafts on a) Restatement of Employment Law

In 2005, the American Law Institute (ALI) produced a first draft on a Restatement of Employment Law. At the issuance of this book the ALI produced its Fourth Draft (October, 2005). It should be stressed that these drafts are very preliminary expressions of the drafter(s), produced as they are for the considerations and advice of the project's Advisers and Members Consultative Group, i.e. subject to substantial revision following those meetings. Preliminary drafts, in other words, do not reflect or represent a position of the American Law Institute. Hence, the drafts initially are the work-product of the project's Reporters[147] and have not (yet) been considered by the Council of the American Law Institute and by its membership. Also, whether this project will come to completion is at least open to doubt. Most likely it will take years.

When it will reach its completion, it is important to realize that the Restatement of Employment Law does not function as a code. The ALI, which was established in 1923 and issues Restatements on Law, does not have lawmaking power. It consists of American justices, lawyers and teachers 'only'.[148] Nevertheless, although it does not have a legislative character, it can be of influence in providing just cause protection to private-sector employees.

In brief, Restatements on Law give guidance on fields in which the need for clarification and simplification is most felt. Generally, these are the fields in which case law is dominant.[149] Although Restatements on Law, in principle, reflect the law as its stands, many believe that the function of the ALI is not only to codify majority rules, but also to anticipate and encourage the development of law. In fact, Burnham emphasizes that Restatements on Law, in the past, have not prevented the ALI from restating what their Drafters believe is the more enlightened rule of law, even if it is not the majority view in current case law. Therefore, it is said that a Restatement on Law generally is not merely a summary of what has been decided by the courts in the past. Hence, it can exercise an important influence towards unification when a new question arises, because although a state court has to follow precedent under settled doctrine, the restatement can be persuasive when the law is still unsettled.[150]

Therefore, the Restatement of Employment Law may fulfill an important function as regards just cause protection under state common law. Interesting for this thesis is the Third Draft (May, 2005), in which the Drafter(s) refused to recognize one of the common law exceptions to the at-will rule, i.e.

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147 From the Fourth Draft (October, 2005) derives that the appointed Reporters are Professors (i) Samual Estreicher, New York University School of Law; (ii) Michael C. Harper, Boston University School of Law; (iii) Christine Jolls, Harvard Law School; (iv) Stewart J. Schwab, Cornell Law School.

148 Farnsworth 1987, p. 79.

149 Farnsworth 1987, p. 30 and 79; Klik 1994, p. 57 and 58. See also www.ali.org

150 Farnsworth 1987, p. 80; Klik 1994, p. 57; Burnham 1995, p. 77.

the implied-in-fact (good cause) contract exception.[151] Consequently, the emphasis in this thesis will be on the Fourth and the previous Draft. Particularly of interest are the Chapters 1 (Existence of Employment Relationship), 3 (Employment At Will and its Contractual Exceptions), and 4 (The Tort of Wrongful Discharge in Violation of Public Policy).

6.5 Chances for national just cause legislation

The United States is lacking federal just cause legislation.The chance that the META will result in a uniform law, providing just cause protection to private-sector employees in the United States is small. There is no broadly based programmatic group that champions such legislation.[152] Besides employers, plaintiffs' attorneys are META's most outspoken opponents. Some of them are sincere in believing that it is wrong for employees to be denied the possibility of full compensatory and punitive damages. Others simply oppose the loss of the contingency fees they can collect.[153] The META, therefore, is likely to remain an orphan, unadopted by any of the states.[154] Theodore St. Antoine remains optimistic, however, based on his experience with the ULC. He stresses that, whereas the initial reaction was considerable skepticism along with some outright hostility, after three years of searching debate and extensive revision of the proposal, lawyers, justices, and legislators became convinced of the essential fairness and soundness of the model act resulting in a final vote of thirty-nine to eleven approval.[155]

Grodin is also of the opinion that just cause legislation – at least in the state of California – should be possible. In his opinion, workers compromise a significant majority of the population in California. Therefore, it would not take a great deal of foresight for a politician to realize that political gold can be mined on this issue.[156] However, Grodin, too, must conclude that none of the bills, which were introduced in California have mustered widespread support. In fact, trial lawyers, typically a potent force in Sacramento, he admits, are ambivalent about any statute that will deprive plaintiffs of tort recovery, because of the effect it will have on the system of contingency fees.[157] In general, proposed bills for just cause legislation in other states have not been successful either for the same reason.[158] Overall, the rationale behind these bills is that (1) unlike most other leading industrial nations, the majority of private-sector employees in the United States are not protected from arbitrary, capricious, or

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151 For a discussion of this refusal, see below under § 12.

152 Kittner and Kohler 2000, p. 10 and 11.

153 Theodore St. Antoine 2001, p. 7. See also Fisher 1994, p. 89.

154 Kittner and Kohler 2000, p. 10.

155 Theodore St. Antoine 1994, p. 101; Theodore St. Antoine 2001, p. 7.

156 Grodin 1990, p. 3.

157 Grodin 1990, p. 3.

158 Peck 1991, p. 15; Fisher 1994, p. 88.

unjust discharge and are terminable at will; and (2) unjust discharge results in (i) employees having no meaningful job security, nor security in income, health, and other benefits; (ii) devastating effects on employees and their families; (iii) a reduction in productivity; (iv) an undermining of fairness, well-being, peace, and safety; and (v) practices contrary to American ideas of justice and fair play.[159] Still, as this dissertation reached its completion, the state of Montana only has enacted a general statute that requires a good cause for dismissal.[160]

6.6 Conclusion

The United States is one of the few developed industrialized countries in the world that adheres to the at-will rule and does not have national just cause legislation.[161] The chance that Congress – in the near or distant future – will enact national just cause legislation is slim. In 1991, there was hope when the National Conference of Commissioners on Uniform State Laws (ULC) adopted the Model Employment Termination Act (META), requiring a good cause for dismissal. However, the chance that it will be adopted – unalteredly – by all states is small. Pressure of politically powered groups among which employers and lawyers, in effect, stands in the way of the enactment of national – and state – just cause legislation. A Restatement of Employment Law, which may see the light in the future, may exercise influence towards a continuing trend towards recognition of just cause protection under common law. One expects, however, that it will take years before this Restatement will reach its completion. Hence, under present law, private-sector employees must still rely on exceptions to the at-will rule under federal and/or state (common) law, to be discussed below.

7 Federal labor law and collective labor law

7.1 Introduction

In this Section, I will examine to what extent private-sector employees enjoy just cause protection under federal labor law and collective labor law. In this respect, it bears mentioning, that the American labor law system significantly differs from the Dutch system.[162]

In the Netherlands, under the Collective Bargaining Agreement Act (*Wet op de collectieve arbeidsovereenkomst* or *WCAO*), in principle, the contracting parties – and its members to which the collective bargaining agreement applies – *only* are bound by the collective bargaining agreement. However, under Article 14 of the Act – unless agreed upon otherwise in the collective bargaining agreement – an employer who is a member of a contracting party must *also*

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[159] Henry 1994, p. 162. For an in-depth discussion of 30 just cause bill between 1980 and 1992, see p. 149-170.

[160] For the law of Montana, see further below under § 9.

[161] See above under § 1.3.3.

[162] See also Stege 2004, p. 333.

apply the terms of this agreement to an employee who is *not* a member of one of the contracting parties. In brief, these include employees who are members of other unions, or employees who are not union members at all. Article 14-employees, on the other hand, lack direct recourse against their employer in case of non-compliance by the employer. Only the contracting parties can demand compliance with this obligation.[163] Second, under the Dutch Generally Binding and Non-Binding Act (*Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten* or WAVV/OVV), the Dutch Minister of Social Affairs has the authority to declare terms of a collective bargaining agreement generally binding – usually for a certain period only – for *all unionized and non-unionized employers and employees of a certain branch*.[164]

In contrast, employers in the private sector in the United States are not obliged to apply the conditions of the collective bargaining agreement to *all* of their employees, but so-called *bargaining-unit employees* only,[165] nor does any American federal instance have the authority to declare conditions of a collective bargaining agreement binding for employers and employees in a certain branch. The federal labor system in the United States, on the other hand, has many other interesting aspects to discuss. The aim of this Chapter is not to focus on *all* of these aspects, but only to those that – directly or indirectly – relate to just cause protection. For a complete view on all aspects, I refer to the numerous publications in this field.[166]

Consequently, in this thesis, I will particularly focus on the National Labor Relations Act of 1935 (NLRA),[167] and collective labor law, in respect of just cause protection. I will not search the field of *state* labor law. In my opinion this is not necessary for the purpose of this research. First, the NLRA allows states to regulate subject matters for situations in which the NLRA does not apply,[168] however, Section 7 of this Act on which this thesis particularly

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163 See Art. 9 and 14 of the WCAO. See also Loonstra en Zondag 2004, p. 492-499; Van Arkel en Loonstra 2004, p. 12.36-12.39.

164 For the terms of a collective bargaining agreement to be declared generally binding, the agreement in question must apply to at least 55 percent of the employees in the relevant industrial sector. See *Toetsingskader Algemeen Verbindend Verklaring CAO-bepalingen*, which applies to the *WAVV/OVV*, Art. 4.1, Stcrt. 1998, 240 and 2002, 114. See also Loonstra en Zondag 2004, p. 499-505; Van Arkel en Loonstra 2004, p. 12.38.

165 For the term bargaining-unit (employees), see below under § 7.4.2.

166 For example, see Melvyn Dubofsky, The state and Labor in Modern America, The University of North Carolina Express, USA, 1994 (hereafter Dubofsky 1994); Labor and the American State, Katherine Van Wezel Stone, in: The Rise and Development of Collective Labour Law, Marcel van der Linden and Richard Price (eds.), Lang, 2000, p. 350-376 (hereafter Van Wezel Stone 2000); Archibald Cox, Derek Curtis Bok, Robert A. Gorman and Matthew W. Finkin, Labor Law, Foundation Press, New York, USA, 2001 (hereafter Cox 2001). For an in-depth discussion of the American federal labor law system, see also Stege 2004, p. 331-473.

167 For the NLRA, see below under § 7.3.

168 Klik 1994, p. 11; Cox 2001, p. 939; Jacobs 2003, p. 32; Stege 2004, p. 370.

focuses,[169] created a *federal* right to engage in concerted activities *immune* from state interference.[170] Second, the US Supreme Court requires that the state statute's provisions parallel those of the federal act.[171] Consequently, the National Labor Relations Board (NLRB)[172] – the body that is responsible for the enforcement of the Act[173] – and has the power to negotiate an agreement with a state agency to cede jurisdiction to the latter,[174] only will do so if state law is consistent with the federal act. Subsequently, state labor relations generally are patterned after the NLRA and rather broaden the scope of the NLRA – e.g. include smaller employers and/or cover employees who are exempted from the NLRA – than that they interfere with the basic rights under Section 7 of the NLRA.[175]

7.2 The decline of unions

The NLRA allows – but does not compel – employers and employees to agree upon collective bargaining agreements.[176] To the extent one would assume that private-sector employees will try to get a union to represent them towards the employer to obtain better working conditions, including protection against unjust dismissal, one is mistaken.[177]

Union membership still grew during the World Wars, and the Great Depression in 1937, but the density of union membership has declined ever since the mid-1950s.[178] As this thesis reached its completion, about ten percent – by 2007, this is about twenty-six percent in the Netherlands[179] – of the private-sector employees were union members.[180]

Carlson stresses that it would be a mistake, however, to conclude that the comparatively low rate of unionization *thus* reflects equanimity or apathy on the

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169 For Section 7 of the NLRA, see below under § 7.3.3.

170 Cox 2001, p. 939; Stege 2004, p. 371.

171 Cox 2001, p. 938 referring to *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 69 S.Ct. 584, 93 L.Ed. 691 (1949). See also Stege 2004, p. 371 and 372.

172 For the NLRB, see also below under § 7.3.2 and § 7.3.4.

173 Kahn 1994, p. 1, 25 and 33; Cox 2001, p. 104; Clark and Ansay 2002, p. 116.

174 Under Art. 10(a) of the NLRA.

175 Kahn 1994, p. 14; Jacobs 2003, p. 32 and 33; Stege 2004, p. 367. For the coverage of the NLRA, see below under § 7.3.2.

176 For the just cause standard in collective bargaining agreements, see below under § 7.4.3 and § 7.5.2.

177 The International Brotherhood of Teamsters with 1.8 million members in 1993 (1.4 in 2003: see Jacobs 2003, p. 41) is the nation's largest labor union. Traditionally this union organized wagon drivers, truck drivers, warehouse workers and their helpers and meanwhile, also retail clerks, office clericals, factory workers, and others. Goldman 1996, p. 231. For other – smaller – unions, see Jacobs 2003, p. 41. For the existence of unions, see Van Wezel Stone 2000, p. 351-376; Cox 2001, p. 11-17; Stege 2004, p. 335-352.

178 Fahlbeck 1994, p. 11; Goldman 1996, p. 224 and 225, 227 and 231; Befort 2003, p. 2.

179 This percentage amounts to approximately 1,900,000 employees. Source: *Centraal Bureau voor de Statistiek* or CBS (Netherlands Bureau of Statistics).

180 Source: US Bureau of Labor Statistics.

part of American workers. In fact, polls indicate that most employees are favorably disposed to unions and believe employees are better off when they are represented by unions.[181] Why then most private-sector employees seem reluctant to join a union?

In general, one assumes that the reasons for this reluctance are the employer's resistance towards unions;[182] the shift in the American economy from manufacturing to services;[183] the increase of contingent workers such as part-time workers, contract workers and independent contractors, who are difficult to organize because of their weak affiliation with the enterprise;[184] corruption within unions;[185] the collapse of communitarian habits;[186] and the fact that an employee does not wish to be bound by *all* provisions of the collective bargaining agreement.[187] Moreover, Carlson and Grodin stress that many employees in non-union workplaces *have not rejected* union representation, but they *cannot* have it because of the so-called majority rule which, in effect, creates a strong headwind against union representation.[188] In brief, a union must obtain 50 percent plus one of all votes to become the exclusive representative of employees.[189]

Last, Bales refers to the Labor Management Relations Act (LMRA)[190] and the Federal Arbitration Act (FAA),[191] stating that a private-sector employee is reluctant to join a union for, in effect, waiving his individual rights under federal and state statutory and common law by becoming a bargaining-unit employee.[192] Bales in my opinion partly overstates the 'price' a private-sector employee has to pay by becoming a bargaining-unit employee, though.

Indeed, under Section 301 of the LMRA, federal courts must refer parties to arbitration in case of an arbitration clause in a collective bargaining agreement.[193] On the other hand, in practice, it must only do so with regard to state law claims[194] that require interpretation of the collective bargaining agreement.[195] These generally concern state contract-based claims only.[196]

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181 Carlson 1992, p. 840.

182 Fahlbeck 1994, p. 4; Goldman 1996, p. 224.

183 Borst 1966, p. 41; Bales 1997, p. 6. See also Jacobs 2003, p. 43 referring to the fallback of United Mine Workers from 700,00 members in 1940 to 30,000 in 2003.

184 Befort 2002, p. 4-8; Befort 2003, p. 6.

185 Borst 1966, p. 42;Jacobs 2003, p. 43.

186 Jacobs 2003, p. 43.

187 Fahlbeck 1994, p. 4-9. See also Borst 1966, p. 35.

188 Carlson 1992, p. 782 and 840; Grodin 1998, p. 31.

189 For the majority rule, see below under § 7.4.2.

190 For the LMRA, see also below under § 7.3.1.

191 For the FAA, see also below under § 7.5.1.

192 Bales 1997, p. 2-5.

193 Hardin 1997, p. 23.92.

194 *Local (1962)*. See Adams 1994, p. 3; Bales 1997, p. 8.

195 *Allis (1985)*. See Adams 1994, p. 5; Bales 1997, p. 9.

Hence, bargaining-unit employees retain their right on state statutory and public policy claims, relating to violations of statutes,[197] which can be resolved without interpreting the agreement.[198] Furthermore, Bales refers to *Gilmer (1991)* to illustrate that private-sector employees waive their *federal statutory rights* tried in court by becoming bargaining-unit employees. In this case, the US Supreme Court allowed a waiver of a federal statutory claim under an arbitration clause.[199] *Gilmer (1991)*, however, involved an employee in a non-union context. With regard to employees in the *union* context other court decisions apply. More specifically, in *Wright (1998)*, the US Supreme Court held that *Gardner (1974)* is still the law in the union context and that *Gilmer (1991)* did not overrule *Gardner (1974)*.[200] In *Wright (1998)*, the US Supreme Court held that for a union to waive employees' rights to a federal judicial forum for federal statutory anti-discrimination claims, the agreement to arbitrate these claims must be clear and unmistakable.[201] Private-sector employees, therefore, do not 'waive' federal statutory claims that easily, as suggested by Bales, by becoming a bargaining-unit employee.

7.3 The NLRA of 1935

7.3.1 Legislative history

In the beginning of the nineteenth century, the *Pullis* case[202] still served as the best American authority for the proposition that collective actions by employees for the purpose of increasing wages were unlawful per se, i.e. constituted a criminal conspiracy.[203] By the middle of the nineteenth century, it was fairly well-established that workers could attempt to set wages by voluntary, collective agreement *among themselves* without committing a criminal conspiracy. The Sherman Act of 1890, nevertheless, still declared conspiracy illegal.

Courts extended the Sherman Act to labor unions. These court decisions provoked Congress to adopt the Clayton Act of 1914, barring application of the Sherman Act to collective action by unions for 'legitimate objects'. In brief, the

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196 With the exception of contract-based claims that are made during the time the employees did not yet join the union (*Caterpillar,1987*). See Bales 1997, p. 9 and 10.

197 For public policy claims, see below under § 10.4.2.

198 With regard to public policy claims, see *Lingle (1987)*. In this case, the employee was discharged because she had filed a false workers' compensation claim. The US Supreme Court held that 301 preempts the application of state law in an action only if such application requires the interpretation of a collective bargaining agreement. The public policy claim did not require such. Consequently, Article 301 of the LMRA did not preempt the employee's retaliatory public policy claim.

199 Bales 1997, p. 13.

200 Mitchell 1999, p. 4.

201 The US Supreme Court in *Wright (1998)* refrained from the question whether such a 'clear and unmistakable' waiver would be enforceable. Fitzgibbon 2000, p. 2.

202 See Carlson 1992, p. 796 referring to *Commonwealth v. Pullis*, Philadelphia Mayor's Court (1806), reprinted in John R. Commons, ed, 3 Doc History of Am Ind Soc 59 (Russell & Russell, 2d ed 1910).

203 Stege 2004, p. 338.

latter meant that so long as a union's action was for the purpose of obtaining higher wages or better working conditions for strikers, its action was privileged, i.e. legitimate.[204] Unions hereupon fought for the adoption of a federal labor statute that would govern the labor-management relations in the private sector in general. Subsequently, due to the lobbying of unions, and the efforts of Senator Wagner, who proposed and fought for a federal labor act, the NLRA was adopted by Congress in 1935, and is considered as the core of federal labor law in the United States.[205] The Act, in fact, became known as the Wagner Act.[206]

The purposes of the NLRA are to (i) promote and to regulate collective action;[207] and (ii) to give more bargaining power to private-sector employees by providing basic rights for the purpose of collective bargaining or other mutual aid or protection.[208] The NLRA was revolutionary at the time. Soon after its enactment, however, the constitutionality of the Act was challenged. Under the constitutional doctrine, the US Supreme Court already struck down labor and employment laws, which were in conflict with the so-called due process clauses under the US Constitution.[209] In brief, the Fifth Amendment – addressed to the federal government – and the Fourteenth Amendment – addressed to the states governments – contain the so-called due process clauses, holding that no person shall be deprived of life, *liberty*, or property, without due process.[210] As Goldman strikingly states

> 'The constitutional doctrine imposed was that a statute that limited the terms and conditions under which employees could sell and employers could buy their services constituted an impairment of the guaranty of freedom of contract and a taking without due process and without just compensation, of the property interest in one's work output. Thus, the courts perversely struck down reforms in aid of workers under the guise of protecting the workers' constitutional rights.' [211]

Consequently, the US Supreme Court struck down a federal act, prohibiting child labor in *Hammer (1918)*, and a New York State Law limiting the hours bakers could work per week in *Lochner (1905)*.[212]

In 1937, however, the nation was in the midst of the Great Depression. Under pressure of President Roosevelt, the US Supreme Court had no other

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[204] Carlson 1992, p. 799-802; Stege 2004 p. 345 and 346.

[205] Goldman 1996, p. 37; Player 1988, p. 37; Carlson 1992, p. 810; Stege 2004, p. 358.

[206] For public employees, see Goldman 1996, p. 31 and 330-332; Jacobs 2003, p. 31, 101 and 102.

[207] Stege 2004, p. 339 and 364.

[208] Turner 2000, p. 7, footnote 164, referring to Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 Cath. U. L. Rev. 791, 791-92 (1998). For the basic rights under the NLRA, see further below under § 7.3.3.

[209] Goldman 1996, p. 32.

[210] Blok 2002, p. 178 and 179.

[211] Goldman 1996, p. 32.

[212] *Adair (1908)*. See Player 1988, p. 2 footnote 6; Goldman 1996, p. 33.

option than to withdraw the constitutional barriers to social-economic legislation as an essential condition of industrial peace.[213] Subsequently, in *West Coast Hotel (1937)*, the US Supreme Court held that, based on the Commerce Clause of the US Constitution,[214] Congress has the power to regulate commerce, i.e. the power to enact all appropriate legislation for the protection of the public interest, which involves the welfare of American citizens. Therefore, it continued, Congress could establish minimum wages designed to counteract the unequal bargaining position of workers.[215] In *NLRB v. Jones & Laughlin (1937)* the US Supreme Court upheld the NLRA, in effect, for the same reason.[216] In fact, the foregoing decisions induced Congress, in 1938, to enact the Fair Labor Standards Act (FLSA), which was originally designed as a federal labor as well. The FLSA, in brief, sets a floor for wages, hours, and child labor, i.e. set collective bargaining minimums from which unions could bargain upward.[217] In practice, this Act, however, always has been considered as an employment, rather than a labor act.[218]

In 1947, the NLRA was substantially revised by the Labor Management Relations Act (LMRA). The latter also became known as the Taft-Hartley Act, deriving from the names of the senators who initiated the Act. The need of the Act was that the NLRA had become too heavily weighted in favor of the unions. The LMRA amendments sought to restore the balance in labor relations. For example, the NLRA forbade unfair labor practices for employers only. The LMRA added a series of unfair labor practices by unions. [219] Because the NLRA, when revised in 1947, was enacted as Title I of the LMRA, the NLRA also is often referred to by the latter name. Either reference title – NLRA or LMRA – is correct.

Last, in 1959, another significant revision of the NLRA took place with the adoption of the Labor Management Reporting and Disclosure Act (LMRDA). This Act, known as the Landrum-Griffin Act, provided for detailed regulation of internal union affairs, and was a result of the disclosures of the McClellan Committee, which compiled a record of wrongdoings on the part of certain unions and their officers.[220]

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213 See also *NLRB v. Jones & Laughlin (1937),* 300 U.S. 1, 42.

214 For the Commerce Clause, see above under § 6.2.

215 *West Coast Hotel (1937)*, 300 U.S. 379, 399 and 400; Stege 2004, p. 363 and 364. For an in-depth discussion of this case, see below under § 27.1.1.

216 *NLRB v. Jones & Laughlin (1937),* 300 U.S. 1, 30-32. For an in-depth discussion of this case, see below under § 27.1.1.

217 Hardin 1997, p. 23.5-6; Corbett 2002, p. 4; Stege 2004, p. 363.

218 Player 1988, p. 37-38; Goldman 1996, p. 32 and 35.

219 Another significant amendment under the LMRA was that the so-called *closed shop* had been forbidden. Under a 'closed shop provision', an employer is obliged to hire union members only, and to dismiss non-union members. See Jacobs 2003, p. 48. For an overview of all changes, see Borst 1966, p. 33; Hardin 1977, p. 23.45; Kahn 1994, p. 2 and 3; Cox 2001, p. 87-92.

220 Player 1988, p. 37 and 38; Kahn 1994, p. 4 and 5; Goldman 1996, p. 35-38; Cox 2001, p. 92 and 93; Jacobs 2003, p. 46-48.

7.3.2 Coverage

In sum, major non-government employers, and their – private-sector – employees *not* covered by the Railway Labor Act of 1926 (RLA), are subject to the NLRA. The RLA covers workers in the railway and the airline industries.[221] The coverage of the NLRA, however, as Cox correctly states, is by no means all-embracing in its coverage of American workers.

In general, the sole requirement for employers to fall within the scope of the NLRA is that their operations affect interstate commerce, which is almost always the case.[222] On the other hand, many employers are *excluded* under Section 2(2). The most significant group exluded are public employers, including federal, state, country and municipal governments.[223] Also, small employers are excluded, in that the NLRB has used its administrative discretion to fix limits as regards gross annual volume of business beyond which it will not tread.[224]

Section 2(3) further excludes certain *employees*. The exclusion of these employees by the way does not prohibit these employees from unionizing. It merely frees the employer from any obligation to deal with them relating to collective bargaining.[225] In brief, whereas the NLRA statutorily defines an employee to include *any employee* of the employer, it explicitly *excludes* agricultural workers, domestic workers, supervisory employees, and independent contractors. The exclusion of agricultural and domestic workers has no logical basis and is due to the fact that they had little political clout when the legislation was enacted.[226] Supervisors[227] and independent contractors, on the other hand, have been explicitly excluded by the Taft-Hartley amendments in 1947, for, in effect, being employers.[228] Additionally, the US Supreme Court

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221 Player 1988, p. 37; Stege 2004, p. 365.

222 For the Commerce Clause, see above under § 6.2.

223 It concerns about twenty million public employees. Most of them are accorded rights to unionize and to engage in collective bargaining (with the common exception of the right to strike), modeled upon those accorded to private-sector employees by the NLRA. See Player 1958, p. 37; Cox 2001, p. 94-96; Stege 2004, p. 366 and 367.

224 For example, for a manufacturing company the test is $ 50,000 annual receipts from or shipments to other states and for retail firms the test is $ 500,000 gross annual volume of business. Kahn 1994, p. 19 and 20; Jacobs 2003, p. 31 and 32.

225 Cox 2001, p. 99.

226 Clark and Ansay 2002, p. 118. For the influence of political powered groups, see also above under § 6.2.

227 A supervisory employee is defined under the statute in § 2 as 'any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely routine or clerical nature, but requires use of independent judgment.' See also Cox 2001, p. 99; Krukowski and Costello 2002, p. 2.

228 Cox 2001, p. 99-101; Clark and Ansay 2002, p. 119; Stege 2004, p. 367.

excluded managerial employees from the scope of the NLRA.[229] These employees make policies. According to the US Supreme Court, Congress would not have intended to invite the conflict of interest that would flow were such managerial employees to organize and bargain with the employer.[230]

Last, so-called confidential employees, who have access to confidential labor-relations information of the employer, have been excluded from the scope of the NLRA, because they may frustrate the normal operations of the collective bargaining process.[231]

In practice, most difficulties with regard to exempted employees arise on the question whether or not an employee can be qualified as an independent contractor. In general, labour arbitrators apply the common law right-to-control test to answer the question. Under this test, the assumption is that the less an employer has a right to control the employee, the more the employee is considered as an independent contractor. The common law test focuses on

- the hiring party's right to control the manner and means by which the product is accomplished;
- the skill required;
- the source of the instrumentalities and tools;
- the location of the work;
- the duration of the relationship between the parties;
- whether the hiring party has the right to assign additional projects to the hired party;
- the extent of the hiring party's discretion over when and how long to work;
- the method of payment;
- the worker's role in hiring and paying assistants;
- whether the work is part of the regular business of the hiring party;
- whether the hiring party is in business;
- the provisions of employee benefits, and
- the tax treatment of the hired party.[232]

The Reporters in the Fourth Draft on a Restatement for Employment Law, in effect, apply the same test. Section 1.01 determines that an individual is an employee whenever

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229 The NLRB defines managerial employees as 'those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer's established policy'. In practice, it concerns executive-type positions and those who are closely aligned with management as true representatives of management. See Cox 2001, p. 101 and 102.

230 Cox 2001, p. 101 referring to *NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).*

231 Cox 2001, p. 103; Stege 2004, p. 369.

232 Cox 2001, p. 97 and 98; Carlson 2001, p. 14; Befort 2003, p. 5. See also *Nationwide Mutual Insurance (1992).*

> '(a) the individual intends to serve, at least in part, the interests of the employer; (b) the employer consents to receive the services of the individual; and (c) the individual's services to an employer are not rendered as part of an independent business. An individual's services to an employer are not rendered as part of an independent business if the employer has the power to control (i) the means and manner of the individual's work; or (ii) the extent to which the individual can be enriched for performing the services.'[233]

7.3.3 Basic rights

Section 7 of the NLRA holds the basis rights of the Act, i.e. the right to self-organization, to form, join or assist labor organizations, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. As the US Supreme Court once held

> '[The] right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer (…) is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we started the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that the was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment: that union was essential to give laborers opportunity to deal on an equality with their employer.' [234]

The right to self-organization, to form, join or assist labor organizations need no further explanation. Like in the Netherlands, this right emphasizes the need to preserve the employees' free choice to become affiliated with a union.[235] The right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection is less clear. In brief, for employees to be protected, Section 7 in this respect requires that

- the activity in question must be concerted, meaning that the – individual – employee must be acting with or on behalf of other employees;[236]

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233 ALI Employment Law Draft No. 4, Chapter 1 p. 4.

234 *NLRB v. Jones & Laughlin (1937),* 300 U.S. 1, 33.

235 For an in-depth discussion of this right, see Cox 2001, p. 115-250.

236 *NLRB v. Deauville Hotel* (1985, CA1) 751 F2d 1562.

- the concerted activities must be for the objective of mutual aid or protection; and
- the nature of the activity must not be unlawful, too disloyal to the employer, in breach of contract, or such that it undermines the authority of a labor organization representing a majority of the employees in a bargaining unit.[237]

This right on protection of concerted activities, for example, covers the right to strike.[238] It is noteworthy to mention that it, too, offers protection to *non-bargaining-unit* employees. As Corbett puts it, the scope of coverage of Section 7 and its application to *all* private-sector employees, including bargaining *and* non-bargaining-unit employees, may have been one of the best-kept secrets of labor law.[239] The cases below will show that non-bargaining-unit private-sector employees, objecting against arbitrary dismissal, may have a cause of action under the Sections 7 and 8 of the NLRA, however, against dismissal for concerted activity only.

7.3.4 Unfair labor practices

Under the Sections 7 and 8, employees must state that the employer committed an unfair labor practice. Section 8(a) enumerates unfair labor practices of the employer; Section 8(b) enumerates unfair labor practices of the union.[240] In light of the interest of this thesis, I will concentrate on unfair labor practices of *employers* only. Under Section 8(a), it shall be an unfair labor practice for an employer

> '(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;
> (3) to encourage or discourage union membership by discriminating with respect to hiring, job tenure or any other condition of employment;
> (4) to discharge or otherwise discriminate against an employee for having filed charges or given testimony under the NLRA; and/or
> (5) to refuse to bargain collectively and/or in good faith with the exclusive agent i.e. the representative of the employees.'[241]

Subsequently, in case of an unfair labor practice, an employee can address the NLRB,[242] however, through the bargaining unit's exclusive agent only.[243] The

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237 Corbett 2002, p. 6.

238 Goldman 1996, p. 327; Jacobs 2003, p. 89; Stege 2004, p. 407.

239 Corbett 2002, p. 3, 6 and 9. See also Lindemann and Grossman 1997, p. 979; Fisk 2002, p. 3 and 4.

240 Goldman 1996, p. 169.

241 Player 1988, p. 38; Kahn 1994, p. 33; Goldman 1996, p. 176 and 185; Hardin 1997, p. 23.58; Corbett 2002, p. 6; Jacobs 2003, p. 45.

latter can order the employer to take affirmative action, including reinstatement of employees with or without back pay under Section 10 of the NLRA.[244] Disobedience of a decision of the NLRB does not result in penalties. The NLRB or one of the parties has to obtain an enforcement order with the federal Court of Appeals, in that disobedience of a court's decision is considered as contempt of court and is punishable by fine or imprisonment.[245]

As said, also non-bargaining-unit employees can invoke the Sections 7 and 8 of the NLRA. For example, in *Timekeeping Systems (1997)*, Leinweber, an employee, offered comments to a company's chief officer's e-mail in which the officer proposed a new vacation policy. In reply, Leinweber sent an e-mail to all other employees, in which he demonstrated that the chief officer's assertion that the proposed plan would result in more days off each year was wrong, and that he could prove the chief officer's statement to be false. The chief officer was not pleased with Leinweber's response and said that his e-mail message was in violation of a company employment manual provision, stating that failure to treat others with courtesy and respect could result in immediate dismissal. The chief officer gave Leinweber the opportunity to correct his actions, which Leinweber failed to do, after which he was discharged. Leinweber had no legal cause of action under federal or state law, so it seemed. However, he then filed an unfair labor practice charge, alleging a violation of Section 8(a)(1) of the NLRA for discharge, stating he engaged in protected, concerted activity according to Section 7. Leinweber won. The remedy offered by the administrative law justice, and affirmed by the NLRB, ordered the employer to offer Leinweber reinstatement with all the benefits he had and to make him whole for any losses he suffered. The NLRB concluded that Leinweber satisfied all requirements of Section 7, which included the concerted requirement, because his e-mail was intended to incite other employees to help him keep the old vacation policy. The e-mail was not considered as violent or serious enough to render the employee unfit for service.[246]

In *Allstate (2000)*, a female employee was operating as an agent of the company. She had participated in a program of the company for which she had to contribute large amounts of her money to the company, however, through which she obtained debts only. When she and other employee-participants were interviewed by Fortune magazine, they were critical of the program. After publication, the employer issued a disciplinary warning to the employee. She then filed an unfair labor practice charge, alleging a violation of Section 8(a)(1). The NLRB concluded that the employee's conduct satisfied all requirements of Section 7, which included the requirement that the action was concerted,

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[242] Kahn 1994, p. 1, 25 and 33; Clark and Ansay 2002, p. 116; Stege 2004, 365.

[243] For the exclusivity rule, see below under § 7.4.2.

[244] Hardin 1997, p. 23.4; Cox 2001, p. 250-263; Jacobs 2003, p. 29-31 and 75.

[245] Player 1988, p. 39 and 40; Goldman 1996, p. 364-370; Hardin 1997, p. 23.44-45; Jacobs 2003, p. 45.

[246] Corbett 2002, p. 10.

because she was initiating or inducing group action with the objective to alert others in the program to the problems she had encountered and that she, therefore, could ask for the remedies under the NLRA, including reinstatement.[247]

The cases above show that non-bargaining-unit employees, too, can obtain protection against arbitrary dismissal under the Sections 7 and 8 of the NLRA in case of concerted activities. Like with discriminatory and retaliatory discharges, the Sections 7 and 8 of the NLRA do not provide protection against arbitrary dismissal in general.

It bears mentioning that to the extent the right to strike is protected under these Sections, its protection is limited as well. Based on *Mackay (1938)*, the US Supreme Court held that it was not an unfair labor practice to replace the striking employees in an effort to carry on the business. Put differently, although the employer may not interfere with the right to strike, it does not follow that an employer herewith lost the right to protect and continue his business by supplying places left vacant by strikers. On the other hand, an employer who reinstated six out of eleven employees, committed an unfair labor practice under the Sections 8(a)(3) and 8(a)(4) of the NLRA – prohibiting discriminatory discharge based on union membership, and discharges for invoking these rights[248] – when the five employees in question who were not reinstated were all union members, and the six who were reinstated, were non-union members.[249]

7.4 Collective bargaining agreements

In the United States, collective bargaining agreements generally hold *standard* working conditions. Under these conditions, employers are *not* allowed to deviate from provisions of the collective bargaining agreement.[250] In contrast, in the Netherlands, collective bargaining agreements, in general, hold *minimum* working conditions. Under these conditions, employers are allowed to deviate from provisions of the collective bargaining agreement *for the benefit of the employee*.[251] Likewise, collective bargaining agreements in both countries supersede conflicting individual employment contracts.

7.4.1 The NLRA with respect to collective bargaining agreements

In the late nineteenth century, the American Federation of Labor (AFL) was one of the largest unions at the time, representing workers in their strive to obtain better working conditions through strikes, collective bargaining, and signing

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247 Corbett 2002, p. 12 and 13.

248 For an overview of NLRB decisions regarding discriminatory discharges, see Cox 2001, p. 221-240. See also Cox, p. 250.

249 For an in-depth discussion of this case, see Stege 2004, p. 407-410.

250 Goldman 1996, p. 49 and 51; Hardin 1997, p. 23.68 and 23.74.

251 Jacobs 2003, p. 73.

labor agreements.[252] Private-sector employees eventually obtained these basic rights under Section 7 of the NLRA.[253] Moreover, Section 8(d) of the NLRA encompasses the duty to bargain, i.e. the obligation to meet and confer at reasonable times in *good faith*. The latter means that parties must have serious intentions to reach an agreement,[254] i.e. must negotiate with the intent to bring about the agreements which the NLRA, in principle, does not attempt to compel.[255]

When parties have reached an agreement, the collective bargaining agreement applies to *all* employees of the bargaining unit – which term will be explained below –, provided that these employees meet the definition of an employee on the one hand, and are not exempted under the NLRA on the other.[256] Put differently, an employee, unionized or non-unionized, who belongs to a bargaining unit is bound by the collective bargaining agreement that applies to the bargaining unit. For a *non-unionized* bargaining unit employee this has a positive side. Just cause and arbitration provisions in collective bargaining agreements generally provide protection against arbitrary dismissal in general. A negative aspect, however, is that if this employee does not wish to be bound by other provisions of the collective bargaining agreement, he has no alternative but to quit the bargaining unit, which generally means quitting his job.[257] It, thus, is important to understand *when* an employee becomes a bargaining-unit employee.

7.4.2 Bargaining units, the majority rule, and the exclusivity rule[258]

Under the NLRA, the NLRB must order elections to establish a bargaining unit. In practice, employees themselves form a unit in deciding to accept a union's representation. This unit, in principle, constitutes the bargaining unit, which at the same time is the extent of the union's representation.[259] Subsequently, a union on behalf of these employees approaches the employer to ask for recognition of this bargaining unit by showing the employer authorization cards signed by the majority of employees of that unit. If an employer refuses to recognize the union, the latter must file a petition with the NLRB, in which it must show that at least 30 percent of the employees in the unit wants to be represented by that union.[260]

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252 Van Wezel Stone 2000, p. 358 and 359; Stege 2004, p. 337 and 340.

253 For these rights, see above under § 7.3.3.

254 Cox 2001, p. 385 and 386.

255 See also *NLRB v. Jones & Laughlin (1937),* 300 U.S. 1, 45; Stege 2004, p. 399 and 400.

256 Fahlbeck 1994, p. 16-20; Jacobs 2003, p. 73; Stege 2004, p. 390.

257 Fahlbeck 1994, p. 16.

258 For an in-depth discussion of the exclusivity rule, i.e. the union's right on exclusive presentation with respect to the bargaining unit in question, see Carlson 1992; Summers 1998.

259 Carlson 1992, p. 841.

260 For an in-depth discussion of this procedure, see Stege 2004, p. 385-390. See also Goldman 1996,

Hereupon, the NLRB will examine whether the bargaining unit satisfies the standard of an *appropriate* bargaining unit. A bargaining unit is appropriate if the employees in this unit share a *sufficient community of interest.* Important factors in this respect are

- the skills and duties of the employees affected;
- the terms and conditions of employment;
- employee interchange;
- functional integration;
- geographic proximity;
- centralized control of management and supervision; and
- bargaining history.[261]

Once the appropriate bargaining unit is established, the NLRB orders a secret ballot election to see which union will be the exclusive representative of the bargaining unit. Under the majority rule, the union with 50 percent plus one of all votes receives the NLRB certification as the exclusive bargaining agent of the employees in the bargaining unit.[262]

Subsequently, the Sections 8(a)(5) and 8(b)(3) of the NLRA provide that the employer must bargain with this union and vice versa.[263] Under Section 9(a), the exclusive union shall be the representative of *all* employees in this unit with respect to pay, wages, hours of employment and other terms or conditions of employment.[264] Hence, under the majority rule, bargaining-unit employees, in principle, cannot exercise their rights independently. Put differently, the union as its exclusive agent has the exclusive right to control the prosecution of claims in labor arbitration cases and/or unfair labor practices under the NLRA.[265] In avoiding partiality between union and non-union members, the NLRA determines that in prosecuting these claims the exclusive agent has to fairly represent *all* members of this bargaining unit.[266] The duty of fair representation, however, does not mean that the exclusive agent of the bargaining unit has a duty to proceed *any* claim of a bargaining-unit employee. For example, when the exclusive agent is of the opinion that a case is weak, he may decide not to proceed with the claim. This is allowed so long as the exclusive agent does not act in bad faith.[267]

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p. 190 and 192 and 357; Hardin 1997, p. 23.45-52; Clark and Ansay 2002, p. 120 and 121; Jacobs 2003, p. 50 and 51.

261 Fahlbeck 1994, p. 16 and 19; Goldman 1996, p. 358; California Labor Law Digest 1997, p. 353; Dempster 2002, p. 1; Jacobs 2003, p. 52; Stege 2004, p. 383-385.

262 Carlson 1992, p. 847-849. The union can appeal from this decision of the NLRB to a federal court, and ultimately the US Supreme Court. Other unions may interfere. Fahlbeck 1994, p. 14.

263 See also Carlson 1992, p. 779.

264 Summers 1998, p. 42.

265 Fahlbeck 1994, p. 17-19; Jacobs 2003, p. 74 and 75.

266 Hardin 1997, p. 23.93-94; Jacobs 2003, p. 75.

267 Fahlbeck 1994, p. 16-20; Bales 1997, p. 4; Jacobs 2003, p. 74and 75.

7.4.3 Bargaining subjects

It should be noted that the employer and the exclusive agent have a duty to bargain on *mandatory* subjects only. These subjects are broadly described in the Sections 8(d) and 9(a) of the NLRA as wages, hours and other terms and conditions of employment.[268] From decisions of the NLRB it can be derived that these mandatory subjects include vacations, safety rules, work rules, drug testing, non-discrimination, discipline, grievance, arbitration and job security.[269] As regards the latter, most collective bargaining agreements have a just cause standard.[270] On the other hand, not all decisions made by management, which affect the job security of employees fall within the scope of mandatory bargaining subjects.[271] For example, layoffs due to a – partial – shutdown of the enterprise are considered as *permissive* bargaining subjects.[272] However, in general, collective bargaining agreements, too, often hold clauses as regards layoffs, the principle of seniority and severance payments.[273] Moreover, Section 8(a)(3) prohibits layoffs motivated by anti-union animus.[274] Hence, the union has control over the decision to lay off employers when this decision is motivated by an intent to harm the union.[275]

The difference between mandatory and permissive bargaining subjects is important. From Section 8(a)(5) of the NLRA derives that parties may not alter *mandatory* terms or conditions, without first negotiating in good faith the proposal to an impasse with the union.[276] For example, when an employer unilaterally alters a just cause provision, before an impasse, the NLRB can order that all employees who are discharged based on this unilateral altered provision will be reinstated with back pay.[277] When an employer alters a *permissive* subject, the union can base its claim on a breach of contract, and ask for contract damages 'only'.[278]

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[268] Player 1988, p. 39; Goldman 1996, p. 260; Hardin 1997, p. 23.69; Jacobs 2003, p. 66 and 67; Cox 2001, p. 428; Stege 2004, p. 411.

[269] Kahn 1994, p. 68-73, referring to *National Licorice Co. (1940)* regarding job security; Hardin 1997, p. 23.72-73; Cox 2001, p. 455.

[270] See below under § 7.4.4.

[271] Heinsius 1999, p. 62 and 63. It bears mentioning, that mass layoffs, involving at least one-third of the employer's workforce or at least 50 employees or 500 or more employees, are subject to the federal Workers Adjustment and Notification Act of 1989 (WARN). In brief, this Act allows for a plant closing or mass layoff – based on economic reasons – under certain requirements. For a discussion of the WARN, see Hardin 1997, p. 23e.1-23e.20; Aaron 1997, p. 275-283; Heinsius 1999, p. 62-65; Heinsius 2004, p. 21.

[272] Clark and Ansay 2001, p. 126 and 127; Cox 2001, p. 466; Stege 2004, p. 411-426.

[273] Heinsius 1999, p. 66.

[274] Cox 2001, p. 464.

[275] Cox 2001, p. 465.

[276] Player 1988, p. 47; Goldman 1996, p. 262; Cox 2001,p. 429; Stege 2004, p. 403 and 404.

[277] For this example, see Player 1988, p. 47, footnote 54, referring to *Fibreboard Paper Products Corp. v. NLRB*, 379 US 203.

[278] Player 1988, p. 47 footnote 42; Hardin 1997, p. 23.72.

7.4.4 Just cause and grievance arbitration provisions

Virtually all collective bargaining agreements hold just cause and grievance arbitration provisions.[279] In fact, private-sector employees in the United States, represented by a union, typically enjoy protection against arbitrary dismissal in general, through just cause provisions in collective bargaining agreements, and labor arbitration.[280]

A just cause provision generally prohibits discharge or other disciplinary action after completion of the probationary period, except when there is 'good cause, proper cause, sufficient cause or just cause'. The terms just cause and good cause are used interchangeably in collective bargaining agreements.[281] In contrast, civil courts distinguish between *just cause* and *good cause* in applying common law exceptions to the at-will rule, explicitly referring to the interpretation by arbitrators of the standard under collective bargaining agreements, and the interpretation of this standard by civil courts, respectively.[282]

Additionally, collective bargaining agreements generally provide grievance procedures, which include the right of appeal to arbitration,[283] calling for all or specified disputes arising under the contract between the parties, eventually to be submitted to arbitration. The latter is considered as the best available alternative for settling disputes under collective bargaining agreements. In fact, it is seen as intolerable to management and impossibly burdensome when unions would resort to a strike to resolve all their disputes.[284]

The arbitration clause generally also provides the procedure to be followed, the subjects covered, the place of arbitration and the manner of selecting the arbitrators. Most commonly, the arbitrator is selected by the parties on an *ad hoc basis* each time a new case is submitted to arbitration, with reference to the Federal Mediation and Conciliation Service and/or the American Arbitration Association as agencies from which the parties will receive names of available third parties.[285] In large units, however, the volume of grievances generally induces parties to select a *permanent* arbitrator, often also called umpire, referee or impartial chairman.[286] In effect, the labor arbitrator directly derives his authority from the arbitration clause. This is not as self-evident as it seems. Only after the so-called *Steelworkers Trilogy* in 1960, the

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279 Brand 1999, p. 29.

280 See above under § 7.3.3. and § 7.4.4.

281 Player 1988, p. 52.

282 See below under § 11.3.3. and § 12.3.3.

283 Iest 1991, p. 107-109; Stieber and Rodgers 1994, p. 72, 76 and 77; Cox 2001, p. 717; Stege 2004, p. 437.

284 Cox 2001, p. 717.

285 Goldman 1996, p. 397; Kahn 1994, p. 134; Cox 2001, p. 717.

286 Fitzgibbon 2000, p. 2; Stege 2004, p. 437.

US Supreme Court held that agreements to arbitrate in collective bargaining agreements became enforceable.[287]

7.5 Labor arbitration

7.5.1 Arbitral authority

Still, problems may occur under collective bargaining agreements with regard to arbitral authority. First, a problem may occur when the employer's conduct results both in a breach of the collective bargaining agreement subject to arbitration *and* an unfair labor practice subject to consideration by the NLRB. The NLRB has settled this dispute under the *Collyer doctrine.*[288] In brief, it refers parties to the *arbitration procedure* under the existing collective bargaining agreement[289] when

- there is a stable collective bargaining relationship between parties;
- there is no claim that the employer is rejecting collective bargaining principles or the organizational rights of its employees;
- the dispute is arbitral and both parties are willing to arbitrate; and
- the dispute centers on the interpretation or application of the terms of the collective bargaining contract.[290]

Second, a problem may occur when the subject of the unfair labor practice already has been decided on in an arbitration proceeding. Under the *Spielberg doctrine*,[291] the NLRB refers parties to the *arbitral award* on the condition that

- the arbitrator considered the issue in the charge filed with the Board;
- the arbitration proceedings appear to have been fair and regular;
- all parties agreed to be bound by the award; and
- the arbitration decision was not clearly repugnant to the purposes of the NRLA.[292]

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287 For an in-depth discussion of *United Steelworkers I, II* and *III*, see Stege 2004, p. 440-445. See also Bales 1997, p. 13-14 and 20; Turner 2000, p. 9-11.

288 *Collyer (1971)*.

289 Most, if not all, collective bargaining agreements hold grievance-arbitration procedures for resolving disputes that may arise between the parties concerning interpretation or application of the terms of the contracts. Disputes relating to rights under the collective bargaining agreement usually are settled under a grievance procedure and, if that fails, by arbitration. Kahn 1994, p. 131; Hardin 1997, p. 23.87.

290 Hardin 2003, p. 23c.75-76.

291 *Spielberg (1955)*.

292 The NLRB, however, will refuse to defer to arbitral awards when resulting in an infringement of protected rights of individual employees such as a discharge for invoking or participating in the processes of the NLRB. Kahn 1994, p 136-137; Hardin 2003, p. 23c.76-77.

Third, a problem may occur, in that *primarily* federal courts are authorized to decide on disputes under collective bargaining agreements under Article 301 of the LMRA. The US Supreme Court has settled the dispute, determining that arbitrators will decide on claims which require interpretation of the collective bargaining agreement.[293]

7.5.2 Interpretation of just cause

Most single cases decided by labor arbitrators are discharge and disciplinary matters.[294] What one arbitrator has previously decided in a discharge case need not be followed by another arbitrator, but usually is. The principle of *stare decisis*,[295] therefore, does not apply to labor arbitration.[296] A second arbitrator, in other words, has discretion to reconsider the matter. In practice, labor arbitrators, nonetheless, often adhere to earlier arbitration awards.[297]

Subsequently, from arbitral awards one can derive that *just cause* stands for fair and reasonable,[298] and that just cause protection does not depend on the sole existence of a just cause provision. To the extent collective bargaining agreements do *not* explicitly prohibit the employer from disciplining or discharging employees without just cause,[299] arbitrators in the *absence* of specific contract language have found that a just cause provision can be implied in the parties' collective bargaining agreement. Hence, the just cause requirement is so well accepted under labor arbitration, that often it is found to be implicit in collective bargaining agreements.[300]

In the past, a problem for labor arbitrators has been that only few collective bargaining agreements provided a definition of just cause.[301] In 1964, Daugherty was one of the first arbitrators who tried to crystallize the definition of just cause into seven independent questions. If the answer to any of these questions was 'no', just cause did not exist. Although the main criticism was that the test was too mechanistic, the test still provides a good tool for arbitrators to determine the existence of just cause. The questions under the Daugherty test are

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293 For Article 301 of the LMRA, see above under § 7.2.

294 Seniority, pay disputes, and work assignment disputes are other significant categories. See Stieber and Rodgers 1994, p. 77; Goldman 1996, p. 400.

295 For the rule of stare decisis, see above under § 5.2.2.

296 Kahn 1994, p. 134; Clark and Ansay 2002, p. 128.

297 Kahn 1994, p. 134; Clark and Ansay 2002, p. 128.

298 Hill and Westhoff 1999, p. 6; Brand 1999, p. 6, 29 and 30, 33 and 34, 37 and 61.

299 According to Kittner and Kohler, in 2000, 97% of all collective bargaining agreements in the United States held a just cause provision. Kittner and Kohler 2000, p. 4.

300 Hardin 1997, p. 23.87; Brand 1999, p. 29. See also Owens 2001, p. 4, referring to *Trailmobile (2000)*, in which the court stated that absent express inclusion to the contrary in the collective bargaining agreement, a discharge is subject to an arbitrator's determination of just cause.

301 Abrams and Nolan 1985, p. 2; Hill and Westhoff 1999, p. 6; Brand 1999, p. 29.

1. did the employer forewarn or foreknowledge the employee of the possible or probable disciplinary consequences of the employee's conduct;
2. was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business;
3. did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed a rule or order of management;
4. was the employer's investigation conducted fairly and objectively;
5. did the employer obtain substantial evidence or proof that the employee was guilty as charged;
6. has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees; and
7. was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee's proven offense; and (b) the record of the employee's service?[302]

The next step in the evolution of a uniform just cause definition was taken by the arbitrators Abrams and Nolan. Under their theory, a discharge for just cause exists when an employee fails to meet a fundamental obligation, deriving from the employment relationship, which in their opinion is to provide satisfactory work, consisting of

- regular attendance;
- obedience to reasonable work rules;
- reasonable quality and quantity of work; and
- avoidance of conduct that would interfere with the employer's ability to carry on the business effectively.[303]

Both tests have been – and still are – used by labor arbitrators.[304] In effect, two principles derive from these tests and are employed by labor arbitrators. *First*, the principle of due process that relates to procedural guarantees such as (i) timely action by the employer; (ii) a fair investigation; (iii) a precise statement of the charges; and (iv) a right to be heard. *Second*, the principle of progressive discipline that relates to progressive steps in order to correct the unacceptable behavior of the employee through (i) oral warning; (ii) written warning; (iii) suspension; and (iv) discharge, respectively.[305]

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302 Hill and Westhoff 1999, p. 6 and 7; Brand 1999, p. 31 and 32.

303 Abrams and Nolan 1985, p. 8-13; Brand 1999, p. 29-30, 33-34, 37 and 61.

304 These tests are also included in American Arbitration Association training manuals for lawyers and arbitrators. See Brand 1999, p. 33.

305 Hill and Westhoff 1999, p. 6; Brand 1999, p. 6, 29 and 30, 33 and 34, 37 and 61; Cox 2001, p. 726.

Additionally, labor arbitrators require two separate considerations (1) whether the employee is guilty of misconduct; and (2) assuming guilt, whether the discipline imposed is a reasonable penalty under the circumstances of the case,[306] considering factors as[307]

- whether the employee is a repeat offender: most arbitrators have overturned discharge when it was based on the employee's first offense;
- the reason of absenteeism: illness usually is covered in collective bargaining agreements and does not constitute just cause;[308]
- whether the employers' standards are unreasonable: discharge for failure to meet quality standards generally is reversed;[309] and
- whether the employee's conduct constitutes misconduct: inappropriate language, for example, usually is evaluated according to its setting, e.g. whether it was private or public, or whether it was a result of provocation or not; language that is acceptable among employees may be unacceptable when addressed to the employer.[310]

In practice, the majority of arbitration proceedings involves the (in)capacity and/or (mis)conduct of the employee, e.g. regular absence, job performance problems and refusals to perform work.[311]

It is noteworthy to mention that under labor arbitration it has become a customary practice that the employer carries the burden of proof of just cause in a discipline or discharge case.[312] This does not apply to civil cases. In fact, courts generally hold that the rules as applied in arbitration hearings are not applicable in civil wrongful termination lawsuits, although the shift of burden of proof would mean a great advantage for non-bargaining-unit employees under common law.[313]

7.6 Conclusion

Private-sector employees enjoy protection against discriminatory and retaliatory dismissals under the Sections 7 and 8 of the NLRA. Furthermore, they enjoy protection against arbitrary dismissal in case of *concerted* activities. These Sections do not provide protection against arbitrary dismissal in general,

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306 Hill and Westhoff 1999, p. 8.
307 Brand 1999, p. 93.
308 Brand 1999, p. 97 and 98.
309 Brand 1999, p. 138 and 139.
310 Brand 1999, p. 279-281.
311 Goldman 1996, p. 309 and 310.
312 Hill and Westhoff 1999, p. 8.
313 See also below under § 12.3.3.

however. Only private-sector employees who belong to a so-called bargaining unit, about ten percent of the private workforce, typically enjoy just cause protection under just cause provisions in collective bargaining agreements, and through labor arbitration. State courts, in principle, are free to look at the practice of labor arbitrators in providing just cause protection to non-bargaining-unit employees, but are not willing to do so. This is why it is often said that those who are *not* subject to a collective bargaining agreement are left without the just cause protection that bargaining-unit employees enjoy. In the following paragraphs, I will examine to what extent these non-bargaining-unit employees, also referred to as *at-will employees* can obtain just cause protection under federal anti-discrimination law (paragraph 8), state statutory law (paragraph 9) and/or common law (paragraph 10).

8 Federal anti-discrimination law

8.1 Federal anti-discrimination statutes

8.1.1 Introduction

Discharge is the most commonly litigated employment dispute in employment discrimination law.[314] In this Section, I will focus on anti-discrimination law related to protection against arbitrary dismissal. Although it is true that anti-discrimination law prohibits discrimination for specified reasons only, *thus*, obviously does not constitute protection against arbitrary dismissal in general, I, nonetheless, wish to – briefly – discuss the field of anti-discrimination law. First, in determining the scope of what constitutes just cause, it is as important to have knowledge of what constitutes *bad* cause in the United States. Second, based on decisions of the US Supreme Court, once an employee establishes a so-called prima facie case of prohibited discrimination an employer must come forward with a legitimate, that is, a non-discriminatory reason for the dismissal. This Section examines to what extent this non-discriminatory reason must constitute just cause. Last, this Section serves to answer the question why federal anti-discrimination statutes could have been enacted 'so easily', where this seems almost impossible for national just cause legislation.

The emphasis in this thesis is on *federal* anti-discrimination law related to protection against arbitrary dismissal. In this respect, Congress enacted, in chronological order, the Civil Rights Act of 1964 amended in 1991 (Title VII); the Age Discrimination in Employment Act of 1967 (the ADEA); the Pregnancy Discrimination Act of 1974 (the PDA); and the Americans with Disabilities Act of 1990 (the ADA).[315] As Jacobs correctly states, to gain a complete view on discriminatory grounds in the United States, one should also consider state anti-

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[314] Player 1988, p. v; Lindemann and Grossman 1997, p. 837.

[315] Also, the ILO enumerates these acts as most important for private-sector employees in providing protection against an unjustified dismissal. See above under § 6.1.

discrimination statutes that may cover *other* discriminatory grounds.[316] However, for the purpose of this thesis, this is not necessary. First, federal and state anti-discrimination statutes remain limited to the same ground for dismissal, namely discrimination. Second, federal anti-discrimination statutes apply to all states, thus, indicate what constitutes bad cause in the *United States*.[317] Nevertheless, I will pay attention to California anti-discrimination law, the Fair Employment and Housing Act (FEHA)[318], but this is to make comprehensible the relationship between federal and state anti-discrimination law only.

8.1.2 Historical background

Federal anti-discrimination statutes, providing protection against arbitrary dismissal have been enacted from the mid-twentieth century. This immediately raises the question why federal anti-discrimination statutes could have been enacted 'so easily', compared with national just cause legislation. The answer lies in the history of slavery. Due to the fact that slavery was not abolished by the US Constitution of 1789, and Congress was not given the power to abolish it, an agricultural economy based on slavery in the South could develop, and could spread into new Southern states. The Northern industrial states disapproved of slavery, but for Congress the issue of slavery was not a point of discussion. Each new state's admission raised the question only whether a state would be admitted as a *slave* or a *free* state.[319]

The situation between the North and the South became critical after judicial decisions in which *courts* disapproved of slavery.[320] In reaction, eleven Southern states 'withdrew' from the Union as established under the US Constitution of 1789. This resulted in the Civil War between the Southern and the Northern states, which lasted from 1861 to 1865, resulting in the surrender of the South.

The legal impact of this war was spelled out in the so-called Civil War Amendments. In brief, the Thirteenth Amendment (1865) ended slavery; the Fourteenth Amendment (1868) provided that state governments could not deprive any person of life, liberty or property, without due process nor could deny to any person the equal protection of its laws; and, the Fifteenth Amendment (1870) assured voting rights to the newly freed slaves.

The Fourteenth Amendment, in particular, had a great impact on the development of federal and state anti-discrimination law. In fact, ever since the

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316 Jacobs 2003, p. 122.

317 Termination of employment digest, ILO 2000, p. 355. Jacobs, for example, refers to state age anti-discrimination statutes, broadening the ADEA in a manner that it covers employees below the age of 40 as well. Jacobs 2003, p. 122.

318 Berkowitz and Emert 2001, p. 5.

319 Burnham 1995, p. 5.

320 Burnham 1995, p. 24 referring to *Dred Scott v. Stanford*, 60 US 393 (1857).

Fourteenth Amendment, *race* has been considered to be at the core of equal protection laws. In fact, immediately after the end of the Civil War, Congress enacted the first Civil Rights Act to advance the goals of the Civil War Amendments, which, as today, are still used to attack employment race discrimination.[321] These are the Civil Rights Act of 1866 (42 U.S.C. § 1981) and of 1871 (42 U.S.C. § 1985 and § 1986), and the Ku Klux Klan Act (42 U.S.C. § 1983).[322]

Hereafter, the actual implementation for all American citizens in federal anti-discrimination statutes was largely neglected for close to one hundred years. After World War II, the issue of discrimination, however, again occupied much legislative and judicial attention.[323] Politicians started to explicitly reject discrimination. On 9 September 1957, Congress in this respect created the Civil Rights Commission and the Civil Rights Division of the Department of Justice. Subsequenty, President John F. Kennedy, in 1963, through his Minister of Justice, announced that the time had come for a major civil rights bill. In June, 1963, President Kennedy transmitted the Bill to Congress. In continuing the fight for civil rights, more than 200,000 people gathered in front of the Lincoln Memorial in which Martin Luther King, on 28 August 1963, delivered his famous *I have a dream* speech.[324] Less than halfway through the legislative consideration of the Bill, on 22 November 1963, President Kennedy was shot. When Congress approved the Bill and President Lyndon Johnson signed the Bill into law on 2 July 1964, this was partly seen as a tribute to President Kennedy, being its initiator.[325]

The Bill resulted in the Civil Rights Act of 1964 of which Title VII deals with discrimination in the employment relationship.[326] Still, Title VII is the broadest federal employment discrimination statute outlawing discrimination based on race, color, sex, religion and national origin.[327] It was especially unique for prohibiting discrimination on the basis of sex, because this ground was not previously recognized as a prohibited basis of discrimination in areas outside of voting. The discriminatory grounds of race, religion and national origin – in respect of the abolition of slavery – already had a solid foundation under constitutional law.[328] Hereupon, almost every year after the enactment of the Civil Rights Act of 1964, Congress enacted federal anti-discrimination statutes,

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321 Burnham 1995, p. 24 and 25, 30 and 340; Goldman 1996, p. 30.

322 Lindemann and Grossman, p. 921; Goldman 1996, p. 145; Hardin 1997, p. 23.152; Jacobs 2003, p. 127.

323 Goldman 1996, p. 30.

324 Goldman 1996, p. 144; Ivancevich 2001, p. 70-73.

325 Lindemann and Grossman 1996, p. xiii and xvii.

326 Player 1988, p. 199; Hardin 1997, p. 23.149.

327 Hardin 1997, p. 23.152; Nolo's Pocket 1997, p. 97; Termination of Employment 2000, p. 11,001-002.

328 Barber 2002, p. 2.

of which I will now briefly discuss those which provide protection against arbitrary dismissal.[329]

8.2 The Civil Rights Act of 1964 amended in 1991 (Title VII)[330]

Title VII applies to private-sector and public employers who are engaged in industry-affecting commerce.[331] It applies to employers with *fifteen* or more employees for each working day in twenty or more calendar weeks in the current or preceding calendar year.[332] State legislation may broaden the scope of Title VII. For example, the California anti-discrimination statute, the FEHA, covers employers who employ *five* or more employees.[333]

In brief, Title VII protects private-sector employees against discriminatory and retaliatory discharges, i.e. against employers who violated one or more of the specific bases for discrimination vested in Title VII, and/or have discharged these employees for participating in procedures under Title VII and/or for opposing unlawful employment practices under Title VII.[334] Subsequently, a court may order affirmative action, including reinstatement, back pay and/or attorney's fees, and – since the amendment of Title VII through the Civil Rights Act of 1991 – compensatory and punitive damages, the latter, however, with a cap of US$ 300,000 for each person.[335] More specifically, Title VII determines that an employer violates the Act if he

> '(1) uses an individual's race, color, religion, sex or national origin as a basis for
> (a) failing or refusing to hire an applicant for employment;
> (b) *discharging* or otherwise disciplining an employee;
> (c) determining an employee's compensation, including fringe benefits or other terms, conditions or privileges of employment; or
> (d) limiting, segregating or classifying an employee or an applicant for employment in a way that would tend to deprive him or her of an employment opportunity or otherwise adversely affect his or her status as an employee; and/or
> (2) discriminates against or *discharges* an employee or applicant for employment because he or she has filed a charge, testified, assisted or

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329 For a list of federal protective legislation, see Mendelsohn 1990, p. 3 and Appendix A, p. 23 and 24.

330 42 U.S.C. § 2000e et seq.

331 For the Commerce Clause, see above under § 6.2.

332 Hardin 1997, p. 23.152; California Labor Law Digest 1997, p. 541; Sedmak and Vidas 1997, p. 13 and 14; Kahn 1994, p.19.

333 The 2000 California Employer, p. 31; Termination of Employment 2000, p. 20,901.

334 Player 1988, p. 273; Lindemann and Grossman 1997, p. 999. For the law of retaliation, see also above under § 6.1.

335 California Labor Law Digest 1997, p. 542; Termination of Employment 2000, p. 11,005.

participated in any manner in an investigation, proceeding or hearing under Title VII or has opposed any unlawful employment practice under Title VII.'[336]

Title VII provides a so-called *BFOQ*-defense *(bona fide occupational qualification-defense).* Under this defense, an employer is allowed to discriminate in employment on the basis of an employee's *religion*, *sex*, or *national origin* if this ground is a so-called *bona fide occupational qualification*, reasonably necessary for the normal operation of a business or enterprise.[337] The BFOQ-defense, thus, does apply to *religion*, *sex*, or *national origin* only, hence, does not apply to race and color,[338] or to harassment.[339] An example of a BFOQ-defense based on *sex***,** for example, is if needs of rape victims necessitate to have a female security officer available to assist them.[340]

Harassment has become actionable through federal court decisions. In practice, most of discriminatory discharge cases involve sexual harassment cases, i.e. *quid pro quo* harassment cases and/or *hostile work environment* harassment cases.[341] The essence of a *quid pro quo* claim is a 'play or pay' bargain by which an employee must choose between job benefits or submitting to sexual demands. The essence of a *hostile work environment* case is that an individual must endure a work environment that causes psychological – not necessarily economic – harm through offensive circumstances.[342]

As today, sexual orientation or sexual preference – concerning gay men and lesbians – is excluded from Title VII. *State* anti-discrimination legislation may include protection as regards sexual orientation.[343] *Hopkins v. Price Waterhouse (1989)*, on the other hand, is considered as a first victory in respect of sexual orientation. In this case, a woman was discriminated against for her failure to comply with societal expectations of feminity. In order to become a partner of the firm she was advised to walk more femininely, talk more femininely, wear make-up, have her hair styled and wear jewelry. The US

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336 Player 1988, p. 269; Hardin 1997, p. 23.155-158; Lindemann and Grossman 1997, p. 649 and 650; California Employment Labor Digest, p. 541; Sedmak and Vidas 1997, p. 16; The 1998 National Employer, p. 418; Hardage 2002, p. 1.

337 Under the FEHA, a Californian employer is allowed to discriminate based on a bona fide occupation qualification in respect of all discriminatory grounds. Termination of Employment 2000, p. 20,902.

338 Sedmak and Vidas 1997, p. 35; Lindemann and Grossman 1997, p. 382; Termination of Employment 2000, p. 11,003. A *BFOQ*-defense, however, is rarely available. See Hardin 1997, p. 23.158; Jacobs 2003, p. 124.

339 The 2000 California Employer, p. 41.

340 Sedmak and Vidas 1997, p. 43.

341 In *Meritor Savings Bank* (1986) the US Supreme Court held that sexual harassment – regardless of whether it causes a direct financial injury – in case of creating a hostile work environment, constitutes sex discrimination and violates Title VII. Lindemann and Grossman 1997, p. 747 and 748; Sedmak and Vidas 1997, p. 33; Nolo's Pocket 1997, p. 107; Hardage 2002, p. 2.

342 Lindemann and Kadue 1996, p. 10; Lindemann and Grossman 1997, p. 745 and 746; Hardin 1997, p. 23.161.

343 Hardin 1997, p. 23.163; Sedmak and Vidas 1997, p. 40; Lindemann and Grossman 1997, p. 475; Barber 2002, p. 2 and 3; Jacobs 2003, p. 131.

Supreme Court held that such employment decisions based on sex-stereotypes are actionable under Title VII, because an employer who acts on the basis of a belief that a woman must not be aggressive – or that she must – has discriminated on the basis of gender, i.e. sex.[344]

8.3 The Age Discrimination in Employment Act of 1967 (ADEA)[345]

The ADEA applies to private-sector employers who are engaged in industry-affecting commerce.[346] The Act applies to employers with *twenty* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year. Public employers are covered, regardless of the number of employees.[347] The ADEA protects a private-sector employee against discriminatory and retaliatory discharge based on age. It, too, bans harassment based on age.[348] The ADEA, as today, holds no upper age limit.[349] Originally, it banned discrimination against employees aged 40 to 65. As from 1986, however, the ADEA covers all employees over 40. Earlier, in 1978, it already converted the upper age of 65 to 70. The rationale behind the age of *40* was that practice showed that discrimination in employment, in general, started from this age on. Consequently, the Bill particularly mustered support of those whose aim was to combat unemployment of elderly employees.[350]

More specifically, under the ADEA an employer commits an unlawful employment practice if he

> '(1) places an employment notice or advertisement indicating a preference, limitation or specification based on age; and/or
> (2) uses an individual's age as a basis for
> (a) filing or refusing to hire an applicant for employment;
> (b) *discharging* or disciplining an employee;
> (c) setting an employee's compensation or other terms, conditions or privileges of employment;
> (d) limiting, segregating or classifying an employee or applicant for employment in a way that would tend to deprive him/her of an employment opportunity or otherwise adversely affect his/her status as an employee; or
> (e) reducing the wage rate of an employee to comply with other requirements of the ADEA; and/or

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344 Barber 2002, p. 2 and 3; Hardage 2002, p. 4-6.

345 29 U.S.C. § 621 et seq.

346 For the Commerce Clause, see above under § 7.3.2.

347 Lindemann and Grossman 1997, p. 545 and 549; California Labor Law Digest 1997, p. 544; Sedmak and Vidas 1997, p. 23; The 1998 National Employer, p. 418.

348 Lindemann and Grossman 1997, p. 999. For the law of retaliation, see above under § 6.1.

349 Player 1988, p. 515; Sedmak and Vidas 1997, p. 24; Gerritsen SMA 1995/7/8, p. 433; California Labor Law Digest 1997, p. 544; Jacobs 2003, p. 129.

350 Gerritsen 1995, p. 433.

(3) discriminating against – or *discharging* – an employee, or applicant for employment because she/he has filed a charge, testified, assisted or participated in any manner in an investigation, proceeding or litigation under the ADEA.'[351]

Like Title VII, the ADEA contains a *BFOQ*-defense, i.e. allows an employer to discriminate in employment on the basis of age if this ground is necessary to the normal operation of a business or enterprise. For example, the ADEA allows a *BFOQ*-defense when raised to defend maximum hiring or mandatory retirement ages for jobs involving the public's safety.[352] In this respect, state legislation may allow for mandatory retirement at age 70 of physicians employed by professional medical corporations.[353]

The ADEA further follows the procedural track of Title VII, but differs in respect of its remedies, in that compensatory and punitive damage are not allowed under the ADEA. On the other hand, reinstatement, back pay, and attorney's fees, plus front pay until the age of 70 are allowed.[354]

8.4 The Pregnancy Discrimination Act of 1974 (PDA)[355]

Title VII left room for discussion whether employers could discharge a pregnant employee. An amendment of Title VII through the PDA in 1974 gave clarity,[356] stating that the term because of or on the basis of sex 'include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions',[357] herewith resolving an ongoing disagreement between the EEOC and the US Supreme Court.[358] The EEOC, as from 1972, had maintained that employment practices, which adversely affected female employee because of pregnancy, constituted sex discrimination under Title VII. The US Supreme Court, in *General Electric Co. v. Gilbert (1976)*, held the opposite. By enacting the PDA as part of Title VII, Congress reversed the holding of this case.[359] Subsequently, under the PDA, employers must reinstate women, being discharged based on *pregnancy*.[360]

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351 Lindemann and Grossman 1997, p. 545, 556 and 557; California Labor Law Digest 1997, p. 544 and 545; The 1998 National Employer, p. 418; Termination of Employment 2000, p. 11,006-007.

352 For examples, see Lindemann and Grossman 1997, p. 612; Gerritsen 1995, p. 433; The 2000 California Employer, p. 47; Termination of Employment 2000, p. 11,008-009.

353 Gov't Code § 12941 and 12942. The 2000 California Employer, p. 31 and 47; Berkowitz and Emert 2001, p. 6.

354 Lindemann and Grossman 1997, p. 597, 641, 757, 1206; The 2000 California Employer, p. 40.

355 42 U.S.C. § 2000k et seq.

356 Feitshans 1994, p. 120.

357 Feitshans 1994, p. 126; California Labor Law Digest 1997, p. 554; Sedmak and Vidas 1997, p. 40 and 41; Termination of Employment 2000, p. 11,036.

358 For the EEOC, see below under § 8.6.

359 Lindemann and Grossman 1997, p. 438-440; Sedmak and Vidas 1997, p. 40 and 41.

360 *California Federal Savings and Loan v. Guerra (1987)*, 479 U.S. 272, 287. See also Feitshans 1994, p. 127 and 128.

The PDA – being an amendment to Title VII – follows the same track as Title VII. In brief, it covers employers, which employ *fifteen* or more employees.[361] It prohibits discriminatory and retaliatory discharges, and harassment claims. Title VII, too, provides a *BFOQ*-defense. Particularly employers in the airline industry terminate(d) the employment of pregnant women, stating that pregnant flight attendants undermine(d) passenger safety. As the concurring judges held in *Burwell v. Eastern Air Lines (1979)*, a stewardess who is vomiting in the lavatory cannot participate effectively in an emergency evacuation.[362] On the other hand, the US Supreme Court in *Johnson Controls (1991)* held that in case of so-called fetal protection policies of employers this is sex discrimination forbidden under the PDA, i.e. Title VII.[363] Also, the PDA follows the procedures and remedies under Title VII.[364] Additionally, the Family and Medical Leave Act of 1993 (FMLA) preserves all employees' rights to return to work after a *birth* or *illness, due to pregnancy*.[365]

8.5 The Americans with Disabilities Act of 1990 (ADA)[366]

The ADA replaced the Rehabilitation Act of 1973. The latter prohibited employers from discriminating against disabled persons. Its scope was restricted, in that it applied to employers who had federal contracts or who had received federal funding only. The ADA has a broader reach and applies to private, state or local government employers. Its scope, in turn, is restricted, in that it applies to employers with *fifteen* or more employees. State legislation, on the other hand, may broaden the scope of the ADA. The FEHA, for example, includes employers who employ *five* or more employees.[367] In brief, the ADA prohibits employers to discriminate against a qualified individual with a disability with regard to the hiring procedure, promotions, employment *terminations*, job training, employee's wages, and other terms and conditions of employment.[368] Section 107 of the ADA adopts the powers, remedies, and procedures set forth under Title VII. Thus, *like* Title VII, it protects a private-sector employee against discriminatory and retaliatory discharge and harassment.[369] *Unlike* Title VII – and all other federal anti-discrimination statutes – the ADA compels an employer to make accommodations, providing

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361 Gardner 2002, p. 7.

362 Feitshans 1994, p. 123-125, referring to *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361, 363 (1979).

363 *Johson Controls (1991)*, 499 U.S. 187, 200. See also Feitshans 1994, p. 128-130.

364 Lindemann and Grossman 1997, p. 441.

365 Feitshans 1994, p. 130 and 131.

366 42 U.S.C. § 12101 et seq.

367 The 2000 California Employer, p. 49; Termination of Employment 2000, p. 20,910.

368 Lindemann and Grossman 1997, p. 259; Sedmak and Vidas 1997, p. 27; The 1998 National Employer, p. 2; Berkowitz and Emert 2001, p. 15; Vargas 2002, p. 2; Termination of Employment 2000, p. 11,050.

369 Lindemann and Grossman 1997, p. 334; California Labor Law Digest 1997, p. 614; Termination of Employment 2000, p. 11,054.

that no person can be discriminated against or prevented from equal enjoyment of goods, services, facilities and accommodations of any place of public accommodation operated by the private sector, because he or she is disabled.[370]

An employee is considered as disabled under the ADA if (i) he has a physical or mental impairment, which substantially limits one or more of the major life activities; (ii) he has a record of such impairment, e.g. an alcoholic;[371] or (iii) he is regarded as having such an impairment.[372] AIDS and the HIV-Infection are covered by the ADA. In *Bragdon (1998)*, a sharply divided US Supreme Court resolved the question of whether a HIV-infection is a covered disability under the ADA. It held that, even in the asymptomatic phase, it is an impairment that substantially limits the major life activity of reproduction, and consequently is a disability under the ADA.[373] State legislation may broaden the scope of the ADA. The FEHA, for example, prohibits all employers from discriminating based on an employee's medical condition, including any health impairment related to or associated with a diagnosis of cancer, of which a person has been rehabilitated or cured, based on competent medical evidence.[374]

8.6 EEOC

The Equal Employment Opportunity Commission (EEOC) is charged with administering Title VII. Section 705 of Title VII created the EEOC. Meanwhile, the EEOC also enforces the ADEA, the PDA, the ADA and the EPA. In brief, an employee may file a charge of an employer's violation of any of the foregoing federal anti-discrimination statutes – better known as an *unlawful employment practice* – with any EEOC office within 180 days after the violation took place.[375] If the EEOC finds reasonable cause to believe discrimination, it is required to attempt to conciliate between parties. If conciliation is not forthcoming, the EEOC will file a suit in a federal district court on behalf of the employee. However, more often it will issue a *right-to-sue letter* advising the employee to file a suit in federal court.[376] A civil action must be filed by the employee within 90 days of receipt of the statutory notice of right to sue.[377]

To answer the question if the EEOC, regardless of its backlog of cases, is effective, one can point to its large number of official guidelines that have

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370 California Labor Law Digest 1997, p. 553, 602 and 603 and 613; Lindemann 1997, p. 259; Lav 2002, p. 4; Termination of Employment 2000, p. 11,054.

371 California Labor Law Digest 1997, p. 603; Termination of Employment 2000, p. 11,051; Page 2002, p. 7; Lav 2002, p. 4; Khasawneh 2002, p. 1 and 2; Vargas 2002, p. 3; Jacobs 2003, p. 130.

372 The 2000 California Employer, p. 49.

373 Jordan 1998, p. 135; Termination of Employment 2000, p. 11,055.

374 The 2000 California Employer, p. 49; Termination of Employment 2000, p. 20,910.

375 Player 1988, p. 200 and 201; Lindemann and Grossman 1997, p. 1205, 1206 and 1217; Sedmak and Vidas 1997, p. 193-195.

376 Player 1988, p. 200; California Labor Law Digest 1997, p. 541; Sedmak and Vidas 1997, p. 197 and 198.

377 Lindemann and Grossman 1997, p. 1240; Termination of Employment 2000, p. 11,005.

persuasive authority, for example, on sex discrimination.[378] Also, for example, can point at its fiscal year 1998, in which the EEOC resolved 101,470 claims in its caseload, received 79,591 new charges, filed 405 lawsuits, and won US$ 92.2 million in monetary benefits for charging parties.[379] As regards the latter, its most famous case is regarding Mitsubishi. This Japanese company decided to open a branch in the state of Illinois in 1990. In 1996, the EEOC sued the company on behalf of 350 women who worked on the assembly line. The Japanese managers were accused of sexual harassment, including discharge against those who refused, while doing nothing when the women in question complained. Mitsubishi eventually agreed to pay US$ 34 million, hence, the case became known as one of EEOC's most successful claims.[380]

8.7 Disparate treatment and adverse impact

In general, protection against discrimination under federal anti-discrimination statutes can be obtained under (i) the disparate treatment theory; or (ii) the adverse impact theory. Disparate treatment cases focus on discriminatory *intent,* adverse impact cases focus on discriminatory *results*.[381]

The vast majority in employment termination cases proceed under the theory of *disparate treatment* of which the essence is different treatment. As the US Supreme Court in *Teamsters v. United States (1977)* once held, under the disparate treatment theory the employer simply treats some people less favorably than others, e.g. based on their race, color, religion, sex, or national origin.[382] Thus, the central question is whether the defendant's actions were motivated by discriminatory intent. However, suppose an employer has illegitimate *and* legitimate reasons to discharge an employee. The Civil Rights Act of 1991, which amended Title VII gave clarity on these so-called *mixed-motive* cases. First, it decided that the plaintiff-employee needs to establish that the discriminatory ground is a motivating factor in the employer's decision. Hereupon, the employer bears the burden of persuasion that it would have reached the same decision otherwise. Consequently, liability is established only if the employer fails herein, in which case the court *cannot* award damages or order reinstatement, but *can* award attorney's fees. In this respect, Congress overruled *Hopkins v. Price Waterhouse (1989),* in which the US Supreme Court ruled that an employer could avoid *all* liability in a successful mixed-motive case.[383] Unlike the disparate treatment theory, the *adverse impact* theory focuses on discriminatory *results*. The adverse impact theory was introduced by the Civil Rights Act of 1991, codifying the adverse impact principles of *Griggs*

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[378] Player 1988, p. 200.

[379] Ivancevich 2001, p. 83 footnote 62.

[380] Press release EEOC of 21 January 1998. See also www.eeoc.gov.

[381] Lindemann and Grossman 1997, p. 81 and 857.

[382] *Teamsters* v. *United States*, 431 U.S. 324, 335 n. 15, 14 FEP 1514 (1977). See also Lindemann and Grossman 1997, p. 9.

[383] Lindemann and Grossman 1997, p. 40-42; Hardage 2002, p. 4-6; Barber 2002, p. 3.

(1971) in a new § 703(k) of Title VII. In *Griggs (1971)*, the US Supreme Court held that Congress directed the thrust of Title VII to motivation *and* the consequences of employment practices.[384] In adverse impact cases, the EEOC generally applies the so-called 80%-rule, i.e. adverse impact is likely to be present if a protected group is selected at a rate less than 4/5 (80%) of the allegedly preferred counterparts. However, this is only one of the selection methods. One single selection method, in general, is not considered enough to demonstrate adverse impact.[385]

8.8 Burden of proof

In this paragraph, I willl discuss case law under which the employer must come forward with a legitimate, that is, a non-discriminatory reason for the dismissal, after an employee established a so-called *prima facie case* of prohibited discrimination under the disparate treatment theory. Before discussing this case law it should be stressed that, in general, it is easier for an employee to prove that the employment practice affected a protected group under Title VII, than for an employee to prove discriminatory *intent* of the employer, which brings me to the decision of the United Supreme Court in *McDonnell Douglas (1973)*. In this case, the US Supreme Court held that the complainant in a Title VII trial – an African-American who was laid off in the course of a general reduction in the company's workforce and sought to be rehired – in a disparate treatment case must carry the initial burden under the statute of establishing a *prima facie case* of racial discrimination. This, according to the Court, may be done by showing that

- he belongs to a racial minority;
- he applied and was qualified for a job for which the employer was seeking applicants;
- despite his qualifications, he was rejected; and
- after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Once the employee has shown a *prima facie case*, which in principle is not difficult to do, the burden shifts to the employer, who needs to show a legitimate, that is, a non-discriminatory reason for the dismissal, to rebut the inference of discrimination. Once the employer meets this burden of production,

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384 *Griggs (1971)*, 401 U.S. 424, 432. See also Lindemann and Grossman 1997, p. 81.

385 *Griggs(1971)*, 401 U.S. 424, 430-432. Player 1988, p. 228 and 229, 356 and 357; Goldman 1996, p. 160 and 161; Hardin 1997, p. 23.154-155; Lindemann and Grossman 1997, p. 81; Jacobs 2003, p. 124 and 125.

the US Supreme Court held that the burden shifts back to the employee to show that the reason stated by the employer was pretext.[386]

The foregoing became known as the *McDonnell Douglas test*, meanwhile, applied in other federal anti-discrimination disparate treatment cases as well.[387] *McDonnell Douglas (1973)*, however, left the question unanswered what would happen after the employee would have made clear that the reason stated by the employer was pretext.

Subsequently, in *Burdine (1981)*, the US Supreme Court made clear that the ultimate burden of proving discrimination rests with the employee. In *Burdine (1981)*, a female alleged that her employer discriminated against her because of her sex in denying her a promotion and later terminating her. With reference to *McDonnell Douglas (1973)*, the Burdine Court held that the plaintiff-employee has the burden of proving the evidence of a prima facie case of discrimination. Second, if the plaintiff-employee succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection. Third, should the defendant-employer carry this burden, the plaintiff-employee must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[388] The employee may succeed in this either (i) *directly* by persuading the court that a discriminatory reason more likely motivated the employer; or (ii) *indirectly* by showing that the employer's proffered explanation is unworthy of credence.[389]

In *Hicks (1993)*, however, the US Supreme Court made clear that a judgment should not *automatically* be entered for the employee when he has proven pretext of the reason stated by the employer. In this case, an African-American employee claimed that he has been discharged because of his race, and could prove that the non-discriminatory reasons given by the employer were false. The Eighth Circuit decided that in such a case the plaintiff-employee was entitled to judgment as a matter of law.

The US Supreme Court reversed the decision. In brief, it ruled that to the extent there is a triable question of falsity, this does not necessarily mean that there is a triable question of discrimination under the statute. An employer who discharges an older black worker because the worker is black does not violate the ADEA. The employee's race is an improper reason, but it is improper

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386 *McDonnell Douglas (1973)*, 93 S.Ct. 1817, 1824. See also Goldman 1996, p. 50, 328-335; Lindemann and Grossman 1997, p. 13-17; Termination of Employment 2000, p. 12,101; Derum and Engle 2003, p. 4.

387 For case law in this respect, see *Hicks (1993)*, 113 S.Ct. 2742, 2757 among which alleged age discrimination.

388 *Burdine (1981)*, 101 S.Ct. 1089, 1093; *Hicks (1993)*, 113 S.Ct. 2742, 2757. See also Lindemann and Grossman 1997, p. 17 and 18; Termination of Employment 2000, p. 12,101-102.

389 *Burdine (1981)*, 101 S.Ct. 1089, 1095. See alsoDerum and Engle 2003, p. 4.

under Title VII, not under the ADEA. Thus, when the plaintiff-employee initiates an ADEA action, claiming he has been discriminated against because of his age, and the employer claims that he dismissed the employee, because he was black, he has given a legitimate, non-discriminatory reason under the *McDonnell Douglas test*.[390] In effect, the US Supreme Court held the same in *Hicks (1993)* as in *Burdine (1981)*, regarding the burden of proof. In this respect, the Hicks Court held that

> 'But the Court of Appeals' holding that rejection of the defendant's proffered reasons compels judgment for the plaintiff, disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, [and] ignores our repeated admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion.'[391]

The dissenting judges in *Hicks (1993)* in this respect held that the Court, in effect, repeated the truism that the plaintiff has the ultimate burden of proving discrimination, without ever facing the practical question of how the plaintiff without such direct evidence can meet this burden. In their opinion, *Burdine (1981)* provided the answer, telling that a plaintiff-employee may succeed in meeting his ultimate burden of proving discrimination, either *directly* by persuading the court that a discriminatory reason more likely motivated the employer, or *indirectly* by showing that the employer's proffered explanation is unworthy of credence,[392] upon which the court must enter judgment for the plaintiff-employee. I agree.[393]

Overall, it can be said that the employer's non-discriminatory reason under *McDonnell Douglas test* does *not* need to constitute just cause. Nevertheless, the test provides some constraint on arbitrary action by employers, in that under *McDonnell Douglas (1973)* and in its progeny *Burdine (1981)* and *Hicks (1993)*, the reason stated by the employer remains subject to scrutiny to determine whether it is the real reason or only a pretext.[394] For example, when an employer's motive for a dismissal is disputed on grounds of age discrimination, the employer cannot simply argue that it decided to downsize. Rather, the employer must address how it determined which employees to terminate, and which to retain.[395]

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390 Goldman 1996, p. 150; Lindemann and Grossman 1997, p. 22-37 and 41 and 42; Termination of Employment 2000, p. 12,102-103.

391 *Hicks (1993)*, 113 S.Ct. 2742, 2749.

392 Justices Souter, White, Blackmun, Stevens dissenting. See *Hicks (1993)*, 113 S.Ct. 2742, 2761 and 2762.

393 *Hicks (1993)*, 113 S.Ct. 2742, 2758, referring to *Burdine (1981)*, 101 S.Ct. 1089, 1094.

394 Theodore St. Antoine 2001, p. 7.

395 Berkowitz and Emert 2001, p. 6 referring to *Guz (2000)*, 24 Cal. 4th, 317, 358.

8.9 Conclusion

Federal anti-discrimination law could develop, due to slavery. In brief, Title VII, the ADEA, the PDA and the ADA prohibit employers to discharge, harass and/or retaliate private-sector employees based on race, color, sex, religion and national origin (Title VII), age (ADEA), pregnancy (PDA), and disability (ADA). Private-sector employees can obtain protection under these acts, either under the disparate treatment theory that focuses on discriminatory intent, or the adverse impact theory that focuses on discriminatory results. Overall, the aforementioned statutes prohibit discharge for *specified* discriminatory reasons only. Hence, federal anti-discrimination statutes do not provide protection against arbitrary dismissal in general. Also, the *McDonnell Douglas test* that the US Supreme Court has introduced under federal anti-discrimination law to relieve the burden of proof for plaintiff-employees in disparate treatment cases, has not created just cause protection. Under this test, an employer can rebut the inference of discrimination by bringing forward a legitimate – that is a non-discriminatory – reason. The latter, however, does not need to constitute just cause. It merely needs to be a reason that does not fall within the statute's definition of discrimination.

9 State statutory law

9.1 Montana

Montana is the only state which has enacted a general statute that requires a good cause for dismissal.[396] The Wrongful Discharge From Employment Act (WDFEA) provides non-probationary employees protection against discharge without good cause.[397] This is unique, as an explicit good cause rule is nowhere to be found under common law, neither in Montana, nor in any other state.[398] Montana thereby became the first state in the United States that chose to modify by statute the *termination-at-will doctrine* of employment, which exists throughout the United States.[399]

With the good cause standard the Montana legislature recognized that the statutory at-will presumption leaves employees overly vulnerable.[400] Nevertheless, *employers* sought the adoption of a statute governing unjust discharges, due to the uncertainties of judicially developed law, and the

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396 Schramm 1990, p. 95.

397 Cottone 2002, p. 7.

398 Cottone 2002, p. 7.

399 Barber 1993, p. 5; Bierman, Vinton and Youngblood 1993, p. 367; Parker 1995, p. 10; Robinson 1996, p. 376; Jarsulic 1999, p. 2; Moberly 1999, p. 11; Cottone 2002, p. 7; Corbett 2003, p. 13; Kohn 2003, p. 57, footnote 56.

400 Schramm 1990, p. 95.

exposure to large damage awards and legal expenses induced.[401] Particularly, in the late 1970s, state supreme courts throughout the United States began to reject the previously dominant presumption of at-will employment by creating exceptions to the at-will rule known as wrongful discharge law.[402] Montana, hereupon, articulated one of the broadest versions of the judicial exception of the implied covenant of good faith and fair dealing,[403] allowing plaintiff-employees to claim punitive damages in a contractual relationship.[404] Moreover, it read a job security into the exception.[405] Subsequently, employers with effective lobbying organizations decided to seek legislative change in the law.[406] Hence, the WDFEA was primarily reacting to an employer backlash against new doctrines under case law that provided just cause protection.[407] By means of trade-off, the WDFEA included a good cause provision. However, it, too, put a cap on damages and preempted common law remedies that were previously successfully sought in Montana courts.[408] In the following parargraphs, I will examine to what extent private-sector employees enjoy just cause protection under the WDFEA.

9.2 Case law prior to 1987

In this paragraph, I will examine case law in Montana prior to the Act. This is necessary for an understanding of the WDFEA. Moreover, case law prior to 1987 may serve as a guideline for state courts that desire to provoke legislative action,[409] hence, the WDFEA may serve as a model for state legislatures considering legislation in this area one day.[410] In Montana, the first wrongful discharge case was *Gates (1982),* also known as *Gates I*. In this case, a private-sector employee was terminated from a clerical position without advance warning, and was pressured into signing a letter of resignation. By not following its own written policies for discharging employees, the Montana Supreme Court concluded that the employer had violated the implied covenant of good faith and fair dealing with the employee.[411] Although the Montana Supreme Court held that the personnel manual was not itself an enforceable contract – it had not been

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401 Peck 1991, p. 15.

402 For a discussion of the common law exceptions to the at-will rule, see below under § 10.4.

403 Leonard 1988, p. 15.

404 Schramm 1990, p. 99. For an in-depth discussion of this exception to the at-will rule, see below under § 10.4.3.

405 See below under § 9.2.

406 Schramm 1990, p. 108; Bierman, Vinton and Youngblood 1993, p. 371; Jarsulic 1999. For the legislative history of the WDFEA, also see below under § 9.3.1.

407 Schramm 1990, p. 95.

408 Robinson 1996, p. 376.

409 Leonard 1988, p. 15; Robinson 1996, p. 377; Jarsulic 1999, p. 2 and 3; Cottone 2002, p. 3; Corbett 2003, p. 13.

410 Leonard 1988, p. 16; Bierman and Youngblood 1992, p. 54 and 55.

411 Hubble 1987, p. 194.

issued until two years after Gates was hired – the employer's unilateral publication of certain procedures with regard to terminations created a standard of conduct by which the employer's good faith should be measured.[412] The case was revolutionary, because the Montana Supreme Court for the first time recognized an implied covenant of good faith and fair dealing in employment contracts as an exception to the at-will rule.[413] Initially, Montana courts, as from the 1960s, recognized the implied covenant of good faith and fair dealing in relationships involving insurance companies and their insured only. In fact, until the late 1970s, courts had refused to extend any such covenant out of that context.[414] As Schramm stresses, *Gates I* meant a major break from the old era of Montana employment law, which was dominated from early statehood by the statutory presumption that employment was an at-will relationship, which either party could end without cause upon a moment's notice.[415]

Already, in *Keneally (1980),* the Montana Supreme Court acknowledged a wrongful discharge claim. The Court, however, dismissed the claim. Nevertheless, it unanimously held – referring to the growing tendency of the judicial system to grant relief to persons who have been abusively or wrongfully discharged – that in a proper case a cause for wrongful discharge could be made by an employee.[416] Subsequently, in *Nye (1982)*, in which a public employee was involved, the Montana Supreme Court held that an employer's violation of written personnel policies may provide a basis for a wrongful termination claim.[417]

In *Gates (1983)*, known as *Gates II*, the Court extended the scope of the good faith covenant in the employment context, recognizing the breach of a covenant of good faith and fair dealing as a *tort* action, hence, allowing punitive damages. In effect, it followed the landmark case of *Cleary (1980)* of the California Court of Appeal.[418] However, in 1988, the California Supreme Court in the landmark case of *Foley (1988)* held that the good faith covenant could sound in contract only, i.e. contract damages could be awarded only. By that time, Montana had already adopted the WDFEA, due to the decisions of the Montana Supreme Court in *Gates I and II*, and the following cases extending the good faith covenant even further, starting with *Dare (1984)*.[419]

In the latter, the Montana Supreme Court read a job security into the covenant. It allowed private-sector employees an action under the implied covenant of good faith and fair dealing, based on the employer's oral and

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[412] Leonard 1988, p. 14.

[413] Hubble 1987, p. 194; Leonard 1988, p. 14; Schramm 1990, p. 96.

[414] Hubble 1987, p. 193.

[415] Schramm 1990, p. 94 and 95.

[416] Leonard 1988, p. 14.

[417] Leonard 1988, p. 14 and 15; Regan 1995, p. 587.

[418] For *Cleary (1980)*, see below under § 10.4.3.

[419] Hubble 1987, p. 194; Schramm 1990, p. 96 and 99. For an in-depth discussion of *Foley (1988)*, see below under § 12.2.4.

unintended objective manifestations of job security. The Court took into consideration factors as a positive performance appraisal, and a salary increase based on which the employee had reason to believe that her job was secure so long as she performed satisfactorily.[420] Subsequently, in *Crenshaw (1984)*, the Montana Supreme Court extended the covenant to probationary employees. It held that unintended objective manifestations could be implied from the employee's inclusion in a benefit program reserved for permanent employees only.[421] The Court hereupon found that the employer had breached the covenant by relying on false charges that it should have investigated when it terminated the private-sector employee.[422] Also, in *Kerr (1987)*, the Montana Supreme Court found that unintended manifestations of job security as promotions and pay increases made it reasonable for a private-sector employee to believe that she had job security. It awarded a front pay over a period of five and a half years, the length of Kerr's employment.[423]

The Montana Supreme Court seemed willing to *restrict* the expanding cause of action of good faith and fair dealing in the non-labor case of *Nicholson (1985).* For a breach of the covenant it required a party to act arbitrarily, capriciously or unreasonably in order to imply a good faith covenant. Moreover, in *Maxwell (1986)*, a federal court held that a private-sector employee had to prove that the employer had committed a breach of contract. In *Nordlund (1987)*, the Montana Supreme Court affirmed this decision.[424]

Consistently, in *Flanigan (1986),* the Montana Supreme Court held that an employer breached the good faith covenant, and upheld an extraordinary damage award of $1.3 million as punitive damages, $94,000 in economic damages, and $100,000 for emotional distress. An expert testimony pointed out that the company had violated its own enforceable personnel policies regarding job security and job rights thirteen times when it terminated an employee who had performed satisfactorily for 28 years, and had failed to give the employee notice or a hearing or to recall her to fill vacant positions. The fact that the company subsequently changed its position as regards the reason for termination before and during the trial – evidently terminating her for a discriminatory purpose – had a negative impact on the case.[425]

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420 Hubble 1987, p. 194; Leonard 1988, p. 15; Schramm 1990, p. 96.

421 Leonard 1988, p. 15; Schramm 1990, p. 96.

422 Hubble 1987, p. 194; Leonard 1988, p. 15.

423 Leonard 1988, p. 15.

424 Schramm 1990, p. 96-99.

425 Hubble 1987, p. 195-197.

9.3 Montana Wrongful Discharge From Employment Act of 1987 (WDFEA)

9.3.1 Legislative history

At the end of the 1980s, employers and employees were in a state of confusion about Montana employment termination law.[426] It was the decision in *Flanigan (1986)*, in particular, that caused employers and insurance companies in Montana to decide to form the Montana Liability Coalition, and to turn for advice to the Montana Association of Defense Counsel. To a large extent this Counsel was made up of lawyers who defended employers and insurance companies. This cooperation resulted in a draft, which after some reworking, became the Wrongful Discharge From Employment Act of 1987.[427] The WDFEA of 1987, as Regan states was

> '(…) a response to two forces: First, employers and insurance companies sought to "reduce the pot of gold at the end of the rainbow" in order to eliminate unreasonably large wrongful discharge awards and marginal wrongful discharge claims. Second, due to the Montana Supreme Court's unpredictable interpretation of the implied covenant of good faith and fair dealing, the drafters of WDFEA sought to provide certainty to employment discharge law in Montana.'[428]

The *first* draft on the side of the employers and the insurance companies incorporated the general principle that only lengthy employment entitled an employee to good cause protection from arbitrary discharge. The draft mandated that employees with five years seniority could only be terminated for good cause. Moreover, the Bill prohibited any discharge made in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy.[429]

The legislature was able to make the Bill more favorable for employees.[430] *First*, it expanded protections against wrongful discharge to cover *any* non-probationary employee, rather than only those who had been with an employer five years or more.[431] *Second*, discharges in violation of an employer's written personnel policies were made actionable.[432] Last, the legislature expanded the amount of damages recoverable by a wrongfully discharged

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426 Leonard 1988, p. 15; Schramm 1990, p. 106.

427 Schramm 1990, p. 108 and 109; Jarsulic 1999, p. 2.

428 Regan 1995, p. 585. See also Schramm 1990, p. 110.

429 Schramm 1990, p. 108 and 109.

430 Berks points out the significant role of the legislature in offering bargaining power towards employers. Berks 2000, p. 14.

431 Schramm 1990, p. 109.

432 This was already common law. Schramm 1990, p. 109 and 110; Regan 1995, p. 587; Cottone 2002, p. 7.

employee from a maximum of two years, to four years' wages.[433] Although with the four-year cap the legislature was of the opinion that it protected employers from unreasonably large damage awards on the one hand, and that it compensated discharged employees during their search for new employment on the other,[434] the latter caused a debate with regard to old-age employees. The argument was that these employees, contrary to younger discharged employees, would face significant barriers in the job market when searching for alternate employment, and generally remain unemployed longer than any other age group.[435]

The WDFEA was signed by the Governor of Montana on 11 May 1987. It went into force on 1 July 1987 as part of the Montana Annotated Code.[436] The WDFEA contains 15 Sections (39-2-901 to 915 in 2004), i.e. § 901 (title); § 902 (purpose); § 903 (definitions); § 904 (wrongful discharge); § 905 (exclusivity); § 906 to 910 (reserved); § 911 (procedures); § 912 (exemptions); § 913 (remedies); § 914 and § 915 (arbitration). With this Act, the legislature met the interests of employers and employees. A point of discussion, however, still is whether the WDFEA properly balances the rights of employers and employees,[437] after the legislature agreed to make the WDFEA the *exclusive* remedy for a wrongful discharge.[438] Put differently, someone wrongfully discharged after 1 July 1987[439] and covered by the WDFEA can no longer initiate a common law cause of action.[440] While such a trade-off had been probably necessary for wrongful discharge legislation to achieve 'political acceptability' and to be enacted, in effect, it deprives employees of common law actions.[441]

Consequently, Parker points out that armed with a just cause standard to entice employee interest groups, Montana employers successfully extinguished magnanimous jury awards by restricting recovery to a showing of no 'good cause', limiting compensatory damages to lost wages, and raising the level of proof for punitive damages.[442] In fact, a significant number of people is still of the opinion that the WDFEA had done a great disservice to the employees of Montana with regard to the exemption of common law actions and the cap on

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433 Schramm 1990, p. 110.

434 Regan 1995, p. 586.

435 Regan 1995, p. 599 and 600.

436 Schramm 1990, p. 113.

437 Robinson 1996, p. 421.

438 Schramm 1990, p. 110; Regan 1995, p. 585 and 586.

439 When an employee is notified of its termination before 1 July 1987, however, dismissed after this date, the WDFEA does not apply. This was decided by the Montana Supreme Court in *Martin (1990)*. See Bierman and Youngblood 1992, p. 69.

440 This comes forward out of Mont. Code Ann. § 39-2-902 and 913 (2004). See also Schramm 1990, p. 110; Peck 1991, p. 14; Bierman and Youngblood 1992, p. 68.

441 Bierman, Vinton and Youngblood 1993, p. 371.

442 Parker 1995, p. 10 and 11. See also Bennett 1996, p. 121; Corbett 2003, p. 12.

damages.[443] Bierman and Youngblood, on the other hand, are of the opinion that the wrongful discharge law in Montana created a considerable degree of certainty for both employers and employees. It subsidized a better business climate by limiting damages and the ability of employees to bring common law actions on the one hand, and established that employers would generally no longer be able to discharge an employee without cause on the other.[444]

9.3.2 Constitutionality

The fact that the WDFEA deprived private-sector employees from common law actions induced employees to challenge the constitutionality of the WDFEA. *Meech (1989)* was the first case in this respect. Meech, an employee, claimed that the WDFEA deprived him of his right to full legal redress under common law, established under Article II, Section 16 of the Montana Constitution, commonly referred to as the *full legal redress clause*.[445] The WDFEA survived this constitutional challenge. First, the Montana Supreme Court stressed that there is no constitutional guarantee on job security. Second, the legislature has the authority to provide a substitute for a common law rule.[446] Third, in overturning an earlier decision, the Montana Supreme Court choose not to test the WDFEA on the, heavier, *compelling state interest test* but on the *rational basis test meeting a legitimate state interest*.[447] With this lower standard the Montana Supreme Court could uphold the constitutionality of the Act. In this respect, the Court held that the WDFEA was rationally related to legitimate state interests based on

- the negative effect that wrongful discharge cases could have of discouraging employers from locating their businesses in Montana;
- the positive effect of the Act, alleviating unreasonable financial threats to Montana employers; and
- the positive effect of the Act, providing a reasonably substitute for the common law causes of action that it abrogated, including good cause protection for employees.[448]

In *Johnson v. State (1989)*, the constitutionality of the WDFEA was challenged a second time. An employee asserted that no compelling state interest had been shown by the legislature to justify the deprivation of common law rights. With reference to *Meech (1989)*, the Montana Supreme Court confirmed that the state

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443 Bierman, Vinton and Youngblood 1993, p. 379.

444 Bierman and Youngblood 1992, p. 55-57.

445 Schramm 1990, p. 112; Bierman and Youngblood 1992, p. 54-55; Barber 1993, p. 5.

446 Robinson 1996, p. 378.

447 Robinson 1996, p. 378. Footnote 9 holds the cases that were overruled by *Meech (1989)*.

448 Bierman and Youngblood 1992, p. 55-57.

legislature had the power to alter common law cause of actions and remedies, without the need of demonstrating a compelling state interest.[449]

Subsequently, in *Allmaras (1991)*, the constitutional challenge by plaintiff-employees was dismissed for lack of standing. Plaintiffs argued that the cap on damages violated the right of juries to determine damages. In effect, the jury left this question unanswered. The jury found that the plaintiffs were not wrongfully discharged and, therefore, they were not affected by the cap. Second, plaintiffs argued that bargaining-unit employees were exempted under Section 912(2) of the Act, lacking common law remedies. With this, they argued, the WDFEA violated the equal protection clause of the Montana Constitution. In reply, the Court stressed that common law remedies, in principle, were not available to bargaining-unit employees before the Act either.[450] Overall, although *Allmaras (1991)* left the first question unanswered, the constitutionality of the Act is considered to be well-established since *Meech (1989)*.[451]

9.3.3 Scope

The scope of the WDFEA is limited to *employees*. Independent contractors are exempted under Section 903. The latter prescribes an employee as a person who works for another for hire. Courts apply the common *law right-to-control test* to determine whether a worker is an employee under the WDFEA, or an independent contractor.[452]

Initially, public employees were excluded as well. Until 1991, Section 2-9-111 of the Montana Code Annotated held that governmental entities were immune to suits for their actions. Hence, suits of public employees against their employers under the WDFEA were not permitted. In a 1991 amendment of the Montana Code Annotated,[453] the legislature made it possible for public employees to bring an action under the WDFEA to the extent that these suits are not statutorily preempted under Section 912(1).[454] The latter exempts from coverage any discharge claim subject to another state or federal statute, which provides a procedure for challenging the discharge and/or provides a remedy for such a discharge.[455] In practice, public employees generally enjoy good cause protection under a constitution and/or a statute, thus, generally lose their claim under the WDFEA under this Section.[456]

Additionally, the legislature exempted two categories of employees from coverage under Section 912(2) of the WDFEA. These are employees who did

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449 Barber 1993, p. 5. See also Bierman and Youngblood 1992, p. 54 and 57.

450 Bierman and Youngblood 1992, p. 57-59. For case law in this respect, see below under § 9.3.3.

451 Bierman and Youngblood 1992, p. 73.

452 For the common law test, see above under § 7.3.2.

453 Mont. Code Ann. § 2-9-111(c)(ii)(1991). See also Bierman and Youngblood 1992, p. 71.

454 Bierman and Youngblood 1992, p. 71; Bennett 1996, p. 123.

455 Regan 1995, p. 589.

456 Bennett 1996, p. 123.

not have a wrongful discharge action under common law before the enactment of the WDFEA either.[457]

First, employees covered by a collective bargaining agreement were excluded from common law actions under *Brinkman (1986)*, affirmed in *Fellows (1990)*.[458] The rationale behind this exemption was that contractual grievance procedures in collective bargaining agreements were considered effective and efficient forums for dispute settlements. Based on *Lingle (1988)*, however, a bargaining unit employee may file a state claim before court, when it concerns a wrongful discharge *tort* claim that needs no interpretation of the collective bargaining agreement.[459] *Second,* employees covered by an employment agreement for a definite period are excluded under Section 912(2). They are subject to the common law rule, which holds that a contract for a specific term automatically expires after termination of the period.[460] This means that an employer does not have to show good cause when the contract is 'terminated', nor is he obliged to renew the contract after expiration, unless the contract determines otherwise.[461] In contrast, when the employer terminates the contract *during* the period other than for good cause, the employee may file a suit in court based on breach of contract and ask for contract damages. The foregoing raises the question whether this means that an employer may enter into a contract for a specific term to establish that the WDFEA does not apply. The answer is positive. In *Farris 1992*, the Montana Supreme Court held that nothing in the WDFEA forbids parties from entering into a contract for a definite period, either or not with the aim to avoid renewing specific term contracts without a showing of good cause.[462]

9.3.4 Contents

Section 904 of the WDFEA determines that a discharge is wrongful if

- the employer retaliates the employee for refusal to violate public policy or for reporting a violation of public policy;
- the discharge is not for good cause and the employee has completed the employer's probationary period of employment; or
- the employer violates express provisions of its own written personnel policy.[463]

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457 Schramm 1990, p. 111; Regan 1995, p. 589.

458 Robinson 1996, p. 401.

459 Schramm 1990, p. 99 and 100; Robinson 1996, p. 401. See also above under § 7.2.

460 Schramm 1990, p. 111.

461 Termination of Employment 2000, Montana, § 20,100, p. 25,317 (December 1997). Leonard 1988, p. 16.

462 Robinson 1996, p. 402; Bennett 1996, p. 122; Jarsulic 1999, p. 3.

463 Schramm 1990, p. 110; Barber 1993, p. 4; Parker 1995, p. 10; Jarsulic 1999, p. 3; Cottone 2002, p. 7.

The good cause provision will be discussed in-depth in the next paragraph. Hence, I will now concentrate on the public policy exception and the handbook exception. In brief, under Section 903, *public policy* means a policy which is in effect at the time of the discharge, concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.[464] In *Wadsworth (1996)*, the Montana Supreme Court, citing *Gantt (1992)*, a California case, added that public policy, too, must involve a matter that affects society at large, rather than a purely personal or proprietary interest of the plaintiff-employee or employer. In addition, the policy must be fundamental, substantial, and well-established at the time of discharge.[465] As regards the *handbook exception* under the WDFEA, Montana, in fact, became the first state to hold by *statute* that written personnel policies were enforceable, i.e. legally binding, and that employer violation of written personnel policies were unlawful.[466] Unclear under the WDFEA, however, is whether an at-will disclaimer in a handbook can negate good cause protection. In *Prout (1989)*, the Montana Supreme Court considered a waiver valid that the employee had signed and was developed by the employer to protect him against implied covenant of good faith claims. *Prout (1989)*, however, was still governed by case law prior to the WDFEA.[467]

Under Section 905, the employee in case of a wrongful discharge can ask for damages, which are restricted to lost wages and fringe benefits[468] for a period not to exceed 4 years from the date of discharge.[469] The award of four years' economic losses is not mandatory, however. Also, less or even zero can be granted, in that an employee has a duty to mitigate damages. For example, when an employee turns down a new job offer, he may be awarded less for the earnings the employee could have earned with reasonable diligence (*Tyner, 1995*).[470] A significant difference with the remedies prior to the WDFEA is that after 1 July 1987, punitive damages are no longer available for violation of the employment contract, a clear reaction to the excessive punitive damages awarded in *Flanigan (1986)*. To the extent punitive damages are available, this is possible only when it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee, in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy.[471] Other remedies than those under the

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464 Robinson 1996, p. 390 and 391.

465 Robinson 1996, p. 391 and 392.

466 Bierman and Youngblood 1992, p. 71; Bierman, Vinton and Youngblood 1993, p. 376; Regan 1995, p. 587.

467 Schramm 1990, p. 104 and 117.

468 Fringe benefits is defined in the WDFEA under Section 903 as 'the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan into force on the date of the termination'.

469 Parker 1995, p. 10.

470 Robinson 1996, p. 396 and 397; Jarsulic 1999, p. 3.

471 Leonard 1988, p. 16; Bierman, Vinton and Youngblood 1993, p. 371 and 373.

WDFEA are exempted under Section 913. An exception to this rule was made in *Beasly (1993)*. In this case, the Montana Supreme Court held that an employee can claim damages, besides those mentioned under the WDFEA, in case of breach of contract that occurred *prior* to and *independent* of the discharge. In this case the employee was promised, but never given his stock options.[472]

Last, Section 911 holds the procedure that must be followed under the Act when wrongfully discharged. Under this Section, an action under the Act must be filed within one year after the date of discharge, which begins upon notification of termination.[473] Previously, the employee has to exhaust *written* internal appeals procedures in order to file a lawsuit under the Act.[474] On the other hand, the employee must be informed of the existence of these procedures, within seven days of the discharge. If the employer fails to do so, the employee does not need to exhaust written internal appeals procedures in order to file a lawsuit under the Act. An employer's failure to give notice is excused when the employee files suit on the very day of discharge.[475] The rationale behind Section 911 is to give the employer a chance to gather information and to eventually reverse the decision. Also, it aims to reduce the period of uncertainty for the employer, because internal grievance procedures usually require an employee to file a claim within a certain time frame.[476] Bennett acknowledged that this provision, indeed, makes an employer think twice. On the other hand, he states, the internal procedure may prove to be just another hurdle for the employee seeking redress for wrongful discharge.[477]

Subsequently, once a lawsuit has been properly filed under the WDFEA, the Sections 914 and 915 encourage the use of arbitration by using the threat of imposition of attorney fees and costs. It, thus, does not compel arbitration.[478] In brief, these Sections determine that either the employer or the employee may make a written offer to arbitrate within 60 days after a complaint is made under the Act. This offer needs to be accepted in writing within 30 days after the date that the offer is made. If the employer does not accept the employee's offer, and the employee wins the case, the employee is entitled to reasonable attorney fees as from the date of the offer. Conversely, if the employee refuses to accept the employer's offer, and the employer wins the case, the employer is entitled to reasonable attorney fees as from the date of the offer.[479] If both decide to litigate, parties have to pay their own attorney fees.[480]

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472 Robinson 1996, p. 403 and 404.

473 For example, see *Martin (1990), Walch (1993), Redfern (1995)*, overruling *Allison (1992)*. See also Robinson 1996, p. 398 and 399.

474 Cottone 2002, p. 7.

475 For example, see *Hoffman (1992)*. See also Robinson 1996, p. 399 and 400.

476 Leonardo 1988, p. 16; Schramm 1990, p. 118.

477 Bennett 1996, p. 123.

478 Bierman, Vinton and Youngblood 1993, p. 373 and 374. See also above under § 6.3.

479 Jarsulic 1999, p. 3.

480 Schramm 1990, p. 118-119; Bierman, Vinton and Youngblood 1993, p. 374.

9.3.5 Good cause provision

As regards the statutory definition of good cause under the WDFEA, it bears mentioning that in *Medicine Horse (1991)*, the Montana Supreme Court still held that the good cause provision in the WDFEA did *not* nullify the at-will rule set forth in Section 39-2-503 of the Montana Code.[481] In *Whidden (1999)*, however, the Montana Supreme Court reversed its decision and held that the WDFEA, by providing that an employer may not discharge an employee without good cause, has effectively eliminated at-will employment and impliedly repealed Section 39-2-503. Subsequently, the 2001 legislature codified the holding of *Whidden (1999)* by explicitly repealing the at-will Section of the Montana statute.[482]

9.3.5.1 Statutory definition

Section 904 holds that a discharge is wrongful if the discharge is not for good cause, *provided* the employee had completed the employer's probationary period of employment. Hence, before one is able to discuss the good cause standard, the question what constitutes a *probationary* period needs answering first. All the more so, when one realizes that during this period the employment may be terminated at will.

The WDFEA does not define the probationary period. The Act, in other words, leaves the length of the employee's probationary period to the discretion of the employer. In fact, it allows the employer to establish the length of the probationary period from a few days to a few years; in the most extreme case the employer may even keep an employee perpetually on probation.[483] The reason for the legislature not to define the probationary period is, that it did not want to upset the probationary period systems.[484] In 2001, the legislature partially met this problem through an amendment of Section 904 of the WDFEA. Under this Section, the legislature *assumes* that there is a probationary period of six months from the date of hire, when an employer does not establish a specific probationary period or provides that there is no probationary period prior to, or at the time of the hire.

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481 Robinson 1996, p. 379 and 380.

482 *Whidden (1999),* 981 P.2d 271, 275.

483 Schramm 1990, p. 116 and 117; Bierman, Vinton and Youngblood 1993, p. 377; Bennett 1996, p. 122; Jarsulic 1999, p. 3.

484 Schramm 1990, p. 116 footnote 134.

More specifically, the WDFEA defines *good cause* as

> '(…) reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason.'[485]

At first sight, the good cause standard under the WDFEA is an equivalent of the just cause standard as is common in collective bargaining agreements, implicitly referring to (in)capacity, (mis)conduct and operational requirements of the undertaking.[486] Also, like in arbitral proceedings, incapacity and misconduct results in good cause only when this has been documented by the employer, and resulted in warnings that discharge would occur if improvement was not seen.[487]

The WDFEA is unclear about what constitutes *other legitimate business reason*, though. From legislative history, it can be derived that this phrasing is to afford employers the discretion to make employment decisions, due to lack of work or elimination of the job. However, this definition is already subsuming the other two phrases in the definition 'a failure to satisfactorily perform job duties' and 'disruption of the employer's operation'.[488] Hence, a plain reading of the WDFEA and a study of its spare legislative history does not clarify the term *other legitimate business reason*. There is one exeption. The WDFEA, as from 1993, determines that the legal use of a lawful product by an individual of the employer's premises during non-working hours is *not* a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4) of the Montana Code.[489] In brief, employees who smoke or drink alcoholic beverages are granted protection from discharge in case of legal use of these products during non-working hours. The WDFEA, nonetheless, allows employers to impose limits or prohibit employment of smokers or drinkers of alcoholic beverages because of job-related responsibilities or bona fide occupational requirements, or because of conflict with the purposes of a non-profit organization.[490]

The legislature further, thus, left it to the courts to determine what constitutes *other legitimate business reason*. In *Cecil (1990)* and *Buck (1991)*, the Montana Supreme Court gave clarity. In *Cecil (1990)*, the Court held that the elimination of a position, due to business needs, being an economic reason, constitutes a legitimate business reason. In this case, a 57-year-old top executive, after having been promoted as company executive vice president, was dismissed without any prior warning or indication of poor performance. The

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485 Section 903. The Montana Supreme Court earlier defined 'good cause' as such in *Koepplin (1994)*. See Cottone 2002, p. 7 footnote 173. See further Parker 1995, p. 10.

486 Leonard 1988, p. 16.

487 For example, see *Peter (1990),* and *Miller (1992*). See also Robinson 1996, p. 389 and 394.

488 Schramm 1990, p. 110.

489 See also Schramm 1990, p. 116; Bierman and Youngblood 1992, p. 59.

490 Robinson 1996, p. 389.

reason for the employer to terminate the employee was an anticipated decline in the price of crude oil that would result in less production and cutbacks on expenditures. Cecil admitted that when he was terminated, crude oil prices were indeed falling. In reply, Cecil argued that his employer did not act fairly or honestly when claiming economic necessity. The Montana Supreme Court held that it is well-settled under case law prior to the Act that economic conditions constitute a 'legitimate business reason'.[491] It stressed that an employer should not be foreclosed from engaging in legitimate reductions in force, necessary to maintain the company's economic vitality.[492] Subsequently, in *Buck (1991)*, the Montana Supreme Court defined *other legitimate business reason* as a legitimate business reason that is neither false, whimsical, arbitrary nor capricious, and must have some logical relationship to the needs of the business.[493]

Additionally, the United States Court of Appeals, Ninth Circuit, applying Montana law, in *Marcy v. Delta Airlines (1999),* defined what is *not* a legitimate business reason. These criteria – which will be discussed below – derived from *summary judgment cases* on good cause protection in Montana. A significant difference between these cases and so-called *trial cases* is that in the latter, the *employee* generally initiates the wrongful discharge claim. Hence, the *employee* has the burden of proof that the employer discharged the employee without good cause.[494] In contrast, summary judgment cases are generally initiated by the *employer* in order to dismiss the action by the employee. Therefore, in summary judgment cases, an *employer* has to show sufficient facts there was good cause to terminate the employment, after which the burden of proof shifts to the employee, who has an obligation to respond with sufficient facts to raise a genuine issue of material fact that termination was for some reason other than for good cause.[495] In brief, in *Marcy v. Delta Airlines (1999)*, the federal court under *Montana* law held that the employee can defeat the grant for summary judgment by showing that the reason given by the employer either

- is false, whimsical, arbitrary or capricious, and with no logical relationship to the needs of the business;
- is invalid as a matter of law under the WDFEA;
- rests on a mistaken interpretation of the facts; or
- is not the honest reason for the discharge, but rather a pretext for some other illegitimate reason.[496]

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491 *Cecil (1990),* 797 P.2d 232, 234.

492 See also *Kestell (1993),* 858 P.2d 3, 7, referring to *Cecil (1990),* 797 P.2d 232, 234.

493 Bierman and Youngblood 1992, p. 60 and 61; Robinson 1996, p. 387; Bennett 1996, p. 129. For the facts in *Buck (1991)*, see below under § 9.3.5.2.

494 Robinson 1996, p. 420.

495 *Jones v. Peabody (1991)*.

496 *Marcy v. Delta Airlines (1999),* 166 F.3d 1279, 1283. See also Robinson 1996, p. 394.

These defenses may serve the employee in summary judgment cases and trial cases, hence, will be discussed in the next Section.

9.3.5.2 Statutory case law

The reason is false, whimsical, arbitrary or capricious, and with no logical relationship to the needs of the business

In *Buck (1991)* – one of the leading Montana Supreme Court decisions since the adoption of the WDFEA – a definition was given of the term *other legitimate business reason* to constitute a reason that is neither false, whimsical, arbitrary nor capricious, and must have some logical relationship to the needs of the business.[497] In this case, a top executive in Montana was discharged when a new owner in Louisiana purchased the car dealership. The new owner wanted to keep supervision on operations outside the state, and as a long standing policy, put his own employees in the top dealership jobs of these operations, including Montana. Buck filed suit under the WDFEA. The Court held that when employers seek to fill sensitive managerial or confidential positions, they may properly look to their own employees. Therefore, this reason constituted a legitimate business reason for it was not false, whimsical, arbitrary nor capricious and for having a relationship to the need of the business.[498] The Court emphasized that *Buck (1991)*, in principle, did not apply to non-managerial employees.[499] In principle, it was confined to those employees who occupy sensitive managerial or confidential positions.[500] In this respect, the Buck Court stressed that a company's interest in protecting its investment and in running its business as it sees fit is not as strong when applied to lower-echelon employees, which rather must be outweighed by their interest in continued, secure employment.[501]

In *Kestell (1993),* the Montana Supreme Court, however, seemed to apply the standard for lower-echelon employees to a highly qualified professional and experienced supervisor. The Court held that an employer's legitimate right to exercise discretion over whom it will employ must be balanced against the employee's – in this case, the supervisor's – equally legitimate right to secure employment. This balance, the Court continued, should favor an employee who presents evidence, and not mere speculation or denial, upon which a jury could determine that the reasons given for his termination were false, arbitrary or capricious, and unrelated to the needs of the

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497 *Marcy v. Delta Airlines (1999),* 166 F.3d 1279, 1283, referring to *Buck (1991),* 811 P.2d 547, 540. See also Bierman and Youngblood 1992, p. 60 and 61; Robinson 1996, p. 387; Bennett 1996, p. 129.

498 *Buck (1991),* 811 P.2d 537, 541.

499 Bierman and Youngblood 1992, p. 59-62 and 69; Bennett 1996, p. 129.

500 *Buck (1991),* 811 P.2d 537, 541. See also Robinson 1996, p. 387.

501 *Buck (1991),* 811 P.2d 537, 541. See also Bennett 1996, p. 129.

business.[502] The Montana Supreme Court held that Kestell presented evidence, demonstrating that the hospital's ostensible reasons for replacing him were false, arbitrary or capricious and unrelated to the needs of the business.[503] In brief, the evidence that was brought forward by Kestell showed that the hospital had not eliminated Kestell's position, due to business needs, but merely replaced Kestell with another person whose job description was identical to Kestell's and for which he received the same base pay.[504]

The reason is invalid as a matter of law

In *Buck (1991)*, a discussion of an invalid reason as a matter of law was presented. In this case the employee, in effect, challenged whether on the face of it, the policy of the new owner was a valid business reason under the WDFEA. The Montana Supreme Court held that the employer was entitled to arbitrarily replace the manager with a person of his own choosing from within his own business organization, regarding sensitive managerial or confidential positions. For to conclude otherwise, the Buck Court held, would be to force a new owner of a business to retain someone it did not know or perhaps even trust to manage a large dollar investment.[505]

The reason is based on mistaken facts

In *Heltborg (1990)*, a case litigated on pre-WDFEA facts and law, the Montana Supreme Court accepted a good-faith defense of an employer. In this case, Mr. Heltborg had worked for Modern Machinery for twenty-two years when he was discharged in connection with a necessary reduction of the workforce. The reason was not disputed. In fact, the employer had sustained large losses for several years. On behalf of her husband, who had died in the meantime, Mrs. Heltborg filed a complaint based on a breach of the covenant of good faith and fair dealing and negligence. The jury ruled in favor of Mr. Heltborg and awarded damages in the amount of US$ 170,608.

On appeal, the employer objected to jury instructions that were given, containing that the employer's right to reduce its personnel does not excuse its obligation to act fairly and in good faith or to use ordinary and reasonable care in the process and manner of termination of employment.[506] The Montana Supreme Court agreed with the employer. It held that there is no justification for giving a jury the authority to review whether reasonable care was utilized in a reduction in force based on economic conditions. In fact, when an employer

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[502] *Kestell (1993),* 858 P.2d 3, 7. See also Robinson 1996, p. 387 and 388; Bennett 1996, p. 129 and 130.
[503] *Kestell (1993),* 858 P.2d 3, 9.
[504] *Kestell (1993),* 858 P.2d 3, 8.
[505] *Buck (1991),* 811 P.2d 537, 541. See also Robinson 1996, p. 387.
[506] *Heltborg (1990),* 795 P.2d 954, 959.

sustains large losses, the employer who acts in good faith should be the sole justice to carry out decisions concerning employment, according to the Court.[507]

Heltborg (1990) is still the law in Montana, regardless of *Marcy v. Delta Airlines (1999)*. In the latter, a private-sector employee claimed that Delta's reason for terminating her, i.e. for intentional falsification of payroll records to obtain non-earned salary as part of an intentional plan to defraud the company rested on a mistaken interpretation of the facts. After three 'mistakes', the employer, without further investigation, discharged Marcy assuming that her actions were intentional. However, Marcy claimed, the mistakes on her payroll records were unintentional, common in Delta's payroll system, and the employer's usual practice was to call employees to clarify discrepancies. The United States Court of Appeals held that Marcy provided sufficient evidence to raise a genuine issue of material fact that her recording errors were unintentional. In this respect, referring to *Morton (1994)* and *Howard (1995)*, it refused to protect the good-faith employer.[508]

Its decision has been severely criticized. Critics – which endorse the good-faith defense of *Heltborg (1990)* – state that *Morton (1994)* and *Howard (1995)* did *not* hold that a good-faith employer is *not* protected under Montana Law.[509] Rather, they continue, *Marcy v. Delta Airlines (1991)*, shows similarity with *Prout (1989)*. In this case, the Montana Supreme Court held that the record cards on time-keeping and payment gave the employer the right to dismiss the employee without cause, but not the right to dismiss an employee for a false cause. In case of the latter, the discharged employee must be given the opportunity to prove the charge of dishonesty false.[510] Furthermore, they refer to the legislative history of the WDFEA. During the realization of this Act the good-faith defense under the definition of the good cause standard was rejected. Apparently, they state, the legislature felt no need to codify the law.[511] Their argument has been most convincing, i.e. when legislative history does not give the answer, it has to be assumed that the legislature in 1987 did not intend to strip employers of a good-faith defense already available to them.[512]

The reason is not the honest reason, but a pretext for an illegitimate reason

An employee may come forward with evidence that the reason is a pretext and not the honest reason for the discharge. In *Mysse (1996)*, a driver who drove for the county used her own vehicle. When she was ordered to drive a new bus purchased by the county, she refused. After she had been given repeated

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507 *Heltborg (1990),* 795 P.2d 954, 961 and 962. See also *Kizer (1991),* 824 P.2d 229, 235.

508 *Marcy v. Delta Airlines (1999),* 166 F.3d 1279, 1287.

509 *Morton (1994),* 868 P.2d 576, 580.

510 *Prout (1989),* 722 P.2d 288, 292.

511 *Marcy v. Delta Airlines (1999),* 166 F.3d 1279, 1283 and 1284.

512 See *Kizer (1991),* 825 P.2d 229, 236.

warnings, she was discharged for disobeying the order. She filed a claim under the WDFEA. Mysse argued that the county used her refusal to drive the county bus merely as a pretext to discharge her for an illegitimate reason. Mysse overheard other senior citizens discussing that she may be too old to drive the bus and that her employer should hire a man to drive the bus, she assumed that her employer's actions were based on age discrimination. However, she did not offer more evidence than that her employer 'attempted to make her the scapegoat for their improvident purchase of the bus'.[513] The Montana Supreme Court upheld summary judgment for the employer where Mysse showed mere speculation, which does not rise to the level of pretext.[514]

9.3.6 Effectiveness

In 1992, the effectiveness of the WDFEA was examined by Bierman, Vinton and Youngblood. They sent a questionnaire to all 2,063 current member attorneys of the Montana State Bar. Responses to the questionnaires were received from 636 members, just over 30.8 percent of those surveyed, which is a fairly good response for a questionnaire. The surveyed plaintiffs' and defendants' attorneys were divided almost equally and were generally familiar with the issue of wrongful termination.[515]

One of the questions was whether the cap on damages influenced attorneys to decline a case under the WDFEA. Nearly half of the surveyed stated that they had personally declined a case for the fact that, in general, the compensation available in wrongful discharge cases did not adequately reflect the time and complexity of the work involved. In fact, according to some, cases were not worth taking, unless some sort of malicious action could be proven.[516] Another question was whether attorneys considered the arbitration clause effective, to the extent the legislature had assumed that this provision under the WDFEA would generally induce employees to make an offer to arbitrate because it would benefit speed, cost and informality,[517] and employers would tend to accept the offer to avoid attorney fees.[518] The question was posed, because anecdotal evidence suggested that aggrieved parties have been largely avoiding arbitration and, instead, taking WDFEA disputes to court.[519] More specifically, the question was whether the advice of attorneys towards clients was either to take their case directly to court, or to go to arbitration. Over 60 percent of the surveyed stated that they advised clients to take their case directly to court without first offering to go to arbitration. The reasons were that

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513 *Mysse (1996),* 926 P.2d 765, 772.

514 *Mysse (1996),* 926 P.2d 765, 771. See also Cecil (1990), 797 P.2d 232, 235.

515 Bierman, Vinton and Youngblood 1993, p. 368-370. The results of the survey were published in Montana Law Review, Volume 54 No. 2, Summer 1993, p. 367-384.

516 Bierman, Vinton and Youngblood 1993, p. 373.

517 Bierman, Vinton and Youngblood 1993, p. 375 and 376.

518 Schramm 1990, p. 118-119; Bierman, Vinton and Youngblood 1993, p. 374.

519 Bierman, Vinton and Youngblood 1993, p. 373 and 374.

attorneys thought it more convenient to try the case before a jury, because (i) they were more familiar with, and had more confidence in court procedure than arbitration; (ii) they felt discovery is better in a lawsuit; (iii) the possibility of success was higher in litigation than in arbitration; and, (iv) they felt some arbitrators were biased. Overall, attorneys were of the opinion that the arbitration clause was not effective under the Act.[520]

In 1999, the effectiveness of the Act was examined a second time. Jarsulic analyzed data on wrongful discharge litigation and arbitration in Montana during the period 1983 to 1997. He concluded that, compared to the pre-WDFEA wrongful discharge regime, the Act had reduced the value of jury awards to plaintiff-employees from about US$ 165,000 to US$ 35,000. The Act further had reduced the average time it takes to litigate a wrongful discharge case from 4 to 2 years. According to Jarsulic, by simplifying the law and reducing the grounds for suit, the cases were likely to be resolved more easily. Moreover, employees had become aware that they received significantly lower awards under the WDFEA, hence, there was less reason for them to pursue time-consuming and expensive discovery and litigation strategies.[521]

A negative side was that the limits on damage awards made it unattractive for attorneys to accept the case on contingency fees, unless the employer has violated a public policy.[522] Consequently, in good cause cases, an employer who refuses an offer of a blue-collar worker to arbitrate will likely cause the employee to go away for reason that the employee cannot afford an attorney. Jarsulic calculates that a wrongful discharge case costs about US$ 150,000 to litigate. He adds that employees who *can* afford an attorney, do not opt for arbitration either. They see juries – made up mostly by employees like themselves – as 'their shot at getting something'.[523] Based on the foregoing, Jarsulic correctly raises the question that to the extent employers simply refuse to arbitrate, and attorneys only accept cases in which the employer has violated a public policy, whether the WDFEA provides good cause protection in practice.[524]

9.4 Conclusion

With the Wrongful Discharge From Employment Act of 1987 (WDFEA), Montana became the first, and so far the only state in the United States to provide statutory good cause protection for employees against wrongful discharge. The majority of private-sector employees in Montana are covered by

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520 Bierman, Vinton and Youngblood 1993, p. 375 and 376.

521 Jarsulic 1999, p. 2-5.

522 In 1990, Harvard law Professor Weiler already pointed out the fact that the cap under the WDFEA would make it difficult for aggrieved employees to find lawyers willing to take their cases. See Bierman, Vinton and Youngblood 1993, p. 371 and 372.

523 Jarsulic 1999, p. 3 and 6.

524 Jarsulic 1999, p. 3.

the WDFEA. The Act excludes independent contractors, probationary employees, public employees, bargaining-unit employees and employees working on the basis of a contract for a definite period. At first sight, the good cause standard under the WDFEA constitutes an equivalent of a just cause standard as is common in collective bargaining agreements. Under the Act, it is defined as reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. Based on statutory case law, the other legitimate business reason is a reason that is neither false, whimsical, arbitrary nor capricious, and must have some logical relationship to the needs of the business. On the other hand, Montana law still protects a good-faith employer. More specifically, so long as the employer acts in good faith, he is the sole judge to carry out decisions concerning employment. Also, the WDFEA appears to be illusory for blue-collar workers. In brief, when an employee – in accordance with the Act – makes an offer to arbitrate, and the employer refuses to arbitrate which is likely for strategy reasons, the employee can seek redress through the judiciary only. However, a blue-collar worker generally lacks the financial capability to hire counsel on an hourly basis. Therefore, whether private-sector employees, *in practice*, can enjoy good cause protection under the WDFEA, is doubtful.

10 State common law

10.1 Introduction

The Montana Wrongful Discharge From Employment Act (WDFEA) was induced by employers. The uncertainties of judicially developed law, commonly referred to as *wrongful discharge law*,[525] induced them to seek the adoption of this statute.[526] In fact, in the late 1970s and early 1980s, courts throughout the United States formulated exceptions, which provided protection against arbitrary dismissal.[527] Consequently, in the twentieth century, the at-will presumption came under fire in the United States. In brief, under the wrongful discharge theory, a private-sector employee may have a claim against the employer based on

[525] CEB Wrongful Termination Book, Chapter 1, p. 3.
[526] See above under § 9.1 and § 9.3.1.
[527] West 1988, p. 12.

- violation of public policy;
- breach of the implied covenant of good faith and fair dealing; and
- breach of contract to discharge for good cause only, which either embraces (i) the handbook exception; or (ii) the implied-in-fact (good cause) contract exception.[528]

In the following paragraphs, I will examine to what extent private-sector employees enjoy just cause protection under these common law exceptions to the at-will rule. In brief, the state of California – being the largest and one of the most important economies with approximately 30 million inhabitants – is at the forefront of wrongful discharge law.[529] In contrast, the state of New York – the second largest with approximately 18 million inhabitants – is one of the few states and perhaps the most conservative one to strictly adhere to the at-will rule and to leave changes of the at-will rule to the legislature.[530] The majority of states – among which the state of Michigan with about 9 million inhabitants – take the middle course. These states accept the public policy exception and the handbook exception and *reject* the implied covenant of good faith and fair dealing.[531] Besides, a few states 'only' accept the implied-in-fact (good cause) contract exception.[532]

10.2 Short history of the at-will rule

Until about 1870, the United States followed English common law with regard to employment contracts.[533] More specifically, it followed the English Rule of the Statute of Labourers of 1562. This Act presumed that servants were hired for a one-year term, and prohibited employers from discharging employees without reasonable and sufficient cause during that one year of service, rebuttable in court by showing a contrary intent of parties.[534] Thus, no master could put away his servant during this one-year term of employment, unless upon reasonable

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528 Termination of employment digest, ILO, 2000, p. 356 and 357; Rudy 2000, p. 1 and 2; Jacobs 2003, p. 212.

529 See above under § 2.2.

530 For example, whereas the New York Court of Appeals in *Weiner (1982)* established a judicially created exception to employment at-will, in *Murphy (1983)* it immediately held that any alteration of the at-will rule is an issue better left to resolution at the hands of the legislature. See Minda 1986, p. 2; Minda and Raab 1989, p. 2; Weinstein 1993, p. 9; The 2000 Tri-State Employer, p. 2. See also Stolker 1992, p. 41 and 42, distinguishing between the controversies of judicial activism versus judicial restraint among judges. For an in-depth discussion of – the low amount of – case law on wrongful discharge of the state of New York, see further Minda (1986); Minda and Raab 1989; Nadler and Amera (1997); Ballam 2000.

531 Postic 1994, p. xxiv-xxxv.

532 See below under § 12.1.

533 Peck 1991, p. 2 and 3.

534 Weinstein 1993, p. 7; Summers 2000, p. 2.

cause and with reasonable notice.[535] Hence, in the United States, the concept of just cause draws it origin from the Statute of Labourers. This English rule, which was brought to the American colonies by English settlers, was followed by most American jurisdictions. By 1870, the law in the United States was confused regarding this English rule, however. Courts went in diverse directions. Some held that if the pay was so much as a week, a month, or a year, there was a presumption that the hiring was for the period named (*pay period presumption*). Other courts rejected the use of any presumption, and determined that employment was at will.[536] In fact, as from 1850, employers in the New England textile industry dismissed their employees at a moment's notice.[537] In spite of the foregoing, however, the employment at-will doctrine in the United States generally is attributed to a publication in 1877 of H. Wood's Treatise on the Law of Master and Servant, in which he said that

> 'With us, the rule is inflexible, that a general hiring or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year; no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.'[538]

Peck thinks it is wrong to attribute the at-will rule to Wood, not only because the cases Wood cited did not support his statement, but also because the New England's employers had accepted the at-will rule long before 1877. Moreover, David Dudley Field and Alexander Bradford had already set out a similar at-will rule in their proposed New York Civil Code, which was adopted – with some amendments: but not with regard to this rule – by the California legislature in 1872 as the California Civil Code.[539] The majority of states, nonetheless, *first* followed the at-will rule after Wood's Treatise.[540] Most famously the employment at-will rule was articulated in *Payne (1884)*, in which the Tennessee Supreme Court held that

> 'Men must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.' [541]

Under the classic version of the at-will rule an employer, therefore, can discharge an employee for any cause, no cause, or even a cause morally wrong,

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535 Peck 1991, p. 2.
536 Summers 2000, p. 2.
537 Peck 1991, p. 3; Barber 1993, p. 3.
538 Peck 1991, p. 3; Barber 1993, p. 3; Summers 2000, p. 2.
539 Peck 1991, p.3.
540 Mendelsohn 1990, p. 3; Barber 1993, p. 3; Weinstein 1993, p. 7.
541 Peck 1991, p. 2; Autor 2001, p. 3; Jacobs 2003, p. 219 and 220.

without being liable. Still, in 1891, the New York Court of Appeals applied the *pay period presumption.* Four years later, also this court, quoting Wood's Treatise, held that an employee hired for an annual salary could be discharged in mid-year without cause. Because of the prestige of the New York Court of Appeals – the highest court in the state of New York – the decision gave credibility and dominant authority to the employment at-will doctrine. By 1930, the doctrine had become embedded in American law, and remained embedded ever since,[542] all the more so, after the decision of the US Supreme Court in *Adair (1908)*. In this decision, it gave the doctrine of at-will constitutional protection.[543]

10.3 At-will rule: a contract principle

The employment agreement is subject to general principles of contract law.[544] From the beginning of the adoption of the at-will rule, however, courts have ignored the elementary principles of contract *interpretation*. As regards the latter, general contract principles determine that the at-will rule is not to be applied from the language of the contract itself when it is evident that the intent of the parties is that it should at all events continue for a certain period.

In contrast, courts have enlarged the rule of interpretation into a *substantive* rule, which overrides the parties' intent. Courts, thus, regardless of what the employer promised or lead to reasonably believe, ruled that – unless the contract specified a definite term[545] – the employee, could be discharged at any time, without cause and without prior notice.[546] On the other hand, courts consistently applied the traditional contract rules with regard to the *formation* of a contract. Subsequently, practically every state requires that

- there must be two parties;
- these parties must have the legal capacity to incur contractual duties;
- there must be a manifestation of assent by all parties to the contract; and
- there must be consideration supporting a contractually enforceable promise.[547]

In brief, there must have been acceptance of an offer, supported by consideration.[548] The latter is a return promise for which the promisor has

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542 Summers 2000, p. 3.

543 Barber 1993, p. 3; Goldman 1996, p. 33. For an in-depth discussion of *Adair (1908)*, see below under § 27.1.1.

544 See also above under § 10.3. See also Farnsworth 1987, p. 109; Burnham 1995, p. 379.

545 In general, those who work on the basis of an employment agreement for a definite period enjoy just cause protection. Jacobs 2003, p. 212 and 224.

546 Summers 2000, p. 3 and 4.

547 Brody 1978, p. 123.

bargained, and which he has received in exchange for the promise.[549] In general, the exchange of labor versus wages is considered as to constitute the required consideration in the employment agreement.[550]

Case law shows that the traditional contract principles do not always fit in the employment context. This led courts – and judges within courts – to go in diverse directions, for example, with regard to just cause provisions in handbooks.[551] Judges either strictly apply traditional contract principles, or – to establish an exception to the at-will rule – apply modern contract principles. Some advocate an amendment of contract law. For example, when the majority of the Alabama Supreme Court in *Meeks (1984)* did not hold a just cause provision in a handbook enforceable for lack of consideration, four dissenting judges held that the time was ripe to reconsider the unlimited right of employers to unilaterally dismiss an employee, hence, to adapt the law of contracts to meet the changing needs of society and the business community.[552]

10.4 Common law exceptions to the at-will rule: wrongful discharge law

10.4.1 The decline of the at-will rule

In the late 1970s, and the early 1980s, courts became responsive to the cry for just cause protection.[553] Given the harshness of the employment at-will doctrine, the decline of unions, and the lack of any comprehensive legislative responsive holding a just cause requirement, the judiciary tried to find ways to whittle away at the harsh rule.[554] Subsequently, in the early 1990s, most state courts had recognized one or more of the three exceptions to the at-will rule under the law of wrongful discharge.[555]

Already, in 1964, one of the first to call for protection against arbitrary dismissal was Blumrosen. Moreover, in 1967, Blades called for the development of a tort remedy to protect employees from abusive exercise power by employers.[556] This call for tort remedies was revolutionary, considering the fact that under old case law breach of contract could lead to contract damages only.[557] In 1976, one of the first to call for a just cause standard under federal

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548 Burnham 1995, p. 379.

549 Farnsworth 1987, p. 111; Burnham 1995, p. 382; Finkin 1995, p. 174.

550 Finkin 1995, p. 174; Jacobs 2003, p. 212.

551 For the handbook exception, see below under § 11.

552 Kohn 2003, p. 3.

553 Barber 1993, p. 4; Summers 2000, p. 4.

554 Weinstein 1993, p. 7.

555 Autor 2001, p. 3 and 4. See also above under § 10.1.

556 Peck 1991, p. 4, referring to Blumrosen, *Employer Discipline*, U.S. Report, 18 Rutgers L. Rev. 428 (1964) and Blades, *Employment at-will v. Individual Freedom, On Limiting the Abusive Exercise of Employer Power*, 67 Colum. L.Rev. 1404 (1967). See also Grodin 1990, p. 3.

557 Friedman 1981, p. 22.

law was Summers.[558] In 1980, thirteen years later, Blades' call was heard by the California Supreme Court in *Tameny (1980)*, awarding tort damages for violation of public policy. Most jurisdictions now recognize the public policy exception as a tort action. The public policy exception, however, does *not* protect an employee against arbitrary dismissal in general. Rather, it constitutes what is a *bad* cause for dismissal, as the following paragraphs will show.

10.4.2 Public policy

10.4.2.1 General

The California Court of Appeal planted the *wrongful discharge doctrine* seed in *Petermann (1959)*. In this case, it recognized the first common law exception to the at-will rule, better known as the public policy exception.[559] *Petermann (1959)* imposed a significant condition upon the employer's broad power of dismissal by nullifying the right to discharge when an employee refuses to perform an unlawful act.[560] Petermann, a business agent for a labor union, was terminated for his refusal to commit perjury as a witness in proceedings, investigating union corruption. He sued his employer, arguing that courts should declare the firing wrongful, because it violated the public policy as contained in the state penal statutes making perjury a criminal act. His employer's defense was that the employment was at will. The California Court of Appeal agreed with Petermann. It recognized his cause of action, holding that the right to discharge an employee under a contract at will may be limited by statute or 'by considerations of public policy'. The Court held that the discharge, due to the fact that Petermann refused to commit perjury, was contrary to public policy.[561]

Courts in other states did not immediately adopt the public policy exception after *Petermann (1959)*. States slowly started to adopt this exception after the 1967 publication of the 1967 law review Article by Blades, in which he called upon courts to use their ability to create the tort of abusive discharge. In brief, Blades argued that the new tort needed to be recognized, because industrialization destroyed the classical ideal of complete freedom of contract, hence, had made an anachronism of the absolute right of discharge. The law needed to counter that power imbalance by protecting employees from being discharged when the employer's motive was wrongful.[562] The *majority* of states, first followed when the California Supreme Court affirmed the Petermann holding in *Tameny (1980)*, however.

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558 Summers 1976.

559 *Cleary (1980),* 111 Cal.App. 3d 443, 454.

560 *Tameny (1980),* 27 Cal. 3d 167, 173.

561 Ballam 2000, p. 3.

562 Ballam 2000, p. 3, referring to Blades. For Blades, see above under § 10.4.1.

In *Tameny (1980)*, an employee of 15 years' standing was urged to participate in an illegal scheme to fix retail gas prices in violation of federal law. When the employee refused, the employer terminated the plaintiff-employee for his refusal.[563] The Tameny court stated that the case closely paralleled *Petermann (1959)*. Similarly, the employer had instructed the employee to engage in conduct, which constituted a criminal offense, after which the employee had refused to violate the law and suffered discharge as a consequence of that refusal.[564] Additionally, the Tameny Court awarded *tort* damages for violation of a public policy. The Court rejected the employer's argument that an action for wrongful discharge could sound in contract only. It held that an obligation of an employer to refrain from discharging an employee who refuses to commit a criminal act does not depend on any express or implied promises set forth in the employment contract, but reflects a duty imposed by law on all employers to implement the fundamental public policies embodied in the penal statutes.[565] It held that if the cause of action arose from a breach of a promise set forth in the contract, the action was *ex contractu*, but if it arose from a breach of duty growing out of the contract it was *ex delicto*. The Tameny Court concluded that the public policy action was *ex delicto*.[566] Consequently, it allowed tort damages.[567]

In *Foley (1988)*, the California Supreme Court affirmed that tort damages were the appropriate remedy, in that contract actions are created to enforce the intentions of the parties to the agreement, and tort law is primarily designed to vindicate 'social policy'.[568]

In accepting the public policy exception, state courts generally apply the traditional contract principle of proof based on which the plaintiff must prove all elements of the cause of action. Only *some* jurisdictions seem willing in public policy cases to place the ultimate burden on the employer. For example, in *Brockmeyer (1983)*, in which an employee alleged he had been wrongfully discharged in violation of public policy, the Wisconsin Supreme Court, without adhering to its decision, held that once the plaintiff-employee has demonstrated that the conduct that caused the discharge was inconsistent with a clear and compelling public policy, the burden of proof then shifts to the defendant-employer to prove that the dismissal was for just cause.[569]

By the early 1980s, twenty-two states had accepted the public policy exception. In contrast, courts in five states – Georgia, Alabama, Mississippi, Louisiana and New York – explicitly refused to recognize the public policy

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563 Postic 1994, p. 70.

564 *Tameny (1980),* 27 Cal. 3d 167, 174.

565 *Tameny (1980),* 27 Cal. 3d 167, 168.

566 *Tameny (1980),* 27 Cal. 3d 167, 175, 178.

567 Peck 1991, p. 4.

568 *Foley (1988),* 47 Cal.3d 654, 683 referring to Prosser, *Law of Torts* (ed. 1971), p. 613.

569 *Brockmeyer (1983)*, 335 N.W.2d 834, 841. See also *Rasch (1985)*, above under § 11.3.4.

exception. These states took the position that creating a broad, new public policy exception should not be done by the judiciary, but, instead, were best and most appropriately explored and resolved by the legislative branch of the government.[570] Furthermore, they argued that the meaning of 'contrary to public policy' was vague, and could not justify the judicial creation of a new tort. Subsequently, the Illinois Supreme Court in *Palmateer (1981)* stated that the 'Achilles heel' of the public policy exception laid in the *definition* of public policy.[571]

10.4.2.2 Definition of public policy

In *Petermann (1959)*, the California Court of Appeal did not define nor indicate which requirements were needed for a claim based on violation of a public policy. The Court solely cited two authorities for the cause of action, a California case, *Safeway Stores v. Retail Clerks International Association*, and the legal encyclopedia, *Corpus Juris Secundum* (*C.J.S.*). In brief, the Safeway Court focused on the public and the public good, while the C.J.S. definition focused on the good for the community and what contravenes good morals or established interests of society. Based on these citations, the Petermann Court concluded that the cause of action for wrongful dismissal must be recognized, because to do otherwise would be obnoxious to the interests of the state and contrary to public policy and sound morality. Although the Petermann Court noted that the public policy prohibiting perjury was contained in a state statute, the decision did not appear to require such a link.[572]

In *Tameny (1980)*, the California Supreme Court reiterated Petermann's principles, without defining public policy either. A footnote (8) in the decision of the Tameny Court, however, led several lower courts in California to believe that public policy, as a basis for a wrongful discharge action, needed to be rooted in a statute or constitutional provision. Several California Courts of Appeal began limiting the holding of *Tameny (1980)* to policies that derived from a statute. Other courts, on the other hand, concluded that public policy, as a basis for a wrongful discharge action, need not be rooted in a statute or constitutional provision. In *Foley (1988)*, the question whether or not a public policy need to be rooted in a statute or constitutional provision remained unsolved.[573] Instead, the Foley Court pointed out another requirement to state a cause of action under the public policy theory. In *Foley (1988)*, an employee had informed his employer that his supervisor was under investigation by the Federal Bureau of Investigation for embezzlement. After the employment agreement had been terminated, Foley brought an action against the employer for wrongful discharge, alleging a tort cause of action based on discharge in

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570 Ballam 2000, p. 4 and 5.

571 Weinstein 1993, p. 9.

572 Ballam 2000, p. 3. See also *Tameny (1980),* 27 Cal.3d 167, 174.

573 *Foley (1988),* 47 Cal.3d 654, 669.

violation of public policy.[574] The Foley Court held there was no statutory duty requiring an employee to report information relevant to his employer's interest. The Foley Court referred to past decisions – including those of other states – recognizing a tort action for discharge in violation of public policy, by protecting the employee

- who refuses to commit a crime *(Tameny, 1980)(Petermann, 1959)*;
- who reports criminal activity to appropriate authorities *(Garibaldi, 1984)(Palmateer, 1981)*; or
- who discloses other illegal, unethical, or unsafe practices *(Hantzel, 1982)*.[575]

Furthermore, the Foley court held that when the duty of an employee to disclose information to this employer serves the private interest of the employer only, the rationale underlying the Tameny cause of action is not implicated.[576] The Foley Court, in other words, required a policy of *public* and not merely *private* concern, i.e. a clear mandate of public concern to state a cause of action based on violation of public policy.[577]

Subsequently, in *Gantt (1992)*, the California Supreme Court required that the policy must be 'fundamental and substantial' and 'embodied in a statute or constitutional provision'.[578] In this case, an employee was terminated for the fact that he had supported a co-worker's sexual harassment claim. The Court examined whether an employee who was terminated in retaliation for supporting a co-worker's claim of sexual harassment had a cause of action for tortuous discharge in violation of public policy. In its decision, the Gantt Court first observed the four categories a public policy case could fall into. These contained the employee's refusal

- to violate a statute;
- to perform a statutory obligation;
- to exercise a constitutional or statutory right or privilege; or
- to report a statutory violation for the public's benefit.[579]

After observing that all four categories involved statutory provision, the Gantt Court limited Tameny's application to cases in which a plaintiff's public source

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[574] *Foley (1988),* 47 Cal.3d 654.
[575] *Foley (1988),* 47 Cal.3d 654, 670.
[576] *Foley (1988),* 47 Cal.3d 654, 670, 671.
[577] Feliu 1996, p. 185.
[578] *Gantt (1992)*, 1 Cal. 4th, 1083, 1090.
[579] *Gantt (1992),* 1 Cal. 4th, 1083, 1090, 1091.

is tethered to either a specific constitutional or statutory provisions.[580] In *Gantt (1992)*, the statutory basis for the policy was found in provisions of the California Fair Employment and Housing Act (FEHA), and in particular the Section prohibiting obstruction of the agency's investigation of a charge.

The rationale behind the new requirement was that in the opinion of the California Supreme Court employers should at least know of the fundamental public policies, found in constitutional and statutory law. In this respect, *Gantt (1992)* has been seen as narrowing the scope of the public policy exception.[581] In *Green (1998)*, the California Supreme Court, at first sight, expanded the public policy exception to administrative regulations, however, these, too, must derive from statutes.[582]

The foregoing California landmark cases show that public policy cases are generally limited to claims finding support in an important fundamental and substantial public policy, based on a statutory or constitutional provision, providing a clear mandate, and serving a public concern. In general, other states apply the public policy exception in a similar way. For example, the state of Connecticut will not support a claim that the termination violates public policy in the absence of a specific statutory right or duty on which the termination has more than an incidental impact.[583] The state of Hawaii requires that the termination violates a clear mandate of public policy.[584] The state of Illinois requires that the employer's termination of the employee must be for activities engaged in by the employee. Moreover, the termination must contravene a clear mandated public policy, that strikes the heart of a citizen's social rights, duties, and responsibilities contained in a constitutional provision, statute, or judicial decision.[585] The state of Michigan requires that for a termination to be actionable as a violation of public policy, the employee must prove that his or her termination was in violation of explicit legislative statements prohibiting the discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty.[586]

Overall, courts have used the public policy exception in situations as to protect employees who were discharged for serving on a jury *(Nees 1975)*, for filing claims for workplace injuries *(Frampton 1973)*, for refusing to join in the employer's illegal practices *(Peterson 1992)*, for objecting to their superiors about legal violations *(Sheets 1980)*, for reporting such violations to public authorities *(Boyle 1985)*, for refusing to lobby the legislature for legislation sought by their employer *(Novosel 1983)*, for refusing to submit to sexual

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580 *Gantt (1992),* 1 Cal. 4th, 1083, 1095.
581 The 2000 California Employer, p. 9
582 Vanse 2000, under II.
583 Postic 1994, p. 124.
584 Postic 1994, p. 185.
585 Postic 1994, p. 211 and 212.
586 Postic 1994, p. 350 and 351.

advances of supervisors *(Lucas 1984)*, and for refusing to participate in games involving indecent exposure *(Wagenseller 1985)*.[587] By 2001, the judicial public policy exception was recognized by 41 of the 49 states (Montana excluded).[588] Still, some conservative states reject the public policy exception.[589] In fact, initially, the Reporters of the Third Draft on a Restatement of Employment Law wished to narrow the scope of the public policy exception. Section 4.02 determined that a discharge violated public policy if the employer discharged an employee for

> '(a) refusing to commit an illegal act;
> (b) fulfilling an obligation imposed by law;
> (c) claiming a benefit arising from employment; or
> (d) reporting or planning to report conduct that the employee reasonably and in good faith believes to be illegal.'[590]

One must admit that an advantage of exhaustive grounds is that it is clear what the law is. On the other hand, an enumeration may also freeze the development of law as regards unanticipated situations. Apparently, in light of the latter, the Reporters in the Fourth Draft on a Restatement of Employment Law included a new phrase in Section 4.02, determining that a discharge, in general, violates public policy if the employer discharges an employee for (e) *another reason* that directly and substantially harms the public interest beyond that of the employee or employer.[591]

10.4.2.3 Whistleblowing

Whistleblower claims make up a large number of challenges to the at-will doctrine on public policy grounds, which is why special attention will be paid to this category.[592] The term *whistleblowing* is derived from the act of an English bobby, blowing the whistle upon becoming aware of the commission of a crime to alert other law enforcement officers and the public within the zone of danger.[593] Like this enforcement official, the employee-whistleblower sounds the alarm when wrongdoing occurs within the firm.[594] In brief, private-sector employees in the United States enjoy whistleblowing protection against their employers, under state whistleblower legislation – modeled after the federal act, the Whistleblower Protection Act (WPA) of 1989 which applies to public

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587 Summers 2000, p. 4.
588 Autor 2001, p. 7.
589 Alabama, Delaware, Maine and New York. See Author 2001, Appendix 6.
590 ALI Employment Law Draft No. 3, Chapter 4, § 4.02, p. 15-31.
591 ALI Employment Law Draft No. 4, Chapter 4, § 4.02, p. 11 and 12.
592 Feliu 1996, p. 206.
593 Feliu 1996, p. 205; Goldman 1996, p. 73; Cavico 2004, p. 3.
594 Feliu 1996, p. 205; Goldman 1996, p. 73; Outten and Filippatos 1999, p. 1; Cavico 2004, p. 1.

employees[595] – and/or the public policy exception under common law.[596] Both need to be discussed, because to understand whisteblower protection under common law, one must understand whistleblower protection under legislation. Before discussing both, the following remarks must be made.

First, as regards legislation, Congress has not promulgated federal whistleblowing legislation, which protects private-sector and public employees in the same manner as, for example, federal anti-discrimination law.[597] An exeption are anti-retaliation provisions in federal and state statutes, which protect private-sector employee in respect of whistleblowing.[598] Furthermore, distinct from whistleblower protection against the employer is the False Claims Act (FCA), and states' versions thereof. The FCA was enacted by Congress and signed into law by President Lincoln in 1863 to combat fraud against the government by Civil War contractors, who mixed sawdust with the gunpowder provided to the armed forces. After an amendment in 1986, the Act provides a significant financial incentive for private citizens for reporting contractor fraud against the government, to discourage fraud against the government and to encourage those with knowledge of fraud to come forward.[599] It further is important to distinguish between private-sector and public employees.[600] Federal public employees are covered by a federal act, the Whistleblower Protection Act (WPA) of 1989, being an amendment to the Civil Service Reform Act (CRSA) of 1978. The WPA protects federal government employees who appropriately alert the public with respect to what they reasonably believe to be violations of law, gross mismanagement, gross waste of funds or abuse of authority that pose substantial and specific danger to the public.[601] In fact, the latter brings me to a significant difference between private-sector and public employees, in that the disclosing of waste, fraud, and mismanagement in the private sector generally will not entitle the employee to legal protection. The reason is that these wrongdoings in the private sector generally do not affect the public, causing tax

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595 Westman 1991, p. 51-53; Feliu 1996, p. 209 and 210 referring among others to California, New York and Michigan; Termination of employment digest, ILO 2000, p. 355.

596 Feliu 1996, p. 205 and 210; Outten and Filippatos 1999, p. 20.

597 Kohn 2001, p. 1; Cavico 2004, p. 2. The new federal whistleblowing law, part of the Sarbanes-Oxley Act of 2002, commonly known as the 'Public Company Accounting Reform and Investor Protection Act', cannot be considered as general whistleblowing legislation. This Act applies to employees of publicly traded companies only providing evidence of only a certain type of fraud that amounts to a violation of federal securities law i.e. congressional securities law, or any rule or regulation of the Securities and Exchange Commission or any provision of federal law relating to fraud against shareholders. Cavico 2004, p. 2-5; Van Uden 2004, p. 17; Putker-Blees 2006.

598 Outten and Filippatos 1999, p. 3-8 referring to anti-retaliation provisions that prohibit employers to retaliate against employees who disclose employer conduct in federal anti-discrimination statutes; p. 10 footnote 38 referring to federal statutes that address public health and safety. See also Goldman 1996, p. 73 and Kohn 2001, p. 79-98.

599 Feliu 1996, p. 212; Goldman 1996, p. 74; Outten and Filippatos 1999, p. 12-13; Kohn 2001, p. 203-216; Cavico 2004, p. 3.

600 Feliu 1996, p. 207.

601 Westman 1991, p. 49; Feliu 1996, p. 209; Goldman 1996, p. 74; Outten and Filippatos 1999, p. 8 and 9; Kohn 2001, p. 100-103.

monies are wasted. Furthermore, federal, state, and local government employee-whistleblowers may invoke the First Amendment of the US Constitution, which protects the freedom of speech, involving issues of public concern.[602] Hence, private-sector employees do not enjoy the broad protection public employees enjoy.[603] In fact, private-sector employees will think twice before disclosing any wrongdoing of the employer,[604] all the more so since the majority of private-sector employees in the United States are hired at will.[605] Nevertheless, these employees may find protection under state whistleblower laws or common law.

In discussing *state whistleblower laws*, it is not my intention to discuss the whistleblower law of each state, rather to point out the similarities and the differences. This to give a general idea on whistleblower protection for private-sector employees under state statutory law. Also, an in-depth discussion of the whistleblower law of each state is not necessary for the purpose of this thesis. From a discussion of the public policy exception in the previous paragraph, it derives that the public policy exception does not constitute good cause. Rather it constitutes what is a *bad* cause for a dismissal. It, however, too, is important to examine which claims fall *outside* the scope of just cause protection, to determine the scope of just cause protection.

An overview of state statutes show that whistleblower protection vary in various aspects. *First*, some are specific and narrow as to the subject matter for whistleblowing; others are phrased as more generally protective whistleblower statutes.[606] For example, in Louisiana, the whistleblower statute pertains only to whistleblowing on issues concerning public health and safety.[607] Tennessee, in fact, has one of the most, if not the most, limited statutory protection; it extends coverage only to those employees who report the misuse of public education funds. In California, on the other hand, violations of law, gross waste of public funds, abuse of authority, or acts that pose a substantial risk to public health or safety are protected activities.[608] *Second*, some statutes typically center on the private sector employer's violation of federal or state constitutional and/or statutory law; others extend the scope of coverage to federal and state agencies rules and regulations and even to county codes and municipal ordinances.[609] *Third*, statutes may vary, in that some require that the employee-whistleblower acts in good faith, i.e. possesses a reasonable belief as to the wrongdoing of the employer.[610] Others require that an actual violation

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602 Outten and Filippatos 1999, p. 11; Kohn 2001, p. 119.

603 Feliu 1996, p. 209.

604 Cavico 2004, p. 1.

605 Feliu 1996, p. 212; Outten and Filippatos 1999, p. 2; Cavico 2004, p. 3 and 4.

606 Outten and Filippatos 1999, p. 1 and 2 and 20; Cavico 2004, p. 4.

607 Outten and Filippatos 1999, p. 20.

608 Feliu 1996, p. 210.

609 Cavico 2004, p. 5.

610 Cavico 2004, p. 8; Kohn 2001, p. 43 referring, for example, to the New Hampshire Whistleblowers' Protection Act of 1987.

occurs.[611] *Fourth*, some statutes require a whistleblower to give prior notice to the employer about its wrongdoing to afford the employer to correct the wrongdoing; others require the employee-whistleblower to report the wrongdoing directly to a governmental agency. Florida, for example, only protects those employees who blow the whistle publicly.[612] *Fifth*, statutory damages may vary from state to state. In general, compensatory damages, including reinstatement, back pay and a restoration of benefits,[613] are provided for.[614] Texas, on the other hand, is one of the few states to provide for both compensatory *and* punitive damages.[615] *Finally*, state whistleblower statutes may preempt public policy based whistleblowing claims under common law; other jurisdictions may allow two distinct causes of actions.[616]

From the foregoing derives that state whistleblower statutes, in general, do *not* provide for punitive damages. Consequently, because most states consider the *public policy exception* as a tort action,[617] most employees will choose the common law public policy exception over a whistleblower statute, unless the state statute *preempts* common law actions.[618] Under *common law*, for whistleblowers in the private sector to obtain protection under the *public policy exception*, most states require that the employer has contravened a clearly articulated, mandated, substantial or well-established public policy of the jurisdiction. The problem – as we have seen in the previous paragraph – is that there is no precise definition of what constitutes a clearly articulated, mandated, substantial or well-established public policy. In general, courts in this respect ordinarily look for clear direction from a legislature in constitutions, statutes, administrative rules and regulations.[619] Hence, some states require a constitutional or statutory basis for the public policy.[620] For example, California courts require that a whistleblower's allegations of misconduct be explicitly tethered to a specific constitutional or statutory authority, and that the concerns be public in nature, affecting society at large.[621] In addition, most states require that public policy involves the public interest. So long as employee's actions are not merely private, but, instead, seek to further the public good, the decision to

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611 Cavico 2004, p. 9; Kohn 2001, p. 45 and 46 referring, for example, to the New York Whistleblower Statute of 1984.

612 Outten and Filippatos 1999, p. 20, 22 and 23; Cavico 2004, p. 9 and 10.

613 Kohn 2001, p. 329.

614 Feliu 1996, p. 210; Kohn 2001 p. 31 referring, for example, to the Florida Whistleblower's Act of 1991.

615 Feliu 1996, p. 210.

616 Cavico 2004, p. 7, 12 and 13.

617 In Arkansas and Idaho, the public policy exception sounds in contract (damages). Cavico 2004, p. 19 footnote 317.

618 Kohn 2001, p. 21. For an overview of all states, see Kohn 2001, p. 25 and 56.

619 Kohn 2001, p. 21; Cavico 2004, p. 14-16.

620 Outten and Filippatos 1999, p. 28.

621 Kohn 2001, p. 28.

expose wrongdoings of the employer is generally protected.[622] Private, internal, management or business problems or disputes ordinarily cannot form the basis for a whistleblowing action under wrongful discharge law, however, complaints regarding workplace safety, conduct that harms the health and welfare of the public can.[623] In general, employees who blow the whistle on wrongdoing, implicating public health or safety stand the best chance.[624]

A heavily disputed issue in whistleblower cases is whether *good faith* must be protected. In general, a reasonable belief in the truth of the claim has generally been found to be sufficient, whether or not the claim ultimately turns out to have merit. However, a number of jurisdictions still require there be an actual violation of the law and not merely an employee's reasonable or good faith belief that a violation has occurred.[625] Moreover, a heavily disputed issue in whistleblower cases is whether *internal* reporting of the alleged illegal or unsafe activities of employers is an act in the public interest. In general, the whistleblowing employee must complain to *outside* government officials – not to the media – in order to take advantage of the public policy exception. The background is that whistleblowers whose claims are made directly to public agencies are more to be found to be acting in the public interest. However, other jurisdictions require *internal* reporting of the alleged illegal or unsafe activities of employers. These courts look more favorably on employees who first seek to resolve disputes internally as most effectively and expeditiously, prior to going public with it, unless to do so would be demonstrated fruitless. In fact, under this conception, whistleblowers who go directly to a public agency without first attempting to address their claims internally run the risk of claims of disloyalty.[626]

10.4.3 Implied covenant of good faith and fair dealing

10.4.3.1 General

The second judicial exception to the at-will rule has been the implied covenant of good faith and fair dealing. Under Section 205 of the (Second) Restatement of Contracts, every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.[627] Under the implied covenant of good faith and fair dealing, parties have a duty to avoid impairing the other side's opportunity to receive the fruits of the agreement in accordance with the principles of good faith and fair dealing.[628]

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622 Feliu 1996, p. 206; Cavico 2004, p. 17.
623 Cavico 2004, p. 16 and 17.
624 Outten and Filippatos 1999, p. 26 and 32.
625 Feliu 1996, p. 206; Outten and Filippatos 1999, p. 1 and 28; Cavico 2004, p. 17.
626 Feliu 1996, p. 206-207; Outten and Filippatos 1999, p. 31; Cavico 2004, p. 17.
627 Peck 1991, p. 10.
628 Goldman 1996, p. 68.

This covenant was first recognized in the *employment context* in *Fortune (1977)* by the Massachusetts Supreme Court.[629] In this case, a salesman was discharged by the employer to avoid paying the full commission earned on a five million dollar sale. The Fortune Court held that the at-will rule did not permit the employer to first obtain the fruits of the employee's services rendered in reliance upon the promise of a commission, and then discharge the employee to deprive him of a part of that commission. This act by the employer was dishonest, therefore, a breach of the implied covenant of good faith and fair dealing.[630] In *Metcalf (1989)*, the Idaho Supreme Court was the second among the highest state courts to apply the implied covenant of good faith and fair dealing to an employment contract terminable at will. With reference to *Fortune (1977)*, the Metcalf Court held that

> 'The implied-in-law covenant of good faith and fair dealing protects the right of the parties to an agreement to receive the benefits of the agreement that they have entered into. The denial of a party's right to those benefits, whatever they are, will breach the duty of good faith implicit in the contract. […] We (…) recognize an implied covenant of good faith and fair dealing in the employment-at-will contract, although that covenant does not create a duty for the employer to terminate the employee only for good cause. The covenant does not protect the employee from a 'no cause' termination because tenure was never a benefit inherent in the at-will agreement. The covenant does protect an employee for a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee, such as the sales commissions in Fortune (…).'[631]

The first features of the implied covenant of good faith and fair dealing in an at-will employment contract, thus, can be discerned from the landmark cases *Fortune (1977)* and *Metcalf (1989)*.[632] According to Holloway and Leech, and Sprang, however, the root meaning of the duty of good faith and fair dealing already was evident in *Monge (1974)*. In this case, an employee was discharged for refusing to date her foreman. The New Hampshire Supreme Court held that the termination by the employer of a contract of employment at will was motivated by bad faith, malice, and/or based on retaliation. It condemned this exploitative use of the employment relationship – because the employer discharged a woman for an immoral reason having no connection with employment – as a breach of the implied duty of good faith and fair dealing.[633]

However, in *Cleary (1980)*, the California Court of Appeal took one of the broadest approaches among state courts towards the implied covenant of good faith and fair dealing. An employee was dismissed without cause after eighteen

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629 Peck 1991, p. 10.

630 Weinstein 1993, p. 9; Holloway and Leech 1993, p. 102 and 103.

631 Holloway and Leech 1993, p. 96.

632 Holloway and Leech 1993, p. 98.

633 Holloway and Leech 1993, p. 102.

years of employment. The Cleary Court held that termination of employment without legal cause after such a period of time offends the implied-in-law covenant of good faith and fair dealing contained in all contracts, including employment contracts. Subsequently, it held that the longevity of the employee's service, together with the expressed policy of the employer, operates as a form of estoppel, which precludes any discharge of such an employee by the employer without good cause.[634] The California Court of Appeal herewith impressed a job security standard on the employment contract as a matter of law,[635] in effect, altering the employment relationship from one of at will to one of just cause.[636]

In *Foley (1988)*, the California Supreme Court explicitly refused to read job security into the implied covenant of good faith and fair dealing exception, overruling *Cleary (1980).*[637] In *Metcalf (1989)*, the Idaho Supreme Court followed Foley's holding, stressing that by no means the covenant could create a duty for the employer to terminate the employee only for good cause.[638] In *Guz (2000)*, in footnote 18, the California Supreme Court, in fact, seemed to suggest that the covenant of good faith and fair dealing, implied by law in every contract, exists *merely* to prevent one contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement actually made. For example, if termination of an at-will employee is a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned.[639]

At first sight, the Reporters of the Third Draft on the Restatement of Employment Law hold likewise

> '(a) Every employment contract imposes on each party an implied duty of good faith and fair dealing, whereby each agrees not to hinder the other's performance under the agreement; (b) In at-will employment contracts, the implied duty of good faith and fair dealing must be read consistent with the at-will nature of the relationship; (c) Even in at-will employment contracts, an employer breaches its implied duty of good faith and fair dealing when the employer terminates, or seeks to terminate, the employment relationship in order to (1) prevent the vesting of an employee right or benefit, or (2) retaliate against the employee for faithfully performing the employee's obligation under the contract.' [640]

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634 Under the promissory estoppel theory, the employer must make promises upon which the employee relied to his detriment. See Holloway and Leech 1993, p. 98; Sprang 1994, p. 5.

635 Holloway and Leech 1993, p. 98.

636 Peck 1991, p. 10; Fabiano 1993, p. 3; Weinstein 1993, p. 9; Goldman 1996, p. 71.

637 *Guz (2000),* D.A.R. 10929, 10938. See also *Foley (1988),* 47 Cal.3d 654, 698, footnote 39.

638 Holloway and Leech 1993, p. 96.

639 *Guz (2000),* D.A.R. 10929, 10938. *Foley (1988),* 47 Cal.3d 654, 698, fn. 39. See also Holloway and Leech 1993, p. 99 and 100.

640 ALI Employment Law Draft No. 3, Chapter 3, § 3.06, p. 28. In the Fourth Draft, the Reporters made minor changes. See ALI Employment Law Draft No. 4, Chapter 3, § 3.06, p. 31 and 32.

Consequently, the Reporters state that the implied covenant of good faith and fair dealing can only serve as a supplementary aid to implement the intentions of the parties, but cannot override or undermine an express term or the essence of the agreement, hence, does not prevent either party to terminate the employment relationship without cause.[641]

The implied covenant of good faith and fair dealing exception in the employment context is rejected by the majority of jurisdictions.[642] In fact, in 1989, only twelve states recognized the implied covenant of good faith and fair dealing in employment at will.[643] In 1994, even fewer states had adopted the covenant, i.e. California, Idaho and Utah only. It is very restrictively applied by Alabama, Alaska, Arizona, Delaware and Massachusetts.[644] The argument of the majority most heard is that it makes no sense to imply an obligation of good faith in the employment context when an employer has an unfettered right to terminate the employment at will.[645]

10.4.3.2 Tort or contract?

In general, the public policy exception is considered as a *tort* action. The implied covenant of good faith and fair dealing, in general, is *not*. In the past, however, a heavily disputed issue has been whether the implied covenant of good faith and fair dealing in the employment context needed to be considered as a contractually-based exception for which contract damages are appropriate, or as an implied-in-law obligation in every contract for which tort damages – including punitive damages – are appropriate.[646] Those who claim that the implied covenant is a contractually-based exception, for which contract damages are appropriate, refer to Section 355 of the (Second) Restatement of Contracts. The latter provides that punitive damages are not recoverable for a breach of contract, unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.[647]

In 1983, the Montana Supreme Court, as the first among the highest state courts considered the implied covenant of good faith and fair dealing as a *tort* action.[648] Previously, in *Cleary (1980)*, the California Court of Appeal had already permitted tort recovery for a breach of the covenant of good faith and fair dealing, inspired by *Tameny (1980)*.[649] In *Tameny (1980)*, the California

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641 ALI Employment Law Draft No. 3, Chapter 3, § 3.06, p. 28.

642 Postic 1994, p. xix-xx; see also Perry 1992, p. 3; Goldman 1996, p. 69; Autor 2001, p. 7.

643 Peck 1991, p. 10, referring to the State Rulings Chart, 9A Lab. Rel. Rep. (BNA) 505:51-52 (Aug. 1989).

644 Postic 1994, p. xxiv-xxxv.

645 McGowan 1998, p. 8-9.

646 Summers 2000, p. 5.

647 Dodge 1999, p. 2.

648 *Gates (1983)*. See also above under § 9.2.

649 Jung and Harkness 1989, p. 2 and 6; Walker 1993, p. 3; McGowan 1998, p. 5.

Supreme Court, in footnote 12, implicitly held that a violation of the public policy in the employment context could result in a tort action,[650] holding that

> ' (…) we believe it is unnecessary to determine whether a tort recovery would additionally be available under (…) a breach of the implied-in-law covenant of good faith and fair dealing inherent in every contract. We do note in this regard, however, that (…) California [insurance: VA] cases have held that a breach of this implied-at law covenant sounds in tort as well as in contract (…).'

In *Foley (1988)*, the California Supreme Court, however, held that tort remedies were not the appropriate remedy for a breach of the implied covenant of good faith and fair dealing in the employment context.[651]

10.4.4 Breach of contract to discharge for good cause only

The last exception to the at-will rule that I wish to discuss is the breach of contract to discharge for good cause only.[652] This exception includes both the handbook exception and the implied-in-fact (good cause) contract exception. The handbook exception is accepted by a majority of states.[653] In contrast, the implied-in-fact (good cause) contract exception is good law in California, and is followed by a few states 'only'.[654] For reason that these exceptions to the at-will rule will be discussed in-depth in the paragraphs 11 and 12, respectively, I will only briefly discuss them in this Section.

10.4.4.1 Handbook exception

In general, the employer's personnel policy is embodied in a handbook. However, this policy, too, may be embodied in a formal personnel or supervisor's manual, or a personnel department memorandum. It may simply be a well-known company policy. Whatever the form is, the employer's policy holding a just cause provision is generally referred to as the handbook exception. In a wrongful discharge case, the first question that needs answering, is whether the policy is enforceable as a contract.[655] Initially, courts flatly rejected the notion that a contractual obligation could arise out of an employee handbook. The Kansas Supreme Court in *Johnson v. National Beef Packing (1976)* reflects the view of the majority of courts at the time. In this respect, the Johnson Court held

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650 Horvitz 1993, p. 2; Walker 1993, p. 2; Vanse 2000, p. 2.

651 Grodin 1992, p. 2 and 3; Rancourt 1996, p. 10; McGowan 1998, p. 5. For an in-depth discussion of *Foley (1988)*, see below under § 27.1.2.

652 Leonard 1988, p. 3.

653 Fabiano 1993, p. 7 and 8; Summers 2000, p. 4; Autor 2001, p. 4. For the handbook exception, see further below under § 11.

654 For the implied-in-fact (good cause) contract, see below under § 12.

655 Holloway and Leech 1993, p. 33.

> 'It was only a unilateral expression of company policy and procedures. Its terms were not bargained for by the parties and any benefits conferred by it were mere gratuities. Certainly, no meeting of the minds was evidenced by the defendant's unilateral act of publishing company policy.'

In fact, if an employee wanted to bind an employer to a handbook provision, promising to terminate for good cause only, the employee needed to provide the employer with a benefit *outside* the regular duties associated with the job, to meet the general contract principle requirement of consideration.[656]

In *Toussaint (1980)*, the Michigan Supreme Court, as the first among the highest state courts held that a handbook could bestow enforceable rights on an employee.[657] The employee successfully had sued for breach of contract to discharge for good cause only, by citing an internal personnel policy handbook, indicating that it was the employer's policy to terminate employees for just cause. Although the employee, Toussaint, was unaware of the handbook when hired, the Toussaint Court held that the handbook implied a binding contract.[658] It did not require express negotiations between the employer and its employees. Rather

> '[I]t is enough that the employer chooses, presumably in his own interest, to create an environment in which the employee believes, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee.'[659]

In *Pine River (1983)*, the Minnesota Supreme Court, too, accepted the handbook exception, however, applied general contract principles, requiring consideration and mutual assent. In brief, it held that the formation of a unilateral employment contract requires that the handbook promises be specific enough to constitute an offer, and that such promises are communicated to the employee by dissemination of the handbook. The Pine River Court held that the choice to continue work after the unilateral offer supplied the consideration, required to support the employer's promises in the handbook.[660]

10.4.4.2 Implied-in-fact (good cause) contract exception

The California Court of Appeal, in *Pugh (1981)*, added the last cause of action for the discharged employee to the existing ones.[661] In this case, the California

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656 Kohn 2003, p. 3. See also below under § 11.1.1

657 Weinstein 1993, p. 8; Estlund 2002, p. 6.

658 Kohn 2003, p. 4.

659 Termination of Employment 2000, p. 24,516.

660 Kohn 2003, p. 5.

661 Peck 1983, p. 13; Hitchcock 1983, p. 2; Jung and Harkness 1989, p. 1; Walker 1993, p. 2; Postic 1994, p. xix; Parker 1995, p. 3.

Court of Appeal was the first among state courts to apply a modern contract approach to protect an employee in an at-will setting, based on an implied-in-fact (good cause) contract analysis.[662] Through the application of modern contract law principles it disposed the problem of independent consideration under traditional contract principles.[663] In *Foley (1988),* the California Supreme Court held that the Pugh Court had correctly applied basic contract principles in the employment context.[664] As regards the latter, the Pugh Court had held that

> '(…) there is no analytical reason why an employee's promise to render services, or his actual rendition of services over time, may not support an employer's promise both to pay a particular wage and to refrain from arbitrary dismissal.'[665]

Consequently, the good cause contract implicitly may derive from the circumstances of the case. The genius of Justice Grodin's opinion in *Pugh (1981)*, according to Cameron, was that Grodin charted new territory simply by drawing the map as though it were covering familiar landscape, and that it did not attempt to overturn California Labor Code Section 2922,[666] but, instead, took up the less controversial task of applying the existing statute to the facts of Pugh's employment contract.[667]

10.5 Conclusion

Until about 1870, the United States followed the just cause rule under English common law. As from then, the at-will doctrine was widely accepted by courts in the United States, after *A Treatise on the Law of Master and Servant* in 1877 by H.G. Wood. As today, the *at-will rule* is the basic premise in the United States undergirding the employment relationship. In its classic form, an employer can discharge an employee for any cause, no cause, or even a cause morally wrong, without being liable. However, the development of judicial exceptions to the at-will rule in the late 1970s, and the early 1980s, presented the prospect that the at-will doctrine would be 'swept away'. In brief, state courts created three exceptions to the at-will rule (1) the public policy exception; (2) the breach of the implied covenant of good faith and fair dealing; and (3) the breach of the contract to discharge for good cause only, which includes the handbook exception and the implied-in-fact (good cause) contract exception.

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662 Tully 1983, p. 5 and 6.

663 Grodin refers to 1 Corbin on Contracts (1963) par. 125, pp. 535-36 and the *Second Restatement of Contracts* 81 (1965). See also Cameron 2001, p. 6.

664 *Foley (1988),* 47 Cal.3d 654, 676, 677.

665 Cameron 2001, p. 6.

666 This Section codifies the presumption that an agreement for an indefinite term of employment is presumed to be at will, and, therefore, terminable at the will of either party. See also Cameron 2001, p.4

667 Cameron 2001, p. 5.

More specifcally, the public policy exception was recognized by the California Court of Appeal in *Petermann (1959)*. Meanwhile, it is recognized by virtually all states as a tort action. Under this exception, an employee can ask for compensatory and punitive damages if an employer has violated a public policy by discharging the employee. The public policy exception does not constitute a just cause for dismissal, however. Rather, it constitutes what is a *bad* cause for dismissal. The California Court of Appeal, in *Cleary (1980)*, hereupon was the first among state courts to accept the implied covenant of good faith and fair dealing applied in the employment context, holding a promise of providing just cause protection. In *Foley (1988)*, the California Supreme Court, however, refused to interpret the implied covenant of good faith and fair dealing as some form of job security.[668] The majority of the few states, accepting the covenant of good faith and fair dealing, are of the same opinion. In fact, 'only' the handbook exception and the implied-in-fact (good cause) contract exceptions accepted by the Michigan Supreme Court and the California Court of Appeal in *Toussaint (1980)* and *Pugh (1981)*, respectively, seem to provide just cause protection to private-sector employees. In the following paragraphs, I will examine to what extent private-sector employees enjoy just cause protection under these exceptions, focusing on the states of Michigan and California primarily.

11 Michigan

11.1 The first state to accept the common law handbook exception

In this Section, I examine to what extent private-sector employees enjoy just cause protection under the handbook exception. In answering this question, I will take the decision of the Michigan Supreme Court in *Toussaint (1980)* as a starting point, being the first to hold that an employee handbook could give rise to contractually enforceable job security rights.[669]

For at-will employees, the handbook exception was an important one. Consequently, with the Supreme Court's decision in *Toussaint (1980)*, Michigan earned a reputation as a leader in the expansion of the common law rights of employees.[670] Employers, on the other hand, were suddenly confronted with employees who could invoke just cause protection under handbooks. In fact, in the time the handbook exception was accepted, almost every employer had a handbook providing for just cause protection – in the belief that it was unenforceable – mainly as an effort on the part of employers to avoid unionization.[671]

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668 Holloway and Leech 1993, p. 100.
669 Berks 2000, p. 13.
670 Smith 1986, p. 773.
671 Berks 2000, p. 8-10.

As today, courts in nearly every jurisdiction recognize the handbook exception.[672] The Fourth Draft on the Restatement of Employment Law, too, holds a provision, which determines that agreements providing for terms other than at-will employment may take the form of a unilateral statement by the employer, establishing employer obligations.[673]

The handbook exception was a unique feature under *contract* law, however. In fact, until the decision of *Toussaint (1980)*, it was considered that by its very nature a handbook could *not* form an enforceable contract, because it was not bargained for. The traditional contract principles of offer-acceptance-consideration did not fit, therefore, statements in handbooks were considered as *unilateral* statements by the employer only, hence, unenforceable.[674] The way courts at the time generally reasoned is best represented in *Johnson v. National Beef Packing (1976)*, in which a discharged employee argued that the policy manual determined that no employer shall be dismissed without just cause, and that this provision was binding on the employer. Consequently, the Kansas Supreme Court held that employment was at an at-will basis, and if an employee wanted to bind an employer to just cause protection under a handbook, the employee needed to show additional, i.e. independent consideration outside the job performance, according to traditional contract principles.[675]

In *Toussaint (1980)*, the Michigan Supreme Court took another avenue. It no longer required mutual assent for provisions in the handbook to become enforceable. The Alabama Supreme Court in *Hoffman-La Roche v. Campbell (1987)* summarized this new approach as 'one of estoppel, invoking the idea of reliance'.[676] In brief, under the estoppel theory, parties do not need to mutually agree on just cause protection. On the other hand, under traditional contract principles, promissory representations must be reasonably relied upon by the employee and *acted upon to his detriment* to estop the employer from reneging on those representations.[677] Contrasting with traditional contract principles, the Michigan Supreme Court in *Toussaint (1980)* did *not* require mutual assent according to contract principles *nor* did it require reliance to the detriment of the employee under the estoppel theory. Therefore, its decision was not consistent with traditional contract principles, and courts of other states had difficulty to follow *Toussaint (1980)*. The majority of states rather followed *Pine River (1983)* for being consistent with contract principles. In the latter, the Minnesota

672 Winters 1985, p. 5; Kohn 2003, p. 3.

673 ALI Employment Law Draft No. 4, Chapter 3, § 3.02, p. 6.

674 Winters 1985, p. 2; Berks 2000, p. 4; Kohn 2003, p. 3.

675 See also above under § 10.4.4.1.

676 *Hoffman-La Roche v. Campbell (1987)*, 512 So.2d 725, 730. See also Winters 1985, p. 5; Pratt 1990, p. 214.

677 Pratt 1990, p. 214 and 215, referring to *Second Restatement of Contracts* § 90 Section 1 (1979).

Supreme Court, too, accepted the handbook exception, but applied the *unilateral contract theory* according to contract principles.[678]

In the following paragraphs, I will examine to what extent private-sector employees obtain just cause protection under the handbook exceptions of *Toussaint (1980)*, and *Pine River (1983)*.

11.2 Toussaint

11.2.1 Facts and holding

Blue Cross hired Charles Toussaint as an assistant to the company treasurer. His duties consisted of analyzing and preparing certain financial reports. Having been employed for five years, he was discharged by the employer, who had difficulty with Toussaint administering a company car program. Toussaint denied alleged unsatifisfactory performance. Toussaint claimed that the discharge violated his employment agreement, which permitted discharge only for cause. He stated that when he was hired, he asked about job security and was told he would be with the company 'so long as I did my job'. This in his opinion constituted an agreement not to discharge except for good cause. Also, Blue Cross handed a manual to Toussaint, which reinforced the oral assurance of job security. The manual stated that it was the policy of the company to release employees for just cause only.

The Michigan Supreme Court held that if an employer, for whatever reason, creates an atmosphere of job security, those promises are enforceable components of the employment relationship.[679] Consequently, it held that a provision of an employment contract, providing that an employee shall not be discharged except for cause is legally enforceable, although the contract is indefinite, and that such a provision may become part of the contract either (i) by express agreement, oral or written; or (ii) as a result of employee's legitimate expectations grounded in an employer's policy statement.[680] It held that the employer had violated an employment agreement that permitted discharge only for cause. With regard to this newly established *legitimate expectation theory* in the employment context it held that

> '(…) where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of

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678 Moise 1991, p. 2; Sullivan 1995, p. 281; Kohn 2003, p. 817. For a discussion of the unilateral contract theory, see below under § 11.3.1.

679 Kohn 2003, p. 814 and 815.

680 *Toussaint (1980),* 292 N.W.2d 880, 885.

> the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employer believes that, whatever the personnel policies and practices, they are established and official at any given time, purports to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation instinct with an obligation.'[681]

As mentioned above, the majority of courts did not follow *Toussaint (1980)* for being inconsistent with contract principles.[682] In this respect, footnote 25 explicitly held that parties' minds need not meet on the subject.[683] To the extent states followed *Toussaint (1980)*, they at least required detrimental reliance under the estoppel theory, according to general contract principles. For example, the Washington Supreme Court in *Thompson (1984)* held that if an employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and an employee is *induced thereby* to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship.[684]

11.2.2 Implied agreement: personnel policies

The Toussaint Court held that the intention of the employer was *irrelevant* for the creation of enforceable rights under a handbook.[685] Herewith, the Toussaint Court accepted an *implied* handbook exception to the at-will rule. In *Miller (1923)*, the Michigan Supreme Court held that a contract is *implied* to the extent its intention is not manifested by direct or explicit words between parties, but is to be gathered by implication or proper deduction from the conduct of parties, language used or things done by them, or other pertinent circumstances attending the transaction.[686]

In *Toussaint (1980),* the *employer* argued that the at-will rule could not be overruled by an *implied* contract. The Toussaint Court held the contrary, arguing that the at-will rule is not a substantive rule as the at-will doctrine seems to suggest, but a rule of construction. This means that it is *presumed* that, because the parties began with complete freedom, they intended to oblige themselves to a relationship at will. However, parties can decide otherwise by *express* or *implied* agreement.[687] One year later, the California Court of Appeal in *Pugh (1981)* – which decision will be discussed in-depth in the next Section –

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681 *Toussaint (1980),* 292 N.W. 2d 880, 892.

682 See above under § 11.1

683 *Toussaint (1980),* 292 N.W. 2d 880, 892 footnote 25.

684 *Thompson (1984),* 685 P.2d 1081, 1088. See also Moise 1991, p. 4, referring to the Ohio Supreme Court in *Mers (1985)*.

685 Pratt 1990, p. 213.

686 See *Rowe (1991),* 473 N.W.2d 268, 273.

687 *Toussaint (1980),* 292 N.W.2d 880, 885. See also *Rowe (1991),* 473 N.W. 2d 268, 271.

followed this rationale of *Toussaint (1980)*. Subsequently, it held that an employment contract intended to be terminable at will is subject, like any presumption, to contrary evidence, which may take the form of an agreement, express or implied, that the relationship will continue indefinitely, pending the occurrence of some cause for termination.[688]

11.2.3 Toussaint overruled?

The majority of states followed *Pine River (1983*) for being consistent with contract principles.[689] In this case, Mettile was hired as a loan officer with the Pine River State Bank in 1978. Late in 1978, he received a handbook that provided sections on job security. In 1979, he was discharged. The bank claimed that Mettile was discharged, due to loan errors, excessive sick leave and a reduction in force. Mettile alleged that he was dismissed because of a personality dispute with his superiors and that he had never received any complaints.[690] The Minnesota Supreme Court ruled in favor of the employee. It held that the restraints on termination of employees in an employee handbook were contractually binding on the employer, and that Mettile had been wrongfully terminated contrary to those provisions.[691] In accepting the handbook exception, the Pine River Court applied the so-called *unilateral contract theory*. Under this theory, a handbook provision is considered as a unilateral offer by the employer, which is accepted by the employee through continuance of work performance. The latter, in itself, constitutes consideration.[692] In this respect, the Minnesota Supreme Court in *Pine River (1983)* held that

> 'Whether a handbook can become part of the employment contract raises such issues of contract formation as offer and acceptance and consideration. (…) Generally speaking, a promise of employment on particular terms of unspecified duration, if in form of an offer, and if accepted by the employee, may create a binding unilateral contract. The offer must be definite in form and must be communicated to the offeree. (…) By continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.'[693]

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688 *Pugh (1981),* 116 Cal.App.3d 311, 324 and 325. See also Cameron 2001, p. 5.

689 See above under § 11.2.1.

690 See also Sullivan 1995, p. 275.

691 *Pine River (1983),* 333 N.W.2d 622, 625.

692 In a unilateral contract, the consideration rather concerns an exchange of an action (or inaction) for a promise; the promisee in other words accepts the contract by performing, not by promising to perform.

693 *Pine River (1983),* 333 N.W. 2d 622, 625-627. See also Sullivan 1995, p. 276 and 277.

In effect, the Pine River Court relied on *Pugh (1981)*, by applying *modern* contract principles, accepting that the single performance of the employee may furnish consideration for multiple promises.[694]

Meanwhile, the Michigan Supreme Court realized that *Toussaint (1980)* was troublesome for courts for not being consistent with contract principles. Subsequently, the Michigan Supreme Court revisited *Toussaint (1980)* in *Rowe (1991).*[695] Already, it attempted to clarify *Toussaint (1980)* in *Valentine (1984)*. In the latter, it held that *Toussaint (1980)* did not create a new job security right. It held that the only right held in *Toussaint (1980)* to be enforceable was the right that arose out of the promise not to terminate except for cause.[696] In *Rowe (1991)*, it went one step further than in *Valentine (1984)*. In fact, Cavanagh and Levin, the dissenting judges, considered *Rowe (1991)* as constituting a virtual *overruling* of *Toussaint (1980)*.[697] In contrast, the Rowe Court explicitly stated to elect not to do so.[698]

In *Rowe (1991)*, an employee applied for a sales position at Montgomery. She stumbled in one day and was interviewed by a sales manager, who told here that she would have a job so long as she achieved her sales quota. Upon being hired, she signed a 'Rules of Personal Conduct' sheet that did not include a just cause provision or disciplinary guidelines. Later, however, Rowe received several employee handbooks, which held disciplinary guidelines on the one hand, and explicit at-will language on issued sign-off sheets on the other, which Rowe, however, refused to sign. Rowe claimed that the oral statement was an *express* agreement under which she could be dismissed for just cause only.[699]

The Michigan Supreme Court commenced its decision with the statement that calling something a contract that is in no sense a contract cannot advance respect for the law. The Rowe Court apparently was in search of a resolution that was consistent with contract principles, relative to the employment setting on the one hand, while minimizing the possibility of abuse by either party to the employment relationship on the other. Subsequently, it addressed the question whether an employer's oral statements and written policy statements could create an employment contract terminable only for cause.[700] First, it held that for an express agreement to exist there must be mutual assent. To decide whether there is mutual assent, the expressed words of the parties and their visible acts are relevant.[701] Second, the Rowe Court held that the statement must be clear and unequivocal to overcome the presumption of at will and when parties attach different meanings to the language, the starting point in analyzing

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694 See also above under § 12.1.1

695 Luce 1992, p. 119.

696 *Valentine (1984),* 362 N.W.2d 628, 629. See also Smith 1986, p. 774 and 775.

697 *Rowe (1991)*, 473 N.W.2d 268, 308. See also Luce 1992, p. 1 and 5.

698 *Rowe (1991)*, 473 N.W.2d 268, 278.

699 See also Volz and Fayz 1993, p. 643 and 644.

700 *Rowe (1991)*, 473 N.W.2d 268, 269 and 270. See also Volz and Fayz 1993, p. 643.

701 *Rowe (1991)*, 473 N.W.2d 268, 271 and 273.

a statement is the meaning that reasonable persons might have attached to the language, given the circumstances presented.[702] In *Toussaint (1980)*, Judge Ryan had already referred to just cause provisions in collective bargaining agreements that 'clearly and forcefully indicate a mutual intention to limit the employer's discretion in terminating the employment relationship'.

Subsequently, the Michigan Supreme Court compared the circumstances with the facts in *Toussaint (1980)*. Although the Court admitted that the 'so long as' statement in *Rowe (1991)* bore some resemblance to remarks made in *Toussaint (1980)*, the Rowe Court found objective evidence lacking to permit a reasonable juror to interpret the employer's statements and actions as a promise of termination only for cause, therefore, it denied Rowe's claim. More specifically, the Rowe Court held that, *unlike* Toussaint, Rowe did not engage in pre-employment negotiations regarding job security. Logic compels the conclusion that when parties expressly negotiate with offers and counteroffers, it is more reasonable to anticipate mutual assent. The Rowe Court herewith – unnecessarily – put heavy emphasis on the need for a negotiation before oral assurances could be given contractual status. Second, *unlike* Toussaint, Rowe upon being hired signed 'Rules of Personal Conduct', which did not contain any 'release for just cause only' language as in *Toussaint (1980)*.[703] The Rowe Court could not find a just cause provision in the handbooks that were issued later either. In fact, the last handbook explicitly held at-will language.[704] Consequently, the Rowe Court rejected that an 'so long as' statement per se constitutes an express contract that overcomes the at-will presumption.[705]

Overall, the Michigan Supreme Court, based on the circumstances of the case, did not consider the statement in *Rowe (1991)* sufficient to rise to the level of an agreement providing termination only for just cause. In fact, it held that the statement of the sales manager that 'so long as she achieved her sales quota, she would have a job at Montgomery' was couched in general terms and vague, thus, that it did not clearly indicate to form a contract for permanent employment. Instead, the context suggested that the statement was merely intended to emphasize the number one priority of Rowe's job: sales. What is striking, is that the Rowe Court *contrasting* with the legitimate expectations theory of *Toussaint (1980)* stated that

> 'Consequently, we find no evidence from which reasonable minds could find that there was mutual assent on a term of employment terminable only for cause.'[706]

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[702] *Rowe (1991)*, 473 N.W.2d 268, 273 and 275. See also Luce 1992, p. 145.
[703] *Rowe (1991)*, 473 N.W.2d 268, 274-276.
[704] *Rowe (1991)*, 473 N.W.2d 268, 275.
[705] *Rowe (1991)*, 473 N.W.2d 268, 274 and 279 and 280.
[706] *Rowe (1991)*, 473 N.W.2d 268, 275.

Under the legitimate expectations theory of *Toussaint (1980)*, the Toussaint Court had not required mutual assent. It had not even required reliance to the detriment of the employee. Therefore, as the dissenting judges stressed, the Rowe Court 'overruled' *Toussaint (1980),* in that it did not consistently apply the legitimate expectations theory.[707] On the other hand, one can also argue that the Rowe Court searched for an *express* instead of an implied agreement.[708]

11.3 Factors that determine the existence of good cause protection

11.3.1 Good cause contract: requirements

The *legitimate expectations theory* of *Toussaint (1980)* makes it relatively easy for an employee to prove a good cause contract. In brief, this theory solely requires that (i) there is an expectation; and (ii) that this expectation is legitimate. The claim, on the other hand, may be denied when an employee admits that he or she had no expectation at all, or an employer has more than once unilaterally modified the provision.[709] More difficult for an employee is to prove a good cause contract under the *unilateral contract theory* of *Pine River (1983)*. First, the language in the handbook must be examined to see if it is specific enough to constitute an offer. Second, the offer must have been communicated to the employee by issuance of the handbook, or otherwise. Third, the employee must have accepted the offer by retaining employment after he has become generally aware of the offer.[710] Although job performance is easy to prove, an employee may prevail on the requirements of offer and communication. For example, in *Pine River (1983)*, the Minnesota Supreme Court held that the language in the handbook section entitled 'Job Security' did not constitute any offer and that it was no more than a general statement of policy. In its opinion, the language did not provide for more than at least an annual review of the employee's work, and, in general, about the stability of jobs in banking.[711]

11.3.2 At-will disclaimers: with or without effect?

At-will disclaimers may range from general statements that the handbook is not intended to form a contract, to explicit statements that employees are hired at will and may be discharged for any reason, with or without cause, and at any time without prior notice.[712] In *Toussaint (1980)*, the Michigan Supreme Court

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707 See Luce 1992, p. 150.

708 *Rowe (1991)*, 473 N.W.2d 268, 275; *Toussaint (1980)*, 292 N.W.2d 880, 891. See also Bogas and Vogan 1989, p. 599.

709 Smith 1986, p. 776 and 777, referring to *Longley (1984)* and *Engquist (1984)*, respectively.

710 *Hoffman-La Roche (1987)*, 512 So.2d 725, 735, referring to *Pine River (1983)*, 333 N.W. 2d 622, 625. See also Winters 1985, p. 6 and 7.

711 *Pine River (1983)*, 333 N.W.2d 622, 625, 626 and 630.

712 Berkowitz and Emert 2001, p. 115.

more than once stated that employers retained their right to *unilaterally* change the provisions of the handbook and that only policies *in force* needed to be uniformly applied.[713] In *Pine River (1983)*, the Minnesota Supreme Court ruled likewise. It held that unilateral contract modification of the employer may be a repetitive process, and that language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions.[714]

Hence, the decisions of both the Toussaint Court and the Pine River Court left room for employers to insert at-will disclaimers.[715] Subsequently, after *Toussaint (1980)*, employers started to insert at-will disclaimers in handbooks. In this paragraph, I will discuss the *effect* of at-will disclaimers. In this respect, it is important to distinguish between

1. an at-will disclaimer contained in the same document said to contain binding promises; and
2. an at-will disclaimer inserted in a handbook *afterwards* to negate enforceable promises under (i) the legitimate expectations theory; or (ii) the unilateral contract theory.[716]

Under the first scenario, the handbook language generally will not result in legitimate expectations, nor will it constitute an offer.[717] At-will disclaimers that have been inserted in handbooks *afterwards* to negate enforceable promises under the legitimate expectations theory and the unilateral contract theory give rise to more problems, and will be discussed below.

Legitimate expectations theory

The Michigan Supreme Court discussed the effect of at-will disclaimers in *Bankey (1989)*. The certified question by the United States Court of Appeals for the Sixth Circuit to the Bankey Court was

> 'Once a provision that an employee shall not be discharged except for cause becomes legally enforceable under Toussaint (…), as a result of an employee's legitimate business expectations grounded in the employer's written policy statements, may the employer thereafter unilaterally change those written policy statements by adopting a generally applicable policy and alter the employment relationship of existing employees to one at the will of the employer in the absence of an express notification to the employees from the outset that the employer reserves the right to make such a change?'[718]

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713 *Toussaint (1980)*, 292 N.W.2d 880, 895.

714 *Pine River (1983)*, 333 N.W.2d 622, 627.

715 Smith 1986, p. 775.

716 See also *Swanson (1992)*, 826 P.2d 664, 676.

717 See also *Conner (2002)*, 560 S.E.2d 606, 611; Heaton 2003, p. 3.

718 *Bankey (1989)*, 443 N.W.2d 112, 113. See also Luce 1992, p. 621.

The Bankey Court hereupon held that an employer may *unilaterally* change a written discharge for cause policy to employment at-will policy, even though the right to make such a change was not expressly reserved from the onset. However, to be effective, *reasonable notice* of change must be given to the employees affected.[719] The fact that the plaintiff-employee did not sign the employment at-will disclaimer is not determinative.[720] In *Ferrera (1990)*, the Colorado Court of Appeals only, applying the legitimate expectations theory, followed the Bankey Court. Additionally, it held that an employer's right to modify an employee handbook is *presumed.*[721] In *Bankey (1989)*, the Michigan Supreme Court 'forgot' to answer what should be understood by *reasonable notice*. In *Rowe (1991)*, the Michigan Supreme Court partly clarified the term. The Rowe Court held that the existence of three handbooks sent to the employee nine months prior to termination constituted reasonable notice of employer's policy.[722]

In *Demasse (1999)*, the *Arizona* Supreme Court, which applied the legitimate expectations theory as well, explicitly rejected *Bankey (1989)*. It opposed the fact that unilateral contract modification was achieved by simply publishing a new handbook with an additional clause stating that the contract has been changed. The Demasse Court did not believe that contract law recognizes such a right,[723] and that an employer may not unilaterally change a just cause policy.[724] In this respect, the Demasse Court emphasized that implied agreements have the same legal effect as express contracts.[725] Thus, an employer could not unilaterally change a contractual right under a handbook than with additional consideration beyond continued employment.[726] In fact, in the opinion of the Court, nothing could be more illusory than to hold that after an employer makes contractual promises, he may issue a new handbook that unilaterally rescinds them.[727]

In *Swanson (1992),* the Washington Supreme Court took the middle course. It held that

- at a minimum, the at-will disclaimer must state in a conspicuous manner that nothing contained in the handbook, manual, or similar document is intended to be part of the employment relationship and

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719 *Bankey (1989)*, 443 N.W.2d 112, 120. See also Luce 1992, p. 622; Kohn 2003, p. 826 and 827.
720 *Rowe (1991)*, 473 N.W.2d 268, 277 and 278.
721 Sullivan 1995, p. 286; Kohn 2003, p. 825.
722 *Rowe (1991)*, 473 N.W.2d 268, 277 and 278.
723 *Demasse (1999)*, 984 P.2d 1138, 1149.
724 See also Sullivan 1995, p.281-284, referring to *Thompson (1987).*
725 *Demasse (1999)*, 984 P.2d 1138, 1144. See also Luce 1992, p. 828.
726 *Demasse (1999)*, 984 P.2d 1138, 1145.
727 *Demasse (1999)*, 984 P.2d 1138, 1147.

that such statements are instead simply general statements of company policy;[728]

- that in order to be effective, the disclaimer must be communicated to the employee; [729]
- there must be reasonable notice to the employee that the employer is disclaiming intent to be bound by what otherwise appear to be promises of employment conditions according to Bankey;[730]
- all of the circumstances, and the representations and practices of the employer must be examined in order to determine the effect of the disclaimer; and
- the disclaimer may be negated by inconsistent employer representations and practices.[731]

The Swanson Court referred to *Leikvold (1984)* and *Wagenseller (1985)*.[732] At first sight, reliance on these cases seems an error in that *Leikvold (1984)* did not discuss the issue of an at-will disclaimer.[733] In *Wagenseller (1985)*, an at-will disclaimer was involved, however, as regards the modification of an at-will to a just cause policy.[734]

Unilateral contract theory

Bankey (1989), *Swanson (1992)* and *Demasse (1999)* show the three possible approaches regarding at-will disclaimers under *the legitimate expectations theory*. In *Fleming (1994)*, the South Carolina Court discusses the three possible approaches under the *unilateral contract theory* to negate just cause protection. The first approach – to allow a change without prior notice – struck the Fleming Court as too harsh. The second approach – to impose a bilateral concept on a unilateral contract, thus, requiring mutual assent and additional consideration – was rejected for not being consistent with *Pine River (1983)*. Hence, the Fleming Court settled on the third approach, which was consistent with unilateral contract principles and fair in a way that employers must have a mechanism that allows them to alter the employee handbook to meet the changing needs of both business and employees.[735] This last – third – approach is followed in the majority of states. Under this approach, a modified provision is considered as a new offer, and the continuing performance of work by the employee as sufficient consideration to accept the offer of the employer to

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728 *Swanson (1992)*, 826 P.2d 664, 672.
729 *Swanson (1992)*, 826 P.2d 664, 673.
730 *Swanson (1992)*, 826 P.2d 664, 672.
731 *Swanson (1992)*, 826 P.2d 664, 676.
732 *Swanson (1992)*, 826 P.2d 664, 676.
733 *Leikvold (1984)*, 688 P.2d 170, 174.
734 *Wagenseller (1985)*, 710 P.2d 1025, 1037 and 1038.
735 See *Pacific Bell (2000)*, 999 P.2d 71, 77, referring to *Fleming (1994)*, 450 S.E.2d 589, 594 and 595.

modify the handbook, on the condition of reasonable notice of the alteration. Thus, a unilateral employment contract may be formed, so may it be modified.[736]

In *Torosyan (1995)*, the Connecticut Supreme Court, based on the same grounds as the Demasse Court under the legitimate expectations theory,[737] rejected this approach. It held that for a new manual to modify the preexisting terms of employment based on an implied contract, the employee must have consented to that modification, and that if the Court were to accept the employer's argument to the contrary, an employee whose preexisting contract provided that his or her employment could be terminated only for cause would have no way of insisting on those contractual rights. The employee's only choices would be to resign or to continue working, either of which would result in the loss of the very right at issue, i.e. the loss of the right to retain employment until terminated for cause.[738]

In *Pacific Bell (2000)*, the California Supreme Court, in turn, rejected the approach of the Torosyan Court. Furthermore, it explicitly rejected *Demasse (1999,* although the latter involved the legitimate expectations theory. In *Pacific Bell (2000)*, the telephone company in question issued a 'Management Employment Security Policy', which held that 'this policy will be maintained so long as there is no change that will materially affect Pacific Bell's business plan achievement.' Two years later, the company announced that it would terminate the policy, replacing it the same day with a new layoff-policy. Subsequently, employees were laid off and they then filed a wrongful termination claim. The certified question of the United States Court of Appeals for the Ninth Circuit to the Pacific Bell Court was

> 'Once an employer's unilaterally adopted policy – which requires employees to be retained so long as a specified condition does not occur – has become a part of the employment contract, may the employer thereafter unilaterally terminate the policy, even though the specified conditions had not occurred?' [739]

The California Supreme Court's answer was that an employer may *unilaterally* terminate a policy so long as the employer affects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits, herein following *Fleming (1994)*.[740]

The three dissenting judges – George, Mosk and Kennard – however, emphasized that to argue that a contract is effectively modified simply because the same transactions, which led to its formation, have again occurred is an

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[736] See Sullivan 1995, p. 285 referring to Sadler (1988); Kohnn 2003, p. 819, 820, 822 and 823.
[737] See *Pacific Bell (2000)*, 999 P.2d 71, 77, referring to *Demasse (1999)*, 984 P.2d 1138, 1141.
[738] *Torosyan (1995)*, 662 A.2d 89, 99.
[739] *Pacific Bell (2000)*, 999 P.2d 72.
[740] *Pacific Bell (2000)*, 999 P.2d 73, 76.

overly simplistic and incorrect axiom.[741] If an employer may unilaterally modify or terminate an employment security policy, simply by maintaining it for a reasonable time and giving reasonable notice of the proposed modification or termination, this, in fact, is contrary to basic principles of contract law. Under contract principles, an employer may not unilaterally modify or terminate a policy that has become part of the employment contract without providing additional consideration and obtaining the employee's assent.[742] Hence, parties need to agree with a modification of an existing contract[743] as is the case with express contracts.[744] Therefore, they continued, the fact that under California law implied contracts stand on equal footing with express contracts, mutual assent is needed to modify the contract.[745]

In literature, too, the majority approach towards *unilateral modification* has been severely criticized. In this respect, Pratt states that

> 'It must be recognized and emphasized that issuing a second, unilaterally modified handbook is not the same as issuing the first. The employer who issues a second handbook is not taking the employee out of an at-will situation by offering her an implied contract. Instead, the second handbook constitutes an offer to modify the existing implied contract. While such an offer may be accepted, an amended handbook does not become effective automatically upon issuance by the employer and continuation of work by the employee. Rather, the traditional requirements of contract modification-assent to modify and additional consideration (here from the employer) must be met. The reason that the requirement of additional consideration here is dissimilar to the simple work requirement necessary under the unilateral contract analysis for the original handbook lies in the differing contexts. With a first edition handbook, an employee must act to accept the employer's offer embodied in the manual. However, an employee need not act to reject a subsequent modified handbook.'[746]

Sullivan agrees with Pratt, in that the modification of a contract is not analogous to its formation. He states that once there is a contract and the employer wishes to modify this existing contract, he must comport with the traditional principles of contract modification, hence, must provide consideration for and obtain assent to such modification.[747] Like the dissents in *Pacific Bell (2000)*, he argues that a contract formed by a handbook is no different from a contract formed by

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741 *Pacific Bell (2000)*, 999 P.2d 71, 90.

742 *Pacific Bell (2000)*, 999 P.2d 71, 88. See also Kohn 2003, p. 837.

743 *Pacific Bell (2000)*, 999 P.2d 71, 94.

744 *Pacific Bell (2000)*, 999 P.2d 71, 91.

745 *Pacific Bell (2000)*, 999 P.2d 71, 91. See also Fabiano 1993, p. 402 referring to *Foley (1988)*, 765 P.2d 373, at 385 and *Toussaint (1980)*, 292 N.W.2d 897, at 885.

746 Pratt 1990, p. 221.

747 Sullivan 1995, p. 11.

any other means, thus, there is no difference between an implied and express contract in this respect.

In contrast, Section 3.04 in the Third Draft on the Restatement of Employment Law (still) provides that a unilateral statement by an employer reasonably establishing employer obligations towards employees is binding on the employer *until* modified or revoked. Section 3.05 further determines that an employer may modify or revoke an obligation established pursuant to a previous unilateral statement by notifying employees of the modification or revocation of the prior terms, hence, does not require reasonable notice as most courts require.[748] Probably, because a Restatement of Law, in principle, reflects majority rules under common law, the last – Fourth – Draft Section 3.05 newly required that 'The revocation or modification and any new terms become effective for employees hired thereafter and for employees who continue working after receiving reasonable notice of the change'.[749]

11.3.3 Good cause: actual misconduct or good faith?

What an *employer* must show in order to justify a dismissal of a protected employee is essential in determining how much protection an employee has from arbitrary termination.[750] In this respect, it is important to know whether a court protects a good-faith employer, or whether it requires the employer to prove actual misconduct. This issue was addressed in *Toussaint (1980)*. The Michigan Supreme Court held that in discharges based on *misconduct*, the jury must determine whether the employee *actually* did what the employer alleged.[751] Subsequently, the Toussaint Court constructed a three-part test for determining just cause

- did the employee do what he or she was accused of doing;
- what was the true reason for the discharge; and
- is this the kind of thing that justifies termination of the employment relationship?[752]

Hereupon, the Toussaint Court chose not to protect a good-faith employer, because a promise to terminate employment for cause only in its opinion would be illusory, if the employer were permitted to be the sole justice and final arbiter of the propriety of the discharge, thus, that there must be some review of the employer's decision.[753] According to the Toussaint Court, the jury should be able to make an independent, *de novo fact* finding, regarding the factual basis of

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748 ALI Employment Law Draft No. 3, Chapter 3, § 3.04 and 3.05, p. 17-27.

749 ALI Employment Law Draft No. 4, Chapter 3, § 3.05, p. 24.

750 Fabiano 1993, p. 404 and 405.

751 *Toussaint (1980)*, 292 N.W. 2d 880, 896. See also Delmondo 1991, p. 2 and 3; Fabiano 1993, p. 412.

752 Bogas and Vogan 1989, p. 599.

753 *Toussaint (1980),* 292 N.W. 2d 880, 896.

the employee's conduct.[754] The majority of jurisdictions, however, reject the so-called De Novo Standard of *Toussaint (1980)*,[755] protecting the good-faith employer to decide on managerial decisions, including dismissals.[756]

11.3.4 Burden of proof: employer or employee?

The majority of state courts apply the general contract principle of proof to the employment agreement.[757] Subsequently, the plaintiff must prove all elements of the cause of action.[758] A plaintiff-employee who disputes the reason for his discharge, thus, must prove all elements of the cause of action, i.e. needs to prove the existence of a good cause contract, and subsequently, the lack of good cause.[759] It needs no explanation that employees have substantially less protection when the burden rests with them to show lack of good cause, than when the burden rests with the employer to show good cause.[760] In general, state courts do not wish to abandon the general rule of contract in wrongful termination cases, rather wish to adhere to the principle that the plaintiff-employee in a trial case must prove all elements of his claim.[761] In fact, in a minority of states only, among which Michigan, courts are divided on whether the burden of proof needs to rest with the employee to show lack of good cause, or with the employer to show good cause.[762] For an employee the difference is a significant one.

As regards Michigan law, the Michigan Supreme Court, did not address the issue who carries the burden to prove the lack or existence of good cause.[763] The sole remark of the dissenting judge, Ryan, in *Toussaint (1980)*, was that the plaintiff-employee has the burden of proving that the just cause provision in the manual was part of his employment contract. Ryan, however, did not discuss who carries the further burden of proving whether the termination was for just cause.[764] The Michigan Supreme Court, on the other hand, *did* hold that for discharges based on *misconduct* the jury must determine whether the employee *actually* did what the employer alleged. It then is logical to assume that when the employer alleges that the employee is guilty of misconduct, the burden rests with the employer to prove that the employee actually did what the employer

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754 Delmondo 1991, p. 3.

755 For the term 'De Novo Standard' or 'De Novo Rule', see *Cotran (1998)*, 948 P.2d 412, 418.

756 See *Cotran (1998)*, 17 Cal.4th. 93, 95, 102 and 103. For an in-depth discussion of the Cotran case, see below under § 12.3.3.

757 With the exception of discriminatory causes of actions, see above under § 8.8. See also Finkin 1995, p. 171.

758 See *Baldwin (1989),* 769 P.2d 298, 302.

759 For example, see *Wilkerson (1989)*, 212. Cal.App.3d 1217.

760 Fabiano 1993, p. 404 and 405.

761 Smith 1986, p. 782. See also Schwarze 1988, p. 548.

762 Schwarze 1988, p. 6.

763 Bogas and Vogan 1989, p. 600; Luce 1992, p. 125.

764 See *Rasch (1985)*, 367 N.W.2d 856, 859.

claimed.[765] However, the Michigan Supreme Court did not explicitly decide on the issue, hence, a tension on this issue is still felt among the court of appeals.[766]

For example, in *Obey (1984)*, the Michigan Court of Appeal applied the general rule, in that the employee had to prove that he was employed under a contract, requiring good cause for a termination, and consequently, had to prove the lack of good cause when the employer breaches the contract by terminating him without good cause.[767]

In *Rasch (1985)*, the Michigan Court of Appeal – with a different membership with that from *Obey (1984)* – departed from this general rule of contract.[768] The Rash Court held that in a wrongful discharge case, the plaintiff-employee must make a prima facie case by proving the contract under the handbook exception, producing testimony that he had performed it up to the time of his discharge, and providing proof of damages. The defendant-employer then has the affirmative burden of proving the plaintiff-employee had breached the contract, and that the discharge was legal.[769] The Rasch Court relied on cases that involved *definite* term contracts, but there is a difference between indefinite and definite term contracts. As Schwarze correctly states, in the latter, parties agree that the employment relationship will continue for a fixed period of time. Thus, the employer needs to prove that there is good cause to terminate the contract before the fixed period has expired.[770] Courts, therefore, find it difficult to follow *Rasch (1985)*. For example, the reason for the Washington Supreme Court to reject the rule under *Rasch (1985)* is that the shift of the burden to prove just cause to the employer could encourage employers to remove all such language from handbooks to retain effective control of the workplace.[771] In *Duke (1987)*, the federal District Court held that to follow the rule from *Rasch (1985)*, in effect, would place a lighter burden on employers accused of race discrimination than employers faced with wrongful discharge claims. This makes little sense in light of the relatively greater protection the law has tried to afford alleged victims of race discrimination.[772]

11.4 Conclusion

In *Toussaint (1980)*, the Michigan Supreme Court was the first among the highest state courts to accept the handbook exception. Based on the so-called legitimate expectations theory, the Toussaint Court accepted just cause protection based on legitimate expectations coming forward out of the

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765 *Wilkerson (1989)*, 212 Cal.App.3d 1217, 1230.

766 See *Duke (1987)*, 668 F.Supp.1031, 1040.

767 *Obey (1984)*, 360 N.W.2d 292, 296. See also *Duke (1987)*, 668 F.Supp. 1031, 1040.

768 See also Schwarze 1988, p. 547 and 548.

769 *Rasch (1985)*, 367 N.W.2d 856, 858. See also Smith 1986, p. 782.

770 Schwarze 1988, p. 549. See also Smith 1986, p. 782.

771 *Baldwin (1989)*, 769 P.2d 298, 303.

772 *Duke (1987)*, 668 F.Supp. 1031, 1040.

circumstances of the case. For being *in*consistent with contract principles, the majority of jurisdictions preferred to follow the unilateral contract theory under *Pine River (1983)*. In the latter, the Minnesota Supreme Court accepted the handbook exception, however, based on – modern – contract principles. Under this theory, it held that the employee's performance of work supplied the necessary acceptance and consideration to make a binding unilateral contract. In obtaining just cause protection under this handbook exception, private-sector employees need to overcome various hurdles, however. First, an employee needs to prove that the provision constitutes an offer, and that the provision is communicated to him. Second, the employee based on the general rule of contract needs to prove the existence of a good cause contract and the lack of good cause. Third, most jurisdictions protect a good-faith employer to decide on managerial decisions. Last, employers started to insert at-will disclaimers to negate job security under this exception. These disclaimers, in general, are considered valid.

12 California

12.1 The first state to accept the common law implied-in-fact (good cause) contract exception

In this Section, I will examine to what extent private-sector employees can obtain just cause protection under the implied-in-fact (good cause) contract exception. Moreover, I wish to show that this exception is not as vague as presumed by the Reporters of the Third Draft. The latter held that

> 'This Restatement does not adopt vague, conceptually ungrounded doctrines such as the "implied-in-fact" contract theory, which enjoyed support for a time in the California courts.' [773]

The implied-in-fact contract theory is still good law in California, and adopted among others in Kansas, New Mexico, Utah, Idaho, Connecticut and Arizona.[774] The rationale behind the *rejection* of this exception by other states is that they believe that to accept this exception, this, in effect, would eliminate the requirement of mutuality of obligation – the exchange of independent consideration – under the contract.[775]

In examining the implied-in-fact (good cause) contract exception, I will take the decision of California's Court of Appeal in the landmark case of *Pugh (1981)* as a starting point, because this Court was the first in the United States to hold that an implied-in-fact (good cause) contract could overcome the presumption of at will. In brief, it held that from the totality of circumstances it

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[773] ALI Employment Law Draft No. 3, Chapter 3, § 3.02, p. 6.

[774] *Morriss (Kan 1987)*; *Kestenbaum (N.M. 1988)*; *Berube (Utah 1989)*; *Metcalf (Idaho 1989)*; *Torosyan (Conn. 1995)*; *Demasse (Ariz. 1999)*. See also Cameron 2001, p. 4.

[775] See *Berube (1989)*, 771 P.2d 1033, 1045.

may derive that an employer may discharge an employee with good cause only. The California Supreme Court affirmed the decision of *Pugh (1981)* in *Foley (1988).*[776]

12.2 Pugh

12.2.1 Facts and holding

Wayne Pugh began working for See's in 1941 as a dishwasher. In thirty-two years of employment with See's, he worked his way up the corporate ladder from dishwasher to production manager, to vice-president in charge of production, and member of the Board of Directors. When Pugh started work for See's in 1941, the President frequently told him that 'if you are loyal and do a good job, your future is secure.' His successors, too, had a practice of only terminating administrative personnel for good cause. During the entire period of his employment, there had been no formal or written criticism of Pugh's work. No complaints were voiced at the annual meetings preceding each holiday season, and he was never denied a raise or bonus. He neither received notice that there was a problem that needed correction, nor any warning that any disciplinary action was being contemplated. In 1973, in a meeting with the President, where he had been expected to be told of another promotion after being congratulated on the increased production in the 1973-edition of See's newsletter, Pugh was dismissed without a reason. When Pugh asked the President for a reason, he was told that 'he should look deep within himself to find the answer'. Pugh brought the case to trial before a jury. He alleged he had been dismissed in breach of contract and for reasons, which offended public policy. The employer filed for a motion for non-suit based on lack of sufficient evidence to establish a breach of contract or violation of public policy.[777] The trial superior court granted the employer's motion. Subsequently, Pugh went to the Court of Appeal, for which Justice Grodin wrote the decision.

The Court of Appeal held that it was error to grant the motion for non-suit with regard to breach of contract. The employee had presented sufficient evidence to justify that he could be terminated only for good cause. The Court of Appeal held that, if parties have agreed, expressly or *impliedly*, the employee could be terminated for good cause only, the employee had presented enough evidence. The Pugh Court held that in the case before it, there were facts in evidence from which the jury could determine the existence of an *implied* promise, deriving from the duration of plaintiff's employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances had been given of continued employment and the employer's acknowledged policies.[778]

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[776] For *Foley (1988)*, see below under § 12.2.4. See also Estreicher and Robbins 1989, p. 2.

[777] Black's Law Dictionary defines a motion as a written or oral application requesting a court to make a specified ruling or order.

[778] *Pugh (1981)*, 116 Cal.App.3d 311, 316-319.

12.2.2 At-will rule: presumption

In building up its theory, the Pugh Court reviewed the legal history of the at-will rule. It held that, historically, the ancient law of master and servant did not provide an at-will rule. Based on the English Rule, the presumption was that employment was for a period of one year, which employment could be terminated for cause only.[779] The law of master and servant in the United States, however, underwent remodeling into at-will employment in the nineteenth century. Contrary to most countries, which decided to enact just cause legislation to protect employees against the negative effects of the Industrial Revolution, the undergirding principle of employment contracts in the United States became the at-will rule.[780] In effect, the superior bargaining power of the employer became a device for guaranteeing to management unilateral power to make rules and exercise discretion. This development brought with it a gradual weakening of the traditional presumption of the one year rule, to a rule that general hiring is prima facie a hiring at will as reflected in the California Labor Code Section 2922.[781]

Still, the Pugh Court stressed, the at-will rule is a presumption only. In this respect, it pointed at just cause provisions in collective bargaining agreements, which had placed limitations on the employer's unilateral right of termination, and the variety of statutory limitations established upon the employer's power of dismissal.[782] Consequently, the Pugh Court held that the mere fact that a contract is terminable at will, does not give the employer the absolute right to terminate it in all cases.[783] Consistently, it held that an implied-in-fact (good cause) contract can overcome the at-will presumption.[784]

12.2.3 Implied-in-fact (good cause) contract: circumstances of the case

In *Pugh (1981)*, the California Court of Appeal held there was enough evidence to enable the jury to find the existence of an implied-in-fact promise that the employer would not discharge employees arbitrarily, based on the totality of circumstances, including the duration of employee's employment, the commendations and promotions he had received, the apparent lack of any direct criticism of his work, the assurances he had been given, and the employer's

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779 *Pugh (1981)*, 116 Cal.App.3d 311, 319. For the history of the one year rule and the at-will rule, see also above under § 10.2.

780 See also above under § 1.2.1.

781 *Pugh (1981)*, 116 Cal.App.3d 311, 319 and 320. Section 2922 of the California Labor Code provides that 'an employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month'.

782 *Pugh (1981)*, 116 Cal.App.3d 311, 320.

783 *Pugh (1981)*, 116 Cal.App.3d 311, 321 and 322.

784 See also Tully 1983, p. 5 and 6.

acknowledged policies.[785] In this respect, the Pugh Court referred to a number of cases, relying on *Cleary (1980)* in particular.[786] In *Cleary (1980),* the California Court of Appeal held that the longevity of service, and the expressed policy of the employer set forth in the regulation, justified an exception to the at-will rule. More specifically, it held that an employer who dismissed an employee for alleged theft after eighteen years of satisfactory service, in violation of published company policy, which required a fair, impartial and objective hearing in such matters, had violated an implied covenant of good faith and fair dealing.[787] Also, *Pugh (1981)* shows strong resemblance with *Toussaint (1980)*, which is known and cited principally as Michigan's equivalent of *Pugh (1981).* The Toussaint Court, too, adopted the rule that an implied-in-fact good cause term can limit the common law at-will employment rule.[788]

12.2.4 Pugh confirmed!

The California Supreme Court affirmed *Pugh (1981)* in *Foley (1988).*[789] In the latter*,* an employee was hired in 1976 as a computer expert by Interactive Data Corporation, a subsidiary of Chase Manhattan Bank in California. At the time of hiring, Foley signed two agreements concerning non-competition and disclosure of proprietary information. In addition, the employer maintained written termination guidelines that set forth express grounds for discharge and a mandatory, seven-step procedure to follow leading up to discharge. After Foley had worked for the employer for almost seven years, receiving steady promotions and pay raises, he was suddenly discharged. He alleged that his supervisors repeatedly assured him that he had job security so long as his performance remained adequate. He also alleged that on the basis of the documents he signed and the termination procedure, he believed he would not be discharged except for good cause. Subsequently, Foley sued his employer for wrongful discharge.

In brief, Foley stated that in 1983, he had gone to his previous supervisor to tell him that he had learnt that his new supervisor was under investigation for embezzlement from his former employer, and that he was worried about the new supervisor's suspected criminal conduct. The former supervisor had told Foley not to discuss rumors and to forget what he had heard. Shortly thereafter, Foley's supervisor informed him that the company had decided to replace him for 'performance reasons', but that he had an option to transfer from California to another position in Massachusetts. Two weeks later, Foley was abruptly discharged.[790] The employer filed for a demurrer,[791] which

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785 Winters 1985, p. 3; Linzer 1986, p. 10.

786 *Pugh (1981)*, 116 Cal.App.3d 311, 327. See also Peck 1983, p.13; Hitchcock 1983, p. 2 and 4; Jung and Harkness 1989, p. 5.

787 *Pugh (1981)*, 116 Cal.App.3d 311, 328.

788 *Cotran (1998)*, 17 Cal.4th 93, 102.

789 *Foley (1988)*, 47 Cal. 3d 654, 676 and 677. See also Barnhart 1998, p. 4.

790 Estreicher and Robbins 1989, p. 2.

the state Superior Court granted and which the California Court of Appeal affirmed. The California Supreme Court agreed to hear the Foley case in appeal.[792] The California Supreme Court addressed three questions in *Foley (1988)*

- when does discharge of an employee violates public policy so as to give rise to tort liability;
- when do promises in employment manuals and related documents create an implied-in-fact contract that an employee at will not be dismissed except for good cause; and
- what is the measure of damages for breach of the implied covenant of good faith and fair dealing?[793]

With regard to the breach of an implied-in-fact (good cause) contract – which is of interest in this thesis – Foley alleged that over the course of his nearly seven years of employment with the bank, the company's own conduct and personnel policies gave rise to an oral contract not to dismiss him without good cause. In contrast, the *employer* in *Foley (1988)* urged the California Supreme Court to reverse the decision of *Pugh (1981)*, and to hold that California law required an *express* contract provision, requiring good cause for termination, supported by independent consideration beyond work performance.[794]

The California Supreme Court held that the Pugh Court had correctly applied basic contract principles in the employment context, and that these principles were applicable to the employee's employment agreement with the employer.[795] First, it stressed that under the fundamental principle of freedom of contract, employers and employees are free to agree upon a contract terminable at will, or to agree upon a contract subject to limitations. Second, whereas the California Labor Code Section 2922 holds a presumption of at-will employment, this may be overcome by evidence, that despite the absence of a specified term, parties reached consensus on limiting the employer's power to dismiss employees, for example, by a requirement that termination be based on good cause only.[796]

As regards the requirement of independent consideration, the Foley Court admitted that there may be some historical basis for imposing independent consideration beyond work performance.[797] However, it stressed that any such basis has been eroded by the development of modern contract law and that

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791 *Black's Law Dictionary* defines a demurrer as a pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer.

792 Estreicher and Robbins 1989, p. 2; Burden 1989, p. 1.

793 Estreicher and Robbins 1989, p. 2.

794 *Foley (1988)*, 47 Cal.3d 654, 671.

795 *Foley (1988)*, 47 Cal.3d 654, 676. See also Cameron 2001, p.5.

796 *Foley (1988)*, 47 Cal.3d 654, 677.

797 For case law, see Hitchcock 1983, p. 1and 2; Tully 1983, p. 4 and 6.

accordingly, it is inappropriate in the modern employment context. In citing *Pugh (1981),* the Foley Court held that there is *no* analytical reason why

- an employee's promise to render services, or his actual rendition of services over time, may *not* support an employer's promise both to pay wage and, for example, to refrain from arbitrary dismissal; and
- in the employment context, factors apart from consideration and express terms may *not* be used to ascertain the existence and content of an employment agreement, including the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry, in which the employee is engaged.[798]

12.3 Factors that determine the existence of good cause protection

12.3.1 Good cause contract: requirements

To obtain just cause protection under the implied-in-fact (good cause) contract exception, private-sector employees must meet the so-called *totality of circumstances* test. In this respect, the Pugh Court held that while oblique language will not, standing alone, be sufficient to establish agreement, it is appropriate to consider the totality of the parties' relationship. It stressed that this agreement may be shown by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances.[799] In *Foley (1988)*, the California Supreme Court upheld this test. In *Guz (2000)*, the California Supreme Court, however, stressed that with its confirmation of the totality of circumstances test in *Foley (1988)*, it did not suggest that every vague combination of Foley factors, shaken together in a bag, necessarily allowed a finding that the employee had a right to be discharged only for good cause.[800]

The Guz Court held that the mere passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot alone form an implied-in-fact (good cause) contract that the employee is no longer at will.[801] In *Guz (2000)*, the employee pointed at the length of service (twenty years), his satisfactory performance, and the testimony of the President of BNI-MI, who believed that Bechtel terminated workers with good reason only.[802] The California Supreme Court denied Guz's claim. The Guz Court held that there was no evidence that Bechtel's employees were aware of an unwritten at-will policy. Moreover, it flied in the face of

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798 *Foley (1988)*, 47 Cal.3d 654, 678-680. See also *Pugh (1981),* 116 Cal.App.3d 311, 327.

799 *Pugh (1981)*, 116 Cal.App.3d 311, 329.

800 *Guz (2000)*, D.A.R. 10929, 10933; 24 Cal.4th 317, 337.

801 *Guz (2000)*, D.A.R. 10929, 10935; 24 Cal.4th 317, 341 and 342.

802 *Guz (2000)*, D.A.R. 10929, 10930; 24 Cal.4th 317, 328.

Bechtel's general disclaimer in written personnel policies. Further, Guz had not received individual promises or representations that Bechtel would retain him except for good cause, nor did Guz seriously claim that the practice in Bechtel's industry was to provide job security. According to the California Supreme Court, Guz, in effect, argued that by retaining him for over twenty years, and by providing him with steady raises, promotions, commendations, and good performance reviews during his tenure, Bechtel had engaged in actions reflecting assurances of continued employment.[803] In contrast, the Guz Court stressed that in the absence of other evidence of the employer's intent, longevity and raises and promotions are their own rewards for the employee's continuing valued service. They do not, in and of themselves, additionally constitute a contractual guarantee of future employment security. Such a rule granting such contract rights on the basis of successful longevity alone would discourage the retention and promotion of employees. The Guz Court, on the other hand, held that long and successful services are not necessarily irrelevant to the existence of an implied-in-fact (good cause) contract. Over the period of an employee's tenure, by its written and unwritten policies and practices, or by informal assurances, seniority and longevity can create rights against termination at will. The issue is whether the employer's words or conduct, on which an employee had reasonably relied, gave rise to this specific understanding.[804]

By approving the totality of circumstances test, and by stating that the length of service is just one factor in the totality of circumstances test, the Guz Court affirmed *Foley (1988)*. Like the Foley Court, the Guz Court held that no fixed length of employment is necessary.[805] Consequently, courts still reach various results[806] on how long one must have been employed for, in order for the contract to be implied: thirty-two years as in *Pugh (1981)*; eighteen as in *Cleary (1980)* on which *Pugh (1981)* expressly relied; or six years, as in *Foley (1988)*?[807]

As this thesis reached its completion, a minority of states accepted the implied-in-fact (good cause) contract. In *Morris (1987)*, the Kansas Supreme Court held that the understanding and intent of the parties in this respect is to be ascertained from several factors, which include oral or written negotiations, the conduct of the parties from the commencement of the employment relationship, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and any other circumstances surrounding the employment relationship, which would tend to explain or make clear the intention of the parties at the time said employment commenced. Like

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803 *Guz (2000)*, D.A.R. 10929, 10934-10937; 24 Cal.4th 317, 339-348.

804 *Guz (2000)*, D.A.R. 10929, 10935; 24 Cal.4th 317, 342.

805 *Guz (2000)*, D.A.R. 10929, 10935; 24 Cal.4th 317, 342.

806 For contrasting cases, see *Zilmer (1989)* (31 years sufficient) and *Miller v Pepsi-Cola (1989)* (11 years insufficient absent policies supporting an implied-in-fact contract).

807 Hitchcock 1983, p. 4.

the Pugh Court, it considered the entire record in the case.[808] In *Kestenbaum (1988)*, the New Mexico Supreme Court, following *Pugh (1981)*, too, considered the totality of the party's relationship.[809] The evidence presented by Kestenbaum was sufficient as a matter of law to establish an implied contract that required a good reason to terminate the employment relationship, based on initial employment negotiations, statements of the operations manager and the vice-president and the manual.[810] Likewise, in *Berube (1989)*, the Utah Supreme Court that followed *Pugh (1981)*, considered factors as personnel policies or practices of employer, the employee's longevity of service, actions or communications by the employer reflecting assurances or continued employment, and the practices of the industry in which the employee is engaged, in determining the existence of an implied-in-fact (good cause) contract.[811] The Berube Court upheld the claim of the employee based upon a disciplinary action policy, actions of the employer that were consistent with an implied-in-fact term of the employment contract, limiting dismissal to situations providing just cause, statements of superiors, promotions, and a climb in salary.[812] In *Metcalf (1989)*, the Idaho Supreme Court found the existence of the implied-in-fact (good cause) contract exception in the manual, the employee handbook and oral statements.[813] Finally, in *Torosyan (1995)*, the Connecticut Supreme Court held that the trial court was not erroneous in finding the existence of an implied-in-fact (good cause) contract, based on the facts that the employee had been invited to work with the employer, in job interviews the employee had informed that he would not make the move unless the employer could guarantee him job security, one interviewer told him to examine the manual which he did when he started working, and the manual included the right to discharge for good cause only.[814]

12.3.2 At-will disclaimers: with or without effect?

In *Pugh (1981)*, there was no at-will disclaimer involved. If so, it has been argued, the decision may have been otherwise. For this reason, it is said that the implied-in-fact (good cause) contract theory has limitations, because employers may specifically provide in manuals that employment is at will.[815] Indeed, after *Pugh (1981),* many employers tried to avoid the creation of an implied-in-fact (good cause) contracts by including at-will disclaimers in their personnel manuals and employee handbooks.[816] California courts, however, generally take

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808 *Morris (1987)*, 738 P.2d 841, 848 and 849.
809 *Kestenbaum (1988)*, 766 P.2d 280, 286.
810 *Kestenbaum (1988)*, 766 P.2d 280, 285.
811 *Berube (1989)*, 771 P.2d 1033, 1045.
812 *Berube (1989)*, 771 P.2d 1033, 1047 and 1048.
813 *Metcalf (1989)*, 778 P.2d 744, 746 and 647.
814 *Torosyan (1995)*, 662 A.2d 89, 93-95.
815 Peck 1991, p. 9.
816 See also above under § 11.3.2.

the approach that an at-will disclaimer in an employee handbook cannot establish the nature of the employment relationship as a matter of law.[817]

In *Guz (2000)*, the California Supreme Court held that courts in California and elsewhere have held that at-will provisions in personnel handbooks, manuals, or memoranda do not bar, or necessarily overcome, other evidence of the employer's contrary intent. The reasoning, express or implied, is that parole evidence is admissible to explain, supplement, or even contradict the terms of an unintegrated agreement, and that handbook disclaimers should not permit an employer, at its whim, to repudiate promises it has otherwise made in its own self-interest, and on which it intended an employee to rely. The Guz Court, therefore, held that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. However, it continued, nor can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, the Guz Court stressed, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed.[818]

Other jurisdictions, which have adopted the implied-in-fact (good cause) contract exception generally take the same approach as the Guz Court. For example, in *Morriss (1987)*, the employer heavily relied on an at-will disclaimer in the manual that held that 'nothing in this policy manual should be construed as an employment contract or guarantee of employment'. The Kansas Supreme Court held that the ultimate decision of whether there was an implied contract not to terminate the employee(s) without cause must be determined from all the evidence presented by the parties on that issue. The disclaimer in the supervisor's manual did not as a matter of law determine the issue for reason that it has not been established that the disclaimer was brought to the personal attention of its employees, or that it was intended by the employer to create an unqualified employment-at-will relationship, especially in view of other provisions in the manual and the statement made by the employer's supervisors to the employees.[819]

Subsequently, in *Adelmeyer (1995)*, which explained *Morriss (1987)*, the Court of Appeal, Tenth Circuit, held that the jury had to evaluate the disclaimer *in conjunction with* additional extrinsic evidence to determine whether the parties intended to form an implied contract as both are part of the totality of circumstances analysis.[820]

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817 Barnhart 1998, p. 5.

818 *Guz (2000)*, D.A.R. 10929, 10934; 24 Cal.4th 317.

819 *Morris (1987)*, 738 P.2d 841, 849.

820 *O'Loughlin (1997)*, 972 F.Supp. 1352, 1370.

12.3.3 Good cause: actual misconduct or good faith?

Like in the majority of states, California law protects a good-faith employer. In *Pugh (1981)*, the California Court of Appeal established an *objective* good-faith standard for discharges under employment contracts holding implied-in-fact promises to terminate only for good cause.[821] Under this standard

> 'good cause connotes a fair and honest cause or reason regulated by good faith on the part of the party exercising the power, whereby care must be taken not to interfere with the legitimate exercise of managerial discretion.' [822]

Additionally, in *Wood (1990)*, the California Court of Appeal held that if the reasons advanced by the employer for the discharge were trivial, capricious, unrelated to business needs or goals, or pretextual, the finder of fact may properly find that the stated reason for termination was *not* a fair and honest cause or reason regulated by good faith. An employer, in other words, does not have an *unfettered* right to exercise discretion in the guise of business judgment. In fact, in the opinion of the Court, an implied-in fact promise to dismiss an employee for cause only, would be illusory if the employer were permitted to be the sole justice and final arbiter of the propriety of the policy giving rise to the discharge.[823]

Subsequently, in *Scott (1995)*, the California Supreme Court defined the term *good cause*, combining *Pugh (1981)* and *Wood (1990)*. Although this case did not involve a wrongful discharge – but a demotion of two employees, in which the employer had breached an implied contract term not to demote employees without good cause – the standard, initially, was used in wrongful termination cases as well. The Scott Court held that

> 'good cause essentially connotes a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power, as opposed to one that is trivial, capricious, unrelated to business needs or goals, or pretextual.'[824]

First, in *Cotran (1998)*, the California Supreme Court defined the *good-faith standard* in *wrongful discharge* cases. The wish to resolve the issue was due to a decision of the Court of Appeal in *Wilkerson (1989)*, which had caused great confusion among the Courts of Appeal in California.

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821 *Pugh (1981)*, 116 Cal.App.3d 311, 330. See also Handelman 2001, p. 3; Hitchcock 1983, p. 4.

822 *Pugh (1981)*, 116 Cal.App.3d 311, 330. See also Hitchcock 1983, p. 4. The dissenting judge Kozinski in *Sanders (1990)* invoked this standard – under Alaska Law where actual violation is required – as appropriate for employees who occupy safety-sensitive positions, as well in order to provide managers with flexibility to ensure that hazardous workplaces can be kept free of possibly dangerous workers. See Fabiano 1993, p. 408 and 409.

823 *Wood (1990)*, 218 Cal.App.3d 661, 670 and 671.

824 *Scott (1995)*, 11 Cal.4th 454, 467.

The decision in *Wilkerson (1989)*, in effect, was a reaction to *Pugh (1988*). In the latter, which case is also known as *Pugh II,* the California Court of Appeal furthered the good-faith standard, as defined in *Pugh I*, as 'the state of mind of the employer, which is honest of purpose, free from an intention to defraud, and in keeping with one's duty or responsibility'.[825] More specifically, it held that an employer must have wide latitude in making independent, good-faith judgments about high-ranking employees without the threat of a jury second-guessing its business judgment. Thus, although the jury must assess the legitimacy of the employer's decision to discharge, it should not be thrust into a managerial role.[826]

In contrast, the Wilkerson Court held that in a wrongful termination suit by an employee terminable for good cause only, the employer must prove, as part of his defense burden, that misconduct leading to dismissal actually occurred, citing from *Toussaint (1980)*, although not explicitly referring to it.[827] This caused confusion, because the decision of *Wilkerson (1989)* was in contrast with the majority of court decisions in California, and most other jurisdictions. In general, the majority suggested that the jury's role was to decide whether the employer concluded misconduct occurred 'fairly, honestly, and in good faith'.[828]

In *Cotran (1998)*, the California Supreme Court explicitly rejected *Wilkerson (1989)*,[829] and adopted the so-called *objective reasonableness good-faith standard*,[830] combining the formulations in *Scott (1995)* and *Pugh (1981).*[831] Under this standard, an employer must have reasonable grounds to believe that sufficient cause existed to justify the employee's termination, rather than that the employer must have good-faith belief that employee's misconduct actually existed.[832] In effect, the Cotran Court took the middle course. It did not believe, unlike the majority in *Toussaint (1980)* and *Wilkerson (1989)*, that permitting juries to decide the factual basis for allegations of employee misconduct is the only way to give meaning and substance to an employer's promise to terminate for 'good cause', or that barring such fact finding leaves just cause provisions toothless.[833]

Consequently, it held that the proper inquiry for the jury is whether the factual basis on which the employer concluded a dischargeable act had been committed was reached honestly, after an appropriate investigation and for reason that are not arbitrary or pretextual.[834] The proper inquiry to the jury, thus,

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825 *Pugh (1988)*, 203 Cal.App.3d 743, 762.

826 *Pugh (1988)*, 203 Cal.App.3d 743, 769. See also *Cotran (1998)*, 17 Cal.4th 93, 101.

827 *Cotran (1998)*, 17 Cal.4th 93, 102 and 103.

828 *Cotran (1998)*, 17 Cal.4th 93, 95.

829 *Cotran (1998)*, 17 Cal.4th 93, 102.

830 *Cotran (1998)*, 17 Cal.4th 93, 102 and 103.

831 Handelman 2001, p. 4.

832 *Kestenbaum (1988)*, 766 P.2d 280, 287. See also *Cotran (1998),* 17 Cal.4th 93, 104 and 105.

833 *Cotran (1998)*, 17 Cal.4th 93, 102.

834 Handelman 2001, p. 5.

the Court continued, was not 'did the employee, in fact, commit the act leading to dismissal?' as is the case in labor disputes[835], but 'was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?' [836]

In establishing the objective reasonableness good-faith standard, the California Supreme Court referred to *Kestenbaum (1988)*. In the latter, the New Mexico Supreme Court 'adopted a standard much like the majority rule exemplified by Simpson, Vargas and Baldwin'.[837] The reference to *Kestenbaum (1988)* is clear, in that the New Mexico Supreme Court did not require actual misconduct, but good-faith belief of the employer, having reasonable grounds to believe that the employee had committed misconduct.[838] The implicit reference to Simpson, Vargas and Baldwin by the Cotran Court, however, is less clear.

In *Simpson (1982),* the Oregon Supreme Court, in applying a good-faith standard, applied a *subjective* good-faith standard.[839] The Simpson Court left the power to determine whether the facts constituted cause for termination completely with the employer.[840] The court needed only to find that the employer acted on the basis of its determination that facts constituting just cause for discharge existed, but the court needed not find that the facts constituting just cause for discharge *actually* existed.[841] In *Vargas (1995)*, the Nevada Supreme Court applied an *objective* good-faith standard, but carried the ruling of the Cotran Court one step further. In this case an employee was accused of sexual harassment and claimed to be discharged without just cause, contrary to a provision within employer's employee handbook. The Vargas Court held that a discharge for good cause is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence, and (2) reasonably believed by the employer to be true.[842] It, in fact, cited *Baldwin (1989)*, in which the Washington Supreme Court had combined the subjective good-faith standard of *Simpson (1982)* with the De Novo Standard of *Toussaint (1980)*.[843]

In Fabiano's opinion, only the Baldwin standard is comparable, at least on paper, to the test employed by arbitrators in interpreting the just cause clauses of collective bargaining agreements.[844] In contrast, the Cotran Court explicitly

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835 For examples, see Brand 1999, p. 234.

836 *Cotran (1998)*, 17 Cal. 4th 93, 107 and 108.

837 *Cotran (1998)*, 17 Cal.4th 93, 103-106.

838 *Kestenbaum (1988)*, 766 P.2d 280, 287 and 288.

839 See *Vargas (1995)*, 901 P.2d 693, 700.

840 *Simpson (1982)*, 643 P.2d 1276, 1279. See also Delmondo 1991, p. 836; Fabiano 1993, p. 404.

841 *Simpson (1982)*, 643 P.2d 1276, 1277.

842 *Vargas (1995)*, 901 P.2d 693, 701.

843 *Baldwin (1989)*, 769 P.2 298, 304.

844 Fabiano 1993, p. 405. See also Delmondo 1991, p. 848.

distinguished the good cause standard from the just cause standard under labor arbitration. Justice Mosk wrote

> 'I note that nothing in the majority opinion is intended to alter the different manner, in which the term good cause is construed by arbitrators pursuant to a collective bargaining agreement between unions and employers. In such agreements the contract is express, the remedies more limited, the role of the arbitrator in policing collective bargaining agreements well-established both contractually and customarily, and the contractual language supplemented by a well developed body of arbitration law concerning the meaning of good cause that the parties can be presumed to be aware of at the time they entered the agreement (…) The majority's good cause standard does not extend beyond the context, in which it is articulated, i.e., implied contracts between employers and individual employees.'[845]

In *Pugh (1981)*, the California Court of Appeal, in footnote 26, too, emphasized that for courts to apply the same standards as labor arbitrators may prove overly intrusive in some cases, because arbitrators are selected by the parties, partly on the basis of the faith that the parties have in their knowledge and judgment concerning labor relations matters.[846] One may argue, that the Cotran Court and the Pugh Court hold that civil courts *cannot* apply the same just cause standard under collective bargaining law to non-bargaining units employees. On the other hand, one may argue that the Pugh Court and the Cotran Court merely indicate that the rules as applied under labor arbitration, *in principle*, do not apply in civil wrongful termination lawsuits, considering it as inappropriate to allow a jury to do the same as a labor arbitrator for reason that the latter is chosen by the parties, presumably for his knowledge of labor-management relations and dependent upon the parties for his future selection, to pass judgment upon the dismissal. As a matter of law, nothing stands in the way to apply the same just cause standard under collective bargaining law to non-bargaining-unit employees.

Schwarze is of another opinion. He objects to the application of the good cause standard standard under labor law to civil cases, referring to the fact that an arbitration hearing is different from a courtroom trial. In a courtroom, the employer has only one opportunity to present his case, where in the arbitration setting he is afforded the opportunity to first state his claim and later present a rebuttal. In his opinion, it then is unfair for the employer to bear the burden of proof on this issue, since the employee retains the advantage of having the first and last word. Another difference he points out is that arbitration allows a neutral arbitrator to decide whether just cause was present. Thus, arbitrators may sympathize with an employee who lost his job and his house, however, their decisions will not reflect it. Jurors, on the other hand, he states, generally have a purely emotional reaction seeing the helpless employee up against the powerful

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845 *Cotran (1998)*, 17 Cal.4th 93, 110.

846 *Pugh (1981)*, 116 Cal.App.311, 330, footnote 26.

employer. Hence, the employee should retain the burden of proof to help compensate for this bias.[847]

12.3.4 Burden of proof: employer or employee?

In *Pugh (1981)*, the California Court of Appeal clearly stated that the burden of proof rests with the employer to prove good cause. In this respect, it held that

> '(…) after an [employee] has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for [employee's] termination now shifts to the employer. [Employee] may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy (…), or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. [Employee] bears, however the ultimate burden of proving that he was terminated wrongfully.'[848]

It referred to *McDonnell Douglas (1973)* and *Cleary (1980)*. In brief, in *Cleary (1980)*, the California Court of Appeal held that the employee has the burden to prove that he was terminated unjustly. In reply, the employer has the opportunity to demonstrate that he exercised good faith and fair dealing with respect to the employee. Only if the employee should sustain his burden of proof, will he have established a cause of action for wrongful discharge.[849] *McDonnell Douglas (1973)* did not involve a common law wrongful termination claim. It held a claim under federal anti-discrimination law.[850] The Pugh Court, so it seems, wished to stress that to the extent Congress has tried to afford alleged victims of race discrimination relatively greater protection, it makes little sense to place a lighter burden on employers accused of race discrimination than employers faced with wrongful discharge claims.[851]

At first sight, the California Supreme Court, too, does not intend to abandon the general rule of contract, under which a plaintiff has to prove all elements of his claim.[852] Also, other courts, which accepted the implied-in-fact (good cause) contract, in general, adhere to the general rule of contract regarding the burden of proof.[853] For example, in *Berube (1989),* the Utah Supreme Court explicitly held that the burden of proof in case of an implied-in-fact (good cause) contract resides upon the plaintiff-employee.[854] Also, the Nebraska

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847 Schwarze 1988, p. 548 and 549.

848 *Pugh (1981)*, 116 Cal.App.3d 311, 329 and 330. See also Schwarze 1988, p. 547.

849 *Cleary (1980)*, 111 Cal.App.3d 443, 456.

850 For an in-depth discussion of *McDonnell Douglas (1973)*, see above under § 8.8.

851 See also above under § 11.3.4.

852 *Foley (1988)*, 47 Cal.3d 654, 676 and 682; *Guz (2000)*, D.A.R. 10929, 10932; 24 Cal.4th 317, 335.

853 For example, see *Kestenbaum (1988)*, 766 P.2d 280, 287.

854 *Berube (1989),* 771 P.2d 1033, 1044.

Supreme Court, in *Schuessler (1993)*, referring to *Stiles (1989)*,[855] held that the burden to prove the existence of an employment contract and all the facts essential to the cause of action is upon the person who asserts the contract.[856]

12.4 Conclusion

In *Pugh (1981)*, the California Court of Appeal was the first among state courts to hold that an implied-in-fact (good cause) contract could overcome the presumption of at will. In brief, it held that based on the totality of circumstances, an employer may discharge an employee with good cause only, deriving from personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged. In *Foley (1988)*, the California Supreme Court affirmed *Pugh (1981)*. In *Guz (2000),* the California Supreme Court, however, stressed that – in the absence of other evidence of the employer's intent – longevity, raises and promotions are their own rewards for the employee's continuing valued service. They do not, in and of themselves, constitute an additional contractual guarantee of future employment security. Overall, the foregoing case law shows that the implied-in-fact (good cause) contract exception is still good law in the state of California, and in a number of other jurisdictions. A weakness of the implied-in-fact (good cause) contract exception is that like with the handbook exception, at-will disclaimers in handbooks, too, may negate job security. *Unlike* with the handbook exception, however, at-will disclaimers under the implied-in-fact (good cause) contract exception, generally, are considered merely as *one* of the factors in the totality of circumstances test. Nevertheless, it *can* be a factor to negate good cause protection, which leaves the employee under the implied-in-fact (good cause) contract with less just cause protection than generally assumed. All the more so when one realizes that the majority of jurisdictions place the burden with the employee to prove an implied-in-fact (good cause) contract, and lack of good cause. Another hurdle is that the majority of states protect the good-faith employer, although the reason given by the employer is subject to scrutiny, at least, in California and New Mexico.

13 American dismissal law: just cause protection for private-sector employees?

13.1 At-will dismissal system

By 2007, the United States is one of the few developed industrialized countries in the world that still embraces the employment at-will doctrine. Under the

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855 *Stiles v. Skylark Meats, Inc*., 231 Neb. 863,865; 438 N.W.2d 494, 496 (Neb. 1989).

856 *Schuessler (1993),* 500 N.W.2d 529, 538.

classic version of the at-will rule, an employer can discharge an employee for any cause, no cause, or even a cause morally wrong, without being liable. The pure concept of employment at will, however, has been eroded by exceptions to the at-will rule under federal and state (statutory and common) law.

13.2 Federal labor law and collective labor law

The National Labor Relations Act of 1935 (NLRA) is the core of labor law in the United States. Private-sector employees can obtain job security under the Sections 7 and 8 of the NLRA. These Sections provide protection against dismissal on specified grounds, and in specified situations only. These Sections, thus, do not offer protection against arbitrary dismissal in general, nor does any other provision of the NLRA.

Collective bargaining agreements, on the other hand, generally contain just cause and arbitration provisions under which employees, subject to a collective bargaining agreement, i.e. the so-called bargaining-unit employees, typically enjoy just cause protection. However, collective bargaining agreements apply to a minority – about ten percent – of the workforce only. The majority of the workforce, the so-called *non-bargaining-unit employees*, also referred to as *at-will employees*, are empty-handed in this respect. All the more so, because courts do not seem willing to apply the just cause standard under labor arbitration to dismissals of at-will employees.

13.3 Federal anti-discrimination law

Federal anti-discrimination statutes provide protection against arbitrary dismissals under Title VII of the Civil Rights Act of 1964 (Title VII), prohibiting discriminatory discharge based on race, color, religion, sex, or national origin; the Age Discrimination in Employment Act of 1967 (ADEA), prohibiting discriminatory discharge against employees of forty years of age or older; the Pregnancy Discrimination Act of 1974 (PDA), prohibiting discriminatory discharge based on pregnancy; and, the Americans with Disabilities Act of 1990 (ADA), prohibiting discriminatory discharge based on disabilities. State anti-discrimination statutes generally broaden the scope of these statutes, but ultimately cover the same ground for a dismissal: discrimination.

In general, to the extent it can be said that anti-discrimination statutes have modified the at-will relationship, protecting private-sector employees against arbitrary dismissal, anti-discrimination statutes rather constitute what is a *bad* cause for dismissal. Also, the shift of burden as accepted by the US Supreme Court did not change the at-will status of the private-sector employees. Under the *McDonnell Douglas test*, employers have to bring forward a legitimate, non-discriminatory reason. The latter, however, does not need to constitute just cause. It merely needs to be a reason that does not fall within the statute's definition of discrimination.

13.4 State statutory law

With the Wrongful Discharge From Employment Act of 1987 (WDFEA), Montana became the first, and is so far, the only state in the United States to provide just cause protection for (non-bargaining unit) private-sector employees. At first sight, the good cause standard under the WDFEA appears to constitute an equivalent of a just cause standard, as is common in collective bargaining agreements. In practice, the WDFEA leaves workers with less just cause protection than generally assumed. First, Montana still protects a good-faith employer, being the sole judge to decide on managerial decisions. Second, surveys show that blue-collar workers, in effect, lack just cause protection under the WDFEA. Whereas the Act offers private-sector employees the possibility of arbitration, in practice, when an employee makes an offer to arbitrate and the employer refuses to arbitrate, the employee has no other option than to address the judiciary. In general, blue-collar workers lack financial means to hire counsel on an hourly basis, leaving blue-collar workers, in effect, empty-handed. Therefore, whether private-sector employees – besides those exempted under the Act – can enjoy just cause protection under the WDFEA, *in practice*, is doubtful.

13.5 State common law

In *Petermann (1959),* the California Court of Appeal was the first among state courts to adopt the first common law exception to the at-will doctrine, the public policy exception. This tort action, among others, applies to situations, in which an employee is discharged for refusing to violate a statute, to perform a statutory obligation, to exercise a constitutional or statutory right or privilege, or to report a statutory violation for the public's benefit. From case law derives that the public policy exception does not provide protection against arbitrary dismissal in general, but – like discriminatory grounds – rather constitutes what is a *bad* cause for dismissal.

In *Cleary (1980)*, the California Court of Appeal – again – was the first to hold that the implied covenant of good faith and fair dealing applied in the employment context. Initially, this exception held a promise of protection against arbitrary dismissal in general, requiring good cause for discharge. In *Foley (1988)*, which decision was followed by the majority of jurisdictions, the California Supreme Court, however, refused to interpret the implied covenant of good faith and fair dealing as some form of job security.[857] Moreover, it held that recovery could not be in tort, but only in contract, hence, violation of this covenant could result in contract damages only. Additionally, in *Guz (2000)*, the California Supreme Court further restricted the application of the covenant, referring to the situation only, in which an at-will employee is discharged as a

[857] Holloway and Leech 1993, p. 100.

mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned. The majority of the few states that accepted the covenant of good faith and fair dealing, too, are of the opinion that this exception no longer includes job security.

In *Toussaint (1980),* the Michigan Supreme Court introduced the handbook exception based on the legitimate expectations theory. Under this theory, a just cause provision in a handbook becomes enforceable based upon reliance by the employee. The majority of courts did not follow *Toussaint (1980)*, for not being consistent with contract principles. They preferred to follow the decision of the Minnesota Supreme Court in *Pine River (1983)*, which applied contract principles. Under the unilateral contract theory of the Pine River Court, a handbook provision is considered as a unilateral offer by the employer that is accepted by the employee through continuance of work performance. The weakness of this theory is that job performance, in turn, is also held sufficient to accept a modification of a just cause to an at-will policy. Consequently, after *Toussaint (1980)*, employers started to insert at-will disclaimers in handbooks to negate just cause protection, which are generally considered as valid by courts. Hence, the handbook exception leaves private-sector employees, in practice, with less just cause protection than primarily assumed.

The so-called implied-in-fact (good cause) contract exception under common law offers a more solid basis, in that an at-will disclaimer is considered as just one of the factors to determine the existence of a good cause contract. This new cause of action against wrongful termination was added in *Pugh (1981)*, and affirmed by the California Supreme Court in *Foley (1988)*. In brief, the California Court of Appeal held that under the totality of circumstances – supported by oral assurances, promotions, salary increases, and reliance upon personnel policies and manuals – an employer may discharge an employee with good cause only.

13.6 Conclusion

This part of the thesis examined to what extent private-sector employees in the United States enjoy just cause protection under legislative and judicial exceptions to the at-will rule. The conclusion is that private-sector employees in the United States obtain protection against arbitrary dismissal, however, *not in general*, under the NLRA, federal and state anti-discrimination statutes, and under common law based on public policy grounds. These grounds rather constitute what constitute a *bad* cause for dismissal. Nevertheless, they limit the unfettered right of employers to dismiss employees under the at-will rule. In contrast, private-sector employees who are subject to a collective bargaining agreement, enjoy protection against arbitrary dismissal *in general*. They, however, form a minority of the workforce. Besides, private-sector employees in the state of Montana enjoy just cause protection under the Montana Wrongful

Discharge From Employment Act (WDFEA). In practice, however, this protection appears without effect for blue-collar workers. Also, the handbook exception under common law provides less just cause protection than one primarily assumes. This protection can be simply negated through at-will disclaimers. The implied-in-fact (good cause) contract exception under common law offers a sounder basis. Under this exception, an at-will disclaimer is considered as merely one of the factors, which determines the existence of the good cause contract.

Overall, this Chapter shows that the general thought in the Netherlands that private-sector employees in the United States lack protection against arbitrary dismissal, is unjustified. In fact, this Chapter shows that besides protection against dismissal for bad cause, American courts gradually accept just cause protection, and that in the debate on a Restatement of Law on Employment, just cause protection, too, gains attention. However, it is true that, *in practice*, still, only a minority of workers in the United States enjoy protection against arbitrary dismissal in general.

III DUTCH DISMISSAL LAW

14 Introduction

In this Chapter, I examine to what extent private-sector employees in the *Netherlands* find just cause protection under their system of private dismissal law. I will also pay attention to prohibitions on dismissal (*ontslagverboden*). These in part determine the scope of a just cause for dismissal. In contrast with the United States – which is known for its *at-will* dismissal system, allowing employers to dismiss employees without cause – the Netherlands is known for its *just cause* dismissal system. In fact, the 1945 Special Decree on Labor Relations (*Buitengewoon Besluit Arbeidsverhoudingen* or *BBA 1945*) and Book 7 Title 10 of the Dutch Civil Code (*Boek 7 Titel 10 Burgerlijk Wetboek*) together comprise what is called the *dual* just cause dismissal system.[1]

The outline of this Chapter is as follows. After a description of the legal system of the Netherlands in paragraph 14.1, I will focus on the general sources of employment (termination) law in paragraph 14.2. In paragraph 14.3, I will briefly describe the Dutch rules on employment termination, focusing on (i) the private-sector employee (ii) with an employment agreement for an indefinite period.[2] In the subparagraphs 14.3.1 and 14.3.2, respectively, I will explain these terms. In the subparagraphs 14.3.3 and 14.3.4, I will briefly describe the two routes of employment termination under the dual just cause dismissal system. In subparagraph 14.3.5, I will discuss the prohibitions on dismissal. Subsequently, in the paragraphs 15 to 18, I will examine to what extent private-sector employees in the Netherlands enjoy just cause protection. *First*, I pay attention to the debate that took place in the past in the Netherlands in respect of just cause protection (§ 15.1). *Second*, I will describe the legislative history of the BBA 1945 (§ 15.2), and of Book 7 Title 10 of the Dutch Civil Code (§ 15.3). The reason to first focus on the BBA 1945 – although the Act of the Employment Agreement of 1907, later transformed in Book 7 Title 10 DCC, was enacted earlier – is that it is generally agreed that just cause protection was first introduced through the BBA 1945. *Third*, I will focus on the BBA 1945 as it applies today (§ 16). The emphasis will be on (i) Article 6 of the BBA 1945, requiring that an employer needs prior authorization to unilaterally terminate an employment agreement; (ii) the Dismissal Decree (*Ontslagbesluit*) that applies to the BBA 1945, requiring that a dismissal is justified; and (iii) the CWI Handbook on Dismissal (*Beleidsregels Ontslagtaak CWI*), which aims to establish that the regional offices of the CWI – the Centre for Work and Income, which decides on whether a dismissal is justified – uniformly apply the Articles of the Dismissal Decree.[3] *Fourth*, I will focus on Book 7 Title 10 of the Dutch Civil Code as it applies today. More specifically, I will discuss Article 7:681

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1 Tekst & Commentaar Arbeidsrecht (2006): BBA 1945, Art. 6 Section 1.

2 For a justification of this restriction, see above under § 2.2.

3 For the CWI Handbook on Dismissal, see below under § 16.2.

DCC, providing a rule on a manifestly unreasonable dismissal (§ 17); and, Article 7:685 DCC, allowing employers and employees to address the Cantonal Court to ask for dissolution of the employment agreement based on serious cause (§ 18). Furthermore, throughout this Chapter, I will pay attention to (i) Article 7:669 DCC, which requires that the employer provides an employee with the reason for dismissal; (ii) the rules on employment termination during the probationary period; and (iii) case law that sees to a summary dismissal. The reason to *particularly* focus on Article 6 of the BBA 1945, Article 7:681 DCC and Article 7:685 DCC, is that it is generally assumed that private-sector employees enjoy just cause protection under these Articles. In this Chapter, I will examine whether this assumption is justified.

14.1 The legal system of the Netherlands

Important differences with the United States are (i) the Netherlands, being a constitutional monarchy since 1814; (ii) the Netherlands, having a tradition of great loyalty as regards the ratification of international treaties regarding social issues;[4] and (iii) the influence of European law on Dutch law, the Netherlands being a member of the European Union. Both countries have in *common* that they distinguish between legislative, executive and judicial powers.

14.1.1 Separation of legislative, executive and judicial powers

Legal history[5]

To understand the governmental structure of the Netherlands, we need to go back to the French Revolution of 1789. The Netherlands was a republic then, but on its way to become a monarchy. The establishment of the Dutch Republic of the United Provinces took place in 1579, when seven northern provinces – Holland, Zeeland, Utrecht, Gelderland, Overijssel, Friesland and Groningen – allied themselves in the Union of Utrecht, to which Drente would join later. When they deposed the Spanish King Philip II through de *Plakkaat van Verlatinghe of 26 July 1581*, they became known as the Dutch Republic of the United Provinces. This Dutch 'declaration of independence' again inspired the colonist states of the United States when declaring *their* independency in 1776.[6] The Dutch provinces continued to appoint Stadholders, however.[7] This led to political, legal and fiscal privileges of leading classes in the provinces. Hence, in the second half of the eighteenth century, when the French Revolution started to spread over Western Europe, there was a growing discontent among Dutch citizens. Consequently, after the French invaded the Republic in 1795, Dutch

4 Jacobs 2004, p. 33.

5 For an in-depth discussion on the legal history of the Netherlands, see Van der Pot-Donner 1995, p. 84-120.

6 See above under § 5.1.

7 Taekema 2004, p. 41, 45 and 46; Jacobs 2004, p. 21.

patriots who earlier had chosen exile in France, returned to the Netherlands and proclaimed the Batavian Republic, enforcing a Constitution upon the Republic, modelled after the French.

This Constitution of 1798 was heavily influenced by the ideas of the French philosophers Jean-Jacques Rousseau, proclaiming the sovereignty of the people, and Charles Montesquieu, proclaiming the separation of legislative, executive and judicial powers. The Constitution transferred the sovereignty of the Provinces to the Republic, formally abolishing the Provinces. The 1806 Constitution, in turn, abolished the Republic, turning the Netherlands into a constitutional monarchy, although it still remained under the regime of the French. Napoleon Bonaparte, in fact, appointed his brother Lodewijk Napoleon in 1808 to be the first King of Holland, but called his brother back to France in 1810, at the same time annexing the Netherlands to his French Empire. In 1813, when Napoleon Bonaparte's power began to crumble and the French had left, William of Orange, son of the former Stadholder William V of Orange, was proclaimed Sovereign Prince of the Netherlands. Subsequently, the 1814 Convention established a new Kingdom of the Netherlands and attributed the executive power to King William (of Orange) I. After amendments in 1815, 1840, 1848 and 1983, the Dutch Constitution, as today, still reflects the French influence on the legal system of the Netherlands, i.e. the separation of legislative, executive and judicial powers.[8]

Legislative powers[9]

Under the Dutch Constitution, *legislative* powers are vested in the government and Parliament. The government is formed by the monarch and government ministers, als referred to as the Crown. The Parliament consists of the Upper House (*Eerste Kamer*), and the Lower House (*Tweede Kamer*). The Lower House, consisting of 150 members, directly elected by the people for four-year terms, has the authority to initiate and to amend bills. Members of the government, too, can take the initiative for introducing bills. The Upper House, composed of 75 members, elected by the Provincial Councils (*Provinciale Staten*) for four-year terms, can approve or reject the bill, it cannot initiate or amend legislation. Before a bill becomes law, it first needs approval of the Lower House, followed by approval of the Upper House, and is finalized by the signature of the monarch and the appropriate minister(s). Subsequently, the law becomes enforceable through publication in the Statute Book (*Staatsblad*). The(se) laws, enacted by the government and Parliament, are known as formal statutes (*wetgeving in formele zin*), and together with case law, are considered as

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8 Taekema 2004, p. 50 and 51; Loonstra 2004, p. 285; Jacobs 2004, p. 21. See also below under § 27.2.

9 This part is adapted from an essay written by Van Arkel, in: Van Arkel en Loonstra 2004, p. 12.2-12.3 with permission from International Labor and Employment Laws, Vol. II, Second Edition, copyright © 2004, American Bar Association, published by the Bureau of National Affairs, Inc., Washington, D.C. For an in-depth discussion on the legislative powers, and Parliament in particular, see Bovend'Eert en Kummeling 2000; Van der Pot-Donner.1995, p. 393-436.

the main sources of employment (termination) law.[10] Under the Province and the Municipal Act, the Provincial and the Municipal Council, respectively, have legislative powers. Their laws are known as ordinances.

Executive powers[11]

Under the Dutch Constitution, the *executive* powers are vested in the government. The monarch – by 2007, Queen Beatrice of Oranje Nassau – can do no wrong and the ministers are responsible for government acts. The people can show their influence through Parliament, which has control over the executive powers of the government. In this respect, it is noteworthy to mention that Parliament has (1) the right of questioning: a member of either chamber can question a minister via the chairman; (2) the right of interrogation: at the request of the majority of either chamber, the chamber can ask a minister for information; and (3) the right of inquiry: at the request of the majority of either chamber, the chamber can start an inquiry with regard to an act of a minister. In a province or a municipality, the County Alderman (*Gedeputeerde Staten*) and the Court of Mayor and Aldermen (*College van Burgemeester en Wethouders*), respectively, have executive powers, unless otherwise stated by the Province Act or the Municipal Act.

Judicial powers[12]

The establishment, structure, and competence of the *judicial* branch are regulated by the Dutch Constitution, the Judiciary Act (*Wet op de rechterlijke organisatie*), and the Act on the New Civil Procedure (*Wetboek van Nieuw Burgerlijke Rechtsvordering*), which went into effect on 1 January 2002.[13] Under the Constitution, the members of the highest judicial body, the Netherlands Supreme Court (*Hoge Raad*), are appointed for life by royal decree, however, they can be dismissed upon request. The members are chosen from a list of recommendations prepared by Parliament. Under the Constitution and the Judiciary Act, the civil court system consists of – in order from lower to higher courts – 59 'District Courts, Cantonal Sections', hereafter referred to as

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10 For employment (termination) law, see further below under § 14.1.2.

11 Parts have been adapted from an essay written by Van Arkel, in: Van Arkel en Loonstra 2004, p. 12.3-12.4 with permission from International Labor and Employment Laws, Vol. II, Second Edition, copyright © 2004, American Bar Association, published by the Bureau of National Affairs, Inc., Washington, D.C. For an in-depth discussion of executive powers, see Van der Pot-Donner 1995, p. 350-392.

12 Parts have been adapted from an essay written by Van Arkel, in: Van Arkel en Loonstra 2004, p. 12.4 and 12.11-12.13 with permission from International Labor and Employment Laws, Vol. II, Second Edition, copyright © 2004, American Bar Association, published by the Bureau of National Affairs, Inc., Washington, D.C. For an in-depth discussion of judicial powers, see Van der Pot-Donner 1995, p. 437-453.

13 The Act on the New Civil Procedure has been amended by Act of 8 September 2005, Stb. 2005, 455, which amendment(s) went into force on 15 October 2005, Stb. 2005, 484.

Cantonal Courts (*Kantongerechten*), 19 District Courts (*Rechtbanken*), five Courts of Appeal (*Gerechtshoven*), and one Supreme Court in the Hague, which serves as the highest court for the Kingdom of the Netherlands.[14] Cantonal Courts have exclusive jurisdiction in employment and labor cases. Hence, private-sector employees must file their claims with the Cantonal Court. If parties do not agree with its decision, they can, unless restricted by law, appeal to the Court of Appeal, and ultimately, they can file for review with the Netherlands Supreme Court. In summary proceedings, a judge of the District Court, either of the Cantonal or Civil Section, decides on employment (termination) cases (*Voorzieningenrechter*), with the possibility of appeal to the Court of Appeal, and ultimately the Netherlands Supreme Court.

A review by the Netherlands Supreme Court is possible on limited grounds only, and the facts cannot be reviewed. Unlike the United States, the Netherlands Supreme Court does not have discretionary authority to grant or refuse review, but in civil cases *must* do so when the request meets the 'technical' requirements of Article 398 of the Act on the New Civil Procedure. In brief, the plaintiff must have exhausted all forms of appeal. When the Netherlands grants review, it can issue a new decision or refer the case to the appellate court. The latter then must issue a new decision, and will take the decision of the Netherlands Supreme Court into consideration, although, formally, the principle of *stare decisis* does not apply. Unlike the US Supreme Court, the Netherlands Supreme Court is not allowed to a constitutional review of treaties and formal legislation. It *can* review the constitutionality of lower legislative instruments.[15] The Netherlands also does not have a jury system.

14.1.2 Labor and employment (termination) law

In general, employment law, covering private-sector employees, compromises the fields of employment agreement law (*arbeidsovereenkomstensrecht*), workers' representation law (*medezeggenschapsrecht*), employment termination law or dismissal law (*ontslagrecht*), and collective bargaining law (*CAO-recht*). The latter generally is referred to as labor law. Employment law (*arbeidsrecht*) together with social security law (*sociaalzekerheidsrecht*), are generally referred to as 'social law' (*sociaal recht*).

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14 Together with the Netherlands Antilles and Aruba, the Netherlands forms the Kingdom of the Netherlands. As from 1 July 2007, the Netherlands Antilles will be dismantled. As from then Curaçao and Sint Maarten – like Aruba – gain a status aparte on the one hand, and Bonaire, Sint Eustatius and Saba become municipalities (*gemeenten*) of the Netherlands on the other.

15 Taekema 2004, p. 87. See also Jacobs 2004, p. 38 and 39.

Labor law

For this thesis, the following labor acts, covering private-sector employees, are relevant (1) the Collective Labor Agreement Act (WCAO or *Wet op de collectieve arbeidsovereenkomst*); and (2) the Act on Administrative Extension and Non-Extension of Collective Labor Agreements (Wet AVV/OVV or *Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*).[16]

With regard to collective bargaining agreements, the Central Office of the Labor Inspectorate (*Arbeidsinspectie*) plays an important role. It is part of the Ministry of Social Affairs. Collective bargaining agreements that are new, altered, or terminated must be reported to the Central Office. In this way, the government stays informed on the process and contents of collective bargaining agreements, which is important in forming its social policy. Unlike unions in the United States, unions deliberate with the government, in reaching compromises, known as the *poldermodel*.[17] In this respect, reference is often made to the *Akkoord van Wassenaar* of 1982, in which the government and unions reached a consensus on wage restraint for employees in combating the negative effects of the Second Oil Crise.[18] By 2007, union membership in the Netherlands is about twenty-six percent.[19] To explain the low grade of unionization, Jacobs, among others, point at the low grade of unionization among new professions, part-time workers, the flexible labour force, young employees, female workers and migrant workers.[20]

Employment law

For this thesis, the following acts, covering private-sector employees, are relevant in respect of employment termination (1) the BBA 1945 (*Buitengewoon Besluit Arbeidsverhoudingen 1945* or 1945 Special Decree on Labor Relations), regulating individual and collective dismissals; (2) Book 7 Title 10 of the Dutch Civil Code (*Boek 7 Titel 10 Burgerlijk Wetboek*), regulating the indvidual relationship including individual dismissals; (3) Books 3 and 6 of the Dutch Civil Code (*Boeken 3 en 6 Burgerlijk Wetboek*), covering patrimonial law (*vermogensrecht*) and the law of obligations (*verbintenissenrecht*), respectively;

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16 For these Acts, see above under § 7.1. For a discussion of these and other sources of labor law, see Jacobs 2004, p. 32-39. In the Netherlands, the most important trade union confederations are the FNV, CNV and MHP. The most important employers' associations are the VNO-NCW, Vakcentrale MKB Nederland (small and medium-sized businesses), and the Vereniging LTO Nederland (agricultural).

17 Jacobs 2003, p. 78 and 79.

18 See Jacobs 2006, p. 27 and 28; Nagelkerke en De Nijs 2006. The *Akkoord van Wassenaar*, too, is considered as the starting point of the process of decentralization. See EK 1999-2000, No. 222a, *Notitie (zelf) regulering*, p. 3.

19 *Centraal Bureau voor de Statistiek* or *CBS* (Netherlands Bureau of Statistics).

20 Jacobs 2004, p. 130 and 131. For the development of labor law in the Netherlands, see De Jong 1975, p. 150-183; Stege 2004, p. 11-61.

and (4) the WMCO (*Wet Melding Collectief Ontslag* or Collective Redundancy Notification Act), regulating collective dismissals, which involve 20 or more employees within a CWI-district.

14.2 General sources of employment (termination) law

Besides national law, which will be discussed in-depth in the paragraphs 15 to 18, international law is considered as an important source of Dutch employment termination law. It stands on the highest level in the Dutch hierarchy of sources of law.[21] Subsequently, international law finds its way into national law through the articles 93 and 94 of the Dutch Constitution. In contrast, *European Community Law*, formally being part of international law, finds its way into national law through case law of the European Court of Justice (*Europees Hof van Justitie*). In this Section, I will briefly pay attention to these sources of Dutch employment (termination) law. First, I briefly pay attention to national law in subparagraph 14.2.1, followed by a more in-depth discussion of international law in general in subparagraph 14.2.2, and of European Community Law in particular in subparagraph 14.2.3. In the subparagraphs 14.3 and 14.4, respectively, I will briefly discuss international and national law with respect to just cause protection. An in-depth examination on the extent of just cause protection of private-sector employees in the Netherlands takes place in the paragraphs 15 tot 18.

14.2.1 National law

The most important national sources of employment termination law are (1) the BBA 1945, and (2) Book 7 Title 10 of the Dutch Civil Code, preceded by the Act of the Employment Agreement of 1907. The Civil Code has been interpreted by civil courts, and Cantonal Courts in particular, which brings me to the next important source of employment termination law, case law. Most important are the decisions of the Netherlands Supreme Court, however. These are binding on lower courts, although, as mentioned above, in the Netherlands, formally, the principle of *stare decisis* does not apply.[22]

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21 See below under § 14.2.2.1. See also Jacobs 2004, p. 38 and 39.

22 Brouwer e.a. 2004, p. 611 and 612; Taekema 2004, p. 68 and 69. For the term *stare decisis*, see above under § 5.2.2.

14.2.2 International law

14.2.2.1 The moderate monistic system of the Netherlands

In the Netherlands, the government is under an obligation to respect *labour* standards generally by virtue of its membership of the United Nations, the International Labour Organization, the Council of Europe,[23] and the European Union.[24] Whether the standards of these organizations must be implemented by the legislature of member states, or automatically becomes part of national law, is dependent on what constitutional law determines. In this respect, one, in general, distinguishes between a dualistic or monistic system. Under a dualistic system – e.g. the United Kingdom of Great Britain and Northern Ireland – treaties and national law are two distinctive legal orders. Hence, a treaty does not automatically become part of national law. Consequently, citizens can invoke rights under this treaty only after its standards have been translated into national law through *legislative* action. Under a monistic system, the treaty becomes automatically part of national law, hence, does not require legislative action.[25]

For example, the United States has a monistic system. Article VI of the US Constitution, the so-called Supremacy Clause, determines that federal law – including treaties, standing on the same level as federal law – made in pursuance of the US Constitution is 'the supreme Law of the Land' and that 'Justices in every State shall be bound thereby'.[26] Consequently, after a treaty has been submitted to and approved by two-third of the states and approved by Congress and the President, a treaty in the United States, *in principle*, becomes part of national law. As Judge Marshall correctly states

> 'It is consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.'

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23 The European Council should not be confused with the – Council of the – European Union. The Council of Europe was the first international organization to be founded in Europe, partly inspired by a Winston Churchill speech in 1946. Established in 1949, its core mission is to strengthen democracy throughout its member states through setting and monitoring legally enforceable standards, notably in the field of human rights. It has more members than the European Union (46 versus 25), again fewer members than the ILO. See also Gerard Quinn, *The European Union and the Council of Europe on the Issue of Human Rights*, 46 McGill L.J. 849 (2001).

24 It bears mentioning, that together with the Netherlands Antilles and Aruba, the Netherlands forms the Kingdom of the Netherlands. The Netherlands only is part of the European Union. However, as from 1 July 2007, the Netherlands Antilles will be dismantled. As from then Curaçao and Sint Maarten – like Aruba – gain a status aparte on the one hand, and Bonaire, Sint Eustatius and Saba become municipalities (*gemeenten*) of the Netherlands on the other. Hence, as from 1 July 2007, European law, in effect, probably will apply to Bonaire, Sint Eustatius and Saba as well, being part of the Netherlands. Also, it is possible that all will gain the so-called status of '*ultraperifere regio*' within the European Union.

25 Burkens e.a. 1997, p. 301 and 302; Kooijmans 2002, p. 82-84.

26 Leary 1982, p. 44 and 45. See also above under § 5.2.1.1.

However, Marshall continues

> '(…) when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the policital, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.'[27]

Put differently, treaties in the United States exist which are *not* self-executing.[28]

The distinction between a dualistic and monistic system, in other words, is not black and white. In fact, the Netherlands has a so-called *moderate* monistic system.[29] In brief, a treaty in the Netherlands gets into force after explicit or implicit approval of Parliament and ratification by the government.[30] In general, the Dutch government intends to first implement the standards and than to ratify.[31] Hereupon, the 'automatic' incorporation of international law into national law takes place through the Articles 93 and 94 of the Dutch Constitution. These Articles determine that treaty provisions which are binding on anyone, have binding effect and priority over national law.[32] Consequently, Dutch citizens can call upon these provisions before the national court.

Citizens may call upon ratified treaty provisions, which have not (yet) been implemented, e.g. provisions addressed to the (member) states. This may turn out successful, in that Dutch courts recognize self-executing standards in treaties,[33] allowing private parties to invoke ratified standards without (yet) being translated into national law. Whereas national courts only can decide whether standards are self-executing, a uniform answer to the question whether standards are self-executing, thus, cannot be given.[34] On the other hand, as Jacobs correctly states, when the Dutch government does not want standards of a treaty applied by national courts without yet being implemented, the state government should not ratify it.[35] As may be clear, under a dualistic system,

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27 *Foster v. Neilson (1829)*, 27 U.S. 253, 314. See also Vierdag 1995, p. 118.

28 Burnham 1995, p. 38.

29 Burkens e.a. 1997, p. 303; Kortmann 2001, p. 173; Kooijmans 2002, p. 86.

30 For an in-depth discussion on the closure, enforcement, and termination of treaties under Dutch law, see Vierdag 1995; Burkens e.a. 1997, p. 306-310; Kortmann 200, p. 163-171; Kooijmans 2002, p. 90-109.

31 Leary 1982, p. 30.

32 For an in-depth discussion on the Articles 93 and 94 of the Dutch Constitution, see Vierdag 1995, p. 115-124; Kortmann 2001, p. 173-179. See also Leary 1982, p. 65-67; Jacobs 1985, p. 11-13; Burkens e.a. 1997, p. 303 and 304; Van Dooren 1997, p. 104-113; Betten 1993, p. 382 and 383; Kortmann 2001, p. Burger 1998, p. 2003.

33 Van der Heijden 1999b, p. 36 – with reference to Jacobs – referring to GH Den Bosch 16 januari 1974, NJ 1974, 229. For cases in which the existence of self-executing standards was explicitly overruled, see Pres.Rb. Den Haag 19 december 1980, NJCM-Bulletin 1981, p. 412; Pres. Rb. Den Haag 21 januari 1982, NJ 1984, 487.

34 Van der Heijden 1999b, p. 35.

35 Jacobs 1985, p. 53.

self-executing standards cannot exist, i.e. standards need legislative incorporation first before citizens are able to call upon these standards.[36]

One of the most famous cases in respect of self-executing standards in the field of Dutch employment (termination) law is the *NS*-case. In 1961, the Council of Europe adopted the *European Social Charter*.[37] The Netherlands ratified it in 1978; it entered into force in 1980. In question was, whether employees could directly call upon its standards, which were addressed to its (member) states, rather than to its citizens. The decision of the Netherlands Supreme Court in the *NS*-case was groundbreaking. In *HR 30 mei 1986, NJ 1986, 688 (NS)*, the Netherlands Supreme Court recognized the (self-executing) right to strike for Dutch employees under Section 6.4 of the ESC, which holds the right to engage in collective action.[38]

Unlike the European Social Charter, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted by the Council of Europe in 1950 to stimulate economic and social progress, is considered as self-executing, meaning that citizens can directly rely upon provisions of this Convention.[39] In effect, it embodies obligations, already provided for in the *Universal Declaration on Human Rights* of the United Nations of 1948,[40] however, being a promotional instrument only,[41] holding civil, political, economic, social and cultural rights.[42] In contrast, the UN Covenants of 1966 are binding, i.e. the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.[43] The Netherlands ratified both.[44] With respect to the first, Article 26 has proven to be particularly interesting for employment (termination) law. This Article determines that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.[45] Finally, ILO Conventions may cover the same rights as the UN Covenants.[46] The difference is that ILO Conventions provide in a more specific and detailed manner for the practical implementation at the national level of the series of

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36 See also Burkens e.a. 1997, p. 302.

37 For the ESC, see Jenks 1960, p. 15; Swepston 2001, p. 141.

38 For an in-depth discussion of this case, see Loonstra and Zondag 2006, p. 275 and 276.

39 Nollkaemper 2004, p. 422.

40 For the UN Universal Declaration on Human Rights, see Davidson 2002, p. 1; Swepston 1994, p. 17 and 18; Valticos 1998, p. 137.

41 Jenks 1960, p. 13 and 15; Brownlie 1998, p. 68 and 69.

42 Valticos 1998, p. 138.

43 Swepston 1994, p. 17 and 18.

44 Valticos 1998, p. 140; Van Roozendaal 2001, p. 70 and 71.

45 See HR 13 januari 1995, NJ 1995, 430, JAR 1995/35 (*Codfried/ISS*).

46 Valticos 1998, p. 138-140, further points at Articles in the Covenant which – like other ILO Conventions – apply to occupational safety and health; weekly rest, limitation of hours of work and holidays with pay; maternity protection. In this respect, see also Van Roozendaal 2001, p. 70 and 71.

principles, embodied in more general terms in the UN Covenants.[47] The Dutch government, too, aims to implement its standards into national law before ratifying the Convention.[48] However, it may occur that citizens call upon ratified standards, which have not (yet) been implemented. Reference can be made to a case of 1996 in which the highest Netherlands Court on Social Security (*Centrale Raad van Beroep* or *CRvB*) needed to decide on the standards of the ratified Conventions Nos. 102 and 103 on Social Security and Maternity Protection,[49] respectively, which were not yet implemented. The Court concluded that the standards in question were self-executing, due to their formulation and imperative character in light of providing minimum social standards.[50] However, in 1995, the Netherlands Supreme Court with regard to ILO Convention 143 on Migrant Workers did not consider a standard as self-executing, because of its programmatic character.[51] In general, so-called programmatic or instructional norms are considered to serve as binding legal obligations for member states only, hence, do not intend to give individual parties the right to invoke the provision before the national court.[52] In 2003, the Netherlands Court on Social Security, nonetheless, with regard to ILO Convention No. 118 on Equality of Treatment (Social Security) of 1962 considered such a standard as self-executing, based on the findings of the Committee of Experts.[53]

14.2.2.2 The (distinctive) legal order of European Community Law

European Union

The Netherlands is a member of the European Union. The latter is built upon the former European Economic Community, established by the Benelux countries (Belgium, the Netherlands, and Luxembourg), the Federal Republic of West Germany, France and Italy through the signing of the Treaty of Rome in 1957. Other countries have since joined this treaty. By 2007, there are 27 member states joining the European Union.[54] The change in name from European

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47 Valticos 1998, p. 140.

48 TK 1994-1995, TK 23 900 XV, No. 44, p. 8.

49 This Convention has been revised in 2000. See ILO Convention 183 concerning Maternity Protection.

50 CRvB 10 juli 1996, RSV 1997, 9. See also Van der Heijden 1999b, p. 37.

51 Van der Heijden 1999b, p. 37 and 38. See also Jacobs 1985, p. 50.

52 See also Swepston 1996, p. 114, stating that not all Conventions are framed in terms of obligations on government to ensure the realization of the aims of the instruments, for example, Conventions 87 and 98 speak of 'rights'.

53 CRvB 14 maart 2003, RSV 2003, 114.

54 As from 1957: Belgium, Germany, France, Italy, Luxembourg and the Netherlands; joined by Denmark, Ireland and Great-Britain (as from 1 January 1973); Greece (as from 1 January 1981); Portugal and Spain (as from 1 January 1986); Finland, Autriche, Sweden (as from 1 January 1995); Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Czech Republic (as from 1 May 2004); Bulgaria and Romania (as from 1 January 2007). See also Barents en Brinkhorst 2006,

Economic Community into European Community took place with the Maastricht Treaty in 1992; the change in name from European Community to European Union took place with the Amsterdam Treaty in 1997. The European Community since then has been *part* of the European Union.[55] Hence, the European Union is founded on three pillars '(1) the European Communities, which includes the European Community and Euratom, supplemented by the policies and forms of co-operation which the European Union establishes, namely (2) a common foreign and security policy, and (3) co-operation in the field of justice and home affairs'.[56] The first pillar – also referred to as European Community Law – is important with respect to Dutch employment (termination) law. [57]

European Community Law

The term European Community Law refers to law enacted by the legislative body of the European Community, the Commission, interpreted by the European Court of Justice.[58] From a formal point of view, as Kapteyn and VerLoren van Themaat correctly state, European Community Law belongs to international law. However, due to the distinctive legal order of the European Community, first recognized by the European Court of Justice in *Van Gend & Loos (1963)*, the traditional doctrines of international law do not apply. That is, under international law, the sovereignty of states is respected, in that member states are free under their monistic or dualistic system to decide how they wish to incorporate the treaty in question into national law. In contrast, European Community Law is supranational, meaning that – regardless of whether a country has a monistic or dualistic system – by becoming a member, European Community Law automatically becomes part of national law.[59]

Treaties[60]

The Treaty of Rome of 1957 is an important source of Dutch employment (termination) law. In principle, citizens may directly call upon provisions of this Treaty. However, this is possible only on the condition that the formulation of

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p. 25.

55 Blanpain 2003, p. 41-43; Lauwaars en Timmermans 2003, p. 3-7; Barents en Brinkhorst 2006, p. 22-24.

56 Kapteyn and Verloren van Themaat 1998, p. 45 and 46.

57 See also Lauwaars en Timmermans 2003, p. 11, 54 and 55; Barents en Brinkhorst 2006, p. 22.

58 See also Barents en Brinkhorst 2006, p. 180.

59 HvJ EG 5 februari 1963, zaak 26/62, Jur. 1963, p. 1 (*Van Gend & Loos*), and HvJ EG 15 juli 1964, zaak 6/64, Jur. 1964, p. 1199 (*Costa/ENEL*). For a discussion of these cases, see Van Dooren 1997, p. 104; Kapteyn and VerLoren van Themaat 1998, p. 77-89; Van Nuffel 2000, p. 47; Kooijmans 2000, p. 255 and 256; Van Roozendaal 2001, p. 30; Lauwers en Timmermans 2003, p. 22-31; Van den Brink 2004, p. 1; Prinssen 2004, p. 9-14.

60 I focus on those related to employment (termination) law only. For a discussion on the relationship between economic and social aspects of treaties, see Goudswaard 2006.

the provision in question is sufficiently clear, precise and unconditional.[61] Article 141 (former Article 119), for example, is self-executing and had an important impact on Dutch employment law. This Article that requires equal pay for men and women, performing the same work, resulted in provisions under Book 7 Title 10 of the Dutch Civil Code.[62]

The Maastricht Treaty of 1992, too, introduced social provisions. It, among others, held rules to the establishment of the European Works Council, resulting in the Works Council Directive of 22 September 1994, which has been incorporated into Dutch law by the European Works Council Act (*Wet op de Europese Ondernemingsraad*).[63] Subsequently, the Amsterdam Treaty of 1997 subscribed to the importance of fundamental rights, earlier subscribed to by member states in Straatsburg.[64] The European Top of Nice of December 2000, hereupon, proclaimed the Charter of Fundamental Rights. The Charter holds provisions which are at the heart of labor and employment law, e.g. the rights of freedom and association, non-discrimination and equality between men and women.[65] It was not given a formal legal status, however, hence, adopted as a political declaration only.[66] The latter would change, in that the Treaty establishing a Constitution for Europe in 2004 included the Charter of Fundamental Rights.[67]

Article 30 of the Charter, at present Article II-90 of the European Constitution, is particularly interesting for this thesis. Initially, it held a 'right to protection of termination of employment', which later became 'protection against unjustified dismissal'. It provides that

> 'Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.'

Unlike Article 4 of ILO Convention 158, it does not explicitly require a valid reason for dismissal connected with the employee's capacity or conduct or based on the operational requirements of the undertaking on the one hand, and includes a failure to give a reasonable period of notice on the other.[68] After ratification of the European Constitution by all member states, citizens, in principle, may directly call upon this provision, on the condition that the

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61 See HvJ EG 5 februari 1963, zaak 26/62, Jur. 1963, p. 1 (*Van Gend & Loos*).

62 See Article 7:646 DCC.

63 Council Directive 22 September 1994, Pb L 254 of 30 September 1994, implemented by Act of 23 January 1997.

64 Jacobs 1989, p. 132; Hendrickx 2006, p. 58.

65 Hendrickx 2006, p. 59. For the Charter, see Van Erp en Smits2001, p. 37-46. For a discussion of these rights, see Bercusson 2002.

66 Bercusson 2002, p. 7; Blanpain 2003, p. 35; Barents en Brinkhorst 2006, p. 24; Hendrickx 2006, p. 60.

67 Bercusson, Clauwaert and Schömann 2002, p. 13 and 14; Hendrickx 2006, p. 60 and 61.

68 For an in-depth discussion of article 4 of ILO Convention 158, see below under § 22.

formulation of the provision in question is sufficiently clear, precise and unconditional.[69] Besides, as Bercusson, Clauwaert and Schömann stress, national courts must interpret national laws consistently with European Community Law, which include the rights guaranteed in the Charter incorporated into the Treaty.[70] As this thesis reached its completion, the European Constitution is not (yet) binding. Although the European Constitution was signed by the member states of the European Union on 29 October 2004, it is binding only after ratification by *all* member states, which as today has not (yet) taken place.[71]

Council Directives

Council Directives, enacted by the legislative body of the European Community, are an important source of Dutch employment (termination) law.[72] Citizens may directly call upon Directives, however, against the state only.[73] In brief, Council Directives provide uniform minimum labour standards to be *pre-emptive*, i.e. exceeding national legislation, imposing an obligation on its member states to transform their national laws within a certain time frame.[74] De Wolff refers to the implementation of standards of Council Directives under Dutch labor and employment (termination) law on Parental leave and leave for family reasons (*ouderschapsverlof*),[75] Part-time working (*deeltijdarbeid*),[76] Obligation to inform on working conditions (*informatieplicht arbeidsvoorwaarden*),[77] and Fixed-time work (*bepaalde tijd*).[78] Additionally, one can refer to the Council Directives on Collective redundancies (*collectief ontslag*),[79] Insolvency of the employer (*insolventie*),[80] Transfers of undertakings (*overgang van*

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69 See HvJ EG 5 februari 1963, zaak 26/62, Jur. 1963, p. 1 (*Van Gend & Loos*). See also Bercusson, Clauwaert and Schömann 2002, p. 13 and 14.

70 Bercusson, Clauwaert and Schömann 2002, p. 14.

71 Barents 2002, p. 306; Kapteyn 2004; Jacobs 2005.

72 See also De Ly 2006, 3 and 5.

73 Van der Burg 2003, p. 119 and 120; Prinssen 2004, p. 14-16.

74 See Lauwaars en Timmermans 2003, p. 109. For an in-depth discussion on Directives, see Prinssen 2004; Hofhuis 2006.

75 Council Directive 96/34/EC of 3 June 1996, Pb L 145 of 19 June 1996.

76 Council Directive 97/81/EC of 15 December 1997, Pb L 14 of 20 January 1998.

77 Council Directive 91/533/EEC of 14 October 1991, Pb L 288 of 18 October 1991.

78 Council Directive 99/70/EC of 28 June 1999, Pb L 175 of 10 July 1999.

79 Council Directives 75/129/EEC and 92/56/EEC replaced by 98/59/EC of 20 July 1998, Pb L 225 of 12 August 1998.

80 Council Directive 80/987/EEC amended by Directive 2002/74/EC (Parliament and Council) of 23 September 2002, Pb L 270 of 8 October 2002.

ondernemingen),[81] Posting of workers (*detachering*),[82] and Equal treatment in employment and occupations (*gelijke behandeling in werk en beroep*).[83]

European case law

Preliminary rulings (*prejudiciële beslissingen*) of the European Court of Justice, interpreting Council Directives, too, affect Dutch employment (termination) law. Under the Treaty of Rome of 1957, the European Court of Justice was given the authority to issue these preliminary rulings.[84] In principle, these rulings must be requested by courts of EU member states, which must apply the decisions of the European Court of Justice without modification or distortion.[85] A recent (Dutch) case in respect of employment law has been regarding an allowance in lieu of the minimum period of paid annual leave of four weeks. The Netherlands Ministry of Social Affairs and Employment held that leave days, statutory as well as non-statutory, saved up from *previous years* exceed the minimum leave entitlement and can, therefore, be eligible for redemption. The European Court of Justice, however, held that the Ministry was wrong, in so far it concerned statutory leave days. It held that the entitlement to paid annual leave is an important principle of Community social law, and that according to this principle workers must be entitled to actual rest, with a view to ensuring effective protection of their safety and health. Only when the employment relationship is terminated, payment of an allowance in lieu of paid annual leave is permitted.[86]

An important recent case in the field of employment termination law is *Mangold (2005)*. In this case, a German employee alleged he had been discriminated based on age. The European Court of Justice held that the principle of non-discrimination on grounds of age is a general principle of European Community Law. It continued that member states, nonetheless, might provide for differences of treatment and to consider them non-discriminatory, if they are justified objectively and reasonably by a legitimate aim. However, the means to achieving such objectives must be appropriate and necessary. The European Court of Justice held that the German law in question authorizes, in principle, without restriction, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. The Court recognized that the purpose of this legislation is plainly to promote the integration into working life of unemployed older workers, in so far as they encounter

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81 Council Directive 77/187/EEC and 98/50/EC replaced by 2001/23/EC of 12 March 2001, Pb L 82 of 22 March 2001.

82 Directive 96/71/EC (Parliament and Council) of 16 December 1996, Pb L 18 of 21 January 1997.

83 See also Blanpain 2003.

84 Van der Burg 2003, p.145 and 146.

85 For an in-depth discussion of the procedures with the European Court of Justice, see Kapteyn en Verloren van Themaat, p. 249-292; Lauwaars en Timmermans 2003, p. 79-81 Barents en Brinkhorst 2006, p. 219-265.

86 See HvJ EG 6 april 2006, C-124/05, JAR 2006/102 (*Staat der Nederlanden/FNV*).

considerable difficulties in finding work. An objective of that kind justifies, as a rule, 'objectively and reasonably', a difference of treatment on grounds of age. However, a provision of national law such as that contained under German law, goes beyond what is appropriate and necessary to attain the legitimate objective pursued. According to the Court, application of the national legislation at issue leads to a situation in which all workers who have reached the age of 52, without distinction, whether or not they were unemployed before the contract was concluded and whatever the duration of any period of unemployment, may lawfully, until their retirement, be offered fixed-term contracts of employment, which may be renewed an indefinite number of times. This significant body of workers, determined solely on the basis of age, is thus in danger, during a substantial part of its members' working life, of being excluded from the benefit of stable employment which constitutes a major element in the protection of workers. Hence, the German law was considered to be in violation of the principle of non-discrimination.[87]

14.3 International law and just cause protection

In this thesis, I focus on Article 4 of ILO Convention 158. One may wonder why I do not focus on the just cause standard of Article 24 of the (revised) European Social Charter of 1996 that, in contrast with Article 4 of ILO Convention 158, is binding for the Netherlands.[88] In fact, the text of Article 24 *sub a* of the Charter is virtually similar to that of Article 4 of ILO Convention 158. More specifically, it determines that

> 'With a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise: (a) the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; (b) the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief. To this end the Parties undertake to ensure that a worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body.'

The reason to focus on Article 4 of ILO Convention 158, instead, is that both the United States and the Netherlands are members of the ILO, which makes the just cause standard of ILO Convention 158 a perfect gauge to compare just cause protection under American and Dutch dismissal law.[89] The United States is not a member of the Council of Europe.

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87 See HvJ EG 22 november 2005, C-144/04, JAR 2005/289 (*Mangold*)

88 The revised European Social Charter went into force on 1 July 1999. See Trb. 2004, 13, G. The Netherlands signed the Revised Charter on 23 January 2004 (Trb. 2004, 13 and 14), and ratified it on 3 May 2006 (see www.coe.int).

89 The United States is not a member of the European Union and/or the Council of Europe.

Moreover, Article 4 of ILO Convention 158, in effect, has inspired Article 24 of the (revised) European Social Charter of 1996. From its Memorandum of Explanation on the Enforcement, it can be derived that Article 24 is extracted from article 4 of ILO Convention 158.[90] Article II-90 of the European Constitution,[91] in turn, refers to Article 24. Hence, it is *implicitly* extracted from Article 4 of ILO Convention 158. In fact, in literature, too, one consistently states that Article 4 of ILO Convention 158 inspired Article II-90 of the European Constitution.[92] This now brings me to a discussion of the Dutch rules on employment termination in respect of just cause protection, to be gauged against Article 4 of ILO Convention 158 in the *next* Chapter.

14.4 National law and just cause protection

14.4.1 Private-sector employees

In the Netherlands, the majority of private-sector employees are hired by employers for an indefinite period of time.[93] Unlike private-sector employees, the government, i.e. the state, province or municipality, appoints public employees. Usually, they are hired for an indefinite period as well.[94] To these employees the General Public Employee Regulation (*Algemeen Rijksambtenarenreglement* or ARAR) applies. This Regulation holds *limited* reasons for dismissal.[95] However, this dismissal system is less limited than appears at first sight,[96] in that it, too, includes the possibility to dismiss a public employee based on *other serious grounds*, e.g. breach of trust ('incomptabilité des humeurs').[97] On a total of approximately 16 million inhabitants, the *independent* – employed and unemployed[98] – workforce in the Netherlands amounts to approximately 6.5 million workers: about 4 million persons work in the private, and 1 million in the public sector. The remainder works in the so-called *g-and-g-sector*, i.e. the field of healthcare and welfare (state subsidized establishments or *gepremieerde en gesubsidieerde sector*), or is unemployed.[99]

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90 See Tractatenblad 2004/13, Memorie van Toelichting, p. 31.

91 Previously, article II-30: see version of the Draft European Constitution, October 2004.

92 Bruun 2002, p. 63.

93 For the definition of an employment agreement on the basis of Art. 7:610 DCC – either for an indefinite or definite period –, see below under § 14.4.2.

94 Korteweg-Wiers 1998, p. 172; Mulder 2002, p. 31 and 36; Lanting 2002, p. 64. For those who are appointed for a definite period, the ARAR determines that the employment automatically expires after the expiry date. Lanting 2002, p. 64.

95 Recently, again, there is a discussion on whether public employees should have a distinctive dismissal system. See Velo 2006.

96 For the various dismissal systems, see above under § 1.1.2.

97 Mulder 2002, p. 36-38 and 48-50. See also Korteweg-Wiers 1998, p. 172-174.

98 In 2004, about 500,000 persons.

99 Verhulp 2002, p. 19 and 20; Loonstra en Zondag 2004, p. 21 and 22.

The term *private-sector* employees in the Netherlands refer to those who work on the basis of a verbal or written employment agreement. Article 7:610 DCC defines an employment agreement as

- an agreement by which one party, the employee, commits himself;
- to perform work;
- in service of the other party, the employer;
- in exchange for payment;
- for a period of time.[100]

Additionally, Article 7:659 DCC determines that the work has to be performed by the employee in question, unless parties agree upon otherwise. In practice, the requirements under Article 7:610 and Article 7:659 DCC meet few difficulties, with one exception: the requirement of subordination (*gezagsverhouding*).[101] In respect of the latter, the Netherlands Supreme Court assumes an employment agreement to exist when (a) the employer is entitled to give instructions to the employee; and/or (b) the working conditions of the employee are similar to those working with the employer on the basis of an employment agreement.[102] The existence of an employment agreement is important, because it functions as an entrance ticket to employment (termination) law and social security law. For example, when a contract between parties can be qualified as an employment agreement, the dual just cause dismissal system applies to the employee.[103] However, an employer may want to avoid these rules. Generally, the employer will do so by qualifying the contract as a contract for services (*opdracht*) according to Article 7:400 DCC, or a contract for work (*aanneming van werk*) according to Article 7:750 DCC.[104] The name given to the contract by parties is not determinative, however.[105] The Netherlands Supreme Court is the ultimate arbiter to decide on the designation,

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100 Loonstra 1998, p. 39-41; Loonstra en Zondag 2004, p. 79-84.

101 In the Netherlands, the requirement of subordination has been point of discussion since 1909, the year the Act of the Employment Agreement of 1907 went into force. See Jansen en Loonstra 1990, p. 363 and 364; Loonstra 1990, p. 36-41. In other countries it has been an issue as well. For Belgium, Germany and Great-Britain, see Loonstra en Zondag 2001. For the United States, see above under § 7.3.2.

102 Important cases in this respect are (a) HR 14 juni 1991, NJ 1992, 173 (*Kruis/Christelijk Gereformeerde Kerk*), and; (b*)* HR 14 november 1997, NJ 1998, 149; JAR 1997/2633 (*Groen/Schoevers*). For an overview of case law with regard to the existence of an employment agreement, see Loonstra 1990, p. 41-46; Loonstra en Zondag 2004, p. 79-91 (hereto I add: HR 10 december 2004, JAR 2005/15, JIN 2005/51 m.n. CJL (*Diosynth BV/Groot*)). See also Jacobs 2004, p. 47; Loonstra 2005b. For cases in the period 1909-1942, see Jansen en Loonstra 1990, p. 364, footnotes 27 and 30.

103 Meijers 1972, p. 1030; Asscher-Vonk 1996, p. 289.

104 Loonstra en Zondag 2004, p. 84-86.

105 See HR 8 april 1994, NJ 1994, 704, JAR 1994/94 (*Agfa/Schoolderman*); HR 10 oktober 2003, JAR 2003/263 (*Van der Male BV/Den Hoedt*).

i.e. the existence of the employment agreement, based on the surrounding facts and circumstances.[106]

It bears mentioning that the Flexicurity Act of 1998 (*Wet Flexibiliteit en zekerheid*) that went into force on 1 January 1999,[107] brought about a significant change for temporary workers (*uitzendkrachten*) and others, working on the basis of a triangular working relationship. As from 1 January 1999, these workers under the new Article 7:690 DCC, gained the status of employees as defined in Article 7:610 DCC. Moreover, Article 7:691 DCC provides these so-called Article 690-employees with a special – flexible – regime, which applies to these workers only.

The Flexicurity Act of 1998, too, brought about a significant change for contingent workers in general (*flexibele arbeidskrachten*). Based on a new Article 7:610a DCC, a working relationship is assumed to be an employment agreement if someone has been working for salary for a principal during a period of three months, either weekly – this can be as little as a day a week –, or at least 20 hours a month. Moreover, the Flexicurity Act of 1998 brought about another significant change for workers on call (*oproepkrachten*). Under a new Article 7:628a DCC, a worker on call must be paid salary for a minimum of three hours even though the job lasts less than three hours. Entitlement to three hours is when parties agreed upon a working relationship of less than 15 hours a week, without specifying the working times, or if the total number of working hours remained unclear.

14.4.2 An employment agreement for an indefinite period

In discussing the basic rules on employment termination for an indefinite period, one first needs to understand the rules on employment termination that apply to an employment agreement for a definite period. The reason is that contracts for a definite and indefinite period interact. As regards employment agreements for a *definite* period, the basic rule is relatively simple. In principle, this contract expires automatically after the date set by parties. An employer may not terminate the employment agreement prior to the expiry date. The employer who does, becomes liable. Only in the following cases the employment agreement can end in between, without the employer being liable (i) through the death of the employee; (ii) when mutually agreed upon by parties;[108] or (iii) through a

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106 Loonstra 1998, p. 39; Loonstra en Zondag 2004, p. 86-91; Verhulp 2005; Loonstra 2005b.

107 Stb. 1998, 300 and Stb. 1998, 332.

108 If an employer states that an employment agreement for a definite or indefinite period has expired through mutual consent and the employee is in denial, the employment agreement remains in place when the employer *fails* to show that the – verbal or oral – statement of the employee is clear and unambiguous in this respect. Moreover, case law imposes a duty of investigation on the part of the employer, and awareness – and a period of reflection – on the part of the employee. Consequently, so long as the employee is prepared to perform work, the employee is entitled to salary. In this respect, see HR 14 januari 1983, NJ 1983, 457 (*Hajziani/Van Woerden*), HR 12 september 1986, NJ 1987,

valid condition subsequent (*ontbindende voorwaarde*).[109] Moreover, on the basis of Article 7:667.3 DCC, parties can insert a provision in their contract, i.e. agree in writing that the employer and the employee may terminate the employment agreement prior to the expiry date. Still, the employer needs permission of the CWI under the BBA 1945. Parties, too, can ask the Cantonal Court to dissolve the employment agreement before the expiry date.[110] *Unlike* employment agreements for a definite period, the basic rule for an employment agreement for an *indefinite* period is that an employer *cannot* unilaterally terminate the agreement than (i) with consent of the CWI; or (ii) through a decision of the Cantonal Court, dissolving the employment agreement.[111] *Like* employment agreements for a definite period, the employment agreement for an indefinite period ends automatically (i) through the death of the employee; (ii) when mutually agreed upon by parties; or (iii) through a valid condition subsequent.

As mentioned above, the rules on employment termination, applying to an employment agreement for a definite and an indefinite period interact. As from 1 January 1999, a new Article 7:668a DCC determines that the third employment agreement for a *definite* period automatically converts into an employment agreement for an *indefinite* period when parties have concluded four contracts for a definite period, with a time frame of no more than three months in between. When an employment agreement – or more agreements – for a definite period exceed the three-year maximum the employment agreement, too, automatically converts to an employment agreement for an indefinite period.[112] Article 7:668a.5 DCC determines that a collective bargaining agreement can set aside these rules. For example, Article 5.4 (b) of the Collective Bargaining Agreement for the Hotel and Catering Industry (*Collectieve arbeidsovereenkomst voor het Horeca- en aanverwante bedrijf*) of 1 July 2005 to 31 March 2008 determines that parties can agree upon *six* contracts for a definite period with a maximum time frame of *one* month in between; second, it contains a *five*-year maximum, including the periods in between with a maximum time frame of *one* month in between, instead of a three-year maximum, before the employment agreement converts to an employment agreement for an indefinite period. For parties, thus, it is important to know whether a collective bargaining agreement applies, as these rules may *set aside* the principal rule under Article 7:668a DCC.

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267 (*Westhoff/Spronsen*), and HR 8 april 1994, JAR 1994/95 (*Van der Laan/LCS*). For more case law, see Loonstra en Zondag 2006, p. 381-385.

109 Conditions subsequent in an employment agreement for a definite or indefinite period are considered *invalid* under law under Art. 7:667(7) and (8) DCC when (i) the conditions stipulate that (a) marriage or registered partnership, and/or; (b) pregnancy or birth will terminate the employment agreement automatically. Conditions subsequent are considered *invalid* under case law when the conditions run counter to the rules that aim to protect an employee against a dismissal. For case law on conditions subsequent, see Loonstra en Zondag 2006, p. 376-379. See also below under § 28.2.1.

110 Loonstra en Zondag 2004, p. 342-356.

111 Loonstra en Zondag 2004, p. 278, 323-342.

112 See Art. 7:668a DCC that was introduced by the Flexicurity Act of 1998 (*Wet Flexibiliteit en zekerheid* or *Flexwe*t).

14.4.3 Dismissal at the initiative of the employer

The *dual* just cause dismissal system became a fact on 15 October 1945, the date the BBA 1945 went into force,[113] because the Act of the Employment Agreement of 1907 already existed. Although the BBA 1945 – as the Preamble explicitly states – was meant to be temporary only,[114] during the parliamentary discussions in 1953, the government decided to maintain the BBA 1945.[115] *Initially*, courts held that an employer needs prior authorization to terminate an employment agreement, after which he could ask for dissolution of the employment. In 1959, the Netherlands Supreme Court ruled otherwise. It decided that an employer could, alternatively, address to the public authority or the Cantonal Court.[116] The employer who wishes to terminate the employment agreement against the will of the employee, thus, has a *choice* between the BBA 1945-procedure and the dissolution procedure, according to the rules as described below.

14.4.4 Permission of the CWI or dissolution by the Cantonal Court

Article 6 of the BBA 1945 requires that an employer needs prior authorization of the Centre of Work and Income (CWI) to unilaterally terminate the employment agreement. According to the Dismissal Decree, this request must be in writing and must state all relevant information, such as the name of the parties, a copy of the employment agreement when in writing, and the justification for the termination.[117] After receipt, the CWI forwards a copy to the employee pointing out the opportunity to respond in writing within two weeks.[118] A Committee on Dismissal (*Ontslagcommissie*) primarily handles the case.[119] The CWI takes into consideration the Committee's findings and the rules of the Dismissal Decree in granting a permit. In practice, employers tend to voluntarily offer a severance payment. Occasionally, the CWI refuses the permit *unless* the employer offers a severance payment to the employee. However, this is more the exception than the rule.[120] In principle, the CWI may not impose

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113 Dienske 1965, p. 5; Kuip 1993a, p. 123 and 124.

114 Kuip 1993a, p. 124, footnote 6.

115 Centraal Sociaal Werkgevers-Verbond 1954, p. 7 and 62.

116 HR 2 april 1959, NJ 1959, 199. See also Loonstra 1996, p. 152 –154; Knegt en Wilthagen 1988, p. 263. For a contrasting view, see Kiewiet1982, p. 372. He argues that Art. 1639w is an exception to the main rule established under Art. 6 of the BBA 1945.

117 For an in-depth discussion on the CWI-procedure, see Van Drongelen en Van Rijs 2003, p. 101-111.

118 See Art. 2:2 of the Dismissal Decree.

119 See Art. 2:5 of the Dismissal Decree.

120 For a discussion of the few cases in which the – offer of a – severance payment has been determinative in either granting or refusing a permit, see Van Marwijk Kooy 1995. See also Koekkoek 1996.

severance payments upon the employer.[121] It may either grant or refuse the permit. In general, the CWI will issue a permit within six to eight weeks after the request is made.[122] The employer can make use of the permit within eight weeks after the date of delivery. Parties cannot appeal from the CWI's decision.[123] Alternatively, the employer can ask the Cantonal Court to *dissolve* the employment agreement. Article 7:685 DCC determines that the Cantonal Court can dissolve an employment agreement based on serious cause. Serious cause embraces either (i) an urgent cause; or (ii) a change of circumstances, based upon which the employment agreement reasonably has to end immediately or on short notice. In case of a *change of circumstances* only, the Cantonal Court is allowed to impose a severance payment. In general, a court decision will be delivered approximately two months after the request is made.[124] The date of the dissolution cannot be retroactive.[125]

The reason(s) why an employer chooses for the BBA 1945-procedure or for a dissolution procedure under Article 7:685 DCC depends on the circumstances of the case. For example, an employer who wishes to terminate an employment agreement based on economic circumstances will want to keep his costs low. He will then address the CWI, because of the low procedure costs and because the CWI cannot impose severance payments.[126] This seemingly 'simple' procedure can become rather complex for two reasons, however, based on which an employer, in turn, may prefer the dissolution procedure to the BBA 1945-procedure. That is, *after* the employer has validly terminated the employment agreement with prior authorization of the CWI, the employee, nonetheless, can address the Cantonal Court to ask for damages,[127] based on a manifestly unreasonable dismissal under Article 7:681 DCC.[128] Second, the BBA 1945-procedure can become complex when the employee initiates a dissolution procedure *besides* the BBA 1945-procedure. This is possible *so long as* the employment agreement exists, hence, regardless of whether the employer has obtained prior authorization to terminate the employment agreement.[129] Another reason for the employer to prefer the *dissolution procedure* to the BBA 1945-procedure is that a decision in a dissolution procedure is delivered on relatively short notice. Moreover, Article 7:685 DCC does not allow parties to appeal from

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121 See Beltzer, Knegt en Van Rijs 1998, p. 12-27 and 83-86; Dienske 1965, p. 51; Overkleeft-Verburg en Roijakkers 1976, p. 18; Beltzer, Knegt en Van Rijs 1998, p. 86.

122 See SZW Ontslagstatistiek 2004, p. 10; Bureau Bartels/SZW 2006, p. 13; Grapperhaus 2006, p. 20.

123 For the CWI-procedure in this respect, see Van Drongelen en Van Rijs 2003, p. 101-111.

124 Jacobs 2004, p. 104; Grapperhaus 2006, p. 20.

125 HR 26 mei 1966, NJ 1966, 345 (*Schmitz/Schrijnemakers*).

126 Jacobs 2004, p. 103 and 104; Research voor Beleid 2000, p. 29.

127 See below under § 17.

128 Jacobs 2004, p. 101 and 102. For case law on a manifestly unreasonable dismissal, see below under § 17.3.

129 The main reason for an employee to initiate a procedure besides the BBA 1945-procedure is to obtain a severance payment under the Cantonal Formula (*Kantonrechtersformule*). Under Art. 7:685 DCC a Cantonal Court is allowed to grant a severance payment in case of a change of circumstances. For the latter, see below under § 18.2.

the decision than in exceptional cases only.[130] Also, an employee cannot initiate a procedure based on manifestly unfair dismissal after the dissolution procedure.[131] Employers, in fact, seem to be comfortable with the so-called Cantonal Formula, which Cantonal Courts apply in determining – the size of – a severance payment, in that it enables employers to roughly calculate the severance payment.[132] Last, but not in the least, employers prefer Cantonal Courts for the higher success rate.[133]

14.4.5 Prohibitions on dismissal[134]

Discriminatory grounds

In discriminatory discharges, employees can address the Cantonal Court. They can invoke the invalidity of termination of employment based on (i) gender; (ii) the number of hours of the employment agreement; and (iii) the duration of the employment agreement.[135] Furthermore, the Act on Equal Treatment Based on a Handicap or Chronic Illness (*Wet gelijke behandeling op grond van handicap of chronische ziekte*) prohibits dismissal based on a handicap or chronic illness.[136] The Act on Equal Treatment Based on Age (*Wet gelijke behandeling op grond van leeftijd*) prohibits discrimination based on age.[137] Last, the General Act on Equal Treatment (*Algemene Wet Gelijke Behandeling*) of 1994 prohibits discharges based on religion, philosophy of life, political affiliation, race, gender, national origin, sexual orientation, and marital status.[138] To have the termination declared void. the employee must *invoke* the invalidity of termination of employment within two months after the employment has been terminated. The employee, too, must timely invoke the invalidity of the termination when the employee has been dismissed for *opposing* the discriminatory dismissal, also known as *vindicatory* discharges (*victimisatie-*

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130 Jacobs 2004, p. 105. See also below under § 18.2.

131 See below under § 18.6. Also, see Knegt en Wilthagen 1988, p. 264 and 265; Scholtens 2001a, p. 6 and 7; Grapperhaus 2006, p. 23.

132 For the Cantonal Formula, see below under § 18.2.

133 Research voor Beleid 2000, p. 30 and 31, 49 and 50; Grapperhaus 2006, p. 22 and 23.

134 For an in-depth discussion of prohibitions on dismissal, see Kuip 1993a, p. 223-256.

135 See Art. 7:646 to 649 DCC.

136 The Act went into force on 1 December 2003, Stb. 2003, 206 in furtherance of Directive 2000/78/EC. For the term *handicap*, which refers to *long*-term illness only, see HvJ EG 11 juli 2006, C-13/05, JAR 2006/191 (*Navas*). For a discussion of this Act, see also Hendriks 2003a; Hendriks 2003b; De Keizer 2004; Gijzen 2003; A.M. ten Bosch-Gerritsen, *Wet gelijke behandeling op grond van handicap of chronische ziekte*, Losbladige Arbeidsovereenkomst, Kluwer, Deventer.

137 The Act went into force on 1 May 2004, Stb. 2004, 30 in furtherance of Directive 2000/78/EC. For a discussion of this Act, see Van der Burg 2004; De Wolff 2004; Cremers 2004; Gerritsen 2004; Van Gemerden 2004; Pranger 2005.

138 The Act went into force on 1 September 1994, Stb. 1994, 230. For an in-depth discussion of this Act, see A.M. ten Bosch-Gerritsen, AWGB, Losbladige Arbeidsovereenkomst, Kluwer, Deventer. See also Veldman 2001, p. 325.

ontslagen).[139] If the invalidity is not invoked timely, the termination is valid. Also, an employee can address the Committee on Equal Treatment (*Commissie Gelijke Behandeling*). Under the AWGB, this Committee can investigate violations of anti-discrimination on the initiative of parties, or on its own initiative. Although the Committee's decision is not binding, it can carry weight with the Cantonal Court. In fact, to estimate their chances, employees, in general, will ask for a decision of this Committee, prior to the civil procedure with the Cantonal Court.

The question arises what action employees have if they have been discharged based on other grounds than those enumerated in the aforementioned statutes. In these cases, employees can base their claim on Article 7:611 DCC and Article 3:12 DCC, with reference to Article 1 of the Dutch Constitution. The latter determines that all people living in the Netherlands shall be treated equally in similar situations and that discrimination based on religion, philosophy of life, political affiliation, race, gender, or *any other similar ground*, is prohibited. Although the Constitution, in principle, regulates the relationship between government and public employees only, the Netherlands Supreme Court, meanwhile, has ruled that a private-sector employee can indirectly rely on the Constitution.[140] In brief, an employee can claim that the employer, by discriminating the employee, has not behaved as befits a good employer according to Article 7:611 DCC, for violating the principles of fairness, among which the principle of non-discrimination under the Dutch Constitution, to be respected under Article 3:12 DCC.[141]

Non-discriminatory grounds

Book 7 Title 10 DCC, too, include prohibitions on dismissal based on *non-discriminatory* grounds. For 'outsiders', Article 7:670.1 DCC, is most striking. This Article prohibits dismissals *during* the first two years of illness.[142] The

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[139] For the rules on vindicatory discharges, see Art. 7: 647(1),7: 648(1) and 7:649(1) DCC regarding gender, the number of hours of the employment agreement, and the duration of the employment agreement, respectively; Art. 9 of the Act on Equal Treatment Based on A Handicap or Chronic Illness; Art. 11 of the Act on Equal Treatment Based on Age; Art. 8 of the *AWGB*. See also Art. 3 of the Act on the Adjustment of Working Time (*Wet aanpassing arbeidsduur* or *WAA*). For an in-depth discussion of case law on the *WAA*, see Van Arkel en Smits 2001; Van Arkel en Smits 2003.

[140] Loonstra en Zondag 2001 p. 217 and 218.

[141] For example, see HR 8 april 1994, NJ 1994, 704, JAR 1994/94 (*Agfa/Schoolderman*); HR 30 januari 2004, JAR 2004/68 (*Parallel Entry/KLM*). See also De Wolff 2003a.

[142] The exceptions on Art. 7:670.1 DCC can be found in Art. 7:670.1.b DCC and 7:670b DCC, respectively. First, the prohibition on dismissal does not apply when the employee has become ill after the CWI already received the employer's request for termination of employment. Second, under Art. 7:670b DCC the prohibition on dismissal does not apply (1) in case of a summary dismissal or during the probationary period; (2) the employee consents to termination of employment, or the company – i.e. the division where the employee works – closes; or, (3) the employee unfoundedly refuses to (a) comply with reasonable instructions of the UWV to reintegrate; (b) to perform suitable work the employer has offered; or (c) to make a plan to work (*plan van aanpak*) together with the UWV according to the Disability Insurance Act (*Wet op de arbeidsongeschiktheidsverzekering* or

rationale behind this provision is to protect ill employees against the psychological pressure of dismissal during a certain period of time, i.e. two years. Initially, the legislature's intent was to protect employees against dismissal during *one* year of illness only. However, the Standing Committee for Private and Penal Law (*Vaste Commissie voor Privaat- en Strafrecht*) objected and stressed that some diseases needed more than one year of recovery, e.g. tuberculosis. The Minister finally bowed, as tuberculosis was a common disease at the time.[143] I agree with those who state that tuberculosis is no longer a common disease, hence, the period of two years should be reconsidered.[144] So long as this Article remains unchanged, however, an employee under Dutch dismissal law is protected against dismissal during the *two* years of illness.[145]

Besides, Book 7 title 10 of the Dutch Civil Code prohibits dismissals (ii) during pregnancy and up to six weeks after post-confinement maternity leave; (iii) during military service or alternative compulsory service; (iv) during membership in a (European) Works Council or related committees; (v) during membership in a union or performance of union activities; (vi) during political attendings of political bodies of which the employee is a member; (vii) exercising the right to parental leave; (viii) based on transfer of the enterprise; and (ix) based on a refusal to work on Sunday such within the margins of the Working Time Act (*Arbeidstijdenswet* or ATW).[146] The employee must file a request with the Cantonal Court within two months to have these terminations declared void.[147] It bears mentioning, that prohibitions on dismissal based on *non-discriminatory* grounds – unlike prohibitions on dismissal based on *discriminatory* grounds – do *not* apply to a summary dismissal or during the probationary period.[148] This does not imply that the employee is empty-handed in these cases. Case law shows that when an employee is dismissed on non-discriminatory grounds during the *probationary period*, an employee may have a cause of action under Article 7:611 DCC.[149]

WAO). The WIA (*Wet werk en inkomen naar arbeidsvermogen*) has replaced the WAO as from 29 December 2005 (Stb. 2005, 619), but still entails this obligation.

143 For an in-depth discussion of the legislative history regarding the period of two years, see Hoogendijk 1999, p. 148-153.

144 Hansma 2005, p. 47.

145 HR 24 oktober 1986, NJ 1987, 292 (*Melchers/De Haan*). See also Hoogendijk 1999, p. 176 and 177.

146 As from 1 January 1999 most non-discriminatory prohibitions on dismissal can be found in Art. 7:670 DCC. For the latter, see Klinckhamers 1998; Jacobs 2004, p. 106-108. The prohibitions can be found in, respectively Art. 7:670.2 (ii); 7:670.3 (iii); 7:670.4 (iv); 7:670.5 (v); 7:670.6 (vi); 7:670.7 (vii); 7:670.8 (viii), and 7:670.9 (ix).

147 Art. 7:677(5) DCC.

148 Art. 7:670b(1) DCC.

149 Van Arkel, Boontje en Loonstra 2003. See also below under § 15.3.3.

15 Legislative history of the dual just cause dismissal system

15.1 The debate on a just cause for dismissal

15.1.1 A just cause for dismissal, desirable or necessary?

Drucker is considered as the 'founding father' of the Act of the Employment Agreement of 1907. In his draft(s), he already paid attention to a just cause for dismissal. He stated that to introduce a just cause standard would imply that the employer *and* the employee were required to state a reason for dismissal. He questioned whether this would be for the benefit of the employee. In his opinion, it would be virtually impossible for an employee to prove bad cause. Hence, the introduction of a just cause rule would be without effect.[150] Instead, he preferred to adhere to the principle that was widely endorsed in the Netherlands at the time, i.e. to allow employers to dismiss employees, on the condition of prior notice, regardless of the reason. Consequently, the Bill underlying the Act of the Employment Agreement of 1907 did not require a just cause for dismissal. Parliament did not protest. In fact, it considered the new rules – compared to the past – as progressive, in that prior to the Act of the Employment Agreement of 1907 employees with employment agreements for an indefinite period could be dismissed *without* prior notice, without being liable.[151]

The only attempt during the parliamentary discussions to have a discussion on just cause protection was by Ter Laan, Hugenholtz, Schaper, Tak en Troelstra. They proposed a provision, based on which an employment agreement could not be terminated if the employee was called for military service. With 39 against 25 votes the proposal was withdrawn.[152] The only attempt, therefore, was without effect.[153] Subsequently, the Act of the Employment Agreement of 1907, which went into force on 1 February 1909,[154] allowed employers to dismiss employees with an employment agreement for an indefinite period without cause.

In literature, Levenbach was the first to introduce the *term iusta causa dimissionis* – a just cause for dismissal – in the Netherlands.[155] Although not the first to defend the introduction of this standard in the Act of the Employment Agreement of 1907,[156] Levenbach is seen as its most important defender. In his inaugural lecture of 15 December 1926 at the University of Amsterdam, Levenbach stressed that a *iusta causa dimissionis*, related to the employee's

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150 MvT O.D. Art. 44-47. See Bles IV, 1909, p. 7 and 8, 14. See also Van den Heuvel 1983, p. 26 and 27; Kuip 1993a, p. 112 and 113.

151 Ringeling 1953, p. 11.

152 Bles IV, 1909, p. 49-58. See also Ringeling 1953, p. 11.

153 See Van den Heuvel 1983, p. 33 and 34.

154 For the legislative history of the Act, see below under § 15.3.

155 Levenbach 1926a, p. 65. See also Ringeling 1953, p. 15; Van den Heuvel 1983, p. 30.

156 Van den Heuvel 1983, p. 29 and 30, referring to Van den Bergh 1924.

conduct or capacity, or related to economic circumstances, should be implemented in the Act of the Employment Agreement of 1907. In his plea for a just cause standard he referred to the standard that already was applied to civil servants law, and commonly used in collective bargaining agreements.[157] Additionally, Levenbach referred to the *Betriebsrätegesetz of 1920*. Under this German Act, employees had a cause of action if

- they were dismissed without cause;
- they were dismissed for bad – discriminatory – cause, among which the duty to perform military service;
- they were dismissed, because they refused to regularly perform other work than agreed upon; or
- a dismissal resulted in unreasonable harsh consequences for the employee.[158]

In this respect, Mok was the first to distinguish between dismissals that took place without pirior notice, and dismissals that took place without a just cause for dismissal. He qualified the first as illegitimate (*onrechtmatig*), and the second as unjust (*onrechtvaardig*), stressing that a legitimate dismissal could be unjust.[159] He, too, pled for a just cause standard. He referred to the standard in collective bargaining agreements, the *Betriebsrätegesetz of 1920*, and *the doctrine of abus de droit* under French law.[160] Mok stressed that the Act of the Employment Agreement of 1907, in effect, allowed an employer to dismiss an employee for bad cause, emphasizing the unfairness of dismissals of employees who were called for military service.[161]

Considered as the appropriate remedy for unjust dismissal, the options were damages or reinstatement. De Gaay Fortman strongly opposed the remedy of reinstatement. He considered reinstatement to be without effect, because the surrounding circumstances of the dismissal would make it impossible to return to the workplace after the employee would have been dismissed for bad cause.[162] Later, De Gaay Fortman nuanced his statement, considering reinstatement as the appropriate remedy for unjust dismissal, *unless* the circumstances made reinstatement impossible.[163] In 1934, with the celebration of the 25th birthday of the Act of the Employment Agreement, Levenbach, again, asked attention for the introduction of a just cause standard in the Act of

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157 Levenbach 1926a, p. 65. See also Ringeling 1953, p. 12 and 13; Van den Heuvel 1983, p. 30.

158 Levenbach 1926a, p. 65; Ringeling 1953, p. 11. For the *Betriebsrätegesetz of 1920*, see Kuip 1993a, p. 292; Jansen en Loonstra 1992, p. 88.

159 Ringeling 1953, p. 15 referring to RBA of 1 February 1934, XIX, p. 99.

160 For this doctrine, see Meyers 1964, p. 44-63.

161 Mok 1937, p. 105. See also Ringeling 1953, p. 15; Van den Heuvel 1983, p. 30-32; Jansen en Loonstra 1992, p. 87 and 88.

162 De Gaay Fortman 1936, p. 127. See also Van den Heuvel 1983, p. 32.

163 See Ringeling 1953, p. 16 and 17.

the Employment Agreement of 1907.[164] With the outbreak of the Second World War, however, the discussion on a just cause for dismissal in the Act of the Employment Agreement temporarily came to an end.[165]

15.1.2 A just cause for dismissal, a right to a job?

In his lecture of 1926, Levenbach stated that when an employer is allowed to dismiss an employee without cause, a right to a job is lacking.[166] This implies that the *introduction* of a just cause standard under dismissal law, in effect, creates a right to a job. In the Netherlands, Van den Heuvel is one of the first to defend that an employee has a right to a job, i.e. the just cause standard guarantees employees continuation of their employment. In defending his theory, he referred to Frederic Meyers and his classic study on the dismissal laws of Mexico, France, Great Britain and the United States. Meyers, in fact, considered the remedy of *reinstatement* as a symbol of ownership of the job,[167] because this results in a right of the employee to continued employment.[168] In using the term 'ownership', however, he emphasized that

> '[it] is of course, used loosely, as an analogy to more traditional rights of property rather than as a category of them (...) it implies a change in the system of rights and obligations surrounding employment and the relationship of employer to employee.'[169]

Van den Heuvel, too, acknowledges that 'the right to a job' cannot be seen as an absolute right.[170] Nevertheless, he stressed that one cannot deny that employees have a right on continuation of employment under Dutch law to the extent that their rights and obligations are automatically being transferred to the new employer, in case of a transfer of an undertaking.[171]

In my opinion, the discussion on whether an employee has a right to a job is a dogmatic one.[172] From a *judicial* point of view, one cannot speak of a right to the job. In this respect, Heerma van Voss correctly states that property under Dutch law is an absolute right, which does *not* allow for intervention, unless the owner gives permission hereto. Dutch dismissal law *does* allow for

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164 Levenbach 1934, p. 20. See also Van den Heuvel 1983, p. 30.

165 Phaff 1986, p 31.

166 Levenbach 1926a, p. 65.

167 Meyers 1964, p. 113. See also Hepple 1981, p. 76.

168 Van den Heuvel 1983, p. 227-229. See Meyers 1964, p. 100.

169 Meyers 1964, p. 1.

170 Van den Heuvel 1983, p. 227 and 228.

171 Transfers of business ownership, in whole or in part, are covered by the EC Directives on transfers of undertakings. The Netherlands has incorporated the first Directive 77/187/EEC into national law on 27 July 1981 in the Art. 662 through 666, Book 7 Title 10 of the Dutch Civil Code.

172 Rojot 2001, p. 429. See also Heerma van Voss 1992, p. 232.

intervention of the employer.[173] In fact, the main principle under Dutch dismissal law is that an employer at all times must be able to terminate an employment agreement.[174] This does not mean that the issue cannot be approached from a *social* point of view as well. In my opinion, Van den Heuvel and Meyers both look at the issue from a *social* point of view.[175] In fact, the social approach is the only way, in which Article 1 of the European Social Charter and Article 19(1) of the Dutch Constitution can be interpreted. In brief, Article 1 provides a right to a job.[176] Article 19(1) of the Dutch Constitution imposes the government to encourage full employment.[177] In this respect, Hepple correctly states that a right to the job as established under *law* must be considered as an *abstract*, rather than as an *absolute* right of the individual. It does not guarantee a right. Rather, it enables employees to benefit equally with others of every opportunity to enter freely into any occupation available, hence, to be free to earn a living and to enjoy equally with others the benefits of state policies.[178]

15.2 Legislative history of the BBA 1945

From a corner no one expected a just cause for dismissal was introduced in Dutch legislation through emergency legislation under the BBA 1495.[179] The latter was meant to be post-war – emergency – legislation only. The following paragraphs describe its legislative history, and conversion from emergency into just cause legislation.

15.2.1 Emergency legislation

In effect, the BBA 1945 is a continuation of German legislation,[180] introduced after the Germans invaded the Netherlands on 10 May 1940. Three days after the invasion, the Dutch Queen Wilhelmina and her government had left for London. By 15 May 1940, the Germans had occupied the Netherlands.[181] However, before their departure, the Dutch government had authorized the Commander in Chief of the Army and Navy of the Netherlands, Winkelman, to

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173 Heerma van Voss 1992, p. 221 and 222.

174 Bles IV, 1909, p. 93-117. See also A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:677 BW (DCC) § 2; Heerma van Voss 1992, p. 36 and 37; Van der Grinten 2002, p. 249. See also HR 26 maart 1965, NJ 1965, 163 (*Walsweer/Acmesa*).

175 See also Jacobs 1983, p. 4 and 19.

176 Hepple 1981, p. 69. See also Rojot 2001, p. 428.

177 Eizenga 1970, p. 3.

178 Hepple 1981, p. 69.

179 Mok 1946, p. 225; Van der Grinten en Haakman 1952, p. 27; Convent der Christelijke-Sociale Organisaties 1957, p. 4; Van den Heuvel 1983, p. 45; Kuip 1993a, p. 128.

180 Naber 1981, p. 59; Van den Heuvel 1983, p. 43; Phaff 1986, p. 33.

181 Körver 2004, p. 171.

take the necessary decisions in the public interest.[182] Additionally, the Dutch government in exile could implement emergency legislation by Royal Decree since deliberations with Parliament were impossible.[183]

After the Germans invaded the Netherlands, Dutch companies started to reduce their costs by terminating employees.[184] Subsequently, on the recommendation of the Department of Social Affairs, the Commander in Chief issued the Decree of 27 May 1940 to prevent mass unemployment.[185] Under this Decree, employers were prohibited to cease their activities and/or to diminish working hours below 36 per week and/or to dismiss 25 or more employees within a period of 30 days, unless they had received prior authorization of the Director-General of Labor (*Directeur-Generaal van de Arbeid*) to terminate these employment agreements.[186]

The Decree of 27 May 1940 was granted a short life only.[187] It was replaced by the First Implementing Order of 13 June 1940 (*Eerste Uitvoeringsbesluit*)[188] that was based on the Ordinance of the Reich Commissioner Seyss-Inquart of 11 June 1940.[189] The latter resulted in three Implementing Orders.[190] Through these orders the German occupier slowly succeeded in controlling the Dutch labour market, and in making Dutch workers subservient to the war.[191]

In brief, the First Implementing Order prohibited employers to dismiss employees, unless they had received prior authorization from, or had been released by the Director-General of Labor (*Directeur-Generaal van de Arbeid*), or in case of a summary dismissal. The German invader, however, overlooked an important aspect. The Dutch Labour Inspectorate (*Arbeidsinspectie*) that was in charge of the execution of the Order rather acted in the interest of Dutch employees, than in the interest of the German enemy.[192] Hereupon, under the

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182 Van Peijpe 1985, p. 294.

183 Körver 2004, p. 171.

184 Scholtens estimates the number of unemployed at the beginning of May 1940 at approximately 150.000; at the end of May at approximately 270.000; in the summer of 1940 at approximately 400,000 to 500,000. See Scholtens 2005a, p. 29.

185 Ringeling 1953, p. 18 and 19; Heerma van Voss 1992, p. 64; Van Drongelen 1991, p. 280; Scholtens 2005a, p. 31-33.

186 Besluit van 27 mei 1940, Stb. O.801.

187 Ringeling 1953, p. 19; Van den Heuvel 1983, p. 42; Van Peijpe 1985, p. 294; Heerma van Voss 1992, p. 64; Scholtens 2005a, p. 29 and 31-33. The request itself needed to be addressed to the District Head of the Labour Inspectorate (*Districtshoofd van de Arbeidsinspectie*). See Van Drongelen 1991, p. 281; Scholtens 2005a, p. 31.

188 Stb. S.800.

189 Heerma van Voss 1992, p. 64.

190 Verordening van de Rijkscommissaris voor het bezette Nederlandse gebied betreffende het beperken van werk 11 juni 1940, Verordeningenblad 1940, No. 8. For the Ordinance, see Naber 1981, p. 340. See also Phaff 1986, p. 31; Heerma van Voss 1992, p. 64.

191 Van der Grinten 1943, p. 21; Van den Heuvel 1983, p. 43, referring to Ph.H.M. Werner, *De ontslagvergunning*, Arbeid 1946, p. 42; Phaff 1986, p. 32; Heerma van Voss 1992, p. 65 and 67.

192 Eerste uitvoeringsbesluit, ingevolge de verordening betreffende het beperken van werk, Verordeningsblad No. 9/1940, Stb. S 800. See Ringeling 1953, p. 19; Van den Heuvel 1983, p. 42,

Second Implementing Order (*Tweede Uitvoeringsbesluit*) of 24 September 1941, the German enemy established an Employment Office (*Rijksarbeidsbureau*) and district employment offices (*gewestelijke arbeidsbureaus*) to take over the duty of the Labour Inspectorate.[193] Under the Third Implementing Order of 20 February 1942 (*Derde Uitvoeringsbesluit*), which replaced the First,[194] the newly established district employment offices were assigned with the issuance and the refusal of permits for dismissal.[195] Elaborating on the Ordinance of the Reich Commissioner Seyss-Inquart of 1 March 1943,[196] the Third Implementing Order required that (i) an employee, too, needed permission; (ii) any termination without permission would be invalid;[197] (iii) termination of employment by *mutual agreement* without permission would be invalid;[198] and (iv) the employer needed permission to dismiss and *appoint* employees.[199]

In 1944, the Dutch government realized that the end of the war was in sight. It imagined that Dutch prisoners in war would return to the Netherlands, and that this would result in chaos on the labour market. To meet this problem, the Dutch government in exile issued the Special Decree on Labor Relations of 17 July 1944 (*Buitengewoon Besluit Arbeidsverhoudingen* or *1944 Special Decree*),[200] and four other Decrees.[201] The 1944 Special Decree was based on drafts of the Minister of Social Affairs. After some deliberations and minor changes of the draft of November 1943, the final draft was sent to the Prime Minister on 10 December 1943. Subsequently, the 1944 Special Decree went into force in September 1944 in the South, being first liberated. The 1944 Special Decree reached the *occupied* territory in March 1945.[202]

When the 1944 Special Decree reached this territory, the Committee of Confidants (*College van Vertrouwensmannen*), meanwhile, had appointed Scholtens, a former Secretary-General, to take measures, regulating the labour

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referring to M.G. Levenbach, *De ontslagregeling*, RBA of 1 August 1940, XXVI, No. 5, p. 33; Phaff 1986, p. 31; Scholtens 2005a, p. 33-35.

193 Tweede uitvoeringsbesluit, Verordeningsblad No. 64/1941. See Van Drongelen 1991, p. 283.

194 Derde Uitvoeringsbesluit No. 14/1942 van de Secretaris-Generaal van het Departement van Sociale Zaken ingevolge de Verordening No. 8/1940, 20 februari 1942, Verondeningenblad 1942.

195 Heerma van Voss 1992, p. 65 and 65, footnote 203, referring to Verordeningenblad 1942, No. 14, afl. 5; Van Drongelen 1991, p. 282 and 283.

196 Verordening van 1 maart 1943 van de Rijkscommissaris voor het bezette Nederlandse gebied betreffende de beperking ten aanzien van het veranderen van betrekking (Verordening Verandering van betrekking), Verordeningenblad 1943, No. 20, aflevering 7. For this Ordinance, see Naber 1981, p. 342-348.

197 Van der Grinten 1943, p. 1 and 9. Van den Heuvel 1983, p. 43; Phaff 1986, p. 32; Van Drongelen 1991, p. 283; Heerma van Voss 1992, p. 66.

198 Dienske 1965, p. 13; Van den Heuvel 1983, p. 42 and 43; Phaff 1986, p. 31 and 32; Heerma van Voss 1992, p. 66.

199 Van der Grinten 1943, p. 21; Phaff 1986, p. 32.

200 Ringeling 1953, p. 19 and 20; Heerma van Voss 1992, p. 68.

201 For a discussion of these Decrees, see Scholtens 2005a, p. 37-46.

202 Centraal Sociaal Werkgevers-Verbond 1954, p. 61; Van den Heuvel 1983, p. 43; Phaff 1986, p. 33.

market after the war.[203] This had resulted in a draft, better known as the Emergency Regulation of 1944 (*Noodregeling Arbeidszaken 1944*).[204] Scholtens, Levenbach and representatives of employees 'and employers' associations, which had realized they needed to work together in light of the restoration of the Netherlands, designed the latter secretly during the war.[205] On 17 May 1945, this cooperation would result in the Labour Foundation (*Stichting van de Arbeid* or *STAR*).[206] The Committee of Confidants strongly opposed when it received the 1944 Special Decree, because the Minister of Social Affairs had not taken into consideration the sentiment of the war. For example, the Minister had appointed the district employment offices to grant permits, neglecting the fact that these offices were strongly related to the German occupier.[207] In spite of the Committee's objections, the 1944 Special Decree remained unchanged and went into force in all parts of the Netherlands, once they were liberated.[208] In brief, under the 1944 Special Decree the employer needed prior authorization of the Director of the District Employment Office (*Directeur van het Gewestelijk Arbeidsbureau*) to dismiss the employee.[209] The reason for the Dutch government to adopt the 1944 Special Decree was that the situation on the Dutch labour market called for immediate measures. In addition, this Decree – through the amendment of 29 December 1944 – determined that employees, too, needed permission to terminate the employment agreement.[210] The reason was the shortage of skilled employees after the war, resulting in a 'loan war' between employers and frustrating the government's income policy at the time.[211]

The Preamble of the 1944 Special Decree was clear, in that it was temporary – emergency – legislation only.[212] Also the BBA 1945, replacing the 1944 Special Decree,[213] was emergency legislation.[214] Due to the latter, both, therefore, lack

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203 This Committee was appointed by the Dutch government in exile in 1944 to represent the government in the occupied territory during its absence. See Scholtens 2005a, p. 46.

204 For this Emergency Regulation (*Noodregeling Arbeidszaken 1944*), see Naber 1981, p. 372-376; Scholtens 2005a, p. 46.

205 Van den Heuvel 1983, p. 43 and 44 referring to M.G. Levenbach, *Kanttekeningen bij het Buitengewoon Besluit Arbeidsverhoudingen*, Sociaal Maandblad 1947, p. 38; Van Peijpe 1985, p. 312; Van Drongelen 1991, p. 289 and 290; Heerma van Voss 1992, p. 69.

206 Centraal Sociaal Werkgevers-Verbond 1954, p. 62; Van Drongelen 1991, p. 288; Heerma van Voss 1992, p. 68.

207 Heerma van Voss 1992, p. 69, footnote 216, referring to Van Drongelen 1986, p. 104; Scholtens 2005a, p. 46-54.

208 Centraal Sociaal Werkgevers-Verbond 1954, p. 61; Van den Heuvel 1983, p. 43; Phaff 1986, p. 33.

209 Besluit van 17 juli 1944, houdende vaststelling van het Buitengewoon Besluit Arbeidsverhoudingen, Stb. 1944, E 52.

210 Besluit van 29 december 1944, houdende wijziging van het BBA, Stb. E.157.

211 Scholtens 2005a, p. 54-56. The Director was not allowed to refuse the permit when this would frustrate an improvement of the employee's position. See Phaff 1986, p. 33.

212 Ringeling 1953, p. 19 and 20.

213 Buitengewoon Besluit Arbeidsverhoudingen van 5 oktober 1945, Stb. F 214. See also Scholtens 2005a, p. 56.

an Explanatory Memorandum (*Memorie van Toelichting*).[215] From archives, however, it can be derived that the Minister of Social Affairs sent a draft underlying the BBA 1945 to the Labour Foundation on 25 July 1945. The Labour Foundation had reacted disappointed, due to the fact that the draft underlying the BBA 1945 strongly deviated from the Emergency Regulation of 1944.[216] In brief, the latter determined that an employer needed permission to terminate an employment agreement, a summary dismissal exempted. The Director-General of Labor (*Directeur-Generaal van de Arbeid*) was authorized to grant permits. The rationale behind the latter was the resistance of the Dutch population against the district employment offices, considering these offices as an invention of the German occupier.[217] Last, the Emergency Regulation determined that to dismiss an employee in violation of the foregoing would be invalid, on the condition that its invalidity would be timely invoked by the employee within six months.[218]

Unlike the Emergency Regulation of 1944, the BBA 1945 determined that the employer *and* the employee needed permission to terminate the employment agreement. Moreover, it appointed the district employment offices to grant permits, due to their expertise on the subject.[219] Hence, the protest of the Committee of Confidants was in vain. The BBA 1945 remained unchanged. After it had been sent to the Council of Ministers on 5 September 1945, the Queen signed it on 5 October 1945. It went into force on 15 October 1945.[220]

15.2.2 Just cause legislation

In 1949, the Netherlands Supreme Court held that the BBA 1945 had legal force, referring to its necessity in light of the special circumstances of the war.[221] This explains that the BBA 1945, as today, still exists although it was primarily *emergency* legislation. This paragraph examines when this emergency legislation, in effect, was converted into just cause legislation. The legislative history of the BBA 1945 started with the issuance of the Decree of 27 May 1940

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214 Centraal Sociaal Werkgevers-Verbond 1954, p. 62; Ringeling 1953, p. 21.

215 A summary explanation can only be found in *Wetsbesluiten tot stand gekomen tussen 24 juni en 23 november 1945 met toelichtingen,* Algemene Landsdrukkerij, Den Haag, 1947. See Dienske 1965, p. 13; Kuip 1993a, p. 124.

216 For this Emergency Regulation (*Noodregeling Arbeidszaken 1944*), see Naber 1981, p. 372-376. For the Labour Foundation's reaction, see its advice of 13 August 1945.

217 Heerma van Voss 1992, p. 69, footnote 216, referring to Van Drongelen 1986, p. 104.

218 Phaff 1986, p. 33.

219 Ringeling 1953, p. 21; Centraal Sociaal Werkgevers-Verbond 1954, p. 62; Van den Heuvel 1983, p. 44; Van Drongelen 1991, p. 325 and 326; Heerma van Voss 1992, p. 69.

220 Centraal Sociaal Werkgevers-Verbond 1954, p. 61; Dienske 1965, p. 13; Scholtens 2005a, p. 56-58.

221 HR 18 januari 1949, NJ 1949, 551 (*Arbeiders-Cooperatie Bouwwerken R'dam*). See Dienske 1965, p. 13, footnote 3; Overkleeft-Verburg en Roijakkers 1976, p. 6; Heerma van Voss 1992, p. 69; Kuip 1993a, p. 124.

by the Commander in Chief of the Army and Navy of the Netherlands.[222] The intent of this Decree was to prevent mass unemployment. The aim of this Decree, thus, was *not* to provide protection to employees against arbitrary dismissal in general.[223] The First Implementing Order of 13 June 1940, which replaced the Decree of 27 May 1940, did provide just cause protection. Paragraph 2.2 of this Order in this respect held that a request, in which an employer asked for permission to terminate the employment agreement, needed to be *well founded*, which implies the requirement of a just cause for dismissal. The same requirement emerged from the Third Implementing Order of 20 February 1942.[224] Because the German enemy with one goal issued these Orders only, to control the Dutch labour market and to make Dutch workers subservient to the war, one cannot speak of just cause legislation.[225]

When the *Dutch* government in exile issued the 1944 Special Decree, this was not to create just cause legislation either. Rather, to prevent mass unemployment and to create social peace on the labour market after the war.[226] To a certain extent, it provided just cause protection, however. Article 6 of the 1944 Special Decree required a summary investigation on the cause for dismissal. In this respect, the 1944 Special Decree determined that an employer needed prior authorization of the Director of the District Employment Office to dismiss an employee, *unless* (i) the employee was dismissed based on urgent cause; (ii) parties had reached mutual consent on termination of employment; (iii) an employee had been involved with the German National-Socialist movement; or (iv) it concerned a female employee hired after 9 May 1940, who had replaced a male employee called for military service during the war.[227] In all other cases, the 1944 Special Decree required a summary investigation on the cause for dismissal by the Director.[228] Through the amendment of 29 December 1944, the 1944 Special Decree, in fact, converted 'a summary investigation' into 'an investigation'.[229] The general opinion, nonetheless, is that the *BBA 1945* first introduced an administrative control on the side of the government to protect

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[222] Naber refers to the German measure of 1 September 1939 – when Germany invaded Poland – as the true origins of the BBA 1945. For this measure, see Naber 1981, p. 24-27, 335 and 338. See also Scholtens 2005a, p. 30.

[223] Ringeling 1953, p. 19.

[224] Naber 1981, p. 38, referring to W.C.L. van der Grinten, *Nieuw Ontslagrecht* (moet zijn Nieuw Arbeidsrecht: VA), Alphen aan den Rijn 1942, p. 5; and, M.G. Levenbach, *Waar staan wij met het arbeidsrecht?*, Sociaal Maandblad 1946, p. 7 e.v. See also Scholtens 2005a, p. 35.

[225] Ringeling 1953, p. 19; Naber 1981, p. 38 and 45; Van Drongelen 1991, p. 283; Scholtens 2005a, p. 34-37.

[226] Centraal Sociaal Werkgevers-Verbond 1954, p. 61; Naber 1981, p. 56; Scholtens 2005a, p. 37-43.

[227] Van der Grinten en Haakman 1953, p. 37 and 38.

[228] Naber 1981, p. 55; Scholtens 2005a, p. 42-46.

[229] Ringeling 1953, p. 20; Centraal Sociaal Werkgevers-Verbond 1954, p. 61; Naber 1981, p. 57-59; Van den Heuvel 1983, p. 44; Phaff 1986, p. 33; Heerma van Voss 1992, p. 68. To the extent the BBA 1945 abolished this rule, it had been implemented through the Directives of the district employment offices again. See Ringeling 1953, p. 21; Centraal Sociaal Werkgevers-Verbond 1954, p. 62.

employees against arbitrary dismissal in general.[230] In this respect, the Circular Letter of the Director of the District Employment Office of 21 January 1946 stipulated that the Director was authorized to grant permission to the employer only in case of (i) a surplus of workers; (ii) incapability of the worker; and (iii) breach of trust.[231]

The intent of the Dutch government behind the BBA 1945 was to serve the interests of employees *and* employers *and* the public.[232] Hence, it does not protect employees only.[233] In fact, the priority of these interests shifted over the years, dependent on the circumstances.[234] For example, after the war, the restoration of the economy had the highest priority. The interests of employers, in turn, was best served during the period of economic recovery in the sixties and seventies.[235] On the other hand, it was said that the BBA 1945 primarily provided protection to employees (i) after the decision of the Netherlands Supreme Court in 1948, which held that an employer could terminate the employment agreement only *after* having obtained prior authorization to dismiss the employee;[236] and (ii) after a 1999 amendment of the BBA 1945, under which employees no longer need to ask for permission to terminate the employment relationship.[237]

In literature, the claim that the interests of the employer, and the public, would no longer play a role under the BBA 1945 is strongly denied, however.[238] In fact, the Directives of 1974[239] explicitly determined that the Director of the District Employment Office in granting permits must balance the interests of the employer and the employee against the public interest.[240] The Dismissal Decree, which replaced the Directives in 1998,[241] too, explicitly determines that the

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230 Ringeling 1953, p. 21; Convent der Christelijke-Sociale Organisaties 1957, p. 4; Haakman 1966, p. 147, referring to Dienske 1965, chapter III; Naber 1981, p. 389; Van den Heuvel 1983, p. 44 and p. 46, referring to 'Bijlagen Handelingen II 1951-1953, 881, No. 6, p. 6'; Kuip 1993a, p. 124 and 125.

231 Ringeling 1953, p. 35; Naber 1981, p. 105 and 106; Kuip 1993a, p. 128.

232 Naber 1981, p. 104, 105, 117 and 118, referring to the Directives of 1954; Van der Heijden 1984, p. 60; Kuip 1993a, p. 125, footnote 13: referring to 'Memorie van Antwoord bij de Rijksbegroting van Sociale Zaken en Volksgezondheid voor het dienstjaar 1953, TK 1952-1953, II, 2800, Hoofdstuk XII, No. 10, p. 8'; and, in footnote 14: referring to 'Wetsontwerp 881, Handelingen II, 19 februari 1943, p. 2351.' In the same sense: De Gaay Fortman 1949, p. 37.

233 Naber 1981, p. 118, referring to Letter of the Director-General of Labor of 29 March 1947.

234 Van der Heijden 1984, p. 60 referring to Directives of 1974 (Stcrt. 22 januari 1974, 15).

235 Dienske 1965, p. 34; Naber 1981, p. 198; Van der Heijden 1984, p. 60; Kuip 1993a, p. 125.

236 Heerma van Voss 1992, p. 71, footnote 232, referring to HR 19 november 1948, NJ 1949, 86 (*De Kock/Van Heijst & Zonen*).

237 Stb. 1998, 300.

238 See also the Netherlands Supreme Court in HR 8 januari 1971, NJ 1971, 129 (*American Express/Mackay*). See also HR 3 mei 1991, NJ 1991, 705 (*Van der Hop/Muskens*).

239 Stcrt. 22 januari 1974, 15.

240 Van den Boom 1981, p. 850; Van der Heijden 1984, p. 60; Kuip 1993a, p. 126.

241 Regeling van 7 december 1998, Stcrt. 1998, 238.

CWI[242] – which grants and refuses permits – must balance the interests of the employer and the employee against the public interests under the Dismissal Decree. In *collective* dismissals, the public interest is to prevent mass layoffs. In *individual* dismissals, the public interest is preventing rash dismissals (i) to protect employees against loss of income, and to protect the weak in particular; and (ii) to restrict the number of applicants for invalidity and unemployment benefits.[243]

15.3 Legislative history of Book 7 Title 10 of the Dutch Civil Code

15.3.1 The Act of the Employment Agreement of 1907

To understand how the rules on employment termination under the BBA 1945 and Book 7 Title 10 of the Dutch Civil Code interact, I will now describe the legislative history of the latter, which starts in 1891 when the Minister of Justice, Smidt, asked Drucker to prepare a draft of an Act of the Employment Agreement. Drucker hereupon submitted his first draft in 1894. Smidt resigned shortly after he received the draft, hence, could not pay significant attention to it. In 1898, Drucker received a renewed assignment from the new Minister of Justice, Cort van der Linden, who received the (second) draft on 17 October of that same year, which resulted in a Bill.[244] Hereupon, the Minister of Justice sent the Bill to the Lower House on 7 May 1901. It was withdrawn that same year. The new Minister of Justice, Loeff, however, on 28 January 1904 sent to Parliament virtually the same Bill as submitted earlier in 1901. The Bill was discussed in Parliament under a new Minister of Justice, Raalte, who had succeeded Loeff in 1905.[245] The Lower House adopted the Bill with 79 to 8 votes against. On 10 July 1907, the Bill was adopted in the Upper House, with 29 to 15 votes against, and approved by the Queen on 13 July 1907.[246] The date

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242 The CWI replaced the Regional Director of Labor Services (*Regionaal Directeur van de arbeidsvoorzieningsorganisatie* or *RDA*) as from 1 January 2002. The Regional Director of Labor Services, in turn, replaced the Director of the district employment office (*Directeur van het gewestelijk arbeidsbureau*) as from 1 January 1999. See Van Drongelen en Van Rijs 2003, p. 19-21.

243 To the extent the Dismissal Decree treats the elderly and the disabled as special categories it is argued to serve the public interest. See Van den Heuvel 1983, p. 45, referring to M.G. Levenbach, *Kanttekeningen bij het Buitengewoon Besluit Arbeidsverhoudingen*, Sociaal Maandblad 1947, p. 41; Van der Heijden 1984, p. 61. See also below under § 16.3.

244 Bles I, 1907, p. v; Canes 1908, p. 9 and 10; Meijers 1912, p. 40; Phaff 1986, p. 9; Kuip 1993a, p. 25; Heerma van Voss 1992, p. 33; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.2.

245 New provisions, which were introduced – compared to the draft of Drucker of 17 October 1898 – were those with regard to the exclusive jurisdiction and the venue of the Cantonal Court in employment and labor matters, and provisions with regard to the collective bargaining agreement (Art. 1637n). See Bles I, 1907, p. vi-viii; Canes 1908, p. 12; Meijers 1912, p. 40, 41 and 73; Phaff 1986, p. 9; Kuip 1993a, p. 25 and 26; Heerma van Voss 1992, p. 33.

246 Canes 1908, p. 13 and 14; Meijers 1912, p. 41; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.2.

of entry into force of the Act of the Employment Agreement was set on 1 February 1909.[247]

The Act of the Employment Agreement of 1907 consisted of the Articles 1637a-1639dd. However, on 25 April 1947, Meijers was assigned by the government to design a New Dutch Civil Code (*Nieuw Burgerlijk Wetboek* or *NBW*). Subsequently, Book 1 on the law of persons and family law (*personen- en familierecht*), and Book 2 on the law of legal persons (*rechtspersonenrecht*) went into force on 1 January 1970 and 26 July 1976, respectively.[248] To the employment relationship, Book 3 on patrimonial law (*vermogensrecht*), and Book 6 on the law of obligations (*verbintenissenrecht*) are important.[249] These Books – together with Book 5 on the law of property (*zakenrecht*) – went into force on 1 November 1992.[250] Subsequently, the Articles of the Act of the Employment Agreement of 1907, in turn, required adjustment to the Books 3 and 6. Consequently, the Act of the Employment Agreement of 1907 temporarily became Book 7A Title 7A of the Dutch Civil Code. Levenbach, meanwhile, already had been asked to revise the Articles of the Act of the Employment Agreement of 1907, to be incorporated in the New Dutch Civil Code. His draft of 1972 formed the basis[251] for what would become Book 7 Title 10 of the Dutch Civil Code (Articles 610 to 689), of which the date of entry into force was set on 1 April 1997.[252]

The Act of the Employment Agreement of 1907 is preceded by a summary regulation on master and servants (*huur van dienstboden en werklieden*), consisting of the Articles 1637 to 1639.[253] Article 1585, too, applied to the employment relationship. At the time, one generally considered the employment relationship as one of rental of services under Article 1583, which Article distinguished between rental of goods (*huur van goederen*) and rental of services (*huur van diensten*). Article 1585 described the latter as an agreement by which one party, the servant, commits himself to perform work for the other, the master, in exchange of payment.[254] The Articles 1637 to 1639 provided detailed rules for the rental of services. The Articles 1637 and 1638 derived from the French Code Civil, with the exception of Article 1639 that derived from Dutch ancient custom law (*oud-vaderlands recht*).[255] Because the French Code Civil did not provide a rule on employment termination, the legislature

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247 KB 13 juli 1907.

248 Van Zeben 1993, p. xi.

249 See also below under § 28.3.1.

250 For Books 3, 5 and 6, see KB 9 mei 1980, Stb. 430, 431 and 432, respectively.

251 For both drafts, see Van der Heijden 1991: enclosures.

252 Stb. 1996, 406 and 562. See also Van Slooten 1997, p. 284-288; Jacobs, Massuger en Plesser 1997.

253 Meijers 1912, p. 3; Phaff 1986, p. 9; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.2. See also below under § 28.2.1.

254 For an in-depth discussion of these Articles – in relation to Art. 1637 to 1639 – see Drucker 1894. See also Cornelissens 1959, p. 519 and 520.

255 For an in-depth discussion of the legislative history of these Articles, see below under § 28.2.1.

had adopted the rule under Dutch ancient custom law.[256] It, however, applied to employment agreements for a definite period only. In this respect, it is noteworthy to mention that, according to custom, parties generally did not agree upon contracts for an indefinite period.[257]

More specifically, under Article 1639, parties could terminate the employment agreement for a definite period, prior to the expiry date, with a legal reason (*wettige reden*) only.[258] It determined that the *servant* who wished to terminate the contract prior to the expiry date, needed a legal reason to establish that he would be entitled to his salary until the expiry date. The *master*, too, could terminate the contract prior to the expiry date, with a legal reason. However, in case the master terminated the contract without a legal reason, Article 1639 explicitly determined that the master needed to provide the servant with a severance payment of at least six weeks, and less, if the contract had lasted shorter than six weeks. Consequently, the Dutch Civil Code of 1838 did not provide rules on employment termination for employment agreements for an *indefinite* period. In contrast, French courts applied the doctrine of *abus de droit* to employment agreements for an indefinite period, providing employees just cause protection. In the Netherlands, employers could still dismiss these employees at will.[259] Only when parties had agreed upon a notice period, did they need to respect this period. However, in practice, parties did not agree upon a notice period, or agreed upon short notice periods only.[260] Hence, the summary regulation led to abuse by employers of workers. First, the regulation did not provide rules on employment agreements for an *indefinite* period, or other important situations, e.g. non-competition. Second, the term 'legal reason' in Article 1639 was not defined, which caused insecurity for employers and employees.[261] Last, Article 1638 was considered as ancient. This Article determined that a servant had to take the master on his word. This rule was effective in small settings, but not in bigger ones such as factories.[262]

To prevent abuse, the legislature enacted the Act of the Employment Agreement of 1907, which replaced the summary regulation.[263] In brief, a new Article 1637 enumerated three contracts of work (i) the employment agreement

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256 Cornelissens 1959, p. 36.

257 In fact, until 1945 the employment agreement for a definite period was more attractive than an employment agreement for an indefinite period. See Loonstra 2004, p 30-32.

258 Cornelissens 1959, p. 36.

259 Cornelissens 1959, p. 36-38, referring to Rb. Amsterdam, 11 juli 1865, Weekblad voor het Recht no. 2738; Rb. Leeuwarden, 18 juni 1885, Weekblad voor het Recht no. 5325; Rb. Utrecht, 11 januari 1893, Weekblad voor het Recht no. 6284; Rb. Den Bosch, 19 april 1895, Weekblad voor het Recht no. 6726; Rb. Den Haag, 14 december 1897, Weekblad voor het Recht no. 7100.

260 Meijers 1912, p. 200, footnote 1; Ringeling 1953, p. 11; Kuip 1993a, p. 20-25.

261 See also above under § 15.3.1.

262 For an in-depth discussion of Art. 1638, see Cornelissens 1959, p. 35, referring to Mannoury 1955. See also Koopmans 1962, p. 8; Kuip 1993a, p. 25; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.2.; Loonstra en Zondag 2004, p. 53-57.

263 For an in-depth discussion on the government's motives behind the Act, see below under § 28.2.1.

(*arbeidsovereenkomst*); (ii) the contract for services (*overeenkomst van opdracht*); and (iii) the acceptance of work (*aanneming van werk*). In total, 78 provisions (Articles 1637 to 1639x) applied to the employment agreement, and 4 provisions (Articles1640 to 1643) to the acceptance of work. The contract for services did not (yet) hold detailed rules.[264] The discrepancy in number of provisions between the employment agreement and the acceptance of work is striking. This difference is due to the subordination of employees under the employment agreement, which, too, explains that, the Articles 1639e to 1639x on employment termination, in total twenty, were virtually all fully *mandatory* (*vol-dwingend*) to prevent employees from being abused by employers.[265] Under the Act

- parties could agree upon a contract for a definite period, which automatically expired after the expiry date and, in principle, could not be terminated in between;
- parties could agree upon a contract for an indefinite period, which could be terminated at all times, provided they respected a notice period;
- parties could agree upon a probationary period, which could be terminated at all times; and
- contracts automatically came to an end through the death of the employee.

The possibility of termination by mutual consent was not mentioned in the Act.[266] To this situation, general contract principles applied.[267] Other ways to terminate the employment agreement were through (i) unilateral termination of the contract with severance payment; (ii) dissolution of the contract by the court for serious cause; and (iii) dissolution of the contract by court based on breach of contract. As today, Book 7 Title 10 of the Dutch Civil Code reflects these ways of dismissal.[268]

Also, to conditions subsequent in employment agreements, general contract principles – of Book 6 – of the Dutch Civil Code applied. Besides, the Articles 1639e.3 and 4 (Articles 7:667.7 and 8 DCC) applied, determining that conditions subsequent in employment agreements are invalid when the conditions stipulate that marriage or registered partnership (Section 7) and/or

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264 Meanwhile, Book 7 Title 7 DCC contains specific rules on the contract for services.

265 Meijers 1912, p. 3-31, 42 and 43; Pitlo 1977, p. 2 and 3; Phaff 1986, p. 9; Heerma van Voss 1992, p. 33. For the term and a justification of mandatory law, see below under § 28.2.2. See also above under § 1.4.3.4.

266 Canes 1908, p. 265 and 266; Meijers 1912, p. 188.

267 For an in-depth discussion of case law on this subject, see Van Heusden 2006, p. 45-111.

268 Loonstra 2004, p. 28-30.

pregnancy or birth (Section 8) will render the employment agreement invalid automatically.[269]

Subsequently, advocates in the past stated that to the extent the legislature declared void *certain* conditions subsequent only, it allowed employers to agree upon *other* conditions subsequent.[270] In contrast, Asscher-Vonk was of the opinion that the exclusive character of the rules on employment termination (*gesloten ontslagstelsel*) excluded the possibility for employers to include a condition subsequent in the employment agreement, hence, the legislature intended to declare *all* conditions subsequent void.[271] Van den Heuvel, too, argued that a condition subsequent could not set aside mandatory rules on employment termination.[272] Coehorst and De Leede took the middle course, stating that whether conditions subsequent in the employment agreement are void depends on whether they are in violation of the – intent behind[273] – mandatory rules on employment termination.[274] With its decision on 6 March 1992, in *Mungra/Meir*, the Netherlands Supreme Court, in effect, followed Coehorst and De Leede. The Court held that a condition subsequent in an employment agreement can be incompatible with the dismissal system, however, not perse, hence, this should be judged ad-hoc, dependent on the circumstances of the case.[275] Hereupon, in literature, a discussion took place on which conditions subsequent in the employment agreement under case law could be considered as (in)valid.[276] Subsequently, in *Van Zijl/Van Koppen (1996)*,[277] and *Arrindell/Port de Plaisance (1998)*,[278] the Netherlands Supreme Court declared conditions subsequent in employment agreements void, adding that a condition subsequent in an employment agreement is valid in rare cases only.[279] The Netherlands Supreme Court in *Monte/De Bank van de Nederlandse Antillen*

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269 Stb. 1976, 295. The provisions went into force on 1 August 1976 (Stb. 1976, 388). See also Loonstra en Zondag 2004, p. 356-359.

270 For example, see Arnold 1978, p. 624.

271 Asscher-Vonk 1978, p. 328.

272 Van den Heuvel 1983, p. 139.

273 De Leede 1998, p. 253 en 254.

274 Coehorst 1984, p. 349.

275 HR 6 maart 1992, NJ 1992, 509, JAR 1992/10 (*Mungra/Meir*): the condition subsequent was considered valid. For an in-depth discussion of this case, see Kuip 1993b; Boersma 2003, p. 7 and 8.

276 For an overview of the authors in question, see HR 13 februari 1998, NJ 1998, 708, JAR 1998/72 (*Arrindell/Port de Plaisance*), Conclusion Advocate General, under 8.

277 HR 24 mei 1996, NJ 1996, 685, JAR 1996/141 (*Van Zijl/Van Koppen*): the condition subsequent was considered invalid. For a discussion of this case, see Heerma van Voss en Van der Heijden 1996; Boersma 2003, p. 7 and 8.

278 HR 13 februari 1998, NJ 1998, 708, JAR 1998/72 (*Arrindell/Port de Plaisance*): the condition subsequent was considered invalid. For an in-depth discussion of this case see Boersma 2003, p. 8 and 9; De Wolff 1999.

279 For an overview of the authors in question, see HR 13 februari 1998, NJ 1998, 708, JAR 1998/72 (*Arrindell/Port de Plaisance*), rov. 3.3.2.

(2002) affirmed the latter,[280] although the condition subsequent in this case was held valid.[281] The application of general contract principles in the employment agreement – like in the United States – thus can lead to problems.

15.3.2 The amendments of 1953 and just cause

The Act of the Employment Agreement of 1907 brought more security for employees,[282] although the Act of the Employment Agreement of 1907 did *not* change the *at-will rule* for employment agreements for an *indefinite* period. The only requirement under the new Article 1639g was that employers and employees needed to respect a notice period established by law, equal to the period between payments.[283] In practice, employers generally paid their employees by week, hence, the notice period, in practice, were a short one.[284] Moreover, the employer was not liable when the termination took place *without* the notice period, i.e. when the party who terminated the contract (i) paid a severance payment to the other; or (ii) could bring forward an urgent reason for dismissal that justified the termination.[285] In fact, under the new Article 1639o an employer could still dismiss an employee without cause or even for a bad cause.[286] The legislature of 1907 did not opt for the introduction of a just cause for a dismissal, because this did not (yet) reflect the general opinion in the Netherlands.[287] In fact, it is said that the Act of the Employment Agreement of 1907 *abolished* the just cause rule that applied to employment agreements for a *definite* period. In brief, under the new Article 1639e in conjunction with the Articles 1639o and 1639r, an employer was *prohibited* to terminate an employment agreement for a definite period prior to the expiry date. Under Article 1639 *old*, the employer could terminate the employment agreement prior to the expiry date with a legal reason. The result was the same, however. In both cases, the employer was liable when he terminated the employment agreement in between without cause.

The absence of a just cause standard in the Act was severely criticized. Dismissals of employees who were called for military service were especially considered as unfair. Objection was also made to the short notice periods, which

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280 HR 1 februari 2002, NJ 2002, 607, JAR 2002/45, rov. 3.7 (*Monte/De Bank van de Nederlandse Antillen*): the condition subsequent was considered valid. For an in-depth discussion of this case, see Boersma 2003, p. 9 and 10. See also Duk 2005, p. 8 and 9.

281 For an overall discussion on the four cases of the Netherlands Supreme Court on conditions subsequent in the employment agreement, see Christe 2002.

282 Meijers 1934, p. 8; Ringeling 1953, p. 11.

283 Under the law, the notice period could not extend six weeks, unless parties had agreed upon extension with a maximum of six months. Bles IV, 1909, p. 7-11, referring to Art. 1639g; De Gaay Fortman 1936, p. 127; Meijers 1912, p. 190 and 191; Naber 1984, p. 12.

284 Canes 1908, p. 286; Bles IV, 1909, p. 93; Meijers 1912, p. 198; Naber 1984, p 11 and 13.

285 Mok 1934, p. 75; Phaff 1986, p. 12 and 17.

286 Canes 1908, p. 286; Bles IV, 1909, p. 93; Meijers 1912, p. 198; Naber 1984, p 11 and 13.

287 Meijers 1912, p. 190; Ringeling 1953, p. 11 and 18; Van den Heuvel 1983, p. 25; Phaff 1986, p. 11 and 12. See also above under § 15.1.1.

applied to employees, regardless of the years of service.[288] Subsequently, in 1935 the Minister of Justice had to promise the Lower House to install a Committee, which was to become the Committee Limburg, to consider the rules with regard to employment termination. This Committee concluded that the Act of the Employment Agreement of 1907 needed to undergo changes in both aspects. Unfortunately, the Bill that the Minister of Justice had prepared could not be discussed in Parliament, due to the Second World War.[289]

After the Second World War, the discussion on a just cause for dismissal and the short notice periods sparked off again. Also, a new debate arose on the interaction of the rules on employment termination under the Act of the Employment Agreement of 1907 and the BBA 1945. In brief, one was of the opinion that the principal rules of the Act of the Employment Agreement of 1907 and the BBA 1945 contradicted each other. The Act of the Employment Agreement of 1907 endorsed the idea that an employment agreement was considered without effect, when one of the parties lost his trust in the other.[290] Consequently, its principal rule was that parties at all times should be able to terminate the employment agreement with prior notice, regardless of the reason, and without intervention of a third party.[291] After the BBA 1945 went into force, Article 6 crossed this rule, because it did not allow employers and employees to terminate the employment agreement than with prior authorization of a public authority, requiring a just cause for dismissal.[292] Because the Preamble of the BBA 1945 held that it was temporary only, the debate, in effect, revolved around what the contents of the Act of the Employment Agreement of 1907 would be after the BBA 1945 had been withdrawn.

After the Second World War, the Dutch government was not able to give clarity *when* the BBA 1945 would be withdrawn. It realized that the Act of the Employment Agreement of 1907 needed to undergo changes on short notice, however. Consequently, Queen Wilhelmina, on behalf of the government, in her speech on 23 July 1946, announced that a Bill on a revision of rules on employment termination would be sent to Parliament. In her speech, the Queen stressed that the aim of the revision would be to give workers with a long state of service more social security. Three days later, on 26 July 1946, the Minister of Justice, Van Maarseveen, asked the Labour Foundation for advice in this matter.[293] On 2 August 1946, the Board of the Labour Foundation installed a

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288 Ringeling 1953, p. 11; Levenbach 1954, p. 2; Centraal Sociaal Werkgevers-Verbond 1954, p. 6; Naber 1984, p. 12. See also above under § 15.1.1.

289 Levenbach 1954, p. 2; Centraal Sociaal Werkgevers-Verbond 1954, p. 6; Phaff 1986, p. 39.

290 Meijers 1912, p. 197 and 198; Mok 1934, p. 74, referring to Bles IV, 1909, p. 96; Naber 1984, p. 11; Heerma van Voss 1992, p. 36 and 37.

291 Naber 1984, p. 11.

292 Levenbach 1954, p. 5.

293 Ringeling 1953, p. 22; Centraal Sociaal Werkgevers-Verbond 1954, p. 6; Levenbach 1954, p. 2; Van den Heuvel 1983, p. 46 and 47; Naber 1984, p. 24; Phaff 1986, p. 39; Heerma van Voss 1992, p. 72. See also STAR-Advies 1947, p. 3.

tripartite Committee, the Committee Slotemaker, to prepare an advice. Besides representatives of employers and employees, also principal officers of the Ministries of Justice, and Social Affairs took part in the Committee, among whom De Gaay Fortman. The latter was one of the principal officers within the Ministry of Justice, and an important defender of the *iusta causa dimissionis*.[294] Initially, the intent of the Committee of the Labour Foundation was to pay attention to the Act of the Employment Agreement of 1907 *and* the BBA 1945. However, when the Minister of Justice made clear that he wished to receive advice on the necessary amendments in the Act of the Employment Agreement of 1907 first – the idea was still that the BBA 1945 would be invoked – the Committee decided to focus on the Act of the Employment Agreement of 1907 only.[295] On 29 July 1947, the Labour Foundation presented its report to the Minister of Justice.[296] The Labour Foundation advised to

- extend the notice periods dependent on years of service;
- prohibit dismissal based on absence, due to military service or illness;
- introduce a just cause for dismissal in general through an action based on manifestly unreasonable dismissal;
- enable courts to reinstate the employee when the dismissal would be manifestly unreasonable; and
- introduce the possibility for an employee to obtain compensation from the employer in case the employee was still bound by a competition clause after termination of the employment agreement.[297]

On 24 September 1947, the Minister of Justice installed a Committee to design a Bill based on the Report of the Labour Foundation. Levenbach, like De Gaay Fortman an important defender of the *iusta causa dimissionis*, was appointed Chairman of this Committee. Its Report was presented to the Minister of Justice on 24 March 1948. On 30 June 1948, the Minister of Justice sent the Bill to the Lower House, which adopted the Bill virtually unamended on 20 February 1953.[298] The Upper House adopted the Bill on 15 December 1953.[299]

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294 STAR-Advies 1947, p. 6-8; Ringeling 1953, p. 22; Levenbach 1954, p. 2; Van den Heuvel 1983, p. 46 and 47; Heerma van Voss 1992, p. 72.

295 STAR-Advies 1947, p. 6-8; Levenbach 1954, p. 5.

296 Ringeling 1953, p. 22; Centraal Sociaal Werkgevers-Verbond 1954, p. 6; Van den Heuvel 1983, p. 47; Naber 1984, p. 24.

297 STAR-Advies 1947. See also Ringeling 1953, p. 22; Naber 1981, p. 256; Van den Heuvel 1983, p. 46 and 47; Naber 1984, p. 24.

298 Ringeling 1953, p. 23-28; Levenbach 1954, p. 3; Gerbrandy 1954, p. 3; Centraal Sociaal Werkgevers-Verbond 1954, p. 7; Van den Heuvel 1983, p. 47 and 48; Heerma van Voss 1992, p. 72 and 73.

299 Levenbach 1954, p. 3 and 4; Centraal Sociaal Werkgevers-Verbond 1954, p. 7.

The Act of 17 December 1953, holding the Revision of rules on employment termination (*Wet van 17 December 1953, houdende wijziging van de bepalingen omtrent het ontslag bij arbeidsovereenkomsten*) went into force on 1 July 1954.[300] The Act was based on the Report of the Labour Foundation of 29 July 1947.[301] Its most important provision in light of the interest of this thesis is the introduction of a manifestly unreasonable dismissal under Article 1639s, which will be discussed in-depth in paragraph 17.[302] For the time being, this provision ended the debate on a requirement of a just cause for dismissal.

15.3.3 The amendments of 1999 and just cause

At the end of the twentieth century, the debate on a just cause for dismissal revived. Employers stated that the dual just cause dismissal system restricted them to act flexibly to changes on the market, which was needed to strengthen their competitive position in the international context. The VNO-NCW, the largest employers' association, advocated the abolition of the BBA 1945.[303] With the Flexicurity Act of 1998, the legislature partly met the need of employers. Besides that it held amendments, it provided 'new rules', including Article 7:669 DCC.[304] In this paragraph I will focus on the latter, due to its implicit link with the just cause standard.

Article 7:669 DCC

Article 7:669 DCC determines that an employer is obliged, at the request of an employee, to provide the employee in writing with the reason for dismissal. Article 7:669 DCC intended to make it easier for employees to initiate an action based on manifestly unreasonable dismissal under Article 7:681 DCC.[305] Initially, the government was of the opinion that the new Article should *not* apply during the probationary period, because an employer, as transpired from legislative history, should be able to dismiss an employee without cause during this period.[306] Therefore, the employer needed not provide the employee with a reason for dismissal during the probationary period. The VNO-NCW subscribed to this point of view. In its letter of 8 September 1997 to the government, however, the FNV, the largest employees' association questioned whether this meant that an employer could also dismiss an employee for *bad* cause during the

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300 KB 30 januari 1954 (Stb. 1954, 26). See also Levenbach 1954, p. 4; Centraal Sociaal Werkgevers-Verbond 1954, p. 7.

301 Centraal Sociaal Werkgevers-Verbond 1954, p. 7. For a comparison between the Report and the Act of 17 December 1953, see Gerbrandy 1954; Levenbach 1954; Phaff 1986, p. 39-49.

302 Ringeling 1953, p. 15-18; Van den Heuvel 1983, p. 30 and 89; Van den Heuvel 2000a, p. 254; Kuip 1993a, p. 169.

303 VNO-NCW 1995, p. 12. See also below under § 28.2.3.

304 This rule can already be found in Bill 21 479. See also TK 25 263, 1996-1997, No. 3, p. 27.

305 Kuip en Scholtens 1999, p. 628. For an in-depth discussion of Art. 7:681 DCC, see below under § 17.

306 TK 25 263, 1996-1997, No. 6, p. 42; TK 25 263, 1996-1997, No. 7, p. 1.

probationary period. With reference to Article 4 of ILO Convention 158, the FNV stressed that although the Netherlands had not (yet) ratified this Convention, it has an obligation to seriously examine to what extent it can meet the standards of this Convention, including the just cause rule. The Netherlands, it continued, in effect, already adopted a just cause standard according to Article 4 of ILO Convention 158.[307] Subsequently, Rosenmöller of *Groen Links*, a political party, filed an amendment, which held that Article 7:669 DCC also would apply to a dismissal during the probationary period, to be found necessary in light of, for example, discriminatory discharges.[308] The amendment was adopted. The date of entry into force was set on 1 January 1999. Surprisingly, no one paid attention to the fact that ILO Convention 158 itself allows workers serving a probationary period to be *excluded* from its protection on the condition, that the probationary period is determined in advance, and of reasonable duration.[309] In this respect, it bears mentioning that as from 1 January 1999, a probationary period under Article 7:676 DCC is valid only when agreed upon in writing, and the probationary period is one month for employment agreements for a definite period, and two months for employment agreements for an indefinite period.[310]

No one discussed the *sanction* on dismissal without good cause during the probationary period. As mentioned above, Article 7:669 DCC intended to make it easier for employees to initiate an action based on manifestly unreasonable dismissal under Article 7:681 DCC. However, Article 7:681 DCC does not apply to a dismissal during the probationary period.[311] The question arises what cause of action an employee then has when he is dismissed without good cause during the probationary period. In my opinion, as I and two other authors already defended in 2003, based on legislative history and the following case law, an employee in these cases can rely on Article 7:611 DCC (1638z old), which determines that an employer must at all times behave as befits a good employer. In fact, in parliamentary discussions it has been stressed more than once that Article 7:611 DCC applies *during* the probationary period.[312] Loonstra correctly states that nothing, in fact, justifies that an employer may behave as a bad employer during the probationary period.[313] The Netherlands Supreme

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307 With regard to the contents of the letters of the FNV and VNO-NCW, see Kuip en Scholtens 1999, p. 109, 629-632.

308 TK 25 263, 1997-1998, No. 11. See also Kuip en Scholtens 1999, p. 632.

309 Protection against unjustified dismissal, ILO 1995, par. 40.

310 Art. 7:652 DCC determines that, as regards an employment agreement for a definite period, parties can agree upon a probationary period longer than one month through a collective bargaining agreement.

311 See Art. 7:676 DCC.

312 See also Van Arkel, Boontje en Loonstra 2003, p. 45.

313 Loonstra 2004, p. 37.

Court seems of a same opinion.in *Codfried/ISS (1995)*,[314] and *Triple P/Tap (2000)*.[315]

In *Codfried/ISS (1995)*, an employer dismissed an employee during her probationary period after the employer had discovered that the central office in hiring the woman, who was 65 years old, had made a mistake. The policy of ISS was *not* to hire employees at or over the age of 65. In pursuance of this policy, ISS dismissed Codfried as from 22 July 1991, the date on which she was initially hired. Codfried claimed before the Netherlands Supreme Court that (i) the dismissal was discriminatory because of age; and (ii) the dismissal was in violation of the employer's duty to behave as befits a good employer. The first ground caught most attention in Dutch literature, because at the time there was no prohibition on dismissal based on age under Dutch law.[316] The second ground is more interesting for this thesis. In appeal, the court in this respect held that the employer had violated his duty to behave as befits a good employer, because the employer could have known that Codfried was 65 when it hired her. The Netherlands Supreme Court did not explicitly rejected the statement of the lower court that Article 7:611 DCC applied to a dismissal during the probationary period.[317]

In *Triple P/Tap (2000)*, the employee, Tap, who had been in service of Triple P for eight years decided to leave the company, but returned on the basis of an employment agreement of two years with a probationary period of two months. The reason to return to Triple P was that the employer had offered Tap a job in England, which was convenient to the employee who had his girl friend and his son living in England. Shortly before he would start to work, Triple P announced that the job in England was cancelled. As an alternative, the employer offered Tap a job in Belgium. Tap, however, rejected the job, hence, was dismissed during the probationary period. The lower court held that a dismissal during the probationary period can be unreasonable according to Article 7:611 DCC. Subsequently, it held that the employer had violated its duty to behave as a good employer based on the facts that (i) the employer should have given the employee some time to think over the job in Belgium; and (ii) the employer did not point out to Tap that he would be dismissed if he refused the job in Belgium, being aware that it was important for the employee to obtain the job in England. Also, in this case, the Netherlands Supreme Court did not explicitly rejected the statement of the lower court that Article 7:611 DCC, in effect, applied to dismissals without good cause during the probationary period.

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314 HR 13 januari 1995, NJ 1995, 430, JAR 1995/35 (*Codfried/ISS*).

315 HR 10 november 2000, JAR 2000, 249 (*Triple P/Tap*).

316 On 1 May 2004, the Act on Equal Treatment Based on Age went into force (Stb. 2004, 30), i.e. an implementation took place of EC Directive 2000/78/EG (PbEG 2003, 29). See also above under § 14.4.5.

317 For an in-depth discussion of HR 13 januari 1995, NJ 1995, 430, JAR 1995/35 (*Codfried/ISS*), see Loonstra 2002.

Overall, *Codfried/ISS (1995)* made clear that an employer is not allowed to dismiss an employee for bad cause during the probationary period. Subsequently, *Triple P/Tap (2000)*, in effect, made clear that an employer must behave as befits a good employer during the probationary period. The latter can also be derived from the fact that Article 7:669 DCC applies during this period.[318] This, in turn, raises the question, *when* an employer is *not* behaving as befits a good employer during the probationary period. The Advocate General (*Advocaat-Generaal*)[319] in *Codfried/ISS (1995)* implies that this is the case when the reason for dismissal is not related to an objective examination of the capability and capacity of the employee. The Netherlands Supreme Court did not follow the Advocate General, in that it only held it as *impossible* to dismiss an employee for a *bad* cause during the probationary period.[320] It did not hold that employees, in general, have a claim on the basis of Article 7:611 DCC when they are dismissed for a reason that is not related to an objective examination of the employee's capability and capacity. In *Triple P/Tap (2000)* the Netherlands Supreme Court, nonetheless, seems to leave room to base a claim on Article 7:611 DCC when the employee dismisses an employee for *other* than discriminatory reasons, including reasons, which are not related to an objective examination of the employee's capability and capacity.

Elaborating on the foregoing decisions, Loonstra argues that the law must be amended, in that an employer can only dismiss an employee during the probationary period when the reason for dismissal is related to an objective examination of the employee's capability and capacity. Personally, I do not advocate restricting the use of the probationary period as Loonstra proposes, or to abolish the probationary period under the dismissal system as others advocate.[321] From the discussion on Article 7:669 DCC it can be derived that the legislature explicitly refers to Article 4 of ILO Convention 158. This international just cause standard includes more than the employee's (in)capability and (in)capacity.[322] Moreover, when the employee is dismissed for other reasons than the foregoing, the above case law provides sufficient protection. Employees can either ask for damages under Article 7:611 DCC, or reinstatement, based on discriminatory discharge.[323] Finally, an employer *and* employee, in general, prefer to have a short period to examine whether they wish to continue their employment relationship before the strict rules on employment termination apply.

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318 For an in-depth discussion of HR 10 november 2000, JAR 2000/249 (*Triple P/Tap)*, see Boontje 2001.

319 The Advocate General writes a legal opinion, in effect, advising the Netherlands Supreme Court. In general, the latter follows the Advocate General.

320 See also Loonstra 2004, p. 36 and 37.

321 See Christe 1979; Van den Heuvel 1983, p. 130; Nelissen-Roy 1988.

322 See below under § 22.

323 For a discussion on the (different) remedies, see Van Arkel, Boontje en Loonstra 2003.

16 The 1945 Special Decree on Labor Relations (BBA 1945): just cause protection?

If the BBA 1945 were to be abolished, it is important to know to what extent private-sector employees enjoy just cause protection under Book 7 Title 10 of the Dutch Civil Code. This will be examined in the paragraphs 17 and 18. If private-sector employees are lacking just cause protection under Book 7 Title 10 of the Dutch Civil Code, this, in fact, may be an argument *not* to abolish the BBA 1945 (yet). Although Phaff in her 1986 dissertation – in which she paid little attention to the Directives, and studies on the subject – concludes that private-sector employees enjoy just cause protection under the BBA 1945, together with Article 1639s (7:681 DCC), it is justified to re-examine this question twenty years later.[324]

16.1 Scope of Article 6 of the BBA 1945

Article 6.1 of the BBA 1945 determines that an employer needs prior authorization of the CWI to dismiss an employee against his will. Additionally, the Netherlands Supreme Court held that the employer could terminate the employment agreement only *after* having obtained permission hereto.[325] If the employer terminates the employment agreement *without* prior authorization, this does not automatically render the termination void. According to Article 9, the employee must *invoke* the invalidity of the termination within six months. Consequently, if the employee does not timely invoke the invalidity, the termination is valid.[326] In the past, there was still discussion whether an employee could ask for reinstatement, or could claim for *damages* only. The issue was resolved in 1942 when the Third Implementing Order made clear that termination of employment without prior authorization resulted in an invalid termination, hence, the employee could ask for reinstatement, as defended earlier by Levenbach in 1940.[327]

Prior authorization of the CWI is not required in case of a summary dismissal; during the probationary period; when parties mutually agreed upon

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324 Phaff 1986, Chapters 6 and 7, particularly p. 88 and 89.

325 HR 19 november 1948, NJ 1949, 86 (*De Kock/Van Heijst & Zonen*). See Van der Grinten en Haakman 1954, p. 28 and 46; Naber 1981, p. 147-150.

326 Kuip 1993a, p. 123 and 124, footnote 4, referring to J. Hijma*, Nietigheden in het vermogensrecht,* Rechtsgeleerd Magazijn Themis 1992, p. 406 and 407.

327 M.G. Levenbach, *Enkele civielrechtelijke kwesties in verband met de ontslagverordening*, RBA XXVI, no. 6, p. 41, 1 September 1940 in debate with H.W.L. Vrind, *De ontslagverordening en de Wet op het arbeidscontract*, RBA XXVI, no. 8, p. 59, 1 November 1940; W.J.M. Weersma, *De ontslagverordening en de Wet op het arbeidscontract*, RBA XXVI, no. 9, p. 65, 1 December 1940; W.C.L. van der Grinten, *Nieuw Arbeidsrecht*, NJB 1940, p. 643. See also M.G. Levenbach, Naschrift bij W.J.M. Weersma, *De ontslagverordening en de Wet op het arbeidscontract*, RBA XXVI, no. 9, p. 65, 1 December 1940. See also Van den Heuvel 1983, p. 42 and 43; Phaff 1986, p. 31 and 32; Heerma van Voss 1992, p. 66.

termination of employment; the employment agreement has expired automatically; or, the employment agreement has been dissolved by court. [328]

Article 6 of the BBA 1945 applies to employees according to Article 7:610 DCC, *and* to employees who perform work for another person.[329] On the other hand, exempted from its scope are (a) those who perform work for at least three persons; (b) those who are assisted by at least three persons; or (c) those who perform work, but the labor in question does not involve their core labor. In general, freelancers are exempted under Article 6 of the BBA 1945. A freelancer, nonetheless, may fall within the scope of the BBA 1945. A problem may rise when his relationship cannot be qualified as an employment agreement under Article 7:610 DCC. A good example is *Sijthoff/Ouwerkerk (1996).*[330] In this case, a publisher, Sijthoff, wished to terminate the working relationship with one of its freelance-journalists, Ouwerkerk. The latter was working for one of its magazines that were distributed in The Hague. The reason to terminate the contract was that Ouwerkerk had decided to move outside The Hague. Hereupon, Sijthoff decided to address the RDA who refused to give permission to terminate the contract solely on this ground. Subsequently, Sijthoff addressed the Cantonal Court to ask for dissolution of the contract. The latter, however, declared the request inadmissible, stating that the relationship could not be qualified as an employment agreement. Subsequently, the question with the Netherlands Supreme Court became whether the contract between Sijthoff and Ouwerkerk, nonetheless, could be dissolved by the Cantonal Court under Article 1639w or, instead, based on the general contract principle of Article 6:258 DCC. Under this Article, a court can dissolve an agreement in case of unforeseen circumstances, with retrospective effect, if based on principles of fairness and reasonability one, in effect, can no longer ask the other to continue the contract.

The Netherlands Supreme Court decided to choose for the latter. It held that Article 1639w applied to employment agreements only, hence, Article 6:258 DCC applied to the contract. The Netherlands Supreme Court, however, must have realized that the application of this general contract principle to the contract between Sijthoff and Ouwerkerk would cause difficulties, in that Article 6:258 DCC according to case law can be applied in rare cases only. Subsequently, the Netherlands Supreme Court held that the contract between Sijthoff and Ouwerkerk under Article 6:258 DCC could be applied 'with no more reservation than the Cantonal Court in applying Article 1639w'. In two aspects the general and special rule clash, however. First, Article 1639w is widely used. Article 6:258 DCC, on the other hand, can only be applied to rare cases. Hence, it is unclear whether a court, under Article 6:258 DCC, can dissolve the contract based on breach of trust. Second, Cantonal Courts *cannot* dissolve an employment agreement under Article 1639w with retrospective

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328 See Art. 6.1 and 2 of the BBA 1945, respectively . See also Van Drongelen en Van Rijs 2003, p. 61-67.

329 See Art. 1.b under 1 and 2 of the BBA 1945.

330 HR 8 november 1996, NJ 1997, 217, JAR 1996/249 (*Sijthoff/Ouwerkerk*).

effect. In contrast, the court can dissolve a contract with retrospective effect under Article 6:258 DCC.[331] Due to these problems, one argues that freelancers who, in effect, are economically and socially dependent, analogous to employees should enjoy the same treatment with regard to just cause protection.[332] This case, too, shows that – similar to conditions subsequent – the application of *general contract principles* in the employment agreement can lead to problems.

Article 2 of the BBA 1945 *excludes* the following workers – either or not with an employment agreement – from its scope (i) public employees and others, working in service of a public agency; (ii) teachers in the broadest sense; (iii) priests, whether performing ecclesiastical services or, in effect, performing as welfare workers; and (iv) cleaning personnel in service of private persons, performing labor fewer than three days per week.[333] In literature, one has serious doubts on the rationale behind the exemption of these workers. In brief, they argue that when there is a special dismissal regime that applies to these workers, the exemption is understandable. Article 2, however, also excludes those who are *not* subject to a special dismissal regime.[334] Also, in Parliament one raises serious doubts to these exemptions under Article 2 of the BBA 1945. To the extent the legislature wishes to respect constitutional rights as the freedom of education (see under ii) or the freedom of religion (see under iii), they argue that these exempted workers also include sports teachers, driving instructors, and teachers of dancing and music**,** hence, one can doubt the rationale to exclude these workers based on the freedom of education and religion, respectively.[335]

Last, managing directors (*statutair directeuren*) are exempted from the scope of the BBA 1945.[336] They are subject to Book 2 of the Dutch Civil Code, being appointed *and* dismissed by the general meeting of shareholders (*algemene vergadering van aandeelhouders: besloten vennootschap*) or the board of supervisory directors (*raad van commissarissen: naamloze vennootschap*). Those who work on the basis of an employment agreement, are subject to the rules of Book 7 Title 10 of the Dutch Civil Code.[337] This often

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331 For an in-depth discussion of this case, see Boerlage en Allegro 1997; Jansen en Loonstra 1997; Vegter 1997; Loonstra en Zondag 2006, p. 293 and 294.

332 Loonstra en Zondag 2006, p. 293.

333 See also Koopmans 1962, p. 274-276; SER-Advies 1970/9, p. 22 and 23.

334 HR 11 december 1998, NJ 1999, 494, JAR 1999/32 (*Siegel/NOvA*). See also HR 20 maart 1992, NJ 1992, 725 (*Driessen/KUN*); HR 19 oktober 1979, NJ 1980, 57 (*Beijer/Smit*).

335 TK 2005-2006, 29 738 and 30 370, No. 22. See also Loonstra en Zondag 2006, p. 294-296.

336 Art. 6. 9 of the BBA 1945 allows the Minister to release certain employees from Art. 6.1 (preventive review). This took place with regard to managing directors (*statutair directeuren*) by Ministerial Decree of November 21, 1972 (Stcrt. 1972, 234).

337 For the dual character of the relationship of managing directors as employees, see HR 13 november 1992, NJ 1993, 265, JAR 1992/133 (*Levison/MAB*), HR 8 oktober 1993, NJ 1994, 211, JAR 1993/244 (*Mooij Verf*), HR 15 april 2005, NJ 2005, 483, JAR 2005/153 (*Bartelink/Ciris*), HR 15 april 2005, NJ 2005, 484, JAR 2005/117 (*Unidek*) and HR 3 februari 2006, JAR 2006/66 (*Seebregts/NH Corporate Training*). For a discussion of the decisions of 15 April 2005, see Ruizeveld 2005; Verburg 2005b; De Bock 2006; Bennaars 2006.

leads to discussions among academics. In general, managing directors are considered as economically and socially *in*dependent, having sufficient bargaining power to determine their own terms. Hence, in literature one states that managing directors should be excluded from the rules under Book 7 Title 10 of the Dutch Civil Code, which primarily see to *dependent* employees.[338] Others plead for a special regime for managing directors under Book 7 Title 10 of the Dutch Civil Code.[339] Already, a debate on this subject took place during the parliamentary discussions of the Bill on the Act of the Employment Agreement. In fact, Drucker in an 1894 publication – in the same year he produced his first draft underlying this Act[340] – stated that managing directors could not be qualified as dependent workers.[341] The reason to, nonetheless, apply the Act of the Employment Agreement of 1907 to managing directors as well, was that the Act wished to cover *all* workers in service of employers.[342]

16.2 The Directives, the Delegation Decree and the Dismissal Decree

Article 6.1 of the BBA 1945 does *not* require a just cause for dismissal. However, under Article 6.3 – that determines that the Minister of Social Affairs can further the rules of the BBA 1945 – the Minister of Social Affairs issued the Dismissal Decree. The latter applies up to today.[343] More specifically, Article 3:1 of the Dismissal Decree determines that the CWI must decide whether a dismissal is justified.[344] The Delegation Decree (*Delegatiebesluit)*,[345] the Directives (*Richtlijnen*),[346] and so-called Circular Letters (*Circulaires*)[347]

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338 Van der Heijden en Noordam 2001, p. 120-122; Loonstra en Zondag 2006, p. 297-299. See the suggestion of the *Committee Tabaksblat* in its *draft* on the *Dutch Corporate Governance Code of D*ecember 2003, prescribing that managing directors are not allowed to agree upon an employment agreement, but on a contract for services (*overeenkomst van opdracht*) only. See also Boot 2005c, p. 87-91.

339 Boot 2005c, p. 77-91 and p. 355-357.

340 See above under § 15.3.1.

341 Drucker 1894, p. 519 and 520.

342 See also Loonstra 1990, p. 35 and 36.

343 The Dismissal Decree of 7 December 1998 went into force on 1 January 1999, Stcrt. 1998, 238, amended by Stcrt. 2000, 137; Stcrt. 2000, 248; Stcrt. 2001, 249; Stcrt. 2002, 53; Stcrt. 2002,175; Stcrt. 2003, 5; Stcrt. 2003, 49; Stcrt. 2005, 242.

344 In the past, the Directives, and Art. 8 of the Delegation Decree provided a similar rule. Van der Grinten en Haakman 1952, p. 41-43 (Directive 1948); Centraal Sociaal Werkgevers-Verbond 1954, p. 78 and 79 (Directive 1954); Dienske 1965, p. 47-49 (Directive 1964); Van der Heijden 1984, p. 60 and 61 (Directive 1974). See also Van den Boom 1992, p. 195; Kuip 1993a, p. 281; Van der Sluis 1997; Beltzer, Knegt en Van Rijs 1998, p. 11.

345 Delegatiebesluit van 20 december 1990, Stcrt. 1990, 252 amended in 1993, Stcrt. 1993, 11.

346 Centraal Sociaal Werkgevers-Verbond 1954, p. 63; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, BBA 1945, Art. 6 BW (DCC) § 12.

347 Ringeling 1953, p. 34, footnote 34, referring to '(a) Circulaire R.A.B. No 921 Afd. I en N betreffende het aangaan en het beëindigen der arbeidsverhouding (BBA.'45) d.d. 21 januari 196 and (b) Circulaire R.A.B. Afd. BA No 11966 betreffende toepassing van de artikelen 1 tot en met 6, 21 en 26 van het Buitengewoon Besluit Arbeidsverhoudingen 1945 d.d. 1 december 1948'.

preceded the Dismissal Decree. Contrary to the Delegation Decree[348] and the Directives,[349] the Circular Letters were issued by the German enemy – i.e. the Director-General of the Employment Office – to control the Dutch labour market. Hence, in light of just cause protection, the focus in this thesis will be on the Directives, the Delegation Decree and particularly the Dismissal Decree.

The Directives applied until 1 January 1991. The reason to replace the Directives by the Delegation Decree is that under Article 6 old of the BBA 1945, the Directors of the District Employment Offices were allowed to grant permits as they pleased, in that the Directives were meant as instructions only.[350] Being in service of the government, however, most Directors considered the rules of the Directives as mandatory. In literature, this hybrid situation was often criticized.[351] Consequently, as from 1 January 1991, the Minister of Social Affairs has been authorized to grant permission and to delegate his authority to the Regional Directors of Labor Services.[352] Subsequently, under the Delegation Decree – which replaced the *non-binding* Directives – the Minister authorized the Regional Directors to grant permits. The Delegation Decree was binding.[353] On 7 December 1998, the Delegation Decree was replaced by the Dismissal Decree, to which the Regional Directors of Labor Services were bound, like with the Delegation Decree.[354] Subsequently, the Regional Directors' authority as from 1 January 1999 derives *directly* from the BBA 1945.[355] As today, the CWI – to whom the authority to grant permits has been transferred to as from 1 January 2002 – *must* apply the Dismissal Decree.[356] Additionally, as from 1 October 2005 the regional offices of the CWI must apply the CWI Handbook on Dismissal to establish that they uniformly apply the provisions of the Dismissal Decree.[357]

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348 The Minister of Social Affairs issued the Delegation Decree. Stb. 1990, 403.

349 The Director-General of Labor Services (*Arbeidsvoorziening*), later the Minister of Social Affairs, issued the Directives. See Centraal Sociaal Werkgevers-Verbond 1954, p. 63; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, BBA 1945, Art. 6 BW (DCC) § 12.

350 For example, see the Directives of 1954, which explicitly determined that the Directors could deviate from these Directives. See Centraal Sociaal Werkgevers-Verbond 1954, p. 63 and 64; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, BBA 1945, Art. 6 BW (DCC) , 12.

351 Centraal Sociaal Werkgevers-Verbond 1954, p. 63; Overkleeft-Verburg en Roijakkers 1976, p. 11; Van der Heijden 1984, p. 64; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, BBA 1945, Art. 6 BW (DCC) § 12; Kuip 1993a, p. 123 and 128, footnote 28, referring to M.G. Levenbach, *Delegatie bij de toepassing van het B.B.A.*, Sociaal Maandblad 1951, p. 284; Van Drongelen en Van Rijs 2003, p. 19.

352 Artikel 14 Invoeringswet Arbeidvoorzieningswet, Stb. 1990, 403.

353 Van Drongelen en Van Rijs 2003, p. 20.

354 See Art. 8:1 of the Dismissal Decree.

355 A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, BBA 1945, Art. 6 BW (DCC) § 12.

356 The authority to grant permits has been transferred to the CWI as from 1 January 2002, pursuant to the Act on the Implementation Structure for Work and Income (*Wet Structuur uitvoeringsorganisatie werk en inkomen* or *SUWI*). Stb. 2001, 642. See also Van Drongelen en Van Rijs 2003, p. 20 and 21.

357 For the underlying decree, and in the enclosure the CWI Handbook on Dismissal, see Stcrt. 2005/195, p. 11 amended by Stcrt. 2006/122, p. 19.

16.3 A justified dismissal

The Articles 3 to 5 of the Dismissal Decree determine whether there is a just cause for dismissal. Article 6 determines when there is *bad* cause. Under the latter, the CWI does not give permission to dismiss former[358] members of a Works Council, based on this ground only. In this respect, the employer must convince the CWI that the wish to terminate the employment agreement is not related to the employee's membership. In examining *just* cause protection the focus will be on the Articles 3 to 5 only.

Article 3:1 of the Dismissal Decree, which requires that the CWI must decide whether a dismissal is justified (*redelijk*), applies to *all* reasons of dismissal. In determining whether a dismissal is justified, Article 3:1 determines that the CWI must balance the interests of the employer and the employee, and other public interests deriving from the Dismissal Decree. Regarding *collective* dismissals, the public interest is to prevent mass layoffs. Regarding *individual* dismissals the public interest is to prevent rash dismissals to protect employees against loss of income, and in particular to protect the weak, and to restrict the number of invalidity and unemployment benefit claimants.[359] In brief, the Articles 4 and 5 of the Dismissal Decree provide detailed rules on *specific* reasons of dismissal. Article 4 refers to dismissals based on economic circumstances (*bedrijfseconomische omstandigheden*). Article 5 refers to dismissals based on unsatisfactory performance (*disfunctioneren*) and breach of trust (*verstoorde arbeidsverhouding*).

16.4 Economic circumstances

The Articles 4:1 to 4:5 of the Dismissal Decree provide rules for dismissals based on economic circumstances.

16.4.1 A marginal test

Article 4:1 determines that the CWI shall grant a permit when the position of one or more employees within the company becomes redundant due to economic circumstances. The CWI Handbook on Dismissal distinguishes between

- financial problems;
- reduction of work and/or turnover;
- technological changes;

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[358] The term 'former' applies to employees, who were members of a works council not longer than two years ago.

[359] See also Van Minnen 2003, p. 380.

- reorganization (i) in light of the employer's bad financial position; or (ii) in light of a new strategy to prevent a bad financial position in the (near) future;
- closure of the company; or
- relocation of the company.

Subsequently, to obtain a permit, the employer must substantiate, respectively

- financial need through (financial) data;[360]
- whether the reduction of work and/or turnover is permanent or temporarily only, through (financial) data over the previous two years, and expectations for the future six months;[361]
- the essence of the technological changes;[362]
- (i) financial need through (financial) data; and (ii) the essence of the new strategy and its underlying reasons;[363]
- the – underlying – reasons of the closure;[364]
- the – underlying – reasons of the relocation.[365]

From the CWI Handbook on Dismissal it can be derived that the CWI applies a marginal test with regard to the *choice* of operational requirements only. In this respect, the CWI examines whether the employer's choice is fair and reasonable. The rationale behind this is that the CWI does not wish to tread on the employer's freedom of business policy. Contrary to Zondag, who advocates that the CWI – to prevent rash dismissals – interferes with the employer's policy.[366] Hence, the CWI rejects a conclusive test (*volle toets*). In this respect, it argues that under the marginal test, the employer must *still* substantiate the existence of the alleged reason.[367] Subsequently, the CWI examines whether the reason is false, i.e. non-existent, in which case it rejects the request. It is not treading on the employer's freedom of policy in this respect either.This is according to the legislative history of just cause protection.[368] A simple statement that due to economic circumstances prior authorization of the CWI is required, thus, does not suffice.[369] The employer must substantiate that the alleged reason for dismissal exists, *and* must lead to the dismissal of the employee in question.

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[360] CWI Handbook on Dismissal (2006), p. 9-3.
[361] CWI Handbook on Dismissal (2006), p. 9-4.
[362] CWI Handbook on Dismissal (2006), p. 9-4.
[363] CWI Handbook on Dismissal (2006), p. 9-4.
[364] CWI Handbook on Dismissal (2006), p. 9-4 and 9.5.
[365] CWI Handbook on Dismissal (2006), p. 9-6.
[366] CWI Handbook on Dismissal (2006), p. 9-7, referring to Zondag 2004b, p. 113.
[367] CWI Handbook on Dismissal (2006), p. 9-2 and 9-3. See also Kouwenhoven 2005, p. 19.
[368] See above under § 15.1.1 and below under § 17.2.
[369] See also Van Minnen 2003, p. 381.

The BBA 1945 does not only apply to individual dismissals. Article 4:1 authorizes the CWI in dismissals based on economic circumstances, involving *one or more* employees. It must, too, respect the rules of the Collective Redundancy Notification Act of 1976 (*Wet Melding Collectief Ontslag* or *WMCO*) if a collective dismissal exceeds *twenty* employees in its district. In brief, employers must notify the CWI of this intent. Subsequently, an employer is obliged to deliberate with unions on alternatives or solutions during one month in order to reach consensus on the necessity to lay off employees, and on the size of severance payments in a Redundancy Plan (*Sociaal Plan*). This period is lengthened so long as the employer in question has not met this obligation. After this period the CWI can handle the requests.[370]

As from 1 March 2006, when it involves a collective dismissal under the WMCO, *and* an employer meets the following requirements under the new Article 4:1 of the Dismissal Decree, the CWI does not have to examine (i) whether economic circumstances exist; (ii) the number of positions which have become redundant due to these circumstances,. The new requirements under Article 4:1 of the Dismissal Decree are that

- the employer notified the CWI of the collective dismissal; and
- the unions affirm the existence of economic circumstances and number of positions which have become redundant due to these circumstances.

The CWI believes this examination to be superfluous when the employer already convinced the unions.[371] In my opinion, the interests of employees are best served when an independent authority examines these issues. On the other hand, the employer must still substantiate that the economic circumstances must lead to the dismissal of the employee in question.[372] In determining the latter, the CWI examines whether the employer correctly applied the principle of reflection, and seriously examined all options to replace the employee in another position, as will be described below.

16.4.2 Principles of reflection and seniority

As from 1 March 2006, the new Article 4:2.1 of the Dismissal Decree determines that the employer must apply the principle of reflection in collective dismissals, regardless of the number of employees involved.[373] Prior to 1 March 2006, the CWI still had to apply the principle of seniority, the so-called ‘last in,

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370 For an in-depth discussion on the procedure under the WMCO, see Heinsius 2004, p. 170-192; Heinsius 2005, p. 75-86; CWI Handbook on Dismissal (2006), p. 25-1 to 25-12.

371 Stcrt. 2003, 13 december 2005, 242, p. 24 and 25. See also TK 2005-2006, 30 370, No. 3, p. 4.

372 Stcrt. 2003, 13 december 2005, 242, p. 24 and 25.

373 Stcrt. 2005, 242, p. 24. For the application of the ‘new’ principle of reflection, see Kouwenhoven 2006.

first out' (lifo) rule. To understand why the government decided to replace the rule of seniority by the principle of reflection, I will describe the 'old' situation first.[374]

Under the principle of seniority, the employer had to dismiss the last employee he hired for interchangeable positions (*uitwisselbare functies*) per establishment (*bedrijfsvestiging*). Interchangeable positions – which must be distinguished from interchangeable *persons*[375] – refer to positions equal in nature, contents, job rating, reward and working conditions.[376] The term establishment refers to an organizational bond acting as an independent unity within the society.[377] A problem was that the principle of seniority particularly protected elderly employees because these, in general, were longer in service.[378]

The Dismissal Decree already contained the principle of reflection. Under this principle, an employer was allowed to, in effect, apply the principle of seniority to categories within the company based on age (15-25; 25-35; 35-45; 45-55; 55 and older). Until 1 March 2006, the principle of reflection only applied to collective dismissals involving *ten or more employees* within a district of the CWI. Employers who dismissed fewer than ten employees were bound by the principle of seniority.[379]

Critics stated that the principle of seniority *as the main rule* was outdated.[380] Zondag pointed at surrounding European countries with protective dismissal systems that did not apply this rule in the strict manner as the CWI.[381] Hansma added that the principle of seniority virtually makes it impossible for employers to choose the right person in the right place, hence, selection based on quality is a better alternative to meet an employer's financial need.[382] Dijkstra, finally, stressed that it seems unfair to prefer an employee based on the principle of seniority who has not performed well to one who performs satisfactorily, only because of the years of service.[383] Another argument has been that the principle of seniority did not meet the requirement of flexibility in

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374 For an in-depth discussion on the (replacement of the) principle of seniority, see Dijkstra 2005; Zondag 2005b.

375 See also Van Minnen 2003, p. 383-385; Kouwenhoven 2005, p. 23 and 24.

376 CWI Handbook on Dismissal (2006), p. 13-1 to 13-8. Van Minnen pleads that interchangeable positions must also be equal in education, taking into consideration the role of the new position within the company after the reorganization. Van Minnen 2003, p. 384.

377 CWI Handbook on Dismissal (2006), p. 12-1 to 12-6.

378 STAR-Advies 04/13, par. 3.

379 CWI Handbook on Dismissal (2006), p. 12-1 and p. 15-1.

380 Hansma 2004. See also Zondag 2005b, p. 465 and 466.

381 Zondag 2005b, p. 467 and 468.

382 In the *ABN-collective bargaining agreement* of 26 Februari 2004, a selection took place on the basis of *quality* as regards changes of position, and on the basis of *age and quality* when it involved equal positions. See Hansma 2004, p. 1484. For advocates of this 'new' criterium of selection based on quality in the Dismissal Decree, see Loonstra en Kruit 2006, p. 22; Bureau Bartels/SZW 2006, p. 63 and 68.

383 Dijkstra 2005, p. 15.

smaller companies. Last, an argument has been that the principle of seniority, in effect, discriminates against younger people.

The absence of flexibility for smaller companies induced a few members of the Lower House to file a motion, in which they asked the Minister of Social Affairs to reconsider the principle of seniority as a starting point in collective dismissals. The Lower House passed this motion on 18 December 2003.[384] The Minister of Social Affairs suggested that the *principle of reflection* would become the starting point in collective dismissals, regardless of the number of employees involved. Subsequently, the Minister asked the Labour Foundation for advice.[385] The latter was divided. The majority advised that the principle of reflection be applied to collective dismissals with fewer than ten employees. In collective dismissals with ten or more employees, employers would have a choice. The employers' representatives within the Labour Foundation preferred that employers would have a choice between the principle of seniority and the principle of reflection in collective dismissals, regardless of the number of employees involved. Hence, they opposed the principle of reflection being a starting point in collective dismissals, as the government suggested.[386] In Bill 30 370 the government, nonetheless, held that the principle of reflection would become the starting point in collective dismissals, regardless of the employees involved.[387]

As from 1 March 2006, Article 4:2.1 of the Dismissal Decree holds this new rule.[388] In addition, the employer needs to apply the principle of seniority to categories based on age within *interchangeable positions*. Prior to 1 March 2006, the employer needed to apply the principle of seniority to categories based on age within the *establishment*. According to the government, the old rule was inefficient and the new rule is easier to apply and to control.[389] The application of *exceptions* to the principles of reflection and seniority remained unchanged. Under these exceptions, the principle of reflection does *not* apply when

- the employer substantiates that an employee with specific, i.e. unique qualities must be exempted, because his or her absence will severely frustrate the operation of the company (Article 4:2.5 of the Dismissal Decree; as from 1 March 2006 Article 4:2.4);[390] or

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384 Motie-Verburg, Weekers, Bakker en Noorman-den Uyl, TK 2003-2004, 29 200 XV, No. 48. See also Hoorn, Schabos en Van Hoeckel 2005; Zondag 2005b, p. 469.

385 For the Letter and Memorandum of the Minister of Social Affairs to the Labour Foundation, see STAR-Advies 2004/13: enclosure 1.

386 STAR-Advies 2004/13. See also Veldman 2005, p. 47; Zondag 2005b, p. 469 and 470. For an in-depth discussion on the principle of seniority, see Dijkstra 2005; Hoorn, Schabos en Van Hoeckel 2005; Zondag 2005b.

387 TK 2005-2006, 30 370, No. 3, p. 4.

388 Stcrt. 2005, 242, p. 24.

389 Stcrt. 2005, 242, p. 24.

390 See also the CWI Handbook on Dismissal (2006), p. 19-1 to 19-8; Kouwenhoven 2005, p. 25 and 26. See also Stcrt. 2006, 59, p. 23.

- an employee compared to the employee next in line needs to be exempted, due to poor chances on the labour market (Article 4:2.6 of the Dismissal Decree; as from 1 March 2006 Article 4:2.5).[391]

Also, flexible rules (still) apply to cleaning agencies (*schoonmaakbedrijven*) and temporary agencies (*uitzendbureaus*).[392] Important to stress is that as regards temporary agencies, the Court of Appeal of The Hague in its decision of 29 November 2002, KG 2002/966 (CMG) held that these flexible rules applied to other agencies with a three-party construction as well. The Minister of Social Affairs held otherwise, and amended the Dismissal Decree – which amendment still stands – determining that these rules apply to temporary agencies *only*, in effect, overruling the decision of the Court of Appeal. For agencies with a three-party construction other than temporary agencies, the Minister provided a so-called hardship clause in Article 4:2.4 of the Dismissal Decree (as from 1 March 2006, Article 4:2.3).[393] Based on this Article, the principle of reflection does *not* apply to employees who work under the supervision of a third party, and replacement reasonably cannot be effectuated.[394]

16.4.3 Requirement of replacement

Under the CWI Handbook on Dismissal, the CWI must examine whether the employer has considered all possible options to replace the employee in another position, before he determines that the position of the employee in question has become redundant due to economic circumstances. In this respect, the CWI examines whether the employer has behaved as befits a good employer by resorting to a dismissal as an ultimum remedium.[395] In effect, the requirement of replacement derives from Article 4:1 of the Dismissal Decree. Under this Article, the CWI must examine the necessity of the dismissal of the employee *in question*.

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391 See also the CWI Handbook on Dismissal (2006), p. 20-1 to 20-4; Kouwenhoven 2005, p. 26. See also Ktg. Maastricht 28 september 2004, RAR 2005/10, which dissolved the employment agreement after the CWI had refused the permit on the basis of Art. 4:2.5 of the Dismissal Decree and a reorganization was needed and it was impossible to replace the disabled employee in the same, adjusted or another position in the new structure. See also Stcrt. 2006, 59, p. 23.

392 For cleaning agencies, see the Dismissal Decree: enclosure A. For temporary agencies, see the Dismissal Decree: enclosure B. See also CWI Handbook on Dismissal (2006), p. 17-1 to 17-14 (temporary agencies). As from 1 March 2006, the principle of reflection in these cases is the starting point as well. See Stcrt. 2005, 242, p. 24.

393 See also Stcrt. 2006, 59, p. 23.

394 See the Letter of the Minister to the Chairman of the Lower House of 10 March 2003, AV/IR/2003/20105, and the Advisory Letter of the Labour Foundation of 4 March 2003 (*Ontslagregels in uitzendrelaties*), advising to amend the Dismissal Decree. The Dismissal Decree was amended as from 13 March 2003 ((Stcrt. 2003/49), explicitly reversing KG 2002/966. See also Berenschot 2003; Kouwenhoven 2005, p. 25.

395 CWI Handbook on Dismissal (2006), p. 9-1 to 9.6.

In general, if the employer *fails* to substantiate (i) the existence of economic circumstances;[396] (ii) the need to dismiss the employee in question; and/or (iii) the impossibility to replace the employee, the CWI rejects the request. Furthermore, it rejects a request based on economic circumstances when the position of the employee can be filled on short notice again.[397] In general, the CWI is of the opinion that the responsibility of the employer to replace an employee increases with the years of service.[398] Hence, the CWI considers seniority as a criterium to weigh the responsibility of the employer to replace the employee.[399] Additionally, when it involves a so-called REA-employee – for whom the employer obtains subsidy based on the Act Reintegration of Disabled Employees (*Wet op de Reintegratie Arbeidsgehandicapten* or *REA*)[400] – the CWI must ask the UWV for advice regarding the (im)possibilities to replace this employee.[401]

16.4.4 Conditional permit[402]

Under article 4:5 of the Dismissal Decree,[403] the CWI may grant a so-called conditional permit (*voorwaardelijke vergunning*) if it assumes that the employer can still replace the employee.[404] In this case, the CWI grants a permit *on the condition* that the employer within 26 weeks – after the CWI has *granted* the permit – does not hire another employee for the performance of duties of the same nature of the employee in question, without first having approached the former employee about whether he wishes to be rehired. If the CWI *erroneously* grants a conditional permit on the condition that the employer does not hire another employee within 26 weeks after the *employer* has *terminated* the employment agreement, this invalid condition converts into a valid condition, i.e. prohibits the employer to hire another employee within 26 weeks after the

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396 Besides the exception of the new Art. 4:1 of the Dismissal Decree. See above under § 16.4.1.

397 CWI Handbook on Dismissal (2006), p. 21-1 to 21-10.

398 CWI Handbook on Dismissal (2006), p. 21-1 to 21-10.

399 Zondag 2005b, p. 466.

400 For a brief discussion on the REA, see Loonstra en Zondag 2004, p. 441 and 442.

401 CWI Handbook on Dismissal (2006), p. 27-5.

402 A conditional permit must be distinguished from a permit 'to the extent required by law' (*vergunning voor zover rechtens vereist*) which can be asked for at the request of the employer or granted by the CWI on its own initiative (*ambtshalve*) when it is doubtful whether the BBA 1945 applies, e.g. the employer other than the employee is of the opinion that the employment agreement has been terminated by mutual consent. See CWI Handbook on Dismissal (2006), p. 1-1. On the other hand, alterratively, the employer can choose to file a so-called *conditional* request *(voorwaardelijk ontbindingsverzoek*) instead under Art. 7:685 DCC based upon which the employer asks the Cantonal Court to conditionally dissolve the employment agreement. For the latter, see below under § 18.4.2.

403 CWI Handbook on Dismissal (2006), p. 23-5 and 23-6.

404 For an in-depth discussion of the conditional permit, see CWI Handbook on Dismissal (2006), p. 23-1 to 23-8. Stcrt. 2006, 59, p. 23. See also Zwemmer 2006.

CWI has granted the permit.[405] The reference to the *duties of the same nature* is to prevent the employer from renaming the position or changing it to avoid Article 4:5 of the Dismissal Decree.[406] When an employer hires a new employee – including part-time or temporary workers – within 26 weeks for duties of the same nature, the condition is fulfilled, hence, the termination of the employment agreement of the employee in question is invalid.[407] This means that the employee is still in the employer's service. The employee *cannot* claim that he must be rehired based on the old terms.[408] The Netherlands Supreme Court further held that when the CWI erroneously forgets to include the 26-weeks-condition, this still can be done afterwards, on the condition that the employer has not yet notified the employee of termination of employment in furtherance of the permit.[409]

Article 2:7.2 of the Dismissal Decree explicitly determines that any other condition than the foregoing is invalid.[410] So-called *premises* (*premisse*), however, are still allowed. As from 1 October 2006 this is no longer allowed in case of long-term illness, however. Previously, employers asked for permission to *partially* terminate the employment agreement. The CWI tended to grant these requests *on the premise* that the employer offered a new part-time employment agreement to the employee *to the extent* the employee could still perform his duties (*deeltijdontslag*).[411] On the other hand, the possibility existed that the employer could still replace the employee in another – adjusted – position for the other part under Article 5:2.1.b of the Dismissal Decree.[412] Hence, as from 1 October 2006 this practice is no longer allowed.[413] Still, this amendment leaves intact the possibility for an employer to ask for termination of employment on the premise that the employer offers the employee(s) in question a severance payment.[414]

16.5 Unsatisfactory performance

The employer may also bring forward unsatisfactory performance as a reason for dismissal.[415] The Dismissal Decree distinguishes between behavior for which

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405 HR 16 november 2001, NJ 2002, 44, JAR 2001/258 (*Holtrop/Smith*). CWI Handbook on Dismissal, p. 22-1 and 22.6. For an in-depth discussion of the decision of the Netherlands Supreme Court, see Van Minnen en Zondag 2002.

406 CWI Handbook on Dismissal (2006), p. 23-4.

407 CWI Handbook on Dismissal (2006), p. 23-2 and 23-7. For example, see Ktg. Emmen 23 oktober 1996, JAR 1996/226; Ktg. Deventer 19 oktober 2004, JAR 2005/1.

408 CWI Handbook on Dismissal (2006), p. 23-5.

409 HR 14 maart 2003, JAR 2003/90 (*Lypack*). See also CWI Handbook on Dismissal (2006), p. 22-4.

410 See also CWI Handbook on Dismissal (2006), p. 23-2 and 23-3, referring to W.A. Zondag ArA 2002/3 (should be ArA *2003*/3: VA. See Zondag, 2003a, p. 95.

411 CWI Handbook on Dismissal (2006), p. 22-1 to 22-6.

412 For this provision, see below under § 16.7.

413 Stcrt. 2006/169, p. 31.

414 CWI Handbook on Dismissal (2006), p. 22-3 referring to Zondag 2003a, p. 94 and 95.

415 CWI Handbook on Dismissal (2006), p. 9-1and 24-3.

the employee is *not* to blame, i.e. incapacity (*onkunde*) and behavior of which the employee is to blame, i.e. misconduct (*onwil*). In practice, incapacity and misconduct can overlap.[416]

Under Article 5:1.1 of the Dismissal Decree, the CWI gives permission to dismiss an employee in case of *incapacity* when the employer is able to substantiate

(1) the employee's incapacity;
(2) the employees' incapacity is not due to a disease or handicap;
(3) the employer has made serious attempts to improve the employee's incapacity; and
(4) the employee's incapacity is not due to a violation of the employer's duty of care.[417]

If the CWI is of the opinion that incapacity is related to the employee's illness or handicap, it will apply Article 5:2 of the Dismissal Decree that sees to *ill* employees.[418] This Article will be discussed more in-depth below in paragraph 16.7. When the dismissal concerns a so-called REA-employee, the CWI must ask the CWI for advice to prevent that the incapacity is related to the employee's illness.[419]

In case of *misconduct*, the CWI gives permission to dismiss an employee when the employer is able to substantiate

(1) the employee's misconduct;[420]
(2) that one reasonably cannot demand of the employer to continue the employment relationship, due to this misconduct;[421] and
(3) the employer seriously examined ways to improve the employee's behavior, either or not through job training and/or occupational retraining (*omscholing*).[422]

In determining whether incapacity and/or misconduct exist, the CWI, too, takes case law of civil courts into consideration. In this respect, it examines whether performance interviews have taken place; whether the targets, which the employee have to meet are reasonable; whether the employer is able to

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416 CWI Handbook on Dismissal (2006), p. 30-2. See also Verhulp en Zondag 2003, p. 2.

417 See also Nationale Ombudsman, 18 april 2006, JAR 2006/140.

418 CWI Handbook on Dismissal (2006), p. 30-5.

419 CWI Handbook on Dismissal (2006), p. 27-5 and 27-6. For the term *REA*-employee, see above under § 16.4.3.

420 See Art. 5:1.4 of the Dismissal Decree.

421 See Art. 5:1.4 of the Dismissal Decree. See also CWI Handbook on Dismissal, p. 30-2.

422 See Art. 5:1.1 under c of the Dismissal Decree. See also CWI Handbook on Dismissal, p. 30-7 and 30-8.

substantiate unsatisfactory performance, based on objective criteria; whether the employer has allowed the employee to react; whether the employer has allowed the employee to improve his conduct; whether the employee has made efforts to improve himself or has neglected reasonable instructions in this respect; and, whether the employer has taken into consideration the employees' years of service, and his chances on the labour market.[423]

16.6 Breach of trust

Article 5:1.5 of the Dismissal Decree applies to *breach of trust*. Under this Article, the CWI gives permission to dismiss an employee when the employer is able to substantiate why

> (1) the employment relationship cannot be continued; and
> (2) restoration of the relationship is not possible.[424]

The 2005 version of the Handbook on Dismissal did not yet provide detailed rules on a breach of trust. These rules were provided by the CWI in July 2006. Under these rules, permission will be granted when the employment relationship is severely and irreparably disrupted, making a replacement, in effect, impossible.[425] In determining the latter, the CWI takes into consideration the employee's age, years of service, his labour market position, the size of the company, and whether the employer considered mediation.[426]

The CWI Handbook on Dismissal determines that if the employer brings forward a conflict or romance between *employees*, this in principle does not justify a dismissal under Article 5:1.5, in that a conflict or romance between employees does not necessarily have to result in a conflict between the employer and the employee(s) in question. This applies all the more so, if the duties of these employees do not overlap.[427] On the other hand, when these situations result in a conflict between the employer and the(se) employee(s), severely frustrating the operation of the company, making a replacement, in effect, impossible, a permit shall be granted under *Article 3:1,* thus, not under Article 5:1.5 of the Dismissal Decree.[428] This makes sense. When a conflict severely frustrates the operation of a company, the conflict, in effect, forces the employer to reorganize his operations. These 'economic circumstances', in itself, justify termination of employment.

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423 CWI Handbook on Dismissal (2006), p. 30-2 to 30-9.
424 CWI Handbook on Dismissal (2006), p. 29-4. See also Van Drongelen en Van Rijs 2003, p. 145-151.
425 CWI Handbook on Dismissal (2006), p. 33-6 and 33-8.
426 CWI Handbook on Dismissal (2006), p. 33-2. See also p. 33-8 and p. 33.9.
427 CWI Handbook on Dismissal (2006), p. 33-5 and 33-6.
428 CWI Handbook on Dismissal (2006), p. 33-5.

The CWI Handbook on Dismissal further determines that if an *employee* states that the employment relationship is disrupted, this does not relieve the CWI from its duty to examine whether there is breach of trust. In this respect, the employer must substantiate that he behaved as befits a good employer by resorting to a dismissal as an ultimum remedium, hence, has seriously sought for possibilities to replace the employee.[429] The fact that the employer has offered an alternative position is not sufficient. It is *one* of the circumstances only, in determining whether a permit will be granted.[430]

From the CWI Handbook on Dismissal derives that the CWI does not consider whether the employer or the employee is to blame for the breach of trust. This can be explained by the fact that the CWI cannot grant a severance payment by which it can take into account the degree for which one of the parties is to blame. However, suppose a just cause for dismissal is lacking, which may be the case when a non-existent reason underlies the breach of trust. From the CWI Handbook on Dismissal derives that based on Article 3:1 of the Dismissal Decree the CWI can give permission to dismiss an employee, based on severe and irreparable breach of trust, frustrating the firm's operations, in effect, making replacement impossible. Hence, it is irrelevant whether the employee is (not) to blame for the breach of trust. It, nonetheless, will strike most as unfair when the employee is not to blame. Hence, to the extent the employee is not to blame, the CWI Handbook on Dismissal explicitly allows the CWI to note down this in its decision to give employees a hand-out to claim damages based on manifestly unreasonable dismissal under Article 7:681 DCC.[431]

Herewith the answer is given to the question of the International Labour Office of the ILO to clarify the possibility for the CWI to allow dismissals based on breach of trust for which the employee is not to blame.[432]

16.7 Other reasons for dismissal

Severe conscientious grounds

Article 5:1.3 of the Dismissal Decree provides rules for employees who refuse to perform their duties, due to severe conscientious grounds (*ernstige gewetensbezwaren*). In these cases, the CWI grants a permit only when an employer substantiates that he is unable to replace the employee in question in another position.

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429 CWI Handbook on Dismissal (2006), p. 33-8. See also above under § 16.4.3.

430 CWI Handbook on Dismissal (2006), p. 33-8 and 33-9.

431 CWI Handbook on Dismissal (2006), p. 33-9.

432 ADO-Rapport 2000, p. 6.

Illness

Article 5:2 of the Dismissal Decree aims to protect ill employees. In this respect, one may argue that the CWI discriminates under the Act on Equal Treatment Based on a Handicap or Chronic Illness (*Wet gelijke behandeling op grond van handicap of chronische ziekte*).[433] Although the Act applies to the CWI,[434] legislative history shows that the Act does not apply to protective rules for ill employees.[435] Article 5:2 of the Dismissal Decree, thus, is exempted from the scope of the Act.[436] Employees, however, can undertake action against the *employer* under the Act, when they are of the opinion that the employer is directly or indirectly discriminating against them due to their handicap or chronic illness by terminating them,[437] on the condition that an employee timely, i.e. within two months after the termination invokes its invalidity.[438]

(i) During the two years of illness

Article 5:2 of the Dismissal Decree applies to employees who are ill for more than two years.[439] Employers, nonetheless, may file requests *during* the two years of illness. In handling these cases, the CWI will point at the prohibition on dismissal. It does not interfere, however. Hence, if there is just cause it will grant a permit. The result remains the same, in that the employer is not able to use the permit during the two years of illness, due to the prohibition on dismissal.[440] An employer, on the other hand, may argue that the prohibition on dismissal does not apply – referring to the Articles 7:658a DCC and 7:660a DCC, which apply as from 1 April 2002 – stating that the employer made serious efforts to reintegrate the employee, but that the employee refused to cooperate.[441] In these cases, the CWI will ask the UWV for advice regarding the (im)possibilities for parties to perform.[442]

More specifically, Article 7:658a DCC requires of the employer to have examined whether an ill employee is able to perform (i) his duties in an adjusted position; (ii) suitable duties in another position, taking into consideration the

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433 For the Act, see above under § 14.4.5.

434 See Art. 4 of the Act on Equal Treatment Based on a Handicap or Chronic Illness. See also TK 2001-2002, 28 169, No. 3, p. 33 and 34.

435 See Art. 3.1.b of the Act on Equal Treatment Based on a Handicap or Chronic Illness.

436 TK 2001-2002, 28 169, No. 3, p. 31 and 32. See De Keizer 2004, p. 125.

437 The Act does not apply to short-term illness. See HvJ EG 11 juli 2006, C-13/05, JAR 2006/191 (*Navas*). For an in-depth discussion of this case, see Waddington en Gijzen 2006.

438 Diebels 2005, p. 177.

439 CWI Handbook on Dismissal (2006), p. 29-4.

440 CWI Handbook on Dismissal (2006), p. 1-6.

441 See HR 29 april 2005, JAR 2005/136 (*Wanders/Scholten*). For a discussion of this case, see Bijkerk-Verbruggen 2005, p. 87. For an in-depth discussion on the extent employers comply with Article 7:660a DCC, see Willems 2006.

442 CWI Handbook on Dismissal (2006), p. 27-2.

employee's abilities and capacities (*krachten en bekwaamheden*);[443] (iii) duties on a lower level; or (iv) duties with another employer.[444] The employer must *seriously* examine whether these possibilities exist.[445] The employee, on the other hand, under Article 7:660a DCC must cooperate, and must make a specific offer with regard to suitable duties in another position.[446] When the employee fails to meet his obligations, the prohibition on dismissal no longer applies,[447] and the employer is entitled to stop paying salary.[448]

(ii) After two years of illness

The prohibition regarding dismissal does no longer applies after two years of illness. Subsequently, the employer will address the CWI, stating that the employee is incapable to perform his duties, due to the employee's disease or handicap. To decide whether the employer can dismiss the employee, the CWI applies Article 5:1.1.b in conjunction with Article 5:2.1 of the Dismissal Decree. Under these rules, the CWI gives permission to dismiss an employee when the employer is able to substantiate

(1) the employee's incapacity;
(2) restoration within 26 weeks is not likely to take place; and
(3) the employer seriously examined all options to replace the employee in an adjusted position or another position,[449] either or not through job training and/or occupational retraining.[450]

Article 5:2.2 of the Dismissal Decree prescribes that the CWI must ask the UWV for advice on the aspects above, *unless* the employee reached consensus

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443 On the other hand, the employer may argue that reasons of physical, mental or social nature stand in the way to perform these duties. See Disselkoen 2003, p. 31; Asscher-Vonk 2003, p. 98 and 99.

444 The duty to examine whether it is possible for the employee to perform duties with another employer applies as from 1 January 2003; as regards employees who have fallen ill before 1 January 2003: as from 1 January 2004. Moreover, a replacement in the same, adjusted or another position within the company of another employer can take place with the *UWV*'s consent only. For an in-depth discussion of these new Articles, see Boot 2002a. See also Asscher-Vonk 2003, p. 98 and 99, 153-159, 164 and 165; Rutgers 2003, p. 132-135.

445 See HR 29 april 2005, JAR 2005/136 (*Wanders/Scholten*). For a discussion of this case, see Bijkerk-Verbruggen 2005, p. 87.

446 See Conclusion of the Advocate General under 4.9-4.13 in HR 23 april 2004, JAR 2004/116 (*De Vreede/SRK Rechtsbijstand*), referring to HR 3 februari 1978, NJ 1978, 248 (*Roovers/De Toekomst*); HR 8 november 1985, NJ 1986, 309 (*Van Haaren/Cehave*); HR 13 december 1991, NJ 1992, 441 (*Goldsteen/Roeland*); HR 26 oktober 2001, JAR 2001/238 (*Bons/Ranzijn*). See also HR 17 januari 2003, RvdW 2003/16, JAR 2003/41 (*Stal/UWV*). For a discussion of these decisions, see Disselkoen 2003, p. 30-33. See also Willems 2006, p. 11 referring to Ktg. Enschede 24 juni 2004, JAR 2004/147.

447 See Art. 7:670b..3 DCC.

448 See Art. 7:629.3 under c, d and e DCC. For example, Ktg. Zwolle 22 september 2004, JAR 2004/231. See also Bijkerk-Verbruggen 2005, p. 87; Willems 2006, p. 9 and 10.

449 See also Van Drongelen en Van Rijs 2003, p. 151-154.

450 The latter requirement applies as from 1 March 2006. See Stcrt. 2005, 242, p. 24 and 25.

with the employer that replacement, in effect, is impossible, or it concerns so-called dead end cases, in which recovery, in effect, is impossible.[451]

In these cases, the employer, as from 1 March 2006, no longer needs prior authorization of the CWI to dismiss these ill employees. Hence, parties may mutually agree on termination of employment without the employee losing his right to unemployment benefits under the Unemployment Insurance Benefits Act (*Werkloosheidswet* or *WW*) on the condition that

- the employee is incapable of performing work due to illness;
- efforts to reintegrate the employee has been without effect, whereby the CWI examines to what extent the employer has behaved as befits a good employer in making serious efforts to reintegrate the employee, and the employee has fully cooperated with the employer; and
- reintegration on short notice – by means of adjusted duties and/or job training and/or occupational retraining – is impossible.[452]

(iii) Because of – frequent – illness

If the employer asks permission to terminate the employment agreement *because* of – frequent – illness, Article 5:2 of the Dismissal,[453] and the former Appendix H of the Delegation Decree[454] – which at present can be found in the CWI Handbook on Dismissal – apply.[455] In brief, the CWI grants a request to terminate the employment agreement because of – frequent – illness *only* when

(1) it is not likely that a regular pattern of illness is to be expected within 26 weeks;
(2) it is impossible for the employer to offer the employee an adjusted or new position;
(3) deliberations on replacement between the employer and the employee have been without effect;
(4) the absence of the employee severely frustrates the operation of the company;
(5) the absence of the employee requires unreasonable efforts of colleagues; and

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451 CWI Handbook on Dismissal (2006), p. 27-2 to 27-3. Regardless of the advice of the *UWV* it has an own responsibility to examine if restoration within 26 weeks is likely and replacement in the same, another or adjusted position is possible. See Nationale Ombudsman 25 juli 2005, JAR 2005/206.

452 CWI Handbook on Dismissal (2006), p. 34-13 and 34-14.

453 CWI Handbook on Dismissal (2006), p. 29-4.

454 For the Delegation Decree, see above under § 16.2.

455 CWI Handbook on Dismissal (2006), p. 27-2.

(6) the employer cannot find a temporary solution, e.g. by hiring temporary employees to fulfill the position of the employee.[456]

The CWI is obliged to ask the UWV for advice regarding the aspects under (1) and (2).[457]

16.8 Studies on the CWI's or its predecessors' practices

The BBA 1945, the Dismissal Decree, the CWI Handbook on Dismissal indicate that private-sector employees enjoy just cause protection. The studies below indicate that the CWI – and its predecessors – which apply these rules, seriously examine the grounds of dismissal, although according to researchers in the past, this differed from time to time, dependent on the ground of dismissal.

Ringeling was the first to examine whether – at the time – the Director(s) of the District Employment Office of Amsterdam (*Directeur van het Gewestelijk Arbeidsbureau Amsterdam*) consistently applied the rules according to the Circular Letter of 1946.[458] He concluded that the Director, in general, gave permission to dismiss an employee, based on (a) economic circumstances; (b) unsatisfactory performance; or (c) breach of trust.[459] He further concluded that in economic circumstances, personal interests more than often had to give way. He stressed that this did not mean that the permits were granted relatively easily, i.e. without investigation. In fact, Directors generally required considerable efforts on the part of employers to look for other ways. A more thorough investigation, however, appeared to take place in requests based on unsatisfactory performance. On the other hand, with regard to requests based on breach of trust, permits were granted relatively easily, although the Directors required serious efforts from the employer to replace the employee in another position.[460] Other studies from 1976, 1981 and 1984 show that requests of employers were based on these same three grounds as well.[461]

Overkleeft-Verburg and Roijakkers, in 1976, concluded that permits based on *all* grounds were granted relatively easily, in particular based on economic circumstances, and that the Directors rather looked at the consequences of the dismissal for employees, instead of thoroughly investigating the reason for

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456 For an in-depth discussion of the legislative history of these rules, see Hoogendijk 1999, p. 198-201. See also Diebels 2005, p. 175-177.

457 CWI Handbook on Dismissal (2006), p. 27-2 to 27-3.

458 As from 1 December 1948 new Directives applied. However, in practice, the Directive of 21 January 1946 was applied until 1949. See Ringeling 1953, p. 42. Based on the 26,000 files that were filed between 1945 and 1949 in the region of Amsterdam, he selected 854 files. Ringeling 1953, p. 42. See also Havinga 1989, p. 22.

459 Ringeling 1953, p. 35.

460 Ringeling 1953, p. 298-301. See also Havinga 1989, p. 22.

461 For the years of 1976, 1981 and 1984, respectively, see Overkleeft-Verburg en Roijakkers 1976, p. 3, who concentrate on three district employment offices: Tilburg, Utrecht en Winschoten; Naber 1981, p. 130-144, who concentrates on all district employment offices; Van der Heijden 1984, p. 66 and 67.

dismissal.[462] Ter Hoeven, too, concluded the foregoing with regard to dockworkers, earlier, in 1973.[463] In 1988, Knegt and Wilthagen more or less came to a same conclusion as Ringeling and Overkleeft-Verburg and Roijakkers, that with regard to requests based on economic circumstances, the employee's personal interests more often than not had to give way. The need of the reorganization was seldom examined.[464] On the other hand, they continued, the Directors of the four District Employment Offices[465] thoroughly investigated the alleged unsatisfactory performance of the employee, or breach of trust. Moreover, in determining whether to grant permission to dismiss an employee, the Directors considered factors such as – the performance during – the years of service, the employee's age, and the employee's labour market position.[466]

Subsequently, in 1998, Beltzer, Knegt and Van Rijs examined *severance payments* under the BBA 1945 and under the dissolution procedure of Article 7:685 DCC. They interviewed ten Regional Directors of Labor Services. Six out of ten Directors took the lack or the presence of a severance payment into consideration in their decision. However, they were unanimous that it could never be a decisive factor. In fact, all ten Directors stressed that they had never refused a permit because of the fact that the employer had not offered a severance payment.[467]

Subsequently, in 1999, the Ministry of Social Affairs assigned the Bureau for Policy Research (*Research voor Beleid*) to examine the effectiveness of the dual dismissal system. More specifically, it was asked to examine whether it (still) served the interests of employees, employers and the public. In its research, the Bureau based its findings particularly on the annual statistics on dismissal of the Ministry of Social Affairs (*SZW ontslagstatistieken jaarrapportages*) of 1998. Additionally, it interviewed 849 employers with 4-9 employees (165), 10-49 employees (182), 50-99 employees (253), and with 100 or more employees (249). Besides, the Bureau interviewed 498 employees who had been dismissed in the previous two years. Of the number of interviewed employers, 38% had been involved in a dismissal procedure in the previous two years.

As regards the BBA 1945-procedure, the Bureau concluded that 20% out of 39,064 requests had been withdrawn, and 6% had been rejected. Regarding the latter, 93% of the employees eventually had left the company. Hence, the Bureau concluded that the CWI-procedure was rather *indirectly*

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462 Overkleeft-Verburg en Roijakkers 1976, p. 3, p. 195 and 196. See also Naber 1981, p. 135.

463 Based on 187 files in Amsterdam and 557 files in Rotterdam of dockworkers in the period 1957 to 1959. See Havinga 1989, p. 22 and 23, referring to P.J.A. ter Hoeven, *Ontslagnormen en ongeschoolde arbeiders in Nederland*, In: Annalen van de faculteit der Economische, sociale en politieke wetenschappen, Brussel, 1973, p. 167-191.

464 Knegt en Wilthagen 1988, p. 316-318. See also Van der Heijden 2000, p. 228 and 229. Havinga concluded the same with regard to collective dismissals in 1989.Havinga 1989, p. 260. See also Hoekema 1985, p. 33.

465 Knegt en Wilthagen 1988, p. 64. See also Havinga 1989, p. 21; Van der Heijden 2000, p. 229.

466 Knegt en Wilthagen 1988, p. 319-322. See also Havinga 1989, p. 24.

467 Beltzer, Knegt en Van Rijs 1998, p. 83-86. See also Even 2005, p. 94.

effective, than *directly* effective.[468] Moreover, it concluded that between October 1997 and October 1999, Cantonal Courts had dissolved 90,000 employment agreements –of which 60,000 involved pro forma cases –. Approximately 85,000 permits had been granted by the CWI. The number of pro forma requests under the BBA 1945-procedure was estimated on 20,000 annually. Hence, the CWI appears to handle the majority of substantive cases. Overall, the majority of requests with the CWI were based on economic circumstances. The majority of requests with Cantonal Courts were based on breach of trust. Determinative for choosing between the RDA or the Cantonal Court were (i) costs: employers prefer the Cantonal Court in case of younger employees, and prefer the RDA in case of elderly employees (ii) success rate: employers believe that the dissolution procedure guarantees a higher success rate, in that Cantonal Courts rather dissolve an employment agreement with a severance payment, than that they reject the request. The 1998 statistics on dismissal, too, showed that Cantonal Courts rejected 3.5% 'only', compared to 6% by the RDA; and (iii) fastness: employers experience the procedure with the Cantonal Court as faster than the BBA 1945-procedure.[469]

In 2002, the Work and Income Inspectorate (*Inspectie Werk en Inkomen* or *IWI*), supervising the CWI, examined how the CWI applied the Dismissal Decree. This 2002 investigation was restricted to requests under Article 4:1 of the Dismissal Decree, and with regard to employees of 55 years and older only. One of the outcomes was that the CWI correctly required of larger companies, e.g. multinationals, stronger efforts to replace the older employee in another – adjusted – position. The IWI approved this 'differentiating' approach towards employers. The IWI held that these companies, indeed, are better suited, whether or not through job training and/or occupational retraining, to replace employees within the company.

What was *unsatisfactory* to the IWI was that the sixteen regional offices, regarding other aspects, tended to apply the Dismissal Decree differently. Subsequently, the IWI asked the CWI to undertake measures in this respect.[470] In 2004, a new examination took place by the IWI on the application of the Dismissal Decree *in general*. The results were to the satisfaction of the IWI, in that the CWI had issued the *CWI Handbook on Dismissal* (*Beleidsregels Ontslagtaak CWI*) to achieve that all sixteen regional offices would uniformly apply the Dismissal Decree in granting permits.[471] The IWI agreed with the CWI that a hundred percent uniformity on the application of the just cause standard could never be reached, because Article 3:1 of the Dismissal Decree leaves

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468 Research voor Beleid 2000, see particularly p. 49.

469 Research voor Beleid 2000, p. 10, 22, 25-31, and 50 See also Grapperhaus 2006, p. 16.

470 IWI 2002, p. 7. For this report, see Staphorst 2003.

471 The handbook became known as '*Beleidsregels Ontslagtaak CWI'* (in this thesis referred to as *CWI Handbook on Dismissal*) and went into force on 1 October 2005.

Directors with a discretionary power to balance the interests of the employer, the employee and the public.[472]

The most recent study on the effect of the dual dismissal system has been executed by Bureau Bartels. The latter, too, was assigned by the Ministry of Social Affairs to examine the effects of the dual dismissal system. The reporters interviewed 64 companies – with less than 50, between 50 and 250, and over 250 employees – in five branches, i.e. industry, trade, building construction, transport and business. All companies had been involved in procedures on employment termination in the last three years.[473] The Report distinguishes between individual and collective dismissals. For purposes of the Report, the latter involves one or more employees.[474] In brief, the Report shows that with regard to *individual dismissals* employers prefer the Cantonal Court to the CWI, due to its speed and security on termination of employment. As minus points, employers point out that Cantonal Courts take the interests of employers into consideration to a certain extent only, resulting in unreasonably high severance payments. Hence, employers prefer the *CWI* to the Cantonal Court when they wish to terminate employment agreements with employees who are ill for more than two years. In general, small-sized companies prefer the CWI, due to the low costs.[475] As regards *collective dismissals*, employers prefer the CWI to the Cantonal Court, due to its speed and the role the CWI plays in informing them on collective dismissals. As minus points of the BBA 1945, employers point out that it does not allow for dismissals based on *quality*, and that the CWI from time to time tends to take place on the chair of the entrepreneur.[476]

Overall, employers consider the dismissal system as too rigid in *individual* dismissals, in that employees who do no longer work at the satisfaction of employer can only be dismissed with high severance payments. Also, in *collective* dismissals, they remain 'stuck' with less qualified personnel, due to the principle of reflection. Consequently, employers invest in these insiders, and in this respect, recognize that the rigid system prevents employers from taking rash decisions.[477] Important for this thesis is that employers, in general, subscribe to the just cause rule that protects employees against arbitrary dismissal in general, as a *basic* rule of the Dutch dismissal system. On the other hand, they oppose the dual just cause dismissal system, in that it overly protects the interests of employees compared to the interests of employers.[478] Employers emphasize that a more flexible dismissal law is particularly needed with regard

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472 IWI 2004, p. 16 and 19.

473 Bureau Bartels/SZW 2006, p. 2, 5 and 6.

474 In contrast, collective dismissals under the statistics of the Ministry of Social Affairs involve dismissals, which include twenty or more employees according to the WMCO. See SZW Ontslagstatistiek 2005, p. 4.

475 Bureau Bartels/SZW 2006, p. 3-6, 33-51.

476 Bureau Bartels/SZW 2006, p. 6, 7 and 52-60.

477 Bureau Bartels/SZW 2006, p. 7-9 and 61-74.

478 Bureau Bartels/SZW 2006, p. 3, 4 and 35.

to *collective dismissals*, in that it will allow employers to dismiss employees, i.e. to make a selection based on quality. They advocate that unions should change their attitude in focusing on job security for employees only.[479] Nevertheless, the majority of employers embrace the dual just cause dismissal system, in that it enables them to make a choice, dependent on the reason for dismissal to either choose for the CWI or the Cantonal Court.[480] The Minister of Social Affairs, De Geus, meanwhile, sent the Report to the SER with the request to take it into consideration in its Advice on the Dutch Social-Economic Policy on the Mid-Long T*erm* (*Advies over het Nederlandse Sociaal-Economische Beleid op de Middellange Termijn* or *MLT-Advies*). The SER in the MLT-Advice, among others, will advise the government on whether the present dismissal system still meets the demands of time for the future five years.[481]

These studies show that the requirement of a just cause for dismissal still leaves room for employers to dismiss employees based on economic circumstances, unsatisfactory performance, and breach of trust. In fact, the annual statistics on dismissal of the Ministry of Social Affairs (*SZW ontslagstatistieken jaarrapportages*) show that the *majority* of requests are granted.[482] In my opinion, this does *not* mean that the just cause standard under the Dismissal Decree is without effect, i.e. private-sector employees do not enjoy just cause protection under the BBA 1945 and the Dismissal Decree. Rather, that in consistently applying the rules, in the majority of cases there is good cause.[483] Van der Heijden, for example, refers to the 1983 study on the effectiveness of the BBA 1945 by Knegt and Wilthagen, who concluded that six out of ten employees for whom a permit had been refused, still were in service the year after.[484] In 2005, 7% of the 70,154 requests handled were rejected due to absence of good cause, and 8% withdrawn.[485]

In the BBA 1945-procedure, requests based on economic circumstances form the majority of requests filed. In 2005, 71% of 74,634 requests filed, were based on economic circumstances. These embraced 56% individual, and 16% collective dismissals.[486] In his 1953 dissertation, Ringeling, too, showed that in the period between 1945 and 1951 the majority of requests of employers – at least regarding the district of Amsterdam – were based on economic

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479 Bureau Bartels/SZW 2006, p. 104.

480 Bureau Bartels/SZW 2006, p. 9-11 and 75-91.

481 Letter of the Minister of Social Affairs to the Chairman of the Lower House of 6 July 2006, AV/IR/2006/55988. For *MLT-Advies*, see more in-depth below under § 29.2.2.

482 See also Research voor Beleid 2000, p. 49: none of the 849 employers had ever received a rejection.

483 See also Research voor Beleid 2000, p. vi. For another opinion, see Grapperhaus 2006.

484 Van der Heijden 2000, p. 288 and 229. See Knegt en Wilthagen 1988, p. 328. See also below under § 28.2.2. See also Van den Heuvel 2000b, p. 366.

485 SZW Ontslagstatistiek 2005, p. 6. See also Research voor Beleid 2000, p. 49.

486 The term collective dismissals under the annual statistics refers to collective dismissals to which the WMCO apply only. Therefore, the term individual is somewhat misleading, in that collective dismissals which involve fewer than 20 employees are included in 'individual' dismissals. See SZW Ontslagstatistiek 2005, p. 4.

circumstances.[487] With respect to requests based on *economic circumstances*, however, one must borne in mind the following. First, (i) a significant number of cases – from 1 January 1999 until 1 January 2007 – involve(d) *expedited* (*verkorte*) procedures (2005: 15%; 2004: 22%). In these procedures, the CWI leaves out the employee's defense and the hearing of parties, and applies when parties *agreed* upon the dismissal in light of economic circumstances, without the employee losing his right to unemployment benefits.[488] These, in effect, concern *pro forma* requests. As the Bureau for Policy Research (*Research voor Beleid*) stressed, the majority of requests still involve substantive requests. Second, the CWI seriously considers the employee's labour market position in its decision. That is, in years of economic *growth* the CWI and its predecessors tend to grant more permits based on economic circumstances than in less prosperous times, e.g. the average was 9.5% between the more prosperous years between 1950 and 1963, and 4.5% between the less prosperous years between 1967 and 1980.[489] In contrast, the number of *rejections* increased in times of economic recession, for example, at the beginning of the eighties: from 4,4% (1980) to 4,7% (1981) to 5,1% (1982).[490] This percentage may seem low, but not when one considers that the number of requests almost doubled between 1980 and 1982: from 89,987 to 140,000 to 173,651, respectively. The doubling in the years between 1980 and 1982, in turn, can be explained by the fact that in times of economic recession the number of requests based on economic circumstances tends to increase.[491] Also, as regards the years between 1984 and 1985 when unemployment was at its highest point, somewhere between 500,000 and 600,000, the number of *rejections* was relatively high.[492] In contrast,

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487 See Ringeling 1953, Tabel I, p. 46.

488 Art. 2:6 (old) of the Dismissal Decree. For an in-depth discussion of the expedited procedure, see Van Drongelen en Van Rijs 2003, p. 127-131; CWI Handbook on Dismissal (2006), p. 24.1-24.6. Meanwhile, as from 1 January 2007, this procedure has been abolished. The reason to introduce an expedited procedure was to establish a quick procedure for employment termination on which parties agreed, however, employees protested against to ensure that they were not qualified as 'voluntary' unemployed under the Unemployment Insurance Benefits Act (*Werkloosheidwet* or WW), i.e. consequently would lose their right to unemployment benefits. The reason to, in turn, abolish this procedure has been that the *WW* has been amended as from 1 October 2006, in that an employee only loses his right on unemployment benefits when he has been dismissed for an urgent cause for which he is to blame – in practice, in case of summary dismissals – or the employment agreement has been terminated at his own request. See Stcrt. 2006, 243, p. 11.

489 Naber 1981, p. 138 and 142.

490 Van der Heijden 1984, p. 66. When we look at more recent numbers of rejections, in 2002 19% of the individual requests based on economic circumstances were rejected and 23% in case of collective dismissals. In 2003 and 2004, a period of slight economic recovery, fewer requests (roughly 17% of the individual requests and 19% of the collective dismissals) were rejected. See SZW Ontslagstatistiek 2002, 2003 and 2004.

491 Van den Heuvel 1983, p. 306. For requests based on economic circumstances, handled in recessions, see SZW Ontslagstatistiek between 2000 to 2003: 2000 (44,159); 2001 (54,376); 2002 (61,743); 2003 (85,881).

492 Knegt en Wilthagen 1988, p. 239.

rejections were relatively *low* in 1999 when unemployment was at its lowest point, somewhere between 190,000 and 265,000.[493]

16.9 Conclusion

The BBA 1945 determines that an employer needs prior authorization to unilaterally terminate an employment agreement. It does not require a just cause for dismissal. Article 3:1 of the Dismissal Decree does. Moreover, the Articles 4 and 5 provide detailed rules on economic circumstances, unsatisfactory performance, and breach of trust. This Chapter shows that private-sector employees appear to enjoy just cause protection under the BBA 1945, the Dismissal Decree, the CWI Handbook on Dismissal, both in theory and practice. On the other hand, statistics of the Ministry of Social Affairs show that the CWI grants permission to dismiss employees in the *majority* of cases. This raises the question whether private-sector employees also *feel* that they are afforded just cause protection, all the more so because the CWI cannot grant severance payments and the BBA 1945 does not allow for appeal. An employee who is dismissed with prior authorization of the CWI, in effect, has no other possibility than to claim a severance payment under Article 7:681 DCC, based on a manifestly unreasonable dismissal.

17 Article 681 of Book 7 Title 10 of the Dutch Civil Code: just cause protection?

17.1 Article 7:681 DCC

Article 1639s was introduced by the Act of 17 December 1953, after a discussion on the necessity of a just cause for dismissal.[494] After its introduction, the reason for dismissal became significant under the Act. This Section examines whether it, too, entailed a *iusta causa dimissionis*.[495] Article 1639s was changed into Article 681 of Book 7 Title 10 of the Dutch Civil Code in 1997. Its contents virtually remained the same.[496] In fact, the present text of Article 7:681 DCC *still* resembles the text of Article 1639s, with one exception.[497] The example under Article 7:681 DCC of a dismissal based on an employee's refusal to perform his work, due to serious grounds of conscience (*ernstige gewetensbezwaren*), was first introduced on 5 March 1994 at the advice of the Social-Economic Council (*SER*) in 1990.[498]

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493 See Scholtens 2001b, p. 54 and 55.

494 Ringeling 1953, p. 15-18; Van den Heuvel 1983, p. 30 and 89; Van den Heuvel 2000a, p. 254; Kuip 1993a, p. 169; Van der Grinten 2002, p. 341. See also above under § 17.2.

495 Van den Heuvel 2000a, p. 255.

496 Van Arkel 1997, p. 73 and 74.

497 For the text of 1639s, see Stb. 1953, 619. See also Ringeling 1953, p. 23.

498 Stb. 1994, 134. For an in-depth discussion of this amendment, see Van Cappelle 1994.

In brief, Article 7:681.1 DCC determines that *when* the court qualifies a termination as manifestly unreasonable, it *must* grant a severance payment.[499] Article 7:681 DCC provides examples of when the court *can* – thus, not must – qualify a termination as manifestly unreasonable. For example, a dismissal can be considered as manifestly unreasonable when the employer terminates the employment agreement without cause, based on a professed (*voorgewende*) or a false (*valse, non-existente*) reason, or the termination has far-reaching consequences for the employer in comparison with the interest of the employee to end the relationship.[500] The termination on the part of the *employer* – the focus of this thesis – *can* be manifestly unreasonable when the employer terminates the employment agreement

(a) without cause, based on a professed or a false reason;
(b) the termination has far-reaching consequences for the employee, due to the minimum of provisions (*voorzieningen*) and the employee's labour market situation in comparison with the interest of the employer to end the relationship;
(c) on the ground that the employee is unable to perform his duty to work, due to military service;
(d) the employer violates rules of seniority in terminating the employment agreement; or
(e) on the ground that the employee refuses to perform his duty to work based on severe grounds of conscience.[501]

Hence, a court must not consider a dismissal as manifestly unreasonable *per se* when an employer dismisses an employee without cause. Under Article 7:681 DCC a court, in fact, has discretionary power to decide whether or not a dismissal is manifestly unreasonable based on the circumstances of the case at the moment of the dismissal.[502] These being examples, the list is not exhaustive.[503] For example, case law shows that a dismissal can also be considered as manifestly unreasonable when an employer *knowingly* hires foreigners who are not in possession of a work permit and subsequently dismisses – or is forced to dismiss – these employees, due to their illegal status.[504]

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499 HR 4 juni 1976, NJ 1977, 98 (*Derksen/Derksen BV*). See also Levenbach 1954, p. 120; Kuip 1993a, p. 177; Van den Heuvel 1983, p. 53; Kuip 1993a, p. 173; Van den Heuvel 2000a, p. 265; Zondag 2004b, p. 6 and 11; Zondag 2005a, p. 13 and 21.

500 Art. 7:681.3 DCC. See also Tekst & Commentaar Arbeidsrecht (2006): Art. 7:681 BW.

501 Art. 7:681.2 DCC. See also Zondag 2004b, p. 6 and 7; Zondag 2005a, p. 12.

502 HR 3 maart 1995 NJ 1995, 451, JAR 1995/78 (*Van Rossum/Van Erp*). See also Hillen 1996.

503 HR 29 januari 1999, NJ 1999, 323, JAR 1999/46 (*Verkerk/Wifac*). See also A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:681 BW (DCC) § 3; Van den Heuvel 2000a, p. 261; Olde 2000; Zondag 2004b, p. 6.

504 For case law on this subject, see De Blecourt-Wouterse 1995; Van Steenderen-Koornneef 1995. For a recent case, see Ktg. Alphen aan den Rijn, 23 augustus 2005, JAR 2005/222. Another example derives from HR 20 juni 1975, NJ 1975, 496 (*Van Dam/KLM)* affirmed by the Netherlands Supreme

Elaborating on these examples, Van den Heuvel distinguishes between a manifestly unreasonable dismissal related to (i) absence of (good) cause; (ii) the manner, in which the dismissal has taken place; and (iii) consequences for the employee as a result of the dismissal.[505] This thesis primarily concentrates on the first, i.e. on the cases, in which an employer under Article 7:681.2.a DCC dismisses an employee without cause, or based on a professed or false reason. In this respect, it is important to stress that if the ground of dismissal – oral or written – is lacking, this does not automatically constitute a termination *without* cause. Determinative is whether the employee is or could have been familiar with the reason for dismissal.[506] With a *professed* reason is meant a reason invoked by an employer to cover the real (for example, discriminatory) reason. Thus, whereas the termination in principle is justified, the court can consider a dismissal as manifestly unreasonable based on bad intent. The dismissal will not be considered manifestly unreasonable, however, if an employer covers the real reason (for example, theft) to spare the employee. A *false* reason is a non-existent reason.[507]

Article 7:681.1 DCC determines that the party in question must invoke his rights within six months after termination of the employment agreement.[508] In general, parties ask for damages. The severance payment according to Article 7:681 DCC primarily aims to cover specific damages.[509] However, because in most employment termination cases it is difficult to estimate damages,[510] courts in Article 7:681-procedures tend to grant a severance payment that is reasonable under the circumstances.[511] From Article 7:682 DCC, it derives that instead of a

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Court in HR 1 juli 1983, NJ 1984, 150 (*Van Dokkum/Mercedes Benz)*. The Netherlands Supreme Court held that an employer must stand his offer to pay a severance payment until the court has decided on the fairness of the offer, and a withdrawal can make the termination manifestly unreasonable. For both decisions, see Trap en Hes 1995.

505 Van den Heuvel 1983, p. 109; Van den Heuvel 2003, p. 78. See also Kuip 1993a, p. 195.

506 TK 1947-1948, 881, No. 3, p. 11. See also Kuip 1993a, p. 172. An important development in this respect has been the introduction of Art. 7:669 DCC under which an employer as from 1 January 1999 is obliged – at the written request of the employee – to provide the employee the reason of the dismissal. See also A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:681 BW (DCC) § 4. For Art. 7:669 DCC, see above under § 17.3.2.

507 TK 1947-1948, 881, No. 3, p. 11. See also Kuip 1993a, p. 172; Van den Heuvel 2000a, p. 262 and 263; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:681 BW (DCC) § 4.

508 Art. 7:683 DCC. See also Kuip 1993a, 169 and 189; Van der Grinten 2002, p. 354.

509 See Annotation Heerma van Voss HR 3 december 2004, NJ 2005, 119, JAR 2005/30 (*Van Ree/Damco*), referring to the amendment of Art. 7:681 DCC through '*de Vaststellingswet van titel 7.10 nieuw BW (Wet van 6 juni 1996, Stb. 1996, 406)*'.

510 This explains the discussion in literature and contrasting decisions of courts as to a formula – more specifically: the Cantonal Formula – being applied to severance payments on the basis of Art. 7:681 DCC as well. See Charbon 2002; Zondag 2004b, p. 11. See further HR 3 december 2004, NJ 2005, 119 annotated by Heerma van Voss, JAR 2005/30 (*Van Ree/Damco*). See also Annotation Loonstra HR 3 december 2004, JIN 2005/89.

511 See Vegter 2003, p. 69 referring to the Conclusion of the Advocate General under 10 in HR 11 oktober 2002, JAR 2002/261 (*Van Maarschalkerwaart/Dalle Vedove*). In literature, some advocate

severance payment, the court can instruct the employer to restore the employment agreement.[512] This can take place at the employee's request only. A court, thus, cannot instruct restoration of the employment agreement on its own initiative.[513] On the other hand, a court is not obliged to grant the employee's request.[514] Restoration of the employment agreement rarely takes place, however. Employees prefer to seek for a new job, and ask for severance payment because a procedure, in general, can take years.[515] Also, the possibility of restoration, in practice, does not result in 'reinstatement', because the employer can ask to pay for a ransom (*afkoopsom*), which request must be granted by court. The court, too, can determine a ransom on its own initiative.[516] Hence, the employer can buy his way out.

The burden of proof is on the party who claims that the termination is manifestly unreasonable. This is generally the employee, who files a request after he has been dismissed with prior authorization of the CWI.[517] This rule on the burden of proof is in accordance with Article 150 of the Act on the New Civil Procedure (*Wetboek van Nieuw Burgerlijk Rechtsvordering*). Under this Article, the *plaintiff*-employee carries the burden of proof.[518] The employee, thus, must prove that the dismissal is manifestly unreasonable, as well as the underlying circumstances of the case. The court, seriously must weigh the employer's defense.[519]

17.2 Legislative history

The legislative history of Article 7:681 DCC begins with the Report of the Labour Foundation of 29 July 1947. From this Report it can be derived that Article 1639s has been a compromise between employers and employees, and only *partly* met the wish of advocates for a just cause standard in the Act of the

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that a severance payment in employment termination cases need to cover specific damages. See Boot 1999c; Luttmer-Kat 1999. Loonstra en Zondag are of another opinion. See Loonstra en Zondag 2000.

512 Art. 7:682 DCC. This does not apply to an employment agreement with a managing director (*statutair directeur*). See Art. 2:134.3 DCC and 2:244.3 DCC. See further Zondag 2005a, p. 21-26 on examples of Art. 7:681 DCC.

513 HR 4 juni 1976, NJ 1977, 98 (*Derksen/Derksen BV*). See also Levenbach 1954, p. 115, 116 and 120; Van der Grinten 2002, p. 353.

514 HR 25 januari 1985, NJ 1985, 559 (*Patelski/Gemeente Sittard*); HR 10 april 1987, NJ 1988, 5 (*Meuleman/Hagemeyer*). See also Levenbach 1954, p. 119.; Kuip 1993a, p. 181; Van der Grinten 2002, p. 353.

515 Kuip 1993a, p. 170; Loonstra en Zondag 2004, p. 308.

516 Levenbach 1954, p. 119 and 120; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:682 BW (DCC) § 3.

517 HR 29 maart 1963, NJ 1963, 247 (*Kooy/Verenigde Pharmaceutische Fabrieken*); HR 2 januari 1970, NJ 1970, 155 (*De Nederlandsche Bank/X*); HR 2 juni 1978, NJ 1979, 520 (*Van den Baard/Psychisch Centrum St. Anna*); HR 17 december 1999, NJ 2000, 171, JAR 2000/29 (*Stichting Thuiszorg Midden-Limburg/P*). See also the Conclusion of the Advocate General in HR 25 april 1986, NJ 1986, 624. See further Van den Heuvel 1983, p. 80 and 81; Kuip 1993a, p. 175; Van der Grinten 2002, p. 350.

518 Van der Grinten 2002, p. 350 and 351; Bosse 2003, p. 234 and 235; Zondag 2004b, p. 8-10; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:681 BW (DCC) § 14.

519 HR 17 december 1999, NJ 2000, 171, JAR 2000/29 (*Stichting Thuiszorg Midden-Limburg/P.).*

Employment Agreement of 1907. In brief, employers and employees in the Labour Foundation agreed that a dismissal, although in compliance with notice requirements and given with consent of the employment district office, nonetheless, could be unjustified, i.e. manifestly unreasonable under certain circumstances. However, it considered a just cause standard as too far-reaching. Consequently, it proposed a cause of action under law, based upon which the court *could* qualify a dismissal as manifestly unreasonable (*kennelijk onredelijk*) or apparently in contradiction with reasonableness (*kennelijk in strijd met de redelijkheid*), taking the interests of the employer and the employee into consideration.

It further held that the court in such a case should be able to instruct the employer to restore the employment agreement. When an employer had violated the principle of seniority or had dismissed an employee for absence due to military service, restoration of the employment agreement had to be possible as well. Only if restoration was impossible due to the circumstances, courts should be able to grant a severance payment instead. Furthermore, in determining the size of the severance payment, the court should be able to take into consideration whether the employee had received social security, the length of the notice period and the employee's labour market position.[520]

The Minister of Justice, Mulderije, welcomed the consensus the social parties had reached on the delicate matter of a requirement of a just cause for dismissal under the Act. Consequently, he wished to respect the proposals of the Labour Foundation. In brief, he agreed with the Labour Foundation that the law needed to provide means to prevent rash dismissals. In time, one felt it as improper when an employer dismissed an employee without (just) cause. In the opinion of the Minister, the thought behind Article 1639o – introduced by the legislature in 1907 – that parties could legitimately terminate the employment agreement with prior notice, *regardless of the reason*, was no longer adhered to.[521] Subsequently, the Minister proposed (i) the introduction of legal rule what later would become Article 1639s, under which a party could ask for a remedy when the other had terminated the employment agreement without just cause; and (ii) the introduction of restoration of the employment agreement as a new remedy under the Act.[522]

The Minister of Justice, Donker, who succeeded Mulderije, too, subscribed to the view of the Labour Foundation. However, he explicitly emphasized that with the introduction of Article 1639s he did not intend to introduce the requirement of a *iusta causa dimissionis*. For Reuter, a member of the Lower House this was not satisfactory. With reference to Levenbach, he stressed the importance of a just cause standard, all the more so if in the future

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520 STAR-Advies 1947, p. 19-23, 26 and 27.

521 TK 1947-1948, 881, No. 3, p. 2 and 3. See also Oud, TK 1952-1953, 881, Handelingen II, 17 februari 1953, p. 2322; Ringeling 1953, p. 25 and 26; Levenbach 1954, p. 115; Kuip 1993a, p. 178 and 179.

522 TK 1947-1948, 881, No. 3, p. 2 and 3. See also Ringeling 1953, p. 25 and 26; Van den Heuvel 2000a, p. 256.

the BBA 1945 had to give way. Reuter, in brief, stated that under the BBA 1945, a public authority was authorized to give a *preventive* review on the reasonability of a dismissal, and under Article 1639s a court was authorized to give an eventual *repressive* review.[523] Moreover, the BBA 1945 provided protection against arbitrary dismissal in general. In contrast, Article 1639s left room for termination of employment without just cause, because under Article 1639s courts had discretionary power in this respect.[524] In reply, Donker stated that the BBA 1945 could – and would – exist besides Article 1639s. Hence, there would be no problem in respect of just cause protection for employees.[525]

In Parliament, the term 'manifestly' came under debate. For most members the term remained unclear. The Standing Committee for Private and Penal Law (*Vaste Commissie voor Privaat- en Strafrecht*) stated that 'manifestly' meant that the unreasonability of the dismissal was crystal clear to experts on the one hand, and that the court was allowed to only marginally test the employer's policy or the employee's intentions on the other.[526] Minister Mulderije, in turn, held that 'manifestly' meant that it was clear to every *reasonable* human being that the dismissal was unreasonable.[527] Donker, contrary to Mulderije, answered that 'manifestly' meant that it was clear to every reasonable human being that the dismissal was unreasonable.[528] A debate in the Upper House between Donker and Molenaar resulted in a statement of Donker that 'manifestly' meant that the court should only act when it was obvious to every human being that the dismissal was unreasonable.[529] Levenbach – subscribing to the view of the Committee on Private and Penal Law[530] and the Minister[531] – held that a precise definition of 'manifestly'could not be given, in that the court had to balance the interests of the employer and the employee in determining whether a dismissal was manifestly unreasonable. Therefore, in his opinion the term would and needed to develop with the spirit of times under case law.[532] Also, the Advocate

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523 Centraal Sociaal Werkgevers-Verbond 1954, p. 62 and 63; Van den Heuvel 1983, p. 43; Hoffmans (1) 1991, p. 46.

524 See TK 1952-1953, 881, Handelingen II, 18 februari 1953, p. 2339; Handelingen II, 19 februari 1953, p. 2359. See also Van den Heuvel 1983, p. 52; Van den Heuvel 2000a, p. 260 and 261.

525 See TK 1952-1953, 881, Handelingen II, 19 februari 1953, p. 2352 and 2353.

526 TK 1949-1950, 881, No. 4, Voorlopig Verslag , p. 18. See also Ringeling 1953, p. 26; Van den Heuvel 1983, p. 53.

527 TK 1951-1952, 881, No. 6, p. 30. See also Gerbrandy 1954, p. 35; Van den Heuvel 1983, p. 54; Kuip 1993a, p. 170; Heerma van Voss 1992, p. 220.

528 Reuter, TK 1952-1953, 881, Handelingen II, 18 februari 1953, p. 2339; Wttewaall van Stoetwegen, p. 2343. See also Gerbrandy 1954, p. 37; Van den Heuvel 1983, p. 54 and 55.

529 Handelingen I, 15 december 1953, p. 2063 en 2067. See also Van den Heuvel 1983, p. 55 and 56; Kuip 1993a, p. 170. For a discussion in literature on the term 'manifestly', see Van den Heuvel 1983, p. 62 and 63. For lower case law on this subject, see Van den Heuvel 1983, p. 64 and 65.

530 TK 1949-1950, 881, No. 4, p. 18.

531 TK 1951-1952, 881, No. 6, p. 30.

532 TK 1947-1948, 881, No. 3, p. 5. See Levenbach 1953, p. 50; Van den Heuvel 1983, p. 63 and 64; Hoffmans (1) 1991, p. 45.

General in *Lampe/De Vries (1961)* – which case will be discussed in-depth below – concluded that the term 'manifestly' concerned a standard of evaluation to be filled out by courts based on the circumstances of the case. In the case that was brought before him, the Advocate General rejected the proposition of the employer that 'manifestly' meant that facts are obvious, in that they need not be investigated. Hence, he rejected the proposition that the dismissal must be manifestly unreasonable *at first sight*, and that the claim must be rejected when this is not the case. In his opinion, manifestly unreasonable meant that it is clear to every reasonable human being that the dismissal is unreasonable, which view was shared by the Netherlands Supreme Court.[533] This means that, in practice, there is no limited judicial review by courts.[534]

Second, a point of discussion was the new remedy of restoration. The Standing Committee on Private and Penal Law argued that employees, due to this new remedy, in effect, could be forced to stay in service against their will. That is, when an *employee* asks for restoration, an employer generally will request a ransom. In turn, when an *employer* asks for restoration, an employee generally lacks the financial means to ask the court to determine a ransom instead, hence, is forced to stay in service. Therefore, the Committee advised the Minister not to apply the principle of equality of parties under contract law to the employee in this respect.[535] In reply, the Minister trusted the courts to take the financial means of the employee into consideration in determining a lump sum payment.[536] Finally, in 1999, the government acknowledged that this remedy could effectually force an employee to stay in service. Consequently, through the Flexicurity Act that went into force on 1 January 1999, it was decided that employers could no longer ask for restoration of the employment agreement if an employee had terminated the employment agreement manifestly unreasonably.[537]

17.3 Case law in light of just cause protection

The *minority* of cases filed under Article 7:681.2.a DCC are those, in which termination of employment has taken place without cause, or based on a professed or a false reason.[538] This is partly due to the decision in 1953 of the Minister of Justice and the Minister of Social Affairs to maintain the BBA 1945

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533 See Conclusion of the Advocate General HR 1 december 1961, NJ 1962, 78 (*Lampe/De Vries*).

534 Loonstra en Zondag 2004, p. 307; 2004b, p. 5 and 6. See also A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:681 BW (DCC) § 3. See further Annotation Zonderland HR 11 februari 1977, NJ 1977, 246 (*Polak/Technodiamant Amsterdam*), and Conclusion of the Advocate General HR 11 november 1983, NJ 1984, 330 (*De Vries/Rank Xerox*).

535 TK 1949-1950, 881, No.4, p. 18 and 19. See also Ringeling 1953, p. 26 and 27; Levenbach 1954, p. 117 and 118.

536 TK 1951-1952, 881, No. 6, p. 31; TK 1952-1953, 881, Handelingen II, 19 februari 1953, p. 2346. See also Ringeling 1953, p. 28.

537 Zondag 2005a, p. 25; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:682 BW (DCC) § 3.

538 Loonstra en Zondag 2004, p. 307 and 308; Zondag 2004b, p. 7.

besides Article 1639s. Already, members of the Lower House, Oud and Wttewaall van Stoetwegen, at the time, stressed that if the BBA 1945 would be maintained, courts would be left only with cases in which district employment offices had judged wrongly. One expected these cases to be rare,[539] besides the cases in which exempted workers from the BBA 1945 would rely on the Article.[540] However, at the time one could not yet oversee the impact of the Netherlands Supreme Court in 1961 in *Lampe/De Vries*, in which it allowed employees to ask for a severance payment based on manifestly unreasonable dismissal because of the consequences for the employee as a result of the dismissal.[541] After this case, employees increasingly started to file claims under Article 1639s, stressing the harsh consequences of the dismissal.[542] By 2007, these cases form a majority of the cases filed under Article 7:681.2.b DCC.[543] Still, however, the total number of – published – cases under Article 7:681 DCC is relatively low in comparison with those under Article 7:685 DCC.[544]

The possibility to claim damages in light of the consequences of the dismissal was not new. Already, the Labour Foundation in its advice of 1947 held that a court, in determining whether a dismissal was manifestly unreasonable, should be able to take into consideration (i) social security; (ii) the length of the notice period; and (iii) the employee's labour market position. In this respect, Article 1639s determined that the court could consider a dismissal as manifestly unreasonable if the dismissal has far-reaching consequences for the employee, due to a minimum of provisions (*voorzieningen*) and the employee's labour market situation in comparison with the employer's interest in ending the relationship.[545] This now brings me to a discussion of case law under Article 7:681 DCC. In discussing case law, the focus will be on decisions of the Netherlands Supreme Court. These decisions provide guidelines and, in effect, must be followed by the lower courts.

17.3.1 Correction of mistakes of the public authority in granting permits

In 1953, Donker particularly focused on Article 1639s in respect of the effect it would have on the correction of mistakes of district employment offices in

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539 Oud, TK 1952-1953, 881, Handelingen II, 17 februari 1953, p. 2322; Wttewaal van Stoetwegen, TK 1952-1953, 881, Handelingen II, 18 februari 1953, p. 2343. See also Van den Heuvel 1983, p. 60; Kuip 1993a, p. 174; Zondag 2004b, p. 37-39.

540 For the exempted workers under the BBA 1945, see above under § 16.1.

541 For this case, see below under § 17.3.4.

542 For an in-depth discussion of HR 1 december 1961, NJ 1962, 78 (*Lampe/De Vries*), see below under § 17.3.4.

543 A significant number of these cases apply to disabled employees who have been dismissed after two years of illness. For an overview of cases between 2001-June 2004, see Zondag 2004b, p. 18-33.

544 Van den Heuvel 1983, p. 60; Beltzer, Knegt en Van Rijs 1998, p. 48 and 49; Scholtens 2002; Zondag 2004b, p. 4.

545 TK 1947-1948, 881, No. 3, p. 11. For the Advice of the Labour Foundation, see STAR-Advies 1947, p. 27. See further Van den Heuvel 1983, p. 70, 263 and 264; Kuip 1993a, p. 174.

granting permits.[546] In this respect, the Netherlands Supreme Court took an important decision in *HAL/Van Werkhoven (1979)*. In this case, the Director of the District Employment Office had not correctly applied the rules. The employer, nonetheless, terminated the employment agreement based on the permit. The lower court held that the employer herewith violated principles of good faith, and ordered restoration of the employment agreement. In contrast, the Netherlands Supreme Court held that the dismissal system did not allow restoration on the ground of good faith.[547] Moreover, it held that an employer might rely on the permit granted. An employer, thus, does not have to investigate whether the Director has granted the permit according to the rules. The Netherlands Supreme Court, however, added that when the permit is granted, due to improper acts on the part of the employer – e.g. the employer provides the public authority with false information in furtherance of which this authority grants a permit – the dismissal could be considered as manifestly unreasonable.[548] In *Urenco/Baakman (1988)*, the Netherlands Supreme Court furthered its decision in *HAL/Van Werkhoven (1979)*. Whereas it allowed the employer to rely on the decision of the public authority, it stressed that this does *not* mean that the court *cannot* undertake an *independent* investigation on the facts that led to the dismissal.[549]

In *Pratt & Whitney/Franssen* (*1999*), employees, in furtherance of these cases held that the dismissal was manifestly unfair, because their employer had willingly provided the public authority with false information on his financial situation in order to obtain a permit for the employees. With the exception of one employee, all claims had become time-barred (*verjaard*). Consequently, the court had denied the claims. However, the Netherlands Supreme Court held that employees, nonetheless, could claim damages based on a tort action, referring to the deceit of the employer, which, in itself, may be qualified as a tort.[550] Hence, it held that to the extent courts cannot order *restoration* of the employment agreement based on grounds other than under the Articles 7:681 DCC and 7:682 DCC, the possibility for courts remain to grant a *severance payment* based on *tort* (Article 6:162 DCC), when a claim under Article 7:681 DCC is time-barred.

17.3.2 Dismissal without cause

To my knowledge one of the first cases that was published, in which the employee held that the termination was given without cause, is *Lampe/De Vries (1961)*. In this case, the employer dismissed the employee for reasons unclear to the employee, and without prior authorization as required under the BBA 1945.

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546 Van den Heuvel 2000a, p. 262 and 263.

547 HR 11 mei 1979, NJ 1979, 441 (*HAL/Van Werkhoven*). See also Rood 1980, p. 293; Hoffmans (1) 1991, p. 46 and 47; Rouwendal 2005.

548 See in this context HR 3 december 1999, NJ 2000, 235, JAR 2000/18 (*Pratt & Whitney/ Franssen)*.

549 HR 5 februari 1988, NJ 1988, 950 (*Baakman/Urenco*). Hoffmans (1) 1991, p. 46 and 47.

550 HR 3 december 1999, NJ 2000, 235, JAR 2000/18 (*Pratt & Whitney/ Franssen)*. See also Olde 2000; Staal 2002; Rouwendal 2005, p. 39. See also Boot 2006b, p. 164-167.

Subsequently, after the employee had protested, the employer asked for permission to dismiss the employee and dismissed the employee *with* prior authorization of the public authority. The Netherlands Supreme Court held that because from that moment the reasons of dismissal were clear to the employee, the Court did no longer had to decide on whether the dismissal was given without cause.[551] In this respect, more interesting is a 1987 decision of the Netherlands Supreme Court. An employer had sent the employee a resignation letter, but failed to state the reason for dismissal. Prior to the resignation letter, however, the employer had applied for a permit under the BBA 1945, in which he had stated that the employee did not perform well. Hereupon, the Director of the District Employment Office granted the permit based on *economic* circumstances. A salient detail was that the *employee* as a possible reason for dismissal, the existence that he at the same time denied, brought this ground forward. When the employer dismissed the employee in furtherance of this permit, the employee held that the termination was manifestly unreasonable. He argued that the dismissal was given without cause, and/or based on a professed or a false reason, because it was not in accordance with the employer's alleged reason of unsatisfactory performance. The Netherlands Supreme Court held that the employee could have known the reason from the employer's application to the Director of the District Employment Office. In contrast, the Advocate General held that, although the Director was free to grant the permit on other grounds than the employer brought forward in his request, the employee in question could not have known the real reason, because the termination was based on the permit, which referred to a reason for the dismissal *other* than the employer had brought forward.[552] I subscribe to the decision of the Netherlands Supreme Court. In my opinion, it is determinative whether the employee, in effect, is able to defend himself against the reason for dismissal. In this case, the employee held a defense both on unsatisfactory performance and economic circumstances.

Also, a case worthwhile mentioning is the one of 1992. In this case, an employer had terminated the employment agreement with its managing director. The resignation letter did not refer to the reason for dismissal. However, prior to this letter the employee had been dismissed by the general meeting of shareholders, based on an auditor's certificate, in which the accountant pointed at the unsatisfactory performance of the managing director for refusing to follow the company's policy. The Netherlands Supreme Court held that the employee could have known the reason for dismissal based on the meeting of shareholders, at which the managing director was also present.[553] A more recent case is that of *Van der Werff/Elan (2006)*, which is almost similar to the case of

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551 HR 1 december 1961, NJ 1962, 78 (*Lampe/De Vries*). For its impact in respect of the consequences of a dismissal, see below under § 17.3.4.

552 HR 10 april 1987, NJ 1988, 5 (*Meuleman/Hagemeyer*).

553 HR 4 december 1992, NJ 1993, 271, JAR 1992/149 (*Meijers/Mast Holding*).

1992.[554] Overall, the foregoing case law shows that the Netherlands Supreme Court does not easily assume that an employee is dismissed *without cause*, if he could have known the reason for dismissal. This is in accordance with legislative history. Therefore, in building up a strong case, employees, in general, *subsidiary* bring forward the argument that the dismissal is based on a professed or false reason.

17.3.3 Dismissal based on a professed or false reason

One of the most interesting cases dates back to 1986. In this case, a managing director was dismissed by the general meeting of shareholders for unsatisfactory performance. The employee stated he was dismissed for a false reason and brought forward facts, which undermined the employer's statement. The lower court agreed with the employee, stating that it, too, was not convinced that the real reason of the dismissal had been unsatisfactory performance. Consequently, it granted a severance payment to the employee under Article 1639s. The Court of Appeal, however, held that the lower court had failed to investigate whether the undermining of statements could stand the employee's burden of proof. The Netherlands Supreme Court affirmed this decision. It held that the burden ultimately rests with the employee to prove that the dismissal is manifestly unreasonable. The Netherlands Supreme Court referred to its earlier decisions in this respect.[555] It made an exception, however. It held that when an employee claims that the alleged reason for dismissal is false, i.e. *non-existent*, the employer has to bring forward sufficient facts so that the employee can properly build his defense.[556] Herewith, it aggravated the duty of motivation on the part of the employer (*verzwaring van de motiveringsplicht*) regarding the charge made against him. In this respect, the Netherlands Supreme Court argued that when the employee must prove a negative fact, i.e. a non-existent reason,[557] which is virtually impossible, it is reasonable and fair to aggravate the employer's duty in this respect.[558] The Netherlands Supreme Court confirmed its decision in 1987.[559]

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554 HR 23 juni 2006, JAR 2006/173 (Van der Werff/Elan). In this case, the Court of Appeal and the Advocate General of the Netherlands Supreme Court held that the managing director could have known the real reason from the minutes of the general meeting of shareholders. The Netherlands Supreme Court did not decide on the issue, i.e. rejected van der Werff's case on formal grounds.

555 HR 29 maart 1963, NJ 1963, 247 (*Kooy/Verenigde Pharmaceutische Fabrieken*); HR 2 januari 1970, NJ 1970, 155 (*De Nederlandsche Bank/X*); HR 2 juni 1978, NJ 1979, 520 (*Van den Baard/Psychisch Centrum St. Anna*); HR 17 december 1999, NJ 2000, 171, JAR 2000/29 (*Stichting Thuiszorg Midden-Limburg/P.*). See also Conclusion of the Advocate General in HR 25 april 1986, NJ 1986, 624 (*Millenaar/Oerlemans*); Van den Heuvel 1983, p. 80 and 81; Kuip 1993a, p. 175; Van der Grinten 2002, p. 350.

556 HR 25 april 1986, NJ 1986, 624 (*Millenaar/Oerlemans*).

557 See also TK 1952-1953, 881, Handelingen II, 18 februari 1953, p. 2339; Van den Heuvel 1983, p. 80.

558 HR 25 april 1986, NJ 1986, 624 (*Millenaar/Oerlemans*). See also Hoffmans (1) 1991, p. 45, 47 and 48; Kuip 1993a, p. 176; Van der Grinten 2002, p. 350; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:681 BW (DCC) § 14.

559 HR 10 april 1987, NJ 1988, 5 (*Meuleman/Hagemeyer*).

The foregoing cases raise the question what the sanction is if the employer does *not* bring sufficient facts for the employee to properly build his defense. The Netherlands Supreme Court answered this question in 1989 and 2001. In *Dolmans BV/Wouters (1989)*, an employee in a 1639s-procedure held that the employer's alleged reason about unsatisfactory performance was false. Based on statements of ex-colleagues, the Director of the District Employment Office had granted a permit. In the civil procedure, the employee undermined the statements of his ex-colleagues. The lower court agreed with the employee. It held that although, in general, the burden of proof rests with the employee to prove the false reason, this burden shifts to the employer when the employee has undermined the employer's statements. The Netherlands Supreme Court rejected the decision of the lower court. It held that the fact alone that the employee has undermined the statement of the employer did not justify a shift of the burden of proof.[560] The Netherlands Supreme Court held that the burden of proof ultimately rests with the employee, although the decision of 7 September 1986 leaves space to decide otherwise.[561] In *Staat/Middel (2001)*, the Netherlands Supreme Court confirmed its decision in *Dolmans BV/Wouters (1989)*. This decision, nonetheless, can be seen to be for the benefit of the employee. In this case, a dentist in service of the navy had been dismissed for unsatisfactory performance. The employer dismissed the employee based on a report of an internal committee, which included interviews with patients of which the employee was not given insight. The employee, who denied the alleged reason, asked his employer several times to give insight into the report so that he could defend himself properly with regard to the complaints of the patients. The employer refused, referring to internal rules of privacy, due to which he was not in the position to hand over the report. This in spite of the fact that the employee had stressed that these rules did not apply to him. The court in first instance *disagreed* with the employee that the termination was manifestly unreasonable, but the appellate court *agreed* with the employee. With reference to the decision of the Netherlands Supreme Court of 25 April 1986, it held that the employer had failed to bring forward sufficient facts for the employee to defend himself properly, and that courts hereupon may consider the dismissal as manifestly unreasonable. The Netherlands Supreme Court affirmed this decision.[562]

Last, a case worthwhile mentioning is *M/Sociaal Kultureel Werk Rotterdam (1999)*. In this case, an employee could no longer perform his duties, due to a

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560 HR 12 mei 1989, NJ 1989, 596 (*Dolmans BV/Wouters*). In an earlier case, HR 21 april 1989, NJ 1989, 573 (*Ruyters BV/Vermeeren*) the Netherlands Supreme Court held that in case an employer does not clearly states his defense this can work to his detriment, regardless of the fact that the burden of proof rests with the employee. The burden of proof, however, ultimately rests on the employee. See on both cases, Hoffmans (1) 1991, p. 48. In contrast, Van den Heuvel advocates the shift of the burden of proof with regard to Art. 1639s (681). See Van den Heuvel 1983, p. 81.

561 See Conclusion of the Advocate General under 2.5 in HR 10 april 1987, NJ 1988, 5 (*Meulemans/Hagemeyer*).

562 HR 7 september 2001, NJ 2001, 616, JAR 2001/188 (*Staat/Middel)*. See also Van der Grinten 2002, p. 350 and 351; Zondag 2004b, p. 9 and 10.

conflict on the job. After two years of (situational) illness, the employer filed a request with the Regional Director of Labor Services in which he asked for permission to terminate the employment agreement. The employer brought forward that the employee was disabled and that he was not able to offer the employee an adjusted position. In this respect, the employer relied on the judgment of the Industrial Insurance Board (*Bedrijfsvereniging*), which had stated that the employee was incapable of performing his regular duties. The employee held the opposite, referring to a medical attest of his doctor and psychiatrist, hence, argued that he was capable of performing his regular duties. The employer terminated the employment agreement, after he had received the permit. After termination of employment, the Board informed the employee he was capable of performing his job again. Subsequently, the employee claimed that the termination of employment was manifestly unreasonable. The Netherlands Supreme Court held that the employer acted in good faith, hence, could trust on the judgment of the Board that the employee was (still) ill when he terminated the employment agreement.[563]

Subsequently, in *Stichting Thuiszorg Midden-Brabant/Van Ierland (2000)*, the Industrial Insurance Board, too, stated that the employee in question was ill. The Netherlands Supreme Court, however, held that an employer had to pay wages over the periods that the employee was able and willing to perform her duties. A saillant detail was that the employee successfully had opposed the Board's decision.[564] This leads one to wonder what the outcome would have been if the employer had *dismissed* the ill employee based on the decision of the Board. The employee then would have been dismissed based on a decision of which the ground had fallen away with retrospective effect. In general, one cannot dismiss an employee for a false, i.e. non-existent reason.[565]

17.3.4 Dismissal in light of the consequences of the dismissal

Lampe/De Vries (1961) meant a major break-through for employees in asking damages due to the harsh consequences of the dismissal. In this case, the head tailor's cutter (*cheffin coupeuse*) was dismissed by her employer with prior authorization of the Director of the Employment District Office after eight and half years of service. The problems between the employee and the employer started after the latter had appointed a new employee as a tailor cutter, who was shortly after promoted as head of a new department. When problems arose between De Vries and this new employee, Lampe decided to dismiss De Vries, who at the time was 48 years old. She filed a claim under Article 1639s, which was rejected by the lower court. In contrast, the appellate court held that the

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563 HR 18 juni 1999, NJ 2000, 31, JAR 1999/148 (*M./Sociaal Kultureel Werk Rotterdam*). See also Olde 2000; Van der Grinten 2002, p. 344.

564 HR 23 juni 2000, NJ 2000, 585, JAR 2000/163 (*Stichting Thuiszorg Midden-Brabant/Van Ierland*). For an in-depth discussion on this decision in comparison with HR 18 juni 1999, NJ 2000, 31, JAR 1999/148 (*V./Sociaal Kultureel Werk*), see Hoogendijk 2001.

565 On the other hand, see the so-called conditional requests below under § 18.4.2.

dismissal was manifestly unreasonable, due to the fact that the employer had not taken into consideration the employee's interests at the time of the dismissal.

The Netherlands Supreme Court affirmed the decision of the appellate court, stressing that it had not considered the *decision to terminate* De Vries as manifestly unreasonable, but the *manner* in which Lampe had dismissed De Vries. In sum, it held that the employer should have taken into consideration the employee's interests when Lampe dismissed her, including her excellent state of service for at least six years; her age and her labour market position, which made it difficult for her to find a similar job; the fact that she would have joined the pension fund of the employer at the age of 60, and the absence of a financial provision in this respect; and the fact that although De Vries was partly to blame for the conflict, problems with her had started only after the employer decided to make changes in its business policy.[566]

Lampe/De Vries (1961) raised the question whether a dismissal also could be manifestly unreasonable if an employee was *seriously to blame* for the underlying conflict between parties.

In *Elmar/Felix (1978)*, the Netherlands Supreme Court held that when an employee was seriously to blame for the conflict – but this behavior did not constitute an urgent cause – the dismissal could still be manifestly unreasonable. It affirmed the decision of the Court of Appeal, which held that although the employee was seriously to blame for the conflict, the dismissal was manifestly unreasonable, due to the fact that the employee had been working to the satisfaction of the employer for almost sixteen years; the employee's labour market position; his medical situation; his age (44), which made if difficult to find a similar job; and, the fact that termination of employment had taken place without an extensive notice period or a severance payment.[567]

In *Schrijver/Essen (1999)*,[568] however, the Netherlands Supreme Court made clear that when the employee's behavior justifies a summary dismissal, the employee does *not* have an action under Article 1639s. It held that in determining whether there is an urgent reason that justifies a summary dismissal, a court must already consider the employer's and employee's interests, i.e. the importance of the reason for dismissal; the nature of the employment relationship; the years of service; whether the performance had been to the satisfaction of the employer; and, the personal circumstances of the employee among which the employee's age and the (financial) consequences for the employee as a result of the dismissal. Hence, when there is an urgent cause,

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566 HR 1 december 1961, NJ 1962, 78 (*Lampe/De Vries*). See also Van den Heuvel 2000a, p. 271; Loonstra en Zondag 2004, p. 307; Zondag 2004b, p. 5 and 6.

567 HR 1 december 1978, NJ 1979, 185 (*Felix/Aruba*). See also Van den Heuvel 1983, p. 72; Kuip 1993a, p. 174; Luttmer-Kat 1996; Van den Heuvel 2000a, p. 271; Loonstra en Zondag 2004, p. 307; Zondag 2004b, p. 6. For an overview of cases with regard to Art. 7:681.2 under b BW, see A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:681 BW (DCC) § 5.

568 For the names, see Peeters 1999, p. 135.

these interests cannot be considered *again* in deciding on whether the dismissal is manifestly unreasonable.

The Netherlands Supreme Court held that to rule otherwise, this would not rhyme with the dismissal system. It referred to Article 1639o (7:677 DCC) and Article 1639w (7:685 DCC) according to which a court cannot grant severance payments in summary dismissals. Therefore, this should not be possible under Article 1639s (7:681) either.[569] With *Schrijver/Essen (1999),* the Netherlands Supreme Court ended an ongoing discussion in literature whether a *valid* summary dismissal could still be manifestly unreasonable.[570] Moreover, it made clear – although not exhaustively[571] – which circumstances must be considered in determining an *urgent reason for dismissal*. In contrast, the Netherlands Supreme Court still must give guidelines on precisely which circumstances need to be considered in determining a manifestly unreasonable dismissal,[572] in that Article 7:681 DCC leaves space to give guidelines.[573]

In *Van Ree/Damco (2004)*, the Netherlands Supreme Court 'only' emphasized that a court must consider all relevant circumstances *on an equal basis*. In this case, the lower court held that to obtain a higher severance payment, the employee must prove a higher pressure of work. The Netherlands Supreme Court, however, held that the pressure of work must be considered as *one* of the circumstances in the totality of circumstances, in determining the existence of a manifestly unreasonable dismissal.[574] The Advocate General was of the opinion that the Netherlands Supreme Court could not decide on this subject, because it is not allowed to give a decision on factual circumstances.[575] Although the Advocate General is correct on the latter,[576] the Netherlands Supreme Court, in

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569 HR 12 februari 1999, NJ 1999, 643, JAR 1999/102 (*Schrijver/Essen*). Phaff earlier defended this theory, see Phaff 1986, p. 125. For an in-depth discussion of this case, see Sagel 1999. See also Van der Grinten 2002, p. 342; Zondag 2005a, p. 38-40.

570 Van den Heuvel, on the other hand, is still of the opinion that a valid summary dismissal can be manifestly unreasonable. Van den Heuvel 2000a, p. 267-274 referring to Van den Heuvel 1983, p. 109-114. In the past Kuip strongly defended this theory as well. Kuip 1993a, p. 194-212; Kuip 1996. The Advocate General in HR 12 februari 1999, NJ 1999, 643, JAR 1999/102 (*Schrijver/Essen*) in my opinion correctly held that the foregoing authors did not take into consideration that all circumstances, including the consequences of the dismissal – thus, not solely the reason – should be considered on an equal basis in determining the existence of an urgent reason. See also Sagel 1999; Van der Grinten 2002, p. 342; Zondag 2005a, p. 38-40.

571 Sagel 1999, p. 12.

572 Hoffmans (1) 1991, p. 48. For an overview of the cases in which disabled employees claim damages under Art. 7:681 DCC, see Zondag 2004b, p. 54-72.

573 Zondag 2004b, p. 59-62; Duk 2006, p. 17 referring to his previous publication Duk 2004, p. 164-169. See further Annotation Zonderling HR 11 februari 1977, NJ 1977, 246 (*Polak/Technodiamant Amsterdam*); Van der Grinten 2002, 345-348.

574 Rov. 3.4.5. HR 3 december 2004, NJ 2005, 119, JAR 2005/30 (*Van Ree/Damco*).

575 HR 3 december 2004, NJ 2005, 119, JAR 2005/30 (*Van Ree/Damco*). See also Annotation Heerma van Voss with HR 3 december 2004, NJ 2005, 119, referring to rov. 2.24 and 2.25; Annotation Loonstra HR 3 december 2004, JIN 2005/89.

576 See also Van den Heuvel 1983, p. 60 and 61.

effect, did nothing more than to provide a clear guideline that a court must consider all relevant circumstances on an equal basis.

In an earlier case, the Netherlands Supreme Court already gave a clear guideline on the *absence of a financial compensation*, in that this in itself does *not* constitute a manifestly unreasonable dismissal.[577] However, in a later decision, the Netherlands Supreme Court held that the fact that an employer had not offered compensation, this did not make the dismissal manifestly unreasonable, because the employee in question was entitled to social welfare. This decision seemed to imply that when an employee was *not* entitled to social welfare, the employer, *thus,* must offer compensation to avoid that the dismissal would be considered as manifestly unreasonable.[578]

One thing is clear, the court must consider *all* circumstances of the case in determining whether a dismissal can be considered as manifestly unreasonable. The latter, however, in turn, became unclear after a decision of the Netherlands Supreme Court in 1999. In *Boulidam (1999)*,[579] an employee who performed a physically heavy job had become ill after working to the satisfaction of his employer for almost 25 years. After two years of illness, he was dismissed by the employer with prior authorization of the Regional Director of Labor Services. The employee did not receive a severance payment, nor did the employee qualify for the Disability Insurance Act (*Wet op de arbeidsongeschiktheidsverzekering* or *WAO*).[580] The Netherlands Supreme Court held that the dismissal was manifestly unreasonable, stating that it was improper to send off an employee after 25 years of work without severance payment. Not in question, according to the Netherlands Supreme Court was whether the employee had become ill *due* to, but *after* the hard work with the employer.[581]

Boulidam (1999) raised the question whether a termination of a disabled employee with a long state of service, in which an employer had not offered a severance payment, should be considered *per se* as manifestly unreasonable. Most authors, among whom Zondag and Verhulp, oppose the latter.[582] Loonstra referred to the fact that courts must consider all circumstances in determining the existence of a manifestly unreasonable dismissal,[583] however, this, in fact, is what happened in *Boulidam (1999)*.[584] Loonstra's point of view was implicitly

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577 HR 20 december 1985, NJ 1986, 713 (*Hotel Ibis/Elbouk*).

578 HR 5 februari 1988, NJ 1988, 950 (*Baakman/Urenco*). See also Hoffmans (1) 1991, p. 46.

579 HR 25 juni 1999, NJ 1999, 601, JAR 1999/149 (*Boulidam*).

580 The WAO has been amended and replaced by the WIA (*Wet werk en inkomen naar arbeidsvermogen*) as from 29 December 2005 and applies to employees who are ill for at least 104 weeks as from 1 January 2004. Stb. 2005, 619.

581 Van der Grinten 2002, p. 348; Loonstra en Zondag 2004, p. 308; Zondag 2004b, p. 27-33. For a discussion of this case see also Boot 1999b.

582 Zondag 2004b, p. 28; E. Verhulp, JAR Verklaard 2001, p. 9. For case law, see Ktg. Bergen op Zoom 6 februari 2002, JAR 2002/52; Ktg. Zaanstad 31 oktober 2002, JAR 2002/283.

583 See Conclusion of the Advocate General in HR 10 juni 2005, NJ 2005, 395, JAR 2005/174 (*Grillroom Ramses II*).

584 See Annotation Loonstra HR 3 december 2004, JIN 2005/89.

confirmed by the Netherlands Supreme Court in *Stichting Thuiszorg Midden-Limburg/S.*[585] Still, in practice, the emphasis in cases regarding ill employees often is on whether or not the employer has made serious efforts to regintegrate the employee,[586] and/or on the relationship between the employee's disability and the circumstances on the job.[587] Hence, specific guidelines in this respect still lack under Article 7:681 DCC.

17.4 Conclusion

In 1954, Levenbach held that parties after the introduction of Article 1639s no longer have an unlimited right to arbitrarily terminate the employment agreement.[588] Or as the Netherlands Supreme Court once strikingly held, the introduction of Article 1639s outmoded the rule of 1907 that an employer at all times could terminate the employment agreement with respect of a notice period, regardless of the reason.[589] These statements are partly true, however. *First*, in 1953, the Minister of Justice explicitly stressed that with Article 1639s he did not wish to introduce a rule based on which an employer needed a just cause for dismissal. *Second*, under Article 1639s (7:681 DCC), a court dependent on the circumstances *can,* but does not have to consider a dismissal without cause as manifestly unreasonable. *Third*, from case law one cannot derive that employers need a just cause for dismissal either. The most far-reaching decisions of the Netherlands Supreme Court in this respect have been with regard to a manifestly unreasonable dismissal based on a false, i.e. *non-existent* reason. The Netherlands Supreme Court, however, explicitly refused to shift the burden of proof. In fact, suppose the Netherlands Supreme Court would require of the employer to prove the *real* reason, this reason does not need to constitute a just cause for dismissal. Courts can only take the alleged – good or bad – cause into consideration as *one* of the circumstances, based on which the dismissal *can* be considered as manifestly unreasonable. *Fourth*, the intent of the legislature behind Article 1639s was to provide the employee with a cause of action under law after being dismissed without cause. In this respect, Article 7:681 DCC lost its meaning, because (i) the Netherlands Supreme Court relatively easily assumes that the employee based on the circumstances of the case could have known the reason; (ii) as from 1 January 1999, an employee under Article 7:669 DCC can require of the employer to provide him with the reason of the dismissal; and (iii) the emphasis of Article 1639s (Article 7:681

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585 HR 17 december 1999, NJ 2000, 171, JAR 2000/29 (*Stichting Thuiszorg Midden-Limburg/P.*). See also Ktg. Bergen op Zoom 6 februari 2002, JAR 2002/52; Ktg. Zaanstad 31 oktober 2002, JAR 2002/283.

586 For example, see Ktg. Utrecht 20 april 2005, JAR 2005/145.

587 For example, see Ktg. Haarlem 11 november 2000 and 14 maart 2001, JAR 2001/88; Rb. Den Haag 6 december 2000, JAR 2001/19; Ktg. Amsterdam 11 mei 2004, JAR 2004/152. See also Zondag 2005a, p. 54-72; Vaandrager 2005, p. 33-36.

588 Levenbach 1954, p. 69.

589 HR 1 december 1989, NJ 1990, 451, rov. 3.5.3 and 3.5.4 (*Deuss/Motelmaatschappij Holland*).

DCC) on just cause protection, in practice, has shifted to cases which rather focus on the consequences for the employee as a result of the dismissal. *Last*, one can doubt whether private-sector employees enjoy just cause protection under Article 7:681 DCC according to the legislature's intent, when an employer, in effect, can buy his way out.

18 Article 685 of Book 7 Title 10 of the Dutch Civil Code: just cause protection?

In the following paragraphs, I will examine to what extent private-sector employees enjoy just cause protection under Article 7:685 DCC. In fact, prior to 1953, there was still doubt whether Article 1639w, its predecessor, required a *iusta causa dimissionis*.[590] Article 1639w, in effect, was considered as a dead letter.[591] However, it was amended significantly by the Act of 1953, primarily to make it possible for an employee to invoke 1639w when a permit was refused under the 1945 Special Decree.[592] In time, however, Article 7:685 DCC became the alternative route of the BBA 1945-procedure, i.e. has been invoked by employers *instead* of the BBA 1945-procedure.[593] In this Section, I will examine the latter, and whether the grounds for dismissal and review by the CWI and the Cantonal Court are the same.

18.1 The rise of the dissolution procedure

The predecessor of Article 7:685 DCC – Article 1639w – was introduced by the Act of the Employment Agreement of 1907. Under this Article, employers and employees could ask for dissolution of the employment agreement. Initially, the Article applied to rare situations only. In fact, between July 1907 and July 1954 only 65 decisions in a dissolution procedure were published.[594] To give an idea, *in the year of 1953 only*, about 40,000 requests were filed under the BBA 1945.[595]

In 1953, the legislature broadened the scope of Article 1639w to include breach of trust as a ground of dismissal.[596] Still, the number of requests based on Article 1639w remained low compared to the requests under the BBA 1945. For example, in 1977 the number of requests under Article 1639w was 480 compared to 71,771 requests under the BBA 1945. In 1978 and 1979 the number

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590 See Oud, TK 1952-1953, 881, Handelingen II, 17 februari 1953, p. 2323.

591 See Tendelo, TK 1952-1953, 881, Handelingen II, 18 februari 1953, p. 2334. See also the Minister, TK 1952-1953, 881, Handelingen II, 19 februari 1953, p. 2352.

592 TK 1952-1953, 881, Handelingen II, 19 februari 1953, p. 2351 and 2352.

593 See also Van der Heijden 2000, p. 235.

594 Loonstra 1996, p. 148.

595 For the number of permits between 1950 and 1982, see Van den Heuvel 1983, p. 306. For the number of decisions under Art. 1639w, Loonstra 1996, p. 148.

596 See below under § 18.3.

of requests was still relatively low, i.e. 639 versus 67,918 and 765 versus 71,007, respectively.[597] In fact, nothing changed until the eighties.

As from the 1980s, employers *increasingly* started to file requests under Article 1639w (7:685 DCC). In 1981, 1982 and 1983 the number of requests under Article 1639w amounted to 1,898, 3,097, 5,035, respectively.[598]

One of the reasons behind the popularity of the dissolution procedure was the Second Oil Crisis. To cut costs, employers wished to dismiss employees. Generally, these employers preferred the BBA 1945-procedure, due to the low costs of this procedure. Because of the heavy workload on the part of the public authority it took months to obtain a permit, however. Not surprisingly, employers started to seek for an alternative. This was offered by Article 1639w.[599] Another reason to invoke the dissolution procedure, was that Cantonal Courts tended to grant decisions in so-called *pro forma* requests easier than the public authority.[600] As mentioned above, in these requests – generally based on economic circumstances – the employee (formally) protests against the dismissal to retain his right to unemployment benefits under the Unemployment Insurance Benefits Act (*Werkloosheidswet* or *WW*), although parties substantially agreed on the termination.

The numbers below show that the BBA 1945-procedure and the dissolution procedure have grown towards one another. According to the data of the Central Bureau of Statistics Netherlands (*Centraal Bureau voor de Statistiek* or *CBS*),[601] and the data of the Ministry of Social Affairs of requests *filed* – which may differ with the cases the CWI and the Cantonal Court eventually *handle*[602] – the BBA 1945 and Article 7:685 DCC (Article 1639 w old) relate to one another as follows[603]

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597 For the statistics on dissolutions between 1977 and 1986, see Groen 1989, p. 63. For the statistics on permits between 1950 and 1982, see Van den Heuvel 1983, p. 306 and 307.

598 For these statistics, see Groen 1989, p. 63.

599 See also Scholtens 2001a, p. 6 and 7.

600 Groen 1989, p. 64; Knegt en Wilthagen 1988, p. 265; Loonstra 1996, p. 155; Scholtens 2001a, p. 7. For an in-depth discussion of *pro forma* cases, see dissertations of Damsteegt 2003, Chapter. 5; and, Van Heusden 2006, Chapter 9.

601 For the statistics on dissolutions between 1977 and 1986, see Groen 1989, p. 63. For the statistics on permits between 1950 and 1982, see Van den Heuvel 1983, p. 306 and 307.

602 For example, see the year of 2004. In this year 89,494 requests were filed with the CWI, but after withdrawals 'only' 82,420 requests were handled. For the latter, see above under § 16.8.

603 For the years of 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004, see also Scholtens statistiek ontbindingsvergoedingen regarding these years; for 2005, see Loonstra en Kruit 2006.

BBA 1945		7:685 DCC
1991	75,997	13,903 (89,900)
1992	85,669	22,031 (107,700)
1993	113,625	36,918 (150,543)
1994	89 732	41,714 (131,446)
1995	68,348	45,055 (113,403)
1996	60,423	44,426 (104,849)
1997	49,790	38,220 (88,010)
1998	39,618	40,106 (79,724)
1999	46,745	31,277 (78,033)
2000	43,584	34,434 (78,018)
2001	54,376	45,629 (100,005)
2002	70,925	68,331 (139,256)
2003	85,881	78,491 (164,372)
2004	89,494	72,011 (161,505)
2005	74,550	67,608 (142,158)

In brief, the dissolution procedure and the BBA 1945-procedure relate to one another as 1:6 in 1991; as 1:3 in 1993; as 1:1 in 1998; and as 1:1.1 in 2005.[604] The year of 1998 was exceptional, to the extent that for the first time in history the number of requests under Article 7:685 DCC was higher than under the BBA 1945 (40,106 versus 39,618).

Earlier, in 1994, the Minister of Social Affairs, Melkert, suggested to make the BBA 1945-procedure the principal route again. He suggested that Article 1639w would apply only to (i) employment agreements for a definite period; (ii) situations in which the public authority refused permission to dismiss an employee under the BBA 1945; and (iii) situations, in which a prohibition on dismissal applied.[605] The majority within the SER rejected the Minister's proposal.[606] Employers, too, opposed, in that they preferred to have a choice between the dissolution procedure and Article 6 BBA 1945.[607] In 2000, the ADO-Committee, nonetheless, virtually proposed the same. It suggested to apply Article 7:685 DCC only to (i) employment agreements for a definite period with at least one year (left); and (ii) situations in which a prohibition on dismissal applied.[608]

More successful means – but eventually without effect – to make the BBA 1945-procedure the main route again, were introduced by the Flexicurity

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604 See Scholtens 2001a, p. 7 and 8. See also Loonstra en Kruit 2006, p. 20.

605 This to simplify the dismissal system, and to provide legal certainty and legal security under the 'new' system. TK 1994-1995, 22 977, No. 3.

606 SER-Advies 1995/8. See also Loonstra 1996, p. 156; Scholtens 2001a, p. 8.

607 Scholtens 2001a, p. 10. See also Bureau Bartels/SZW 2006, p. 98.

608 ADO-Rapport 2000, p. 148.

Act of 1998. This Act introduced the *expedited* procedure (*verkorte procedure*) under the BBA 1945-procedure.[609] Second, the Flexicurity Act of 1998 held that an employer who had obtained a permit, in terminating the employment agreement, could deduct one month of the notice period, with at least one month left.[610] Third, it held that the prohibition on dismissal during the two years of illness did *not* apply when the employee had become ill *after* the CWI had received the employer's request for a permit.[611] Hereupon, in 1999, the BBA 1945-procedure, so it seemed, gained popularity at the expense of the dissolution procedure, *due* to these measures. However, in 2002, the number of requests was equal again (about 70,000). Hence, the success of the foregoing measures turned out to be relatively short.[612]

18.2 Serious cause

Under Article 7:685 DCC, an employer and an employee independently and at all times can address the Cantonal Court, asking to dissolve the employment agreement for serious cause. Serious cause embraces either (i) urgent cause; or (ii) a change of circumstances based upon which the employment agreement reasonably has to end immediately or on short notice. According to legislative history, the Cantonal Court must reject the request when serious cause is lacking. Hence, an employer cannot trade off just cause protection by a severance payment. Considering the foregoing, the decision of the Cantonal Court of Haarlem of 10 August 2006 is remarkable. In this case, the Supervisory Board, applying its own rules in this respect, after which the Cantonal Court was asked to dissolve the employment agreement, had sent off a managing director of a housing corporation.[613] The Court granted the request. It held that because the employment agreement, in effect, was without meaning after the Board's decision. The Court did not investigate whether there was serious cause. It simply concluded that, due to the rules of the Supervisory Board, the employee was without any protection against dismissal, upon which the Cantonal Court decided to take the absence of protection against dismissal into consideration in the severance payment, instead of rejecting the request.[614]

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609 Art. 2:6 (old) of the Dismissal Decree. Meanwhile, the expedited procedure is abolished as from 1 January 2007 (Stcrt. 2006, 243, p. 11). For the rationale behind its introduction and, in turn, its abolition , see above under § 16.8. See also below under § 29.2.2.

610 This rule was laid down in Art. 7:672.4 DCC.

611 This rule was laid down in Art. 7:670.1 under b DCC.

612 Loonstra en Kruit 2006, p. 20. See also Scholtens statistiek ontbindingsvergoedingen 1999 and 2000.

613 It concerned a decision of the Supervisory Board, in which members of the Housing Committee were involved, to be distinguished from a General Meeting of Shareholders. In case of the latter, Book 2 of the Dutch Civil Code and case law of the Netherlands Supreme Court apply based upon which the decision of the General Meeting of Shareholders, in principle, results in the termination of the employment agreement as well. For the dual character of the relationship managing director and employee, see above under § 16.2.

614 Ktg. Haarlem 10 augustus 2006, LJN: AY6060.

In practice, requests to dissolve the employment agreement are made by employees and employers, however, most frequently by employers.[615] In this thesis, I will concentrate on the latter only. The requests based on urgent cause will be discussed in-depth in paragraph 18.4; the requests based on a change of circumstances will be discussed in-depth in paragraph 18.5.

In brief, the term *at all times* means that parties can ask for dissolution so long as the employment agreement exists. This means that (i) parties can ask for dissolution after having agreed upon the employment agreement, regardless of whether the employee started working; and (ii) the employee can ask for dissolution, regardless of whether the employer notified the employee of termination of employment in furtherance of the CWI's permission to dismiss the employee.[616] The reason for an employee to address the Cantonal Court, although the employer already notified the employee, is that the CWI *cannot* grant a severance payment. The Cantonal Court *can*, when dissolving the employment agreement based on *a change of circumstances*.[617] According to Article 7:685 DCC, this severance payment must be fair and reasonable under the circumstances, hence, need not cover specific damages.[618] This leaves room to apply a standard formula.[619]

In fact, as from 1 January 1997 the so-called Cantonal Formula (*Kantonrechtersformule*) applies to severance payments in the dissolution procedure under Article 7:685 DCC. The Cantonal Formula = NxWxC (*AxBxC*). In brief, *N* refers to the Number of years of service (*Aantal dienstjaren*), but, too, takes into consideration the employee's age. In respect of the latter, N = 1 for each year of service when the employee is younger than 40 years old at the time of the dissolution; N = 1.5 for each year of service when the employee is between ages 40 through 49; and N = 2 for each year of service when the employee is 50 and older. The *W* refers to Wages. More specifically, it refers to gross salary, including vacation bonuses (*Beloning*). The *C* refers to the correction factor (*Correctiefactor*). In determining the size of the severance payment, the starting point is a neutral dissolution. For example, termination of employment based on economic circumstances is considered as neutral, because no one generally is to blame for these circumstances. In these cases, the

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615 Knegt en Wilthagen 1988, p. 221. See also Scholtens statistiek ontbindingsvergoedingen 1998, 2000, 2001 and 2003 (II). For an in-depth discussion of requests of *employees*, asking for a dissolution of the employment, see Burger 2000; Van Slooten 2001a, p. 41-49.

616 Toelichting op Aanbevelingen voor procedures ex Art. 7:685 BW zoals vastgesteld in de plenaire vergadering van de Kring van Kantonrechters d.d. 8 november 1996, laatstelijk gewijzigd d.d. 5 oktober 2001. Tekst & Commentaar Arbeidsrecht (2006): Bijlage 2. Circle of Cantonal Courts (*Kring van Kantonrechters*) was established in 1953. See Loonstra en Zondag 2006, p. 349 and 350.

617 See below under § 18.3.

618 See Annotation Heerma van Voss HR 3 december 2004, NJ 2005, 119 (*Van Ree/Damco*).

619 However, see the discussion in literature – and contrasting decisions of courts – to have a formula, i.e the Cantonal Formula applied to severance payments under Art. 7:681 DCC. See Charbon 2002; Zondag 2004b, p. 11; Annotation Heerma van Voss HR 3 december 2004, NJ 2005, 119 (*Van Ree/Damco*).

correction factor is 1. On the other hand, if the employee is responsible for termination of employment – i.e. the employee is at fault and/or termination of employment is at his risk – the Cantonal Court can set the correction factor at less than one, or even zero. In contrast, if the employer is responsible for termination of employment, the Cantonal Court can set the correction factor at greater than one.[620] In general, a correction factor greater than two is exceptional.[621] Although employers to a certain extent can calculate the severance payment under the Cantonal Formula, an employer may be confronted with an unpleasantly high severance payment, or an employee with an unpleasantly low severance payment. In this respect, there is a possibility to withdraw the request, however, this is possible only when the court allows the *petitioner* to. According to Article 7:685.9 DCC, Cantonal Courts, in principle, *must* point out to the petitioner the possibility to withdraw the request. In this respect, Cantonal Courts, generally, decide that they dissolve the employment agreement by a certain date under a severance payment, *unless* the petitioner has withdrawn the request before the date in question. On the other hand, when the Cantonal Court fails to point out this possibility, the petitioner cannot undertake any action against this 'wrong' decision, nor can he withdraw the request on his own initiative.[622]

Not surprisingly, employees will primarily base their requests on a change of circumstances with the aim to obtain a severance payment. The parties' choice is not determinative, however. In *Franssen/Safe Sun (1986)*, the Netherlands Supreme Court held that the court ultimately decides whether there is an urgent reason for dismissal, or a change of circumstances.[623] Consequently, when an employer asks the Cantonal Court to dissolve the employment agreement based on urgent cause, but the circumstances, *in effect*, constitute a change of circumstances, the Cantonal Court may dissolve the employment agreement based on the latter.[624] In *Franssen/Safe Sun (1986)*, the *employee* asked to dissolve the employment agreement based on a change of circumstances which, in effect, constituted an urgent cause. Subsequently, the Cantonal Court dissolved the employment agreement based on urgent cause. Hence, the employee was not entitled to a severance payment. The unfairness was that the employer was to blame for this urgent reason for dismissal. The Netherlands Supreme Court outbanned this unfairness in *Deuss/Motelmaatschappij Holland (1989)*, which decision was affirmed by the Netherlands Supreme Court in

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620 For an in-depth discussion of cases, see Aanbevelingen 3.1-3.7 Kantonrechtersformule in: Tekst & Commentaar Arbeidsrecht (2006): Bijlage 2.

621 For example, see Scholtens statistiek ontbindingsvergoedingen 1997, 1998, 1999 and 2000. See also Loonstra and Zondag 2006, p. 352.

622 HR 27 maart 1998, NJ 1998, 553, JAR 1998/136 (*FNV/Kuypers*).

623 HR 4 april 1986, NJ 1986, 549 (*Franssen/Safe Sun*).

624 HR 4 april 1986, NJ 1986, 549 (*Franssen/Safe Sun*). HR 22 november 1996, NJ 1997, 203, JAR 1996/252 (*Tele-Aruba/Lampkin*).

2002.[625] It held that when an employer is guilty of an urgent cause based on which the employee is forced to resign, or based on which the employer dissolves the employment agreement, the employer violates his duty to behave as befits a good employer under Article 1638z (7:611 DCC) and, subsequently, the employee can ask for damages under Article 7:677.3 DCC and 7:686 DCC. Under Article 7:677.3 DCC, an employee can ask for a fixed amount when he has substantiated that the employer is guilty of the urgent cause that led to the dissolution. Under Article 7:686 DCC, the employee can ask for additional damages, e.g. the loss of income based on breach of contract.[626] A more efficient alternative for the employee would have been when the employee could have appealed from the decision in the dissolution procedure. However, Article 7:685.11 DCC, in principle, does *not* allow parties to appeal from the decision of the Cantonal Court,[627] although it has been more than once suggested that an appeal be allowed regarding the size of the severance payment.[628] In fact, under case law, appeal is possible *only*

- when the Cantonal Court exceeded the scope of Article 7:685 DCC, e.g. it believed to have dissolved an employment agreement that did not exist;[629]
- when the Cantonal Court erroneously did not apply Article 7:685 DCC, e.g. it believed that the agreement could not be qualified as an employment agreement;[630] or
- when the employer has violated a fundamental principle of fair trial, in practice, restricted to the hearing of both sides (*hoor en wederhoor*).[631]

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625 HR 1 december 1989, NJ 1990, 451 (*Deuss/Motel Maatschappij Holland*) affirmed by the Netherlands Supreme Court in HR 11 oktober 2002, JAR 2002/261 (*Van Maarschalkerwaart/Dalle Vedove*). For an in-depth discussion of the latter, see Vegter 2003, p. 62-77.

626 HR 1 december 1989, NJ 1990, 451 (*Deuss/Motel Maatschappij Holland*).

627 Art. 7:685.11 DCC. For its legislative history, see below under § 18.3. See also HR 24 oktober 1997, NJ 1998, 257, JAR 1997/248 (*Baijings*); HR 2 november 2001, NJ 2001, 667, JAR 2001/255 (*Elverding/Wienholts*). See Van Marwijk Kooy 2002, p. 34. For case law, in which *Baijings (1997)* was affirmed and/or decisions in which the Netherlands Supreme Court further explained *Baijings (1997)*, see below under § 18.5.

628 First, in 1988, the SER suggested to allow partial appeal against the size of the severance payment (SER-Advies 1988/12, p. 39 and 40). The government followed the SER (TK 1989-1990, 21 479, No. 2 under K), however, Bill 21 479 was withdrawn in 1996. A year later, the Minister of Social Affairs sent the Bill on Flexibility and Security to the Lower House, in which it followed the suggestions of the Labour Foundation with one exception. It did not allow appeal against the award of a severance payment in an Article 685-procedure. See STAR-Advies 1996/2, p. 32 and 33. See also below under § 28.2.1. For a discussion between various authors, lawyers, judges and scientists on this issue, see *Waarheen met artikel 1639w BW?*, Verslag van de voorjaarsvergadering van 3 juni 1988, Nederlandse vereniging voor procesrecht, Kluwer, Deventer, 1989.

629 HR 6 maart 1992, NJ 1992, 707 (*Campina*).

630 HR 12 maart 1982, NJ 1983, 181 (*Sneep/Stichting Paedo*).

631 HR 4 maart 1988, NJ 1989, 4 (*Hollandsche Beton Maatschappij/Wielenga*); HR 24 april 1992, NJ 1992, 672, JAR 1992/13 (*Woesthoff/Intershow*); HR 23 juni 1995, NJ 1995, 661, JAR 1995/15 (*V.A./R*).

18.3 Legislative history

1907

Drucker submitted his – second – draft to the Minister of Justice in 1898. This would form the basis of the Act of the Employment Agreement of 1907. Article 50 of this draft provided the possibility for parties to ask the court to dissolve the employment agreement based on *a change of circumstances*, with explicit examples on the part of the employer and the employee.[632] The legislature of 1907 followed the draft, but included a dissolution based on urgent cause as well. The latter was contrary to the legislature's initial intent to create an *extrajudicial* procedure under Article 1639w. Initially, Article 1639w would apply to situations for which no one was to blame only. Consequently, Van den Heuvel speaks of a so-called *weaving error* (*weeffout*) on the part of the legislature, because dismissals based on urgent cause generally involve the question of who is to blame.[633] Also, the legislature of 1907 crossed out the enumeration of examples as suggested by Drucker, considering Article 1639w clear enough in this respect.[634]

Consequently, when Article 1639w was introduced in the Act of the Employment Agreement of 1907, it provided that 'an employer and an employee independently, before and after the employee started working, could ask the court to dissolve the employment agreement based on serious cause, either embracing (i) an urgent cause according to Article 1639o; or (ii) a change of circumstances in one's personal or financial position or in the job, based upon which the employment agreement reasonably has to end immediately or on short notice'.[635]

Urgent cause

The possibility to ask for dissolution of the employment agreement based on urgent cause was suggested by Van Idsinga, a member of the Lower House. During parliamentary discussions, he stressed that employers may have doubts on whether a reason constituted an urgent cause under the new Article 1639o. Hence, he suggested that employers would be offered an alternative through Article 1639w, to avoid liability under Article 1639o when – afterwards – an urgent cause was lacking.[636] Therefore, Van Idsinga suggested that employers,

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632 Drucker 1898, p. 18 and 19.

633 Van den Heuvel 1983, p. 116-118; Van den Heuvel 1989b, p. 2 and 3; Kuip 1993a, p. 118 and 119.

634 Wet op de arbeidsovereenkomst van 13 juli 1907 (Stb. 193). See also Canes 1908, p. 310.

635 Levenbach 1954, p. 81.

636 Examples of an urgent cause based upon which the employer could ask the Cantonal Court to dissolve the employment agreement could be found in the new Art. 1639p, which included acts, characteristics or behavior of the employee based on which one reasonably could not expect of the employer to continue the employment agreement. Examples of an urgent cause based upon which the

who were doubtful whether a reason constituted an urgent cause under Article 1639o, would be offered a possibility to ask for dissolution based on urgent cause under Article 1639w. All the more so, in that the only other alternative was an action based on breach of contract. However, not all urgent reasons for dismissal constituted a breach of contract.

Through Article 1639w, the legislature of 1907, hereupon, introduced the possibility of dissolution of the employment agreement based on urgent cause. Herewith, it explicitly authorized Cantonal Courts to decide on the existence of an urgent cause, covering situations, in which (i) employers were doubtful whether a summary dismissal under the new Article 1639o was successful; and/or (ii) an urgent cause did not constitute a breach of contract under the new Article 1639x.[637] Article 1639w regarding an urgent cause, however, became a dead letter. The 'new' Article 1639w referred to 'an urgent cause on the basis of Article 1639o'. This automatically meant that case law with regard to Article 1639o applied to the Article 1639w-procedure, among which the decision of 14 November 1913 – affirmed in 1914 – of the Netherlands Supreme Court. Under this case law, an employer was not allowed to keep an employee in service *after* the employee was dismissed based on an urgent reason.[638] Under Article 1639w, however, the employee remained in service until the date of the dissolution.[639]

Change of circumstances

A dissolution based on a change of circumstances was possible on limited grounds only, i.e. based on a change of circumstances in one's personal or financial position, or in the job.[640] Consequently, the legislature – and the founding father of the Act, Drucker – thought of rare cases only for which no one of the parties was to blame.[641] For example, they thought of a wealthy person who had hired a secretary and lost all of its fortune, due to unforeseeable circumstances and, consequently, could no longer afford the secretary; or of an employee who had agreed on an employment agreement for a period of three years, but suddenly was given the opportunity to take over the family business through his father's sudden death.[642] Courts applied Article 1639w strictly

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employee could ask the Cantonal Court to dissolve the employment agreement could be found in Art. 1639q. This Article included circumstances based on which one reasonably cannot ask of the employee to continue the employment agreement, among which the refusal to pay salary in time, battery and/or insult towards the employee.

637 Canes 1908, p. 311; Bles IV, 1909, p. 264 and 265; Meijers 1924, p. 206. See also Polak 1939, p. 222; Kuip 1993a, p. 31.

638 HR 14 november 1913, NJ 1913, 1268 (*Verbruggen/Verhoef*); HR 24 december 1914, NJ 1915, 268 (*Mulder/Van der Schoot*). For a discussion of these cases, see Kuip 1993a, p. 53, 57 and 58.

639 Polak 1939, p. 221 and 222.

640 Bles IV, 1909, p. 256 and 262; Levenbach 1954, p. 81; Loonstra 1997a, p. 10 and 11.

641 Polak 1939, p. 222.

642 Drucker 1898, p. 77 and 78; Bles IV, 1909, p. 260; Meijers 1924, p. 206; Levenbach 1954, p. 81 and 82.

according to the legislature's intent.[643] In 1921, its scope was broadened under case law. In this case, the Netherlands Supreme Court allowed the employee to ask for dissolution of the employment agreement when he was given the opportunity to obtain a far better job.[644] The Netherlands Supreme Court did not follow its Advocate General, who held that a job offer did *not* constitute a change (yet), because it was an offer only.[645] Still, employers and employees invoked Article 1639w rarely. Instead, parties preferred to terminate an employment agreement for an indefinite period with respect of the – short – notice period, rather than to ask for dissolution of the employment agreement under a 1639w-procedure.[646] It is noteworthy to mention that at the time the dissolution procedure did not (yet) brought any extras, e.g. the possibility for employees to ask for a severance payment. As regards the latter, the legislature held that courts *by setting the date of the dissolution* could take the damages of parties into consideration.[647]

No appeal

The legislature did not aim to provide courts a means with Article 1639w to settle a dispute between parties as is common in judicial procedures in contentious matters (*judiciële procedure op tegenspraak*). Consequently, the legislature left out the possibility of appeal in the dissolution procedure.[648] Moreover, it left out the second defense (*conclusie van repliek*) and/or rejoinder (*conclusie van dupliek*), as is common in judicial procedures in contentious matters.[649] In time, however, voices were raised against the absence of appeal, because of the fact that requests based on urgent cause – and as from 1953, requests based on breach of trust – in effect, concern contentious matters.[650] Also, they referred to the 1981 decision of the Committee on the European Convention on Human Rights, which held that Article 6.1 ECHR[651] applies to employment termination.[652] In brief, this Article determines that everyone is

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643 Levenbach 1954, p. 81.

644 Meijers 1924, p. 206, referring to HR 20 oktober 1921, NJ 1921, 1201 (*De Vries/Arnhemsche Orchestvereeniging*).

645 Loonstra 1996, p. 149 and 150, referring to HR 20 oktober 1921, NJ 1921, 1201 affirming the decision of Ktg. Enschede 22 oktober 1914, RBA (6) 1917, No. 13 and 14. See also Jansen en Loonstra 1990, p. 369 and 370.

646 Meijers 1924, p. 206 and 207; Levenbach 1954, p. 81 and 82.

647 Bles IV, 1909, p. 266 and 267; Levenbach 1954, p. 84.

648 Bles IV, 1909, p. 85; Groen 1989, p. 172; Kuip 1993a, p. 30. See also Boot 2005b, p. 13-15.

649 See Polak 1939, p. 234 and 235.

650 For example, see Peereboom 1932, p. 35 and 36; Menalda 1957, p. 364 and 365; Slagter 1957, p. 465-469; and, De Rijke 1957, p. 469 and 470. See also below under § 18.3.

651 For this Treaty, see above under § 14.2.2.1.

652 ECRM 8 oktober 1980, 8974/80, NJ 1981/149. The complaint on which the Committee had to decide was whether the BBA 1945 was in violation of Article 6 ECHR (EVRM), in that an administrative body – i.e. the government – decided on termination of employment without the possibility of appeal. The Committee held that the employee, eventually, could apply for an independent court under Art. 1639s (Art. 7:681 DCC).

entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.[653] They argue that Article 6.1 ECHR applies to Article 7:685 DCC and the dissolution procedure does not constitute a fair hearing, because appeal is lacking, therefore, it is in violation of this Article.[654] Opponents argue that, under prevailing case law, appeal *is* possible. They refer to case law that applies when the Cantonal Court has violated fundamental principles of fair trial.[655] This case law, however, does not allow for appeal in *all* cases, e.g. when the Cantonal Court fails to motivate its decision.[656]

1953

In 1946, Queen Wilhelmina announced a Bill on a revision of rules on employment termination with the aim to give workers with a long state of service more social security. This resulted in the Act of 17 December 1953.[657] Under the Act, the notice periods were extended, dependent on the years of service. Subsequently, by means of trade-off, the legislature gave employers a means to have the employment agreement dissolved earlier under Article 1639w.[658] To achieve the latter, the legislature crossed out the limitative grounds with regard to a change of circumstances, and determined that dissolution of the employment agreement was possible based on 'a change of circumstances of such a kind that the employment agreement has to end on short notice'.[659]

On the other hand, the legislature explicitly stated that with this change it did not intend to give courts discretion to dissolve the employment agreement based on *any* kind of change of circumstances. The legislature, in other words, still wished to cover rare situations as described above with one addition only: it, too, covered situations based on breach of trust for which no one was to blame, nonetheless, frustrating the execution of the employment agreement, hence, making it necessary to dissolve the employment agreement. Whereas parties prior to 1953 could already ask for a dissolution based on breach of trust, this was possible only when one of the parties was to blame for the breach of trust, i.e. the reason constituted an *urgent cause*.[660]

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653 For the full text, see Viering 1994, p. 3.

654 Van den Heuvel 1983, p. 115-120; Petri 1981. See also Loonstra 1985, p. 358. The latter emphasizes that the question of who is to blame particularly occurs in requests based on breach of trust; in other cases it still concerns so-called neutral cases in which no one is to blame. Moreover, Loonstra's research does not include requests based on urgent cause, in which the question of who is to blame has a central role as well. See Van den Heuvel 1983, p. 116-118. Already, Loonstra had pointed at *pro forma* cases, which, too, cannot be considered judicial. Loonstra 1997a, p. 50 and 51.

655 Groen 1989, p. 183.

656 Kuijer en Sagel 2001. For the possibilities of appeal, see above under § 18.2.

657 Stb. 1953, 619. See also above under § 15.3.2.

658 Levenbach 1954, p. 82; Loonstra 1997a, p. 11.

659 Levenbach 1954, p. 82-84.

660 Levenbach 1954, p. 83.

Also, by means of trade-off with respect to the extension of the notice periods, the legislature 'liberalized' Article 1639w regarding an urgent cause. The *new* phrasing of Article 1639w became that a dissolution of the employment agreement based on urgent cause was possible 'if the ground would have had constituted an urgent cause under Article 1639o based on which the employment agreement could have been terminated immediately'.[661]

Hence, the legislature made it possible for employers to ask for dissolution based on urgent cause on the one hand, and to keep the employee in service until the date of the dissolution on the other. The legislature of 1953 did not abandon the rule that case law on summary dismissals (still) needed to be respected. Consequently, the decision of 14 November 1913, in effect, still applies.[662] In brief, under this decision, an employer must file a request under Article 7:685 DCC *shortly* after he has knowledge of the urgent reason for dismissal.[663] I agree with Kuip that the only case law on summary dismissals that does *not* apply to the dissolution procedure, is case law under which an employer must inform the employee of the urgent reason for dismissal *immediately* (*onverwijld*) after he knew of this cause.[664] This requirement was to guarantee the employee a fair trial, i.e. to enable the employee to immediately investigate whether the reason was true and to have a court decided on this on short notice.[665] However, in the dissolution procedure a court per definition will decide on the dismissal, which makes this requirement superfluous in dissolution procedures.

Still, despite the liberalization of Article 1639w, the dissolution procedure was invoked rarely.[666] After the legislature of 1953 had further 'liberalized' the Article, in that it had authorized courts to grant a severance payment in case of a change of circumstances, the number of requests, nonetheless, remained low.[667] The legislature had introduced a severance payment, because practice showed that courts could not take into consideration the damages in *all* cases, by shifting the date of the dissolution. In fact, Article 1639w did not allow to have the date of the dissolution laid too far from the date of the Cantonal Court's decision, because Article 1639w required termination of employment *immediately* or *on short notice*.[668] With the introduction of severance payments, the legislature also realized that the difficulty for the petitioner would be to calculate the severance

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661 Levenbach 1954, p. 76-81.

662 HR 14 november 1913, NJ 1913, 1268 (*Verbruggen/Verhoef*) ; HR 24 december 1914, NJ 1915, 268 (*Mulder/Van der Schoot*). For an in-depth dicussion of these cases, see Kuip 1993a, p. 53, 57 and 58.

663 Van den Heuvel 1983, p. 117; Phaff 1986, p. 106; Kuip 1993a, p. 82 and 83.

664 I add that to the extent the employee wishes to be informed on the urgent reason for dismissal on short notice, the employee can file a claim on the basis of Art. 7:669 DCC. For an in-depth discussion of Art. 7:669 DCC, see above under § 15.3.3.

665 Kuip 1993a, p. 82-84.

666 Levenbach 1954, p. 84 referring to J. Mannoury, Sociale Zekerheidsgids Mei 1954, p. 321.

667 Levenbach 1954, p. 84 and 85.

668 Levenbach 1954, p. 84.

payment in advance. Hence, the legislature decided that courts must give the petitioner the possibility to withdraw the request within a certain time frame.[669]

Initially, the legislature thought of situations for which no one was to blame. Therefore, it allowed a severance payment in case of a *change of circumstances* only. In this respect, the one example mentioned in the Memorandum in Reply (*Memorie van Antwoord*) was that of the librarian, who had been left without work and without a future after the library had burnt down. In such a case, the librarian should be able to ask for dissolution of the employment agreement, and a severance payment.[670] In case of an *urgent cause*, usually one is to blame, hence, a severance payment should not be awarded. It, however, made one exception. When a party has given an urgent cause to the other party to ask for dissolution of the employment agreement, this party should be able to ask the other for a severance payment. Subsequently, the legislature of 1953 amended Article 1639o (Article 7:677.3 DCC), explicitly determining that a party in such a case can ask for a severance payment under this Article.[671]

1999

Article 1639w – after it had been converted into Article 7:685 DCC[672] – underwent a (last) relevant change in light of just cause protection as from 1 January 1999 through the Flexicurity Act.[673] As from then, Article 7:685.1 DCC provides that the Cantonal Court can grant a request only *after* it has ascertained that the reason for dismissal is not related to a prohibition on dismissal.[674] This requirement still exists.[675] Second, the Flexicurity Act of 1998 determined that a request was inadmissible, if the employer had not handed over a so-called reintegration plan (*reintegratieplan*) for an employee who had reported himself ill *before* the Cantonal Court had received the request. A reintegration plan was already required under Article 71a (old) of the Disability Insurance Act (*Wet op de arbeidsongeschiktheidsverzekering* or *WAO*).[676] As from 1 January 1999, the legislature applied this requirement to the dissolution procedure. In this reintegration plan, the employer needed to substantiate (i) to what extent the employee was still able to work; and (ii) the reason why the employer could not provide the employee with other – adjusted – work. With this new requirement,

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669 Levenbach 1954, p. 85.

670 Levenbach 1954, p. 84, referring to 'Memorie van Antwoord, p. 18'.

671 Levenbach 1954, p. 84.

672 Enforcement on 1 April 1997. See Stb. 1996, 406 and 562.

673 Stb. 1998, 300.

674 For its legislative history, see below under § 18.5.2.2 under (ii).

675 For whether and to what extent Cantonal Courts apply the prohibition on dismissal as regards illness, see below under § 18.5.2.2.

676 The WAO has been amended and replaced by the WIA (*Wet werk en inkomen naar arbeidsvermogen*) as from 29 December 2005 and applies to employees who are ill for at least 104 weeks as from 1 January 2004. Stb. 2005, 619.

the legislature aimed to provide Cantonal Courts a means to decide on the possibility of reintegration,[677] and, consequently, to protect disabled employees against rash dismissals.[678] However, in practice, the new requirement frustrated the operation of Article 7:685 DCC. A reintegration plan first needed to be reviewed by the National Institute for Social Security (*Landelijk Instituut voor Sociale Verzekeringen* or *LISV*),[679] which took a considerable amount of time. This conflicted with the nature of the dissolution procedure, which required an immediate dissolution, or dissolution on short notice. Second, a request was inadmissible *per se* when the employee was ill, *regardless of* whether the change of circumstances was related to illness. For example, when the employer asked for dissolution of the employment agreement based on unsatisfactory performance, apart from the employee's illness, the request, nonetheless, was inadmissible, simply due to the fact that the employee was ill.

Courts became divided on this matter.[680] In its decision of 29 September 2000, the Netherlands Supreme Court gave clarity. It held that when an employee was ill, this did not automatically imply that the request was inadmissible when a reintegration plan was lacking. In this case, the employee had made it impossible for the employer to determine whether he was ill. Consequently, the employer was not able to submit a reintegration plan.[681] Subsequently, in 2001, the Netherlands Supreme Court held that also in situations, in which reintegration, in effect, is impossible – e.g. in case of breach of trust – a request is admissible, although a reintegration plan is lacking.[682] The foregoing decisions of the Netherlands Supreme Court – and criticism in literature[683] – eventually urged the legislature to abandon the requirement of a reintegration plan, as from 1 April 2002. Still, under *case law*, employers must substantiate the impossibility to replace the employee in another – adjusted – position.[684]

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677 Verburg 1998.

678 See Scholtens 2001a, p. 8 and 9. See further Verburg 1998; Boot 1999a, p. 149; Van Arkel en Loonstra 2004, p. 12.29.

679 The Lisv has been replaced by the Social Security Agency (*Uitvoeringsinstituut Werknemers Verzekeringen or UWV*) as from 1 January 2002 under the Act on the Implementation Structure for Work and Income (*Wet Structuur uitvoeringsorganisatie werk en inkomen* or *SUWI*).

680 For example, see Ktg. Gorinchem, 24 november 1999, JAR 2000/2; Ktg. Groningen 1 september 2000, JAR 2000/213.

681 HR 29 september 2000, NJ 2001, 302, JAR 2000/224 (*Kuijper/ING*). For a discussion of this decision, see Pieters 2000, p. 201-206; Verhulp 2000; Verhulp 2001.

682 HR 22 juni 2001, NJ 2001, 475, JAR 2001/130 (*Van der Kooy/Autoservice Van der Velden*). For this decision, see Verhulp 2001; Buijs 2001.

683 See in particular Marcelissen, Knegt, Van de Pas en Beltzer 2000.

684 *Wet verbetering poortwachter*, Stb. 2001,685 (in furtherance of TK 27 678, No. 3, p. 29). See Boot 2002a; Verhulp 2000, footnote 32, referring to 'Brief van 22 september 2000 aan de Voorzitter van de Tweede Kamer der Staten-Generaal, kenmerk AV/RV/2000/43758', in which the Minister of Social Affairs already announced to reconsider the requirement of a reintegration plan in a dissolution procedure.

18.4 Urgent cause

It never has been an issue that an urgent cause constitutes a just cause for dismissal.[685] This Section, nonetheless, examines case law in this respect under Article 7:685 DCC. The reason is to examine whether courts qualify a reason as urgent relatively easily. The reason to examine the foregoing in the context of Article 7:685 DCC, and not in the context of Article 7:677 DCC (summary dismissals), is that Article 7:685 DCC, in particular, is controversial in the debates on just cause protection. In brief, under Article 7:678 DCC, an urgent cause, i.e. urgent reason for dismissal on the part of the employer may consist of acts, characteristics or behavior of the employee, e.g. theft, battery and/or insult based upon which a reasonable person cannot expect the employer to continue the employment agreement.[686] Also, behavior for which the employee is not to blame, e.g. alcoholism, can constitute an urgent cause.[687] The examples given by the legislature may alter in time. For example, in 1920 courts held that a strike constituted a severe breach of contract. Consequently, an employer was allowed to dismiss an employee who had joined a strike instantly,[688] because a strike was considered as illegitimate.[689] Meanwhile, in 1986, the Netherlands Supreme Court has held that a strike is legitimate under Article 6.4 of the European Social Charter of 1961.[690] Under Article 31 ESH a strike can become illegitimate, albeit in exceptional situations when it is in serious violation of interests of third parties, e.g. unions have abused their right to collective bargaining.[691]

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685 Van den Heuvel 1983, p. 107-109. For summary dismissals in historical perspective, see Kuip 1993a, p. 15-31.

686 Examples of an urgent cause based upon which the *employee* can ask the Cantonal Court to dissolve the employment agreement can be found in Art. 7:679 DCC. This Article includes circumstances based on which one reasonably cannot expect the employee to continue the employment agreement, among which the refusal to pay salary in time, battery and/or insult towards the employee. For an in-depth discussion of requests based on urgent cause, see below under § 18.4. For a recent case on whether theft constitutes an summary dismissal, see HR 24 maart 2006, JAR 2006/99 (*Staal/Middelkoop*).

687 HR 3 maart 1989, NJ 1989, 549 (*Choaibi/NS*) affirmed by the Netherlands Supreme Court in HR 29 september 2000, NJ 2001, 560, JAR 2000/223 (*D./Nutricia*). See also HR 21 januari 2000, NJ 2000, 190, JAR 2000/45 (*Hema I*).

688 Jansen en Loonstra 1990, p. 368, footnote 75, referring to Ktg. Enschede 4 maart 1920, RBA (9) 1921, No. 13 and 14.

689 With regard to a discussion on whether a strike was (il)legitimate, see Jansen en Loonstra 1990, p. 368, 370 and 37, referring to E.M. Meijers, *Staking als dringende reden*, in: RBA 4 (1913), p. 73 and 74; and, M.G. Levenbach, *Onrechtmatige daad en werkstaking*, Haarlem 1935.

690 HR 30 mei 1986, NJ 1986, 688 (*NS*).

691 For a discussion of the right to strike and relevant case law in this respect, see Bakels 2005, p. 248-263; Loonstra en Zondag 2006, p. 273-281.

18.4.1 Studies on case law

The following studies on case law show that requests based on urgent cause form a *minority* of the cases under Article 7:685 DCC on the one hand, and are rejected in the *majority* of cases on the other. More recent cases, too, show that Cantonal Courts are reluctant to grant requests based on urgent cause.[692] First, in 1939, Polak presented results in this respect. He examined decisions regarding Article 1639w, delivered between 1909 and 1939. He concluded that in case of an urgent cause, employers gave preference to Article 1639o.[693] Loonstra and Jansen, too, concluded the same regarding decisions, delivered between 1909 and 1942. The central question generally was whether an employee could be dismissed before he started working, or if the employment agreement had come to an end because of an employee's statement.[694] Overall, the few cases based on urgent cause under Article 1639w were due to its strict formulation.[695] In fact, the liberalization of Article 1639w in 1953 resulted in a slight increase of the requests based on urgent cause only, and remained relatively low ever since.

As demonstrated by Groen in his 1988 dissertation, between 1 January 1953 and 1 January 1987, only 13% of the requests under Article 1639w were based on urgent cause. Groen had examined published 227 decisions, delivered between 1953 and 1978 (50), and between 1979 and 1986 (177).[696] Groen concluded that the majority of cases based on urgent cause were rejected, hence, only a quarter of the requests based on urgent cause were granted (31%).[697] A brief study of Scholtens indicates that the(se) numbers did not actually change between 1987 and June 1993.[698] A brief overview of Luttmer-Kat of requests based on urgent cause under Article 7:685 DCC shows the same percentage. From this overview derives that Cantonal Courts between 1987 and 2003 *granted* requests in 30 of 105 cases (about 30 %).[699]

Luttmer-Kat's overview further shows that 37 of 75 requests (about 50%), which were rejected based on urgent cause, eventually were dissolved based on a change of circumstances. Groen, too, concluded that a request based on urgent

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692 For example, see Ktg. Eindhoven 24 november 2003, JAR 2004/6; Ktg. Amsterdam 28 november 2003, JAR 2004/74; Ktg. Vzngr. Lelystad 25 februari 2004 en 31 maart 2004, JAR 2004/106; Ktg. Amsterdam 1 juni 2004, JAR 2004/208; Ktg. Eindhoven 3 juni 2005, JAR 2005/223; Ktg. Amsterdam 17 juni 2005, JAR 2005/177.

693 Polak 1939, p. 221, 222 and 232.

694 Jansen en Loonstra 1990, p. 367 and 368.

695 See also above under § 18.3.

696 See Scholtens 1993a, p. 439.

697 Groen 1989, p. 65.

698 Scholtens 1993a,a p. 439; Scholtens statistiek ontbindingsvergoedingen 1993.

699 See A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:685 BW (DCC) § 23 (2006).

cause eventually led to dissolutions based on a change of circumstances.[700] This induced him to plea for abolishing dissolutions of employment agreements based on urgent cause under Article 1639w (7:685 DCC). All the more so, because the procedures under Article 1639o and Article 1639w led to different results in similar cases, which in his opinion is totally unjustified. Groen referred to (i) the absence of severance payments under Article 1639w contrary to Article 1639o; and (ii) the absence of appeal under Article 1639w contrary to Article 1639o.[701] In 1983, Van den Heuvel, too, held that the urgent cause should be eliminated from Article 1639w, in that it primarily intends to be an extrajudicial procedure, hence, termination of employment based on urgent cause does not belong in this procedure.[702]

In contrast, Loonstra advocates eliminating the possibility of a summary dismissal under *Article 7:677 DCC* (1639o old), and *instead* to have all cases decided under Article 7:685 DCC. He argues that in summary dismissals under Article 7:677 DCC, the employer is the sole judge to decide whether urgent cause exists, whereby the employee is left without salary payment instantly. Because of these aspects, the intervention of a court is not only desirable, but also needed.[703] Earlier, Van Spaendonck, in 1979, advocated eliminating the possibility of a summary dismissal under Article 7:677 DCC (1639o old). He proposed that, instead, employers would be allowed by law to suspend an employee based on urgent cause, without an employee's right on continuation of salary payment. Subsequently, the employer could have the urgent cause decided on by the Cantonal Court under Article 1639w (7:685 DCC), on the condition that the employer would file this request within fourteen days after the suspension, and subsequently, would ask for dissolution based on urgent cause.[704]

Personally, I agree with Loonstra, in that it seems justified to *first* have a court examine the case.[705] In this respect, one must bear in mind that between 1907 and 1953, Article 1639o (Article 7:677 DCC), in effect, was the only basis to terminate employment instantly, without legal recourse. As mentioned above, due to its strict formulation parties could not invoke Article 1639w. However, since 1953 the legislature liberalized this Article, making it possible to file a request based on urgent cause under Article 1639w.

This alternative is more efficient for an employer (a decision on short notice, and no appeal), and less harmful for an employee (payment of salary

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700 Groen 1989, p. 66. For a discussion on the change of circumstances, see below under § 18.5. For recent case law, see Ktg. Eindhoven 29 november 2004, JAR 2005/2; Ktg. Lelystad 17 november 2004, JAR 2005/19.

701 Groen 1989, p. 66 and 69.

702 Van den Heuvel 1983, p. 115-118.

703 Loonstra 2005a, p. 295 and 296.

704 Van Spaendonck 1979. For reactions, see Rood 1980, p. 293-295; Van der Sloot en Jacobs 1980; De Jonge 1980, p. 300 and 301; Van Seggelen 1980a; Van Seggelen 1980b.

705 See also Verburg 1984, p. 114.

until the dissolution, and a possible rejection of the request or a dissolution with a severance payment). In fact, it has become the best alternative for employers after *Schrijver/Essen (1999)*[706] and *Vixia/Gerrits (2004)*,[707] which decisions will be discussed in-depth in the paragraph below. In brief, these cases make it extremely difficult for employers to dismiss an employee based on urgent cause, hence, make it extremely risky for employers to dismiss an employee on the basis of Article 7:677 DCC. In my opinion, Van Spaendonck's proposal is outdated, in that an employer, under present case law, must – continue to – pay salary during suspension.[708] Therefore, my proposal would be to abolish the possibility of a summary dismissal under Article 7:677 DCC. Subsequently, under case law, the employer can suspend the employee with continuation of payment of salary, after having notified the employee on the urgent reason for dismissal. Based on case law,[709] the employer shortly after can – or better said, *must* – file a request on the basis of Article 7:685 DCC, in which he asks the Cantonal Court to dissolve the employment agreement. In effect, this proposal is in accordance with the legislature's initial intent.[710]

18.4.2 Criteria in determining an urgent cause

The previous studies do not distinguish between unconditional and conditional requests. A significant number of requests based on urgent cause constitute *conditional* requests, however.[711] In practice, these requests seem to be granted easier than unconditional requests.[712] This raises the question whether it is justified for courts to apply *different* criteria to conditional and unconditional requests. I will first discuss case law to examine *which* criteria Cantonal Courts apply in determining an urgent reason for dismissal in conditional and unconditional requests.

Unconditional requests

In unconditional requests, employers ask Cantonal Courts to dissolve the employment agreement based on urgent cause when they *doubt* whether the

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706 HR 12 februari 1999, NJ 1999, 643, JAR 1999/102 (*Schrijver/Essen*).

707 HR 8 oktober 2004, JAR 2004/259 (*Vixia/Gerrits*).

708 For the right on salary, see HR 1 juli 1993, NJ 1993, 666, JAR 1993/177 (*Chicopee/Van Gerwen)* and HR 21 maart 2003, JAR 2003/91 (*Van der Gulik/Vissers & Partners*). For an in-depth discussion of these decisions, see Sagel 2003a and Sagel 2003b.

709 See above under § 18.3.

710 See Advocate General in HR 21 maart 2003, JAR 2003/91 (*Van der Gulik/Vissers & Partners)* under '*D. Pogingen om de schorsing bij de wet te regelen'*, rov. 3.15-3.19, referring to, amongst others, 'Levenbach's ontwerp (1972), Art. 7.10.1.7 and 7.10.5.13'. For the latter, see Van der Heijden 1991: enclosure.

711 At least 17 of the 30 cases involved conditional dissolutions (*voorwaardelijke ontbindingen*). Groen does not state which requests based on urgent cause concerned conditional request. However, he states that this often is the case. See Groen 1989, p. 65.

712 Knegt en Wilthagen 1988, p. 262; Roeloff 1988, p. 205; Verhulp 2003d, p. 39.

dismissal justifies a summary dismissal under Article 7:677 DCC (1639o old). This was exactly the situation the legislature had in mind when it introduced the possibility to dissolve an employment agreement based on urgent cause under Article 1639w (7:685 DCC).[713] In determining an urgent cause for dismissal in unconditional requests, case law shows that Cantonal Courts *explicitly*[714]or *implicitly*[715] refer to case law on summary dismissals under Article 7:677 DCC (Article 1639o old). These courts, in brief, take into consideration what the court with jurisdiction as to the merits of the case (*bodemrechter*) would have decided. This is in accordance with legislative history, based on which Cantonal Courts must respect the case law on summary dismissals under Article 1639o (7:677 DCC).

Criteria in determining an urgent cause for dismissal in unconditional requests

Kuip – elaborating on Levenbach – stated that under case law, *objectively*, the reason, in itself, must be considered serious enough to justify a summary dismissal and, *subjectively*, that the employer, consequently, has no other alternative than to *instantly* dismiss the employee after he has learnt the reason. As regards the latter, if the employer had *not* dismissed the employee instantly, the idea was that an urgent reason for dismissal was lacking.[716] Most recently, the Netherlands Supreme Court furthered the *objective* aspect in *Schrijver/Essen (1999)*,[717] and *Vixia/Gerrits (2004)*.[718] In *Schrijver/Essen (1999)*, it held that the reason, in itself, was not sufficient. Instead, courts must balance the interests of the employer and the employee in determining whether a reason constitutes urgent cause. A summary dismissal, thus, depends on all circumstances of the case. Hence, the reason, in itself, for example, theft, is no longer sufficient to justify a summary dismissal.[719] Elaborating on this case, Loonstra was of the opinion that courts also had to take into consideration *non*-job-related circumstances in determining urgent cause.[720] His view was affirmed by the

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713 See above under § 18.3.

714 For example, see Ktg. Vzngr. Lelystad 25 februari 2004 en 31 maart 2004, JAR 2004/106; Ktg. Arnhem 16 februari 1995, Prg. 1995, 4259.

715 For example, see – in accordance with case law on summary dismissals after HR 12 februari 1999, NJ 1999, 643, JAR 1999/102 (*Schrijver/Essen)* – Ktg. Sittard 21 december 2001, JAR 2002/28; Ktg. Haarlem 15 februari 2002, JAR 2002/55; Ktg. Alkmaar 1 juli 2002, JAR 2002/157. For *Schrijver/Essen (1999)*, see also above under § 17.3.4.

716 Kuip 1993a, p. 53 and 54.

717 HR 12 februari 1999, NJ 1999, 643, JAR 1999/102 (*Schrijver/Essen*).

718 HR 8 oktober 2004, JAR 2004/259 (*Vixia/Gerrits*). Recently, the Netherlands Supreme Court had a chance to affirm this decision in HR 3 november 2006, JAR 2006/305 (*De Paulo/Private Banking Curaçao*), but because the complainant, in effect, asked a decision on *facts*, it rejected the case based on Article 81 of the Judiciary Act (*Wet op de Rechterlijke Organisatie*).

719 For an in-depth discussion of this case, see above under § 17.3.4.

720 Loonstra referred to HR 12 februari 1999, NJ 1999, 643, JAR 1999/102 (*Schrijver/Essen*); HR 21 januari 2000, NJ 2000, 190, JAR 2000/45 (*Hema I*); HR 27 april 2001, NJ 2001, 401, JAR 2001/95 (*Wennekes Lederwaren*) en HR 20 juni 2003, NJ 2003, 523, JAR 2003/179 (*Wickel/Klene*). See Loonstra 2004, p. 34 and 35.

Netherlands Supreme Court in *Vixia/Gerrits (2004)*. The Netherlands Supreme Court held that courts in determining an urgent cause for dismissal must take all circumstances of the case into consideration, including personal non-job-related circumstances.[721] Sagel and Verhulp hereupon held that when an employer explicitly had asked an employee about his personal circumstances, courts should not be allowed to consider other than these circumstances in determining an urgent cause for dismissal.[722] However, suppose, an employee – due to the pressure of the situation – is psychologically unable to express his or her thoughts. It then seems unfair to 'punish' the employee by neglecting the personal circumstances, which the employee failed to mention. Furthermore, the Netherlands Supreme Court furthered the *subjective* aspect in its recent decision of 16 June 2006. In brief, it held that when an employer points at different facts to justify a summary dismissal, he must prove all (these) facts.[723] This is different only when the employer states that (i) the facts, *separately*, urged him to dismiss the employee instantly;[724] (ii) the employee could have known that the facts were merely examples;[725] or (iii) the employee could have known that it concerned minor facts.[726]

Overall, *Schrijver/Essen (1999)*, *Vixia/Gerrits (2004)*, and the decision of 16 June 2006, make it extremely difficult for employers to dismiss an employee based on urgent cause under Article 7:677 DCC.[727] I subscribe to these decisions, however. *First*, the reason *why* an employee acts in a certain way can only be assessed on the basis of *all circumstances* of the case. One may argue, that these decisions imply that an employee cannot be dismissed for theft *because* he has worked with the employer for 35 years. However, the Netherlands Supreme Court is clear, in that *all* circumstances must be taken into consideration. Also, these decisions do not imply that the employer must prove all (ir)relevant facts, rather must state which facts induced him to dismiss the employee instantly, and must prove *these* facts. *Second*, from legislative history it can be derived that a dismissal must be considered as an ultimum remedium.[728] In this respect, the decision of the Netherlands Supreme Court of 1983 is understandable, in which it approved a summary dismissal to be effected

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721 HR 8 oktober 2004, JAR 2004/259 (*Vixia/Gerrits)* rov. 3.5.2. For a discussion, see Sagel 2004; Beltzer 2005b; Vegter 2005b De Laat 2005. See also the Conclusion of the Advocate General under 3.17-3.20 in HR 24 december 2004, JAR 2005/50 (*Ouled L'Kadi/Albert Heijn*).

722 Sagel en Verhulp 2005, p. 96 and 97.

723 HR 16 juni 2006, NJ 2006, 340, JAR 2006/171 (*X/Willemsen*)

724 HR 7 oktober 1988, NJ 1989, 258 (*Stoof/Gemeente Koudekerk aan den Rijn*).

725 HR 10 maart 1989, NJ 1990, 185 (*Otten/Stichting RBS*).

726 HR 12 november 1999, LJN: AG2328.

727 For a discussion of decisions of the Netherlands Supreme Court until 1993, see Kuip 1993a. For the recent decision of 16 June 2006, NJ 2006, 340, JAR 2006/171 (*X/Willemsen*), see Tan, *Financieel Dagblad* of 13 July 2006; Vermeulen 2006; Ruizeveld 2006.

728 Loonstra en Zondag 2004, p. 311; Sagel 2004, p. 434 and 435; Buijs 2005b, p. 26; Boot 2005a, p. 167.

after the employee was given a week to terminate the employment agreement on his own initiative.[729]

Conditional requests

When an employer dismisses an employee under Article 7:677 DCC, one may assume that the employer has *no* doubts whatsoever that the reason constitutes an urgent cause. Nevertheless, employees will deny an urgent reason for dismissal and ask for continuation of salary payment in summary proceedings (*kort geding*), followed by a procedure with the court with jurisdiction as to the merits of the case (*bodemrechter)*. Consequently, almost as a rule, an employer files a *conditional* request under Article 7:685 DCC after having dismissed the employee.[730] In brief, the employer asks the Cantonal Court to *conditionally* dissolve the employment agreement *in case* the employment agreement still exists, for example, the court in the proceedings on the merits decides that an urgent cause for dismissal is lacking. The aim of the request is – because the proceedings on the merits can take years – to achieve that the employment agreement at least will have been dissolved on a date relatively close to the date of the summary dismissal. This prevents the employer from having to pay salary with retrospective force after years of litigation.[731]

The Netherlands Supreme Court approved this practice in 1983. It held that under Article 7:685 DCC (1639w old), Cantonal Courts are allowed to give a solution *on short notice* on the existence of an employment agreement. In this respect, it held that an employer after a summary dismissal has an interest in obtaining this security on short notice.[732] Literally, the Netherlands Supreme Court is correct. However, Kuip in my opinion has a strong point, in that a Cantonal Court should not be allowed to decide on a conditional request that is based on the *same* urgent reason for dismissal, and facts, as brought before the court that must still decide on the merits of the case. In fact, according to legislative history, Article 1639w aimed to offer an *alternative* for employers who were uncertain about the existence of an urgent cause. Therefore, it is in violation of legislative history to offer this possibility to employers who obviously are certain in this respect, and, nonetheless, to allow them to follow this procedure for damage control only.[733]

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729 HR 4 november 1983, NJ 1984, 187 (*Keller/Van Kimmenade*). For a discussion of this case, see Kuip 1993a, p. 60, 70 and 71.

730 Knegt en Wilthagen 1988, p. 262; Groen 1989, p. 101 and 102.

731 Groen 1989, p. 101-107; Kuip 1993a, p. 143-150; Van Slooten 2000; Sagel 2002; Fruytier 2004.

732 HR 21 oktober 1983, NJ 1984, 296 (*Nijman/X*) affirmed by the Netherlands Supreme Court in HR 27 maart 1987, NJ 1987, 882 (*Seceurop/Koning*). For an in-depth discussion of these decisions see Kuip 1993a, p. 148 and 149. See also Roeloff 1988, p. 201; Sagel 2002, p. 25; Verhulp 2003d, p. 38; Bouwens 2004, p. 179 and 180; Fruytier 2004, p. 9 and 10.

733 Kuip 1993a, p. 148-153.

The latter, in particular, strikes most as unfair. In fact, in 1995 the Cantonal Court of Harderwijk rejected a conditional request based on the fact that the urgent reason for dismissal, and facts, were the same as submitted to the court that had jurisdiction on the merits of the case. In this case, the Cantonal Court considered it as unfair that the employment agreement would be conditionally dissolved, when the court in a later stadium would decide that the reason did *not* constitute an urgent cause under Article 7:677 DCC.[734] The decision of the Cantonal Court of Harderwijk is an exception to the rule, however. In general, Cantonal Courts act in accordance with the decision of the Netherlands Supreme Court.[735]

Nevertheless, the decision of the Cantonal Court of Harderwijk is understandable. When the court with jurisdiction as to the merits of the case determines that an urgent reason for dismissal is *lacking*, the Cantonal Court by granting the *conditional* request based on urgent cause, in effect, endorses that the employer dismisses an employee *without* – an urgent – cause. Moreover, Cantonal Courts *reward* employers, in that they only have to pay salary as from the date of the dismissal to the date of the conditional solution.[736] Understandably, Cantonal Courts search for practical solutions to meet this hybrid situation. For example, this takes place when a *same* Cantonal Court decides on the conditional request *and* the injunction in which the employee asks for continuation of salary payment, after a summary dismissal. In these cases, Cantonal Courts may try to persuade the employer to withdraw the summary dismissal, stating that the reason is not as urgent as the employer assumes, after which the Cantonal Court eventually dissolves the employment agreement through an *unconditional* request based on a change of circumstances.[737] However, an employer may want to persist with the summary dismissal, which leaves the Cantonal Court no other option than to decide on the conditional request based on urgent cause.

Criteria in determining an urgent cause for dismissal in conditional requests

In conditional requests, employers ask Cantonal Courts to dissolve the employment agreement *in case* the employment agreement still exists. Cantonal Courts do not have to examine *whether* the employment agreement still exists.[738] This leaves intact that Cantonal Court must still examine whether the employment agreement can be dissolved on the alleged urgent cause. Cantonal Courts must apply the same stringent criteria they apply to unconditional requests, in determining an urgent reason for dismissal to conditional requests. This can be derived from legislative history, and the foregoing decision of the

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734 Ktg. Harderwijk 11 oktober 1995, Prg. 1996, 4492. See also A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:685 BW (DCC) § 12.

735 See also Groen 1989, p. 102.

736 Kuip 1993a, p. 144, referring to Offermans en Poelmen 1975, p. 3-5. See also Sagel 2002, p. 24.

737 See Buijs 2005a, p. 37.

738 A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:685 BW (DCC) § 12.

Netherlands Supreme Court in 1983, in which it 'only' allowed employers to file a conditional request after a summary dismissal to obtain security on the existence of the employment agreement. It did *not* allow for Cantonal Courts to apply less stringent criteria than in unconditional requests in determining an urgent reason for dismissal.[739]

Consequently, Loonstra argues that Cantonal Courts should grant a conditional request *only* when the urgent reason for dismissal is evident.[740] What is evident, though? From case law it can be derived that Cantonal Courts have considered a reason as urgent in situations, in which the employee had used drugs while working in a drug rehabilitation centre,[741] the employee had misled the employer by showing a false degree certificate,[742] or the employee had been guilty of battery[743] or theft.[744] Although these reasons at first sight seem evident to justify a summary dismissal, *Schrijver/Essen (1999)* and *Vixia/Gerrits (2004)*, meanwhile, may point out otherwise. Therefore, Loontra is correct to the extent 'evident' means that there is an urgent cause under case law on summary dismissals.[745] In practice, Cantonal Courts, however, do not act accordingly, and apply less stringent criteria in determining an urgent reason for dismissal in conditional requests based on urgent cause.[746] They may not be aware that in doing so they reinforce an abuse of the system of conditional requests by employers. To understand the latter one must first explain the possibility for employees to make a so-called 'switch' after being dismissed under Article 7:677 DCC.

As mentioned above, employees generally will deny the existence of an urgent reason for dismissal, and consequently, state that the employment agreement still exists. On the other hand, when they have found a job they no longer wish to continue the employment agreement. Subsequently, in *Dibbets/Pinckers (1994*), the Netherlands Supreme Court approved the 'switch' on the part of the employee. In brief, after the employee primarily had objected to the summary dismissal, asking for continuation of salary payment, the Netherlands Supreme Court allowed the employee, instead, to consent to termination of employment

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739 Whereas the Netherlands Supreme Court in its decision of 27 March 1987, NJ 1987, 882 (*Seceurop/Koning*) stressed that the dissolution procedure differed from the procedure with the court with jurisdiction as to the merits of the case, this in my opinion did not imply that the Cantonal Court could apply less stringent criteria in determining an urgent cause.

740 See Loonstra 1997a, p. 28.

741 Ktg. Rotterdam 22 februari 1993, JAR 1993/103.

742 Ktg. Amsterdam 12 oktober 1993, JAR 1993/265.

743 Ktg. Utrecht 26 februari 1996, Prg. 1996, 4499.

744 Ktg. Utrecht 20 augustus 1997, JAR 1997/204. See also Ktg. Rotterdam 13 september 2002, JAR 2002/239.

745 See also Bouwens 2004, p. 180.

746 See also Verhulp 2003c, p. 81.

and to ask for a severance payment based on irregular termination of the employment agreement, i.e. termination of employment without prior notice.[747]

Subsequently, the question arose whether an employee could, too, make this switch *after* the Cantonal Court had granted a conditional request based on urgent cause, or a change of circumstances for which the employee is to blame.[748] One can imagine, the Cantonal Court's decision immediately raises doubts on whether the employee's claim still will be successful with the court with jurisdiction as to the merits of the case. The best alternative for the employee in such a case is to make a switch, i.e. to consent to termination of employment and to ask for a severance payment based on irregular termination of employment instead of salary. In *Greeven/Connexxion (2002)*, the Netherlands Supreme Court approved the employee's switch after a conditional solution.[749] In doing so, the Netherlands Supreme Court again balanced the relationship between the employer and the employee after its decision of 1983, in which it allowed employers to file a conditional request after a summary dismissal.[750]

However, in practice, employers *prior* to this switch tend to withdraw the summary dismissal when the Cantonal Court has dissolved the employment agreement without severance payment, leaving an employee, in effect, empty-handed. In brief, employers claim that by withdrawing the summary dismissal, the condition of the conditional dissolution is fulfilled. Hence, the employment agreement is dissolved as from the date of the conditional dissolution. As a consequence, the employer only has to pay salary as from the date of the dismissal to the date of the conditional dissolution. This practice undermines the protection that is offered to the employee in *Greeven/Connexxion (2002)*. The question arises whether one can speak of an *abuse* of the conditional dissolution on the part of the employer, in that the employer is led by reasons of damage control only. The answer seems negative. The Netherlands Supreme Court *allowed* employers to file a conditional request for this reason in 1983. Nevertheless, in my opinion one can speak of an abuse of the system of conditional requests when employers, knowing that Cantonal Courts use less stringent criteria, dismiss the employee based on urgent cause and immediately file a conditional request, in effect, to use the conditional dissolution to get rid of the employee in an easy and cheap way. A summary dismissal in my opinion must remain an ultimum remedium.[751] Employers, on the other hand, may have

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747 HR 7 oktober 1994, JAR 1994/234 (*Dibbets/Pinckers*). Under Art. 7:677 DCC, the severance payment is equal to the period that lies between the date of the summary dismissal and the date on which the employment agreement *would* have terminated, provided the employer would have respected the notice period.

748 HR 7 juni 2002, NJ 2003, 125, JAR 2002/155 (*Greeven/Connexxion*).

749 For an in-depth discussion of these decisions, see Boot 2002b, p. 14-18. See also Verhulp 2003d, p. 40 and 41; Verhulp 2003c, p. 82-84; Bouwens 2004/ p. 180 and 181; Zondag 2004b, p. 12-16.

750 Duk 1986, p. 158; Boot 2005a, p. 167.

751 Roeloff 1988, p. 205.

a point that Cantonal Courts who apply less stringent criteria, in effect, reinforce this practice.

Surprisingly, the practice of employers to withdraw the summary dismissal *after* a conditional dissolution is hardly disputed. In fact, the District Court of The Hague in its decision of 1 March 2000 affirmed that the employment agreement had come to an end after the employer had withdrawn the summary dismissal prior to the switch.[752] In my opinion, an employment agreement does not *per se* come to an end through a conditional request, after a withdrawal of a summary dismissal. Put differently, I doubt whether the condition of a conditional dissolution is fulfilled in *all* cases. *First*, if an employer asks for a conditional dissolution 'in case *a court* determines that the employment agreement still exists', the employee in my opinion can object when the *employer* determines that the employment agreement still exists. *Second*, in its decision of 1998 the Netherlands Supreme Court explained the nature of a conditional request, in that it is inextricably bound up with the invalidity of the dismissal.[753] However, if the employer withdraws a dismissal, this does not necessarily imply that the employer consents to the invalidity of the dismissal. *Third*, one may argue whether the Netherlands Supreme Court in 1983 meant to allow *employers* to withdraw the summary dismissal after a conditional dissolution, or instead, legislative history requires that when an employer withdraws a summary dismissal, he must file an *unconditional* request, because the employment agreement still exists when the employer withdraws a summary dismissal.

Boot, too, doubts whether an employment agreement comes to an end through a conditional request after a withdrawal of the summary dismissal by the employer. In this respect, he brings forward that an employer is unable to unilaterally withdraw the summary dismissal. He refers to a decision of the Netherlands Supreme Court of 1995.[754] In this case, the Netherlands Supreme Court stated that when an urgent reason for dismissal is lacking and the employer terminates the employment agreement without prior notice, the employee can object to the termination of the employment agreement and ask for salary, *or* can consent to the termination of the employment agreement and ask for a severance payment based on irregular termination of employment instead. It held that *when* the employee consents to the termination of the employment *after* he first objected to the termination of the employment agreement – i.e. the employee has made a switch – the employer *cannot* convert the irregular termination into a regular termination by afterwards terminating the

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752 Rb. Den Haag 1 maart 2000, JAR 2000/98, which on the other hand held that the employer was liable under Art. 7:611 DCC.

753 HR 5 september 1997, NJ 1998/421 (*De Bode/DHIJ*). For an in-depth discussion of this decision, see Van Slooten 2000.

754 Boot 2005a, p. 171; HR 30 juni 1995, NJ 1996, 52, JAR 1995/152 (*De Waal/Van Rijn*).

employment agreement with respect of the notice period.[755] Does this decision of the Netherlands Supreme Court, as Boot states, mean that an employer *cannot* withdraw a summary dismissal after a conditional dissolution? I seriously doubt this. In my opinion, the decision of the Netherlands Supreme Court of 1995 applies to situations only, in which an employee makes a switch. This differs from the situation we have before us, in which the employee has *objected* to termination of employment, and the employer invokes the conditional dissolution *before* the employee can make a switch. Verhulp seems to share this opinion. He wonders whether there are special circumstances based upon which the employee, *nonetheless*, can seek for a severance payment based on irregular termination in these cases.[756] Verhulp is of the opinion that when an employer *abuses* the system of conditional requests, i.e. withdraws the summary dismissal to terminate the employment agreement to get rid of the employee in an easy and cheap way, this constitutes a special circumstance, allowing the employee to make a switch *after* the employer has invoked the summary dismissal.[757] Verhulp refers to *Dibbets/Pinckers (1994)* and *Greeven/Connexxion (2002)*. From these cases it can be derived that when the Cantonal Court has granted a conditional dissolution, this does not prevent the employee from making a switch. The problem, however, is that it will be difficult, if not impossible, for an employee to prove bad intent of the employer. Therefore, so long as the Netherlands Supreme Court, or the legislature do not hold otherwise, this practice will continue. On the other hand, this practice can be restricted when Cantonal Courts strictly apply case law on summary dismissals to conditional requests.

Overall, it can be derived from legislative history that Cantonal Courts are allowed to decide on an urgent cause for dismissal. Therefore, the statement of Cantonal Courts that they cannot decide on 'summary dismissals', because the dissolution procedure is not the appropriate procedure, is incorrect.[758] Second, according to legislative history, and the 1983 decision of the Netherlands Supreme Court, Cantonal Courts must apply case law on summary dismissals to unconditional and conditional requests that are based on urgent cause, and consistently must reject or grant requests. To the extent Cantonal Courts apply case law on summary dismissals in determining urgent cause, one can speak of just cause protection. To the extent Cantonal Courts apply *less* stringent criteria in – mainly conditional – requests, Cantonal Courts undermine this protection. This applies all the more so, when Cantonal Courts herewith, in effect, reinforce an abuse of the system of conditional requests on the part of employers. When the case is – too – complex, there are, in fact, two options. First, Cantonal Courts may *not* defer any further decision until the court's

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755 The decision is important in light of Art. 7: 653 DCC. Under this Article, an employer cannot invoke a covenant not to compete in case of an irregular termination.

756 See also Rb. Den Haag 1 maart 2000, JAR 2000/98.

757 Verhulp 2003d, p. 42.

758 See also the Conclusion of the Advocate General under 3.53 in HR 27 april 2001, NJ 2001, 421, JAR 2001/95 (*Wennekes Lederwaren*); Kuip 2002, p. 41; Visser 2004.

decision in the proceedings on the merits, because the Netherlands Supreme Court does not allow this.[759] On the other hand, Cantonal Courts may exclude a certain issue under *Baijings (1997)*. Its exception, however, can be applied in exceptional cases only.[760] Second, Cantonal Courts are allowed – or better said *must* – examine whether the facts and circumstances constitute an urgent cause or a change of circumstances. Hence, Cantonal Courts primarily can examine whether there is a change of circumstances.[761] A significant number of cases, in effect, eventually are dissolved based on breach of trust.[762] Whether a breach of trust at all times constitutes a just cause for dismissal will be examined below.

18.5 A change of circumstances

18.5.1 Studies on case law

(i) Studies on case law prior to 1954

The legislature of 1907 allowed for dissolution of the employment agreement based on a change of circumstances *only* in case of (i) a change in the employer's or employee's personal situation; (ii) a change in the employer's or employee's financial position; and/or (iii) a change of circumstances in the job, based upon which the employment agreement reasonably had to end immediately or on short notice.[763]

The studies on case law by Polak and Loonstra demonstrate that courts strictly applied Article 1639w, according to the legislature's intent. Polak was one of the first to examine court decisions under Article 1639w. Of the twenty-two published cases between 1909 and 1939, he categorized eight under category (i), seven under category (ii), and seven under category (iii). Almost half of the twenty-two cases were rejected: more than half on the part of employers, and less than a quarter on the part of employees. Whereas the legislature had only contemplated rare situations, it was striking, therefore, that Cantonal Courts granted requests based on economic circumstances in a majority of cases. In five out of six cases, Cantonal Courts dissolved the employment agreement.[764] Jansen and Loonstra stressed that the First World War, in fact, made the situation a rare one, but that the latter did not at all times

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759 HR 3 december 1982, NJ 1983, 182 (*Bravenboer/Van Rhee*). See also Groen 1989, p. 103.

760 This derives from HR 24 oktober 1997, JAR 1997/248 (*Baijings)*. For an in-depth discussion of this decision and more case law on this issue, see below under § 18.6.

761 For example, Ktg. Zwolle 19 april 2006, RAR 2006/96. See also Buijs 2005a, p. 38. Another possibility of course is to examine urgent cause based on case law that applies to urgent dismissals, and when urgent cause is lacking, to examine whether there is breach of trust. See Ktg. Haarlem 13 november 2006, LJN AZ3130 in accordance with the proceedings on the merits, Ktg. Haarlem 16 juni 2006, JAR 2006/162.

762 Roeloff 1988, p. 205; Fruytier 2004, p. 180.

763 See also Polak 1939, p. 222.

764 Polak1939, p. 225-229.

made dissolution of the employment necessary.[765] Also, illness, in principle, did not justify dissolution of the employment agreement. In fact, courts seemed to be willing to dissolve the employment agreement in case of *long-term* illness only.[766]

In general, Cantonal Courts, too, were of the opinion that dissolution of the employment agreement based on breach of trust could not lead to dissolution.[767] The Cantonal Court of Rotterdam even *explicitly* held that a breach of trust was excluded by Article 1639w.[768] In contrast, in 1914, the Cantonal Court of Onderdendam dissolved the employment agreement based on breach of trust, although it admitted that it was doubtful whether this was according to the legislature's intent.[769]

Hence, even more striking was the decision of the Cantonal Court of Amsterdam of 28 November 1931, which dissolved the employment agreement based on breach of trust, without making any reservation in this respect. In this case, the employer asked the Cantonal Court to dissolve the employment agreement with one of its key executives. The employer alleged that the executive had conspired with a colleague, as a result of which the executive had damaged the company's interests. However, based on testimonies of witnesses the alleged reason appeared to be non-existent. Nevertheless, the Cantonal Court held that it was not in the company's interest to continue the employment relationship with the executive. The Cantonal Court dissolved the employment agreement based on the fact that the employment relationship, in effect, had resulted in a breach of trust.[770] Neither of the parties had brought forward this reason, however. Consequently, this decision led to heavy criticism. Peerenboom held that the trial was unfair, because the employment agreement had been dissolved on a ground of which the employee could not have been aware of, and against which he could not have defended himself. Moreover, the dismissal was unjustified because the Cantonal Court, in effect, allowed the employer to dismiss an employee for a non-existent reason, hence, without cause and without legal recourse as appeal was excluded by Article 1639w.[771]

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765 Jansen en Loonstra 1990, p. 369, referring to Ktg. Rotterdam 23 september 1914, RBA (6) 1917, No. 21 and 22.

766 Ktg. Amsterdam 1 juni 1920, NJ 1920, 976; Ktg. Assen 24 augustus 1922, RBA (11) 1923, No. 5 and 6. See Polak 1939, p. 225; Jansen en Loonstra 1990, p. 369.

767 Ktg. Amsterdam, 28 november 1931, NJ 1932, 95. See also Polak 1939, p. 224. Loonstra in this respect also refers to Ktg. Onderdendam 21 november 1914, RBA (6) 1914, No. 7 in: Loonstra 1996, p. 151.

768 Polak 1939, p. 230, referring to Ktg. Zutphen 10 maart 1922, NJ 1922, 454 and Ktg. Rotterdam 2 mei 1936, NJ 1936, 681.

769 Ktg. Onderdendam 21 november 1914, RBA (6) 1914, No. 7. See also Loonstra 1996, p. 151.

770 Ktg. Amsterdam 28 november 1931, NJ 1932, 95. See also Polak 1939, p. 224.

771 Peereboom 1932, p. 35 and 36.See further Van Creveld 1934.

Also Loonstra's 1996 research shows that prior to 1954 courts strictly applied Article 1639w.[772] Like Polak, Loonstra concluded that the majority of *employers'* requests – of the thirty-one cases, published between July 1907 and July 1954 – were rejected. The employers' requests based on economic circumstances, on the other hand, were granted in a majority of cases (seven out of twelve), which could be explained by the First World War.[773] The *employees*' requests were granted in a majority of cases. Most of these requests were based on a change of their personal or financial situation, e.g. business opportunities.[774]

(ii) Studies on case law between 1954 and 1999

The legislature of 1953 broadened the scope of Article 1639w, making it possible to dissolve an employment agreement based on breach of trust. Loonstra's research of 1985 – in which he had examined sixty-eight cases between 1970 and 1983 – showed that the *second* largest category consisted of requests based on breach of trust (20.6%). The Cantonal Court granted these requests in a significant majority (64.4%). Loonstra concluded that although Cantonal Courts generally required that the employment relationship had become permanently and irreparably disrupted, this appeared to be assumed relatively easily. Also, he concluded that it was not a decisive factor for the Cantonal Court, in rejecting the request, that the employee was not to blame for the breach of trust. This played a role in determining the size of the severance payment only. In this respect, the Cantonal Court, too, considered factors as the employee's salary, the years of service, the employee's performance, the employee's age, the labour market situation, and the employee's right on social security.[775]

The largest category consisted of requests based on economic circumstances (26.5% of the 68 cases), in which the employment agreement had been dissolved either with (44.4%) or without severance payment (5.6%).

In his 1988 dissertation, Groen *affirmed* the increasing popularity of requests based on breach of trust. In total, he examined 227 published decisions, delivered between 1 January 1953 and 1 January 1987. Like Loonstra, he more or less distinguished between requests based on a change of circumstances consisting of (i) economic circumstances (ii) unsatisfactory performance, either or not due to illness; and (iii) breach of trust. This time, the majority of requests were based on unsatisfactory performance, either or not due to illness (23.8%), followed by requests based on economic circumstances (22.5%), and breach of

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772 Loonstra 1996, p. 148, referring to Ktg. Onderdendam 21 november 1914, RBA (6), No. 7; Ktg. Breda 11 april 1934, NJ 1935 ,207; Ktg. Rotterdam 2 mei 1936, NJ 1936, 681; Ktg. Rotterdam 9 augustus 1949, NJ 1950, 278.

773 Loonstra 1996, p. 148 and 149.

774 Polak 1939, p. 225-229; Loonstra 1996, p. 148.

775 Loonstra 1985, p. 349-353.

trust (18.5%). To explain the differences with Loonstra's research, Groen stressed that Loonstra's research did not include the year of economic recovery of 1986. In this year, fewer requests were filed. In fact, the relatively short period between 1970 and 1983 on which Loonstra had focused included years of economic recession. This in Groen's opinion could explain the large number of requests filed, based on economic circumstances between 1970 and 1983.

What was striking, was that in Groen's research the requests based on breach of trust formed a minority, which was *contrary* to the general assumption at the time that most cases were dissolved based on breach of trust. Like Loonstra, Groen, on the other hand, concluded that the requests based on breach of trust were granted in an overwhelming majority of the cases (73.8%), compared to the average of 50% in other cases, which in his opinion explained this general assumption, and the popularity of requests based on breach of trust.[776] Subsequently, in the same year Groen published his thesis, Loonstra presented new results on the dissolution procedure. Overall, Loonstra examined eighty-two decisions, published between 1984 until 1986. The largest categories consisted of requests based on breach of trust (44%) economic circumstances (23.3%), and unsatisfactory performance, whether or not due to illness (15.4%). Again, Loonstra concluded that Cantonal Courts had dissolved requests based on breach of trust in a significant majority of cases (72.1%) – compared to the average of 50% in the other categories – either with (64.7%) or without severance payment (8.1%). *Unlike* in the past, in two-third of the cases based on breach of trust, Cantonal Courts rejected the request, because the employee was not to blame, i.e. a serious cause was lacking.[777] In 2001, Scholtens, again, stressed the success of requests based on breach of trust, which were granted in the majority of cases. Only in 5% of the cases the requests had been rejected, when it was still possible to replace the employee in another position.[778]

(iii) Studies on case law between 1999 and 2007

As from 1 January 1999, Cantonal Courts must ascertain that the reason for dismissal is *not* related to a prohibition on dismissal.[779] Consequently, the Circle of Cantonal Courts adjusted the Cantonal Formula as from 8 October 1999, determining that a Cantonal Court must examine on its own initiative (*ambtshalve*) whether there is a prohibition on dismissal, particularly in *pro forma* cases.[780] Only when employers and employees have explicitly stated that a prohibition on dismissal does not apply, the Cantonal Court may assume its

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776 Groen 1989, p. 58-60, 63 and 65.

777 Loonstra 1988a, p. 99 and 100.

778 Scholtens 2001b, p. 64 and 65. Scholtens had examined 918 cases between 1992 and 2000, in which Cantonal Courts had dissolved the employment agreement.

779 For an in-depth discussion of the prohibitions on dismissal, see above under § 14.4.5.

780 For the term *pro forma* cases, see above under § 18.1.

absence.[781] Case law shows that Cantonal Courts, in general, strictly apply prohibitions on dismissal.[782] The introduction of a prohibition on dismissal during illness, in fact, was in accordance with a long-standing practice,[783] as a 2001 study by Scholtens shows. Scholtens's examination covered the period between 1992 and 2000. He concluded that the number of *rejections* was the highest with regard to requests based on unsatisfactory performance, either or not due to illness (60 out of 219: 27%),[784] and that twenty-one cases were rejected, due to the prohibition on dismissal regarding illness; eighteen of these cases were rejected *before* 1 January 1999.[785]

In 2000, the Bureau for Policy Research (*Research voor Beleid*) concluded that the majority of requests with the Cantonal Court are based on breach of trust, and the majority of requests with the RDA based on economic circumstances, both granted in the majority of cases. For the year of 2005, Loonstra and Kruit came to a same conclusion with regard to requests filed with the Cantonal Court and the CWI.[786]

Another significant development after 1999, was that the legislature started to take measures to diminish *pro forma* cases,[787] which formed, and until 2007, still forms, one of the largest categories.[788] A study by Knegt and Wilthagen from 1988 shows that about 40% of all cases were *pro forma* cases.[789] They examined 315 cases, covering the period between July 1984 and June 1985 in five cantonal districts.[790] Subsequently, in 1999, Beltzer, Knegt and Van Rijs examined 258 decisions, covering the years of 1995 and 1997, of the Cantonal Courts of 's-Hertogenbosch, Hoorn, Meppel, Nijmegen and Rotterdam. They

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781 Toelichting Aanbeveling 4 Kantonrechtersformule in Tekst & Commentaar Arbeidsrecht (2006): Bijlage 2. See also Olde 1999.

782 Rutgers 2003, p. 119. For example Ktg. Tiel 25 oktober 2000 JAR 2001/6; Rb. Arnhem 29 oktober 2001, JAR 2001/252; Ktg. Emmen 20 december 2002, JAR 2003/24; Ktg. Rotterdam 12 september 2003, JAR 2003/253; Ktg. Amsterdam 16 april 2004, JAR 2004/121.

783 Boertien en Schaink 1996; A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:685 BW (DCC) § 7.

784 Scholtens 2001b, p. 55 and 56.

785 Knegt en Wilthagen 1988, p. 239; Beltzer, Knegt en Van Rijs 1998, p. 111 and 116.

786 For an in-depth discussion of the report of Research voor Beleid 2000, see above under § 16.8. See also Loonstra en Kruit 2006, p. 21.

787 Council for the Judiciary (*Raad voor Rechtspraak*) estimates that it concerns about 80% of all cases; Verburg about 85%; Scholtens about 90%.; Boot between 80 and 90%. See Scholtens statistiek ontbindingsvergoedingen 2005 (I), p. 33.; Raad voor de Rechtspraak, *Advies Wetsvoorstel normering ontslagvergoeding*, 8 juli 2004, 2004/28; Verburg 2005a, p. 149; Boot 2006a, p. 1103. In the period between October 1997 and October 1999, one spoke of approximately 60,000 pro forma cases – on a total of 90,000 – yearly. Research voor Beleid 2000, p. 10. More recently, the government speaks of approximately 45,000 pro forma cases – on a total of 70,000 – yearly. TK 2005-2006, 30 370, No. 8, p. 60. See also Grapperhaus 2006, p. 16.

788 In the past, the legislature already has tried to take measures to diminish *pro forma* procedures. See Scholtens 2001a, p. 7.; Van Heusden 2002; Damsteegt 2003, Chapter 5; Van Heusden 2006, Chapter 9.

789 Knegt en Wilthagen 1988, p. 239. See also Scholtens 2001b, p. 53 and 54.

790 Knegt en Wilthagen 1988, p. 217-219.

came to an even higher number of *pro forma* cases (65%). They, too, concluded that virtually all cases were granted.[791] In an unpublished research, L.W.J. van den Heuvel, who examined 648 decisions, covering the year of 1999 of the Cantonal Court of Tilburg, too, concludes that the majority of cases were *pro forma* cases (about 69%: 446 cases).[792]

The most recent measure to diminish *pro forma* procedures is an amendment of Article 24 of the Unemployment Insurance Benefits Act (*Werkloosheidswet* or *WW*). After this amendment, an employee *only* loses his right on unemployment benefits when he has been dismissed based on a valid urgent reason, or termination of employment takes place on the employee's own initiative. The amendment went into force on 1 October 2006.[793]

In conclusion, Groen correctly states in his 1988 dissertation that studies on case law cannot be seen as statistical evidence, because researches, in general, show only a fraction of the total of requests, which are filed. However, they can give an indication.[794] The studies above under (i), (ii) and (iii) in my opinion indicate that (1) employment agreements generally are requested based on (i) economic circumstances; (ii) unsatisfactory performance, either or not due to illness; and (iii) breach of trust.[795] In literature, the foregoing reasons for dismissal are also to which generally is referred.[796] Hence, in the following paragraphs, I will concentrate on these reasons of dismissal, in examining to what extent private-sector employees enjoy just cause protection under Article 7:685 DCC, and to what extent Cantonal Courts apply the same criteria as the CWI; (2) Cantonal Courts grant requests which are based on a *change of circumstances* in the *majority* of cases. This raises the question whether Cantonal Courts seriously examine whether there is a serious cause to dissolve the employment agreement. At first sight, one must assume that Cantonal Courts seriously examine the cases, in that Cantonal Courts still reject requests for absence of serious cause.[797] Scholtens' research of 2001 shows that in at least ninety-seven of the cases the Cantonal Court *rejected* the request for absence of serious cause, generally pertaining to requests based on unsatisfactory performance, either or not due to illness.[798]

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791 Beltzer, Knegt en Van Rijs 1998, p. 111 and 116. See also Scholtens 2001b, p. 54.

792 Knegt en Wilthagen 1988, p. 239. See also Scholtens 2001b, p. 54.

793 Stb. 2006, 303 and 304. See also below under § 29.2.2. For a discussion of this proposal, see Beltzer 2005a. For scepticism on whether it will diminish the number of pro forma requests, see Boot 2006a, p. 1103-1107; Fluit 2006. For a less sceptic view, see Van de Poel 2006. For a discussion of the amendment in light of a 'healty' and an ill employee in this respect, see Koolhoven 2006.

794 Groen 1989, p. 60. See also Loonstra 1988a, p. 98; Scholtens statistiek ontbindingsvergoedingen 1999, p. 6; Loonstra en Kruit 2006, p. 23.

795 See also Groen 1989, p. 64.

796 For an extensive overview of literature in this respect, see Groen 1989, p. 55-57.

797 See Buijs 2005a, p. 30.

798 Scholtens 2001b, p. 59-64. His annual statistics on the year of 2003 show that in at least eleven cases the requests were rejected for absence of serious cause. See Scholtens statistiek ontbindingsvergoedingen 2003 (II), p. 12. See also Research voor Beleid 2000, p. 49.

18.5.2 Criteria in determining a change of circumstances

18.5.2.1 Economic circumstances

Requests based on economic circumstances involve either individual or collective requests. In general, a collective dismissal refers to a dismissal according to the WMCO, involving at least *twenty* employees within a CWI's district.[799] However, literally, collective requests involve *more than one employee*. These, in turn, may take the form of collective or separate requests.[800] In this thesis, I primarily concentrate on individual dismissals. However, in discussing dismissals based on economic circumstances, a discussion of collective dismissals in light of economic circumstances is indispensable, due to the fact that individual dismissals are often part of collective dismissals. From case law it can be derived that courts are divided on whether they have exclusive jurisdiction in collective dismissals. The Cantonal Courts of Utrecht and Amsterdam present a striking example. They were asked to decide on a collective request, involving nine employees, filed by what was basically the same employer. The Cantonal Court of Utrecht, in its decision of 16 December 1993, referred the employer to the RDA, the predecessor of the CWI, stating that the Cantonal Court was not the appropriate authority to decide on collective dismissals. It added that the RDA was better equipped to decide on the employer's request to dissolve the employment agreements with the nine employees, i.e. to answer the questions (i) whether the reorganization was necessary; (ii) whether the employer had correctly applied the principle of seniority; and (iii) whether it was possible to replace the employee in another position.[801] In contrast, the Cantonal Court of Amsterdam in its decision of 29 December 1993, explicitly held that it was authorized to decide on the nine requests, arguing that 'it was not a collective dismissal according to the WMCO'.[802] For this Court, therefore, it was determinative whether the collective dismissal involved fewer than twenty employees within a CWI's district.[803]

(i) Authority of Cantonal Courts in dismissals based on economic circumstances

The Cantonal Court of Utrecht, in its decision of 16 December 1993, referred the employer to the RDA. This is understandable, in that Article 4:1 of the

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799 For the WMCO, see above under § 16.4.1. See also Heinsius 2004, p. 170-192; Zondag 2001, p. 230-232; CWI Handbook on Dismissal (2006), p. 25-1 to 25-12.

800 Knegt en Wilthagen 1988, p. 42; Lousberg 1997, p. 77.

801 Ktg. Utrecht 16 december 1993, JAR 1994/23.

802 Ktg. Amsterdam 29 december 1993, JAR 1994/23. See also Ktg. Haarlem 11 maart 1994, JAR 1994/71.

803 See above under footnote 799.

Dismissal Decree – and in the past the Directives – determines that the CWI is authorized to decide on collective dismissals, in which *one or more positions* become(s) redundant due to economic circumstances.[804] On the other hand, the legislative history of Article 1639w does not imply that Cantonal Courts are *not* authorized to decide on collective dismissals, or are authorized to decide on individual dismissals only.

Moreover, in the 1990s the Minister of Social Affairs implicitly underlined the Cantonal Court's authority in this respect when he discussed the rule – which went into force on 1 January 1994 – to include five or more requests under Article 7:685 DCC in the number of twenty under the WMCO. The Minister held that if an employer files four requests with the Cantonal Court and sixteen requests with the RDA (CWI), this does not constitute a collective dismissal under the WMCO. On the other hand, if the employer files six requests with the Cantonal Court and fourteen requests with the RDA (CWI), it does.[805] The Minister herewith implicitly held that the Cantonal Court is authorized to decide on requests, which involves *fewer* than twenty employees in the CWI's district. The Cantonal Court of Amsterdam, with its decision of 29 December 1993, thus, correctly held that he was authorized to decide on a collective dismissal, in which fewer than twenty employees were involved.[806] In contrast, the Cantonal Court of Utrecht held that the employer's claim was inadmissible.[807]

The foregoing case law leaves the question unanswered whether Cantonal Courts are authorized to decide on requests based on economic circumstances, which involve *twenty or more* employees. Loonstra and Zondag are of the opinion that to allow Cantonal Courts to decide on collective dismissals to which the WMCO applies, this would traverse the legislature's intent.[808] In brief, the rationale behind the WMCO is to prevent unemployment. Loonstra and Zondag are of the opinion that the CWI is better equipped to prevent unemployment. For example, it is able to advise the employer in general, and on short-time permits (*ontheffingsverlening van verbod werktijdverkorting*) and financial aid in particular.[809] Therefore, in their opinion Cantonal Courts should not be authorized to decide on collective dismissals to which the WMCO apply. However, the WMCO does *not* exclude Cantonal Courts from deciding on

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804 See above under § 16.4.1.

805 TK 1992-1993, 22 970, No. 5, p. 2. See also Friedberg 1994; Heinsius 2004, p. 111 and 112.

806 See also Loonstra 1997a, p. 47; Friedberg 1994.

807 For other cases, see Loonstra 1997a, p. 44, referring to Ktg. Groningen 29 januari 1986, Prg. 1986, 2507; Ktg. Utrecht 8 december 1986, Prg. 1987, 2619; Ktg. Oostburg 2 december 1993, Prg. 1994, 4055.

808 Loonstra en Zondag 2004, p. 366; Loonstra 1997a, p. 44, 46 and 47, referring to Ktg. Breda 6 november 1984, Prg. 1984, 2232.

809 Heinsus 2004, p. 173, referring to TK 1974-1975, 13 324, No. 3, p. 8. See also CWI Handbook on Dismissal (2006), p. 25-6; Bureau Bartels/SZW 2006, p. 6 and 7.

collective dismissals which involve twenty or more employees, as Heinsius correctly states.[810]

Hence, a number of Cantonal Courts handle these cases, although with restraint. The general opinion among courts is that the CWI must remain the main route in collective dismissals to which the WMCO applies, and Cantonal Courts can decide on these dismissals in case of an *urgent* situation only.[811] Consequently, courts apply the rules of the WMCO. In this respect, the Cantonal Court of Groenlo held that '(…) the Directives and the WMCO, in principle, must form the lead on which Cantonal Courts must decide in collective dismissals which involve twenty or more employees'.[812] Consequently, Cantonal Courts consistently require that employers deliberate with unions and/or the Works Councils.[813] If not, Cantonal Courts tend to reject the requests.[814]

To the extent Cantonal Courts handle collective dismissals under the WMCO in urgent situations, Loonstra points out that the WMCO, too, covers urgent situations.[815] At the time, he referred to Article 6 of the WMCO.[816] He, however, did not point out that a request had to be made in this respect, and that it took about three weeks to obtain a decision.[817] Moreover, he did not consider that, in practice, employers and unions *themselves* might explicitly prefer a dissolution procedure to the BBA 1945-procedure, due to the urgency of the case. In this respect, unions, apparently, too, are of the opinion that Article 6 of the WMCO is less efficient than the dissolution procedure.[818] In fact, for the employer the dissolution procedure has an important advantage. Employees, in principle, cannot ask for a severance payment after the dissolution procedure. After a BBA 1945-procedure, based on Article 7:681 DCC, they can.[819]

A fact remains that *so long as* the WMCO is not exclusive, the Act leaves room for Cantonal Courts to decide on collective dismissals under the WMCO. I agree with Loonstra and Zondag that the WMCO should be(come) the main route. Employers should not be able to traverse the legislature's intent to prevent unemployment. Cantonal Courts, in fact, agree that the CWI, a public authority, is the appropriate authority to safeguard this public interest. Therefore, my suggestion would be that either the legislature makes the WMCO

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810 Heinsius 2004, p. 112-121.

811 For example, see Ktg. Groenlo 5 oktober 1994, JAR 1994/238; Ktg. Gorinchem 28 februari 1995, JAR 1995/71; Ktg. Groenlo 10 april 1995, JAR 1995/103 en 116; Ktg. Leeuwarden 28 september 2005, JAR 2005/259.

812 Ktg. Groenlo 10 april 1995, JAR 1995/103 en 116.

813 For example, see Ktg. Zevenbergen 2 januari 1986, Prg. 1986, 2537; Ktg. Groenlo 10 april 1995, JAR 1995/103 en 116; Ktg. Leiden 4 december 2002, JAR 2003/5; Ktg. Leeuwarden 28 september 2005, JAR 2005/259; Ktg. Leeuwarden 4 januari 2006, JAR 2006/24.

814 For example, see Ktg. Leeuwarden 4 januari 2006, JAR 2006/24.

815 Loonstra 1997a, p. 46 and 47.

816 Loonstra 1997a, p. 46 and 47.

817 Heinsius 2004, p. 187.

818 For example, see Ktg. Groenlo 5 oktober 1994, JAR 1994/238.

819 See below under § 18.6.

exclusive, or Cantonal Courts only will handle these cases when the employer and unions have substantiated that Article 6 and/or the new Article 6a of the WMCO must be passed. A procedure pending with the Works Council, for example, may stand in the way to make an effective use of Article 6a. As from 1 January 1999, the new Article 6a of the WMCO determines that when the unions state that they have been informed by the employer, and have agreed on the expedited procedure under the WMCO, the CWI must immediately handle the request.[820]

(ii) The criteria in determining economic circumstances

This brings me to an examination of criteria that Cantonal Courts apply to requests based on *economic circumstances*. The first question that arises is whether Cantonal Courts *must* apply the Articles 4:1 to 4:6 of the Dismissal Decree, in determining serious cause.[821] As Heinsius correctly states, Cantonal Courts, in principle, do not have to apply the same criteria as the CWI, because these derive from the Dismissal Decree and apply to the CWI only.[822] Nevertheless, Cantonal Courts generally apply the same criteria as the CWI.

For example, the Cantonal Court of Amsterdam of 29 December 1993 held it was authorized to decide on a collective dismissal of nine employees, because the WMCO did not apply. However, because more than one employee was involved, it held that 'the RDA, in principle, was the appropriate authority and, therefore, the Cantonal Court must apply the same criteria as the RDA in answering the questions (i) whether the reorganization was necessary; (ii) whether the employer had correctly applied the principle of seniority; and (iii) whether it was possible to replace the employee in another – adjusted – position'.[823] In a nutshell, these at the time indeed were the criteria based upon which the CWI – the RDA's successor –examined whether a dismissal was justified,[824] and based upon which Cantonal Courts, in general, determined whether there was serious cause.[825] Subsequently, the Cantonal Court of Amsterdam rejected the requests, because the employer (a) had not substantiated the financial need; (b) had not substantiated which positions became redundant

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820 Heinsius 2004, p. 187 and 190; Heinsius 2005, p. 85 and 86.

821 For example, see Ktg. Zutphen 15 juli 1996, JAR 1996/177, which asked for advice of the RDA and consistently applied the Articles in question of the Delegation Decree, the predecessor of the Dismissal Decree; Ktg. Utrecht 2 juli 2004, JAR 2004/201, which explicitly referred to Art. 4:2 of the Dismissal Decree; Ktg. Deventer 30 november 2005, JAR 2005/23, which, in effect, applied Art. 4:2.6 of the Dismissal Decree.

822 Heinsius 2004, p. 111 and 112.

823 Ktg. Amsterdam 29 december 1993, JAR 1994/28. See also Ktg. Lelystad 18 juni 2003, JAR 2003/174; Ktg. Zwolle 4 september 2003, Prg. 2004, 6165; Ktg. Leiden 5 oktober 2005, JAR 2006/5.

824 See above under § 16.4.

825 For example, see Ktg. Lelystad 18 juni 2003, JAR 2003/174; Ktg. Zwolle 4 september 2003, Prg. 2004, 6165; Ktg. Utrecht 2 juli 2004, JAR 2004/201; Ktg. Bergen op Zoom 9 december 2004, Prg. 2005, 56.

due to economic circumstances; and (c) had not correctly applied the principle of seniority to the employees in question.[826]

The principle of reflection

Until 1 March 2006, the principle of *seniority* applied to collective dismissals. As from 1 March 2006, the principle of *reflection* applies in collective dismissals, regardless of the number of employees involved. As this thesis reached its completion, there were only few cases published *after* 1 March 2006. In its decision of 9 June 2006, LJN AX8998, the Cantonal Court of Haarlem dissolved the employment agreement of the employee, due to economic circumstances, after having examined that the employer correctly applied the *principle of reflection*. In contrast, in its decision of 27 June 2006, LJN AX9570, the Cantonal Court of Leeuwarden rejected fourteen requests, although the employer and unions agreed upon the necessity to dismiss these employees due to economic circumstances. The Court stated that the employer had not substantiated why these circumstances made it necessary to dismiss the employees in question. Moreover, the employer did not substantiate *which* positions became redundant. Hence, it was unclear whether the employer had applied the *principle of reflection* correctly.[827] Although the foregoing cases make it impossible to conclude whether Cantonal Court*s* in the future continue to follow the Dismissal Decree in this respect, it is likely due to the fact that in the past Cantonal Courts consistently applied the principle of seniority in collective dismissals, as described below.

The principle of seniority

Case law *until 1 March 2006* shows that Cantonal Courts applied the principle of *seniority* in dismissals based on economic circumstances. *Like* the CWI, if the employee in question was not the last in service, Cantonal Courts rejected the request,[828] or *unlike* the CWI granted the request, compensating the absence of serious cause by a severance payment.[829] Cantonal Courts allowed employers to deviate from the principle of seniority if the employer and unions[830] – or the

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826 See also Ktg. Amsterdam 29 december 1993, JAR 1994/28.

827 For a discussion of these decisions, see Margadant 2006, p. 16 and 17.

828 For example, see Ktg. Zwolle 24 juni 1994, JAR 1994/189; Ktg. Arnhem 28 september 1994, JAR 1994/237; Ktg. Rotterdam 11 oktober 1994, JAR 1994/239; Ktg. Alphen aan den Rijn 23 december 1994, JAR 1995/56; Ktg. Utrecht 2 juli 2004, JAR 2004/201; Ktg. Gorinchem 26 augustus 2004, Prg. 2004, 6299; Ktg. Haarlem 9 februari 2006, RAR 2006/56.

829 For example, see Ktg. Utrecht 11 mei 1998, JAR 1998/156 See also Boot 2005c, p. 268-272; Loonstra en Kruit 2006, p. 26.

830 For example, see Ktg. Roermond 31 maart 2003, JAR 2003/109; Ktg. Den Haag 22 december 2004, JAR 2005/55.

employer and the Works Council[831] – had consented to a Redundancy Plan (*Sociaal Plan*), in which they agreed to deviate from the principle of seniority. In this respect, the Cantonal Court of Haarlem in its decision of 5 November 2004 held that the employer's interest in running his business efficiently is as important as job security, hence, the employer must be free to run his business as he likes. Consistently, he held that the employer must be free to apply the criteria for dismissal, which best suited the employer's business.[832] The Cantonal Courts of Leeuwarden and Utrecht,[833] and the Cantonal Court of Enschede held the same.[834] In this respect, Cantonal Courts, too, allowed a selection of employees based on *quality* on the condition that

- the employer substantiates which positions have become redundant, and for which objective reasons the employees in question need to be dismissed, i.e. the application of the criteria is verifiable, hence, the dismissal of employees is not arbitrary; and
- quality as a criterium of dismissal is fair and reasonable, in that it must be considered as the best alternative to meet the financial problems of the company.[835]

Cantonal Courts, too, allow for other criteria for dismissal in dismissals to which the *WMCO* applies, on these same conditions.[836]

Personally, I do not object to *quality* as a criterium to select employees on the conditions above. Legislative history of Article 7:685 DCC shows that when an employee does not perform to the satisfaction of the employer this, in itself, constitutes a – just – cause for dismissal. So long as the legislature has not amended the Dismissal Decree in this respect, I, however, am in favor of Cantonal Courts applying the same criteria as the CWI.[837] To the extent the

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831 Ktg. Utrecht 4 december 2003, JAR 2004/23.Also when there was no Works Council involved, the Cantonal Court sometimes allowed deviation. For example, see Ktg. Sittard-Geleen 17 mei 2005, JAR 2005/143; Ktg. Nijmegen 3 mei 2005, JAR 2005/163.

832 Ktg. Haarlem 5 november 2004, JAR 2005/56. In contrast, the Cantonal Court of Nijmegen, too, allowed deviation based on quality, without consent between the employer and unions and/or a Works Council, in Ktg. Nijmegen 3 mei 2005, JAR 2005/163. For these cases, see also Grapperhaus 2006, p. 41.

833 Ktg. Leeuwarden 24 oktober 2003, Prg. 2004, 6181.

834 Margadant refers to Ktr. Enschede 31 mei 2006, zaaknr. 219797, in which the Cantonal Court did not apply the principle of reflection under the Dismsissal Decree, but, instead, approved and applied the criteria for dismissal as agreed upon by the employer and unions. See Margadant 2006, p. 17.

835 For example, see Ktg. Amsterdam 2 juli 2002, JAR 2002/212; Ktg. Amsterdam 14 juni 2004, JAR 2004/262; Ktg. Haarlem 5 november 2004, JAR 2005/56; Ktg. Den Haag 22 december 2004, JAR 2005/55. From these cases derive that the Cantonal Court applies a marginal test with regard to the question what the best alternative is to meet financial needs. For an in-depth disussion of the marginal test, see below under § 18.6.

836 For example, see Ktg. Leeuwarden 24 oktober 2003, Prg. 2004, 6181; Ktg. Roermond 25 januari 2003, JAR 2003/109.

837 See also Margadant 2006, p. 17.

BBA 1945-procedure and the dissolution procedure have become alternative routes for terminating an employment agreement, private-sector employees, in my opinion, deserve a same treat with regard to just cause protection, regardless of which route the employer chooses to terminate the employment agreement. This, in turn, raises the question whether the Dismissal Decree should be amended in this respect.

Requirement of replacement

Like the CWI, Cantonal Courts must examine whether employers are able to replace the employee in another – adjusted – position. The way the majority of courts think is best reflected through the decision of the Cantonal Court of Zwolle. The latter held that '(…) whereas an employer has the right to run his business as he likes and to reorganize the company as needed on the one hand, the employer has an obligation to do his utmost to replace the employee in another position within the company on the other'.[838] This applies all the more so, when this obligation to replace the employee is manifest in the Redundancy Plan.[839] Also, the employer must examine whether he is able to replace the employees, when the unions and the Works Council have acknowledged the need to reorganize. Therefore, when the employer had not seriously examined the possibility to replace the employees, the Cantonal Court of Bergen op Zoom rejected the requests, although the unions and the Works Council had agreed upon the need to reorganize, and on the dismissals in question.[840]

On the other hand, a request will be granted if the employer substantiates that he seriously examined whether the employees in question could be replaced in another position.[841] Therefore, I find the decision of the Cantonal Court of Utrecht of 4 December 2003 remarkable. In this case, the employer had to reorganize the company due to economic circumstances. The Court held that the employer could not be reasonably expected to examine whether he could replace the employee within the company, in that the employee was already offered a new position in light of the reorganization. The employee did not meet the requirements of this new position. A salient detail in the Utrecht case was that the company employed about 2500 employees.[842] This is more an exception than the rule, however.

In conclusion, Cantonal Courts tend to apply the same criteria as the CWI in requests based on economic circumstances. Additionally, Cantonal Courts

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838 Ktg. Zwolle 10 juni 1994, JAR 1994/141. See also Ktg. Sneek 13 april en 18 juni 1994, JAR 1994/140; Ktg. Zuidbroek 8 februari 1996, Prg. 1996, 4485; Ktg. Apeldoorn 20 maart 1996, Prg. 1996, 4531; Ktg. Rotterdam 9 april en 11 juni 1997, Prg. 1997, 4863; Ktg. Harderwijk 15 februari 1999, JAR 1999/105.

839 For example, see Ktg. Harderwijk 15 februari 1999, JAR 1999/105.

840 Ktg. Bergen op Zoom 9 december 2004, Prg. 2005, 56.

841 Ktg. Groenlo 5 oktober 1994, JAR 1994/238; Ktg. Gorinchem 28 februari 1995, JAR 1995/71.

842 Ktg. Utrecht 4 december 2003, JAR 2004/23.

accept *quality* as a criterium for dismissal, however, on certain conditions only. This is possible, because the Dismissal Decree does not bind Cantonal Courts. Heinsius' statement that the rules of the Dismissal Decree were written to serve in the BBA 1945-procecure is correct. In practice, Cantonal Courts, nonetheless, apply these rules. This is possible, in that there is no legal obstacle for Cantonal Courts to apply the same principles as the CWI.[843]

First, Article 7:611 DCC requires that an employer must behave as befits a good employer. In furtherance of this Article, and according to legislative history, Cantonal Courts consider a dismissal as an ultimum remedium, hence, require of employers to examine whether it is possible to replace the employee in another position.[844] Also, one can argue that Article 7:611 DCC imposes on an employer a heavier duty of care to look for alternatives, the longer the employment relationship endures.[845] The fact that the Cantonal Formula does not include the principle of reflection, nor the requirement of replacement, is not determinative, and insufficient for this matter. The Cantonal Formula mainly sees to the size of the severance payment, and does not constitute law, but directives.[846] *Second*, from Article 7:685 DCC it can be derived that Cantonal Courts must examine whether there is serious cause to dissolve the employment agreement for the *employee in question*. In effect, the principle of reflection, and requirement of replacement, sees to the latter. Last, a reason that might explain *why* Cantonal Courts apply the same criteria as the CWI, is that courts may have become aware of the fact that the BBA 1945-procedure and the dissolution procedure have grown towards one another, i.e. requests under both procedures are based on the same reasons for dismissal. Consequently, Cantonal Courts may be of the opinion that employees deserve the same treatment, regardless of the route the employer chooses. In this respect, the Cantonal Court of Gorinchem held that '(…) the choice to adhere the Cantonal Court should not serve an employer to avoid the protective rules of the Dismissal Decree'.[847] Also, Cantonal Courts may wish for clear criteria in determining serious cause. Article 7:685 DCC and/or the Cantonal Formula lack criteria on determining serious cause. The CWI Handbook on Dismissal, on the other hand, entails clear rules on a just cause for dismissal.

In my opinion, Hansma oversees these aspects when he states that it is illogical for Cantonal Courts to apply the same criteria to the dissolution procedure like the CWI in the BBA 1945-procedure.[848] He is correct that the dissolution procedure was meant for other situations than the BBA 1945. However, in my opinion this argument is no longer valid, in that the dissolution procedure in

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843 See also Loonstra 1997a, p. 48.

844 See above under § 16.4.1 and § 18.4.2.

845 For example, see Ktg. Zwolle 10 juni 1994, JAR 1994/141; Ktg. Utrecht 2 juli 2004, JAR 2004/201.

846 Tjong Tjin Tai en Veling 2005, p. 159, referring to Teuben 2005, p. 20, 102, 318 and 320.

847 Ktg. Gorinchem 26 augustus 2004, Prg. 2004, 6299. See also Ktg. Heerlen 9 maart 2005, JAR 2005/125, rov. 7.3.1. See also Van Minnen 2003, p. 380.

848 Hansma 2005, p. 46 and 47.

time has become the *alternative* route for the BBA 1945-procedure. This applies all the more so after several attempts of the legislature to make the BBA 1945 the main route have failed.[849] In my opinion, to the extent the BBA 1945-procedure and the dissolution procedure are alternative routes, and the intent behind both procedures is to provide employees just cause protection, without the possibility for employers to trade off this protection, employees in dissolution procedures deserve the same treatment.[850]

Heinsius' argument, that if Cantonal Courts will apply the rules of the Dismissal Decree to the dissolution procedure, this will lead to insecurity for employees,[851] in my opinion, is unfounded. Rather, when Cantonal Courts apply *different* criteria in determining serious cause – which, in practice, appears to be the case – *this* will lead to insecurity for employers and employees. Instead, when the Cantonal Court applies the same criteria as the CWI, this will give insight on which criteria Cantonal Courts – uniformly – apply to requests based on economic circumstances. On the other hand, the legislature cannot ignore that employers apparently are in need of other criteria for dismissal, and that Cantonal Courts respond to this need. In effect, this cry for more flexible law already induced the legislature to reconsider the principle of seniority as a criterium for dismissal.[852] This raises the question whether courts *or* the legislature must respond to the cry of employers for – more – flexible law.

18.5.2.2 Unsatisfactory performance

After 1954, a large category embraced requests based on unsatisfactory performance. The *rejections* were also the highest in this category. Courts, in other words, do not easily assume this ground.[853] As mentioned above, the CWI roughly distinguishes between behavior for which an employee is not to blame (incapacity), and behavior for which he is to blame (misconduct).[854] Cantonal Courts tend to make a similar distinction between incapacity – whether or not due to illness – and misconduct. In general, misconduct is brought forward as an *urgent cause* in dissolution procedures, which is discussed in-depth in paragraph 18.4 above.[855] In discussing a *change of circumstances* the focus in this paragraph, therefore, will be on the employee's *incapacity*, distinguishing between (i) incapacity in general; and (ii) incapacity, due to illness.

(i) Incapacity in general

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849 Scholtens statistiek ontbindingsvergoedingen 2003 (I), p. 3.

850 See also Van Minnen 2003, p. 388; Van Beek 2004, p. 32.

851 Heinsius 2004, p. 112.

852 Zondag 2005b, p. 465-467.

853 See also above under § 18.5.1 under iii.

854 See above under § 16.5.

855 See also Verhulp en Zondag 2003, p. 1-4 making a same distinction. For misconduct, i.e. behaviour outside the job for which an employee is convicted under penal law, see Koevoets 2006. See also Loonstra, Koevoets en Zondag 2003, p. 213; Van Luyn en Van Poelgeest 2005, p. 28-34. For an in-depth discussion on dissolutions based on urgent cause, see above under § 18.4.

Cantonal Courts, in general, agree that an employment agreement constitutes an obligation on the part of the employee to perform to the best of one's ability (*inspanningsverbintenis*). The fact that the employee had not reached his target, thus, does not automatically constitute a just cause for dismissal,[856] because an employment agreement does *not* entail an obligation to produce a certain result (*resultaatsverbintenis*).

In this respect, Cantonal Courts consider factors in granting requests as whether

- the employer is able to provide objective criteria for unsatisfactory performance;[857]
- the employee has been warned;[858]
- performance interviews have taken place;[859]
- the employer shortly after the alleged unsatisfactory performance, notified the employee of the unsatisfactory performance;[860]
- the employer notified the employee in clear wordings and in a proper way, in which respect the employee performed unsatisfactorily;[861]
- the employer allowed the employee to react;[862]
- the employer allowed the employee to improve himself;[863]
- the employer and the employee made a realistic plan in improving the employee's performance, and the employer offered guidance, including job training and/or occupational retraining;[864]

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856 For example, see Rb. Zwolle 7 oktober 1992, JAR 1993/7; Ktg. Amersfoort 5 februari 1997, JAR 1997/123. See also Buijs 2003, p. 102.

857 For example, see Rb. Zwolle 7 oktober 1992, JAR 1993/7; Ktg. Utrecht 27 november 1992, JAR 1993/22; Ktg. Gouda, 22 juni 1993, JAR 1993/168; Ktg. Amsterdam 12 mei 1995, JAR 1995/120; Ktg. Amersfoort 5 november 1997, JAR 1998/57; Ktg. Alkmaar 13 maart 1998, Prg. 1998, 4981; Ktg. Rotterdam 14 april 2003, JAR 2003/121; Ktg. Amsterdam 22 januari 2004, JAR 2004/54.

858 For example, see Ktg. Amsterdam 21 juli 1993, JAR 1993/201; Ktg. Nijmegen 10 december 1993, JAR 1994/21; Ktg. Zwolle 12 juli 1995, JAR 1995/171; Ktg. Alkmaar 4 juli 1997, JAR 1997/169; Ktg. Deventer 6 november 2001, JAR 2001/246; Ktg. Emmen 29 augustus 2001, JAR 2001/178; Ktg. Rotterdam 4 januari 2005, JAR 2005/40.

859 For example, see Ktg. Zevenbergen 22 november 1995, Prg. 1996, 4487; Ktg. Alkmaar 4 juli 1997, JAR 1997/169; Ktg. Breda 26 februari 2002, JAR 2002/86.

860 For example, see Ktg. Eindhoven 2 oktober 2000, Prg. 2000, 5562; Ktg. Rotterdam 31 mei 2001, JAR 2001/165; Ktg. Haarlem 31 juli 2002, JAR 2002/191; Ktg. Alkmaar 9 augustus 2002, JAR 2002/210.

861 For example, see Ktg. Gouda 22 juni 1993, JAR 1993/168; Ktg. Rotterdam 11 oktober 1994, JAR 1994/239; Ktg. Utrecht 16 maart 1995, JAR 1995/128; Ktg. Zwolle 12 juli 1995, JAR 1995/171; Ktg. Zevenbergen 22 november 1995, Prg. 1996, 4487; Ktg. Eindhoven 8 april 1998, Prg. 1998, 4980; Ktg. Amsterdam 12 februari 1997, JAR 1997/124; Ktg. Delft 25 januari 2001, JAR 2001/70.

862 For example, see Ktg. Amsterdam 12 februari 1997, JAR 1997/124.

863 For example, see Ktg. Eindhoven 26 juni 2001, Prg. 2001, 5712; Ktg. Rotterdam 4 januari 2005, JAR 2005/40.

864 For example, see Ktg. Groningen 30 september 1996, JAR 1996/222; Ktg. Hilversum 15 juli 1998, JAR 1998/187; Ktg. Utrecht 15 februari 1999, JAR 1999/54; Ktg. Delft 25 januari 2001, JAR

- the employee made efforts in improving himself or, in contrast, neglected reasonable instructions in this respect;[865]
- the employee fulfilled a role model within the company;[866] and
- the dismissal must be considered as disproportionate based on the employee's age, years of service and chances on the labour market.[867]

Additionally, Cantonal Courts consider factors as whether the request has been filed shortly after the probationary period expired,[868] the employer recently has extended the employment agreement,[869] the employer has been given several raises,[870] or, the employee has been promoted shortly before the alleged unsatisfactory performance.[871] In two aspects, the foregoing practice resembles the practice of the CWI. Like the CWI, Cantonal Courts (i) require of employers to have given employees the opportunity to improve themselves, and to make realistic plans in this respect;[872] and (ii) require of employers to search for possibilities to replace the employee in another position.[873]

(ii) Incapacity due to illness

As from 1 January 1999, Cantonal Courts must ascertain that the reason for dismissal is not related to a prohibition on dismissal.[874] This new rule under Article 7:685 DCC was to prevent employers from avoiding prohibitions on dismissal through the dissolution procedure. Prohibitions of dismissal, being notice requirements, in principle, apply to a unilateral termination of employment only. Article 7:685 DCC concerns a *dissolution* of the employment agreement to which prohibitions on dismissal, in principle, do not apply. As from 1 January 1999, this has changed. It is noteworthy to mention that the prohibition on dismissal in dissolution procedures is only *one* of the

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2001/70; Ktg. Haarlem 3 april 2003, JAR 2003/117; Ktg. Lelystad 1 maart 2004, JAR 2004/91; Ktg. Rotterdam 3 april 2006, RAR 2006/93.

865 For example, see Ktg. Rotterdam 8 september 1997, JAR 1997/252; Ktg. Utrecht 19 februari 1997, JAR 1997/75.

866 For example, see Ktg. Middelburg 13 december 2001, JAR 2002/25.

867 For example, see Ktg. Utrecht 27 november 1992, JAR 1993/22; Ktg. Groenlo 15 november 1995, JAR 1996/3; Ktg. Amsterdam 17 juni 2005, JAR 2005/177; Ktg. Bergen op Zoom 25 oktober 2006, Prg. 2006, 185.

868 For example, see Rb. Zwolle 17 juni 1992, JAR 1992/61.

869 For example, see Ktg. Gouda 22 juni 1993, JAR 1993/168.

870 For example, see Ktg. Utrecht 16 maart 1995, JAR 1995/128; Ktg. Alphen aan den Rijn 26 augustus 1997, JAR 1997/197; Ktg. Rotterdam 13 augustus 1998, JAR 1998/180.

871 For example, see Ktg. Amsterdam 2 april 1999 JAR 1999/95; Ktg. Deventer 20 februari 1998, JAR 1998/62; Ktg. Zaandam 16 april 1993, JAR 1993/212.

872 See Art. 5:1.1.c of the Dismissal Decree. See also Blom 2002, p. 23; Buijs 2003, p. 100 and 101.

873 For example, see Ktg. Amsterdam 12 mei 1995, JAR 1995/120; Ktg. Amsterdam 12 februari 1997, JAR 1997/124; Ktg. Apeldoorn 30 maart 1998, Prg. 1998, 4973; Ktg. Deventer 20 februari 1998, JAR 1998/62.

874 For a discussion of the prohibitions on dismissal in general, see above under § 14.4.5.

circumstances in determining serious cause.[875] Legislative history shows that Cantonal Courts, in principle, need to *reject* the request in case of a prohibition on dismissal, however, they must *grant* the request if the *totality of circumstances* constitute serious cause, which necessitates to dissolve the employment agreement on short notice.[876]

This Section focuses on the prohibition on dismissal of Article 7:670.1 DCC, prohibiting employers to dismiss an employee *during* the first two years of illness. Literally, it, thus, does not protect an employee *because* of illness. However, in effect, it protects an employee against dismissal based on *any* ground during this period, therefore, the employee is protected against dismissal because of illness during this period as well.[877] *After* the two years of illness, Article 7:670.1 DCC, in principle, no longer applies. Article 7:685.1 DCC, on the other hand, requires of Cantonal Courts to examine whether the request is *related* to a prohibition on dismissal, therefore, broadens the scope of Article 7:670.1 DCC. Hence, the duty to examine whether a dismissal is *related* to a prohibition on dismissal, in effect, sees to dismissals *during* and *because* of illness.[878] Consequently, I will make a distinction in discussing case law between (a) requests during the period of two years of illness; (b) requests after the period of two years of illness; and (c) requests, in which the employer asks the Cantonal Court to dissolve the employment agreement *because* of illness.

(a) Dissolution during the first two years of illness

Cantonal Courts, in general, strictly apply the prohibition on dismissal during the two years of illness.[879] On the other hand, Cantonal Courts are free to *grant* a request when the totality of circumstances constitute a serious cause that necessitates to dissolve the employment agreement on short notice. This explains the decisions of the Cantonal Courts of Deventer and Alphen aan den Rijn, which dissolved the employment agreement with an ill employee – although Article 7:670.1 DCC applied – because of the fact that their positions had become redundant due to economic circumstances.[880] The aforementioned courts held that Article 7:670.1 DCC applied to situations only (i) in which an

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875 TK 25 263, 1996-1997, No. 3, p. 32. See also Van Kempen en Ridderbroek 2006, p. 3-5.

876 EK 1997-1998, 25 263, No. 132d, p. 15. Hoogendijk 1999, p. 208-212; Bijkerk-Verbruggen 2005, p. 89; Diebels 2005, p. 178.

877 Hoogendijk 1999, p. 177 and 178, referring to the legislative history of Art. 7:670.1 DCC.

878 Diebels 2005, p. 178.

879 For case law, see A.M. Luttmer-Kat, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Art. 7:685 BW (DCC) § 8.3. See also Van Kempen en Ridderbroek 2006, p. 6.

880 For example, see Ktg. Heerlen 30 mei 2001, JAR 2001/134; Ktg. Deventer 19 februari 2004, JAR 2004/57; Alphen aan den Rijn 6 april 2004, JAR 2004/102. See also Bijkerk-Verbruggen 2005, p. 89 and 90; Van Kempen en Ridderbroek 2006, p. 7. In contrast, the Cantonal Court rejected the request, regardless of economic circumstances, arguing (i) that the employee could be replaced in another – adjusted – position (Ktg. Brielle 29 april 2005, JAR 2005/140); and (ii) that the employer, in effect, asked for a dissolution of the employment agreement *due* to illness (Ktg. Den Bosch 5 juli 2006, JAR 2006/179).

employer asked for dissolution of the employment agreement *because* of illness; (ii) the employee was not capable to defend himself, due to this illness in the dissolution procedure; and (iii) the illness was caused during the performance of the employee's duties. This does not derive from legislative history, however.[881] From case law further derives, that in determining whether the totality of circumstances justifies a dismissal of the ill employee during the first two years of illness, a Cantonal Court, in general, rejects the request when it is of the opinion that the employer has not seriously examined whether he is able to replace the employee in another – adjusted – position.[882] Only incidentally, Cantonal Courts grant requests, although serious cause, in effect, is lacking.[883] In these cases, the Cantonal Court compensates the absence of serious cause by a severance payment. The legislature, however, requires serious cause without the possibility for the employer to trade off serious cause. The legislature, as a matter of fact, codified the requirement to replace an ill employee in another – adjusted – position under the new Article 7:658a DCC. Hence, under this Article, the employer must make serious efforts to reintegrate the ill employee.[884]

Also, the prohibition on dismissal of Article 7:670.1 DCC applies to *situational* illness. The latter, in general, refers to illness as a direct consequence of a conflict between colleagues, which makes the employee incapable of performing work with the employer in question.[885] Hence, it is incorrect to state that a dissolution is justified *per se* in case of situational illness, due to the fact that Article 7:670.1 DCC, in principle, applies.[886] Consequently, employers generally state that the situational illness has resulted in a permanent and irreparable breach of trust. The latter, in itself, constitutes serious cause which, in turn, makes the decision in accordance with legislative history.[887] This explains that Cantonal Courts dissolve employment agreements during the first

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881 EK 25 263, 1997-1998, No. 132d, p. 15. See also Verburg 1998; Bijkerk-Verbruggen 2005, p. 89.

882 Scholtens 2001b, p. 64-66, referring to Ktg. Utrecht 28 augustus 1992, JAR 1992/91; Ktg. Utrecht 29 april 1999, JAR 1999/111; Ktg. Amsterdam 13 oktober 1999, JAR 1999/258. In addition, see Ktg. Eindhoven 23 oktober 2002, JAR 2002/284. See also Buijs 2005a, p. 32-33.

883 For example, see Ktg. Apeldoorn 18 december 2003, JAR 2004/4. See also above under § 18.3 under 1999.

884 For an in-depth discussion of this Article, see above under § 16.7.

885 Hoogendijk 1999, p. 175; De Groot 1995, p. 5. See also GH Arnhem 11 november 2003, JAR 2003/292, disapproved by Verspagen. See Verspagen 2004. For a reaction on Verspagen, see Heida 2005.

886 Incorrect, therefore, is the decision of the Cantonal Court of Zwolle (Ktr. Zwolle 7 oktober 2005, LJN AU4462). In contrast, see Ktr. Maastricht 17 november 2005, JAR 2006/110, recognizing the employee's situational illness on the one hand, but rejecting the employer's request to dissolve the employment agreement on the other due to its failure to deliberate with the employee on how to improve the employee's attitude, either or not through a mediator. See also Ktg. Tiel 27 januari 2006, JAR 2006/78.

887 For example, requests were granted by Ktg. Boxmeer 6 juli 1993, Prg. 1994, 4115; Ktg. Alkmaar 15 april 1992, Prg. 1992, 3725; Ktg. Arnhem 6 februari 1997, JAR 1997/60; Ktg. Delft 4 maart 2004, JAR 2004/88. For an in-depth discussion of requests/dissolutions based on breach of trust, see below under § 18.5.2.3.

two years of illness, when the illness is *situational*.[888] When the employee is not to blame for the breach of trust – or the employer has not behaved as befits a good employer – Cantonal Courts tend to compensate this by a severance payment.[889] Consequently, one raises the question whether a breach of trust, which has led to the employee's incapacity – e.g. the *situational* illness of the employee – for which the employee is *not* to blame, at the same time, can constitute a serious cause.[890]

The prohibition on dismissal during illness does *not* apply, if the employee structurally refuses to cooperate with the efforts of the employer to reintegrate the employee.[891] Also, the prohibition on dismissal during illness does not apply in case of an urgent reason for dismissal.[892] In fact, employers generally ask for a (conditional) dissolution based on urgent cause if an ill employee structurally refuses to comply with reasonable instructions of the employer, in effect, making it impossible for the public body, i.e. the Social Security Agency (*Uitvoeringsinstituut Werknemers Verzekeringen* or *UWV*) to determine whether the employee is ill. In general, this takes place during the two years of illness. In principle, these employees enjoy just cause protection, to the extent Cantonal Courts *consistently* apply case law on summary dismissals regarding ill employees, as discussed below.[893]

In *Vixia/Gerrits (2004)*,[894] the Netherlands Supreme Court held that *absent* other circumstances a frequent violation of reasonable instructions to determine the existence of the illness of the employee *alone* does not constitute an urgent cause for dismissal. Primarily, the employer must suspend salary until the employee meets the employer's instructions.[895] However, in *Ouled L'Kadi/Albert Heijn (2004)*,[896] the Netherlands Supreme Court held that when *other* circumstances occur, a frequent violation of reasonable instructions can constitute an urgent cause for dismissal, *without* the obligation for the employer to first suspend the employee's salary. These other circumstances derive from decisions of the Netherlands Supreme Court,[897] i.e. (i) a summary dismissal must remain an ultimum remedium; and (ii) the court must take into

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888 Rutgers 2003, p. 119. For case law, see Hoogendijk 1999, p. 218 and 219; Holtzer 1998; Boertien en Schaink 1996, p. 7; Boertien en Schaink 1999, p. 10.

889 For example, see Ktg. Alkmaar 15 april 1992, Prg. 1992, 3725; Ktg. Boxmeer 6 juli 1993, Prg. 1994, 4115; Ktg. Arnhem 28 mei 1999, JAR 1999/136; Ktg. Amersfoort 25 februari 2003, JAR 2003/74.

890 For case law, I refer to Ktg. Amersfoort 29 juni 1988, Prg. 1989, 3094; Ktg. Amersfoort 2 september 1992 en 17 februari 1993, Prg. 1993, 3830; Ktg. Amsterdam 10 november 1992, Prg. 1992, 3773. For the answer to the question, I refer to § 18.5.2.3.

891 Art. 7:670b.3 DCC. For an in-depth discussion of this Article, see above under § 16.7.

892 See Art. 7:670.1 DCC.

893 See above under § 18.4.

894 HR 8 oktober 2004, JAR 2004/259 (*Vixia/Gerrits*).

895 Kronenburg-Willems 1996, p. 1519.

896 HR 24 december 2004, JAR 2005/50 (*Ouled L'Kadi/Albert Heijn*).

897 See also Bijkerk-Verbruggen 2005, p. 88.

consideration *all* circumstances of the case in determining an urgent cause.[898] In the case of Ouled L'Kadi, the employer already had suspended the employee's salary and had warned the employee for a last time that when the employee persisted in ignoring instructions without any reasonable ground, a summary dismissal would follow.[899] Finally, when an employer and employee differ on whether the employee is (not) ill, the decisions of the Netherlands Supreme Court of 1974, 1982 and 1991 apply. Based on these decisions, it is determinative whether the employee *actually* – thus, apart from the UWV's judgment – is capable of performing work. When afterwards it turns out that the employee is capable of performing work, it is determinative whether the employee reasonably might have believed that he was not able to work. The Netherlands Supreme Court affirmed these decisions in 1991.[900] *In conclusion*, so long as Cantonal Courts act in accordance with these cases, private-sector employees – who are ill – enjoy just cause protection under Article 7:685 DCC.[901] To the extent Cantonal Courts compensate the absence of serious cause by a severance payment, i.e. grant requests in these cases, although serious cause, in effect, is lacking, private-sector employees lack just cause protection.

(b) Dissolution *after* two years of illness

Article 7:670.1 DCC raises the question whether an employee automatically can be dismissed *after* the period of two years of illness. The general opinion is that Cantonal Courts are free to dissolve the employment agreement.[902] Case law prior to 1953 already showed that courts dissolved the employment agreement in case of long-term illness.[903] Loonstra's 1985 study shows that Cantonal Courts dissolved employment agreements in 80% of cases of long-term illness. Loonstra found it striking that Cantonal Courts in determining serious cause did not require *other* circumstances than long-term illness *alone*.[904] In this respect, it is interesting to look at the practice of the CWI. Under Article 5:2 of the Dismissal Decree, the CWI rejects the request when recovery is possible within 26 weeks *and* it is possible for the employer to offer the employee an adjusted position or other suitable duties in another position.[905] In contrast, *Cantonal Courts* examine whether the employee can be replaced in another – adjusted –

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898 For an in-depth discussion of case law on summary dismissals, see above under § 18.4.

899 For an in-depth discussion of these cases, see Vegter 2005b; Beltzer 2005b; Sagel 2005.

900 HR 6 juni 1975, NJ 1975, 484 (*Motel Maatschappij Holland/Sijstermans*); HR 13 januari 1978, NJ 1978, 433 (*Loullichki/Hoechst Holland NV*); HR 22 januari 1982, NJ 1982, 470 (*Chemlal/Jaarbeurs*); HR 20 september 1991, NJ 1991, 768 (*Van Dam/SVB en RvA*). For a discussion of these cases, see Hoffmans (2) 1991, p. 207-209.

901 For an in-depth discussion of requests/dissolutions based on urgent cause, see above under § 18.4.2.

902 See Rutgers 2003, p. 151; Bijkerk-Verbruggen 2005, p. 90 and 91. See also *De Volkskrant 10 January 2006*, p. 9, referring to a research in assignment of the STAR.

903 See above under § 18.5.1 under (i).

904 Loonstra 1985, p. 354.

905 See above under § 16.7.

position after two years of illness in a *minority* of cases only.[906] In the majority of cases, Cantonal Courts compensate the absence of serious cause by severance payments. This is contrary to the Cantonal Formula. The latter determines that before granting a severance payment in case of long-term illness, the Cantonal Court must first determine whether replacement is impossible.[907]

When this is impossible, only then Cantonal Courts must focus on the questions 'at whose risk the illness is' and 'who is to blame'. In this respect, Cantonal Courts, in general, examine whether the illness is due to circumstances on the job and/or whether the employer has made serious efforts to reintegrate the employee.[908] Because the latter has already been discussed in-depth above under (a), I will focus on the circumstances on the job only. As regards the latter, it can be derived from case law that when the illness is – partly – caused by bad working conditions on the job, this will be compensated by a severance payment.[909] The illness is considered to be at the *risk* of the employer when the employee falls ill, due to circumstances *related* to the job, e.g. an employee is injured during a personnel event organized by the employer, in which the employee must participate.[910] The Cantonal Formula, however, determines that when the *employee* is to blame, e.g. the employee joins a sport event against the employer's will, Cantonal Courts do not compensate the aspect of illness by the severance payment.[911] This may seem strange, because the employee under the same circumstances, in general, remains entitled to his salary under Article 7:629.3.a DCC.[912] On the other hand, under Article 7:611 DCC an employee must at all times behave as befits a good employee, in that his behavior will not result in illness or that he avoids the risk to become ill to the least possible, which aspect may be considered in determining the *size* of the severance payment.[913] Besides a severance payment under Article 7:685 DCC, the employee can, too, ask for a severance payment on the basis of the Articles 7:658 DDC and 7:611 DCC in a separate procedure. Under *Article 7:658 DCC* a

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906 For example, see Ktg. Zutphen 20 april 2000, JAR 2000/158, which dissolved the employment agreement with a severance payment after it had examined that reintegration was not realistic.

907 Toelichting Aanbeveling 3.4 Kantonrechtersformule in Tekst & Commentaar Arbeidsrecht (2006): Bijlage 2.

908 Van Slooten 2001a, p. 43 and 44; Vegter 2002; Asscher-Vonk 2003, p. 216; Heerma van Voss 2005a, p. 72. For case law, see Ktg. Utrecht 17 januari 1992, Prg. 1992, 3772; Ktg. Utrecht 11 mei 1999, JAR 1999/269; Ktg. Gouda 10 april 2003, JAR 2003/116; Ktg. Apeldoorn 18 december 2003, JAR 2004/4.

909 For example, see Ktg. Rotterdam 29 mei 1998, JAR 1998/173; Ktg. Rotterdam 11 december 2002, JAR 2003/61.

910 See Sap 2000, referring to Rb. Utrecht 3 september 1997, JAR 2000/13; Rb. Breda 15 november 1999, JAR 2000/31.

911 Asscher-Vonk 2003, p. 215 and 216.

912 See also TK 1995-1996, 24 439, No. 5, p. 61 and No. 6, p. 74; EK 1995-1996, 24 439, No. 134a, p. 30 and No. 134b, p. 48. For an in-depth discussion of Art. 7:629.3.a. DCC, see Willems 2005; Hoogendijk 1996, p. 227-233.

913 Hoogendijk 1996, p. 231-233. See also Ktg. Amersfoort 12 december 2001, JAR 2002/34, which held that the employee was not entitled to salary during his illness after getting in a car with a colleague who was drunk *and* without a driver's license.

formal or a substantive employer is responsible for damages, which an employee suffers, due to circumstances on the job, *unless* the employer can prove that the employer met his obligations to behave as befits a good employer in this respect *or* the damages are a result of the employee's malice (*opzet*) or willful recklessness (*bewuste roekeloosheid*).[914] Under *Article 7:611 DCC*, the employee can claim damages he suffered due to circumstances *related* to the job.[915] In general, a procedure under Article 7:611 DCC is excluded after a dissolution procedure. However, claims in which the employee asks for damages due to circumstances on the job or related to the job, generally, are considered as so-called *independent* claims.[916] *In conclusion*, Cantonal Courts must reject a request when serious cause is lacking, which is the case when it is still possible to reintegrate the employee, i.e. to replace the employee in an adjusted or another position. From case law it can be derived that Cantonal Courts often compensate the absence of serious cause by a severance payment. These employees do not obtain just cause protection according to the legislature's intent.

(c) Dissolution *because* of illness

Literally, the prohibition on dismissal does not apply when the employer files a request *between* periods of illness. Employers file these requests when the employee is frequently ill. As mentioned above, Article 7:685.1 DCC broadened the scope of Article 7:670.1 DCC, in that Cantonal Courts must ascertain that the request is not *related* to a prohibition on dismissal. This implies that an employee cannot be dismissed *during* and *because* of illness. Consequently, Cantonal Courts are reluctant to dissolve an employment agreement *becaus*e of illness.[917] From case law it can be derived that Cantonal Courts, in fact, only seem willing to dissolve the employment agreement *because* of illness when the employer substantiates that the frequent absence *severely* frustrates the operation of the company and/or the frequent absence requires unreasonable efforts by

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914 Under HR 20 september 1996, NJ 1997, 198, JAR 1996/203 (*Pollemans/Hoondert*) and HR 11 september 1998, NJ 1998, 870 (*Van der Wiel/Philips*) these exceptions, in effect, are a dead letter. For an in-depth discussion of these cases, see Loonstra en Zondag 2003, p. 49-55. For a discussion of this term in private law in general, see Haak en Koot 2004.

915 HR 22 januari 1999, NJ 1999, 534, JAR 1999/44 (*S/Stichting Reclassering*); HR 12 januari 2001, JAR 2001/24 (*Vonk/Van der Hoeven*); HR 9 augustus 2002, NJ 2002, 235, JAR 2002/205 (*De Bont/Oudenallen*). For a discussion of these cases, see Loonstra 2002, p. 15-21; Loonstra en Zondag 2004, p. 248-254, referring to other authors in this respect as well. For compensation for mental injury on the basis of Art. 7:658 and/or 7:611 DCC or otherwise, see Vegter 2005a, p. 83-171.

916 For case law on this subject and the term independent claims, see below under § 18.6. See also Van Slooten 2001a.

917 Hoogendijk 1999, p. 214, footnote 131, referring to relevant case law. See also Ktg. Den Bosch 28 september 1994, JAR 1994/227; Ktg. Rotterdam 10 november 1995, JAR 1996/21; Ktg. Amsterdam 14 juni 1996, JAR 1996/159; Ktg. Utrecht 18 maart 1997, JAR 1997/80; Ktg. Den Haag 25 juni 1997, JAR 1997/188; Ktg. Haarlem 17 april 2002, JAR 2002/8. See further Boertien en Schaink 1999, p. 6. Most recently, see Ktg. Den Bosch 5 juli 2006, JAR 2006/179. For the latter, see Van Kempen en Ridderbroek 2006, p. 7.

colleagues to establish a smooth operation.[918] This practice of Cantonal Courts – and the CWI[919] – is in accordance with *Bons/Ranzijn (2001)*, in which the Netherlands Supreme Court implicitly held that the termination of employment is justified when the absence of the ill employee severely frustrates the operation of the company and/or his colleagues will be overburdened by performing duties of the colleague in question.[920] Therefore, the idea that under the Act on Equal Treatment Based on a Handicap or Chronic Illness (*Wet gelijke behandeling op grond van handicap of chronische ziekte)* an employer can *never* ask for dissolution of the employment agreement with an employee who is ill, is misplaced.[921]

Overall, I conclude that, in general, employees who are ill for more than two years are lacking just cause protection, to the extent that absence of serious cause is compensated by a severance payment. In all other cases, Cantonal Courts, in general, are reluctant when they are asked to dissolve the employment agreement. Hence, employees during the two years of illness, and those frequently ill, generally enjoy just cause protection according to the legislature's intent.

18.5.2.3 Breach of trust

When the legislature of 1953 allowed dissolutions based on breach of trust, it thought of dissolutions for which no one was to blame. For situations, in which a party was to blame the legislature offered a possibility to file a request based on urgent cause. The latter changed over time. However, what did not change was that the legislature required serious cause.[922] It bears mentioning that the 1953 legislature, too, held that a change of circumstances did not include *any* kind of change of circumstances. Consequently, this implies that not *any* breach of trust constitutes a serious cause.[923] Logically, there was loud protest when Scholtens in 1988 implied that Cantonal Courts as a rule should dissolve the employment agreement when there was breach of trust.[924] Apparently, it was felt by all that *a just cause for dismissal,* as the basic principle under Dutch dismissal law must at all times be respected.[925] Also the VNO-NCW, the Netherlands' largest employers' association, stressed the importance of this principle.[926] Buijs, a

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[918] Hoogendijk 1999, p. 217, footnote 138, referring to relevant case law. See also Ktg. Enschede 19 november 2003, Prg. 2004, 6159; Ktg. Amsterdam 18 september 2006, JAR 2006/249.

[919] For a discussion of the rules the CWI applies in case of illness, see above under § 16.7.

[920] HR 26 oktober 2001, JAR 2001/238 (*Bons/Ranzijn*). See also Rutgers 2003, p. 132.

[921] For the Act, see above under § 14.4.5 and § 16.7.

[922] See above under § 18.3. See also Roeloff 1988, p. 203.

[923] See above under § 18.3.

[924] Scholtens 1989, p. 22-24. For protest, see Ingelse 1989, p. 32-35. See also Roeloff 1988, p. 36-38.

[925] See also Buijs 2005a, p. 23-27.

[926] VNO-NCW 1995.

Cantonal Judge, too, held that based on legislative history,[927] not *any* breach of trust, as Scholtens seemed to imply, automatically constitutes a just cause for dismissal.[928] Scholtens later nuanced his statement, in that 'as a rule', in effect, meant that the employment agreement must be dissolved when based on a change of circumstances it is reasonable and justified to dissolve the employment agreement.[929]

On the other hand, one can only agree with Scholtens that Cantonal Courts almost as a rule grant requests based on breach of trust. When an employee is to blame for breach of trust this is understandable, because in these cases the breach of trust, in general, is caused by misconduct on the part of the employee, which, in itself, constitutes serious cause.[930] However, one can raise the question whether a breach of trust for which the employee is *not* to blame constitutes serious cause. I particularly refer to cases, in which a *non-existent reason* underlies the breach of trust.[931] For example, in its decision of 28 November 1931, the Cantonal Court of Amsterdam dissolved the employment agreement, although the alleged reason of the employer of unsatisfactory performance was *non-existent*. The Cantonal Court dissolved the employment agreement based on the fact that continuation of the employment relationship was not in the interest of the company. This approaches Scholtens's view, because 'why continuing an employment relationship if both parties are in conflict with one another?' Peerenboom at the time, however, considered this decision 'unfair and in violation of Dutch dismissal law that required serious cause'.[932] Why? The answer is simple: an employment agreement can be dissolved when there is serious cause only. Peerenboom held that there was no serious cause. When we look back at the decision of 28 November 1931, the Cantonal Court dissolved the employment agreement based on the fact that to replace the employee in question in the same or another position would severely frustrate the operation of the company. This, in itself, constitutes serious cause. Peerenboom still has a point, however, in that breach of trust was not considered as a serious cause at the time, therefore, the employee could not properly defend himself against the dismissal. In this respect, I refer to the decision of the Court of Appeal of Amsterdam of 13 March 2003 and 5 June 2003, in which the Court held that an appeal of the Cantonal Court's decision was possible, because the

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927 Scholtens 1989, p. 46-48. See also Scholten 2001a, p. 10.

928 See also Buijs 2005a, p. 38, referring to Ktg. Harderwijk 13 november 1984, Prg. 1985, 2247; Ktg. Harderwijk 11 oktober 1995, Prg. 1996, 4492.

929 See also Buijs 2003, p. 104.

930 For example, see Ktg. Wageningen 16 april 1997, Prg. 1997, 4781; Ktg. Haarlem 10 februari 1998, Prg. 1998, 4971; Ktg. Rotterdam 14 februari 2002, JAR 2002/78; Ktg. Hilversum 16 mei 2002, JAR 2002/177; Ktg. Hilversum 16 oktober 2002, JAR 2002/283.

931 This must be distinguished from an *existent* reason for which the employee is not to blame. See HR 29 september 2000, NJ 2001, 560, JAR 2000/223 (*D./Nutricia*). See also above under § 18.4.

932 For the decision of the Cantonal Court of Amsterdam of 28 November 1931, see above under § 18.5.1.

Cantonal Court had violated the fundamental principle of hearing both sides.[933] More specifically, the Cantonal Court dissolved the employment agreement based on breach of trust although *none of the parties* had referred to this ground of dismissal, i.e. both had not brought forward facts and arguments in this respect.[934] In effect, this also happened in the case before the Cantonal Court of Amsterdam of 28 November 1931, to be distinguished from *Franssen/Safe Sun (1986),* in which the Netherlands Supreme Court held that the Cantonal Court *based on the facts that parties had brought forward* ultimately decides whether there is an urgent reason for dismissal or a change of circumstances.[935]

Cantonal Courts, in general, do not examine whether the employment relationship is permanently and irreparably disrupted.[936] A minory only require that the employment relationship be permanently and irreparably disrupted, according to legislative history,[937] in that it makes replacement, in effect, impossible. Under case law, replacement is still possible when the employer is able to restore the employment relationship by making (new) serious efforts either or not through (external) coaching.[938] The *majority* of Cantonal Courts, however, dissolve the employment agreement although serious cause is lacking, compensating its absence by a severance payment, rather than that they reject the request.[939] Scholtens would argue that to replace the employee in the same or another position is without effect when the employment relationship is permanently and irreparably disrupted. Case law, however, shows that the latter is assumed relatively easy. Few courts seriously examine whether it would be an option to replace the employee in the same, adjusted or another position, i.e. whether the employment relationship still could be continued in the same or another setting. In this respect, it bears mentioning, that an employer under Article 7:658a DCC has an obligation to examine whether it is possible to replace the – ill – employee in the same, or another – adjusted – position within

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933 For the eventual possibilities to appeal from the decision of the Cantonal Court under Art. 7:685 DCC, see above under § 18.2.

934 GH Amsterdam 13 maart 2003 en 5 juni 2003, JAR 2003/98.

935 HR 4 april 1986, NJ 1986, 549 (*Franssen/Safe Sun*). For this case, see also above under § 18.2.

936 For example, see Ktg. Eindhoven 26 februari 2002, JAR 2002/110; Ktg. Rotterdam 14 april 2003, JAR 2003/121; Ktg. Nijmegen 6 oktober 2004, JAR 2005/90; Ktg. 21 april 2006, JAR 2006/142; Ktg. Haarlem 13 november 2006, LJN AZ 3130.

937 See above under § 16.6.

938 For example, see Ktg. Den Haag 14 mei 1997, JAR 1997/129; Ktg. Rotterdam 9 juni 1997, Prg. 1997, 4813; Ktg. Den Bosch 26 februari 2002, JAR 2002/110; Ktg. Rotterdam 20 juni 2003, JAR 2003/175; Ktg. Roermond 28 november 2003, JAR 2004/9; Ktg. Delft 4 maart 2004, JAR 2004/88; Ktg. Zwolle 14 maart 2005, JAR 2005/94; Ktg. Tiel 27 januari 2006, JAR 2006/78; Ktg. Haarlem 17 mei 2006, JAR 2006/147; Ktg. Leeuwarden 19 oktober 2006, Prg. 2006, 179; Ktg. Utrecht 31 oktober 2006, JAR 2006/295. One could also argue, that reference should be made to Ktg. Amsterdam 18 september 2006, JAR 2006/249 and Ktg. Maastricht 17 november 2006, JAR 2006/110. However, these cases, in my opinion, rather see to rejections due to the prohibition on dismissal regarding illness, than on rejections due to a failure to reintegrate the ill employee, leading to breach of trust.

939 See Roeloff 1988, p. 204.

one's own company and the company of *another employer*.[940] Apparently, the fact alone, that parties appear in court as conflicting parties and/or an employer's general statement to have lost faith in the employee is a decisive factor for Cantonal Courts to assume that parties are not able to work together in the future.[941]

In conclusion, Article 7:685 DCC requires serious cause for dismissal. Cantonal Courts, however, act differently when it concerns breach of trust for which an employee is to blame, i.e. a non-existent reason underlies the breach of trust. I am of the opinion that Cantonal Courts must make a distinction between (i) breach of trust for which the employee is to blame; and (ii) breach of trust for which the employee is not to blame, i.e. a non-existent reason underlies the breach of trust. In case of the latter, a serious cause is present only when the breach of trust is permanent and irreparable, in that *replacement, in effect,severely frustrates the operation of the company*. In determining the latter, Cantonal Courts must examine whether it is possible for employers to replace the employee, and consistently must reject the request when replacement is possible. This applies to unconditional and conditional requests. As mentioned above, when the Netherlands Supreme Court allowed employers to file a conditional request it did *not* allow for Cantonal Courts to apply less stringent criteria in conditional requests in determining serious cause.[942] By applying less stringent criteria in determining serious cause with regard to breach of trust, Cantonal Courts, in effect, may reinforce a practice, through which the employer automatically will base his request on breach of trust to ensure that the employment agreement will be dissolved.[943] Subsequently, an employer can *make up* a non-existent reason resulting in breach of trust based on which the employment agreement will be dissolved. In my opinion, this *cannot* be qualified as a *justified* dismissal. As Roeloff correctly stated, it is not hard for an employer to force breach of trust, and to consequently call upon this ground to establish dissolution.[944] Although it seems fair that Cantonal Courts reflect the absence of serious cause through severance payments, this is not in accordance with the legislature's intent. With the introduction of Article 1639w, and the severance payment in 1953, the legislature did not intend to offer employers the possibility to trade off the requirement of serious cause by severance payments.[945] Therefore, I conclude that Cantonal Courts which dissolve an employment agreement based on breach of trust for which the employee is not

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940 See above under § 16.7. A statement of the employer that the employee is allowed to sollicitate with related companies is not sufficient. See Ktg. Amsterdam 11 november 2005, JAR 2006/52.

941 For example, see Ktg. Gorinchem 4 augustus 2003, JAR 2003/233; Ktg. Haarlem 15 april 2004, JAR 2004/125; Ktg. Enschede 17 januari 2006, JAR 2006/55.

942 See above under § 18.4.2.

943 Moreover, an employer can add that he is not able to pay a severance payment due to his bad financial position. See Ktg. Apeldoorn 11 december 1996, JAR 1997/41. For an in-depth discussion of this decision, see De Blecourt 1997.

944 Roeloff 1988, p. 202.

945 See above under § 18.3.

to blame, i.e. a non-existent reason underlies this breach of trust, *without* examining replacement, undermine the system of just cause protection.[946]

18.6 Serious cause, a marginal test or conclusive test?

Before drawing *final* conclusions whether or not private-sector employees enjoy just cause protection under Article 7:685 DCC, the question that needs answering first is to what extent Cantonal Courts may apply a marginal test in determining serious cause. The CWI applies a marginal test with regard to requests based on economic circumstances, in that it does not interfere with the employer's policy in respect of the employer's choice of operational requirements. In this respect, it examines whether the employer's choice is fair and reasonable.[947] From case law it derives that Cantonal Courts apply a same marginal test in case of requests based on economic circumstances. A striking example is the decision of the Cantonal Court of Amsterdam of 17 February 2004. The Cantonal Court explicitly stated that 'reorganization, in itself, is justified because an employer, in principle, may run his business as he likes'. This Cantonal Court went one step further than the CWI, because prior to this statement it explicitly held that the employer had not substantiated the financial need to reorganize, nor the fact that the position of the employee had become redundant due economic circumstances. The CWI in such a case rejects the request. The CWI makes one exception only, as from 1 March 2006 with regard to collective dismissals under the WMCO.[948] In all other cases, the CWI requires of the employer to substantiate the economic reasons, the need to reorganize, the number of positions which becomes redundant due to these circumstances, and the necessity of the dismissal of the employee in question. Herewith it does not tread on the employer's freedom of policy. In effect, it simply examines whether the reason is (non) existent. This is consistent with legislative history on just cause protection.[949] Contrary to legislative history, the Cantonal Court of Amsterdam in the aforementioned decision of 17 February 2004 granted a severance payment, compensating the absence of serious cause, and the employer's bad behavior.[950] Personally, I have problems with this decision. The alleged reason did not exist, nor was it clear why the position of the employee needed to end. Nevertheless, the Cantonal Court of Amsterdam granted the request, stating that reorganization, in itself, justifies a dismissal. In this respect, I refer to the CWI Handbook on Dismissal which, in my opinion, correctly states 'that a simple statement of the economic circumstances does not suffice to justify a dismissal'.[951] By no means do I wish to imply that Cantonal Courts

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946 Roeloff 1988, p. 203.

947 See above under § 16.4.1.

948 See above under § 15.1.1. and § 17.2.

949 See above under § 16.4.1.

950 Ktg. Amsterdam 17 februari 2004, JAR 2004/56.

951 CWI Handbook on Dismissal (2006), p. 9-5. See also Ktg. Lelystad 3 mei 2006, Prg. 2006, 107.

must apply a conclusive test (*volle toets*) with regard to economic circumstances, as Zondag advocated in the past. The latter advocated that Cantonal Courts would interfere with the employer's choice for operational requirements to meet the employer's financial need.[952] Contrary to Zondag, I subscribe to the CWI's practice to apply a marginal test in respect of operational requirements (only). In my opinion, Cantonal Courts, like the CWI, too, must examine the existence of the alleged reason.

First, legislative history requires such. Second, *Baijings (1997)* requires of Cantonal Courts to examine the existence of the alleged reason. In brief, the Netherlands Supreme Court requires of Cantonal Courts in a dissolution procedure that the severance payment reflect *all* relevant circumstances of the case, herewith, in effect, instructing Cantonal Courts to consider all relevant circumstances in determining serious cause.[953] This applies all the more so, in that *Baijings* (*1997*) makes it virtually impossible to initiate an action under Article 7:681 DCC based on manifestly unreasonable dismissal after the dissolution procedure, when being dismissed without cause.[954] To understand the foregoing I will discuss *Baijings* (*1997*), and in its progeny, the case law insofar as relevant for this thesis.[955]

In *Baijings* (*1997*), the Cantonal Court had dissolved the employment agreement between Sara Lee/Douwe Egberts N.V. and one of its key executives, Baijings. The Cantonal Court did not include the loss of stock options in the severance payment. The Cantonal Court held that the employee was free to initiate a separate procedure for this issue. The employee filed a new claim with the appropriate court in first instance that rejected the claim. When the attorney-at-law failed to appeal against this decision, Baijings sued his attorney before the District Court. He sued for damages, including the loss of the stock options which, Baijings claimed, would successfully be awarded in appeal based on the principles of fairness and reasonableness. The District Court held that with regard to the loss of stock options the employer indeed had not behaved as befits a good employer. Moreover, the District Court held that the employer had terminated the employment agreement in a manifestly unreasonable manner under Article 1639s (7:681 DCC). The Court of Appeal did not agree with the District Court. It held that the employment agreement was *dissolved* and that it was, thus, impossible to initiate a claim based on manifestly unreasonable dismissal under Article 1639s, which sees to a unilateral termination of the

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952 In brief, Zondag proposed that Cantonal Courts would refer the employer to the Labour Inspectorate to ask for a short-time permit (*werktijdverkorting*) when the financial need was temporary. Zondag 2003b, p. 163. In contrast, I subscribe to the CWI's practice to reject the request, and to point out the possibility of a short-time permit. See CWI Handbook on Dismissal (2006), p. 10-1 to 10-5.

953 Loonstra 2002, p. 21-23; Van Marwijk Kooy 2002, p. 33; De Laat 2002, p. 162; Bodewes 2004, p. 14.

954 See above under § 17.3.2.

955 For an in-depth discussion of HR 24 oktober 1997, NJ 1998, 257, JAR 1997/248 (*Baijings*) and in its progeny the cases that followed hereafter, see the numerous publications referred to in the following footnotes.

employment agreement only. In addition, it held that there is no room for a test based on these principles outside Article 1639s.

The Netherlands Supreme Court overruled the decision of the Court of Appeal. Although it agreed that it was not possible to initiate a claim based on manifestly unreasonable dismissal after a dissolution procedure, this did not per se mean that an employee could *never* initiate a claim based on the principles of fairness and reasonableness after the dissolution procedure. Subsequently, the Netherlands Supreme Court held that the main rule is that the special relationship of the employment agreement and the protective rules surrounding this relationship, in principle, do not allow a second test against the principles of fairness and reasonableness than in exceptional cases only. According to the Netherlands Supreme Court, this means that a Cantonal Court, in principle, must test all relevant circumstances against the principles of fairness and reasonability in the dissolution procedure. Subsequently, it held that the severance payment should fully reflect the result of this test and, therefore, in principle excludes a second test based on the principles of fairness and reasonability. Baijings, nevertheless, was allowed to initiate a new procedure based on the principles of fairness and reasonability, because the Cantonal Court had explicitly stated in the dissolution procedure that he had not considered the loss of stock options in the severance payment, and that Baijings in this respect was free to initiate a separate procedure.[956] In literature, the general opinion on *Baijings* (*1997*) was that for the Netherlands Supreme Court to rule otherwise, in effect, would mean that the Netherlands Supreme Court implicitly would allow an appeal of the Cantonal Court's decision in the dissolution procedure, which is excluded by Article 7:685.11 DCC.[957]

In *Elverding/Wienholts (2001)*, the Netherlands Supreme Court affirmed *Baijngs (1997)*. In this case, Wienholt filed a claim after the dissolution procedure based on exactly the same facts and the same legal cause of action – i.e. the principles of fairness and reasonableness – but on the basis of Article 7:611 DCC this time. The Netherlands Supreme Court rejected the claim with reference to *Baijings (1997)*.[958] Subsequently, the Netherlands Supreme Court partly had rejected a claim of an employee in *Tulkens/FNV(1999)*[959] for the same reason.[960] New in *Tulkens/FNV(1999)* was that the Netherlands Supreme Court, implicitly, left a possibility for the employee to initiate a 611-procedure based on a 'new' fact, which had not been taken into consideration by the Cantonal Court in the dissolution procedure.[961] The Netherlands Supreme Court, implicitly, confirmed

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956 HR 24 oktober 1997, NJ 1998, 257, JAR 1997/248 (*Baijings*), rov. 5.1. See also Grouls 2004, p. 119.

957 See Van Marwijk Kooy 2002, p. 35; Grouls 2004, p. 120; Loonstra en Verburg 2005, p. 53.

958 HR 2 november 2001, NJ 2001, 667, JAR 2001/255 (*Elverding/Wienholts*). See also Van Slooten 2001b; Loonstra 2002, p. 26 and 27; Bodewes 2004, p. 15.

959 HR 5 maart 1999, NJ 1999, 644, JAR 1999/73 (*Tulkens/FNV*).

960 For an in-depth discussion on these cases, see Tjong Tjin Tai en Veling 2005, p. 161-164.

961 See also Loonstra 2002, p. 22 and 23; Bodewes 2004, p. 14.

the latter in *Van Ravenswade/ING (2003)*.[962] Consequently, in *Tjemkes/ABN AMRO (2004)*, the Advocate General held that a claim based on a 'new' fact was admissible only when it was not related to the ground(s) of the dismissal.[963] The Netherlands Supreme Court, however, did not decide on the issue. It rejected Tjemkes' case on formal grounds. Nevertheless, based on these decisions one argued that an employee could initiate a 611-procedure when a court is asked to decide on (new) facts that occurred *after* the decision in the dissolution procedure.[964]

The Netherlands Supreme Court brought more clarity to the question whether and when an employee can initiate a *second* test based on fairness and reasonability in *TNO/Ter Meulen (2002)*,[965] *Guerand/PTT (2002)*[966] and *Vermeulen/Douwe Egberts (2004)*.[967] In brief, the Netherlands Supreme Court held that it is possible to initiate a second fairness and reasonability-test after the dissolution procedure for so-called *independent* claims.[968] According to the Netherlands Supreme Court, these claims – in the aforementioned cases: an invention award, a backpay wage claim and an award based on a redundancy plan, respectively –

(i) have found their basis of existence during the employment agreement;
(ii) are related to the period prior to the termination of employment;
(iii) are not related to the – reason for dismissal and the – manner the employment agreement has come to an end; and
(iv) in principle need not be tested against the principles of fairness and reasonability.[969]

A salient detail in *Guerand/PTT (2002)* was that the Cantonal Court to a certain extent had taken the independent claim into consideration in the severance payment, i.e. the Cantonal Court had taken into consideration that the employer had not behaved as befits a good employer, because he had not paid salary in time. As Baris correctly states, based on *Baijings* (*1997*), the latter *must* be considered in determining the size of the severance payment in a dissolution procedure.[970] Because it strikes as unfair to consider the same facts twice in determining a severance payment, the Netherlands Supreme Court held that the

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962 See Loonstra en Verburg 2005, p. 56.
963 HR 2 april 2004, JAR 2004/114, rov. 12 (*Tjemkes/ABN AMRO*).
964 See also Bodewes 2004, p. 17-19.
965 HR 1 maart 2002, NJ 2003, 210, JAR 2002/66 (*TNO/Ter Meulen*).
966 HR 1 maart 2002, NJ 2003, 211, JAR 2002/67 (*Guerand/PTT*).
967 HR 10 december 2004, NJ 2006, 214, JAR 2005/12 (*Vermeulen/Douwe Egberts*).
968 See also the conclusion of the Advocate General under 11 in HR 2 april 2004, JAR 2004/114 (*Tjemkes/ABN AMRO*).
969 See also De Laat 2002; Verburg 2004, p. 61; Grouls 2004, p. 120 and 121; Baris 2005, p. 133-136.
970 See also Baris 2005, p. 135.

court in a new procedure must take the size of the severance payment in the dissolution procedure into consideration.[971]

In *Visser/Van Lee (2003)*,[972] the Netherlands Supreme Court, with reference to *Guerand/PTT (2002)* and *TNO/Ter Meulen (2002)*, held that a same fact can lead to different claims. By means of example, the Netherlands Supreme Court referred to a backpay wage claim. To the extent the employer by not paying wages has not behaved as befits a good employer, this must be taken into consideration in determining the size of the severance payment. However, this same fact constitutes a so-called independent claim, based on which the employee retains a right to his wage for which he can file a separate claim under Article 7:611 DCC, or any other legal cause of action he prefers.[973] Subsequently, the Netherlands Supreme Court held admissible the employee's claim in *Drankencentrale Waterland/Blakborn (2004)*[974] and *De Zonnehof/Swart (2004)*.[975] In the first case, the employee asked the employer to comply with a contractual obligation to pay a severance payment, and in the second, the employee asked the employer to comply with an obligation to pay a redundancy payment (*wachtgeld*) under the collective bargaining agreement.[976]Also, in *Vermeulen/Douwe Egberts B.V. (2004)* the claim – related to an agreement based on the Redundancy Plan – was held admissible. The claim was denied for being without interest, however.[977]

The main rule, thus, is that a Cantonal Court, in principle, must test all relevant circumstances against the principles of fairness and reasonability in the dissolution procedure. When we examine the exceptions to this rule, the Netherlands Supreme Court made a first exception in *Baijings (1997)*, i.e. in which the *Cantonal Court* explicitly excluded the issue of stock options. Such exclusion, however, was possible in *exceptional* cases only.[978] Apparently, the latter was the reason for the Netherlands Supreme Court to approve the decision of the Cantonal Court in *Intramco (2000*) to include 'the right on stock options' in the severance payment.[979]

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971 HR 2 april 2004, NJ 2006, 212, JAR 2004/112 (*Drankencentrale/Blakborn*). See De Laat 2002, p. 165; Bodewes 2004, p. 18 and 19; R.M. Beltzer, JAR Verklaard 2004, p. 11; Verburg 2004, p. 61; Tjong Tjin Tai en Veling 2005, p. 164 and 165.

972 HR 7 november 2003, NJ 2004, 174, JAR 2003/295 (*Visser/Van Lee*).

973 HR 7 november 2003, NJ 2004, 174, JAR 2003/295 (*Visser/Van Lee*). See also Baris 2005, p. 136 and 137; Grouls 2005, p. 121; Tjong Tjin Tai en Veling 2005, p. 166.

974 HR 2 april 2004, NJ 2006, 212, JAR 2004/112 (*Drankencentrale/Blakborn*). For an in-depth discussion, see Loonstra en Verburg 2005, p. 48-51.

975 HR 25 juni 2004, NJ 2006, 213, JAR 2004/169 (*De Zonnehof/Swart*).

976 See also Bodewes 2004, p. 19 and 20; R.M. Beltzer, JAR Verklaard 2004, p. 11; Grouls 2004, p. 121 and 122; Tjong Tjin Tai en Veling 2005, p. 167.

977 See Loonstra en Verburg 2005, p. 51 and 52; Bodewes 2005.

978 See also the conclusion of the Advocate General under 1 in HR 2 april 2004, JAR 2004/114 (*Tjemkes/ABN AMRO*).

979 HR 15 december 2000, NJ 2001, 251, JAR 2001/14 (*Intramco*).

The Netherlands Supreme Court again seemed to have broadened the exception of *Baijings (1997)* in *Van Ravenswade/ING (2003)*.[980] In the latter, the employee wished to have the employer's accusations on his unsatisfactory performance rectified in the dissolution procedure. Article 7:685 DCC, in principle, is not the appropriate legal cause of action to ask for rectification.[981] Nevertheless, the Cantonal Court had instructed the employer to rectify its accusations in a report. When the employer had not sufficiently met this instruction, the Cantonal Court increased the severance payment to the extent the accusations had damaged the employee's career. In a separate procedure with regard to the rectification, the Netherlands Supreme Court held that the Cantonal Court should have given the employee the opportunity to agree with the increase or, in contrast, the employee should have been given the opportunity to ask for a rectification in a separate procedure. At first sight, it appeared that the Netherlands Supreme Court by doing so, in effect, instructed the Cantonal Court in a dissolution procedure to comply with the employee's wish to exclude a certain issue. This, however, is contrary to the decision of the Netherlands Supreme Court in *Baijings (1997)*. As derives from *Baijings (1997)*, an exclusion can be made by *court* and is *exceptional*. From *TNO/Ter Meulen (2002)* and *Guerand/PTT (2002)*, it can be derived that employees, in fact, can only ask courts to apply the exception in *Baijings (1997)* with regard to *independent* claims.[982] I, therefore, find it difficult to agree with De Laat that the 'instruction' of the Netherlands Supreme Court in *Van Ravenswade/ING (2003)* refers to claims in general.[983] In my opinion, Van Ravenswade's claim was an independent claim,[984] which explains the 'instruction' of the Netherlands Supreme Court. Hence, *Van Ravenswade/ING (2003)* in my view leaves the rule of *Baijings (1997)* intact.

In conclusion, legislative history and the foregoing case law do not allow a marginal test in determining serious cause. Cantonal Courts *must* examine whether the alleged reason by the employer exists, and whether the alleged reason necessarily leads to the dismissal of the employee in question. Only with regard to requests based on economic circumstances Cantonal Courts may apply a marginal test, to the extent it respects the employer's choice for operational requirements. Therefore, when an employer cannot substantiate the reason and/or the necessity of the dismissal, serious cause is lacking, and, subsequently, the request must be rejected.

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980 HR 10 januari 2003, NJ 2003, 231, JAR 2003/39 (*Van Ravenswade/ING*).

981 See conclusion of the Advocate General under 20 in HR 10 januari 2003, NJ 2003, 231, JAR 2003/39 (*Van Ravenswade/ING*). See also Bodewes 2003, p. 6 and 7; De Laat 2003a; Bodewes 2004, p. 17 and 18; Verburg 2004, p. 60-63; Baris 2005, p. 133; Tjong Tjin Tai en Veling 2005, p. 165 and 166.

982 See also Baris 2005, p. 135.

983 De Laat 2003a, p. 90.

984 HR 10 januari 2003, NJ 2003, 231, JAR 2003/39 under 20 (*Van Ravenswade/ING*). See also Bodewes 2003, p. 6 and 7; De Laat 2003a, p. 88-90; Bodewes 2004, p. 17 and 18.Verburg 2004, p. 60-63; Baris 2005, p. 133; Tjong Tjin Tai and Veling 2005, p. 165 and 166.

18.7 Conclusion

Article 7:685 DCC (1639w old) was introduced in the Act of the Employment Agreement of 1907. The legislature's intent was to provide a means to obtain a reasonable solution in case of a conflict of interests between an employer and an employee. Under this Article, a Cantonal Court is allowed to dissolve an employment agreement based on *serious cause*. Initially, the legislature of 1907 required an urgent cause or a change of circumstances, to be applied strictly. The legislature of 1953 broadened its scope by allowing dissolutions based on breach of trust. Moreover, the legislature introduced the possibility for Cantonal Courts to grant a severance payment in case of a change of circumstances. Studies on case law, and case law, show that Cantonal Courts, contrary to the legislature's intent, tend to compensate the absence of serious cause by severance payments, instead of rejecting requests, when serious cause, in effect, is lacking. This regularly takes place with requests based on breach of trust, for which the employee is not to blame. Also, Cantonal Courts grant so-called *conditional* requests, applying less stringent criteria than in unconditional requests, herewith, reinforcing a practice, in which employers abuse Article 7:685 DCC to dismiss an employee without – an urgent – cause. Third, occasionally, Cantonal Courts grant requests based on economic circumstances, although the employer has not substantiated its existence. Last, Cantonal Courts grant requests for employees who are ill for more than two years without seriously examining the possibility whether it is still possible for employers to replace the employee in the same, an adjusted or another position. It should be noted that the number of these cases is unknown, because published cases only show a fraction of the cases Cantonal Courts handle. However, to the extent Cantonal Courts do not consistently apply Article 7:685 DCC according to the legislature's intent, one *can* state that they undermine the system of just cause protection. The fact that Cantonal Courts in these cases grant a severance payment does not *justify* the dismissal. That is that with the introduction of – the severance payment – under Article 1639w, the legislature did not intend to offer employers a possibility to trade off the requirement of serious cause with a severance payment. On the other hand, one can argue that these Cantonal Courts meet the wish of employers for a more flexible dismissal law. This raises the question whether it is up to courts, or the legislature, to find a balance between flexible dismissal law for employers, and just cause protection for employees.

19 Dutch dismissal law just cause protection for private-sector employees?

The Dutch dismissal system, initially, did not differ from the American dismissal system. Private-sector employees with an employment agreement for an indefinite period, too, could be dismissed at will. However, contrary to the American dismissal system, the introduction of the BBA 1945 converted the

Dutch at-will dismissal system into a just cause dismissal system. In general, one assumes that private-sector employees in the Netherlands enjoy just cause protection under the BBA 1945 and the Articles 681 and 685 of Book 7 Title 10 of the Dutch Civil Code. This Chapter shows that only the BBA 1945 – together with the Dismissal Decree and the CWI Handbook on Dismissal – provide(s) just cause protection to private-sector employees, according to the legislature's intent. This is to provide just cause protection *without* the possibility for employers to trade off just cause protection with a severance payment. Article 7:681 DCC on a manifestly unreasonable dismissal makes it possible for employers to trade off restoration of the employment agreement with a severance payment. Moreover, under this Article, a court *can* – but does not have to – consider a dismissal as manifestly unreasonable when an employee is dismissed without cause. Hence, Article 7:681 DCC does not hold a *iusta causa dimissionis*. Article 7:685 DCC, on the other hand, in theory, requires serious cause based upon which an employer can ask the Cantonal Court to dissolve the employment agreement. To the extent Cantonal Courts apply the same criteria as the CWI to determine whether a dismissal is justified, private-sector employees enjoy just cause protection. To the extent Cantonal Courts compensate the absence of serious cause by severance payments, courts undermine the system of just cause protection. This more often than not takes place with requests based on breach of trust. The general assumption that private-sector employees, too, enjoy just cause protection under the Articles 681 and 685 of Book 7 Title 10 of the Dutch Civil Code, therefore, is unjustified.

V AMERICAN AND DUTCH DISMISSAL LAW IN LIGHT OF ARTICLE 4 OF ILO CONVENTION 158

> *'The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.'* Article 4 of ILO Convention 158

20 The International Labour Organization (ILO)

20.1 Introduction

In this Chapter, the American and the Dutch just cause standards will be gauged against the international just cause standard of Article 4 of Convention 158 of the International Labour Organization (ILO).[1] The aim of this Chapter is to gain an impression whether – and to what extent – the American at-will dismissal system and the Dutch dual just cause dismissal system are growing towards this international just cause standard. This brings me to the importance of Article 4, which is partly determined by the (legal) status of the Convention.

To understand its *status*, I will describe why the ILO was established and what its goals are (20.2), its characteristics (20.3), and its core work (20.4). Also, I will pay attention to the process of economic globalization. As demonstrated in the first Chapter, just cause protection is still needed in this ongoing process, which justifies that I will pay attention to ILO's role in this process (20.5). Subsequently, I will pay attention to ILO Convention 158. In the paragraphs 21 and 22, respectively, I will describe the legislative history of ILO Convention 158 to show the *intent* behind the Convention in general, and behind its just cause standard in particular. In paragraph 23, I will examine the importance of ILO Convention 158 of 1982 in light of the ILO Declaration of 1998, which provides fundamental workers' rights. In paragraph 24, I will conclude to what extent the just cause standards under American and Dutch dismissal law meet Article 4 of ILO Convention 158. Finally, in paragraph 25, I will examine *why* the Dutch government wishes to ratify ILO Convention 158, and the need and the chances of ratification of ILO Convention 158 in general. The question whether the Dutch government, in fact, *should* ratify the Convention will be answered in the last Chapter.

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1 For these treaties and sources, see above under § 1.3.2.

20.2 The ILO and its establishment

20.2.1 Constitution

After the First World War, the Allies signed a Treaty of Peace at the (Peace) Conference in Versailles on 28 June 1919 (hereafter Treaty of Versailles of 1919) to have Germany paid for the damages it caused during the war in particular, and to prevent another war in general. To ensure the latter, the League of Nations (*Volkenbond*) and the International Labour Organization were created by the Treaty. The task of the League of Nations was to keep world peace in general, ILO's task was to promote social peace. The latter was considered a prerequisite for universal peace and was based on the belief that social peace abolishes the danger of military adventures, being used as a diversion from domestic difficulties.[2] Part XIII of the Treaty of Peace of Versailles held the Constitution of the ILO (Articles 387-426). It was prepared by the tripartite Commission on International Social Legislation, which was set up by the Allied countries in the Peace Conference for the purpose of drafting the provision of an 'organization of work'. The Peace Conference adopted the Constitution in two stages, on 11 and 28 April 1919.[3] This Conference, too, was composed of representatives of workers' and employers' organizations, hence, not only of government representatives. In brief, ILO's task under the Constitution was to institute a system of international labour legislation through the creation of uniform and universal minimum labour standards for workers that would amount to fair competition between countries.[4]

The wish for international labour legislation dates back to the nineteenth century. The International Association for the Legal Protection of Workers[5] already prepared the Berne Conventions in 1906, the world's first two multilateral labour conventions, prohibiting the use of white phosphorus and night work of women in industry, respectively. In fact, this Association, a private organization, is seen as the predecessor of the ILO, but had been dependent on diplomatic channels for the adoption of proposals. The ILO, instead, became an international *public* organization that was able to commit their governments on the subjects agreed upon.[6] The ILO gained support of the international community, as reflected through the Nobel Peace Prize it was awarded in 1969.[7] The first time the existence of the ILO was at stake was with the fall of the Berlin Wall in 1989, when the Communist world began to

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2 Valticos 1969 (1996), p. 395; Raetsen 1979, p. 11; Boonstra 1996, p. 11.

3 The principle of tripartism is the most distinguishing characteristic of the ILO. For a discussion of this principle, see below under § 20.3.2.

4 Thomas 1921 (1996), p. 261; Feis 1927 (1996), p. 305; Valticos 1969 (1996), p. 395-396; Raetsen 1979, p. 11; Ghebali 1989, p. 8-10 and 62; Swepston 1994, p. 1; Boonstra 1996, p. 11; Devlin 2001, p. 366. See also www.ilo.org

5 See also above under § 1.3.1.

6 Thomas 1921 (1996), p. 264; Ghebali 1989, p. 4; Swepston 2001, p. 135.

7 Van der Ven (2) 1979, p.38; Valticos 1996, p. 476.

crumble. The harmonization of a bipolar world, in effect, was the main raison d'être for the ILO, and some even said that ILO's days had passed.[8] In pursuance hereof, the ILO Director-General, Michel Hansenne, in 1994, when observing the 75th anniversary of the ILO called for a new approach in his Report *Defending Values, Promoting Change – Social Justice in a Global Economy: An ILO Agenda*. Hansenne stressed the need for refocusing ILO's standard setting activity, and for the future to focus on fundamental principles related to human rights to combat the negative effects of the process of economic globalization on workers.[9] Eventually, this initiative resulted in the Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 (ILO Declaration of 1998).[10] With this Declaration, as Sybesma-Knol states, the ILO began its third life,[11] adjusted to the challenge of the 21st century, that of globalization,[12] whereby its main goal remained standard setting, to create social peace and to regulate international competition through international labour standards.[13] In fact, through the ILO Declaration of 1998 the ILO *re*-established its role as world leader in the social field.[14] Already, in 1921, the first Director-General of the ILO – Albert Thomas – wondered what the ILO intended to become

> '(…) the International Labour Organization might (…) be nothing but a bureaucratic institution without real authority. (…).' [on the other hand, he continued]: '(…) it may (…) command the attention of governments; its advice and intervention may be sought; its operations may furnish the workers whom it protects (…). A common spirit may be created, which will animate if room within. It may be the centre of a real and intense international life.'[15]

In 2007, we look back at what the ILO *has* become, an international organization with 178 member states, and acknowledged as the international keeper of social norms.[16]

20.2.2 Goals

The ILO has instituted a system of international labour legislation. According to the main principles of the Constitution, these serve to amount to fair competition between countries, and to establish social peace through working conditions. Hence, the International Labour Conference (hereafter also Conference),

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8 Swepston 1994, p. 17.

9 Smyth 1994, p. 49; Sybesma-Knol 1999, p. 57; Cloutier 2001, p. 8.

10 Kellerson 1998, p. 223-224. Sybesma-Knol 1999, p. 58.

11 First life after World War I; Second life after World War II.

12 Sybesma-Knol 1999, p. 58.

13 Sybesma-Knol 1999, p. 58.

14 Gould 2001, p. 11.

15 Thomas 1921 (1996), p. 263 and 270 and 271.

16 See also below under § 20.5.2.

primarily focused on minimum labour standards for workers. This changed through the Declaration of Philadelphia of 1944, in which the Conference reaffirmed the fundamental principles of the Constitution, however, influenced by the Second World War, paid attention to human rights as well.[17] In line with this broadened objective, the thought was that peace is not possible in a world where one cannot speak freely, and where one is subject to discrimination.[18] Additionally, in 1998, the Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The latter, too, was a reaffirmation by the ILO's government, employer and worker constituents of central beliefs on fundamental principles as set out in the organization's Constitution, but this time in light of the process of economic globalization.[19] ILO's primer goals remain(ed) to regulate international competition and to establish social peace.[20]

20.2.3 Structure

From the moment of its establishment, member states of the ILO – inspired by fear for another war and unfair competition – were willing to accept international labour standards for workers worldwide. From the start, the intent was to have international labour standards adopted by a Conference, consisting of delegates from all member states,[21] designed to be the legislative assembly of the new organization, responsible for the drafting, adoption and supervision of international labour standards.[22] Consequently, Article 2 of the ILO Constitution provides for an International Labour Conference consisting of representatives of state governments, employers' and workers' organizations to decide on the adoption of proposals,[23] by means of Conventions and Recommendations.[24] Through this tripartite representation it, in effect, aims to build a 'reality check' into its standards.[25] As Swepston states

> '[it] increases the likelihood that ILS [International Labour Standards: VA] (…) will take into account the problems workers face, the capacity of employers to comply, and the possibilities that governments will adopt the regulatory and

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17 For an in-depth discussion of the Declaration of Philadelphia (1944), see Boonstra 1996, p. 14-19. Ghebali 1989, p. 61 and 62; Sietaram 2001, p. 22. See also below under § 20.4.4.

18 Protection against unjustified dismissal, ILO 1995, p.138. See also Ghebali 1989, p. 7 and 61-66; Swepston 2001, p. 135; Rogovsky and Sims 2002, p. v and 1.

19 For an in-depth discussion of the ILO Declaration of 1998, see below under § 20.5.3.

20 Sybesma-Knol 1999, p. 55; Swepston 2001, p. 136.

21 Thomas 1921 (1996), p. 261-263.

22 Article 19 of ILO Constitution. See also Ghebali 1989, p. 150; Betten 1993, p. 17; Boonstra 1996, p. 24. Since the Second World War, the Conference has authority in respect of admission of new members and constitutional amendments as well. See Ghebali 1989, p. 150 and 151.

23 See also Article 19 of the ILO Constitution. Sybesma-Knol 1999, p. 65 and 66.

24 Raetsen 1979, p. 19 and 20; Boonstra 1996, p. 24 and 25.

25 Rogovsky and Sims 2002, p. 6.

supervisory systems necessary to implement the standards on the national level.'[26]

The *International Labour Conference* primarily is considered as the *legislative* body of the ILO. In fulfilling its task, it annually meets in June.[27] Besides, it discusses the Annual Report of the Director-General,[28] and devotes an essential part of its debates to a general discussion on global social policy, based on the Annual Report of the Director-General. In fact, in the course of time, the Conference has become considered as a 'world parliament of labour', in which social and labour questions of importance to the entire world are discussed.[29] The *Governing Body* is considered to be the *executive* organ of the ILO, coordinating the activities of the ILO, and convening three times a year. More specifically, under Article 2 of the Constitution, it controls the expenditure of the organization, has overall responsibility for managing ILO programmes, and supervises the work of the International Labour Office.[30] Also, it has primary responsibility to determine the Annual Agenda of the Conference. In determining the Agenda, it needs to take into consideration suggestions of the Conference, member states, the representative organizations of employers and workers, and/or public international organizations.[31] When the Conference decides by two-thirds of the votes cast by the delegates present that any subject shall be considered by the Conference, that subject shall be included in the Agenda for the following meeting as well.[32] The Governing Body, finally, appoints the Director-General.[33]

The *Director-General* is responsible for the efficient conduct of the secretariat of the ILO, the International Labour Office, and for such other duties as may be assigned to him. He is responsible to the Governing Body only.[34] The Director-General, contrary to what the Constitution suggests, is far more than just the manager of a bureau, however. Together with the Officers of the Governing Body he draws up the Agenda for the Conference.[35] Moreover, the Director-General enjoys the prerogative of expressing in his Annual Report to

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26 Swepston 1994, p. 17.

27 Betten 1993, p. 18; Boonstra 1996, p. 24. The ILC , however, can hold an extra session of its general Conference of June. The 94th (Maritime) Session, for example, devoted to the maritime sector, to address specific problems in that sector, was held from 7 to 23 February 2006.

28 For the Director-General, see hereafter in this same paragraph.

29 Ghebali 1989, p. 151.

30 Ghebali 1989, p. 141and 142 and 147; Betten 1993, p. 28; Boonstra 1996, p. 34; Sybesma-Knol 1999, p. 71-73.

31 Boonstra 1996, p. 24 and 35.

32 Article 16(3) of the ILO Constitution. See also Ghebali 1989, p. 141 and 142.

33 Since 1975, the appointment of the Director-General has been submitted to the Conference for approval. Sybesma-Knol 1999, p. 77.

34 Article 8 of ILO Constitution. See also Ghebali 1989, p. 142 and 159 footnote 2; Boonstra 1996, p. 35. As from the ILO's establishment, a man has been appointed as Director-General. Under the ILO Constitution, it, too, could be a woman.

35 Ghebali 1989, p. 159.

the Conference his own views on world economic and social developments and the work of the ILO.[36] The *International Labour Office* is ILO's headquarter. It has branch offices all over the world.[37] Its functions, enumerated in Article 10 of the Constitution, include collecting and distributing information on international labour affairs, examining subjects, which it is proposed to bring before the Conference, preparing documents on the various items of the agenda for the meetings of the Conference, and editing publications dealing with problems of employment of international interest. Popularly spoken, the International Labour Office, fulfills the functions of secretariat, information centre and publisher.[38]

20.3 The ILO and its characteristics

20.3.1 Membership

When the ILO was created by the Treaty of Versailles,[39] it consisted of 29 states, which originally signed the Treaty of Versailles in 1919. The Netherlands was invited to access to the Treaty and to become an Original Member of the League of Nations. It was the firm conviction of the ILO that it would be more effective if its membership could be made universal. With 178 members in 2007, practically covering all countries of the world, it has reached this goal. As regards its membership, as with other international organizations, e.g. the United Nations,[40] or the European Union,[41] a state becomes a member by the formal acceptance of the obligations and principles of the organization. Under Article 1(3) of the ILO Constitution, a member state of the United Nations *automatically* becomes a member of the ILO by communicating to the Director-General the acceptance of the obligations of the Constitution.[42] The consequence of being a member of the ILO seems to reach further than a membership with

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36 Ghebali 1989, p. 160 and 163; Sybesma-Knol 1999, p. 75. As from 1919 respectively Alfred Thomas (France), Harold Butler (UK), John G. Winant (US), Edouard Phelan (France), David A. Morse (US), Wilfred Jenks (UK), Francis Blanchard (France), Michel Hansenne (Belgium), and Juan Somavia (Chile) were Director-General of the International Labour Office. Betten 1993, p. 30-31; Boonstra 1996, p. 35; Sybesma-Knol 1999, p. 74.

37 Betten 1993, p. 30 and 31; Boonstra 1996, p. 35; Sybesma-Knol 1999, p. 74.

38 Ghebali 1989, p. 161; Boonstra 1996, p. 35-36; Sybesma-Knol 1999, p. 75.

39 See above under § 20.2.1.

40 Sybesma-Knol 1999, p. 67 referring to the UN Charter.

41 For example, candidate countries are expected to enter into nominal convergence or sustained non-inflationary growth conforming with the criteria laid down in the Maastricht Treaty, enabling them eventually to join the European Monetary Union (EMU). See Egger 2003, p. 5.

42 In most cases Article 1(3) is applied. More rarely Article 1(4) is applied based on which a formal Conference decision must be taken by a two-thirds of the government delegates present and voting. According to Article 1(5) a member may withdraw. In the event of a withdrawal, the readmission of a state – according to Article 1(6) – shall be governed by the aforementioned paragraphs 3 and 4 again. See Ghebali 1989, p. 103 in footnote 2 referring to C. Wilfred Jenks, Universality and ideology in the ILO, in Annals of international studies, Vol. I, 1970, p. 45; Sybesma-Knol 1999, p. 66-67; Kuczkiewicz 2001, p. 29.

other international organizations, however. The ILO Declaration of 1998 explicitly states

> '(…) that in freely joining the ILO (…) all Members, *even if they have not ratified the Conventions in question* [italics: VA] have an obligation arising from the very fact of membership in the Organization to respect, to promote and to *realize* [italics: VA], in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions (…).'[43]

Put differently, it is a unique feature that the ILO *based on membership alone* is able to require of its members to respect, to promote and *to realize* international labour standards, regardless of ratification of the conventions that guarantee them.[44] On the other hand, one can argue that *to realize* is not judicially the same as being *legally bound* to realize*,* but rather *a serious intent* to realize to the extent the ILO Declaration of 1998, in principle, intends to be a promotional instrument only.[45] In fact, it concerns eight fundamental Conventions underlying the ILO Declaration of 1998 'only'. One cannot deny, however, that the phrase is not commonly used by other international organizations, therefore, important in that it wishes to stress that membership of the ILO requires for more than to respect and to promote its standards.

As regards its *members*, worthwhile mentioning for their major political implications are the memberships – and withdrawals – of the former USSR, the United States, and the Republic of South-Africa. As regards the *USSR*, from the start it was hostile to the ILO, considering it as a tool of capitalism. By virtue of its admission to the League of Nations, in 1934, it joined the ILO. Subsequently, it lost its membership in 1940, but was readmitted again after Stalin's death in 1954.[46] Hereupon, other communist countries decided to resume full co-operation with the ILO,[47] or to apply for membership.[48]

The 'American crisis' started in 1970, with the threat of President Nixon that the United States would withdraw from the ILO if it became a forum

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43 Javillier 2001, p. 5; Brett 2001, p. 1; Cloutier 2001, p. 8-9; Delhomenie 2001, p. 13; Sietaram 2001, p. 22; Van Roozendaal 2001, p. 72. For the eight fundamental Conventions in question, see below under § 20.5.3.

44 Kuczkiewisz 2001, p. 29. See also Boonstra 1996, p. 32 and 33.

45 See below under § 20.5.3.

46 Ghebali 1989, p. 106 and 107.

47 The communist countries in question were Albania, Bulgaria, Czechoslovakia, Hungary and Poland who had ceased to honour their financial commitments, to the point where some of them had lost their voting rights at the Conference. See Ghebali 1989, p. 107 hereby in footnote 3 refers to Harold K. Jacobson: 'The USSR and ILO', in International Organization, Vol. XIV, No. 3, Summer 1960, p. 406.

48 For example, Romania had waited, but became a member of the ILO in 1956 after it had become a member of the United Nations. See Ghebali 1989, p. 107 in footnote 4 referring to Record of Proceedings, ILC, 1954, p. 575.

for political, rather than social issues.[49] The withdrawal of the United States announced by the Minister of Foreign Affairs, Henry Kissinger, became a reality on 6 November 1977. The reasons, in brief, were the undermining of the principle of tripartism mainly by Communist countries; the condemnation in 1974 of Israel on grounds of racial discrimination and violation of trade union freedoms in the occupied territories on the one hand, and the lack of objectivity as regards violations of these rights of other member states on the other; the admission in a highly emotional atmosphere of the Palestine Liberation Organization (PLO) as an observer at the Conference in 1974; and, the decision of the Governing Body to initially refuse to grant a PLO observer status at the World Employment Conference in 1976, which made the ILO a forum of political, rather than social issues.[50] However, the United States – which had been a member from 1934 – returned to the ILO on 10 February 1980 in the realization that the best way to counter international political affairs would be through an active presence, rather than absence.[51] Meanwhile, during its absence, the *Republic of South-Africa* had withdrawn from the ILO in March 1966, due to the resistance of other member states against its regime of *Apartheid*. In 1994, after the first democratic elections were held and won by Mandela – who would become South Africa's first black President – the United Nations recognized the Republic of South-Africa as an independent state, hence, in May 1994, it was readmitted to the United Nations, and to the ILO, again.[52]

20.3.2 Tripartite system

The tripartite system is the most distinguishing characteristic of the ILO. Primarily, this system refers to decision-making by representatives of state governments, employers' and workers' organizations.[53] The founders of the ILO Constitution felt that the aim of social justice would more likely be attained if social partners, *besides* governments, were given a role and responsibility. In effect, this was a reaction against the Communist revolutionary system. Consequently, considered to be one of the most important Articles of the Peace of Treaty of Versailles of 1919, was the provision that required employers' and workers' delegates besides governments' delegates to the Annual Conference.[54] This was revolutionary, considering the fact that employers' and workers' organizations were not fully recognized in most countries at the time. In fact, it

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49 Raetsen 1979, p. 33; Ghebali 1989, p. 114.

50 Raetsen 1979, p. 34; Ghebali 1989, p. 114.

51 Ghebali 1989, p. 115; Gould 2001, p. 3.

52 See Ghebali 1989, p. 111; Smyth 1994, p. 51.

53 Delhomenie 2001, p. 13 in footnote 1 referring to Provisional Record of Proceedings, Nos. 20 and 22, International Labour Conference, 86th Session, Geneva, 1998.

54 Oudegeest 1921 (1996), p. 278.

still is a novelty under international law.[55] It is noteworthy to mention that the principle of tripartism applies to *all* internal organs of the ILO.[56] Hence, the Conference consists of two government delegates, and two delegates representing employers and workers, supplemented with advisors.[57] Also, the Governing Body consists of a tripartite body. It includes the Chairman and two Vice-Chairmen, selected of each of the three groups; the Chairman, in general, being a government representative.[58] Generally, also Committees of the Conference and the Governing Body are tripartite organs.[59] Last but not least, Conventions and Recommendations are shaped and fostered by tripartism. Hence, only the co-operation of government, employers and workers opens up any door to standard setting.[60]

In the past, questions on tripartism, nonetheless, have been raised. For example, in 1971, the discussion was whether or not the principle of tripartism should prevail over the principle of universality. More specifically, the question was whether the ILO should admit *fewer* member states, in which all parties *actually* were represented, or *more* member states of which parties, *in effect*, were not all represented. In its Resolution of 1971, the Conference took the middle course by stressing the importance of tripartism.[61] More recently, in 2002, the Conference adopted another Resolution concerning tripartism and social dialogue, in the light of the process of economic globalization. It invites governments to ensure that the necessary preconditions exist for social dialogue, including respect for the fundamental principles and the right to freedom of association and collective bargaining. In this respect, the Resolution stresses that the Governing Body must continue to promote the ILO Declaration of 1998. The Resolution further stresses the importance of independent and democratic organizations of workers and employers, engaged in social dialogue.[62]

20.3.3 Supervisory standards system

The system of supervision built up by the ILO in 1919 is one of the most advanced of its kind at the international level, particularly for 'keeping close track of national developments, for carrying out objective and impartial supervision, and for advancing constructive proposals on how states can meet

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55 See also Thomas 1921 (1996), p. 270 stating that (also) the first successes were mainly due to this co-operation between three interested groups; Boonstra 1996, p. 19; Valticos 1996, p. 475; Tapiola 2001, p. 61.

56 Boonstra 1996, p. 19 referring to a speech by Blanchard addressed the Faculty of Law of the Leyden University in 1989.

57 Boonstra 1996, p. 24.

58 Ghebali 1989, p. 147 and 148.

59 Ghebali 1989, p. 147 and 148; Boonstra 1996, p. 26.

60 Javillier 2001, p. 6.

61 Ghebali 1989, p. 133 and 134; Betten 1993, p. 13-17; Boonstra 1996, p. 23. See also Thomas 1921 (1996), p. 272.

62 For this Resolution and an in-depth discussion hereof, see GB.285/7/1, 285th Session, Geneva, November 2002.

the standards voluntarily ratified with concrete help of the ILO'.[63] Experience over the years has shown that this standard supervisory system of the ILO provides for a highly effective form of supervision of Conventions, although supervision alone does not at all times ensure full compliance with its instruments.[64]

Historically, under Article 22 of the ILO Constitution, member states only needed to supply annual reports on the application and the law and practice of ratified Conventions.[65] However, the Conference realized that solely when the reports submitted by governments were subjected to scrutiny, was it possible to talk of supervision.[66] Consequently, to promote and control the *actual* implementation of the provisions of Conventions, the Conference adopted a Resolution in 1926, authorizing the Governing Body to appoint experts to make a preliminary study of these annual reports submitted by the various governments, and for the Conference to set up a committee, to consider these annual reports.

Hereupon, in 1927, the Committee of Experts on the Application of Conventions and Recommendation (hereafter, the Committee of Experts) was set up by the Governing Body. Also, the Conference set up a permanent committee, the Committee on the Application of Conventions and Recommendation.

In first instance, the Committee of Experts examines whether the law and/or practice are/is in conformity with Conventions and Recommendations.[67] Subsequently, the Committee on Application of Conventions and Recommendations, to whom the Committee of Experts submits its Report,[68] may call on governments to give account of the situation in their country and to appear before it to explain discrepancies with Conventions. The Conference, thus, is the organ of the ILO, in which non-compliance of member states with ILO standards are publicly exposed and discussed.[69] Clearly, a member state does not wish to be mentioned in the 'special paragraphs' of the Report of the Committee on the Application of Conventions and Recommendations, and to be followed with close interest. As Cloutier states

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63 Leary 1982, p. 17; Swepston 1994, p. 20. See also Valticos 1969 (1996), p. 409; Boonstra 1996, p. 32; Valticos 1998, p. 143.

64 Jenks 1960, p. 21; Van der Heijden 1999b, p. 27-30.

65 See Article 22 of the ILO Constitution. Valticos 1969 (1996), p. 409; Boonstra 1996, p. 27; Cloutier 2001, p. 10.

66 Boonstra 1996, p. 26 and 27, 39, 40 and 44; referring in footnote 36 to E. Osieke, *Constitutional law and practice in the International Labour Organisation*, Dordrecht 1985, p. 173.

67 Under Article 31 of the ILO Constitution the International Court of Justice formally has the final say. The findings of the Committee of Experts on the law and the practice of a state, in practice, however, are 'final'. Valticos 1969 (1996), p. 409 and 410; Ghebali 1989, p. 147 and 148; Valticos 1998, p. 143; Boonstra 1996, p. 24-27 and 29; Swepston 1998, p. 174.

68 Under Article 23 of the ILO Constitution, when the Committee of Experts draws up a report, the Director-General is responsible for its submission to the Conference. See also Boonstra 1996, p. 27.

69 Boonstra 1996, p. 24; Cloutier 2001, p. 10.

> '(…) governments generally do not very much relish having to appear before the Committee on Application of Conventions or Recommendations or, worse yet, being cited in the famous "special paragraphs" of its report dealing with cases in which "problems" (read infringements) have arisen (…) publicity of this kind is often enough to rectify the situation.'[70]

This form of exposure is described as *the mobilization of shame*, for although no economic sanction can be imposed, the conclusions are experienced as political or moral sanctions carried by an international forum, in which governments, employers and workers may speak freely. The positive side of this form of exposure is that it usually inspires the government of the specific state to implement the provisions of the Convention voluntarily, or to ask for assistance to make compliance possible.[71]

Furthermore, the Committee on Freedom and Association plays an important role in the supervisory standard system.[72] This tripartite Committee was set up in 1951 by the Governing Body, originally to make a preliminary examination of complaints, submitted either by governments or by employers' or workers' organizations with the Governing Body, in cases involving *freedom of association*.[73] It, however, gradually went on to independently examine the substance of complaints and gained considerable importance, in that it made all states accountable for their actions in this particularly sphere. As today, it calls on countries, even if states have not ratified the relevant Conventions. For its authority it relies on the ILO Constitution, the Declaration of Philadelphia in 1944 and ILO Declaration of 1998, which all hold the principle of freedom of association and must be respected based on mere membership alone.[74]

In 1946, the supervisory system became more advanced through an amendment of the ILO Constitution to monitor *unratified* Conventions. In this respect, Article 19(5) of the Constitution requires of member states

> '(…) to report to the Director-General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provision of the Convention by legislation, administrative action, collective

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70 Cloutier 2001, p. 10.

71 Valticos 1969 (1996), p. 410; Boonstra 1996, p. 26 and 30; Van der Heijden 1999b, p. 29 and 30.

72 Valticos 1998, p. 139; Gernigon 2001, p. 17.

73 The Fact-Finding and Conciliation Commission on Freedom of Association was originally set up by the Governing Body in 1950 for exercising the final examination. However, contrary to the Committee on Freedom of Association, it needed the consent of the government in question to do an examination. Boonstra 1996, p. 33 and 34; Swepston 1998, p. 175.

74 Valticos 1969 (1996), p. 411; Valticos 1998, p. 143; Swepston 1998, p. 175; Gernigon 2001, p. 17 and 18; Cloutier 2001, p. 12.

agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention.'

A similar reporting obligation with regard to *Recommendations* is laid down in Article 19(6)(d). In furtherance of Article 19 of the Constitution, the Governing Body yearly selects a number of *unratified* Conventions and Recommendations with the purpose of calling governments' attention to these instruments. The Committee of Experts hereupon writes a *General Survey* on the national law and/or practice of the countries involved, either leading to ratification, or at least action to give effect to some of their provisions.[75]

In 1959, the system of supervision was simplified.[76] Governments were no longer obliged to supply reports on *ratified* Conventions annually, but, instead, every four years, unless reports were requested at shorter intervals.[77] In November 2001 and March 2002, the Governing Body approved a new reporting system, which entered into force for a period of five years. As from then, reports on *ratified* Conventions are either due (i) every two years for fundamental Conventions;[78] and (ii) every five years for all other Conventions, unless they are specifically requested at shorter intervals.[79]

Part of the supervisory standards system further is the procedure under the Articles 24 to 33 of the ILO Constitution that, in practice, is rarely invoked.[80] In brief, Article 24 determines that *social partners* have the right to file a complaint with the International Labour Office to report any member state's failure to secure the effective observance of any Convention to which it is a party. Subsequently, the Governing Body may communicate this representation to the government against which it is made, and may invite that government to make such statement on the subject as it may think fit. Under Article 25, if no statement is received within a reasonable time from the government in question, or if the statement when received is not deemed to be satisfactory by the Governing Body, the latter shall have the right to publish the representation and the statement – if any – made in reply to it.

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75 Valticos 1969 (1996), p. 410; Ghebali 1989, p. 147 and 148; Boonstra 1996, p. 27 and 28; Swepston 1998, p. 176; Cloutier 2001, p. 10.

76 Valticos 1969 (1996), p. 412. For an overview of – also other - amendments, see Valticos 1969 (1996), p. 412-414.

77 As from 1959 until 2003, a member state has to report the year it ratifies the Convention, and further every four years. Van der Heijden 1999b, p. 26.

78 The two-year reporting cyclus also applies to so-called priority Conventions. The Priority Conventions are the four following instruments:
Employment Policy Convention, 1964 (No. 122),
Labour Inspection Convention, 1947 (No. 81),
Labour Inspection (Agriculture) Convention, 1969 (No. 129),
Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144).

79 See Handbook of procedures relating to international labour Conventions and Recommendations, International Labour Standards Department, International Labour Office, Geneva, rev. 2006, p. 20.

80 Swepston 1994, p. 17. For the exceptional cases of Columbia (violation of freedom of association) and Myanmar (Burma) (violation of forced labour), see Cloutier 2001, p. 11.

Article 26 determines that any of the *member states* shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other member state is securing the effective observance of any Convention, which both have ratified. The Governing Body may, if it thinks fit before referring such a complaint to a Commission of Inquiry, communicate with the government in question, or directly appoint a Commission of Inquiry. Under Article 28, when the Commission of Inquiry has fully considered the complaint, it shall prepare a report embodying the findings containing such recommendations as it may think proper as the steps, which should be taken to meet the complaint. Subsequently, the Director-General of the International Labour Office shall communicate this report to the Governing Body and to each of the governments concerned in the complaint that can either accept the recommendations of the Commission of Inquiry, or have the complaint referred to the International Court of Justice. Under the Articles 32 and 33, the decision of the latter in which the Court affirms, vary or reverses the findings or recommendations of the Commission of Inquiry, is final. Under Article 33, in the event of any member state failing to carry out the recommendations of the Commission of Inquiry or the International Court of Justice, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance herewith.

20.4 The ILO and its core work

20.4.1 International labour standards

The Conference initially established *working conditions* only. As mentioned above, its mandate was broadened through the Declaration of Philadelphia of 1944 to also include general social policy, human and civil rights matters.[81] Due to the Declaration of Philadelphia of 1944, the international labour standards of the ILO, thus, do no longer represent mere standards to improve the level of working conditions of workers in the world.[82] In effect, this Declaration

> '(…) broadened the Organization's competence and constitutional basis in two ways: rationae materiae, it was to emphasise that this competence was not confined to conditions of work alone, and rationae personea, it was to extend this competence from workers in the strict sense of the word to all human beings.' [83]

This setting of universal and uniform minimum labour standards through Conventions and Recommendations has become ILO's most important task.[84] Also, the Conference and the Governing Body may agree upon documents such

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81 Ghebali 1989, p. 61; Swepston 1994, p. 16; Valticos 1996, p. 394. See also above under § 20.2.2.

82 Swepston 1994, p. 1; Gernigon 2001, p. 17.

83 Valticos 1969 (1996), p. 398.

84 Ghebali 1989, p. 204; Valticos 1996, p. 393-396; Rogovski and Sims 2002, p. 6.

as codes of conduct,[85] resolutions and declarations, but these generally are not referred to as part of ILO's system of international labour standards.[86] The other functions of the ILO – which are in service of its standard setting – are (i) to offer technical assistance to help governments implement standards; (ii) to offer education and to initiate promotional activities; and (iii) to raise awareness and understanding of standards.[87] Particularly, providing technical assistance gained importance.[88] In fact, the Follow-up of the ILO Declaration of 1998 explicitly entails an obligation for the ILO in respect of these standards.[89] More specifically, it contains an obligation to assist its members to attain the objectives set out in the Declaration,[90] therefore, pertaining to the implementation of *specific* international labour standards.[91]

20.4.2 Conventions and Recommendations

After the Conference has adopted Conventions and/or Recommendations, all member states have the obligation to bring the newly adopted ILO labour standards before the competent authority within 12, or in exceptional cases within 18 months of adoption,[92] and to inform the ILO of the outcomes of this process.[93] In general, the competent authority is the authority, which according to national law has the power to legislate, or to take other action in order to implement Conventions and Recommendations.[94]

For *federal* states there is a special procedure with regard to the submission of Conventions and Recommendations. Article 19(7) of the Constitution prescribes that the federal government must submit Conventions and Recommendations, which it considers appropriate for *federal action* to the competent authorities within 12, or in exceptional cases within 18 months of adoption. The latter is applicable only in respect of Conventions and Recommendations, which the federal government considers to be appropriate under its constitutional system *for action by the constituent states, provinces or*

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85 Otherwise: Ghebali 1989, p. 204 footnote 3.

86 For example, there are codes of conduct on occupational health and safety, which are rather technical and subject to scientific changes. See also Rogovski and Sims 2002, p. 6.

87 Valticos 1996, p. 394.

88 See Validire 2001, p. 53 quoting Hansenne.

89 Cloutier 2001, p, 11-12; Tapiola 2001, p. 63-64.

90 Van der Heijden 1999b, p. 12; Cloutier 2001, p. 9.

91 See Delhomenie 2001, p. 13, as well as p. 14, referromg to the Malagasy Government that has requested the help of the International Labour Office in dealing with the comments addressed to it by the Committee of Experts concerning the implementation of Convention 29 and the ratification of Convention 105 both on the (Abolition of) Forced Labour.

92 More specifically, after the closing of the Session in which the adoption took place.

93 See the Articles 19(5) and (19)6 of the ILO Constitution.

94 Memorandum concerning the obligation to submit Conventions and Recommendations to the competent authorities, International Labour Office, Geneva, 2005, under II.

cantons, rather than for federal action.[95] In this case, the federal government must periodically consult with the constituent states, provinces or cantons on ratification of the Conventions.[96] In practice, this procedure leads to only little ratification by federal states.[97]

The moment of submission, state and federal governments, too, must indicate what measures they wish to take to give effect to these instruments, or propose that no action should be taken or that a decision should be postponed. For example, when the government is of the opinion that the Convention is fully applied in national law it may recommend ratification.[98] It, too, must state that there will be an opportunity to take up the matter for debate.[99] Overall, the aim of submission is to bring the contents of international labour standards to the knowledge of the public, to stimulate public debate at the national level on these matters, to stimulate tripartite dialogue, and eventually to promote measures at the domestic level for the ratification of Conventions, and the implementation of Conventions and Recommendations.[100] The obligation to submit does *not* imply any obligation to propose the ratification of Conventions or to accept the Recommendations.[101]

In total, from 1919 to 2007, the International Labour Conference adopted more than 180 Conventions, and more than 190 Recommendations, covering a broad range of subjects from working conditions to human rights matters, collectively called the *International Labour Code*.[102] Before the Treaty of Peace at Versailles had been signed on 28 June 1919, the Conference had already adopted six Conventions and six Recommendations in its first session in 1919.[103] These instruments dealt with immediate problems of working conditions such as the longstanding demand of workers for an eight-hour day

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95 Memorandum concerning the obligation to submit Conventions and Recommendations to the competent authorities, International Labour Office, Geneva, 2005, under V(b).

96 Under Article 19(2) of the ILO Constitution 'only' a majority of two-thirds of the votes cast by the delegated present is necessary for the adoption of a Convention or Recommendation. See also Jenks 1960, p. 17.

97 Raynauld en Vidal 1998, p. 53.

98 Burger 1998, p. 202; Van der Heijden 1999b, p. 25 and 26. The Dutch government, in principle, does not ratify a Convention, unless already converted into national law. See TK 1994-1995, 23 900 XV, No. 44, p. 8.

99 Memorandum concerning the obligation to submit Conventions and Recommendations to the competent authorities, International Labour Office, Geneva, 2005, under IV.

100 Burger 1998, p. 202-203; Van der Heijden 1999b, p. 26. See also Memorandum concerning the obligation to submit Conventions and Recommendations to the competent authorities, International Labour Office, Geneva, 2005, under I.

101 Memorandum concerning the obligation to submit Conventions and Recommendations to the competent authorities, International Labour Office, Geneva, 2005, under III(b).

102 Valticos 1969 (1996), p. 398.

103 The six Conventions adopted were respectively Hours of Work (Industry); Unemployment; Maternity Protection; Night Work (Women); Minimum Age (Industry); Night Work of Young Persons (Industry). See also Valticos 1969 (1996), p. 398; Ghebali 1989, p. 9 and 10; Devlin 2001, p. 366 footnote 1.

and forty-eight-hour week in industry.[104] An interruption by the Second World War, the adoption of international labour standards was resumed and has gone on steadily ever since.[105] The number of 180 includes revised Conventions. A revised Convention generally includes a clause, stating that the adoption of the revised instrument will not entail the cancellation of the original, but that the original will no longer be open to ratification after the entry into force of the revised Convention, and that ratification of the latter by a state will entail denunciation by it of the original.[106]

The difference between Conventions and Recommendations is significant, in that Conventions are legally binding when ratified. under Article 22 of the ILO Constitution, member states have a *legal* obligation to implement its provisions once they ratify the Convention. Recommendations, which typically deal with the same subjects as Conventions, are not open to ratification. They set out guidelines for national policy only.[107] Nevertheless, Recommendations may fulfill useful functions, because in many ways they help to pave the way for the ratification of a Convention.[108] It is noteworthy to mention that adoption *without* ratifying a Convention also entails obligations for member states. As former Director-General of the ILO, Wilfred Jenks, put it

> 'No member is bound by the provisions of a convention by reason of the adoption of the convention by the Conference. But adoption, nevertheless, has important legal consequences.'[109]

One of these consequences derives from Article 19(5) of the ILO Constitution. Under this Article, *non*-ratifying states have an obligation to regularly report on the law of the state, and to state the reason why it has not (yet) ratified the convention. Thus, without any legal obligation, a non-ratifying member state has an enduring obligation to examine the possibility of ratification of Conventions.[110]

20.4.3 Universality and uniformity

From the beginning, ILO's approach to standard setting has been a universal one. The ILO wished to include all states of the world as its member states.[111]

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104 Valticos 1969 (1996), p. 398.

105 Valticos 1969 (1996), p. 399.

106 In general, when a member state wishes to denounce a Convention a period of notice of ten years applies. Valticos 1969 (1996), p. 404; Swepston 1994, p. 20; Sybesma-Knol 1999, p. 98.

107 Valticos 1969 (1996), p. 404; Boonstra 1996, p. 39; Burger 1998, p. 202; Rogovski and Sims 2002, p. 6.

108 Valticos 1969 (1996), p. 404-405.

109 Jenks 1960, p. 17 and 18.

110 See below under § 20.4.2.

111 Mahaim 1921 (1996), p. 289.

The difficulty, however, has been to set a standard that could be accepted by the greatest possible number of countries. It had to be practicable for all states on the one hand, but not too low to bring about progress on the other. The problem is that universal standards, in effect, imply that these standards equally apply to *all* member states, regardless of different levels of development, climates, and social and/or cultural structures.[112] Due to the latter, universal standards can become impracticable for states, however. Hence, the difficulty from the start has been to strike a balance between ideals and practice.[113]

Consequently, Article 19(3) of the Constitution determines that the Conference with regard to countries, in which climatic conditions, the imperfect development of industrial organization, or other special circumstances that make the industrial conditions substantially different, may suggest to exempt these countries from implementation of standards. This rarely takes place, however. As said, ILO's goal remain to set universal standards.[114]

The foregoing raises the question whether the differences in economic and social conditions between various parts of the world should rather call for regional than universal standards. The fundamental reason why the ILO adheres to the general principle of universal standards is that in a world becoming increasingly interdependent, it is of the opinion that regional standards rather sharpen than reduce the differences between various parts of the world.[115]

The Conference, therefore, aims to create universal and uniform minimum labour standards, which are flexible enough to be applied to a variety of countries and situations to bring about a real improvement in working conditions.[116] This explains that almost all Conventions, adopted since 1946, hold flexible formulas of one kind or another, except for standards related to human rights,[117] to prevent standards from becoming meaningless.[118] As Van der Heijden and Devlin correctly point out, *state governments* are *not* allowed to make reservations in ratifying Conventions. The rationale behind this is that allowing state governments to make reservations would undermine the tripartite system.[119]

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112 Van Roozendaal 2001, p. 70 referring to Van Liemt 1989, p. 437.

113 Valticos 1969 (1996), p. 402.

114 Van Roozendaal 2001, p. 73 referring to Servais 1989, p. 425.

115 Valticos 1969 (1996), p. 403.

116 Valticos 1996, p. 477; Swepston 2001, p. 138. The EC Directives rather include minimum (labour) standards, than that they aim to establish unification of national rules. See De Ly 1993, p. 25-30.

117 Thomas 1921 (1996), p. 261; Ghebali 1989, p. 206; Van Roozendaal 2001, p. 73 referring to Servais 1989, p. 425.

118 Valticos 1969 (1996), p. 402 and 403. See also Jenks 1960, p. x; Valticos 1998, p. 140; Van Roozendaal 2001, p. 73.

119 Van der Heijden 1999b, p. 25 and 26; Devlin 2001, p. 367.

20.4.4 Human rights

As stressed by the former Director-General David Morse in 1967, the importance of international protection for human rights does not only relate to social justice, but should be considered as a theme that must pervade all ILO activities, rather than that they should be considered as a distinct field of action.[120] The ILO Declaration of Philadelphia of 1944 was the first in the international area to explicitly proclaim the principle of international protection for human rights.[121] After the Second World War, member states had become more aware of the link between international peace and social justice, and the importance of international labour standards.[122] The Declaration held that

> '(…) all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.'[123]

The thought was that without human rights, such as the freedom of expression and of association, social justice would be a fraud.[124] In fact, since the adoption of the Declaration, the relationship between international labour standards and human rights has been of ongoing concern to the ILO. In light hereof the Conference adopted ILO Conventions 87 and 98 in 1948 and 1949, respectively. These Conventions provide the right to the freedom of association and the right to collective bargaining.[125] The first Convention protects workers against interference by the *state*, the second protects workers against interference of *employers*.[126]

The importance of human rights was furthered in ILO Convention 100 on Equal Remuneration for Men and Women adopted in 1951, and Convention 111 on Discrimination in Employment and Occupation adopted in 1958.[127] In addition, the Conference adopted ILO Convention 105 on the Abolition of Forced Labour – broadening the goals of ILO Convention 29 on Forced Labour in 1930 to eradicate slave work – in 1957,[128] the Minimum Age Convention 138 in 1973, and the Worst Forms of Child Labour Convention 182 in 1999.[129] The latter was partly in furtherance of the ILO Declaration of 1998, in which the

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120 Ghebali 1989, p. 74 in footnote 2 referring to Record of Proceedings 1967, p. 421.
121 Ghebali 1989, p. 62 and 63; Valticos 1998, p. 135.
122 Sybesma-Knol 1999, p. 55; Ghebali 1989, p. 61.
123 Sybesma-Knol 1999, p. 56; Sietaram 2001, p. 22.
124 Ghebali 1989, p. 62 and 63.
125 Gernigon 2001, p. 17.
126 Jenks 1960, p. 51 and 55.
127 Valticos 1998, p. 139 and 140; Sietaram 2001, p. 22 and 23.
128 Swepston 1994, p. 1; Valticos 1998, p. 138; Fenwick 2001, p. 40 and 41.
129 Valticos 1998, p. 136-138; Grumiau 2001, p. 46.

Conference emphasized the importance of working conditions related to human rights, this time in light of the process of economic globalization.[130]

20.5 The ILO and its role in combating the negative effects of economic globalization on workers

20.5.1 The debate on a social clause

In the twentieth century, the ILO and other international organizations became forums through which economic globalization and its effects were regulated.[131] A discussion on its social effects started with a campaign in 1986 by the world's largest international trade union organization, the International Confederation of Free Trade Unions (ICFTU). The latter was impelled by the increasing number of infringements on labour standards related to human rights worldwide. Also, the governments (mainly) of developed countries became aware of the violation of these labour standards, not in the least by the emergence of the success of the exporting developing countries, which violated these standards.[132] In its campaign, the ICFTU held that without a so-called *social clause* in trade agreements the global competition would result in a worldwide lowering of standards, i.e. 'a race to the bottom'.[133] Subsequently, the ICFTU asked the WTO that deals with international trade and is concerned with tariff reductions in light of fair international competition, to insert a social clause in trade agreements that required compliance with minimum labour standards. Governments that failed to observe this clause would be subject to inquiry, and would be urged to rectify the situation and would face retaliatory measures as a last resort.[134] This request of the ICFTU to the WTO led to an international debate on a social clause in trade agreements, in which the ILO, the UN, the WTO and the OECD became involved, the WTO serving as the main forum for the discussion.[135]

The ICFTU, in the debate on a social clause, initially emphasized standards related to the freedom of association, collective bargaining, minimum age for employment, occupational health and safety, labour inspection, non-discrimination and the abolition of forced labour. Around 1993, the ICFTU

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130 Valticos 1998, p. 136. See also Summers 2001, p. 3.

131 See also Hey 2002, p. 220.

132 The argument was that when a country allows its workers to work under deplorable working conditions, it could export its products at lower prices through which it acquires an unfair advantage over its competitors. Van Liemt 1989, p. 434 and 438; Servais 1989, p. 423; Van Roozendaal 2001, p. 33.

133 Van Roozendaal 2001, p. 17, 20 and 38; Cloutier 2001, p. 9; Van Liemt 1989, p. 435. The fear of the shift of industrial activities from so-called high standards countries to low standards countries, however, generally is not only related to the question of labour costs, but also with that of labour productivity. Servais 1989, p. 427-428; Raynauld and Vidal 1998, p. 42; Gould 2001, p. 7 hereby also referring to an OECD Report of 2000.

134 Van Roozendaal 2001, p. 16; Validire 2001, p. 51.

135 Kellerson 1998, p. 224; Van Roozendaal 2001, p. 32.

dropped labour inspection and occupational health and safety to increase the chances of its proposal being accepted.[136] Subsequently, proponents came up with different suggestions.[137] In March 1995, at the UN World Summit for Social Development, in Copenhagen, the Heads of State and Government of developed and developing countries, eventually, committed themselves to safeguard the basic rights and interests of workers, and to promote respect for relevant ILO Conventions. These rights included the freedom of association, elimination of forced labour, abolition of child labour, and the elimination of discrimination, considered as universal standards, and corresponding with provisions in the UN Universal Declaration on Human Rights.[138]

Nevertheless, a group of developing countries, in which Malaysia played a significant role, opposed a social clause in trade agreements. Already, from the early start, in 1986, these countries had taken a common stand against such an inclusion.[139] In brief, the developing countries considered trade as a two-way relationship. In general, both parties expect to gain from it. Hence, it is not a privilege given to someone.[140] A social clause asked for reciprocity in social obligations in return for trade concessions.[141] Hence, they considered the social clause to be disguised protectionism, obstructing their industrial development and depriving them of their key comparative advantage: the ability to use low-cost labour productivity.[142] Therefore, developing countries perceived a social clause as the further underpinning of protectionism in another guise, in that the countries most dependent on international trade would be hardest hit by these trade measures.[143]

In general, one will not deny that the added value of developing countries is cheap labour.[144] The latter is also the reason why these countries[145] generally oppose a worldwide minimum wage, due to the fact that all other comparative advantages such as technology, capital, marketing networks are already with the developed countries, leaving the developing countries, in effect, empty-handed.[146] Also, advocates of unbridled economic liberalism take the view that the 'North' should not forbid the 'South' from using the working

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136 Van Roozendaal 2001, p. 38.

137 Van Liemt 1989, p. 436.

138 Kellerson 1998, p. 224; Van Roozendaal 2001, p. 34 and 71 referring to the OECD Report of 1996.

139 Van Roozendaal 2001, p. 33. For examples of agreements in which the US incorporated social clauses with trading partners in the past, see Servais 1989, p. 427; Van Liemt 1989, p. 440.

140 Van Liemt 1989, p. 443.

141 Van Liemt 1989, p. 435.

142 Raynauld and Vidal 1998, p. 9; Summers 2001, p. 4.

143 Brett 2001, p. 1; Munck 2002, p. 133 and 134.

144 Servais 1989, p. 428.

145 It is the question whether *developed* countries are in favor of a worldwide minimum wage.

146 Raynauld and Vidal 1998, p. 5-6; Sybesma-Knol 1999, p. 115.

methods that enabled the industrialized countries to accumulate *their* capital.[147] In fact, there is no good reason for objecting to competitive developing countries based on favorable working conditions. This is quite different, however, if the low standard of working conditions can be attributed to practices resulting in the exploitation of workers. As the former Director-General of the ILO in 1976 stated

> 'The competitiveness of new imports from developing countries should not be achieved to the detriment of fair labour standards.' [148]

Put differently, a social clause in trade agreements is justified when it wishes to correct abusive practices. However, the question is whether a social clause in trade agreements is the appropriate way of achieving the desired social changes.[149]

20.5.2 The Singapore Ministerial Declaration of 1996

In 1996, it became clear that no consensus could be reached on a social clause in trade agreements, due to the ongoing resistance of Asian developing countries. The developed and developing countries, nonetheless, were able to reach a compromise through the *Singapore Ministerial Declaration of 1996*, in which the Ministerial Conference,[150] on behalf of the WTO, stated that

> 'We renew our commitment to the observance of internationally recognized core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and ILO Secretariats will continue their existing collaboration.'[151]

The compromise could be reached, because the United States was prepared to drop the social clause issue in exchange for an agreement on the liberalization of the information technology market. In return, Malaysia gave up its resistance to any reference to labour standards in the Singapore Declaration, however, on the

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147 Servais 1989, p. 425; Raynauld and Vidal 1998, p. 10-11; Van Roozendaal 2001, p. 35; Validire 2001, p. 53 and 54.

148 See Servais 1989, p. 423 and 428 and 429.

149 Van Liemt 1989, p. 434 and 447.

150 In this First WTO Ministerial Conference which was held in Singapore between 9 and 13 December 1996 trade, foreign, finance and agriculture Ministers from more than 120 World Trade Organization Member governments participated. See www.wto.org

151 Kellerson 1998, p. 224; Van Roozendaal 2001, p. 15.

condition that the Declaration would not have any consequences as regards trade. This resulted in several developing countries to follow the Malaysian lead.[152] What was important for the ILO, was that all member states of the WTO – more than 140[153] – pointed at the ILO as the competent body to deal with core labour standards.

20.5.3 ILO Declaration on Fundamental Principles and Rights at Work of 1998

The ILO Declaration of 1998 was a result of the Singapore Ministerial Declaration of 1996. It holds fundamental rights, to be respected by all member states, to guarantee that workers in developing and developed countries will equally benefit from the process of globalization.[154] In 1994, the ILO Director-General, Hansenne, had already called for a new approach of the fundamental rights of workers in light of the process of economic globalization and technological changes.[155] Hereupon, a number of member states tabled resolutions asking the Director-General to develop the ideas in his report, and to take into account the different needs of both developed and developing countries.[156] Consequently, in 1997, after years of internal debate, the ILO Director-General, Hansenne, in his Report on *The ILO, standard setting and globalization* suggested the adoption by the ILO International Labour Conference of a declaration of fundamental rights, directly linked to ILO standards, on which the World Summit for Social Development[157] had reached a consensus in March 1995 in Copenhagen.[158] Subsequently, the Governing Body of the International Labour Office, in the course of its 270th session of 1997, decided to place on the agenda of the next International Labour Conference a proposal concerning the possible consideration and adoption of a declaration on fundamental rights, including a follow-up mechanism.

In June 1998, the ILO International Labour Conference hereupon adopted the ILO Declaration of 1998.[159] There were no votes against. Apparently, the international society had realized that globalization was the problem and that global solutions had to be sought.[160] As mentioned above, the

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152 Van Roozendaal 2001, p. 35 and 36.

153 149 member states on 11 December 2005. See www.wto.org

154 Raynauld and Vidal 1998, p. 65; Velasco 2001, p. VI.

155 Sybesma-Knol 1999, p. 57; Cloutier 2001, p. 8.

156 C. Raghavan, Labour: social standards issue will be prominent at ILC, Geneva, 7 June 1994. See ilo.sunsonline.org

157 At the World Summmit for Social Development, held in March 1995 in Copenhagen, governments reached a new consensus on the need to put people at the centre of development. The Social Summit was the largest gathering ever of world leaders at the time. It pledged to make the conquest of poverty, the goal of full employment and the fostering of social integration overriding objectives of development. See www.un.org

158 Kellerson 1998, p. 224; Tapiola 2001, p. 63.

159 Kellerson 1998, p. 223 and 224; Sybesma-Knol 1999, p. 58; Van Roozendaal 2001, p. 71; Cloutier 2001, p. 9; Boonstra 2003, p. 8.

160 Van der Heijden 1999b, p. 10; Howard 2001, p. 55.

ILO Declaration of 1998 aims to guarantee that employers and workers can freely demand, individually and collectively and without any discrimination, a just share of the fruits of progress.[161] In this respect, the Declaration provides that

> 'Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.'

In brief, the Declaration acknowledges that economic growth is essential to ensure social progress. However, it emphasizes that economic growth is not sufficient to guarantee fundamental principles and rights at work. This is of significance because fundamental rights enable workers to claim freely, and on the basis of equality of opportunity, their fair share of the wealth that they have helped to generate, which, in turn, helps to achieve fully the human potential of workers.[162] The Declaration enumerates core labour standards to be promoted, respected and realized by all member states, regardless of ratification, in the hope to establish the social progress needed in the process of economic globalization.[163] More specifically, the ILO Declaration of 1998 determines that

> '(…) all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.'[164]

These principles are not new. They can be found as specific rights in fundamental and widely ratified Conventions, i.e. the Convention on the Freedom of Association and Protection of the Right to Organise Convention of 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention of 1949 (No. 98);[165] the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention of 1957 (No. 105); the Minimum Age

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161 Van Roozendaal 2001, p. 72-73.

162 Ghebali 1989, p. 63; Van Roozendaal 2001, p. 72 and 73.

163 Tinoco and Vado 1999, p. 41.

164 See § 2 of the ILO Declaration of 1998.

165 Gernigon, Odero and Guido 2003, Freedom of Association, p. 5; Collective Bargaining, p. 21.

Convention of 1973 (No. 138) and the Worst Form of Child Labour Convention of 1999 (No. 182); the Discrimination (Employment and Occupation) Convention of 1958 (No. 111), and the Equal Renumeration Convention of 1951 (No. 100).[166]

The adoption of the ILO Declaration of 1998 raises the question whether *other* rights than enumerated in the Declaration are still of importance. In this respect, Javillier correctly states that the Declaration and its Follow-up cannot and never will be able to weaken the other standards,[167] because these instruments primarily were meant to be promotional only, i.e. did not aim to replace existing instruments.[168] Van der Heijden, therefore, correctly points at the continuing importance of, for example, ILO Convention 102 on Social Security of 1952. Although the underlying principle of this Convention is not included in the ILO Declaration of 1998, he states that the Preamble to the ILO Constitution of 1919, in which all member states have committed themselves to improving working conditions with regard to 'the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment'.[169] Van der Heijden further refers to the debate on a social clause, in which the ICFTU initially included the standards related to occupational health and safety as fundamental.[170] Hence, ILO Convention 158, too, did not lose its importance, as will be discussed below.

21 ILO Convention 158

21.1 International labour standards on termination of employment

In a Resolution adopted in 1950, the International Labour Conference noted the absence of international standards on termination of employment. Consequently, it requested a report on national law and practice on the matter for consideration. After a number of studies carried out on the subject, the Conference, in 1963, adopted the Termination of Employment Recommendation 119, the first international labour instrument to specifically deal with this issue. ILO Recommendation 119 held fundamental standards with regard to justification for termination, notice, the right to appeal, compensation and income protection. It also included provisions with regard to reduction of the workforce. Overall, it marked the recognition at the international level of the idea that workers should be protected against arbitrary termination of their employment relationship, and

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166 Van der Heijden 1999b, p. 11 and 12 and 14-23; Javillier 2001, p. 5; Cloutier 2001, p. 8 footnote 1; Sietaram 2001, p. 22; Van Roozendaal 2001, p. 72.

167 Javillier 2001, p. 6.

168 Sietaram 2001, p. 26. See also Delhomenie 2001, p. 13.

169 Van der Heijden 1999b, p. 14 and 23 and 24.

170 See above under § 20.5.1.

against the economic and social hardship inherent in their loss of employment.[171]

In 1974, the Committee on the Application of Conventions and Recommendations concluded that the issue should be put before the Conference again, in order to draw up another suitable instrument, taking into consideration new developments since the adoption of Recommendation 119, including the process of economic globalization.

At its 211th Session in 1979, the Governing Body decided to place the issue on the agenda. Subsequently, the Committee on Termination of Employment was set up by the Conference at its third sitting on 4 June 1981. The Committee held fourteen sessions before it presented its report to the Conference for discussion.[172] At the end of its 67th Session in 1981, the Conference adopted the report and included the item on the 68th Session in 1982 for a second discussion with a view to the adoption of a Convention and a Recommendation.[173] A new Committee on Termination of Employment was set up on 3 June 1982. This Committee, too, acknowledged the importance of the subject. It held that the just cause standard did not only affect the right of workers to security of employment, but also the right of employment to manage the undertaking and the harmony of labour-management relations.

Hereupon, the Committee agreed the time was ripe, almost 20 years after the adoption of ILO Recommendation 119 of 1963, to consider the updating of the international standards on the subject, taking into account the developments in national law and practice since that date.[174] Subsequently, on 22 June 1982, the Conference adopted the Termination of Employment Convention 158 and Recommendation 166, replacing the Termination of Employment Recommendation 119 of 1963.[175]

ILO Convention 158 went into force after ratification by two member states, to be exact on 24 November 1985,[176] regulating the termination of individual employment and – partly – collective dismissals.[177] Overall, it holds provisions, which together constitute a series of procedural and substantive controls on the employer's ability to dismiss an employee.[178] Its twofold objective is

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171 Protection against unjustified dismissal, ILO 1995, par. 3. See on ILO Recommendation 119 Van den Heuvel 1983, p. 151 and 152.

172 ILC, Record of Proceedings, 67th Session, 1981, p. 33/1.

173 ILC, Record of Proceedings, 67th Session, 1981, p. 33/30.

174 ILC, Record of Proceedings, 68th Session, 1982, p. 30/1.

175 ILC, Record of Proceedings, 68th Session, 1982, p. 36/17.

176 Protection against unjustified dismissal, ILO 1995, par. 1. In fact, ILO Conventions in general do not come into force until at least two ratifications have been registered. Leary 1982, p. 9.

177 Governing Body, Paper 2001, Appendix I (short survey), par. 2, 6 and 52.

178 Governing Body, Paper 2001, Appendix I (short survey), par. 52.

1. to protect workers in their professional life against arbitrary termination of employment by requiring a valid reason for dismissal, and prohibitions of dismissal; and
2. to preserve the right of employers to terminate the employment of workers for reasons which are recognized as being valid.[179]

ILO Recommendation 166 serves as a guideline to fill out the minimum standards of ILO Convention 158.[180]

21.2 Procedural safeguards: defense, burden of proof, and appeal

To obtain a complete overview of ILO Convention 158, I will pay attention to its substantive safeguards, procedural safeguards, and its remedies. In brief, the procedural safeguards are

- the right of a worker to defend himself against the allegations made;
- the right of a worker not to have to bear alone the burden of proving that the termination was unjustified;
- the right of appeal to an impartial body;[181] and
- the right that a worker shall be entitled to a reasonable period of notice, or compensation in lieu thereof.[182]

The opportunity to defend oneself is laid down in Article 7 of the Convention. It entails the right to assistance in preparing a defense, to access to information, and to be heard.[183] The Committee of Experts, which examined the laws of the member states, concluded that the employee's right to defend himself is considered by many of these states as one of the most important procedural requirements that employers must fulfill before they may take a decision to terminate the employment of a worker.[184] Article 8 entails the procedural right of appeal to an impartial and independent body.[185] Article 9 of the Convention, provides the procedural right that the worker does not have to bear alone the burden of proving that the termination was unjustified. In this respect, the Convention allows member states to make a choice, in that (a) the burden of proof shall rest on the employer; or (b) a court shall be empowered to reach a conclusion on the reason for the termination based on the evidence provided by

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179 Governing Body, Paper 1998, par. 49.

180 Protection against unjustified dismissal, ILO 1995, p. 4; Sybesma-Knol 1999, p. 84.

181 Sims 1995, p. 675.

182 See Article 11 of ILO Convention 158. Governing Body, Paper 2001, Appendix I (short survey), par. 7 and 39.

183 Sims 1995, p. 696.

184 Protection against unjustified dismissal, ILO 1995, par. 149-151. See also Heerma van Voss 1992, p. 290 and 291.

185 Protection against unjustified dismissal, ILO 1995, par. 175-178. See also Heerma van Voss 1992, p. 317 and 318; Sims 1995, p. 698-700.

parties. Subsequently, the Committee of Experts is of the opinion that when sufficient evidence lacks, the burden of proof shifts to the employer.[186] Last, Article 11 provides that a worker shall be entitled to a reasonable period of notice, or compensation in lieu thereof. More specifically, Article 11 of ILO Convention 158 determines that

> 'A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.'[187]

The notice period, thus, can be replaced by compensation.[188] Therefore, the amendment of the Workers' members was rejected at the 67th Session of the Committee in 1981, determining that the worker should *per se* be entitled to a period of notice. This now brings me to an important aspect of the *substantive* safeguards: these *cannot* be traded off by the employer.

21.3 Substantive safeguards: valid and invalid reasons

In brief, the substantive safeguards on the employer's ability to arbitrarily dismiss an employee are

- the requirement of a valid reason – a just cause – to dismiss an employee; and
- the enumeration of invalid reasons – bad causes – based on which an employer is prohibited to dismiss an employee.

Before discussing these safeguards more in-depth, it should be stressed that protection against arbitrary dismissal must be distinguished from the idea of employees' ownership of jobs.[189] Employment termination legislation falls short of providing such protection, in that it implies some kind of veto over dismissal or an automatic right to compensation for loss of employment.[190] As Jenks correctly states, a right to work is in the nature of a moral challenge to the economic system, rather than of a right susceptible of legal definition and enforcement.[191] Consequently, whereas Article 4 of ILO Convention 158 for the benefit of the employee requires a valid reason for dismissal, either through

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186 Protection against unjustified dismissal, ILO 1995, par. 211. See also Heerma van Voss 1992, p. 322.

187 For a discussion of urgent dismissals in light of Article 11 of ILO Convention 158, see Kuip 1993a, p. 283.

188 ILC, Record of Proceedings, 67th Session, 1981, p. 33/13.

189 See also above under § 15.1.2.

190 Governing Body, Paper 2001, Appendix I (short survey), par. 53.

191 Jenks 1960, p. 120.

preventive or repressive review, on the one hand,[192] it allows an employer to dismiss an employee connected to the conduct or capacity of the worker, or operational requirements of the undertaking on the other. Hence, it does *not* deny the employer's authority to carry out dismissals.[193]

Additionally, the Articles 5 and 6 provide invalid reasons, i.e. bad causes for dismissal.[194] More specifically, these Articles prohibit discriminatory and retaliatory discharges,[195] and determine that

> 'The following, inter alia, shall not constitute valid reasons for termination: (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a workers' representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; and (e) absence from work during maternity leave. [196] [Article 5]
>
> Temporary absence from work because of duly certified illness or injury shall not constitute a valid reason for termination, unless the operational requirements of the undertaking, establishment or service make it necessary to replace the worker concerned on a permanent basis. [Article 6].'

The list is not exhaustive. The national legislature can add *other* invalid reasons of dismissal. This follows from the term 'inter alia' in Article 5.[197] ILO Recommendation 166, by means of example, sets forth the following invalid reasons for dismissal (1) age – subject to national law and practice regarding retirement –; and (2) absence from work, due to compulsory military service or other civil obligations.[198]

One may argue that Article 4, in effect, may become superfluous, considering the extensive list of invalid reasons for dismissal under the Articles 5 and 6, in practice, supplemented by the national legislature with other invalid reasons.

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192 See also Nyfer 2000, p. 164; Grapperhaus 2006, p. 6.

193 Protection against unjustified dismissal, ILO 1995, par. 86; Governing Body, Paper 2001, Appendix I (short survey), par. 54. See also Sims 1995, p. 684.

194 Sims 1995, p. 675.

195 Protection against unjustified dismissal, ILO 1995, par. 75, 118 and 126-128; Governing Body, Paper 2001, Appendix I (short survey), par. 41. For a discussion of the Articles 5 and 6, see also Heerma van Voss 1992, p. 238 and 284; Kuip 1993a, p. 281; Sims 1995, p. 689-691.

196 For the underlying principles and Conventions and Recommendations of this Article, see Protection against unjustified dismissal, ILO 1995, par. 102; Governing Body, Paper 2001, Appendix I (short survey), par. 9.

197 Protection against unjustified dismissal, ILO 1995, par. 101; see also footnote 31; Sims 1995, p. 693 and 694.

198 Protection against unjustified dismissal, ILO 1995, par. 10. See also Heerma van Voss 1992, p. 245-247 and 277. For a discussion of all provisions, see also Kuip 1993a, p. 285-287.

One has a point, in that it is realistic to assume that combating discrimination is a continuous process, resulting in an even more extensive list of invalid reasons.[199] The difference between Article 4, and the Articles 5 and 6, however, is significant and best felt in an at-will dismissal system. Under this system, the existence of prohibitions on dismissal in it itself does *not* change that an employee can still be dismissed without cause, i.e. arbitrarily. Or as the Committee of Experts put it

> '(…) these specific types of protection [Articles 5 and 6: VA] are indeed very important, nevertheless they should be considered complementary measures to the more general guarantees against unjustified termination of employment contained in Article 4 of the Convention, which establishes the general principle that any [italics: VA] termination of employment has to be based on a valid reason.' [200]

Also, when a national legislature *literally* implements the Articles 5 and 6, an employee, for example, is not protected against a dismissal based on age.[201] The employee in such a case can invoke Article 4, which prescribes that the ground of dismissal must be connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking.[202] Article 4, thus, is of importance besides the Articles 5 and 6.

21.4 Remedies for an invalid dismissal

Article 10 of ILO Convention 158 provides that in case of unjustified termination of employment, the competent bodies shall be able to order reinstatement. If this is not workable, the competent body – usually the court – shall be empowered to order adequate compensation. Reinstatement is not considered as workable, for example (i) when the period between the termination of employment and the decision on reinstatement is too long; or (ii) when employers concern small enterprises where personal ties are closer between employers and workers, which makes reinstatement less favorable.[203]

Article 10, thus, provides *alternative* remedies.[204] The rationale for preferring reinstatement is that the Convention primarily aims to offer job security and the possibility to retain the rights the worker has acquired during his years of service.[205] The latter is achieved by the Articles 4, 5 and 6. In its General Survey, the Committee of Experts of 1995 subscribes to the general

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199 Sietaram 2001, p. 25.

200 Protection against unjustified dismissal, ILO 1995, par. 374.

201 See also Sims 1995, p. 693 and 694.

202 For Article 4, see below under § 22.

203 Governing Body, Paper 2001, Appendix I (short survey), par. 38.

204 ILC, Record of Proceedings, 68th Session, 1982, p. 30/10.

205 Protection against unjustified dismissal, ILO 1995, par. 218-221, 226 and 229. See also Sims 1995, p. 700-702.

practice of most countries that *when* national courts award financial compensation, the amount in most countries commonly is determined by the length of service, age, acquired rights, the circumstances of the particular case, the personal circumstances of the worker, and the possibility of finding a job.[206]

22 Article 4

22.1 A valid reason for dismissal

As may be clear by now, Article 4 protects *employees* against arbitrary dismissal on the one hand, and allows *employers* to terminate the employment of workers for reasons connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking on the other.[207] At first sight, Article 4 holds exhaustive reasons. Hence, the employer's freedom to dismiss employees is restricted. Subsequently, the Government of the United States submitted an amendment seeking to delete Article 4, strongly disapproving a system of national regulation, which listed the reasons for which an employer might terminate a worker's employment. The amendment was withdrawn when Workers' members and Employers' members opposed.[208] Hereupon, the Government of the Netherlands submitted an amendment for virtually the same reason, proposing to replace point 8 – which would later become Article 4 – with a provision that would determine that

> 'The employment of a worker should not be terminated unless there is a valid reason for such termination and an adequate protection against unjustified termination.'

This amendment, in effect, proposed a general requirement of a valid reason for termination, without stipulating the kind of reasons that were valid, which in the opinion of the Government of the Netherlands could be diverse. For example, a dismissal based on breach of trust, which is often brought forward in the Netherlands.[209] The Workers' members supported the amendment. However, the Employers' members and several Governments opposed the amendment, hence, it was rejected.[210]

Does this mean that a *breach of trust* is excluded from Article 4? From the discussion on Article 4 during the 67th Session of the Conference of 1981, and the General Survey of the Committee of Experts in 1995, it can be derived that although Article 4 contains *listed* reasons, it, in effect, is *open-ended* as regards its interpretation. In fact, the General Survey of the Committee of Experts in

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206 Protection against unjustified dismissal, ILO 1995, par. 218-221, 226 and 229.

207 See also Heerma van Voss 1992, p. 233; Kuip 1993a, p. 280 and 281; Sims 1995, p. 675.

208 ILC, Record of Proceedings, 67th Session, 1981, p. 33/6 and 33/7.

209 See above under § 16.6 and § 18.5.2.3.

210 ILC, Record of Proceedings, 67th Session, 1981, p. 33/7.

1995 showed that the terms of Article 4 are interpreted almost in a similar way by courts, tribunals or arbitrators worldwide.[211] Hence, the listed reasons, in practice, do not constitute significant difficulties.

To stick with our example, at first sight, *breach of trust* is excluded from Article 4. However, in practice, it can be categorized under either misconduct (breach of trust for which the employee is to blame) or economic circumstances (breach of trust for which the employee is not to blame, but has resulted in a severe frustration of the operation of the company). In all other cases – when an employee is not to blame for the breach of trust and/or still can be replaced in the same, an adjusted or another position, it is assumed that a valid reason is lacking. Correctly, the International Labour Office, in this respect, has asked the Dutch government to clarify the practices of the CWI and Cantonal Courts.[212]

22.2 Capacity of worker

The termination of employment connected with the capacity of the worker relates to a lack of the skills or qualities necessary to perform certain tasks, eventually resulting in loss of confidence.[213] This is largely consistent with the definition used in a number of countries.[214] However, it appears that countries may differ as regards the employer's freedom to judge on the employee's (in)capacity.

For example, the highest court in Gabon decided that the employer remains the sole judge of the professional abilities of an employee, i.e. the opinion of the employer is determinative. In contrast, the highest court in France held that the alleged loss of confidence must be based on objective considerations.[215] The Committee of Experts seems to take the middle course. It states that whether a dismissal is justified based on an employee's incapacity should be determined by substantive *and* procedural safeguards such as careful assessment of his work, warning him about the possible consequences if the quality of his work does not improve, and allowing him to demonstrate his skills and to improve his work performance.[216] The freedom to dismiss employees for a valid reason, thus, does not imply that a judgment on the existence of this reason can be left totally at the free discretion of employers.[217]

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211 Protection against unjustified dismissal, ILO, 1995, par. 88; Governing Body, Paper 2001, Appendix I (short survey), par. 56.

212 See ADO-Rapport 2000, p. 6., and above under § 16.6. For dissolutions based on breach of trust, see above under § 18.5.2.3.

213 Protection against unjustified dismissal, ILO 1995, par. 94.

214 Protection against unjustified dismissal, ILO 1995, par. 78.

215 Sims 1995, p. 687.

216 Protection against unjustified dismissal, ILO 1995, par. 95. See also Sims 1995, p. 695 and 696.

217 ILC, Record of Proceedings, 68th Session, 1982, p. 30/1.

22.3 Conduct of worker

Article 4 further refers to the worker's conduct as a valid reason for dismissal.[218] In practice, it implies *mis*conduct, which in various countries is referred to as a 'breach of discipline'.[219] In general, misconduct refers to a worker's

- *improper behavior*, for example, the use of insulting language, violence, disrupting the peace and order of the workplace, or turning up for work in a state of intoxication; or
- *professional misconduct*, for example, a violation of work rules, disobedience of legitimate orders, or tardiness or absence without good cause.[220]

In furtherance of Article 11, most countries in this respect make a distinction between serious misconduct, which gives rise to summary dismissal, i.e. termination of the contract without notice, and misconduct of a less serious nature, which requires a termination of employment with prior notice.[221]

22.4 Operational requirements of the undertaking

Last, an employer can dismiss an employee based on a reason for dismissal connected with operational requirements of the enterprise. According to the Committee of Experts, this includes reasons of an economic, technological, structural or similar nature,[222] which according to this Committee, is largely consistent with the definition used in most countries.[223]

Besides Article 4, the Articles 13 and 14, too, see to dismissals based on economic reasons. In theory, Article 4 must be read in conjunction with the supplementary provisions of the Articles 13 and 14 of the Convention. In practice, however, the Articles 13 and 14 in most countries generally apply to collective dismissals only, i.e. 'redundancy' or 'retrenchment'.[224] More specifically, the Articles 13 and 14 include the right to information and consultation of workers' representatives, and the notification of the competent authority, respectively.[225]

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218 Protection against unjustified dismissal, ILO, 1995, par. 89.

219 Protection against unjustified dismissal, ILO, 1995, par. 78.

220 Protection against unjustified dismissal, ILO 1995, par. 90; Simps 1995, p. 684 and 685.

221 Protection against unjustified dismissal, ILO 1995, par. 91.

222 Protection against unjustified dismissal, ILO, 1995, par. 96. See also Sims 1995, p. 676.

223 Protection against unjustified dismissal, ILO, 1995, par. 78; Sims 1995, p. 677.

224 Protection against unjustified dismissal, ILO, 1995, par. 276-278. See also Sims 1995, p. 677 and 679.

225 Governing Body, Paper 2001, Appendix I (short survey), par. 8.

23 ILO Convention 158 in light of the ILO Declaration of 1998

23.1 Prevention of unemployment

The just cause standard is *not* included in the ILO Declaration of 1998 as a fundamental right. Like ILO Convention 102, however, the just cause standard of ILO Convention 158 can be seen as rooted in the ILO Constitution.[226] In the Preamble of the ILO Constitution, member states have committed themselves to improve working conditions with regard to prevention of unemployment. Therefore, to the extent the just cause standard protects workers against – arbitrary – dismissal, it can be said to prevent unemployment under the Constitution, as also stressed by the Committee of Experts in its General Survey on ILO Convention 158.[227]

In fact, the predecessor of ILO Convention 158 – ILO Recommendation 119 of 1963 – in 1981 was reconsidered in light of *massive job losses* in many countries, due to economic and technological developments.[228] Moreover, in its General Survey on ILO Convention 158,[229] the Committee of Experts concluded that ILO Convention 158 had lost none of its relevance in light of the very large-scale job losses, through restructuring of enterprises, made necessary by the globalization of the economy.[230] Primarily, however, as the Workers' members, as well as several Government members, stressed during the 68th Session of the Conference in 1982 on ILO Convention 158, Article 4 sets forth a fundamental principle[231] to guarantee minimum protection against arbitrary dismissal for workers everywhere.[232]

Opponents of just cause protection state that the just cause standard protects the working class only,[233] and that deregulation of dismissal law is the panacea for unemployment. On the other hand, when the Dutch legislature made the dismissal laws more flexible the rate of unemployment did not fall. In fact, legislative reform in Europe elsewhere focusing on deregulating the labour market and enhancing flexibility did not result in a reduction of unemployment

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226 For ILO Convention 102 in light of the ILO Declaration of 1998, see above under § 20.5.3.

227 Protection against unjustified dismissal, ILO 1995, par. 371.

228 Protection against unjustified dismissal, ILO 1995, § 376. See also International Labour Conference, 68th Session, 1982, Report V(1), Termination of Employment at the Initiative of the Employer, International Labour Office, Geneva, p. 3 and 4; ILC, Record of Proceedings, 67th Session, 1981, p. 33/1.

229 For this General Survey, see also below under 25.

230 Protection against unjustified dismissal, ILO 1995, par. 379 and 380; Governing Body, Paper 2001, par. 9-11.

231 ILC, Record of Proceedings, 68th session, 1982, p. 30/4 and 30/5.

232 ILC, Record of Proceedings, 68th session, 1982, p. 30/1.

233 Feis 1996, p. 308-309; Ichino 1998, p. 306 and 310; HSI 1999/03, p. 10; Gould 2001, p. 4; Governing Body, Paper 2001, Appendix I (short survey), par. 62.

either.[234] This might explain why French students protested in March 2006 against new dismissal laws of the French government, which intended to enable employers to dismiss employees until the age of twenty-six more easily to create jobs for newcomers, hence, to combat youth employment.[235]

To the extent nearly one-third of the global work force is unemployed,[236] it would be interesting to explore the causal relationship between employment protection and the overall level of (un)employment. As today, the causal relationship between employment security protection and the overall level of (un)employment has not yet been empirically proven.[237] However, it would go beyond the scope of this thesis to discuss the trade-off between dismissal regulation and (un)employment. In fact, this would force me to look at the termination of an employment agreement from an economic point of view. As may be clear, I wish to look at dismissal law primarily from a social point of view.[238] From a social point of view, the Committee of Experts is correct in stating that the Conference's intent behind Article 4 of ILO Convention 158 is to protect workers against arbitrary dismissal in general, hence, from becoming unemployed.

23.2 Protection of fundamental principles and rights at work

Besides the fact that Article 4 of ILO Convention 158 prevents employees in question from being dismissed, in my opinion, the just cause standard, can further the rights of the ILO Declaration of 1998. The latter stressed the importance of the freedom of association and the right to collective bargaining, elimination of child labour and forced labour, and non-discrimination. Brett, in this respect, correctly states that

> '(…) the very notion of fundamental workers' rights should not be read as giving secondary status to other equally important international labour standards. They are fundamental in the sense that *without respect for core labour standards, other standards will either be inaccessible or under threat* (Italics: VA). In fact, fundamental workers' rights are enabling rights without which other objectives stand in jeopardy. What are the chances for respect for

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234 Termination of employment digest, ILO 2000, p. 11 and 12, footnote 25, referring to OECD, Employment outlook (Paris), June 1999, Chapter 2.

235 NRC Next 28 maart 2006, p. 4 and 5. See also Loonstra 2006a; Grapperhaus 2006, p. 3. In the Netherlands, the Koninklijke Metaalunie, proposed the same for youngsters till the age of 23. Its proposal did not make it, due to heavy criticism of unions. See www.metaalunie.nl and www.fnvbondgenoten.nl.

236 Smyth 1994, p. 46.

237 Protection against unjustified dismissal, ILO 1995, par. 378; Governing Body, Paper 2001, Appendix I (short survey), par. 57-60. See also Termination of employment digest, ILO 2000, p. 11; Nagelkerke 2006.

238 For an economic view on dismissal law, see Vandenberghe 2004, p. 165-185; CPB Document 135 (2006).

> ILO standards on social protections (…) if workers are denied the right to form unions or to bargain collectively.'[239]

Elaborating on Brett's statement, one can *also* state that *without the just cause standard* the core labour standards of the ILO Declaration of 1998 may be inaccessible or under threat. Hence, in my opinion, the just cause standard may further the rights of the ILO Declaration of 1998, notably (i) the right to freedom of association and the right to collective bargaining; and (ii) the right to non-discrimination. Put differently, the *at-will rule*, in effect, may threat the principles of freedom of association and collective bargaining and non-discrimination, in that an employee under this system can be dismissed without cause, hence, arbitrarily.[240]

For example, Hepple refers to the BJ&B factory in the Dominican Republic, owned by a Korean parent company producing Nike, Reebok and Adidas products. Although the Dominican Republic ratified the ILO Conventions 87 and 98, all workers that filed a petition under Dominican law for the recognition of their union were dismissed or retaliated against in another way. Although the Dominican Republic had to respect these fundamental rights on the one hand, the Labour Code of the Dominican Republic left considerable discretion to management with respect to dismissal without cause on the other.[241] This example illustrates that the value of the freedom of association, in effect, may be null when workers can be dismissed without cause, i.e. may become less effective under an at-will dismissal system. Consequently, the Committee of Experts in their General Survey on ILO Convention 158 held that

> 'Protection against acts of anti-union discrimination, and in particular termination of employment for such activities, is particularly necessary for trade union leaders and representatives, since in order to be able to fulfill their duties freely and independently they must have the guarantee that they will not suffer any prejudice as a result of holding trade union office or taking up trade union activities.'[242]

In this respect, I refer to the fundamental rights of ILO Convention 98 that sees to the freedom of association and the effective recognition of the right to collective bargaining. More specifically, this Convention provides *protection against acts of anti-union discrimination* in respect of employment, including protection against dismissal by reason of union membership, or of participation in union activities. [243] To the extent the international just cause standard of Article 4 of ILO Convention 158 – by requiring a just cause for dismissal in general – is able to further the(se) fundamental rights of ILO Declaration 1998,

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239 Brett 2001, p. 3.

240 Gernigon, Odero and Guido, 2003, Freedom of Association, p. 17.

241 Hepple 2003, p. 20 and 21.

242 Protection against unjustified dismissal, ILO 1995, par. 110.

243 Jenks 1960, p. 55; Gernigon, Odero and Guido, 2003, Freedom of Association, p. 7.

the just cause standard is as fundamental as these rights. Hence, Article 4 of ILO Convention 158, too, is important in light of the process of economic globalization. This now brings me to the question to what extent the American and Dutch just cause standards meet this international just cause standard.

24 American and Dutch dismissal law: in accordance with Article 4 of ILO Convention 158?

24.1 Introduction

Before examining to what extent the American and Dutch just cause standards meet Article 4 of ILO Convention 158, it is important to realize that Article 1 of ILO Convention 158 determines that a ratifying state may choose between *different* methods to give effect to the Convention. Hence, the implementation of standards can take place by laws or regulations, by means of collective bargaining agreements, arbitration awards or court decisions, or in such other matter consistent with national practice.[244] The ILO Convention 158, therefore, is flexible with regard to the methods of implementation of its standards,[245] which includes Article 4.[246] This means that the legislature does *not* need to explicitly require a valid reason for a dismissal, rather that the legislature, courts or arbitrators, in effect, apply this rule. The Committee on Termination of Employment in the 67th Session of the Conference in 1981, in this respect, stressed that

> 'Both the proposed Convention and the Recommendation leave it entirely up to each nation to concretise implementation within its own tradition and practice, but subject to only two provisions: first, that there be institutions in one form or another, such as courts, government departments, tribunals, arbitrators, and so forth, to see to it that the universal principles relative to termination are given a concrete expression within the framework of its sovereign people; and secondly that such institutions be impartial in character.'[247]

24.2 American dismissal law

24.2.1 Federal statutory law

In Chapter 2, I concluded that private-sector employees in the United States may enjoy protection against arbitrary dismissal under the Sections 7 and 8 of the National Labour Relations Act of 1935 (NLRA). However, these Sections

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244 Protection against an unjustified dismissal, ILO 1995, par. 371-373; Governing Body, Paper 2001, Appendix I (short survey), par. 3.

245 Protection against an unjustified dismissal, ILO 1995, par. 371-373; Governing Body, Paper 1998, par. 49.

246 Protection against unjustified dismissal, ILO 1995, par. 79. See also Heerma van Voss 1992, p. 234.

247 ILC, Record of Proceedings, 67th Session, 1981, p. 39/22.

provide protection in case of specified – concerted – activities only. Hence, the Sections 7 and 8 of the NLRA do not provide protection against arbitrary dismissal *in general* according to Article 4 of ILO Convention 158, nor do they afford this protection under any other provision in the NLRA. Apart from the NLRA, private-sector employees can enjoy protection against dismissal under the Civil Rights Act of 1964 amended in 1991 (Title VII); the Age Discrimination in Employment Act of 1967 (the ADEA); the Pregnancy Discrimination Act of 1974 (the PDA); and, the Americans with Disabilities Act of 1990 (the ADA). Under these Acts, employers are prohibited to discharge private-sector employees based on race, color, sex, religion and national origin, age, pregnancy, and disability, respectively. This protection against discriminatory dismissal can be obtained under the disparate treatment doctrine, which focuses on discriminatory intent, or the adverse impact doctrine, which focuses on discriminatory results. These federal anti-discrimination statutes do not provide protection against arbitrary dismissal *in general*. All federal – and state – anti-discrimination statutes prohibit a discharge for specified – discriminatory – reasons only. The *McDonnell Douglas* test, which the US Supreme Court has introduced under federal anti-discrimination law to relieve the burden of proof for employees in disparate treatment cases did not create protection against arbitrary dismissal in general either. Under this test, an employer can rebut the inference of discrimination by bringing forward a legitimate, i.e. a non-discriminatory reason. However, the latter need not constitute just cause; it merely needs to be a reason that does not fall within the statute's definition of discrimination.

Only private-sector employees, who are subject to a collective bargaining agreement, can enjoy just cause protection according to Article 4 of ILO Convention 158. They can enjoy this protection through collective bargaining agreements and labor arbitration. These so-called bargaining unit employees, a minority of the private-sector employees – about ten percent of the private workforce – cannot be dismissed but for just cause only.

24.2.2 State statutory law

The good cause standard under the Wrongful Discharge From Employment Act of 1987 (WDFEA) is an equivalent of a just cause standard as is common in collective bargaining agreements. In brief, good cause under the WDFEA is defined as reasonable job-related ground of dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. This protection appears meaningless for the majority of workers. First, under statutory case law the 'other legitimate business reason', referred to in the WDFEA, holds a reason that is neither false, whimsical, arbitrary nor capricious, and must have some logical relationship to the needs of the business. Montana law, however, still protects a good-faith employer. That is, so long as the employer acts in good faith, he is the *sole* judge in decisions concerning employment. This seems in contrast with the vision of the

Committee of Experts' on just cause protection according to ILO Convention 158. Second, a violation of the good cause standard results in contract damages only, hence, the good cause protection of the Montana statute appears to be illusory for blue-collar workers. In brief, the WDFEA primarily provides for arbitration, but when an employee makes an offer to arbitrate and the employer consequently refuses to arbitrate, which is likely for strategic reasons, the employee has no other option than to address the judiciary. Considering the facts that attorneys-at-law generally do not accept contract claims on a contingency fee basis – unless it concerns contract claims of white-collar workers – on the one hand, and blue-collar workers generally lack the financial capability to hire counsel on an hourly basis on the other, blue-collar workers, in practice, will lack just cause protection. Put differently, the good cause standard under the WDFEA meets the standard of Article 4 of ILO Convention 158 in *theory*, but not in practice, to the extent it protects good-faith employers on the one hand, and protects white-collar workers only on the other.

24.2.3 Common law

The common law at-will rule is the basic premise in the United States undergirding the employment relationship. In its classic form, an employer can discharge an employee for any cause, no cause, or even a cause morally wrong, without being liable. The development of judicial exceptions to the at-will rule in the late 1970s and the early 1980s, presented the prospect that the at-will doctrine would be 'swept away'. In brief, courts created three exceptions to the at-will rule (1) the public policy exception; (2) the breach of the implied covenant of good faith and fair dealing; and (3) the breach of the contract to discharge for good cause only, which includes the handbook exception and the implied-in-fact (good cause) contract exception. In brief, the public policy exception constitutes what is a *bad* cause for dismissal. Hence, it does not offer protection against arbitrary dismissal in general. The same applies to the implied covenant of good faith and fair dealing as applied in the employment context. Initially, the latter held a promise of giving just cause protection. However, meanwhile, the majority of the few states that accepted the covenant of good faith and fair dealing are of the opinion that this exception to the at-will rule does *not* provide protection against arbitrary dismissal in general.

Only the handbook exception and the implied-in-fact (good cause) contract exception – first accepted by the Michigan Supreme Court in *Toussaint (1980)* and the California Court of Appeal in *Pugh (1981)*, respectively – appear to provide protection against arbitrary dismissal in general. The bottleneck as regards the *handbook exception*, however, is that in reaction to this exception, employers started to insert at-will disclaimers to negate job security under this exception. Because courts generally consider these disclaimers as valid, this, in practice, leaves the employee with less just cause protection than primarily assumed under the handbook exception. The implied-in-fact (good cause) contract offers a more solid cause of action. Based on the totality of

circumstances, an employer under this exception needs good cause to terminate the employment The majority of states, however, still protect the good-faith employer, although the reason given by the employer is subject to scrutiny. Hence, the employer does not have an *unfettered* right to exercise discretion in the guise of business judgment. However, like the handbook exception, employers started to insert at-will disclaimers. Although – unlike the handbook exception – an at-will disclaimer generally is considered merely as *one* of the factors in the totality of circumstances test it, nonetheless, can be a factor to negate good cause protection, which leaves the employee under the implied-in-fact (good cause) contract, too, with less just cause protection than primarily assumed. Overall, the implied-in-fact (good cause) contract exception under state common law most closely approaches the just cause standard of Article 4 of ILO Convention 158. It bears mentioning, however, that the implied-in-fact (good cause) contract exception results in contract damages only, and that attorneys-at-law generally are not willing to accept – these – cases on a contingency fee basis. Hence, like under Montana statutory law, blue-collar workers, in effect, generally lack just cause protection. Also, a minority of the states only accepted the implied-in-fact (good cause) contract exception.

24.3 Dutch dismissal law

24.3.1 The dual just cause dismissal system

In the early nineties, the Minister of Social Affairs, De Vries, stated that the Dutch dismissal system met the standards of ILO Convention 158. These standards included the just cause standard.[248] In 2000, the Committee Rood that was asked by the Minister of Social Affairs to write a proposal on a new dismissal system and to involve ILO Convention 158 into its review, too, concluded that Dutch dismissal law was in accordance with the just cause standard of ILO Convention 158. It referred to Article 3:1 of the Dismissal Decree which, in effect, requires a just cause for dismissal. However, it was of the opinion that this just cause standard needed to be codified in Book 7 Title 10 of the Dutch Civil Code, before the Netherlands could ratify ILO Convention 158. In brief, the Committee Rood advised the government to abolish the BBA 1945 and the provision on a manifestly unreasonable dismissal, and subsequently, to replace the dismissal system by a system that would require a valid reason for a dismissal according to Article 4 of ILO Convention 158. It stressed that the latter was necessary, because the action of a manifestly unreasonable dismissal did *not* meet the standard of Article 4 of ILO Convention 158. The new requirement, in turn, made the BBA 1945 obsolete.[249]

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[248] TK 1990-1991, 21 479, No. 6, p. 20. See also Kuip 1993a, p. 287 footnote 50.

[249] ADO-Rapport 2000, p. 76 and 77. For an in-depth discussion of this Report, see further below under § 29.2.2.

In contrast, the Labour Foundation (*Stichting van de Arbeid* or *STAR*), in reply to the Committee's proposal advised negatively, stressing that there was no need to introduce an explicit just cause rule according to Article 4. More specifically, it held that Article 3:1 of the Dismissal Decree was in accordance with Article 4 of ILO Convention 158, and Article 7:685 DCC (1639w old) required a – serious – cause for dismissal as well.[250] The International Labour Office of the ILO, on the other hand, expressed doubt whether Dutch dismissal law was in accordance with Article 4 of ILO Convention 158. *First*, it held that Article 7:681 DCC (1639s old) did not meet Article 4 to the extent it determines that a dismissal without cause is not *automatically* – manifestly – unreasonable.[251] *Second*, the International Labour Office opposed the practice under Dutch dismissal law which makes it possible for employers to dismiss an employee based on breach of trust for which the employee is not to blame.[252]

24.3.2 BBA 1945

In the literature, too, one has doubts whether Dutch dismissal law is in accordance with Article 4 of ILO Convention 158. More specifically, in 1991, the Working Committee on Revision of Dismissal Law (*Werkgroep Herziening Ontslagrecht*)[253] held that the BBA 1945 was not in accordance with Article 4. Although the Directives at the time determined that the public authority shall grant a permit to terminate the employment agreement in case of a just cause only, authors held that it did not *explicitly* require a just cause connected with the capacity or conduct of the employee, or operational requirements of the undertaking. Instead, the Directives only required that the public authority in its decision had to balance the interests of the employer, the employee and the public.[254] Kuip, too, held that the BBA 1945 and/or the Directives did not explicitly require a just cause for dismissal connected to the capacity or conduct of the employee, or operational requirements of the undertaking.[255] Van Dooren brought forward the same argument as Kuip.[256]

Still, the BBA 1945 does not explicitly require a just cause standard. The Dismissal Decree that replaced the Directives and applies to the BBA 1945, however, does. Article 3:1 of the Dismissal Decree determines that an employer can only dismiss an employee when justified, i.e. for just cause only.[257]

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250 STAR-Advies 2003/7, p. 7, 11 and 12.

251 ADO-Rapport 2000, p. 6.

252 ADO-Rapport 2000, p. 6 and 76.

253 The Working Committee is part of the '*Vereniging voor Arbeidsrecht'* (Dutch Association of Employment Law). It focuses on dismissal law in particular and looks at necessary changes on which the members of the Working Committee – judges, lawyers, scientists – advise. See Werkgroep Ontslagrecht VvA 1991, p. 214.

254 Werkgroep Ontslagrecht VvA 1991, p. 218.

255 Kuip 1993a, p. 280 and 281.

256 Van Dooren 1999, p. 890.

257 For an in-depth discussion of this Article, see above under § 16.3.

Moreover, in practice, under this Article, the CWI grants permission for dismissal connected to the capacity or conduct of the employee, or operational requirements of the undertaking. Additionally, in case of breach of trust, it grants permission when the breach of trust either results in misconduct or operational requirements of the operation. It, thus, is in accordance with Article 4 of ILO Convention 158. As mentioned above, under Article 1 of ILO Convention 158, the implementation of Article 4, in effect, can take place through different methods, hence, it does not require that the legislature explicitly requires a valid reason for a dismissal according to Article 4 through *legislation*, rather that the legislature *or* courts *or* arbitrators, in effect, apply this rule.[258] I, therefore, agree with the Committee Rood and the Labour Foundation that Article 3:1 of the Dismissal Decree is in accordance with Article 4 of ILO Convention 158.

24.3.3 Book 7 Title 10 of the Dutch Civil Code

In the literature, one states that Article 7:681 DCC does not meet Article 4 of ILO Convention 158. In 1991, the Working Committee on Revision of Dismissal Law held that when the legislature introduced Article 1639s (a) it did not explicitly require a just cause for dismissal in general; and (b) when an employer dismisses an employee without – just – cause, the dismissal is not per se manifestly unreasonable. Furthermore, it held that the Articles 1639g and 1639o were not in accordance with Article 4. The Working Committee did not explain why these Articles were not in accordance. It only emphasized that according to Article 1639g an employer in terminating an employment agreement must respect a notice period, and according to Article 1639o, an employer is allowed to terminate an employment agreement without prior notice, provided the employer pays a severance payment. Apparently, the Working Committee on Revision of Dismissal Law wished to indicate that in both cases termination of employment could take place, regardless of the reason. However, as Heerma van Voss correctly states, the Articles 1639g and 1639o are covered by Article 11 of ILO Convention 158, which contains a right on a notice period *or* a severance payment in lieu hereof.[259] In 1993, Kuip used the same arguments as the Working Committee. He, too, held that the Articles 1639g, 1639o and 1639s were not in accordance with Article 4.[260]

In Chapter 3, I have demonstrated that the Minister of Justice stressed that with Article 1639s he did not wish to introduce a just cause rule that would provide protection against arbitrary dismissal in general. Moreover, under Article 1639s, courts based on the circumstances of the case can – thus, do not have to – determine that a dismissal is manifestly unreasonable, after the employer has terminated the employment agreement without – just – cause.

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[258] See also above under § 24.1.

[259] See also Heerma van Voss 1992, p. 331 and 332.

[260] Kuip 1993a, p. 280 and 281.

Therefore, a termination that is given without cause is not per se – manifestly – unreasonable under this Article.[261] Courts did not introduce a just cause rule either. Although the Netherlands Supreme Court has relieved the burden of proof when the reason stated by the employer is false, i.e. non-existent, case law does not require a just cause for dismissal. To the extent an employer must bring forward sufficient facts so that the employee can properly build his defense, the court can 'only' take a bad reason in consideration as one of the circumstances in determining whether a dismissal is manifestly unreasonable. I, therefore, conclude that Article 7:681 DCC – as also brought forward in literature[262] – does *not* meet the standard of Article 4 of ILO Convention 158.[263]

In contrast, Article 7:685 DCC, in my opinion, in theory, does meet Article 4 of ILO Convention 158. This Article requires serious cause for dismissal. Article 7:685 DCC (1639w old), in brief, determines that an employer and an employee independently and at all times can ask the Cantonal Court to dissolve the employment agreement based on serious cause. Serious cause embraces either an urgent reason for dismissal, or a change of circumstances based upon which the employment agreement reasonably has to end immediately or on short notice. Legislative history shows that when serious cause is lacking, the Cantonal Court must reject the request.

An examination of case law, however, shows that Cantonal Courts, in practice, allow employers to trade off the existence of serious cause. First, Cantonal Courts grant a severance payment although the stated reason by the employer, in effect, is non-existent. This takes place with regard to requests based on *breach of trust* of which the employee is not to blame, i.e. a non-existent reason underlies the breach of trust without the existence of another valid reason. In such a case, the Cantonal Court must reject the request, with one exception only. That is if replacement in the same, an adjusted or another position would severely frustrate the operation of the firm. The latter constitutes good – serious – cause as these circumstances, in effect, can be considered as 'economic circumstances' based upon which the employment agreement must end immediately or on short notice. Therefore, the International Labour Office correctly opposes Dutch dismissal law, to the extent it allows employers to dismiss an employee based on breach of trust for which the employee is not to blame.[264] Second, Cantonal Courts grant *conditional* requests based on urgent cause according to less stringent criteria than the Netherlands Supreme Court, which, too, undermines the system of just cause protection according to the legislature's intent. These courts, in effect, reinforce a practice, in which the employer may and will abuse the alternative route of Article 7:685 DCC to dismiss an employee without – an urgent – cause. Both practices are not

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261 See also Gerbrandy 1954, p. 37 and 38.

262 See above under § 23.3.1.

263 See also above under § 17.4.

264 For remarks on a manifestly unreasonable dismissal, see above under § 17.4; for remarks on a dissolution based on breach of trust, see above under § 18.5.2.3.

consistent with Article 4 of ILO Convention 158. Hence, the Labour Foundation, in my opinion, is incorrect to the extent it implies that Article 7:685 DCC meets Article 4 *per se*. Article 7:685 DCC meets the just cause standard of Article 158 in *theory*, but not in *practice*, at least not in the foregoing cases.[265]

25 The need and chances on ratification of ILO Convention 158

One may argue that ratification of ILO Convention 158 may be superfluous when the provisions of ILO Convention 158 are already applied in practice.[266] Advocates of ratification, including the Dutch government, however, argue that – although ratification of Conventions is not a purpose in itself, rather the improvement of conditions of labour – it may be an important step towards implementation, and consequently in the fulfillment of ILO's goals.[267] Second, they argue that ratification of ILO Conventions is an expression of solidarity with other member states in agreeing that international coordination of workers' rights and working conditions is appropriate.[268] Furthermore, they argue that ratification is a direct consequence of the adoption of a Convention. Adoption means that standards are accepted by the majority of member states, and that based on its membership every ILO member state has an obligation to improve working conditions for all workers in the world.[269] In this respect, De Pooter states that the ratification of a Convention does not serve to stimulate *national* working conditions, but rather *global* working conditions and, therefore, national laws that provide for better conditions should not stand in the way of ratifying a Convention.[270] Additionally, Van der Heijden states that ratification is important for ensuring that minimum fundamental principles will continue to be respected.[271] In my opinion this, in fact, happened with the ILO Declaration of 1998. This Declaration could be adopted relatively easily, i.e. without any votes against, *due to the fact* that the underlying – eight – Conventions of the ILO Declaration of 1998, holding minimum fundamental principles, had already been ratified by a significant majority of member states.[272] A high number of ratifications of a Convention, in general, is an indication that the underlying principles are acceptable for the majority of member states and workable under national law, i.e. are generally accepted values worldwide. The latter is not (yet) the case with regard to all standards of ILO Convention 158. As this thesis reached its completion, ILO Convention has been ratified by thirty-two

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265 See also above under § 24.3.1.

266 For example, see Ghana who brought forward this argument. See Governing Body, Paper 1998, par. 54.

267 Boonstra 1996, p. 44; TK 1994-1995, 23 900 XV, No. 44, p. 2.

268 Valticos 1998, p. 140; TK 1994-1995, 23 900 XV, No. 44, p. 4.

269 De Pooter 1994, p. 475; Boonstra 1996, p. 44.

270 De Pooter 1994, p. 475 and 476; TK 1994-1995, 23 900 XV, No. 44, p. 7.

271 Van der Heijden 1999b, p. 11; TK 1994-1995, 23 900 XV, No. 44, p. 7.

272 For the ILO Declaration of 1998, see above under § 20.5.3.

countries 'only'. Nevertheless, the Dutch government expressed an interest in ratifying the Convention.[273]

This brings me to the chances on ratification of ILO Convention 158. In general, it may be clear that the step from a dual just cause dismissal system towards a just cause dismissal system according to Article 4 is easier to take than from an at-will dismissal system. As regards the latter, to achieve ratifications among states with at-will dismissal systems, in my opinion, it is important to first promote the basic principle of the Convention, i.e. the just cause standard – e.g., in light of the process of economic globalization[274] – rather than to promote the ratification of ILO Convention 158 as a whole. Most countries experience the Convention as too detailed with its procedural controls on the employer's ability to dismiss an employee.[275] In this respect, I agree with Boonstra that the influence of standards is affected not so much along linear paths, but more through persuasion, for example, because they were based on generally accepted shared values, protected by a supervisory machinery, rather than through force.[276] De Ly further points at the possibility of unification of law through initiatives of other international organizations in which they subscribe to these standards.[277] Last, a possibility is to have the just cause standard transferred – back again – to a Recommendation, as suggested during the 68th Session of the Conference of 1982 by the Government member(s) of the United States.[278] Overall, it is not realistic to think that within the near future a significant majority of member states or *all* member states will ratify ILO Convention 158. In fact, in 1998, a significant number of member states stated that they were examining or would be examining in the near future the possibility of ratifying ILO Convention 158. As this thesis reached its completion, none of these countries had ratified the Convention.[279] Only five other member states had ratified ILO Convention 158 after the examination of 1998. By 2007, the United States has no intention to ratify the Convention.[280]

ILO Convention 158 encounters persistent difficulties in gaining a significant number of ratifications.[281] Already, the Governing Body, in accordance with Article 19 of the ILO Constitution, decided at its 251st Session (November 1991)

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273 See also above under § 1.3.3.

274 See above under § 23.

275 See also TK 1994-1995, 23 900 XV, No. 44, p. 7, in which the Dutch government stresses that too many details may form an obstacle in ratifying a Convention.

276 Boonstra 1996, p. 45.

277 De Ly 1993, p. 57. This, in fact, happened with regard the just cause standard of Article 4 of ILO Convention 158 , being a source of inspiration to Article 24 of the revised European Social Charter of 1996 of the Council of Europe, and Article II-90 of the European Constitution of the European Union. For these treaties, see above under § 1.3.2.

278 ILC, Record of Proceedings, 68th Session, 1982, p. 30/4 and 30/5.

279 Governing Body, Paper 1998, par. 52, footnote 34.

280 Governing Body, Paper 2001, par. 5, footnote 7. See www.ilo.org for an update of ratifications.

281 Governing Body, Paper 1997, par. 53.

to invite the governments of those member states that had not yet ratified ILO Convention 158 to submit a report on this instrument. The reports, together with those submitted by the member states that ratified the Convention, enabled the Committee of Experts in 1995 to carry out a General Survey on the effect given to ILO Convention 158, called *Protection against unjustified dismissal*.[282]

Subsequently, the Working Party of the Governing Body undertook its first examination on ratification of ILO Convention 1958 in March 1997.[283] Consequently, it requested information from member states on the obstacles and difficulties encountered that might prevent or delay ratification of the Convention or that might point to the need for its revision. In March 1998, the Working Party re-examined ILO Convention 158 in the light of these results,[284] and decided that a short survey be carried out. Pursuant to a decision by the Governing Body in March 1998, a short survey was submitted to the Working Party in 2001.[285] In brief, the United States, as a general obstacle to ratification and a specific obstacle to Article 4, cited the common law rule that an employee without a contract for a definite period can be discharged for good cause, no cause or even a morally wrong cause. Consequently, the right to appeal a termination of employment as provided in Article 7 was not available either.[286] The American government did not mention that opponents of the at-will rule prefer that this rule will be given notice. Grodin, in brief, states that the at-will rule should be dismissed, because it is out of step with job protection systems adopted by other industrialized nations, and with international norms as exemplified in the ILO Convention 158.[287] However, the chance that the United States will ratify ILO Convention 158 is small. In fact, by 2007, the United States has ratified 14 Conventions only and is among the countries with the least ratification.[288] To give an idea, by 2007, the Netherlands ratified 104 Conventions.[289]

26 Conclusion

In this Chapter, I have examined to what extent the American and Dutch just cause standards meet the international just cause standard of Article 4 of ILO Convention 158. The conclusion is that, besides the just cause standard under collective labor law, the Montana Wrongful Discharge From Employment Act (WDFEA) holds a good cause standard according to Article 4 of ILO Convention 158. Under common law, the implied-in-fact (good cause) contract approaches most closely the just cause standard of Article 4 of ILO Convention

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282 Protection against unjustified dismissal, ILO 1995.

283 Governing Body, Paper 1997.

284 Governing Body, Paper 1998.

285 Governing Body, Paper 2001, par. 13 and 14; Appendix I (short survey), par. 1.

286 Governing Body, Paper 1998, par. 52 and 82.

287 Grodin 1990, p. 2.

288 Hardin 1997, p. 23.21; Jacobs 2003, p. 22.

289 See www.ilo.org. See also Leary 1982, p. 13.

158. It should be stressed, however, that the foregoing just cause standards under American dismissal law apply to a minority of the work force only, and – apart from the just cause standard under collective labor law – do not always provide just cause protection in practice. The majority of private-sector employees, therefore, are still subject to the at-will rule, hence, would welcome the ratification of ILO Convention 158. The American government, however, has no intention to ratify the Convention. In contrast, the Dutch government expressed its wish to ratify the Convention. In the Netherlands, the majority of private-sector employees already enjoy just cause protection according to Article 4 of ILO Convention 158 under the BBA 1945. The Dutch dual dismissal system, however, leaves room for employers, as an alternative, to ask for dissolution of the employment agreement. From case law it can be derived that Article 7:685 DCC provides just cause protection in theory. However, *in practice*, Cantonal Courts do not consistently apply Article 7:685 DCC according to the legislature's intent. Hence, to this extent, Article 7:685 DCC is *not* in accordance with Article 4 of ILO Convention 158. Before ratifying ILO Convention 158, the Dutch government, thus, must reconsider Article 7:685 DCC when it wishes to make dismissal law more flexible by abolishing the BBA 1945 in finding a new balance between flexibility for employers on the one hand, and just cause protection for employees on the other.

V COMPARISON OF AMERICAN AND DUTCH DISMISSAL LAW

27 Illustrative comparison

27.1 Aim of the comparison

The previous Chapters show that the American dismissal system is showing a development towards just cause protection, and the Dutch dismissal system towards more flexibility for employers. At first sight, the American and Dutch dismissal system, therefore, grow towards one other.[1] Nevertheless, the American and the Dutch dismissal system in respect of just cause protection still significantly differ from one another. The basic rule in the United States is the at-will rule, and the basic rule in the Netherlands the just cause rule.[2]

The just cause rule is generally considered as a better rule than the at-will rule. This can be explained by the international acceptance of just cause protection as a primary social goal in the post-war period, for example, through the ILO Recommendation 119 of 1963, the predecessor of ILO Convention 158.[3] From an *economic* point of view, however, the at-will rule is considered as a better rule, because rules on employment termination lead to costs in hiring and firing employees. Due its low costs, the at-will rule enables employers to make more profits, hence, benefits the economy.[4] The answer to the question whether the at-will rule or the just cause rule is better, thus, depends on one's economic or social point of view.[5] Moreover, one must bear in mind that law makers may well recognize the positive aspects of an at-will or a just cause rule, but that they do not always have a choice to act upon at notice as a dismissal system is the outcome of specific social, historical or geographical conditions of the country.[6] In fact, the Chapters 2 and 3 on American and Dutch dismissal law, respectively, show that only the analysis of other legal systems will recognize what is accidental rather than necessary, and what is permanent rather than changeable in legal norms.[7]

In this Chapter, I compare American and Dutch dismissal law in respect of just cause protection. Unlike a *legal* comparison (*rechtsvergelijking*) that generally focuses on the harmonization of legal rules, the underlying comparison will *not*

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1 From OECD 2004 it derives that this applies to Anglo-saxon countries in general. See also Nagelkerke 2006, p. 483.

2 For a same conclusion, see also OECD 2004, Chapter 2. See also TK 2004-2005, 30 109, No. 1, p. 39 and 40.

3 For ILO Convention 158, see below under § 21. See also Napier, Javillier and Verge 1982, p. 3.

4 See above under § 1.1.2. See also Van den Heuvel 2000b, p. 361.

5 For a discussion of the common law and the civil law system, see below under § 27.2.

6 Van der Heijden 2000, p. 236. See also the Minister of Social Affairs in *Notitie Ontwikkelingen en keuzes in het stelsel van werk en inkomen* of 28 June 2006, p. 2 and 3.

7 Sauveplanne 1981, p. 2; Bourgeois 1995, p. 25; De Cruz 1999, p. 3, 9 and 10; Zondag 2001, p. 323.

focus on the harmonization of legal rules. The different legal systems of the United States and the Netherlands, in fact, make a legal comparison virtually impossible. Hence, in furtherance of Heerma van Voss, who compared Japanese and Dutch dismissal law, I will speak of an *illustrative* comparison (*illustratieve vergelijking*). In this respect, I will examine whether and what countries can learn from each other, regardless of their differences in cultural, geographical and legal aspects.[8] Also, *this* comparison must serve a goal, however.

The *primary* goal of the underlying comparison is to describe American and Dutch dismissal law as a method of study.[9] In 1992, Heerma van Voss already stressed the importance for the Netherlands to focus on the United States.[10] As Heerma van Voss correctly states, the United States is an important competitor. Like the Netherlands, it is coping with the process of economic globalization, which has resulted in transnational law firms, the ever-growing influence of these corporations in foreign countries and the drafting of transnational contracts,[11] making it necessary to become aware of the legal rules of these other countries involved in the process.[12] *Second*, by looking at dismissal systems through the perspective of an 'outsider', the underlying illustrative comparison will help to (i) better understand one's own dismissal system and that of the other; and (ii) realize that, regardless of the cultural, geographical and legal differences, the United States and the Netherlands might learn from each other in finding a new balance between flexible dismissal law for employers and just cause protection for employees.[13] This Chapter examines whether both countries, despite of their differences, have enough in common to allow lessons to be drawn from comparison. Or as Blanplain emphasizes, countries may have chosen for different solutions on a same issue 'such that one cannot help, but initiate the analysis and evaluation of one's own system again, but now from another angle, from an enriched point of view, from a new insight.'[14]

27.2 The American common law and the Dutch civil law system

The different families of legal systems refer to a set of deeply rooted historically conditioned attitudes about the nature of law, the role of law in the society and

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8 See Heerma van Voss 1992, p. 18. See also the Minister of Social Affairs in *Notitie Ontwikkelingen en keuzes in het stelsel van werk en inkomen* of 28 June 2006, p. 2 and 3.

9 Sauveplanne 1981, p. 5; De Cruz 1999, p. 3; Zondag 2001, p. 323.

10 See Heerma van Voss 1992, p. 20. At present, China is booming due to the process of economic globalization, which makes it also interesting to examine Chinese dismissal law, hence, this might induce other researchers to 'illustratevely' compare Dutch and Chinese dismissal law. See also Advocatenblad 2006/9, p. 394 and 395.

11 De Cruz 1999, p. 21 and 22.

12 Sauveplanne 1981, p. 2. See also Appendix I.

13 Sauveplanne 1981, p. 3 and 4; De Cruz 1999, p. 6. See also Heerma van Voss 1992, p. 18.

14 Zondag 2001, p. 323, referring to Blanpain 1993, p. 4. See also Blanpain 2001, p. 4; De Cruz 1999, p. 9 and 10.

the political ideology, and the organization and operation of a legal system.[15] Different distinctions between families of legal systems have been made.[16] The most common distinction is between common law, civil law, and socialist countries. Countries, which are usually classified as common law jurisdictions are the United States, Australia, New Zealand, Canada, England and Wales, Singapore, Malaysia and Hong Kong. Civil law countries, for example, include the Netherlands, Germany, France, Italy, Austria, Latin American countries, and Turkey. Socialist law jurisdictions include the former USSR, China and Cuba.[17] It is generally agreed that the United States and the Netherlands do not belong to the same family of legal systems.[18]

In the United States, English settlers implemented *English common law*, which was developed by courts. It provided a large body of rules founded on unwritten customary law that had evolved and developed throughout the centuries with strong monarchs and centralized courts, being its typical features.[19] In fact, from the beginning of the eleventh century, King William the Conqueror (1066-1087) prevented the triumph of Roman law in England. King Henry II (1154-1189) subsequently prevented a diversity of customary law. In this respect, he appointed so-called 'justices in eyre' to speak law on behalf of the King in cases, which involved the Crown. These judges had a great influence on the development of common law in England. In effect, three kings' courts established English common law, i.e. (i) the Court of Exchequer, which handled tax issues; (ii) the Court of King's Bench, which handled cases on interests that involved the Crown; and (iii) the Court of Common Pleas, which handled all other – civil – cases.[20] Consequently, typical legal institutions in common law jurisdictions were – and still are – contract and tort principles.[21] Kings' courts initially traveled throughout the country, hence, common law reflected – and still reflects – ad hoc decisions, rather than a general principle or rule of law.[22] In fact, federal judges in the United States – in accordance with the English common law system – still are appointed for life, contrary to judges on state level who are *chosen* for a number of years. The rationale behind chosen judges is that the public wishes to have a saying – other than through *jury* trials – on

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15 De Cruz 1999, p. 31.

16 For example, a distinction has been made between the French and the German group. Under this distinction, the Netherlands belongs to the first, Japan to the second. For an in-depth discussion of the influence of German law on Japanese law, see Heerma van Voss 1992, p. 373 and 374. See also Sauveplanne 1981, p. 14, 74, 162 and 178. See further, De Cruz 1999, p. 3 and 31. Also, a(nother) distinction has been made between Romanistic, Germanic, Anglo-Saxon, Slavic and Islamic on the one hand, and Romanistic, Germanic, Nordic, Common Law Family, Socialist, Far Eastern Systems, Islamic Systems and Hindu law on the other. See Sauveplanne 1981, p. 18-20; De Cruz 1999, p. 32, referring to Esmein (1905) and Zweigert and Kotz (1977).

17 De Cruz 1999, p. 32 and 33.

18 De Cruz 1999, p. 3 and 31.

19 See above under § 10.2. See also De Cruz 1999, p. 34.

20 Sauveplanne 1981, p. 138-140; Uniken Venema/Zwalve 2000, p. 28-33.

21 De Cruz 1999, p. 37. See also above under § 10.3.

22 Sauveplanne 1981, p. 140.

those who apply the law, i.e. on those who rule over them. In this respect, a court decision, too, may include more opinions, i.e. concurring and dissenting opinions.[23]

In contrast, in the Netherlands, the reception of *Roman law* took place in the late Middle Ages, although its influence was already felt in the thirteenth and fourteenth century.[24] Subsequently, in 1795, when Napoleon Bonaparte conquered the – former – Netherlands, the influence of *French law* was felt. When in 1808 Napoleon's brother was appointed King of the new Kingdom of Holland, he, in effect, abolished Roman Dutch law, introducing *Het Wetboek Napoleon ingerigt voor het Koningkrijk Holland*. The French Civil Code, in turn, replaced the latter, in 1811. After the French had left in 1813, a new Kingdom of the Netherlands was established in 1815, after which the Dutch government – after the separation of Belgium in 1830 – in 1838, enacted its own civil codes. The Dutch government saw codification, introduced by the Romans and subsequently by the French, as an important means for the unification of rules and security on interpretation of these legal rules.[25] Hence, the Netherlands generally is qualified as a *civil law* country. The civil law system, unlike the common law system, as De Cruz correctly states

> '(…) reflects both the Roman law origins, strong influence of the French Civil Code and the subsequent influence of the German Civil Code. However, more significant has been the influence and reception of Roman law with a particular system. It was Roman law with its notions of codification, systematization of concepts into categories, principles and divisions of law which has left its lasting imprint on the French and German Codes. This was in stark contrast to common law adoption of substantive law principles, which developed in an ad hoc fashion, in response to the need to resolve disputes, whose development was largely dependent on disputants bringing their case to the courts. In general, there in fact is no common law legislative tradition which sought to reform or redress the law by means of the legislature, unlike the civil law system.'[26]

The common law and the civil law system explain why judge-made law has considerable weight in the American legal system, and statutory law in the Dutch legal system.[27] These systems also explain that the at-will rule in the United States is judge-made law, and the just cause rule in the Netherlands has

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23 A concurring judge agrees with the majority, but not with its reasoning. In contrast, a dissenting judge disagrees with the majority. See Drion en De Savornin Lohman 1973, p. 25; Stolker 1992, p. 33-44; Klik 1994, p. 17.

24 For an in-depth discussion of the reception of Roman law in the Netherlands, see De Monte Verloren en Spruit 1982, p. 228-248.

25 Sauveplanne 1981, p. 56; Bourgeois 1995, p. 26; Uniken Venema/Zwalve 2000, p. 27. See also C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.

26 De Cruz 1999, p. 34 and 35. See also Bourgeois 1995, p. 2. For an in-depth discussion of the historical development of the civil law system, see De Cruz 1999, p. 47-100.

27 De Cruz 1999, p. 35.

been adopted by the legislature. Moreover, the common law and the civil law system clarify why American courts and the Dutch legislature, respectively, are generally considered as the appropriate instances to amend the at-will and the just cause rule in the United States and the Netherlands. Last, the common law system explains why the judge-made at-will rule in the United States – with 50 states with their own law and court system – is only slowly developing towards a just cause rule. The distinction between common law and civil law countries is not black and white, however.

For example, Roman emperors were in command of England – at the time, called Britannia – during five centuries.[28] Also, common law and the civil law systems, in practice, overlap, in that legal systems continue to resemble each other in their use of sources of law.[29] For example, in the United States discrimination law is given *statutory* force by federal and state legislatures.[30] Nevertheless, the influence of English common law in the United States is still felt, although it has declined.[31] In fact, three main *English common law* ideas, in fact, still dominate the American legal thought, i.e. (i) the concept of supremacy of law, best illustrated by the notion that statutory law is subject to judicial review; (ii) the tradition of precedent; and (iii) the notion of a trial as an adversarial, contentious proceeding, usually before the jury.[32] In the Netherlands, the qualification of civil law country is not black and white either. In the Netherlands, statutory law has considerable weight, but may well be a codification of judge-made law.[33] Hence, in understanding the legal rules of the United States and the Netherlands one must consider the influence of common law and civil law, respectively. However, it is only *one* aspect of the legal system. To understand American and Dutch dismissal law one – as took place in the Chapters 2 and 3 – must focus on *all* relevant aspects of the legal system, including its legal history, the institutions that are inherent to these legal systems, the legal hierarchy of law, and the political influence on these legal systems.[34] Also, in understanding American and Dutch rules on employment termination, it is noteworthy to mention that the United States is a relatively young state compared to the Netherlands.

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28 Uniken Venema/Zwalve 2000, p. 26.

29 De Cruz 1999, p. 39.

30 See above under § 8.

31 De Cruz 1999, p. 109.

32 De Cruz 1999, p, 120. Sub (ii) also explains why American judges – still – apply the rule of stare decisis. De Cruz 1999, p. 119 and 120, referring to Atiyah and Summers (1991).

33 For example, see Art. 7:667.4 DCC, providing a rule on a valid termination of an employment agreement for a definite period preceded by an employment agreement for an indefinite period. This rule is a codification of HR 4 april 1986, NJ 1987, 678 (*Ragetlie/SLM*). For an in-depth discussion of this rule, see Ostendorf 2004. See also Buijs en Heerma van Voss 1996, p. 286.

34 Bourgeois 1995, p 45. For example, the historical explanation of American jurisdictions is not only found in British, but also in French colonism. As a consequence, the state of Louisiana – as the only state in the United States – has a legal system that is based on Roman, Spanish, and French Civil Law as opposed to English Common Law . In fact, Louisiana retains a civil law legal sytem, based on the Louisian Civil Code , which is almost similar to the French Civil Code. See De Cruz 1999, p. 35.

27.3 Differences and bottlenecks regarding just cause protection

The United States of America was established in 1787 by *thirteen* colonist states, with the potential to grow to *fifty* states.[35] In this process of growth, Congress, in principle, felt no need to intervene in the relationship between employers and employees. Instead, the priority of the American federal government at the end of the nineteenth, and the beginning of the twentieth century, was to *stimulate* the relatively young economy. Although the American government was aware of the negative effects of the Industrial Revolution on workers, the bad working conditions mainly involved immigrants. The latter were not the government's first concern.[36] Nevertheless, under pressure of unions, the federal government started to enact protective labor laws. The Republican pro-business orientated US Supreme Court, in turn, frustrated the existence of these laws.[37] Subsequently, when the US Supreme Court allowed protective labor laws – and Congress could regulate any subject matter, including that of employment termination protection – pressure from politically powered groups such as employers and attorneys-at-law kept national just cause legislation from enactment.[38]

Consequently, Congress left the issue of employment termination to state governments, which left the issue to the courts. These applied the at-will rule to employment agreements, which was attributed to H. Wood's Treatise on the Law of Master and Servant of 1877.[39] It is assumed that Wood's understanding of the doctrine was well-suited to the needs of employers in the developing industrial and commercial society of his period, which might explain the popularity of the at-will rule.[40] Under this rule, employers and employees are considered as equal parties to which general contract principles apply. The rule assumes a market transaction, a buyer and a seller of goods or services.[41] The at-will rule, in other words, denies the existence of unequal bargaining power between the employer and the employee.[42] From this view, the at-will rule enables employers to run their businesses as they like, providing an *unlimited* power to dismiss employees. Courts, too, approached the employment relationship from this economic point of view.[43] In fact, courts still consider

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35 See above under § 5.1.

36 See above under § 1.2.1.

37 See below under § 28.1.1.

38 See above under § 6.2.

39 For Wood's rule, see above under § 10.2. Subsequently, the US Supreme Court gave the at-will doctrine constitutional protection. For a discussion of *Adair (1908)*, see below under § 28.1.1.

40 Barber 1993, p. 3. Others argue that the doctrine reflected the dominant pattern of short term employment of that time. They, however, cannot explain why the at-will rule survived in times of long term employment as well. Summers 2000, p. 3.

41 Finkin 1995, p. 171. See also above under § 10.3.

42 Finkin 1995, p. 171.

43 See above under § 10.2.

employers and employees as parties with equal rights, in that an employer can dismiss an employee at will on the one hand, and employees can quit at any time on the other. These courts, however, ignore that employees generally do not wish to quit, but that they prefer job security.[44] An important development for at-will employees in the United States, therefore, was when in the late 1970s, and early 1980s, a number of courts started to recognize just cause protection for these employees by applying *modern* contract principles.[45] Already, federal and state governments had started to restrict the employer's freedom of contract by making *legislativ*e exceptions to the at-will rule.[46]

In contrast, the Netherlands already had a flourishing economy at the time the United States of America was established. With the incorporation of the Dutch East India Company (*Verenigde Oost-Indische Compagnie* or *VOC*) in 1602 – in effect, being the world's first multinational trading species and other consumer products worldwide – the Netherlands was fortunate to experience the Glory of the Golden Age, in which Amsterdam would become the trade and financial center of the world. From an economic point of view, the Industrial Revolution in the nineteenth century meant a new boost for the economy, but not for workers. In fact, the Industrial Revolution reached its lowest point for Dutch workers at the end of the nineteenth century, a period better known as the 'Social Question' (*Sociale Quaestie*).[47] By means of the Act of the Employment Agreement of 1907, the Dutch government aimed to balance the unequal bargaining power between employers and employees.[48] A hundred years later, the process of economic globalization, however, forced the Dutch government to look at dismissal law – again – from an economic point of view.[49]

In conclusion, both the United States and the Netherlands cope with finding a new balance between flexibility of rules on employment termination for employers on the one hand, and just cause protection for employees on the other. In the United States, the main bottleneck is that courts still consider the employment agreement a contract like any other. In the Netherlands, the main bottleneck is that the government still considers the employment relationship as a special relationship. As derives from the first Chapter, the aim of this thesis is to make suggestions regarding bottlenecks in respect of just cause protection. However, before one is able to make suggestions, one needs to understand the different views on dismissal law by American courts and Dutch governments, and on the rules underlying these bottlenecks in particular. Therefore, in paragraph 28, I will first focus on dismissal law from a *social-economic* angle, discussing the economic point of view on dismissal law by American courts on

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44 Napier, Javillier and Verge 1982, p. 7; Finkin 1995, p. 171. See also under § 28.1.2.

45 See above under § 10.4.

46 See above under § 6.1.

47 See above under § 1.2.1.

48 See above under § 15.3.1.

49 See above under § 15.3.3. See also below under § 29.2.2.

the one hand, and the social point of view on dismissal law by the Dutch government on the other. In paragraph 29, I will focus on dismissal law from a *judicial-technical* angle, discussing the legal rules which underlie the bottlenecks regarding just cause protection in the United States and the Netherlands, respectively.[50]

28 Differences due to different views on the employment relationship

28.1 American dismissal law: economic view

28.1.1 At-will rule: equal bargaining power

By giving the at-will doctrine constitutional protection in *Adair (1908)*, the US Supreme Court, in effect, affirmed that employers and employees have equal bargaining power. In question was the Erdman Act, which Act was passed by Congress in 1898. It applied to carriers engaged in interstate commerce and their employers, making it illegal for employers to dismiss employees on the basis of their participation in labor unions. Under the Act, 'yellow dog' contracts under which employees had to commit themselves *not* to join a union during the duration of the employment agreement, were considered as illegal as well.[51] In this case, a representative of the Louisville and Nashville Railroad Company, William Adair, had violated the Erdman Act by discharging a locomotive fireman who had joined a union. The issue on which the US Supreme Court had to decide was whether the Erdman Act violated the Fifth Amendment. The latter guarantees freedom of contract and property right, and prevents governments from depriving an individual of liberty or property without due process of law.[52] On a 6-2 decision, the US Supreme Court held that the right to purchase or to sell labor is part of the liberty protected by this Amendment. In this respect, Jude Harlan, who delivered the opinion of the Court, held that

> 'The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee. It was the legal right of the defendant Adair (…) to discharge Coppage because of his being a member of labor organization, as it was the legal right of Coppage, if he saw fit to do so (…) to quit the service in which he was engaged because the defendant employed some persons who were not members of a labor organization.'[53]

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50 For a same distinction, see also Zondag 2001, p. 324.

51 For an in-depth discussion of the Erdman Act and the (in)validity of yellow dog contracts, see Stege 2004, p 340, 347-352.

52 See also above under § 5.2.1.1.

53 *Adair (1908)*, 208 U.S. 161, 175 and 176.

Moreover, the Adair Court held that any legislation that disturbs the equality between an employer and employee is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land. Therefore, it considered the Erdman Act as *unconstitutional* for violating the due process clause of the Fifth Amendment. Second, it held that whereas Congress has a large discretion in the regulation of interstate commerce, it could not make it a crime against the United States to discharge the employee because of his being a member of a labor organization, which in its opinion had nothing to do with interstate commerce. More specifically, it argued that anyone who engages in the service of an interstate carrier would faithfully perform his duty whether he is a member, or not a member of a labor organization. It is the employee as a man, and not as a member of a labor organization who labors in the service of an interstate carrier.[54]

In contrast, the dissenting judges McKenna and Holmes argued that the liberty guaranteed by the Fifth Amendment is *not* a liberty, free from *all* restraints and limitations, e.g. it does not include the liberty to discriminate. As regards the Erdman Act, which prohibited discrimination or discharge of employed persons because of union membership by a carrier engaged in interstate commerce in the employment, McKenna added that relations of railroads with unions of railroad employees are closely enough connected with commerce to justify legislation by Congress and that, consequently, legislation, which prevents the exclusion of such unions is sufficiently near.[55]

In effect, the decision in *Adair (1908)* reflected the consistent pro-business slant that the US Supreme Court would take until 1937.[56] This changed when the Democratic President Roosevelt (1933-1945) and Congress, under pressure of the stock-market crash of 1929 and the Great Depression of the 1930s, discussed the possibility of authorizing the President to appoint additional democratic justices to the Court to change the balance of power, i.e. to change the Court's attitude towards the constitutional doctrine. Before Congress and the President could act, however, the US Supreme Court abandoned the constitutional doctrine.

In *West Coast Hotel (1937),* the US Supreme Court overruled the holding in *Adair (1908)*, making protective labor legislation possible.[57] The US Supreme Court – in accordance with the dissenting judges in *Adair (1908)* – held that Congress under the Commerce Clause of the US Constitution has the power to regulate interstate commerce, including the power to enact all appropriate legislation for the protection of the public interest. Moreover,

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54 *Adair (1908)*, 208 U.S. 161, 179 and 180.

55 *Adair (1908)*, 208 U.S. 161 (1908). See also Barber 1993, p. 3; Goldman 1996, p. 33.

56 Between 1900 and 1937, Wilson was the only Democratic president (1913-1921). More specifically, the others were McKinley (1897-1901), Theodore Roosevelt (1901-1909), Taft (1909-1913), Harding (1921-1923), Coolidge (1923-1929) and Hoover (1929-1933).

57 Peck 1991, p. 3; Burnham 1995, p. 12 and 13; Jacobs 2003, p. 211, and p. 17, footnote 12, referring to Levenbach 1926b, p. 93; Stege 2004, p. 341.

because the Fifth Amendment does not speak of freedom of contract,[58] but of liberty without due process of law, it held that the US Constitution does not recognize an absolute and uncontrollable liberty. Instead, the Fifth Amendment refers to a liberty in a social organization, which requires the protection of law against the evils, menacing the health, safety, morals, and welfare of the people. Hence, Congress can intervene in the relationship between employers and employees. In this respect, it held that

> 'The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are, thus, relatively defenseless against the denial of a living wage is detrimental to their health and well being. Subsequently, the community may direct its law-making power to correct the abuse which springs from disregard of the public interest.'[59]

Subsequently, it decided that Congress could establish minimum wages designed to counteract the unequal bargaining position of workers under the Act in question.[60] Consequently, the US Supreme Court upholds protective labor law in *NLRB v. Jones & Laughlin (1937)*. In question was the National Labor Relations Act, which was passed by Congress in 1935.[61] The NLRA was challenged by Jones & Laughlin Steel Corporation in its entirety as an attempt to regulate all industry, invading the reserved powers of the states over their local concerns. In brief, the National Labor Relations Board (*NLRB*) under the NLRA had ordered the Jones & Laughlin Steel Corporation to cease and desist from discrimination against members of the union with regard to hire, tenure and termination of employment, and intimidating its employees in order to interfere with their self-organization. When the NLRB ordered reinstatement to ten employees, the employer failed to comply. The NLRB petitioned the Circuit Court of Appeals to enforce the order, which, however, denied the petition, after which the US Supreme Court granted certiorari.

The US Supreme Court held that the Act did not regulate all industry for it did not *compel* agreements between employers and employees. It stressed that the Act did not go further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection, without restraint or coercion by their employer. Hence, a rule to prevent the free exercise of the right of employees to self-organization and representation in the opinion of the Court was a proper subject for condemnation by Congress, stressing the law-making power of Congress to correct the abuse by employers of the unequal position of employees. As regards the latter, it held that

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58 *West Coast Hotel (1937)*, 300 U.S. 379, 399 and 400. See also Stege 2004, p. 363 and 364.

59 *West Coast Hotel (1937)*, 300 U.S. 379, 399 and 400. See also Stege 2004, p. 363 and 364.

60 *West Coast Hotel (1937)*, 300 U.S. 379, 391.

61 For the NLRA (1935), see above under § 7.3.

> 'Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.'[62]

After *Adair (1908)* was overruled in 1937, the at-will rule, nonetheless, remained in place as the basic premise in the United States undergirding the employment relationship.[63] For an outsider this is remarkable, because the US Supreme Court, in 1937, in effect, acknowledged that employees needed protection, due to their unequal position in the relationship with employers. The at-will rule denies this unequal position. The basic premise of the at-will rule, thus, at first sight seems inconsistent with labor law. Not surprisingly, opponents of the at-will rule generally refer to protective labor laws, stressing that the employment agreement is *not* a contract like any other, and *special* rules should apply.[64] As demonstrated in Chapter 2, bottlenecks in the United States regarding just cause protection arise, because of the application of general contract principles to the employment agreement. Subsequently, the question that arises is 'when general contract principles do not fit in the employment contract, must the employment relationship still be considered as a contractual relationship like any other, or rather as a relationship to which special rules must apply?'[65]

28.1.2 Discussion on special character of the employment relationship

In the landmark case of *Foley (1988)*, the California Supreme Court had to decide on whether the employment agreement was a special relationship. More specifically, the Foley Court had to decide on whether a breach of the covenant of good faith and fair dealing in the relationship between *employers and employees* could lead to *tort* damages, analogous to the relationship between an insurer and insured.[66] The majority of courts, considering the *insurance* relationship as a special relationship, argued that the insured typically has no ability to bargain for terms, and is at the insurer's mercy in case a claim is made. Hence, the insurer is in an automatically superior bargaining position.[67] Consequently, the majority of jurisdictions, by finding a special relationship

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62 *NLRB v. Jones & Laughlin (1937),* 300 U.S. 1, 30-32. See also above under § 7.3.1 and Stege 2004, p. 359.

63 Peck 1991, p. 3; Goldman 1996, p. 33; Summers 2000, p. 1 and 3.

64 See below under § 29.1.1.

65 See also above under § 10.3.

66 For an in-depth discussion of *Foley (1988)*, see above under § 10.4.2.2.

67 Rancourt 1996, p. 4.

between the insurer and the insured,[68] has recognized a breach of the covenant of good faith and fair dealing to sound in *tort* in the *insurance* relationship.[69] As this thesis reached its completion, the majority of states have not recognized the *tort* remedy for a breach of this covenant *outside* the insurance context. In contrast, the California Court of Appeal has recognized the tort remedy for breach of the covenant of good faith and fair dealing in the *employment* relationship in *Cleary (1980)* and *Koehrer (1986)*, inspired by *Tameny (1980)* and *Seaman's (1984)*, respectively.

In *Tameny (1980)*, the California Supreme Court held that the employee could recover tort damages in the employment context when a discharge violated public policy. In *Seaman's (1984)*, the California Supreme Court had carried the Tameny ruling one step further, in creating tort liability for breach of the implied covenant of good faith and fair dealing in *commercial* contracts.[70] The impact of *Seaman's (1984)* in the *employment* context was that the California Supreme Court in this decision made explicit reference to footnote 12 of its decision in *Tameny (1980)*. In this footnote, the California Supreme Court stated that past California cases held that breach of the covenant of good faith and fair dealing in the employment context could sound in tort as well as in contract, referring to insurance cases. Herewith, it had hinted that the employment agreement might be as special as insurance contracts. Inspired by footnote 12 in *Tameny (1980)*, the California *Court of Appeal* decided *Cleary (1980)*, permitting tort recovery for a breach of the covenant of good faith and fair dealing in the employment context.[71] Subsequently, inspired by inspired by footnote 6 in *Seaman's (1984)*, it decided *Koehrer (1986)*,[72] allowing employees to claim tort damages based on breach of the implied covenant of good faith and fair dealing, when being discharged intentional and done without probable cause while having fully performed and complied with all duties under the employment agreement.[73] In footnote 6 in *Seaman's (1984)*, the California Supreme Court held that

> 'In Tameny v. Atlantic Richfield Co. (1980) (…) footnote 12 (…) this court intimated that breach of the covenant of good faith and fair dealing in the employment relationship might give rise to tort remedies. That relationship has some of the same characteristics as the relationship between insurer and insured (…).'[74]

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68 Davidow 1990, p. 3; Horvitz 1993, p. 4; Mijuskovic 1996, p. 14; Dodge 1999, p. 5 and 6.

69 *Communale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654 (1958)*; *Crisci v. Security Ins. Co., 66 Cal. 2d 425 (1967)*; *Egan v. Mutual of Omaha Insurance Co., 620 P. 2d 141 (1979).*

70 *Seaman's Direct Buying Service v. Standard Oil Co., 36 Cal. 3d 752 (1984)*.

71 Jung and Harkness 1989, p. 2,referring to footnote 5; Walker 1993, p. 3; McGowan 1998, p. 5. See also above under § 10.4.3.2.

72 *Foley (1988)*, 47 Cal.3d 654, 693.

73 Macintosh 1994, p. 5 and 6.

74 Jung and Harkness 1989, p. 6; Macintosh 1994, p. 5 and 6; Rancourt 1996, p. 2;

Again, but this time more explicit, the California Supreme Court in this footnote recognized that an employment relationship could be as special as the insurance relationship. The California Supreme Court in *Foley (1988)*, however, declined to accept the suggestion that a special relationship, analogous between insurer and insured, should be deemed to exist in the employment relationship. It refused to award *tort* damages in case of a breach of the covenant of good faith and fair dealing in the employment context, emphasizing the traditional role of contract remedies and the need for predictability in commercial relationships.[75] In brief, it argued that under a special – insurance – relationship

- one of the parties to the contract enjoys a superior bargaining position, to the extent, that it is able to dictate the terms of the contract;
- the purpose of the weaker party in entering into the contract is not primarily to profit, but rather to secure an essential service or product, financial security or peace of mind;
- the relationship of the parties is such that the weaker party places its trust and confidence in the larger entity; and
- there is conduct on the part of the defendant to frustrate the weaker party's enjoyment of the contractual rights.

Subsequently, regarding the *employment* relationship it held that

- a breach in the employment context did not place the employee in the same economic dilemma that an insured faces, because the insured cannot turn to the marketplace, while an employee presumably may seek alternative employment;
- an employer, unlike an insurance company, does not sell economic protection;
- an employee, unlike an insured, allegedly does not seek a different kind of financial security than those entering a typical commercial contract; and
- insurance and employment contracts differ fundamentally, because the insured's and insurer's interests are financially at odds, while the employer's and employee's interests allegedly are most frequently in alignment.[76]

At first sight, the Foley Court seems to deny that an employee lacks dependency on the employer. On the other hand, one may argue that the Foley Court denies that an employee lacks the dependency of an *insured* to subscribe that *tort*

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75 Grodin 1992, p. 2 and 3; Macintosh 1994, p. 7; Rancourt 1996, p. 10; McGowan 1998, p. 5. Dodge 1999, p. 5.

76 *Foley (1988)*, 47 Cal. 3d 654, 719. See also Macintosh 1994, p. 7 and 8; Livoti and Manning 1996, p. 4.

damages in case of breach of the covenant of good faith and fair dealing is not the appropriate remedy in the employment context.[77] What is without discussion, is that the Foley Court does not consider the employment agreement a special contract in this respect, but as a contract like any other.

This view was not shared by all justices of the Foley Court, however. Broussard, Kaufman, and Mosk dissented from the court's refusal to allow tort damages for breach of the covenant of good faith and fair dealing in wrongful discharge cases. They stated that the relationship between an employer and an employee is as special as the relationship between an insurer and insured, stressing that it is naive to believe that the availability of the marketplace, or that a supposed alignment of interests renders the employment relationship less special or less subject to abuse than the relationship between an insurer and insured.[78] They stressed

> 'Whatever bargaining strength and marketability the employee may have at the moment of hiring diminished rapidly thereafter. Marketplace? What market is there for the factory worker laid off after 25 years of labor in the same plant, or for the middle-aged executive dismissed after 25 years with the same firm? Financial security? Can anyone seriously dispute that employment is generally sought, at least in part, for financial security and all that that implies: food on the table, medical car etc. Peace of mind? One's work obviously involves more than just earning a living. It defines for many people their identity, their sense of self-worth, their sense of belonging.'[79]

In fact, the dissenting judges stated that they could not think of a relationship in which one party places more reliance upon the other, is more dependent upon the other, or is more vulnerable to abuse of the other, than the relationship between employer and employee. In their opinion, in no other relationship does the relative imbalance of economic power between employer and employees tend to increase, rather than diminish the longer that relationship continues. Also, an employee usually does not enter into an employment relationship solely for the money, but because a job is one of status, a way of defining one's self-worth and worth in the community as well. Hence, a job is central to one's existence *and* dignity.[80] In literature, too, one emphasizes that a contract of employment differs from an ordinary business contract, in that employees are unique individuals possessing distinct talents, strengths, and weaknesses, not merely inputs to production. Moreover, one refers to the fact that people earn the necessities of life, i.e. food, clothing and shelter by working. Therefore, the loss of a job is not only an economic catastrophe, but also a psychological and emotional disaster for the employee and his or her family.[81]

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77 See *Foley (1988)*, 47 Cal.3d 654, 690.

78 Jung and Harkness 1989, p. 3.

79 *Foley (1988),* 47 Cal. 3d 654, 719. See also McGowan 1998, p. 1.

80 *Foley (1988),* 47 Cal. 3d 654, 709.

81 McGowan 1998, p. 1 and 2.

The Foley Court was of another opinion, although it should be noted that the winds of political change just began to blow at the time of its decision. The California Supreme Court, headed by the liberal Chief Justice Rose Bird, at the time persistently overturned nearly all death verdicts. In 1986, angered by this apparent refusal to carry out the popular will, the public voted Chief Justice Bird and two other justices out of office. Consequently, in 1986, Governor George Dukemejian, an avowed conservative, appointed three new justices as replacements and elevated fellow conservative Justice Malcom Lucas to the position of Chief Justice.[82] Not only did the court's death penalty jurisprudence changed virtually overnight after the shift from a liberal to a conservative court,[83] but the jurisprudence in civil cases as well. *Foley (1988*) is part of this significant imprint that Chief Justice Malcolm Lucas left on California jurisprudence.[84] Not surprisingly, the Foley Court, too, mentioned that changing remedies was best left to the legislature as well. However, as the dissenting justices correctly stated, it is fundamentally illogical for the majority to *abolish* an established *judge-made* tort remedy for the implied covenant in employment agreements, and then to argue that radical change in existing remedies is best left to the legislature.[85] In *Lazar (1996)*,[86] the California Supreme Court, however, repeated that any extension of tort remedies for an implied covenant should come from the legislature and not the courts.[87] A discussion on the appropriate remedy for a violation of the covenant of good faith and fair dealing in the employment context, in fact, still continues.[88] In my opinion, Grodin has a point that the way out of this dilemma ideally does not lie in the direction of choosing tort remedies over contract remedies, but rather by reframing and/or expanding the remedies of the employment agreement.[89] Hence, the focus should *not* be on the question whether a good faith covenant constitutes a tort or breach of contract, but on the question whether the employment agreement should be considered a relationship to which *special* rules and remedies should apply, as in the Netherlands.

28.2 Dutch dismissal law: social view

28.2.1 From a general to a special contract

In the Netherlands, Book 7 Title 10 of the Dutch Civil Code and the BBA 1945 provide rules, which apply to the employment relationship. Besides, employees have a cause of action under general contract principles if the employer abuses

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82 Stolker 1992, p. 39; Macintosh 1994, p. 7.

83 Jung and Harkness 1989, p. 2 and 3; Horvitz 1993, p. 3.

84 Jung and Harkness 1989, p. 2 footnote 5; Walker 1993, p. 4; Rancourt 1996, p. 2 and 7.

85 Walker 1993, p. 6.

86 *Lazar v. Superior Court, 909 P.2d 981 (Cal. 1996).*

87 McGowan 1998, p. 5 and 6.

88 See above § 10.4.3.2.

89 Grodin 1992, p. 3.

its economic power to force the employee to close an agreement.[90] For an outsider this is remarkable. This general contract principle, however, was not yet law in 1907. It was then when the legislature enacted the Act of the Employment Agreement, the predecessor of Book 7 Title 10 of the Dutch Civil Code, which, in turn, replaced a summary regulation on master and servants (*huur van dienstboden en werklieden*), i.e. the Articles 1637 to 1639 of the Dutch Civil Code of 1838.[91] These Articles, with the exception of Article 1639 which derived from Dutch ancient custom law (*oud-vaderlands recht*) and was introduced in 1838, were copies of the French Code Civil and had been introduced in the Dutch Civil Code in 1811.[92]

The reason to enact the Act of the Employment Agreement of 1907 was due to the deficiencies of this summary regulation. Under the latter, employees who had a contract for an *indefinite* period could be dismissed with or without cause, or even for a bad cause.[93] The Dutch government was aware of this deficiency, however, followed a so-called 'laissez-fair, laissez-aller' policy and, in principle, did not wish to intervene in contractual relationships between citizens. Citizens – including employers and employees – were considered as equals who were perfectly able to regulate their own affairs in relation to one another.[94] This attitude towards employers and employees changed when complaints on abuse of employees by employers reached the government, after the Lower House of Parliament had installed a Parliamentary Committee on 13 October 1886. After this Committee had registrated abuse of employers on 27 July 1887, the government installed a State Committee on 19 January 1890 to investigate these abuses. In January 1894, the Committee submitted its report to the government. Subsequently, based on depositions, which Section committees had held with employees and experts throughout the Netherlands, the State Committee delivered proof that, in practice, employees were unable to negotiate on an equal basis with their employers.[95] For example, the results for the North-Eastern part of the Netherlands showed that

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90 See Art. 44.4 of Book 3 Title 2 of the Dutch Civil Code. See also Hijma 1988, p. 125 and 126. Hartlief 1997, p. 225, referring to the rules on vitiated consent in general (*wilsgebreken*); Van Heusden 2006, p. 80 and 81, referring to HR 5 februari 1999, NJ 1999, 652 (*Ameva/Van Venrooij*). See also Van Eck 2001.

91 Bles I, 1907, p. 221.

92 Bles I, 1907, p. 1; Cornelissens 1959, p. 34-36; Kuip 1993a, p. 15-21; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.1; Loonstra en Zondag 2004, p. 53.

93 See also Handelingen NJV 1894, I, p. 181. For the deficiencies, see also above under § 15.3.1.

94 Heerma van Voss 1992, p. 31. See also C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.2.

95 The installment of the State Committee took place by Stb. 19 January 1890, No. 1. See Arbeidsenquete 1893, p. 1; Handelingen NJV 1894, I, p. 198; Bles I, 1907, p. 1; Meijers 1912, p. 57; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.1.

- an obligation to respect a notice period was generally lacking, and when agreed upon these periods were very short;
- factory regulations (*fabrieksreglementen*) that included a notice period could be amended by employers whenever it suited them; and
- employees were often dismissed without cause or even for a bad cause.

The State Committee concluded that these social abuses were a result of the poor regulation on master and servants in the Dutch Civil Code of 1838. In its opinion, the regulation needed to be replaced by an act that would provide specific rights and obligations of those working on the basis of an employment agreement.[96] This proposal to replace the Articles 1637 to 1639 was in accordance with the opinion of academics gathered in the Netherlands Association of Legal Academics and Practitioners (*Nederlandse Juristen Vereniging* or *NJV*),[97] and with the public opinion in general.[98] Already, Cohen Stuart in his Preliminary Advice (*Preadvies*), addressing to the NJV, had stressed that the Articles 1637 tot 1639, in effect, were dead letters. Article 1637 aimed to prevent slavery, and Article 1638 assumed that the employer in all circumstances could be taken on his word. Furthermore, Article 1639 required of a master, who wished to terminate an employment agreement for a *definite* period before the expiry date, a just cause for dismissal. However, employees generally were hired per hour, per day or per week, hence, this Article was without effect as well.[99]

The government could not deny the abuse of employees by employers, and saw it as its task to protect the weak. Therefore, it felt it had no other choice than to undertake action. An option was to replace the summary regulation by a cause of action under general contract principles, allowing a party to have an agreement declared void when the other abused his economic power to force one to close an agreement. Another option was to replace the summary regulation by an in-depth regulation that would entail rights and obligations of employees working on the basis of an employment agreement. The government chose for the latter. In this respect, it followed the State Committee, which had held that a more extensive regulation would be more efficient to prevent abuse.[100] To justify that

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96 Arbeidsinspectie 1893, p. 95 and 96; Bles I, 1907, p. 1; Canes 1908, p. 7.

97 The NJV, the only one of its kind, was an association, which was established in 1870 as a forum for legal academics and practitioners to discuss on legal affairs. See Handelingen NJV 1894, I, p. 199; II, p. 100.

98 Bles I, 1907, p. 1; Meijers 1912, p. 3.

99 Handelingen NJV 1894, I, p. 267. See also Verhulp 2003b, p. 291 referring to H.P.G. Quack, *De socialisten*, deel VI, Amsterdam 1921, p. 446. See further above under § 15.3.1.

100 Bles I, 1907, p. 221, 225 and 226. See also Verhulp 2003b, p. 291; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.2.

the employment relationship required *special* rules, the government held that the employment relationship distinguishes itself from a regular contractual relationship, in that

- labor is not a commodity like any other good that can be traded for money as it is part of the person of the employee;[101]
- it generally is the only means for an employee to earn a living;
- the latter makes the employee dependent of an employer in economic and societal aspects; with the loss of a job he loses his income, but this also affects his status; and
- the employee's dependent position requires protection against abuse of the employer.

Although in other relationships one party, too, might be dependent on the other, in the government's opinion, it was not as constantly present on the side of one party as in the relationship between the employer and the employee.[102] In *Foley (1988)*, the *dissenting* judges, in effect, had brought forward the same argument.[103] Unlike the Foley Court, the Dutch government recognized the employee's economic and societal dependence on the employer,[104] and adopted special rules to protect an employee against employer's abuse in virtually *all* aspects.

This raises the question which rules apply in the Netherlands, when special rules under Book 7 Title 10 of the Dutch Civil Code are lacking. The principal rule under Dutch (employment) law is that special rules prevail over general contract principles.[105] They, however, do not set aside general contract law as a whole, as it is virtually impossible for the legislature to regulate the employment relationship in *all* aspects in advance.[106] In fact, general contract principles are *needed* besides special rules. A good example is *Sijthoff/Ouwerkerk (1996)*.[107] In this case, the BBA 1945 applied to the publisher and the freelancer. The freelance contract did not meet the requirements of an employment agreement. Hence, when the public authority refused a permit, the contract could not be dissolved under Article 1639w (Article 7:685 DCC). The Netherlands Supreme Court hereupon held that the contract could be dissolved under the general

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101 See also Fokker, Handelingen NJV 1894, I, p. 175 and 176.

102 Meijers 1924, p. 17; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.3.

103 See above under § 28.1.2.

104 See below under § 28.2.2. See also Levenbach 1934, p. 19; Verhulp 2003b, p. 291.

105 Loonstra 2003, p.37.

106 Van den Berg en Zondag 2003, p. 4 and 404. See also Hartlief 1997, p. 232.

107 HR 8 november 1996, NJ 1997, 217, JAR 1996/249 (*Sijthoff/Ouwerkerk*). For a discussion of cases in which employees invoke general contract principles in the employment context, see Konijn 2000. See also Van der Heijden 1993b.

contract principle of Article 6:258 DCC.[108] This raises another question. Suppose, the application of *general* contract principles contrast with the special character of the employment agreement. A good example is case law on the validity of conditions subsequent (*ontbindende voorwaarde*). In brief, the application of the *general* contract principle of Article 6:21 DCC in the employment relationship frustrates the protective rules under the dual dismissal system. In reply, the Netherlands Supreme Court adjusted the general contract principle to fit into the employment context,[109] taking the special character of the employment agreement into consideration.[110]

This, in turn, raises the question if a Labour Code, setting aside general contract principles that conflict with the special character of the employment relationship, would not be a better alternative, as Loonstra suggested in the past. In this respect, Loonstra referred to the *status aparte* of the employment relationship in which the employee makes his labor *and* person subservient to the employer.[111] Like Loonstra, Levenbach, too, in 1926, spoke of a *status aparte* of the employment relationship, referring to its personal character, however, not in the same sense as Loonstra. Rather, he thought of the recognition of employment law as a separate field of law, not as separate rules setting aside general contract principles *per se* that are contrasting with the special character of the employment agreement.[112]

Initially, Drucker was indifferent about whether the special rules on the employment agreement became part of the Civil Code or were enacted as a separate act.[113] Eventually, Drucker agreed with the government – and the majority in Parliament[114] – in that the rules on the employment relationship would be part of the Civil Code, being a private contract in the first place, to which *primarily* special rules, and *subsidiary* general contract principles applied.[115] A few members of the Upper House, on the other hand, considered it as *illogical* to include the rules on the employment agreement in the Civil Code. The premise of general contract law was that parties were *equal*. In contrast, the premise of the rules, which would apply to the employment agreement, was that parties were *unequal*.[116] Hence, they preferred a separate act containing private and public rules, which would apply to the employment agreement. With the majority, however, they agreed that general contract principles would apply

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108 For an in-depth discussion of concurrence (*samenloop of cumulatie*), alternativity (*alternativiteit*) and exclusivity (*exclusiviteit*) of general and special rules, see Ingelse 1993; Van Slooten 1999, p. 20-24 and 34; Konijn 1999; Konijn 2000, p. 154.

109 For an in-depth discussion of case law on conditions subsequent, see above under § 15.3.1.

110 See also Konijn 1999, p. 304 and 308, stressing that this is not always the case.

111 Loonstra 2003, p. 52 and 53. See also Canes 1908, p. 5-7.

112 Levenbach 1926a, p. 28 and 29. See also Levenbach 1966a, p. 9.

113 Bles I, 1907, p. 109.

114 Bles I, 1907, p. 113 and 114.

115 Bles I, 1907, p. 111.

116 Bles I, 1907, p. 120.

when special rules were lacking.[117] In accordance with legislative history, the ongoing practice of courts is to apply *primarily* special rules, and *subsidiary* general contract principles.

With Loonstra, De Laat, a Cantonal Judge, acknowledges that when special rules lack for the employment agreement, it is insecure how courts will apply the general contract principle, but in his opinion this does not justify a Labour Code as suggested by Loonstra.[118] I agree with De Laat. To his argument(s), I add that under Loonstra's proposal a *court* – generally the Cantonal Court – must establish a *new* rule of law if it finds the general contract principle contrasting with the special character of the employment agreement. The first problem that arises is that a discussion may evolve on whether the general contract principle contrasts with the special character of the employment agreement. Moreover, when the case is brought before the Cantonal Court under a 7:685 DCC procedure, appeal is excluded. Therefore, in light of legal certainty, I advocate that the Dutch *legislature* only is the appropriate authority to establish, and to supervise rules on employment termination.[119] Only when decisions of courts interpreting a general contract principle continue to lead to legal uncertainty, should the legislature in my opinion make a special rule. This brings me to the question whether this rule should be mandatory (*dwingend*) or permissive (*regelend*).

28.2.2 Mandatory law: balancing unequal bargaining power

The Act of the Employment Agreement of 1907 held full mandatory law (*vol-dwingend recht*), semi mandatory law (*semi-dwingend recht*), and permissive law (*regelend recht*). The majority of provisions on *employment termination* – in total twenty – were full(y) mandatory.[120] In effect, these rules replace the will of parties. For a justification for the government to intervene to this extent, Loth states that this may be justified for three reasons (1) to protect the weak; (2) to safeguard the public interest; and/or (3) to protect the interests of third parties.[121] With the Act of the Employment Agreement of 1907, the Dutch government particularly wished to protect the weak employee.[122] In this respect, it invoked the *principle of balancing unequal bargaining power* (*beginsel van ongelijkheidscompensatie*) to justify full mandatory law,[123] allowing parties to

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117 Bles I, 1907, p. 124 and 125. See also Van Slooten 1999, p. 14-16.

118 De Laat 2003b, p. 313 and 314. See also Van Slooten 1999, p. 19 and 20; Heerma van Voss 2004, p. 117 and 118.

119 For an in-depth discussion of the trias politica, and the role of the court within this system, I refer to Broers en Van Klink 2001, and Broers en Jacobs 2003.

120 For an in-depth discussion of the legislative history of the Act of the Employment Agreement of 1907, see above under § 15.3.1.

121 Loth 2000, p. 41-47.

122 Van Peijpe 1999, p. 364; Verhulp 2003b, p. 289 and 290.

123 For an in-depth discussion of this principle in the employment relationship, see the contributions of I.P. Asscher-vonk, LH. van den Heuvel, P.F. van der Heijden and A.T.J.M. Jacobs to the Liber

deviate in favor of the employee only (*gunstigheidsbeginsel*).[124] The principle of balancing unequal bargaining power aims to guarantee the economically and socially weaker employee from being abused by the employer on the one hand, and to provide private-sector employees a minimum level of protection on the other.[125]

Besides, the Act of the Employment Agreement of 1907 held semi mandatory law and permissive law.[126] The legislature did not make this distinction, i.e. qualified these rules as such. Instead, the qualification of *semi mandatory law* had been made by Scholten in 1931, placing the rules between full mandatory law and permissive law.[127] In brief, semi mandatory law allows parties to deviate from permissive rules, however, in writing only (*eis van geschrift*). The rationale behind this requirement was to make employees aware of a deviation of the permissive rule. By introducing semi mandatory law, the government acknowledged that employees needed protection on the one hand, but that *both* parties, in practice, might wish to deviate from the rule in question on the other.[128] The aim of permissive rules was to provide rules when parties had not made arrangements of their own. Hence, parties are allowed to deviate from these rules, verbally or in writing.[129]

In time, unions and Works Councils started to play an important role in determining terms of employment. Subsequently, the government started to recognize unions – and to a certain extent, Works Councils – as equal bargaining parties of employers.[130] Consequently, *three-quarters* mandatory law (*driekwart-dwingend recht*) was introduced with the Act of 1953, which allowed collective bargaining parties – *only* – to deviate by a collective bargaining agreement from the rules in question.[131] The qualification of *three-quarters mandatory law* was not made by the legislature either, but by Levenbach, in 1954, placing this type of law between fully mandatory law and semi mandatory law.[132] In general, the rationale for the government to choose for three-quarters mandatory law is to offer employers the possibility to adapt the rules in question

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Amicorum of M.G. Rood, *Ongelijkheidscompensatie als roode draad in het recht*, L. Betten (red.), Kluwer, Deventer, 1997.

124 TK 1996-1997, 25 426, No. 1, p. 4 and 5; EK 1999-2000, No. 222a, *Notitie (zelf) regulering*, p. 2. See also Franssen en Jacobs 2006, p. 114.

125 Bles I, 1907, p. 212.

126 See also Heerma van Voss 2005b, p. 121.

127 Scholten 1931, p. 30. See also Loth 2000, p. 4 and 5.

128 TK 1996-1997, 25 426, No. 1, p. 6; Van Arkel en Loonstra 2004, p. 12.14.

129 TK 1996-1997, 25 426, No. 1, p. 6; EK 1999-2000, No. 222a, *Notitie (zelf) regulering*, p. 2; Bles I, 1907, p. 212. See also Heerma van Voss 2005b, p. 121.

130 TK 1996-1997, 25 426, No. 1, p. 5 and 6; EK 1999-2000, No. 222a, *Notitie (zelf) regulering*, p. 4. For the the pivotal role unions play as counterpary of the employee, see also Jacobs 1986, p. 301; Buijs en Heerma van Voss 1996, p. 288; Loonstra 1997, p. 29; Heerma van Voss 2005b, p. 121 and 126; Grapperhaus 2006, p. 33-36; De Ly 2006, p. 13.

131 Heerma van Voss 2005b, p. 128. For the Act of 1953, see above under § 15.3.2.

132 Levenbach 1954, p. 18. See also Heerma van Voss 2005b, p. 121 and 122.

to the operation of the enterprise on the one hand, and to avoid that parties set aside the protection of employees relatively easily on the other.[133]

Last, *two-thirds* or *five-eights* mandatory law (*tweederde of vijfachtste dwingend recht*) was introduced with the Working Time Act of 1996 (*Arbeidstijdenwet* or *ATW*). Under this Act, standard clauses apply, unless parties are allowed under deliberations clauses (*overlegbepalingen*) to deviate – within certain margins – from these standards through so-called collective agreements. For purposes of the *ATW*, collective agreements refer to collective bargaining agreements, and enterprise agreements (*ondernemingsovereenkomst*) between the employer and the Works Council (*Ondernemingsraad*).[134] Consequently, in the literature, this type of law has been qualified as two-thirds or five-eights law.[135] In the near future, this dual standard system will only apply to just a few provisions of the Act.[136]

I wish to stress that the introduction of mandatory law in the Act of the Employment Agreement of 1907 was not without discussion. In its meetings on 31 August and 1 September 1894, the NJV had a discussion on the issue of mandatory law in the employment relationship, initially concentrating on three questions. The first was whether the freedom of contract between employers and employees should be unlimited. If not, the second question was which rules needed to be mandatory. Third, the question was which remedies needed to apply if parties violated these mandatory rules. The members of the NJV eventually decided not to vote on the second question. Nevertheless, the arguments in favor of, and against mandatory law remain interesting to look at, because these are still used to justify the existence of mandatory rules or its abolishment.[137] It bears mentioning, that Fokker, Heldt and Mouton, all members of the NJV, had already advised the Corporation Promoting Machinery and Manual Work in the Netherlands (*Vereeniging tot bevordering van Fabrieks- en Handwerksnijverheid in Nederland*) on this matter. Subsequently, in the meetings of the NJV of 1894, the findings of the Reporters were included, accompanied with a Memorandum of Fokker, in which he stressed that the Reporters had approached the assignment by the Corporation from an *economic* point of view.[138] From this point of view, they had concluded that the legislature should only intervene in the relationship between employers and employees when necessary in light of the public interest. In fact, the less intervention, the

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133 TK 1996-1997, 25 426, No. 1, p. 5 and 6; EK 1999-2000, No. 222a, *Notitie (zelf) regulering*, p. 2.

134 TK 1996-1997, 25 426, No. 1, p. 6; Van Arkel en Loonstra 2004, p. 12.14; Heerma van Voss 2005b, p. 124, 125 and 128. See also EK 2000-2001, 00033, No. 229, p. 5.

135 See EK 2000-2001, 00033, No. 229, p. 5; Heerma van Voss 2005b, p. 128.

136 As this thesis reached its completion, a Bill was pending to abolish this dual standard system, with the exception of a few provisions. For these exceptions, see TK 2005-20006, 30 532, No. 3, p. 7 and No. 6, p. 9, referring to SER-Advies 2003/3.

137 See also above under § 1.1.2.

138 Handelingen NJV 1894, I, p. 173.

better.[139] In this respect, the Reporters had stated that rules frustrated the employer's operation and competition position.[140]

In his Memorandum, Fokker now approaches the issue from a *social* point of view. From this point of view, he concludes that, due to its personal character, special rules should apply to the employment relationship.[141] Second, he advocates that in making these rules, the legislature must make mandatory rules when the principle of freedom of contract leads to dangerous situations, causing harm to the public.[142] Cohen Stuart, in his Preliminary Advice, adds that mandatory rules in the employment relationship, in effect, already exist, but generally to protect women and children only.[143] To the extent protective rules lack for adult men, this in his view can be called odd when they work under bad circumstances, hence, need protection against employers as well.[144] 'What reason, he wonders, is there for protecting women and children against the abuse of the employer, and not to use the same argument for adult men?'[145] Cohen Stuart recognizes that employers have valid arguments in opposing mandatory rules, because the total costs generally will increase. On the other hand, the government can and must limit the freedom of contract when this is necessary to safeguard the welfare of the public, he states.[146] In enacting mandatory rules, the government's task is to find a balance between the interests of the employer on the one hand, and the interests of the employees on the other.[147] Consequently, his advice is to primarily enact permissive rules, allowing parties to deviate from the rule in question,[148] and to enact mandatory law only when permissive rules turn out to be ineffective.[149]

The members within the NJV react differently to the Memorandum, and the Preliminary Advice. Advocates of mandatory law, in principle, are Levy, Eyssell and Tripels. They stress that employees, who for their existence have nothing more than their labor to rely on, and, in practice, are at the will of the employer must be protected against abuse of employers.[150] Eyssell, however, warns that the legislature must prevent employees from abusing their economically weaker position.[151] Coninck Liefsting does not oppose mandatory law per se either, but prefers permissive rules, in that too many mandatory rules may weaken the

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139 Handelingen NJV 1894, I, p. 203 and 256.
140 Handelingen NJV 1894, I, p. 255.
141 Handelingen NJV 1894, I, p. 176.
142 Handelingen NJV 1894, I, p. 178.
143 Handelingen NJV 1894, I, p. 268-273.
144 Handelingen NJV 1894, I, p. 273.
145 See also Bles I, 1907, p. 125.
146 Handelingen NJV 1894, I, p. 275-277 and 285.
147 Handelingen NJV 1894, I, p. 279.
148 Bles I, 1907, p. 212.
149 Handelingen NJV 1894, I, p. 287-289.
150 Handelingen NJV 1894, II, p. 19 and 55.
151 Handelingen NJV 1894, II, p. 33 and 34.

competitive position of the employer.[152] Stern, too, stresses that mandatory rules may frustrate the employer in his operation.[153] Tripels and De Pinto agree with Drucker.[154] The latter, who would eventually become the 'founding father' of the Act of the Employment Agreement of 1907, and was already preparing drafts for the Minister of Justice at the time,[155] states that the question should not be whether the legislature needs to enact mandatory rules. In fact, the first step must be whether the legislature must enact rules for the employment agreement. In this respect, he states that the legislature had done so for other relationships, e.g. purchase agreements, hence, there is no reason to withhold action as regards employment agreements. Second, the legislature must ask itself with *every* rule whether permissive or mandatory law suffices. If the legislature wishes to prevent that the rule will become a dead letter, it must apply mandatory law.[156]

Hereupon, the members of the NJV unanimously voted in favor of special rules for the employment agreement. They did *not* vote on the question *which* rules should be mandatory. They admitted that the answer was virtually impossible to give, as Drucker had stressed.[157] What was important for the government, was that there was general agreement on government's intervention in the employment relationship, and also through mandatory law, when necessary for the employee's welfare.[158]

A debate within *Parliament* on mandatory law in the employment relationship took place in discussions on the Bill, underlying the Act of the Employment Agreement of 1907. Particularly, members of the Upper House opposed mandatory law, objecting to the general assumption that an employee is the economically weak party *per se*, hence, *all* need to be protected against the economic strong(er) employer. They held that an employee's economic dependence on the employer, in general, is determined by the supply and demand of employees.[159] The government, however, replied that employees, in practice, generally have no other choice than to agree upon the employer's terms, because they are dependent on the employer for their income. Employees who reject the terms will not be hired. For the employer, on the other hand, it will be relatively easy to find another employee, regardless of the supply and demand of employees.[160]

In the *Upper House*, Van Houten opposed the fact that the legislature wished to enact mandatory law in the employment relationship in almost *every* aspect. He argued that the legislature with mandatory law, in effect, aimed to

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152 Handelingen NJV 1894, II, p. 41.
153 Handelingen NJV 1894, II, p. 50 and 51.
154 Handelingen NJV 1894, II, p. 55-58.
155 See above under § 15.3.1.
156 Handelingen NJV 1894, II, p. 42-47.
157 Handelingen NJV 1894, II, p. 100-103.
158 See Drucker, Handelingen NJV 1894, II, p. 99.
159 Bles I, 1907, p. 219 and 220.
160 Bles I, 1907, p. 228 and 299.

punish the employer for making profits to the detriment of employees. He noticed that it is inherent to any relationship which involves a financial trade-off, that one party aims to make profits to the detriment of the other.[161] Van der Feltz, on the other hand, stressed that the discussion should not see to more or less mandatory rules, but to its justification, which in his opinion laid in the protection of the economic weaker employee.[162] The Minister of Justice, Van Raalte, agreed with Feltz, and held that the employee, *in general,* is the economically weaker party, hence, it in fact is superfluous to have a discussion on this.[163] Van Houten, however, objected, stating that not *all* employees are in an economic weak position, i.e. need protection of the government through mandatory law, referring to an employee who has a choice between working for an employer or for himself.[164] In reply, Van Raalte held that *those* who work in service of the employer are economically dependent and need protection through mandatory rules against abuse of the employer.[165] In fact, referring to De Courcy, the government was of the opinion that mandatory rules only could prevent an employer from abusing the employee, as permissive rules, in practice, could be contracted away.[166]

The legislature partly met Van Houten's objection to apply mandatory law to *all* employees. Already in his drafts, Drucker had made a distinction between employees, based on the height of their salary. For example, Article 1638l of the Act of the Employment Agreement of 1907 held a rule on the moment of payment of salary. When the employee earned less than four Dutch florins per day, an employer had to pay out salary ultimately after two weeks. When an employee earned more, parties themselves could decide on this moment.[167] In this respect, the legislature had recognized that *in certain aspects* employees with a high salary were less economically dependent on employers than those with an average salary. This distinction as regards the moment of payment no longer exists.[168]

On the other hand, the successor of Article 1637u, Article 7:650 DCC – providing a rule on penalty clauses in employment agreements – still makes a distinction between employees based on the height of salary. The only difference compared to 1907, is regarding the *height* of salary. In 1909, the height of salary was set on four Dutch florins per day in Article 1637u. As this thesis reached its completion, the height in Article 7:650 DCC has been set on the minimum wage. In brief, for those who earn more than the minimum wage,

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161 Bles I, 1907, p. 219 and 220.

162 Bles I, 1907, p. 229.

163 Bles I, 1907, p. 230 and 231.

164 Bles I, 1907, p. 234 and 235.

165 Bles I, 1907, p. 235 and 236.

166 Bles I, 1907, p. 212. See also Verhulp 2003b, p. 292.

167 For an in-depth discussion of Art. 1638l, see Meijers 1912, p. 125-127. See also Canes 1908, p. 216 and 217.

168 See its successors, i.e. Art. 7:623 and 624 DCC.

permissive rules apply.[169] This raises the question whether mandatory rules, *in general*, should not be converted into permissive – or less mandatory[170] – rules for *all* employees earning more than a certain wage.

28.2.3 Discussion on the existence of unequal bargaining power

The government eventually chose to apply the rules of the Act of the Employment Agreement of 1907 to *all* employees in service of the employer.[171] Thus, mandatory rules applied, regardless of whether the *employee in question* was economically and socially dependent, or whether the *employer in question* was economically stronger and socially independent.[172] The reason to choose for a general act was based on the thought that employees in service of employers, *in general*, were dependent of these employers. One will not deny that, in 1907, employees were working under extreme bad working conditions, and not in the position to determine their own terms.[173] The employee of 2007, however, differs from the employee of 1907. In a period of a hundred years the employee partly determines his own terms. This has raised the question whether employees are still parties with unequal bargaining power, i.e. whether *mandatory* rules in the employment relationship are still necessary.[174] Apparently, the government thinks they are. The number of mandatory rules in Book 7 Title 10 of the Dutch Civil Code has *increased* rather than decreased in a period of hundred years.[175]

In 1972, Van der Ven already stressed to reconsider the rules on employment termination in light of the employee's (in)dependency on employers.[176] In this respect, Jacobs, in 1994, stressed that the premise of unequal bargaining power no longer existed for the majority of employees, pointing out that in 1907 only a small minority of employees were subject to collective bargaining agreements. In 1994, he stressed, the majority were subject to collective bargaining agreements, hence, unions were able to bargain on behalf of employees with the employer.[177] Also, he suggested that employees who earned more than 150.000 Dutch Florins, about 70.000 Euro, or with a university degree should be excluded from Book 7 Title 10 DCC – he does not speak of the BBA 1945 – and, instead, should become subject to general

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169 See Art. 7:650.6 DCC. For an in-depth discussion of Art. 1637u, see Meijers 1912, p 124-128.

170 See Heerma van Voss 2005b, p. 126, suggesting to reconsider a conversion of fully mandatory rules into three-quarters mandatory rules.

171 Bles I, 1907, p. 132. See also Koopmans 1962, p. 78-86; Verhulp 2003b, p. 292-294.

172 Bles I, 1907, p. 139-141; Koopmans 1962, p. 78. See also Hondius 1999, p. 389; Lindenbergh 1999, p. 411.

173 See above under § 1.2.1. See also Verhulp 2003b, p. 289.

174 See also Verhulp 2003b, p. 297.

175 See Heerma van Voss 2005b, p. 125. See also below under § 28.2.3.

176 Van der Ven (1) 1977. See also Van den Heuvel 2002, p. 238.

177 Jacobs 1994, p. 1039 and 1040. In 1997, on the other hand, he recognizes the often dominant position of the employer. Jacobs 1997, p. 76.

contract principles, and collective bargaining agreements. In his opinion, *these* employees are not economically dependent, and are able to determine their own terms of employment.[178] Already, the SER suggested in 1970 to include a rule in the Act of the Employment Agreement, i.e. Book 7 Title 10 of the Dutch Civil Code, which makes it possible to exclude – or include – certain employees.[179]

Jacobs's suggestions met with heavy criticism in literature, however. Only Duk seemed to agree with Jacobs.[180] The main objection against Jacobs's proposal has been that the Act of the Employment Agreement of 1907 had proven to be efficient to the extent that it applied to *all* employees *in service of* an employer. Jacobs' suggestion to make a distinction between employees would lead to too much diversity, hence, would be inefficient.[181] Van Peijpe and Van der Heijden, in effect, opposed Jacobs's proposal to distinguish between employees based on salary *only*. They rather prefer to distinguish between dependency in the sense of Article 7:610 DCC, and independency in the sense of Article 7:400 DCC. Hence, Van der Heijden calls for *protection* of economic independent employees who, in effect, are economic dependent.[182] Conversely, Van Peijpe calls for *excluding* those who are economic independent, from protective rules on employment termination.[183]

At first sight, this criticism is remarkable. In general, one recognizes that employees with higher salaries are less dependent on their employers. Also, the legislature, in effect – although to a certain extent only – recognized that employees with high salaries are less dependent on employers than those with average salaries. I admit, during the discussion of the Bill, underlying the Act of the Employment Agreement of 1907, Drucker already stressed that *salary* based upon which one would be excluded from a rule's protection was arbitrary. On the other hand, the advantage of this criterium was that the height of one's salary was easy to determine.[184] In this respect, the Lower House and the government agreed with Drucker that in certain aspects a distinction could be made between more and less economically weak employees based on this criterium.[185] In contrast, the Upper House opposed the height of salary as a criterium for protection. In reply, the government stated that one cannot deny that, *in general,* an employee with a high salary will be less dependent on the employer than an employee with an average salary, hence, economic dependency lies in the height of the salary.[186]

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178 Jacobs 1994, p. 1041 and 1042. See also Jacobs 1997, p. 74 and 77.

179 SER-Advies 1970/9, p. 22.

180 Duk 1996, p. 25.

181 Pera 1994, p. 1425; Van der Heijden 1995, p. 13; Asscher-Vonk 1995, p. 17. See also Konijn 1999, p. 32.

182 Van der Heijden 1999a, p. 6-8. See also Verheul 1999.

183 Van Peijpe 1999, p. 375-377.

184 Bles I, 1907, p. 243.

185 Bles I, 1907, p. 246 and 247.

186 Bles I, 1907, p. 247-251.

Jacobs correctly points at the, meanwhile, mature and independent employee who is able to determine his own terms. Also, he referred to the importance of unions in this respect.[187] In contrast, in 1993, Van der Heijden asked attention for the development of individualization (*individualisering*), referring to employees who wished to deliberate on specific terms with the employer, dependent on their personal circumstances, *rather than that unions speak up for them*. However, Van der Heijden, too, stressed the need to convert industrial law into post-industrial employment law,[188] in that the society in a period of hundred years had converted from an industrialized society, in which employees needed protection against the employer's abuse, into an industrial and service society, in which employees have become emancipated, well-educated, and capable of speaking up for themselves or through others. In this respect, Van der Heijden pointed at the development of privatization (*privétisering*), referring to employment laws, which take the personal circumstances of employees into consideration, furthering the rights of employees to agree upon their own personal terms.[189]

Van der Heijden, too, emphasized that employees were still protected through mandatory rules, which had been created for employees a hundred years ago. On the other hand, employers who needed to operate flexibly to strengthen their competitive position in the international context, due to the process of economic globalization, avoided these rules by hiring contingent workers, who, in turn, were in need of, but lacked dismissal protection. To the extent courts were unable to solve the problem, Van der Heijden concluded that it was time for the government to adapt the rules on the employment relationship in furtherance of the foregoing development.[190] In this respect, Jacobs, in 1997, stressed that the principle of order (*ordeningsfunctie*) – enabling an employer to run his business properly – is as important as the principle of balancing unequal bargaining power.[191]

Van den Heuvel correctly states that advocates of protective rules will continue to stress that employees need protection, due to their unequal bargaining power, and opponents of protective rules will continue to stress that protection is not necessary, stressing that parties, in effect, are equal.[192] I agree with Van den

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187 Jacobs 1994, p. 1040 and 1041.

188 Van der Heijden 1993a, p. 297.

189 Van der Heijden 1999c; Zondag 2003c.

190 Van der Heijden 1993a, p. 298 and 300. See also Van der Heijden 1997a, p. 56-59.

191 Jacobs 1997, p. 71-73. In 1994, he spoke of 'the principle of freedom of contract, unless necessarily limited by law or collective bargaining agreements' as a leading principle. See Jacobs 1994, p. 1040 and 1041.

192 Van den Heuvel 1989a, p. 15.

Heuvel that employees in service of employers will never be independent in respect of *employment termination*.[193]

However, I agree with Van der Heijden, Noordam, and Jacobs that the principle of balancing unequal bargaining power is and should no longer be the leading principle in *all* aspects, i.e. *to the extent* that it was when the legislature introduced the Act of the Employment Agreement of *1907*. Put differently, employees are still in need of dismissal protection on the one hand, and protective rules in general on the other, but not to the extent as a hundred years ago.[194] Subsequently, I suggest that, in the spirit of Drucker, the legislature – due to the new developments – reconsiders whether protective rules are necessary, secondly whether these should be full mandatory, three-quarters mandatory, semi-mandatory, or permissively,[195] and thirdly, to which workers these rules should apply.[196] In this respect, it is important to stress that employers generally do not oppose just cause protection. For example, when, in 1995, the VNO-NCW, being the largest employers' association in the Netherlands, suggested to reduce the large number of mandatory rules on employment termination – stressing the need for employers to survive in the race of international competition in light of the process of economic globalization – to a few basic norms, it explicitly rejected the so-called 'hire and fire' system of the United States. It suggested abolishing Article 6 of the BBA 1945 on the one hand, however, it stressed that it wished to maintain the just cause rule as a basic rule in a new dismissal system on the other.[197] The SER, too, advised the government that one of the basic rules of dismissal law should remain that employers should not be allowed to dismiss employees on unjust grounds.[198]

Consequently, the government in Bill 25 263 on Flexiblity and Security held that just cause protection remains necessary, due to the economically weak position of the employee in his relationship with the employer. On the other hand, it recognized that the rules on employment termination needed to be made more flexible in light of developments as individualism, privatization and the process of economic globalization. This needs clarification. As mentioned above, the term *individualization* refers to mature and independent employees who are able to partly determine their own terms.[199] To the extent the government wishes to maintain just cause protection for employees due to their

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193 Van den Heuvel 2002, p. 238. See also EK 1999-2000, No. 222a, *Notitie (zelf) regulering*, p. 4, in which the Upper House acknowledges that collective bargaining parties must be free to regulate working conditions other than those related to employment termination; Zondag 2004c, p. 9.

194 Van der Heijden 1997a, p. 63; Konijn 1999, p. 33.

195 See also Verhulp 2003b, p. 302-304.

196 See above under § 28.2.2.

197 VNO-NCW 1995, p. 12.

198 For the VNO-NCW, see above under § 28.2.3. For the SER, see SER-Advies 1970/9, p. 13 and 22. See also De Vries, below under § 29.2.2.

199 See TK 1996-1997, 25 263, No 6, p. 4.

economically weak position on the one hand, but recognizes that employees are independent on the other, this means that (i) the government interprets the term economically weak as meaning something *different* than mature and independent;[200] or (ii) to the extent economically weak must be interpreted as immature and dependent, the government recognizes that not *all* employees are mature and independent, but that it prefers a uniform act for employees in service of the employer; or (iii) the government wishes to reconsider the rules on employment termination on the one hand, but wishes to maintain the just cause rule on the other. The latter is most likely. What was striking, therefore, was the recent – meanwhile, withdrawn – proposal of the Minister of Social Affairs in Bill 30 370, in which he suggested to allow collective bargaining parties to agree upon their own criteria for dismissal in collective dismissals, excluding them from the scope of the BBA 1945, thus, *without* the CWI examining whether there is just cause to dismiss these employees.[201]

Bill 25 263 eventually led to the Flexicurity Act of 1998.[202] The Flexicurity Act of 1998 provided – as Van der Heijden had suggested in 1993 – flexible rules on employment termination for employers on the one hand, and (job) security for contingent workers on the other.[203] In the underlying Bill, the government indeed acknowledged that, in 1997, with the *technical* revision of the Act of the Employment Agreement of 1907,[204] it had missed a chance to adapt the Act earlier to the process of economic globalization.[205] The discussion on the need of *more* flexible rules on employment termination, nonetheless, continued after the Flexicurity Act of 1998.[206] In this debate, Van der Heijden and Noordam asked attention for developments as globalization, flexibilisation and deregulation, in effect, urging the government to again reconsider the rules on the employment relationship in light of these developments.[207] In brief, they suggest distinguishing between basic principles (*basiswaarden*), social variables (*sociaalrechtelijke variabelen*) and social methods (*sociaalrechtelijke methoden*). For example, they consider protection as a basic principle, and the circle of protected workers as a variable principle.[208] In effect, the principle of balancing unequal bargaining power still underlies what they call the basic principle of protection.[209] In contrast, in the United States the principle of order (*ordeningsfunctie*) seems to prevail. Also this country, however, is in search of a

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200 See also Riphagen 1997, p. 136.

201 For this proposal in Bill 30 370, see also below under § 29.2.2.

202 See also above under § 15.3.3.

203 See EK 1999-2000, No. 222a, *Notitie (zelf) regulering*, p. 4. See also below under § 29.2.1.

204 For the technical changes, among which the renumeration of the provisions into 610 to 686, see '*Vaststellingswet titel 7.10 Burgerlijk Wetboek* (*Stb. 1996, 562*)'.

205 Van der Heijden 1995.

206 For an in-depth discussion of the ongoing discussions on dismissal law, see below under § 28.2.2.

207 Van der Heijden en Noordam 2001, p. 7-29.

208 Van der Heijden en Noordam 2001, p. 96-98.

209 Van der Heijden en Noordam 2001, p. 85-87. See also Van der Heijden 1999a, p. 3; Loonstra 2006b.

new balance between flexibility for employers on the one hand, and just cause protection for employees on the other.

29 Bottlenecks due to the need to strike a new balance between flexibility for employers and security for employees

29.1 American dismissal law: from flexibility to security

29.1.1 At-will system under fire: wrongful discharge law

In the late 1970s, and the early 1980s, the American at-will system came under fire. Courts became responsive to the cry to protect employees against abuse of employers of their unilateral right to dismiss employees, implementing a variety of exceptions to the at-will doctrine.[210] As Ballam put it, by the mid-twentieth century, employment law began to reflect the interdependence of individuals, and particularly the dependence of employees on employers, and the concomitant power of employers to abuse that power.[211] In this respect, reference is made to statutes, which evidenced a legislative judgment that employee interests in employment deserve protection from the unhindered power of employers to discharge. Additionally, Peck points at job protection for *public* employees, making it difficult for the government to justify the arbitrary and capricious action of private-sector employers tolerated by the employment-at-will doctrine.[212] Also, the California Court of Appeal in *Pugh (1981)* considered it as striking that legislatures in the United States have refrained from adopting statutes, providing generalized protection to private-sector employees against unjust dismissal, while public employees may enjoy job security through civil service rules and due process principles.[213] In *Pugh (1981)*, the California Court of Appeal in this respect held that

> 'The law of the employment relationship has been, and perhaps still is, in the process of continuing evolution. The old law of master and servant, which held sway through the 18th century and to some extent beyond (…) drew its contours from the model of the household – in which, typically, the servant worked, the master had general authority to discipline the servant, and it was the servant's duty to obey. (…). With the industrial revolution in the 19th century the law of master and servant underwent a gradual remodeling (…). The emphasis shifted from obligation to freedom of choice. (…) In light of the generally superior bargaining power of the employer, the employment contract became (…) in large part a device for guaranteeing to management unilateral power to make rules and exercise discretion (…). The recognized inequality of bargaining power between employer and individual employee undergirded the rise of the labor unions (…) [which] have placed limitations on the employer's unilateral

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210 Barber 1993, p. 4; Summers 2000, p. 4.

211 Ballam 2000, p. 3.

212 Peck 1991, p. 5.

213 *Pugh (1981)*, 116 Cal.App.3d 311, 321.

> right of termination. Under most union contracts, employees can only be dismissed for just cause (…). In recent years, there have been established by statute a variety of limitations upon the employer's power of dismissal (…). [Hence] the employer's right to terminate employees is not absolute.'[214]

To illustrate the new attitude of courts, Peck further refers to *Monge (1974)*, in which an employee was discharged for refusing to date her foreman.[215] The New Hampshire Supreme Court condemned this exploitative use of the employment relationship by the employer as breach of the implied duty of good faith and fair dealing.[216] In effect, it condemned the unlimited power of the employer to dismiss employees under the at-will rule. The Monge Court in this respect held that

> 'When asked to reexamine the long-standing common law rule of property based on an ancient feudal system which fostered in a tenancy at will a relationship heavily weighted in favor of the landlord, this court did not hesitate to modify that rule to conform to modern circumstances. (…) The law governing the relations between employer and employee has similarly evolved over the years to reflect changing legal, social and economic conditions. (…) Although many of these changes have resulted from the activity and influence of labor unions, the courts cannot ignore the new climate prevailing generally in the relationship of employer and employee. (…) In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two.'[217]

Peck further refers to *Pierce (1980)*.[218] In this case, the highest court of the state of New Jersey recognized a cause of action for violation of public policy. In justifying an 'abandonment' of the at-will rule, the New Jersey Supreme Court held that

> 'In the last century, the common law developed in a laissez faire-climate that encouraged industrial growth and approved the right of an employer to control his own business, including the right to fire without cause an employee at will. (…) The twentieth century has witnessed significant changes in socio-economic values that have led to reassessment of the common law rule. Businesses have evolved from small and medium size firms to gigantic corporations, in which ownership is separate from management. Formerly there was a clear delineation between employers, who frequently were owners of their businesses, and employees. The employer in the old sense has been replaced by a superior in the corporate hierarchy who is himself an employee. We are a nation of

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214 *Pugh (1981)*, 116 Cal.App.3d 311, 319-321.

215 Peck 1991, p. 7.

216 Holloway and Leech 1993, p. 102. See also above under § 10.4.3.

217 *Monge v. Beebe Rubber Co*., 316 A.2d 549 (N.H. 1974). See also Peck 1991, p. 7.

218 Peck 1991, p. 7.

> employees. Growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations. Commentators have questioned the compatibility of the traditional at-will doctrine with the realities of modern economics and employment practices. (…) The common law rule has been modified by the enactment of labor relations legislation. (…) The National Labor Relations Act and other labor legislation illustrate the governmental policy of preventing employers from using the right of discharge as a means of oppression. (…) Consistent with this policy, many states have recognized the need to protect employees who are not parties to a collective bargaining agreement or other contract from abusive practices by the employer.' [219]

Subsequently, in the early 1990s, most states had recognized one or more of the three following exceptions to the at-will rule under the law of wrongful discharge (1) violation of public policy; (2) breach of an implied covenant of good faith and fair dealing; and/or (3) breach of contract to discharge for good cause only, either under (i) the handbook exception, or (ii) the implied-in-fact (good cause) contract theory.[220] What is striking, is that when courts created these causes of action in the employment context, American labor unions suffered the greatest decline in membership. It appears that a social change took place in favor of job security for employees, as an alternative for just cause protection under collective bargaining agreements.[221]

29.1.2 Bottleneck: application of general contract law to employment contract

Private-sector employees in the United States may obtain *just cause protection* under the common law (i) handbook exception; and/or (ii) the implied-in-fact (good cause) contract exception. Under the *handbook exception*, the main bottleneck is that an at-will disclaimer can negate just cause protection. In contrast, the *implied-in-fact (good cause) contract exception* considers an at-will disclaimer merely as one of the factors in the totality of circumstances test, thus, offers a more solid ground. Nevertheless, bottlenecks remain. *First*, with regard to both contract exceptions the employee must prove all elements of the claim, i.e. the good cause contract and the lack of good cause when wrongfully discharged. *Second*, the majority of states protect a good-faith employer, although the reason given by the employer in the majority of states may be subject to scrutiny. *Third*, both exceptions can lead to *contract* damages only. Attorneys-in-law, in general, only accept cases, in which punitive damages can be asked for. This leaves blue-collar workers, who in general cannot afford legal counsel on an hourly basis, empty-handed in this respect. *Last*, the handbook exception is accepted in virtually all states. The implied-in-fact (good cause) contract exception is good law in the state of California and in a minority of

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219 *Pierce v. Ortho Pharmaceutical Corp*.,417 A.2d 505, 509 (N.J. 1980). See also Peck 1991, p. 7.

220 Autor 2001, p. 3 and 4.

221 Berks 2000, p. 8 and 11.

other states, and as this thesis reached its completion, has not (yet) been recognized by the Drafters on the Restatement of Employment Law as a cause of action.[222]

In conclusion, the bottlenecks employees in the United States face regarding just cause protection derive from the *economic* view of American courts on dismissal law in the past. From this point of view, employers and employees have equal bargaining power, and labor is considered as a commodity, which can be traded by parties. In this respect, the employment agreement is considered as a contract like any other, to which general contract principles apply. Hence, bottlenecks under *American* dismissal law remain (i) the burden of proof; (ii) at-will disclaimers; and (iii) the protection of good-faith employers.[223] In contrast, bottlenecks in respect of just cause protection in the Netherlands derive from the *social* view of the Dutch legislature on dismissal law, as the following paragraphs will show.

29.2 Dutch dismissal law: from security to flexibility

29.2.1 Dual dismissal system under fire: Flexicurity Act of 1998

At the beginning of the twentieth century, employees pled for the introduction of a just cause for dismissal, which eventually led to a dual just cause dismissal system in the Netherlands. At the end of the twentieth century, employers, in turn, plead for the abolition of this system. In brief, employers stress that in the process of economic globalization they need to respond flexibly to changes on the market to strengthen their competitive position in the international context, and that the dual just cause dismissal system restricts them in this respect. Employers plead for the abolition of the BBA 1945,[224] as the true bottleneck for the rigid system.[225]

In reply, the Minister of Social Affairs, Melkert, presented his Memorandum on Flexibility and Security in 1995.[226] He acknowledged the need for a more flexible dismissal law on the one hand, but stressed the need for (job) security for contingent workers on the other.[227] Being aware of the conflicting interests between employers and employees, the Minister asked the Labour Foundation for advice on his proposals on 4 December 1995.[228] On 3 April 1996, the Labour Foundation presented its report to the Minister of Social Affairs. In brief, the Labour Foundation agreed with the government to (i) liberalize the rules on termination of employment, but not to overreact by means

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222 See above under § 6.4.

223 See above under § 11.4 and 12.4.

224 VNO-NCW 1995, p. 12.

225 Van der Heijden 2000, p. 227.

226 Nota Flexibiliteit en Zekerheid 1995.

227 Nota Flexibiliteit en Zekerheid 1995, p. 1, 28 and 29.

228 See the Letter of the Minister of Social Affairs Melkert to the Labour Foundation of 4 December 1995, AV/RV/952497e (enclosure to STAR-Advies 1996/2).

of the American 'hire and fire' system;[229] (ii) to maintain the BBA 1945; and (iii) to amend the Act on the Employment Agreement of 1907 in this respect. More specifically, the Labour Foundation suggested regarding

- the probationary period: in case of a contract for a definite period of shorter than two years, to restrict the notice period to a maximum of one month instead of two months;
- employment agreements for a definite period: to allow more employment agreements after one another which would all end automatically after the expiry date; however, to protect employees in the long term, thus, to convert a contract for a definite period into an employment agreement for an indefinite period in case of three continuing contracts, and if the contracts exceeded a period of 36 months;
- temporary workers: to qualify their relationship with the agency as an employment agreement to which a special regime would apply; and
- contingent workers: to assume an employment agreement when a worker has worked at least one day per week or twenty hours per month for at least three months, after which the burden of proof rests with the employer that the agreement does not meet the requirements of Article 610 DCC.[230]

In large, the Labour Foundation followed the proposals made in the Minister's Memorandum. It presented three new proposals. *First*, the Labour Foundation suggested that after the employer has received a permit under the BBA 1945, the employer would be allowed to shorten the notice period by one month, on the condition that one month would be left. *Second*, the Labour Foundation suggested that the prohibition on dismissal regarding illness would not apply when the employee had become ill *after* the CWI had received a request of the employer for a permit to terminate the employment agreement. *Third*, the Labour Foundation suggested that appeal be allowed against the award of a severance payment in an Article 685-procedure.[231] On 7 March 1997, the Minister of Social Affairs sent the Bill on Flexibility and Security to the Lower House. His proposals were based on the Report of the Labour Foundation.[232] In fact, the Minister of Social Affairs followed the suggestions of the Labour Foundation, with one exception. It did not allow appeal in an Article 685-procedure regarding the severance payment.[233]

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229 STAR-Advies 1996/2, p. 5 and 6.

230 For these and all other amendments, see STAR-Advies 1996/2.

231 STAR-Advies 1996/2, p. 31-33.

232 TK 1997-1998, 25 263, No. 1-2.

233 Kuip en Scholtens 1999, p. 13 and 27.

This Bill on Flexibility and Security, in effect, was the successor of Bill 21 479. The latter was based on a Report of the Social-Economic Council (*Sociaal-Economische Raad* or *SER*) of 1988. In this Report, the SER had stressed the need for deregulation,[234] and had suggested that the government would maintain the BBA 1945, and amend the Act of the Employment Agreement of 1907, to establish this *deregulation*. The SER based it advice on the Report of the DIA-Committee (*Deregulering, Inkomensvorming en Arbeidsmarkt* or *Deregulation, Income policy and Labour Market*),[235] which had emphasized the need for deregulation and flexibilisation for the Dutch economy to enable employers to strengthen their competitive position in the international context.[236] In furtherance of SER's Advice of 1988, the Minister of Social Affairs sent Bill 21 479 to the Lower House, focusing on *deregulation.* However, it avoided a discussion on the abolition of the BBA 1945.[237] This led to severe criticism of the Upper House that wished to await an investigation on the effect of the BBA 1945, before deciding on new dismissal law. Hence, the government, in 1996, decided to withdraw Bill 21 479.[238]

A year later, the Minister of Social Affairs sent the Bill (25 263) on Flexibility and Security to the Lower House. This time the emphasis was on *flexibilisation* of dismissal law. The Bill more explicitly met the wish of employers to make rules on employment termination flexible, enabling them to respond flexibly to changes in the market to strengthen their competitive position in the international context.[239] The Bill on Flexibility and Security was adopted by the Upper House on 12 May 1998, and approved by the Queen on 14 May 1998.[240] The Act on Flexibility and Security – also known as the Flexicurity Act of 1998 – went into force on 1 January 1999.[241]

The Flexicurity Act only *partly* met the need of employers. As before with Bill 21 479, the government again had avoided a discussion on the abolition of the BBA 1945. In *1996*, the government had been forced to withdraw Bill 21 479. In *1999*, the Upper House stated it would withdraw its approval to the Bill on Flexibility and Security, *unless* the Minister of Social Affairs promised to install a Committee that would reconsider the – abolition of the – dual dismissal

234 SER-Advies 1988/12.

235 For DIA-Rapport, see TK 17 931, 1983-1984, No. 24.

236 TK 1989-1990, 21 479, No. 1-2. For a discussion of this Bill, see Van der Heijden 1992; Scholtens 1992a, p. 271-285; C.J. Loonstra, Losbladige Arbeidsovereenkomst, Kluwer, Deventer, Boek 7 Titel 10, Inleiding § 3.5.

237 Scholtens 1990, p. 424. See also Scholtens 1992b, p. 476.

238 STAR-Advies 1996/2, p. 18 footnote 11. See Van der Heijden 1997b.

239 Kuip en Scholtens 1999, p. 31.

240 Stb. 1998, 300. See also Kuip en Scholtens 1999, p. 25.

241 Stb. 1998, 332. See also Kuip and Scholtens 1999, p. 26.

system.[242] Hereupon. the government installed the ADO-Committee, known as the Committee Rood, named after its Chairman, on 25 February 1999, which consisted of representatives of judges, professors of law and lawyers, hence, lacking representatives of employers' organizations and unions.[243]

In brief, the government asked the ADO-Committee to examine the effectiveness of the dual dismissal system for the future, in both the national and international context. Also, it was invited to make suggestions to improve the system if it considered the system ineffective. If it would decide to abolish the BBA 1945, it was invited to propose a new dismissal system with compensating measures, taking the employees with a weak market labour position into consideration.[244] Overall, the Committee's recommendations led to a discussion on the abolition of the BBA 1945, which continues as today.[245]

29.2.2 Bottleneck: abolition of the BBA 1945

The ADO-Committee presented its Report on 15 November 2000 under the promising title *Farewell to the dual dismissal system* (*Afscheid van het duale ontslagrecht*). The Committee suggested abolishing the CWI's preventive review on just cause protection, thus, to abolish Article 6 BBA 1945, and, instead, to introduce a civil dismissal system with a *repressive* judicial review on just cause protection, on the condition of an internal hearing procedure. As regards just cause protection, it suggested to include an explicit rule in the new dismissal law system according to Article 4 of ILO Convention 158, determining that an employer needs a valid reason for dismissal, i.e. a just cause for dismissal connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking.[246] Hence, under the new dismissal system, employees have a cause of action if (i) a just cause for dismissal is lacking; and/or (ii) the employer has not respected the formal rules on the hearing procedure. Under the system of repressive judicial review, employees can address the Court only *after* being dismissed to ask for annulment of the termination of the employment agreement. The employee needs to invoke the annulment within two months after termination of employment. If the court is of the opinion that reinstatement is not possible, it can, at the request of the employee, grant severance payment instead.

In furtherance of the foregoing, the ADO-Committee suggested that the 7:681 DCC procedure be abolished, because the new just cause rule of Article 4 of ILO Convention 158, in effect, made Article 7:681 DCC superfluous. Additionally, the ADO-Committee suggested to restrict the application of Article 7:685 DCC on the one hand, however, to introduce the possibility to

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242 EK 1997-1998, 25 263, No. 132g. See also Kuip 1998, p. 154.

243 Stcrt. 1999, 43. See also ADO-Rapport 2000, p. 1 and 5; Van der Heijden 2000, p. 227.

244 ADO-Rapport 2000, p. 5; See also Kuip en Verhulp 2001, p. 415 and 416.

245 For an in-depth discussion of the legislative history of the Flexicurity Act of 1998, and the ADO-Rapport 2000, see below under § 28.2.2.

246 See also above under § 22.1.

appeal from the decisions of the Cantonal Court on the other. In this respect, it suggested that Article 7:685 DCC would apply to the following situations only, i.e. (i) an employer is unable to terminate the employment agreement, e.g. when a prohibition on dismissal applies; and (ii) an employer wishes to terminate an employment agreement for a definite period, with a period of at least one year left, prior to the expiry date.[247]

After the Ministers of Social Affairs, and of Legal Affairs, had received the Report they decided to ask advice from (i) the Labour Foundation (*Stichting van de Arbeid* or *STAR*); (ii) the Netherlands Association for the Judiciary (*de Nederlandse Vereniging voor Rechtspraak* or the *NVvR*); (iii) the Netherlands Bar Association (*de Nederlandse Orde van Advocaten* or NOvA); and (iv) the Lisv ((*Landelijk Instituut voor Sociale Verzekeringen* or *National Institute for Social Security*).[248]

Only the *NOvA* agreed with the new dismissal system as proposed by the ADO-Committee. The *Labour Foundation* rejected the new dismissal system, considering the dual dismissal system as more efficient in providing just cause protection.[249] It particularly stressed the importance of the BBA 1945-procedure for small-sized companies, which considered this procedure as cheap and relatively quick.[250] It further questioned whether ILO Convention 158 should be the basis for Dutch dismissal law, due to the low number of ratifications among states of the European Union.[251] Moreover, it held that the Dutch dismissal system was in accordance with Article 4 of the ILO Convention 158. In this respect, it referred to Article 3:1 of the Dismissal Decree and Article 7:685 DCC.[252] The *NVvR* agreed with the abolition of Article 6 BBA 1945, however, took into doubt whether a *repressive* judicial review would provide sufficient just cause protection. In this respect, it had missed the Committee's examination on a *preventive judicial review* on just cause protection. The *Lisv* stated that it expected an inflow of unemployed under the new dismissal system.[253]

In literature, the ADO-Committee's proposal on a new dismissal system led to mainly negative sounds. One of the few positive sounds came from Scholtens.[254] A subcommittee on dismissal law of the Dutch Association on Employment

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247 ADO-Rapport 2000, p. 137-151.See also Van Slooten 2001c, p. 932 and 933.

248 The Lisv has been replaced by the Institute for Employee Benefits Schemes (*Uitvoeringsinstituut Werknemers Verzekeringen* or *UWV*) as from 1 January 2002 based on the Act on the Implementation Structure for Work and Income (*Wet Structuur uitvoeringsorganisatie werk en inkomen* or *SUWI*).

249 STAR-Advies 2003/7. See also TK 2004-2005, 30 109, No. 1, p. 42; Knegt 2003, p. 174; Duk 2003, p. 295.

250 STAR-Advies 2003/7, p. 4. See also Knegt 2003, p. 176.

251 STAR-Advies 2003/7, p. 7. See also above under § 1.3.3.

252 STAR-Advies 2003/7, p. 7, 11 and 12. See also above under § 24.3.1.

253 TK 2004-2005, 30 109, No. 1, p. 42.

254 Scholtens 2001c. See also R. Hansma, *Financieel Dagblad* of 16 June 2006.

Law (*Working Committee on Dismissal Law* or *Werkgroep ontslagrecht van de Vereniging voor Arbeidsrecht*) agreed, but presented a new proposal to make the new dismissal system more workable.[255] The majority of academics rejected the new dismissal system, however. Particularly, there was skepticism on the Committee's motives to replace the *preventive* review on just cause protection by a *repressive* judicial review. Hereafter, I will focus on this aspect only, being directly related to just cause protection. For other aspects, I refer to the large number of publications that saw the light after the ADO-Committee presented its Report in November 2000.[256]

In justifying a *repressive* judicial review, the ADO-Committee argued that just cause protection under Article 6 BBA 1945 had proven to be ineffective. It referred to the fact that (i) despite rejections of requests to establish termination of employment, the employment relationship eventually comes to an end; and (ii) the dual dismissal system does not prevent employees with weak labour market situations – e.g. elderly – from being dismissed.[257] The Committee, however, did not mention the dismissals that the BBA 1945 *did* prevent. Van der Heijden, for example, refers to the 1983 study on the effectiveness by Knegt and Wilthagen, who concluded that six out of ten employees for whom the public instance had refused a permit were still in service the year after.[258] Earlier, in 1970, also, the SER had pointed at positive effects of the BBA 1945 to the extent that (i) employers do not tend to address the GAB, if they realize they do not have a case; (ii) employers during the BBA 1945-procedure may invoke their request, preferring termination of employment with mutual consent, rather than terminating the employment agreement through the BBA 1945-procedure.[259] Hence, the argument of ineffectiveness *alone* cannot carry the decision of the ADO-Committee to abolish Article 6 BBA.[260] Its *effectiveness*, in fact, justifies *preventive* review.[261] In this respect, Hampsink has serious doubts whether the employee will enjoy just cause protection under the new dismissal system, when preventive review of a third independent party on a just cause for dismissal is lacking.[262] Moreover, Van Slooten adds that the assumption of the ADO-Committee that a hearing procedure will induce parties to deliberate on alternatives, is in vain, particularly when an employee is

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255 Werkgroep Ontslagrecht VvA 2001, p. 35.

256 For example, for reactions from different angles on the ADO-Rapport 2000, see SMA 2001/2.

257 ADO-Rapport 2000, p. 58 and 59. For additional arguments, see Grapperhaus 2006.

258 Van der Heijden 2000, p. 288 and 229. See Knegt en Wilthagen 1988, p. 328. In contrast, Van Zevenbergen and Oelen conclude that with regard to 2,344 requests out of 39,064, which had been rejected, 93% of the employees in question eventually left the company. Research voor Beleid 2000, p. 49.

259 SER-Advies 1970/9, p. 8 and 14. See also Research voor Beleid 2000, p. 49.

260 Knegt 2003, p. 177. See also Knegt 2001, p. 93-96; Havinga 2001, p. 104-106.

261 Hampsink 2001. See also Van Slooten 2001c, p. 936.

262 Hampsink 2001, p. 73; Meijer 2001, p. 45. See also Fase 2000, p. 194 and 195; Loonstra 2000, p. 356; Havinga 2001, p. 105 and 106; Kuip en Verhulp 2001, p. 423.

dismissed based on his ability and/or capacities.[263] In conclusion, Kuip and Verhulp are of the opinion that the ADO-Committee, to the extent it recommended to abolish the BBA 1945, has *not* fulfilled its assignment to offer measures to compensate the lack of the guarantees on just cause protection.[264]

Five years after the ADO-Committee submitted its Report, the *government* finally took a position on future dismissal law in Bill 30 109 on the Unemployment Benefits Insurance Act and Dismissal Law (*Werkloosheidswet en Ontslagrecht*).[265] In this Bill, it stressed that to establish a more dynamic labour market situation, future dismissal law must lead to an efficient allocation of demand and supply on the labour market on the one hand, and just cause protection for employees on the other.[266] For the justification of just cause protection it used the same argument as a hundred years ago, in that the employee is economically and socially dependent on his employer. On the other hand, it recognized that mandatory rules on employment protection led to a rigid dismissal system, protecting insiders, rather than offering job opportunies for outsiders. As regards the latter, it referred to the problem of the increasing number of elderly persons (*vergrijzing*). In this respect, it stressed that employers are not eager to (re)hire elderly employees, referring to their low productivity, relatively high salaries, and the compensation of the(ir) age in the Cantonal Formula which makes it expensive to dismiss these employees. Subsequently, to meet the interests of *all*, the government in Bill 30 109 suggested the following measures

- to replace the principle of seniority by the principle of reflection in collective dismissals, regardless of the number of employees involved, to establish just cause protection of insiders on the one hand, and to offer opportunities for newcomers and outsiders on the other.[267]

  Meanwhile, as from 1 March 2006, Article 4:2.1 of the Dismissal Decree determines that the employer must apply the reflection rule in collective dismissals, regardless of the number of employees involved;[268]

- to allow collective bargaining parties to determine their own criteria in collective bargaining agreements regarding collective dismissals under the WMCO. In this respect, the government proposed to

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263 Van Slooten 2001c, p. 934. For a more positive view on the hearing procedure, see Van der Heijden 2001, p. 89 and 90.

264 Kuip en Verhulp 2001, p. 416 and 417. See also Van den Heuvel 2002, p. 240.

265 TK 2004-2005, 30 109, No. 1 and 2.

266 TK 2004-2005, 30 109, No. 1, p. 11 and 43.

267 TK 2004-2005, 30 109, No. 1, p, 44.

268 Stcrt. 2005, 242, p. 24. See also above under § 16.4.2.

amend the BBA 1945, in that parties do not need permission of the CWI (i) when these criteria are agreed upon in the collective bargaining agreement; (ii) the collective bargaining agreement provides the possibility for employees to bring forward their objections to the contemplated dismissal in a hearing in front of a complaints committee; and (iii) the collective bargaining agreement determines that the complaints committee only is able to handle objections of these employees *after* parties have reported the collective dismissal with the CWI according to Article 3 of the WMCO.[269]

The Minister of Social Affairs, meanwhile, has withdrawn this proposal;[270]

- to diminish *pro forma* procedures by amending the Unemployment Benefits Insurance Act (*Werkloosheidswet* or *WW*).[271]

  The Minister of Social Affairs, meanwhile, has amended the Unemployment Insurance Benefits Act. The amendment went into force on 1 October 2006.[272] *Under the amendment, an employee is voluntary unemployed (verwijtbaar werkloos), i.e. only loses his right to unemployment benefits, when he has been dismissed based on an urgent reason for which the employee is to blame, or the employment agreement has been terminated at his own request.*[273] *In furtherance of this amendment, the expedited procedure under the Dismissal Decree, too, has been abolished as from 1 January 2007.*[274]

- if collective bargaining parties have reached consensus on the necessity of the dismissal due to economic circumstances, and on the number of positions which have become redundant due to these circumstances, to restrict the CWI's review to the questions only whether parties correctly applied the principle of reflection, and seriously examined whether the employees in question can be replaced in the same, an adjusted or another position.[275]

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269 TK 2004-2005, 30 109, No. 1, p. 45 and 46. See also TK 2005-2006, 30 370, No. 2, p. 21; No. 3, p. 3, 67 and 68.

270 TK 2005-2006, 30 370, No. 8, p. 3 and 4.

271 TK 2004-2005, 30 109, No. 1, p. 46 and 48.

272 Stb. 2006, 303 and 304.

273 Art. 24.2 under a and b, respectively, of the WW. See also TK 2005-2006, 30 370, No. 12.

274 Stcrt. 2006, 243, p. 11. For the rationale behind the introduction and, in turn, the abolition of the expedited procedure under Article 2:6 (old) of the Dismissal Decree, see above under § 16.8. See also Stb. 2006, 303, p. 6.; Bureau Bartels/SZW 2006, p. 13.

275 TK 2004-2005, 30 109, No. 1, p. 48.

Meanwhile, as from 1 March 2006, Article 4:1 of the Dismissal Decree no longer applies to a collective dismissal under the WMCO when (i) the employer has reported the collective dismissal to the CWI according to Article 3 of the WMCO; and (ii) this report is accompanied by a union's statement in which it acknowledges the existence of economic circumstances, and agrees on the number of positions that have become redundant due to these circumstances;[276]

- to stimulate job training and/or occupational retraining and employability to prevent dismissals, particularly of elderly employees. This to compensate that elderly employees will be dismissed in particular, due to the new criteria for dismissal under the Minister's proposal in Bill 30 370.[277]

  The Minister of Social Affairs, meanwhile, has withdrawn this proposal.

In brief, the Minister of Social Affairs focuses on four categories of persons, in establishing a new dismissal law for the future (1) employers; (2) insiders, including elderly employees; (3) outsiders, including elderly persons; and (4) newcomers.[278] In my opinion, Bill 30 370 is an important step towards a new balance between more flexible rules on employment termination for employers and just cause protection for insiders on the one hand, while providing job opportunities for outsiders and newcomers on the other. However, the Minister of Social Affairs, meanwhile, has withdrawn his proposal to exclude collective bargaining parties from the scope of the BBA 1945. Indeed, it is likely that this proposal did not meet the interests of insiders, including elderly employees. Nevertheless, the Minister dared to start a discussion regarding the BBA 1945. After a negative advice of the CPB of 13 January 2006, however, the Minister got cold feet, leaving the issue with the SER. In brief, the CPB concluded that the proposal would result in negative effects on particularly elderly employees. Subsequently, on the same date, the Minister announced to withdraw his proposal.[279]

What was striking, was that the Minister, in 2003, had already asked the CPB to advise the government on positive and/or negative incentives (*positieve en negatieve prikkels*) to stimulate the demand of elderly employees on the labour market, i.e. to advise the government on (i) a negative incentive, which included a penalty after an employer had dismissed an elderly employee; and (ii)

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276 See also above under § 16.4.1.

277 TK 2004-2005, 30 109, No. 1, p. 49-51.

278 See also TK 2004-2005, 30 109, No. 1, p. 11.

279 See the Minister's Letter to the Chairman of the Lower House of 13 January 2006, SV/F&W/2006/4519. See also TK 2005-2006, 30 370, No. 8, p. 3 and 4.

a positive incentive, which included employer's immunity from disability and unemployment benefits for hiring elderly persons. Already, the CPB in its advice of 17 November 2003 had answered that the negative incentive would lead to extra costs for employers, therefore, this incentive would have a counter effect, because due to this negative incentive, employers would prefer to hire young(er) employees rather than older ones. In contrast, a positive incentive would reduce costs, hence, would have a positive effect on (re)hiring elderly employees. In its Advice of 13 January 2006 the CPB, in effect, affirmed these standpoints. It did not imply that the proposal in Bill 30 370 should be withdrawn. In fact, it did not take any standpoint on whether the government should introduce a positive incentive, or a combination of positive and negative incentives to prevent an outflow of elderly employees from the labour process. As regards the latter, the Minister in his letter of 4 January 2006 to the CPB – in which he asked for advice on this matter – in fact, had suggested that '*it is also conceivable to introduce only the positive incentive in accordance with the CPB's advice of 17 November 2003'*.[280] Therefore, the most logical reaction would have been if the Minister had included the CPB's Advice of 17 November 2003 and 13 January 2006 in the discussions on Bill 30 370, opening a debate in the Lower House on alternatives for compensating measures in light of these advices. The Minister, however, simply decided to withdraw his proposal after the statement that the proposal would result in negative effects for particularly elderly employees. Not surprisingly, the withdrawal by the Minister led to criticism in the literature.[281]

Bill 30 370, nonetheless, remains an important step towards a new balance between more flexible rules on employment termination for employers and just cause protection for insiders on the one hand, while providing job opportunities for outsiders and newcomers on the other. A negative side of Bill 30 370 is that the government *again* has *not* taken position on the abolition of the dual dismissal system, i.e. the abolition of the BBA 1945. In this respect, it announced that it wished to await the MLT-Advice of the SER (*Advice on the Dutch Social-Economic Policy on the Mid-Long Term* or *Advies over het Nederlandse Sociaal-Economische Beleid op de Middellange Termijn*). More specifically, on 15 February 2005, the Ministers of Social Affairs, and Economic Affairs, asked the SER to advise the government on the Dutch Social-Economic Policy for the future five years to see whether and how the government can meet the demands of time. Initially, the SER had planned to send the advice to the government in June 2006. However, on 28 April 2006, it announced that it postponed its advice to the Fall of 2006, stating that it wished to await financial data of the CPB, which it wanted to include in the MLT-Advice. In July 2006, it

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[280] See the Letter of the Directeur Financieel-Eocnomische Zaken, R.H.J.M. Gradius, on behalf of the government to the Chairman of the Lower House of 4 January 2006, FEZ/ASV/2006/1282.

[281] For example, see Boot 2006c; Stege 2006. For criticism on the Minister's proposal, see Duk 2006, p. 19 and 20.

announced to split up the MLT-Advice in two parts. Part I was due for the Fall, Part II on Dismissal Law was due for December 2006.[282]

Meanwhile, Part I on *Welfare for and by All* (*Welvaartsgroei door en voor iedereen*) has been sent to the government on 20 October 2006. In brief, the SER unanimously advises the government on the mid-long term to convert the welfare state (*verzorgingsstaat*) into a state in which *all* will participate (*activerende participatiemaatschappij*), e.g. through the creation of work, job training and/or occupational retraining, favorable taxes, social security on the one hand, while reducing costs of aging on the other.[283] The SER announced that the ways of participation will be furthered in Part II, which will focus on dismissal law, (re)training, and social security in light of this new strategy. Consequently, dismissal law by the government is not considered as a goal in itself, but rather as a means which must serve the new strategy of the government as described in Part I.[284] Meanwhile, on 11 December 2006, the SER announced to have postponed Part II, partly because it wants to await the formation of the new government in furtherance of the elections of 22 November 2006.[285]

Most probably, the SER has difficulties in reaching a consensus on the abolition of Article 6 BBA 1945. To the extent unions may agree upon the abolition of the BBA 1945, they undoubtedly will demand compensation for absence of just cause protection under the BBA 1945. The skepticism on the outcome of the abolition of the BBA 1945 can be explained by discussions in the past on its abolition,[286] which started in the 1950s. As mentioned in Chapter 3, the general idea then was that after the introduction of Article 1639s on a manifestly unreasonable dismissal, Article 6 BBA 1945 would be abolished. Subsequently, during the parliamentary discussions of the Bill, underlying the Act of 1953, a significant number of members in the Lower House voted in favor of the abolition of Article 6 BBA 1945. They considered the BBA 1945 as emergency legislation on the one hand, and considered Article 1639s to have introduced a just cause for dismissal on the other. In fact, if Rijckevorsel had not forgotten to register for the voting, and Van Dis had not erroneously voted in favor of the BBA 1945 – upon which the only other member in the Lower House of this same political party (SGP), Ds. Zandt, withdrew from the voting to avoid conflicting interests – there would have been a *majority* in favor of the abolition of Article 6 BBA 1495, which would have meant the end of the BBA 1945. Instead, Article 6 BBA 1945 'survived'.[287] Moreover, the government made

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282 *Volkskrant* of 8 July 2006, p. 7. See also the website of the SER (www.ser.nl).

283 SER-Advies 2006/8.

284 SER-Advies 2006/8, p. 120.

285 See website of the SER (www.ser.nl).

286 See Duk 2006, p. 17 and 20.

287 Van den Heuvel 1983, p. 56-58; Van den Heuvel 1989a, p. 12 and 13; Van den Heuvel 2000b, p. 362; Scholtens 1992b, p. 477 and 478; Heerma van Voss 2000, p. 240. See also TK 1975-1976, 13 656, No. 3, p. 7.

clear that it wished to maintain the BBA 1945, arguing that the BBA 1945 could – and should function – besides the Articles in the Act of the Employment Agreement of 1907.[288]

However, in 1968 – when the government decided to abolish the Articles in the BBA 1945 on national wage formation[289] – the Minister of Social Affairs decided to ask the SER for advice on whether Article 6 BBA 1945 should be maintained. It acknowledged that the BBA 1945, in principle, was still emergency legislation. On 17 July 1970, the SER advised that Article 6 BBA 1945 be abolished. However, the SER was divided on an alternative rule in the Civil Code. As regards the termination of employment there were (i) members – a large minority – who were of the opinion that employers and employees were equal, therefore, the same rule for preventive or repressive review on just cause protection should apply to parties; and (ii) members – a small majority – who were of the opinion that employers and employees were unequal. Hence, a different rule should apply for the employer and the employee, in that termination of employment on the part of the employer would be subject to a preventive review. Termination on the part of the employee would be subject to a preventive review, in exceptional cases only.[290] The SER finally chose for (ii), referring to the employee's weak position in the relationship with the employer in case of termination of employment.[291] The government followed the small majority within the SER.

In furtherance of the SER's Advice of 1970, the government sent Bill 13 656 to the Lower House on 13 October 1975. In brief, it proposed to abolish Article 6 BBA 1945, and to incorporate this rule in the Civil Code.[292] Subsequently, members in Parliament raised the question whether a public authority was still the appropriate instance to decide on a conflict, involving the interests of employers and employees or, instead, a civil court. Moreover, the question was raised whether review on just cause protection should be preventive or repressive.[293] In general, employers opposed a preventive review, in that it frustrated them in responding flexibly to changes in the market. Earlier, in 1982, one of the largest employers' organizations, the Netherlands Christian Federation of Employers (*Nederlands Christelijk Werkgeversverbond* or

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288 The Minister first wished to await case law on Art. 1639s. See also Dienske 1965, p. 34, referring to Bijl. Hand. II 881, Hand. II 1952-1953, p. 2320-2363, 2365-2379, Bijl. Hand. I 881, Hand. I 1953-1954, p. 2051-2071.

289 These Articles would eventually be replaced by the Act on Wage Formation of 1970 (*Wet op de Loonvorming van 1970*).

290 SER-Advies 1970/9, p. 6-18. See also Van den Heuvel 1989a, p. 12 and 13.

291 SER-Advies 1970/9, p. 13 and 14, 18-24.

292 TK 1975-1976, 13 656, No. 3, p. 8. See also TK 1992-1993, 22 977, No. 1, p. 9 and 10; Verburg 1984, p. 110 and 111.

293 For an in-depth discussion of the parliamentary discussion on this subject, see ADO-Rapport 2000, p. 27 and 28.

NCW),[294] and, subsequently, in 1983, the Committee Van der Grinten opposed preventive review on just cause protection for this reason.[295]

The Committee Van der Grinten was set up by the Minister of Economic Affairs in 1983 to give advice on how to cope with the economic recession. This Committee had focused on rules, which frustrated the restoration of the Dutch economy. In its Report, which was sent to the Lower House on 27 June 1983, the Committee van der Grinten held that the preventive review by the GAB frustrated the restoration of the economy significantly, and that it did not offer positive effects which outweighed this negative effect. However, it expected strong resistance to the abolition of Article 6 BBA 1945. Therefore, it suggested that the government would reconsider (i) replacing the preventive review by a repressive judicial review; or (ii) abolishing Article 6 BBA 1945, and, instead, to install dismissal committees in the GAB-districts that would decide in advance on the dismissal, but by means of a non-binding advice only; or (iii) maintaining Article 6 BBA 1945, on the condition that its procedure would be amended. In this respect, it suggested that if the GAB had *not* refused a permit within a month after it had received the request, the employer was free to dismiss the employee. The Committee preferred (i) or (ii), hence, preferred to have Article 6 BBA 1945 abolished,[296] subscribing to the DIA-Committee's point of view on the need of deregulation and flexibilisation.[297]

In conclusion, already as from the 1980s, the Committee Van der Grinten, has induced the Dutch government to look at *dismissal law* from another angle – i.e. an economic point of view – in light of the process of economic globalization.[298] The Report of the Committee Van der Grinten, in fact, led the government to ask the SER for advice on its proposals on dismissal law in Bill 13 656. After the SER disapproved most proposals in its Advice of 1988,[299] the government decided to withdraw Bill 13 656. Instead, the government sent Bill 21 479 to the Lower House on 15 March 1990, the latter, in turn, being the predecessor of Bill (25 263) on Flexibility and Security. It is noteworthy to mention, that under Bill 21 479, the government wished to maintain Article 6 of the BBA 1945,[300] but that there was no consensus in the Lower House on whether Article 6 BBA 1945 should be maintained. Consequently, members of the Lower House invited the Minister of Social Affairs to take a standpoint on this. Subsequently, in 1992, in

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294 See Verburg 1984, p. 112; Van Peijpe 1990, p. 49.

295 Most recently, Grapperhaus opposed the requirement of prior authorization of the CWI to dismiss an employee in his inaugural lecture. See Grapperhaus 2006.

296 TK 1982-1983, 17 931, No. 5. See also TK 1992-1993, 22 977, No. 1, p. 10; Verburg 1984, p. 107-111; Van der Meer 1989, p. 50 and 51; Van Peijpe 1990, p. 49 and 50; Heerma van Voss 2000, p. 241; ADO-Rapport 2000, p. 28.

297 TK 1983-1984, 17 931, No. 24. For the DIA-Committee, see above under § 29.2.1.

298 See also Van Peijpe 1999, p. 364.

299 SER-Advies 1988/12, p. 16 and 18-43. For an in-depth discussion of SER-Advies 1988/12, see Werkgroep Ontslagrecht VvA 1989; Van Peijpe 1990, p. 50.

300 TK 1992-1993, 22 977, No. 1, p. 10 and 11. For criticism on this Bill, see Heerma van Voss 1992, p. 116, footnote 459.

times of economic recession, the Minister of Social Affairs, De Vries, suggested to *abolish* Article 6 BBA 1945 to improve the functioning of the labour market and to combat unemployment. In this respect, he suggested to replace the preventive review of the RDA by a *repressive* judicial review on the one hand,[301] and to maintain the basic rule under Dutch dismissal law that an employee should not be dismissed arbitrarily on the other.[302] In his opinion, a repressive judicial review, too,

- would protect an employee against arbitrary dismissal, i.e. loss of income;
- would respect the employer's interest, i.e. continuation of the undertaking;
- would not frustrate the mobility of the employee and/or well-functioning of the labour market; and
- would protect employees with a weak labour market situation.[303]

The majority of the SER rejected De Vries's proposal, because it was not convinced that the abolition of the BBA 1945 would lead to less unemployment.[304] In 1994, the Ministers of Social Affairs, De Vries, and of Judicial Affairs, Kosto, nonetheless, sent their proposal to the Council of State (*Raad van State*), which advises the Dutch government and parliament on legislation and governance.[305]

Before the Council of State was able to advise on the matter, the successor of De Vries, Melkert, withdrew the proposal.[306] In brief, Melkert considered the BBA 1945 as an important tool to regulate the outflow of employed and inflow of unemployed, and to protect employees with a weak labour market position. To justify the withdrawal, the Minister stressed that the SER in 1970 was not unanimous on the abolition of preventive review either. Important objections of the SER against a repressive judicial review were that (i)

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301 TK 1992-1993, 22 977, No. 1; ADO-Rapport 2000, p. 29. For an in-depth discussion of this proposal, see ADO-Rapport 2000, p. 121 and 122.

302 See also the VNO-NCW above under § 27.2.3, and the SER in SER-Advies 1970/9, p. 13 and 22.

303 TK 1992-1993, 22 977, No. 1, *Toetsing van Ontslag*, p. 7-9. See also Boot 2005c, p. 246 and 247.

304 SER-Advies 1994/05. See Trap en Vogel 1994, p. 135; Heerma van Voss 2000, p. 241. For criticism on the proposal of De Vries, see Scholtens 1993b; Barendrecht 1993; Buijs1993; Knegt en Wilthagen.

305 Voorstel van wet, gepubliceerd in P.F. van der Heijden, J.J.M. de Laat, C.G. Scholtens, *Ontslagrecht zonder ontslagvergunning*, Mededelingen van het Hugo Sinzheimer Instituut, Nr. 10, Amsterdam 1995. See also Buijs en Heerma van Voss 1996, p. 87; Van der Heijden 2000, p. 229-232; ADO-Rapport 2000, p. 121.

306 See Letter of the Minister of Social Affairs Melkert of 23 November 1994, TK 1994-1995, 22 977, No. 3. Subsequently, the Minister of Judicial Affairs informed the Queen that a discussion on the proposal of De Vries would not be continued, and consequently requested the Council of State not to handle the advice on the proposal. See ADO-Rapport 2000, p. 121. In reply, the Section Employment and Labor Law of the University of Tilburg, the Netherlands, presented its own proposal on future dismissal law. See FRW KUB Tilburg 1994. For an in-depth discussion of this proposal, see ADO-Rapport 2000, p. 123 and 124.

employees with a weak labour market position would lack just cause protection under this system; (ii) the BBA 1945-procedure was an efficient means for small-sized employers to establish termination of employment agreements; and (iii) employees would lack just cause protection they enjoyed under Article 6 BBA 1945.[307] Instead, Melkert suggested *simplifying* the procedure of the BBA 1945. Subsequently, he asked the Labour Foundation for advice on 2 December 1994, to which the Labour Foundation responded on 29 May 1995.[308] Melkert took these suggestions into consideration in Bill 21 479. As mentioned above, this Bill focused on deregulation, however, avoided a discussion on the abolition of the dual dismissal system. After resistance of the Upper House in this respect,[309] the government decided to withdraw Bill 21 479 in 1996. Its successor, Bill 25 263, became the Flexicurity Act of 1998, which went into force on 1 January 1999. However, this Bill, too, avoided a discussion on the abolition of the BBA 1945.[310] Hence, as today, a discussion on the abolition of the BBA 1954 still continues.

30 Conclusion

A comparison between American and Dutch dismissal law shows that the at-will dismissal system and the dual just cause dismissal system are slowly growing towards one another. Initially, courts in the United States approached employment termination from an *economic* point of view. The Dutch government approached employment termination from a *social* point of view. As from the 1980s, the process of economic globalization, in effect, forced the United States and the Netherlands to reconsider their rules on employment termination, i.e. to approach dismissal law from a social rather than from an economic point of view, and vice versa. Still, the American and the Dutch dismissal system significantly differ from each other. In the United States, the at-will rule is still the basic rule. In the Netherlands, the just cause rule is the basic rule. Moreover, a difference remains that, in their attempts to strike a new balance between flexible dismissal law for employers on the one hand, and just cause protection for employees on the other, *courts* in the United States play an important role, which means that a just cause rule, in effect, can only develop under case law. In contrast, in the Netherlands, the *government* plays an important role. The comparison (further) demonstrates that contrasting views between employers and employees lead to impasses in both countries. At first

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307 TK 1994-1995, 22 977, No. 3, p. 8 and 9. See also Trap en Vogel 1995, p. 3 and 4; Van der Heijden 2000, p. 231 and 232; Heerma van Voss 2000, p. 241 and 242.

308 STAR-Advies 1995/3. For Letter of the Minister of 2 December 1994, see enclosure 1 with the Advice.

309 For an in-depth discussion of the withdrawal of Bill 21 479, see above under § 29.2.1.

310 For an in-depth discussion on the withdrawal of Bill 21 479 and its successor Bill 25 263, see above under § 29.2.1. For proposals on alternatives for the dual just cause dismissal system, published after the Flexicurity Act of 1998 went into force, see HSI 1999/03; Nyfer 2000; Van den Heuvel 2000b, p. 359-370; Werkgroep Ontslagrecht VvA 2000. For an in-depth discussion of these proposals, see ADO-Rapport 2000, p. 124-128.

sight, in the *United States*, the emphasis in the ongoing debate on dismissal law is on just cause protection for employees, however, *without* a departure of the at-will dismissal system. In the *Netherlands*, the emphasis is on flexibility for employers, however, *without* a departure of the dual just cause dismissal system. Hence, American courts still apply general contract principles, in effect, frustrating the possibility for private-sector employees to enjoy just cause protection. In the Netherlands, private-sector employees are still subject to a dual just cause dismissal system, in effect, frustrating employers to respond flexibly to changes on the market. In my opinion, in resolving these bottlenecks, the United States and the Netherlands can learn from each other, regardless of their differences in cultural, geographical and legal aspects, for this Chapter shows that in the United States, the employee is as much dependent on the employer as in the Netherlands. Rather, the extent of just cause protection is determined by whether economic or social views prevail among their lawmakers, which now brings me to making suggestions on how to solve bottlenecks under American and Dutch dismissal law.

VI CONCLUSIONS AND SUGGESTIONS

31 Just cause protection under American and Dutch dismissal law

In this thesis, I have focused on a just cause for dismissal in the United States and the Netherlands. In Chapter 1, I have stressed the importance of just cause protection. In the Chapters 2 and 3, respectively, I have described where the law in the United States and the Netherlands stands in this respect. In Chapter 4, I have examined to what extent the American and the Dutch just cause standards meet the international just cause standard of Article 4 of ILO Convention 158. In Chapter 5, I have compared American and Dutch dismissal law regarding just cause protection. More specifically, I have examined whether and to what extent both countries can learn from each other in this respect. This thesis shows that in the United States, there is a trend towards just cause protection according to Article 4 of ILO Convention 158. I point at the just cause standard in collective bargaining agreements, the Montana Wrongful Discharge From Employment Act (WDFEA), and the implied-in-fact contract (good cause) exception under common law. All foregoing standards under American dismissal law, however, apply to a minority of the work force only, and – apart from the just cause standard under collective labor law – do not always offer just cause protection in practice. Hence, the majority of private-sector employees are still subject to the at-will rule. Therefore, private-sector employees in the United States would welcome a ratification of ILO Convention 158. The American government has no intention to ratify the Convention, however. In contrast, the Dutch government expressed its wish to ratify the Convention. In the Netherlands, private-sector employees, in theory, enjoy just cause protection under the BBA 1945 and Article 7:685 DCC. This dual just cause dismissal system is unique among dismissal systems in the world. The rationale behind the government's intent to ratify ILO Convention 158, in fact, is to harmonize its dismissal system with those of other member states, and in accordance with one of the goals of the ILO, to establish fair international competition. Although this goal in itself is justified, one can doubt whether a ratification of ILO Convention 158 is the best alternative for striking a new balance between flexible dismissal law for employers on the one hand, and just cause protection for employees on the other, or instead, a better alternative would be to modify the dual just cause dismissal system without (yet) ratifying the Convention. As this Chapter will show, I advocate the latter.

I conclude that although there are obvious differences between the United States and the Netherlands, both countries in the ongoing process of economic globalization are in search of a new balance between flexible dismissal law for employers on the one hand, and just cause protection for employees on the other. My presumption has been that in striking a new balance, both countries might learn from each other in solving bottlenecks regarding just cause protection. This Chapter justifies this presumption.

32 Bottlenecks regarding just cause protection

In the United States, bottlenecks regarding just cause protection relate to the fact that the majority of courts still consider the employment agreement a contract like any other. Only the relationship between an insurer and insured has been recognized as a special relationship by courts. Until 1907, Dutch courts took a same approach as regards the employment relationship. In the Netherlands, a debate on the special character of the employment relationship took place at the end of the nineteenth, and the beginning of the twentieth century, which resulted in the Act of the Employment Agreement of 1907.

In contrast, *in the United States*, national just cause legislation is lacking. This does not mean that lawmakers in the United States, or academics, deny the unequal bargaining power between employers and employees. Mainly due to the political power of employers and attorneys-at-law who oppose such legislation, however, national and state just cause legislation is frustrated. An exception is Montana that adopted the Wrongful Discharge from Employment Act (WDFEA), setting aside the at-will rule. Blue-collar workers in Montana, however, in practice, in general, lack just cause protection under this Act. Outside Montana, at-will employees in the United States, however, may enjoy just cause protection under *common law exceptions* to the at-will rule, i.e. the handbook exception and the implied-in-fact (good cause) contract exception. They, too, often lack this protection, due to the contingency fee system of attorneys-at-law. In fact, it seems that only at-will employees who are subject to collective bargaining agreements, in practice, enjoy just cause protection. Hence, a minority of private-sector employees in the United States only enjoy just cause protection. This is mainly due to the economic point of view on the employment relationship by state courts, which still apply general contract principles to the employment agreement. The United States can learn from Dutch dismissal law in this respect. The recognition of the employment agreement as a special relationship – with its own rules and remedies – in the Netherlands has been determinative for Dutch private-sector employees in obtaining just cause protection. The focus, in other words, should be on the special character of the employment relationship. Instead, the focus in the United States is on whether violation of an exception to the at-will rule results in contract or punitive damages. However, when the central issue in the ongoing debate on just cause protection continues to be that ‘when the employment agreement is considered as a special relationship, punitive damages must be awarded’, employers will continue to protest in recognizing the employment agreement as a special relationship due to the high unpredictable costs, hence, continue to frustrate the adoption of bills on just cause legislation.

In the Netherlands, the main bottleneck derives from the social point of view by the Dutch legislature to the employment relationship, i.e. the recognition of the employment agreement as a special agreement. In brief, employers stress that the just cause dual dismissal system leaves them no room to respond flexibly to

changes on the market. They particularly advocate the abolition of the BBA 1945, due to the rigid application of these rules by the CWI.[1]

As I made clear in Chapter 3, the CWI consistently applies the just cause standard, hence, provides just cause protection to private-sector employees. This explains that the government and private-sector employees, in principle, oppose the abolition of the BBA 1945. Meanwhile, the Dutch government recognized the need for more flexible rules on employment termination in light of the process of economic globalization, and adopted the Flexicurity Act of 1998 to establish this flexibility.[2] Moreover, in 2005, the government *again* recognized the need for (more) flexible rules on employment termination, when calling on the SER for advice on a social-economic policy on the mid-long term.[3] Besides the government, Cantonal Courts, too, recognize the need for more flexible rules on employment termination. In *collective* dismissals, they started to apply other – flexible – criteria for dismissal than the CWI. Additionally, in *individual* dismissals, they started to allow employers to trade off just cause protection with severance payments. This explains the popularity of Article 7:685 DCC, which in time has become the alternative route for the BBA 1945. The question is whether (more) flexible rules on employment termination should be established by the legislature or courts. As I emphasized in the previous Chapter, in light of legal certainty, in my opinion, the Dutch *legislature* only is the appropriate authority to establish, and to supervise rules on employment termination.[4] In fact, intervention is necessary since the practice of Cantonal Courts leads to legal inequality en uncertainty for private-sector employees, due to the fact that the CWI and Cantonal Courts apply different criteria in deciding on the same grounds of dismissal.

33 Suggestions

33.1 American dismissal law

The majority of private-sector employees in the United States are subject to the at-will rule. The at-will rule evolved under common law, which implies that the just cause rule may evolve under common law as well. Courts, which play an important role with regard to the development of just cause protection in the United States already started this process in the late 1970s, and the early 1980s. This, in fact, will remain unchanged so long as Congress does not regulate this matter. For the near future, there is no reason to assume that Congress will enact national just cause legislation. On the other hand, nothing stands in the way of

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1 See also TK 30 109, 2004-2005, No. 1, Brief van de Minister van Sociale Zaken en Werkgelegenheid p. 40 and 41.

2 TK 25 263, 1996-1997, No. 3, p. 1.

3 Adviesaanvraag over het sociaal-economisch beleid op middellange termijn d.d. 15 februari 2005 van Ministers Brinkhorst (Economische Zaken) en De Geus (Sociale Zaken) aan de Voorzitter van de SER (Wijffels), kenmerk EP/AEP5005891, p. 2.

4 See above under § 28.2.1.

courts to recognize the inequality of bargaining power between employers and employees, and to apply special rules and remedies to the employment agreement. Courts in this respect could determine that

- just cause protection cannot be contracted away through at-will disclaimers;[5]
- the employer in dismissals based on economic circumstances has discretionary power with regard to the choice of operational requirements on the one hand, but must show the need and the existence of these operational requirements on the other;
- the employer must show actual (mis)conduct or (in)capacity; and
- the burden to prove good cause rests on the employer.

The true bottleneck is that courts must first recognize a (common law) right on just cause protection. In the past, California *Courts of Appeal* established such a right under the covenant of good faith and fair dealing. State supreme courts, too, could recognize this right under the covenant, referring to the unequal bargaining power between parties in respect of termination of employment, and the need of protective rules in light of this inequality. Already, Congress and a number of state courts – like the Dutch government – acknowledged that (i) labor is not just a commodity, which can be traded; (ii) instead, has a personal character, thus, to the extent employees earn wages, this is more than just a trade-off of labor; (iii) employees are in service of the employer, i.e. are part of an organization, therefore, in practice, dependent on the employer's will and subject to the goals of the organization; (iv) hence, employees are economically and socially dependent of the employer; (v) because employees can only rely on labour for income, they are lacking bargaining power when they are not able to – sufficiently – offer this labour; (vi) taking into consideration that the employee's performance can only be defined *during* the employment agreement; (vii) this makes employees particularly dependent in case of a dismissal.[6]

The reality is that most courts continue to apply general contract principles to the employment agreement. Moreover, the system of contingency fees causes attorneys-at-law to accept *tort* claims and contract claims of white-collar workers only. However, the exceptions to the at-will rule, providing just cause protection, result in *contract* damages only. Hence, *in practice*, blue-collar workers generally lack just cause protection.

In my opinion, there are several options to solve the foregoing bottlenecks. First, federal and/or state legislatures could abolish the contingency fee system, which is unlikely to succeed, considering the economic power of

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5 Under Dutch dismissal law, one speaks of full mandatory law, making it impossible for parties to deviate from the rule by contract. Levenbach 1954, p. 71. See also above under § 28.2.2.

6 For the United States, see above under § 28.1.1. and § 28.1.2. For the Netherlands, see Van Slooten 1999, p. 31-34.

attorneys-at-law in the United States. A more realistic option is that courts award a special remedy in case of violation of the just cause standard, *including* punitive damages. The latter, in turn, may lead to state just cause legislation, e.g. the Montana Wrongful Discharge From Employment Act (WDFEA). The weakness of this Act, however, is that private sector-employees under the arbitration provisions eventually rely on the system of contingency fees again. Whereas the Act primarily prescribes – but does not compel – arbitration, in practice, employers refuse to arbitrate. Hence, employees can address the judiciary only. Third, government(s) could consider a public subsidized legal aid system similar to the system in the Netherlands,[7] allowing blue-collar workers with contract damage claims to effectuate their claims at the expense of the government(s), at least for the major part.[8] On the other hand, one must be realistic about how far the measures above will go in the – near – future. Hence, for the *near* future, I suggest to address the Drafters of the Restatement of Employment Law, convincing them through publications, to recognize *all* common law exceptions to the at-will rule, including the implied-in-fact (good cause) exception. The function of the Drafters – i.e. the American Law Institute – should not only be to codify majority rules, but also to anticipate and encourage the development of laws. Moreover, to the extent these Drafters recognize the handbook exception, to convince them that it is as important to recognize that *once* there is a good cause contract under the handbook exception, and the employer wishes to modify this contract through an at-will disclaimer, this modification according to general contract principles – as subscribed to by a number of state supreme courts and academics – requires consideration and assent.

33.2 Dutch dismissal law

In the Netherlands, the *legislature* fulfills an important role regarding the development of just cause protection for private-sector employees. *Courts* fulfill an important role in applying and anticipating on the rules on employment termination. Courts, in principle, must consistently apply legal rules. To the extent they do not, they may undermine just cause protection for private-sector employees. On the other hand, this deviation may be a signal towards the legislature that these rules need to be changed. In the 1990s, the Dutch government with the Flexicurity Act of 1998, in fact, partly responded to case law.[9] In 2005, the government recognized the need for *more* flexible rules on

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7 See *Wet op de Rechtsbijstand (WRB)*, Stb. 1993, 775, gewijzigd per 13 juli 2002, en laatstelijk per 1 april 2006. Advocatenblad 2006/5, p. 228 For the replacement of *Bureau voor Rechtshulp* by *Juridisch Loket*, see Amsterdams Balie Bulletin, maart 2006, p. 19 and 20. For the main rules of the WRB, see Advocatenmemo 2006, Kluwer, Deventer, p. 304-325 (No. 15 Gefinancierde rechtshulp). See also Themanummer Rechtshulp 1994/1, p. 2-5; Muller en Woudenberg 1995.

8 In theory, the Legal Service Corporation Act of 1974 offers equal justice for all. However, with the exception of legal aid in penal matters, in practice, this in civil matters generally means nothing more than being pshysically present in the courtroom. See Kleiboer, Huls en De Kluiver 1997, p. 13-31.

9 See TK 25 263, 1996-1997, No. 3, p. 4, 9.

employment termination.[10] In this respect, the government – and employers – more than once suggested to abolish the BBA 1945.[11] Recently, in Bill 30 370, the Minister of Social Affairs proposed to exclude collective bargaining parties from the scope of the BBA 1945. Meanwhile, the Minister has withdrawn this proposal after the Netherlands Bureau for Economic Policy Analysis (*Centraal Planbureau* or *CPB*) held that the measures as suggested by the government could not prevent negative effects for elderly employees, to be expected of the proposal. In literature, several authors have argued that the Minister should reconsider his decision.[12]

Others, however, continue to advocate the abolition of the BBA 1945.[13] In brief, they argue that (i) the BBA 1945 is emergency legislation, in that it needed to regulate the labour market after the war, however, this public interest is no longer present; (ii) to the extent the BBA 1945 still protects the public interest, this is to protect the weak, which finds its basis in Book 7 Title 10 of the Dutch Civil Code as well;[14] (iii) a review on just cause protection in individual dismissals involve the interests of employers and employees only, therefore, should be left to a civil court. In this respect, they add that the BBA 1945-procedure is in violation of Article 112 of the Dutch Constitution and/or Article 6 ECRM, requiring an independent instance to decide on civil disputes;[15] (iv) the dissolution procedure under Article 7:685 DCC has become the alternative route of Article 6 BBA 1945, hence, Article 6 BBA 1945 has become superfluous in individual dismissals.[16]

Zijl, in her 2006 dissertation, doubts whether employers are in need of more flexible rules on employment termination, as often stated. She emphasizes that employers generally have invested in employees, hence, prefer to maintain them.[17] De Gier, in turn, doubts whether the government will achieve its goal to involve unemployed – in particular elderly, youngsters and women – through more flexible rules on employment termination.[18] It is noteworthy to mention, that both refer to the OECD Employment Outlook of 2004, stressing that the

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10 See above under § 32.

11 See above under § 29.2.2.

12 Boot 2006a, Loonstra 2006a.

13 Heerma van Voss 2005a, p. ix.

14 Scholtens 2002. See also above under § 15.2.2.

15 Verburg 1984, p. 113; Van der Heijden 1984, p. 60-64;Van der Heijden 2000, p. 228, 232 and 233.

16 See ADO-Rapport 2000, p. 19-23. See also Scholtens 1992b; Scholtens 2003.

17 Zijl 2006, p. 127-129, 145 and 146. See also *Financieel Dagblad* of 20 June 2006.

18 H.G. de Gier is appointed as Professor '*Comparatief Arbeidsmarktbeleid*' with the Faculty of Science of Management at the Radboud University of Nijmegen. For his reaction, see *Staatscourant* 24 August 2006 '*De Geus legt teveel nadruk op versoepeling van het ontslagrecht*', in which he refers to the Memorandum of the Minister of Social Affairs '*Notitie ontwikkelingen en keuzes in het stelsel van werk en inkomen*' of 28 June 2006.

Netherlands belongs to the average of countries in providing employment protection.[19] The following remarks need to be made, however.

First, I will not deny that employers in general wish to protect their investments.[20] However, in Chapter 3, I have sufficiently shown that Article 7:685 DCC has become the alternative route of Article 6 BBA 1945 regarding employment agreements for an indefinite period. From the OECD Employment Outlook of 2004 derives that employment protection in respect of these contracts is extremely *high* in the Netherlands.[21] This explains the popularity of Cantonal Courts, which apply more flexible criteria for dismissal than the CWI. Hence, regarding employment agreements for an indefinite period, employers appear to be in need of more flexible rules on employment termination. *Second*, a recent research in assignment of the Ministry of Social Affairs shows that employers are in need for more flexible rules on employment termination, particularly with regard to collective dismissals.[22] *Third*, a recent research of the CPB stressed the need for flexible rules on employment termination to establish participation of outsiders and newcomers.[23] *Fourth*, the OECD-indicator includes employment protection for employees (i) with regular jobs; (ii) with temporary jobs; and (iii) those involved in collective dismissals.[24] The Dutch government particularly focuses on employment agreements for an indefinite period.[25] Hence, the main question for the Dutch government regarding these contracts has become *not* whether employers need more flexible rules on employment termination, rather *how* it must respond to the need of employers for more flexible rules on employment termination.

This brings me to the BBA 1945. Regarding its abolition to make dismissal law more flexible, I wish to make the following remarks. *First*, in the discussion on the abolition of Article 6 BBA 1945, one must not lose sight of the fact that its abolition would mean that those working on the basis of a contract according to the BBA 1945, but *not* on the basis of an employment agreement according to Article 7:610 DCC, would lack just cause protection.[26] *Second*, in the urge for a more flexible dismissal law, one too easily forgets that the Dismissal Decree and the CWI Handbook on Dismissal – unlike Article 7:685 DCC and/or the Cantonal Formula – hold clear rules on just cause protection. The fact that these rules are consistently applied by the CWI should not be a negative, but rather a positive aspect in light of legal certainty. On the other hand, the negative

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19 For a discussion of the results of the OECD Employment Outlook of 2004, see CEP 2006, p. 143. See also Nagelkerke 2006, 483.

20 See also Heerma van Voss 1992, p. 10 and 11; Nyfer 2000, p. 80 referring to OECD Jobs study, Part II, p. 74.

21 CEP 2006, p. 144; Nagelkerke 2006, p. 483.

22 Bureau Bartels/SZW 2006, p. 100.

23 CPB Document 135 (2006).

24 See also CEP 2006, p. 144.

25 TK 1996-1997, 25 263, No. 6, p. 4.

26 See also Dienske 1965, p. 34; Koopmans 1962, p. 281.

appreciation by employers is a signal that these rules may be too rigid. This means – as also recognized by the Dutch government – that it needs to act. It does *not* mean that the Dutch government must abolish the BBA 1945. In fact, if one continues to focus on the abolition of the BBA 1945, this will rather polarize employers and employees than that parties will be able to reach a compromise, which is needed to strike a new balance between the interests of employers and employees in light of the process of economic globalization. In this respect, there is a similarity with the debate on dismissal law in the United States.

Therefore, in striking a new balance, the focus in the Netherlands should not be on the abolition of the BBA 1945, but primarily on the question how to avoid legal inequality and legal insecurity for private-sector employees, which is a result of the alternative routes for the *same* grounds of dismissal under the Dutch dual just cause dismissal system.[27] Subsequently, the focus should be on the question whether the CWI and Cantonal Courts can and must play a role in this new dismissal system. Thirdly, the focus should be on the question how to strike a balance between – more – flexibility for employers on the one hand, while safeguarding just cause protection for employees on the other.

The results of my research induce me to suggest to maintain the dual dismissal system,[28] and to divide the tasks between the CWI and Cantonal Courts. More specifically, requests with the CWI should be restricted to requests based on economic circumstances as described in the CWI Handbook on Dismissal.[29] Thus, requests with the CWI cannot include a breach of trust, although these eventually constitute a severe frustration of the operation of the company, i.e. 'economic circumstances'. The rationale behind this division of tasks is that the CWI and Cantonal Courts apply different criteria for requests based on the same grounds of dismissal. This can and – in light of legal certainty and legal insecurity – *must* be avoided by authorizing the CWI to handle *all* requests based on *economic circumstances*, and authorizing Cantonal Courts to handle individual dismissals based on grounds *other* than economic circumstances. This distinction of tasks is in accordance with ongoing practice.[30] Cantonal Courts, too, acknowledge that the CWI is the appropriate authority to handle requests based on economic circumstances.[31] In this respect, I add that *individual* dismissals based on economic circumstances, which involve one employee only, too, should be handled by the CWI. Subsequently, I propose to modify the WMCO, the BBA 1945, the Dismissal Decree, the CWI Handbook on

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27 See Research voor Beleid 2000, p. 59.

28 Employers, in principle, do not oppose the dual dismissal system. See Research voor Beleid 2000, p. 63. Those who oppose refer to the fact that they advocate one instance to decide on dismissals, instead, of two instances. See Bureau Bartels/SZW 2006, p. 98.

29 See above under § 16.4.1

30 For the years of 2005 – in comparison with earlier years – see Loonstra en Kruit 2006, p. 20 and 21.

31 Petri 1981, p. 164.

Dismissal, Book 7 Title 10 of the Dutch Civil Code and the Cantonal Formula, as described below.

CWI: (individual and collective) dismissals based on economic circumstances

1.
To establish that the CWI will have the *exclusive* authority to decide on collective dismissals based on economic circumstances, my *first* proposal is to make the WMCO exclusive for the CWI.

2.
My *second* proposal is to amend Article 3:1 of the Dismissal Decree and Article 7:685 DCC, in that the CWI, will be authorized to decide on requests based on economic circumstances, and Cantonal Courts to decide on requests based on serious cause, economic circumstances *exempted.*

The rationale behind my proposals is that the BBA 1945 aims to prevent mass unemployment. Meanwhile, the *WMCO*, too, aims to prevent mass employment and authorizes the CWI to decide on collective dismissals under this Act. It, however, too, leaves room for *Cantonal Courts* to decide on these dismissals. Cantonal Courts, however, lack the specific tools of the CWI, and apply other – less stringent criteria for dismissal – than the CWI.[32] This leads to legal inequality and legal uncertainty for private-sector employees. By making the CWI the *exclusive* safekeeper on collective dismissals according to this Act, and all other dismissals based on economic circumstances, the government in my opinion will be able to better serve the goal of preventing mass unemployment, needed in the ongoing development of economic globalization. At first sight, these proposals sound groundbreaking. However, case law shows that Cantonal Courts, in general, already point at the CWI as the appropriate authority to decide on requests based on economic circumstances. The CWI handles these request generally also quicker than Cantonal Courts.[33] More important, by authorizing *one* instance only – the CWI – to decide on requests based on economic circumstances, the government will prevent private-sector employees from being treated differently. In my proposal, the only difference among requests based on economic circumstances handled by the CWI will be whether additional rules of the WMCO apply.

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32 See also TK 30 109, 2004-2005, No. 1, Brief van de Minister van Sociale Zaken en Werkgelegenheid, p. 40.

33 Bureau Bartels/SZW 2006, p. 22.

3.
A consequence of authorizing the CWI to decide on dismissals based on economic circumstances, is that selection of employees based on *quality* will no longer be allowed. Quality is an important asset for the employer, in that it is an important asset to compete.[34] In itself, (in)capacity is a valid reason for dismissal. Employees, on the other hand, argue that to the extent quality is applied by Cantonal Courts as a criterium for dismissal in collective dismissals, the latter implies that the employee is *less* qualified than other employees, *not* that the employee is incapable of performing his duties. Therefore, quality as a criterium of dismissal in collective dismissals is difficult to measure. In my opinion, both have a point. Consequently, to meet the interests of employers and employees, my *third* proposal is that the Minister considers an amendment of the Dismissal Decree, which will include the 'new' principle of quality – as already applied in dissolution procedures – as a criterium for dismissal in collective dismissals under the WMCO. In the past, the government did not oppose this principle.[35] However, by means of a trade-off, I suggest that a duty of job training and/or occupational retraining is laid down in the Dismissal Decree, on the part of employers, for employees who must meet this new requirement of quality.

With employees, I agree that quality as a criterium of dismissal in collective dismissals is difficult to measure. Hence, I advocate that the Minister of Social Affairs *lists* the – exhaustive – criteria for dismissal in the Dismissal Decree. Moreover, the CWI Handbook on Dismissal must determine that these criteria must be in accordance with reasonability, objectivity and verifiability, to prevent these criteria of being abused by employers. To stick with the 'new' criterium of quality. With regard to *reasonability*, the CWI, in my opinion, must apply a *marginal* test. The CWI must pose the question whether under the circumstances of the case it is reasonable, for example, to require a university degree of the employee. In brief, the requirement of quality as a criterium for dismissal is unreasonable when – like with a manifestly unreasonable dismissal – it is clear to every reasonable human being that the requirement is unreasonable. Reasonability, however, should be required, because it at least constitutes some scrutiny of the employer's freedom to dismiss an employee based on this criterium. Furthermore, in furtherance of case law under Article 7:685 DCC, the principle of quality as a criterium for dismissal in collective dismissals must meet the requirements of *objectivity* and *verifiability* to prevent the employer from being the sole 'judge' of the employee's capabilities. Based on objective criteria, which includes job training and/or occupational retraining, the employee himself must be able to check to what extent he has (not) met the requirement of quality.[36] The foregoing explains why I find the proposal of the Minister of Social Affairs in Bill 30 370, to allow collective bargaining parties

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34 Bureau Bartels/SZW 2006, p. 6, 7 and 52-60.

35 See TK 2005-2006, 30 370, No. 3, p. 23.

36 See also EK 2005-2006, 29 738 and 30 370 C, p. 17 and 18, referring to the *KPN 'Mobiliteit-CAO'*.

to decide on their own criteria of dismissal, too far-reaching in *two* aspects. First, the Minister leaves the criteria for dismissal open-ended, assuming up front that the criteria agreed upon by collective bargaining parties will meet the requirements of reasonability, objectivity and verifiability. Second, the Minister leaves the supervision with the parties who draw up these criteria. In my opinion, the government *only* is the appropriate authority to establish, and – by means of the CWI or Cantonal Court – to supervise the application of criteria for dismissal.[37] To rule otherwise will endanger the requirements of reasonability, objectivity and verifiability, hence, will lead to legal inequality and legal uncertainty. To this extent, I am pleased that the Minister of Social Affairs has partly withdrawn Bill 30 370.

4.
My *fourth* proposal is to amend the Dismissal Decree, in that employers will be left a choice to apply the principles of reflection or seniority, either or not in combination with quality as a criterium for dismissal to collective dismissals under the WMCO, as subscribed to by Cantonal Courts already,[38] and representatives of employers in the Labour Foundation.[39] It is awkward that the Minister in Bill 30 370 initially allowed collective bargaining parties to draw up their own criteria for dismissal in these dismissals, leaving parties free to alternatively apply these principles, and, subsequently, to determine that these same parties as from 1 March 2006 *must* apply the principle of reflection.[40] This brings me to the reason for the Minister to withdraw his initial proposal. He held that the proposal might negatively affect elderly employees, however, practice has shown that the principle of reflection, too, negatively affects elderly employees.[41] Indeed, one cannot deny that employers do not tend to hire elderly employees easily,[42] and that elderly employees form a significant part of employees being dismissed,[43] however, the focus should not be on elderly employees *only*, as subscribed to by the government' members in the SER.[44]

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37 The need of preventive review becomes clear as regards Redundancy Plans (*Sociaal Plan*), in which both the CGB and the Cantonal Court conclude that the Plan is in violation of the Act on Equal Treatment Based on Age (WGBL). For example, see CGB 13 maart 2006, JAR 2006/85 'affirmed' by the Cantonal Court of Deventer 9 juni 2006, JAR 2006/161. For an in-depth discussion on age discrimination in Redundancy Plans, see Bruynincks en Kehrer-Bot 2006.

38 For example, see ABN Redundancy Plan. See also above under § 16.4.2

39 STAR-Advies 2004/13. See also above under § 16.4.2.

40 See also a divided Labour Foundation in this respect. STAR-Advies 2004/3. See also above under § 6.4.2.

41 According to announcement of Jan Meijer, Head Dismissal Law, at CWI Congress '*Ontslagrecht bespiegeld'* , 17 November 2006. See also EK 2005-2006, 29 738 en 30 370, C, p. 2-5.

42 TK 2002-2003, 28 862, No. 6, p. 9, referring to the Report of the Netherlands Interdisciplinary Demografic Institute (NIDI), *Organisaties, veroudering en management: een onderzoek onder werkgevers*, Den Haag 2001, p. 16. See also Plessen 2006, p. 289; Van der Lans 2006, p. 21, 24 and 25, referring to '*Werkdocument Arbeidsbemiddeling en – reintegratie van werklozen, Centraal Planbureau, Den Haag, februari 2000, p. 62 en Kamerstukken II 1998/00, 26202, nrs. 1-2, p. 54-55'*.

43 TK 2002-2003, 28 862, No. 3, p. 2; No. 6, p. 8.

44 SER-Advies 2006/8.

First, one too easily assumes that employers tend to dismiss elderly employees as a rule. The general assumption that elderly people are less productive *per se* has been proven to be unjustified, in that this, in general, depends on other characteristics and circumstances than age alone.[45] Second, to the extent the new criterium of quality negatively affects elderly employees, my third proposal to introduce a duty of job training and/or occupational retraining, may partly prevent elderly employees of being dismissed.[46] Third, there is no such thing for – elderly – employees as job security, i.e. a right to the job.[47] To the extent elderly employees are considered to be in need of protection, already they obtain protection as a special category. For example, elderly employees are protected under the Act on Equal Treatment Based on Age (*Wet gelijke behandeling op grond van leeftijd*),[48] through measures on the part of employers,[49] and through specific measures of the government, stimulating employers to hire elderly persons and to invest in them.[50]

5.

My *fifth* proposal, like my third proposal, as a matter of fact, too, may be in the interest of elderly employees. In brief, I suggest that employers compensate the *years of service* when an employee is dismissed based on economic circumstances *only*. This applies to all dismissals in my proposal, which are subject to the CWI's review. I, thus, do not agree with Hansma that employees, in principle, are not entitled to severance payment, when being dismissed with just cause.[51] Rather, I agree with Zondag and Grapperhaus that although the principle of seniority should no longer be considered as the *primary* criterium for dismissal in requests based on economic circumstances, this does not mean that the *years of service* are without meaning.[52] As I stated in Chapter 1, employers and employees depend on each other to reach their goals. Employers, in other words, can only survive with the help of employees, and employees, in principle, can only survive with the help of employers. If the employee has to

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45 Nyfer 2000, p. 99. See also Van der Lans 2006, p. 26.

46 See also EK 2005-2006, 29 738 and 30 370, C, p. 2.

47 See below under § 15.1.2 and § 21.2.In this respect, see also Plessen 2006, p. 290, referring to HvJ EG 22 november 2005, C-144/04 (*Mangold*).

48 See CGB 13 maart 2006, JAR 2006/85 and in furtherance hereof Ktg. Deventer 9 juni 2006, JAR 2006/161. See also Ktg. Deventer 21 maart 2006, JAR 2006/89. See further Heemskerk 2006a; Heemskerk 2006b; Heerma van Voss en Van Slooten 2006, p. 503-505; Van Kranenburg-Hanspians 2005; Plessen 2006.

49 See *Financieel Dagblad* of 12 July 2006*, Ziekenhuis-CAO opzij vanwege vergrijzing*. On the other hand, the age of 65 is still a justification to terminate employment. See De Jong (2) 2006. See further Plessen 2006, p. 290; and Themanummer Arbeid Integraal 2006/1, *De oudere werknemer*.

50 For example, see *Wet van 19 december 2003*, *houdende premievrijstelling bij in dienst nemen en in dienst houden van oudere werknemers*, Stb. 2003, 557. For an overview of – other – measures taken in this respect, see TK 2003-2004, 27 046, *Bevordering arbeidsdeelname oudere werknemers*, No. 5, p. 11-18, 28 and 29. See also Plessen 2006, p. 289 and 290.

51 See Scholtens 2005b, p. 52, referring to Hansma 2000, p. 363.

52 Zondag 2005b; Grapperhaus 2006, p. 37 and 38. See also Duk 2006, p. 18, referring to HR 28 maart 1997, NJ 1997, 561, JAR 1997/90 (*Cemsto/El Azzouti*).

leave the company for economic reasons *only*, the employer is asking the employee to make a sacrifice in order for the employer to survive, which he could not have done without the help – i.e. years of service – of the employee in the first place. For this sacrifice on the part of the employee, the employer, regardless of whether he applies quality as a criterium of dismissal, in my opinion should award the years of service. In fact, at present, an award for the years of service implicitly is incorporated in the Cantonal Formula. Employees in neutral dissolutions, e.g. dissolutions based on economic circumstances only, in principle, have a 'right' on a severance payment. In my proposal, the Cantonal Court is no longer authorized to decide on dismissals based on economic circumstances. Hence, employees, in effect, waive this right, because the CWI cannot grant severance payments.

Subsequently, the CWI Handbook on Dismissal, therefore, should be amended, determining that the employer must take the years of service into consideration. Primarily, the employer must offer a severance payment according to the Cantonal Formula.[53] Alternatively, when financial means are insufficient, employers may offer outplacement. According to ongoing practice, employers, too, can offer a combination.[54] The chance that a compensation based on the years of service is in violation of the Act on Equal Treatment Based on Age should not meet too much resistance.[55] All the more so, when the Redundancy Plan meets the requirements of appropriateness and proportionality.[56] The offer of severance payment and/or outplacement (costs) can take place through so-called premises. If an employer invokes the so-called 'habe-nichts'-exception, alleging that he is unable to offer a severance payment due his financial situation, the CWI, however, cannot reject the request when there is a just cause for dismissal. In this respect, the CWI is allowed to express his doubts in the permit, offering the employee a handout to start a procedure under Article 7:681 DCC.[57] Unlike the Committee Rood, therefore, I argue in favor of Article 7:681 DCC remaining in existence, as a continuation of the BBA 1945-procedure, with the aim it may urge employers to consider the years

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53 TK 2001-2002, 28 170, No. 3, p. 33 and 34. See also Van der Hulst 1999, p. 248; Loonstra 2001b; Knegt 2006; Grapperhaus 2006, p. 38. For a calculation of the years of service, see Martens 1997; Van Ladesteijn 2006.

54 Van der Hulst 1999, p. 247-249.

55 See CGB 13 maart 2006, JAR 2006/85, 'affirmed' by the Cantonal Court of Enschede, 9 juni 2006, JAR 2006/161, determining that a Redundancy Plan violated this Act, due to a distinction based on *age*. See also Veldman 2005, p. 47 en 48, referring to *Advies over de notitie van de Minister van Sociale Zaken en Werkgelegenheid inzake heroverweging van het last-in/firs-out (lifo) beginsel bij bedrijfseconomisch ontslag,* CGB-Advies/2004/05, Utrecht (juli) 2004. In contrast, see CGB 12 oktober 2006, JAR 2006/268, allowing parties to make a distinction – in paying severance payments – based on age in a Redundancy Plan.

56 See CGB 24 september 2004, Oordeel 2004-118. For a discussion of this case, see Vegter 2004, p. 379 and 380; Joosten 2005. In this respect, see also HvJ EG 17 oktober 1989, zaak 109/88, Jur. 1989, p. 3199 (*Danfoss*) and HvJ EG 3 oktober 2006, zaaknr. C-17/05, JAR 2006/267 (*Cadman*). For a discussion of these cases, see Veldman 2006.

57 This possibility is explicitly referred to in the CWI Handbook on Dismissal under breach of trust. See above under § 16.6.

of service more seriously in making efforts to examine whether another position is available or in calculating a severance payment. As may have become clear, I do not advocate a *legal right* on the award of the years of service through a severance payment in the BBA 1945. This would mainly hurt small-sized companies which, due to the low costs, tend to address the CWI when asking for a termination of employment based on economic circumstances.[58] In my proposal, they have a possibility to offer outplacement, or to invoke the 'habe-nichts'-exception.

Cantonal Courts: individual dismissals based on other grounds

6.
In my proposal, Cantonal Courts under Article 7:685 DCC will be authorized to decide on *individual* dismissals based on serious cause, economic circumstances exempted. Already, these cases form the majority of the substantive cases with the Cantonal Court.[59] The Cantonal Formula, however, unlike the CWI Handbook on Dismissal, does not provide clear rules on these dismissals, which explains that the decision-making of Cantonal Courts is so often referred to as a 'tombola'. Hence, my *sixth* suggestion is that the Circle of Cantonal Courts adopts a *Cantonal Formula with respect to the Application of the Just Cause Standard*, and uses the CWI Handbook on Dismissal as a model. In effect, nothing stands in the way for Cantonal Courts to apply the same rules as the CWI. There is a difference between the CWI and the Cantonal Court, however. The CWI as part of the government must serve the public interest. Cantonal Courts, in principle, 'only' need to balance the interests of employers and employees. Therefore, the Circle of Cantonal Courts, in principle, must be free to adjust the rules of the CWI Handbook on Dismissal in this respect. Overall, the rules in the CWI Handbook on Dismissal are to the satisfaction of employers. It appears that employers are particularly satisfied on the application of rules as regards ill employees.[60] Also, for dismissals based on unsatisfactory performance, the CWI provide clear rules, taking case law of civil courts into consideration. The rules in the CWI Handbook on Dismissal as regards a breach of trust, too, are in accordance with the legislature's intent behind just cause protection. In contrast, Cantonal Courts often allow employers in these cases – of which most are handled by Cantonal Courts – to trade off just cause protection.[61]

7.
My *seventh* proposal sees to (these) requests based on breach of trust. As I pointed out in Chapter 3, in practice, Cantonal Courts tend to dissolve the

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58 See Loonstra en Zondag 2000, p. 1268-1272. See also Bureau Bartels/SZW 2006, p. 48.

59 See Loonstra en Kruit 2006, p. 20 and 21.

60 See also Bureau Bartels/SZW 2006, p. 21, 37 and 38.

61 See also Research voor Beleid 2000, p. 30; Boot 2005c, p. 268-272.

employment agreement based on breach of trust, although the alleged reason underlying the breach of trust is non-existent. This explains an announcement in the *Newspaper for the People* (*Volkskrant*) of 28 March 2006 that the question in dissolution procedures under Article 7:685 DCC, in practice, focuses on the question of severance payment only.[62] The law, however, requires serious cause, without the possibility of employers to trade off just cause protection. According to legislative history, this means that Cantonal Courts may dissolve these requests only when the employment relationship is severely and irreparably disrupted, hence, a replacement in the same, an adjusted or another position is impossible.

The system, on the other hand, is not workable if Cantonal Courts reject a request because serious cause is lacking, and parties appear in court shortly after, due to the fact that replacement does not *severely* frustrate the operation of the firm, but eventually is enough to render the working situation not workable for the employee. To make the new dismissal system workable for *both* parties, I, therefore, suggest that the legislature amends Article 7:685 DCC, in that when serious cause is lacking, an *employee* is given a choice to agree upon continuation of the employment agreement *or* a trade-off sum, instead, as suggested by the court.[63] In this respect, the new *Cantonal Formula with respect to the Application of the Just Cause Standard* must give clarity on its size. In my opinion, my proposal is in accordance with Article 4 of ILO Convention 158. The latter does not allow *employers* to trade off just cause protection. Also, the employer remains entitled to withdraw the request. The employer, thus, has the last say. The employee, on the other hand, has the last say on whether the employment agreement will come to an end, when just cause protection is lacking. An advantage of this trade-off system is that the law provides employees just cause protection according to the legislature's intent on the one hand, but that the system of dismissal law becomes more flexible and workable for employers *and* employees on the other. In this respect, I agree with Zijl that trade unions need not be overly concerned about the level of employment protection. In her opinion, employees may prefer other job aspects than job security alone.[64] Also, employees, in principle, remain entitled to unemployment benefits to the extent that the employment agreement is dissolved based on breach of trust for which the employee is *not* to blame. The UWV, on the other hand, may argue that the employee, in effect, agreed with the termination of employment. Future case law will decide whether the employee, indeed, remains entitled to unemployment benefits.

8.

My *eight* proposal, in effect, is in furtherance of the foregoing and sees to factor N(umber of years of service)/*A* (*aantal dienstjaren*) of the Cantonal Formula. It

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62 *Volkskrant* of 28 March 2006, p. 7. See also Van den Heuvel 2000b, p. 364.

63 This proposal ressembles the opt-out provision in the META. See above under § 6.3.

64 Zijl 2006, p. 93; *Financieel Dagblad* of 20 June 2006. See also Bureau Bartels/SZW 2006, p. 104.

sees to the *size* of the severance payment. More specifically, it sees to the aspect of age. Under the Cantonal Formula, N is related to age, in that N = 1.5 for employees each year of service when the employee is between ages 40 through 49; N = 2 for employees each year of service when the employee is 50 or older. Probably, the Circle of Cantonal Courts was of the opinion that the older the employees are, the more difficult it is for them to find a new job.[65] A side-effect has been that severance payments, in general, are considered as relatively high compared to other countries.[66] What is more important, is that the Cantonal Formula in this respect *undermines* measures of the government, stimulating employers to hire elderly employees and to invest in them, because factor N makes it *unattractive* to hire elderly employees, imposing relatively high costs on the employer when he wishes to *dismiss* this employee.

Moreover, factor N discriminates against employees below the age of 40. Under European case law, this is allowed only, when according to Article 7.1.c of the Act, this distinction is *objectively justified*. Hence, the distinction must meet the requirements of legitimacy (*legitimiteit*), appropriateness (*doelmatigheid*) and proportionality (*proportionaliteit*) to be valid.[67] In my opinion, one can doubt whether factor N (A) in the Cantonal Formula meets these criteria. First, one can doubt whether it is *legitimate* to protect elderly employees. As derives from case law of the European Court of Justice, the legitimacy is determined by state law and/or the social policy of the government.[68] The social policy of the Dutch government is to involve elderly employees in the labour process. This goal is legitimate under Article 7.1.a of the Act. The Cantonal Formula *negates* the effect of measures to stimulate employers to hire elderly persons and to invest in them, however. Moreover, case law of the European Court of Justice does not allow deviating from the Act based on *general assumptions*.[69] One can doubt whether it is *legitimate* to protect elderly employees based on the *general assumption* that elderly employees have more difficulties to find a new position on the labour market when being dismissed. In this respect, one can doubt whether it is *appropriate* to offer elderly employees a severance payment to cope with the problem of *eventual* unemployment. Also, one can doubt whether it is appropriate that an employee of 36 years with 15 years of service in a neutral dissolution obtains a severance payment of 15 x salary x 1, and an employee of 59 years with 10 years of service in a neutral dissolution obtains a severance payment of (9x2) +

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65 The Circle of Cantonal Courts (*Kring van Kantonrechters*) has not made clear the exact reason to include age in factor N (A). See also Van der Lans 2006, p. 14.

66 See TK 2004-2005, 30 109, No. 1, p. 40. For a discussion on this issue, see Barendrecht 2004, Fikkers 2004, Jongerius 2004, and Van den Braak 2004. See also Scholtens 2005b.

67 These requirements derive from case law of the European Court of Justice. See HvJ EG 31 maart 1981, zaak 96/80, Jur. 1981, p. 911 (*Jenkins*), HvJ EG 13 mei 1986, zaak 170/84, Jur. 1986, p. 1607 (*Bilka*) and HvJ EG 13 juli 1989, zaak 171/88, p. 2743 (*Rinner-Kuhn*).

68 HvJ EG 9 februari 1999, C-167/97, Jur. 1999, p. I-623 (*Seymour-Smith*).

69 HvJ EG 13 juli 1989, No. 171/88, Jur. 1989, p. 2743 (*Rinner-Kuhn*).

(1x1.5) = 19.5 x salary x 1.[70] Last, one can doubt whether the factor N (A) in the Cantonal Formula is *necessary* to meet the difficulty of elderly employees in finding a job. Factor C, too, allows Cantonal Courts to include the bad labour market position of the elderly employee. Moreover, it is less *disproportional* than application of factor N (A). In this respect, I agree with the Judiciary Council (*Raad voor de Rechtspraak*) *not* to introduce a legal norm on severance payments under Article 7:685 DCC, but to leave Cantonal Courts the possibility to decide on the size of the severance payment based on the specific circumstances of the case, which *may* include the bad labour market position of the elderly employee.[71] In conclusion, I subscribe to the claim that the forum named Alternative for Union (*Alternatief voor Vakbond* or *AVV*) – focusing on rights for newcomers on the labour market – recently filed with the CGB, alleging that the factor N is in violation of the Act on Equal Treatment Based on Age.[72] To a certain extent, my proposal shows similarity with the so-called *Groen Version* (*Groen-variant*), named after the Cantonal Judge who refused to apply factor N (A) = 2, because the employee was hired above the age of 50. In his opinion, factor N (A) = 1 should be applied to employees who were hired above the age of 40, and between ages 40 through 49 at the time of the dissolution. Factor N (A) = 1.5 should be applied to employees who were hired above the age of 40, and between ages 50 and older at the time of the dissolution. To employees who were hired above the age of 50, he advocated that factor N (A) should be 1, regardless of their age.[73] The *Groen Version* has been followed by a number of courts.[74] In fact, most recently, it has been followed by the Cantonal Court of Deventer. In brief, the Cantonal Court held that to include age as a separate factor, this may impose unreasonable costs on the employer on the one hand, and may form a bottleneck to hire elderly – experienced – employees on the other. Moreover, this Court, too, had doubts whether the Cantonal Formula is in accordance with the Act on Equal Treatment Based on Age in this respect.[75]

9.

My *ninth* proposal sees to *conditional* requests based on urgent reasons for dismissal. To the extent that Cantonal Courts do not consistently apply case law on summary dismissals to conditional requests, these employment agreements, in effect, are being dissolved based on non-existing urgent reasons. My proposal

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70 See also Van der Lans 2006, p. 18.

71 For the government, see TK 2004-2005, 30 109, No. 1, p. 42. For *the Raad voor de Rechtspraak*, see its Advice (Letter) of 8 July 2004 (www.rechtspraak.nl). See SER-Advies 2005/5, p. 126 and 127.

72 The AVV filed its complaint with the CGB in August 2006 based on a doctoral thesis of Van der Lans 2006. See www.alternatiefvoorvakbond.nl.

73 Ktr. Hilversum 22 oktober 1999, JAR 1999/241.

74 For case law, see Scholtens statistiek ontslagvergoedingen 2002 (II), p. 6; 2004 (II), p.7; Scholtens 2005c, p. 6; Van Kranenburg-Hanspians 2005, p. 7; Heemskerk 2006a, p. 21; Van der Lans 2006, p. 16, footnote 24.

75 Ktg. Deventer 21 maart 2006, JAR 2006/89. For another opinion, see Ktg. Heerlen 23 augustus 2006, JAR 2006/230.

is that the new *Cantonal Formula with respect to the Application of the Just Cause Standard*, too, determines that Cantonal Courts consistently apply case law on summary dismissals to these requests on the one hand, and that the legislature *abolishes* the possibility of a summary dismissal under Article 7:677 DCC on the other. The rationale behind the foregoing proposal(s) is twofold. First, the abolition of an summary dismissal will prevent that employers, in effect, abuse the practice of conditional requests under Article 7:677 DCC in conjunction with Article 7:685 DCC to get rid of an employee without cause. Second, under Article 7:677 DCC an employer decides on an urgent reason for dismissal. In general, dismissals under the Dutch dismissal system are subject to a *preventive* review of the CWI or the (Cantonal) Court. The rationale behind a preventive review is to prevent rash dismissals, and to safeguard that employers will use a dismissal as an ultimum remedium only.[76] Therefore, it seems illogical to have an employer to decide on a summary dismissal, considering the consequences it has for employees. Moreover, for employers *and* employees it is more efficient if an employer suspends the employee after the occurrence of the urgent reason for dismissal, in principle with continuation of payment of salary, and instantly initiates an Article 7:685-procedure, in which the Cantonal Court is asked to grant a dissolution based on urgent cause. This procedure will lead to lower costs for the employer on the one hand, and will protect an employee against instant loss of income on the other. I am aware that if the legislature will abolish summary dismissals under Article 7:677 DCC, case law on an urgent reason for dismissal as from then will be established by Cantonal Courts. Case law of courts under Article 7:677 DCC, on the other hand, will remain to serve as its starting point. Consequently, Cantonal Courts must reject a request when an urgent reason for dismissal – under this case law – is lacking. Instead, based on my seventh proposal, Cantonal Courts may leave the *employee* a choice to agree upon either continuation of the employment agreement, or a trade-off sum instead.

10.
My *tenth* proposal, finally, sees to workers employed on the basis of a contract according to the BBA 1945, but *not* on the basis of an employment agreement according to Article 7:610 DCC. These employees fall within the scope of the BBA 1945 only. Hence, in my proposal, they will lack just cause protection when being dismissed based on grounds *other* than economic circumstances. For these workers, I propose to include a rule in Book 7 Title 10 of the Dutch Civil Code, enabling the Minister of Social Affairs to apply a special regime to these workers, in that they have the same rights as employees under Article 7:610 DCC regarding these other grounds of dismissal. In 1970, the SER already suggested such a rule, allowing the Minister to exclude – or include – employees. Earlier, Van der Heijden already suggested a special regime for

[76] Kuip en Verhulp 2001, p. 416. See also Van den Heuvel 2000b, p. 368 and 369; Loonstra 2005a, p. 293.

economically dependent employees in general. The latter is still point of debate, however.[77] In this respect, Koopmans correctly states that by applying the Act of the Employment Agreement of 1907, the legislature did not aim to make an Act for all types of agreements and workers, rather to outban social abuses.[78] There is *no* discussion, however, on whether workers who *already* enjoy just cause protection under the BBA 1945 should obtain just cause protection. Hence, to the extent these workers no longer enjoy just cause protection under the BBA 1945, this should be provided by Book 7 Title 10 of the Dutch Civil Code.

Overall, my proposals on *individual* and *collective* dismissals primarily intend to provide employers and employees legal equality and legal security regarding employment termination on the one hand, and to make the dual just cause dismissal system more flexible for employers and employees – while safeguarding just cause protection for employees – on the other. As regards the latter, my suggestion is to give *employees* a possibility to trade off just cause protection. If the International Labour Office opposes this practice, the Dutch government in my opinion should reconsider *why* it, in fact, wishes to ratify ILO Convention 158. The desire for harmonization of dismissal systems alone does not enable employers to strengthen their competitive position in the international context. Only if *all* countries adhere to the just cause rule, this may be the case. In this respect, the statement of the Labour Foundation is understandable, in that 'due to the low number of ratifications among states of the European Union it was not (yet) convinced whether ILO Convention 158 should be the basis for Dutch dismissal law'.[79] Hence, my suggestion is to *modify* the dual just cause dismissal system according to the above, *without* (yet) ratifying the Convention In my opinion, the Dutch government – as a matter of speaking – kills two flies with one stone. First, private-sector employees will enjoy just cause protection according to Article 4 of ILO Convention. Second, in this respect, the Dutch dismissal system will be harmonized with dismissal systems of other member states, which ratified the Convention.

In conclusion, as regards the *United States*, I primarily address the Drafters of a Restatement of Employment Law. I suggest that (i) they reflect the law as it stands, hence, recognize the implied-in-fact (good cause) contract, which is good law in California and a number of other states; and (ii) they recognize that *once* there is a good cause contract under the handbook exception, and the employer wishes to modify the just cause standard, the employer needs consideration and assent to such modification according to general contract principles. I further invite courts to focus on the question whether and which special rules and remedies should apply to the employment relationship.

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77 EK 2005-2006, 29 738 and 30 370 C, p. 17.

78 Koopmans 1962, p. 80.

79 See above under § 1.3.3. and § 24.3.1.

As regards the *Netherlands*, I address the legislature, Cantonal Courts and the CWI to consider my proposals. In my opinion, by making rules on employment termination more flexible for employers *and* employees, while maintaining just cause protection, this will result in (job) security for insiders, and job opportunities for newcomers and outsiders.[80] In this respect, my suggestions meet the requirements with which Dutch dismissal law, according to the government, must comply. In brief, it (1) must prevent rash dismissals to protect an employee against the loss of work and income; (2) this protection must find its limit in a reasonable interest of the employer on continuation and the well-being of the organization; (3) must not frustrate the mobility of the labour market, nor that of employees; and (4) must offer newcomers and outsiders job opportunities.[81] In this respect, my suggestions, too, comply with the mid-long policy that *all* must participate in the labour process, as subscribed to by the SER.[82]

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80 See also Zijl 2006, p. 143; CPB Document 135 (2006).

81 HSI 1999/03, p. 13, referring to TK 1992-1993, 22 977, No. 2. See also Boot 2005c, p. 246 and 247 referring to TK 1992-1993, 22 977, No. 2 as well. In my opinion the(se) aims of dismissal law as formulated by De Vries are rather to be found in TK 1992-1993, 22 977, No. 1. See also more recently, *Notitie Ontwikkelingen en keuzes in het stelsel van werk en inkomen* of the Mininster of Social Affairs, sent to the Lower House on 28 June 2006, in furtherance of TK 2004-2005, 29 804, No. 6.

82 SER-Advies 2006/8.

SAMENVATTING

INLEIDING EN PROBLEEMSTELLING (hoofdstuk 1)

De Industriële Revolutie in de 19e eeuw leidde tot sociale misstanden voor werknemers. De Nederlandse regering reageerde met de Wet op de arbeidsovereenkomst van 1907. Deze wet beoogde werknemers te beschermen tegen misbruik door werkgevers, maar bevatte vooralsnog geen zogeheten *iusta causa dimissionis*. Deze eis van een redelijke grond voor ontslag, die beoogt een willekeurig ontslag *in het algemeen* tegen te gaan, kreeg voor het eerst haar beslag in na-oorlogse – van origine Duitse – wetgeving, beter bekend als het Buitengewoon Besluit Arbeidsverhoudingen van 1945 (BBA 1945). Naast de introductie van dit *algemene* opzegverbod, introduceerde de wetgever *bijzondere* opzegverboden in Boek 7 Titel 10 Burgerlijk Wetboek (BW), de opvolger van de Wet op de arbeidsovereenkomst van 1907, die beogen werknemers te beschermen tegen een willekeurig ontslag op grond van *specifieke* redenen. Amerika kent eveneens opzegverboden. De nadruk in Amerika werd echter aanvankelijk gelegd op de ontwikkeling van de relatief jonge economie. Regels die beogen werknemers te beschermen tegen een willekeurig ontslag in het algemeen bleven uit. Amerikaanse rechters kozen voor de zogeheten *at-will rule*, die nog steeds het uitgangspunt is voor werknemers in het Amerikaanse ontslagrecht. Op grond van deze regel kan een werkgever een werknemer zonder reden ontslaan.

Het proces van economische globalisering aan het eind van de 20e eeuw leidde wederom tot misbruik van werknemers. Dit proces werd ingeleid door de openstelling van markten voor goederen en diensten door landen wereldwijd, waardoor de internationale concurrentie toenam. Met name in ontwikkelingslanden, maar ook in Amerika en Nederland leidde het proces van economische globalisering – behalve tot positieve effecten voor de economie ook – tot negatieve effecten voor werknemers. Het proces noodzaakte de laatsten feitelijk op zoek te gaan naar een nieuwe balans tussen een flexibel ontslagrecht voor werkgevers enerzijds, en ontslagbescherming voor werknemers anderzijds. De vraag die in dit proefschrift centraal staat, is in welke mate werknemers met een arbeidsovereenkomst voor onbepaalde tijd in Amerika en Nederland bescherming genieten tegen een willekeurig ontslag in het algemeen. Het antwoord is van belang voor Amerika en Nederland bij hun zoektocht naar deze nieuwe balans. Met betrekking tot de mate waarin werknemers bescherming tegen een willekeurig ontslag in het algemeen genieten, is aansluiting gezocht bij artikel 4 van Conventie 158 van de Internationale Arbeidsorganisatie (IAO). Dit artikel bepaalt dat de arbeidsovereenkomst van een werknemer niet mag worden beëindigd zonder dat daarvoor een geldige reden aanwezig is, die verband houdt met de geschiktheid of het gedrag van de werknemer of gebaseerd is op de vereisten voor het

functioneren van de onderneming.[1] Voor beide landen is nagegaan welke knelpunten rijzen in hun zoektocht naar een nieuwe balans tussen flexibiliteit voor werkgevers enerzijds, en ontslagbescherming voor werknemers anderzijds. Ik vraag mij daarbij steeds af of, en in hoeverre beide landen van elkaar kunnen leren. Het onderzoek beoogt oplossingen voor de geconstateerde knelpunten aan te dragen, en op deze manier een bijdrage te leveren aan de discussie over het ontslagrecht in beide landen.

AMERIKAANS ONTSLAGRECHT (hoofdstuk 2)

In hoofdstuk 2 beschrijf ik het Amerikaanse ontslagrecht. Ik ga na in hoeverre Amerikaanse werknemers met een arbeidsovereenkomst voor onbepaalde tijd bescherming tegen een willekeurig ontslag in het algemeen genieten uit hoofde van de door de federale wetgever, statelijke wetgevers, en rechters gemaakte uitzonderingen op de *at-will rule*. In dit kader besteed ik achtereenvolgens aandacht aan het (federale) collectieve arbeidsrecht, (federale) anti-discriminatiewetgeving, statelijke wetgeving, en de rechtspraak. De conclusie is dat de vooronderstelling als zou het Amerikaanse recht in het geheel geen ontslagbescherming aan werknemers bieden onjuist is. Dit staat overigens los van de vraag of werknemers deze bescherming in de praktijk genieten. Werknemers op wie een collectieve arbeidsovereenkomst (CAO) van toepassing is, de zogeheten *collective bargaining-unit employees*, genieten bescherming tegen een willekeurig ontslag in het algemeen uit hoofde van CAO-bepalingen en arbitrage. Civiele rechters lijken geenszins bereid om in navolging van arbiters deze bescherming ook aan *non*-bargaining-unit employees c.q. *at-will employees* te bieden. De laatsten genieten op grond van de *National Labor Relations Act (NLRA)* van 1935 'slechts' bescherming tegen een willekeurig ontslag op grond van een specifieke discriminatoire reden, en in het geval van georganiseerde activiteiten (*concerted activities*), maar niet tegen een willekeurig ontslag in het algemeen. *At-will employees* zijn voor het laatste aangewezen op (federale) anti-discriminatiewetgeving, statelijke wetgeving en/of rechtspraak (*common law*).

Uit hoofde van *(federale) anti-discriminatiewetgeving* genieten *at-will employees* geen bescherming tegen een willekeurig ontslag in het algemeen, maar 'slechts' bescherming tegen een ontslag op grond van specifieke discriminatoire gronden. Wel vloeit uit de rechtspraak omtrent (federale) anti-discriminatiewetgeving voort dat de werkgever een non-discriminatoire reden dient te aan te tonen nadat de werknemer het vermoeden van discriminatie heeft aangetoond. De rechtspraak bepaalt evenwel dat deze non-discriminatoire reden geen redelijke grond voor ontslag hoeft te behelzen, maar slechts een reden die geen discriminatoire in de zin van de wet in kwestie is. Ergo, resteert statelijke wetgeving en/of rechtspraak waarop *at-will employees* zich eventueel kunnen verlaten voor bescherming tegen een willekeurig ontslag in het algemeen.

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[1] Zie ook Kuip 1993a, p. 280.

Een exercitie onder statelijk recht leert dat alleen werknemers in de staat *Montana* bescherming kunnen genieten tegen een willekeurig ontslag in het algemeen. De *Wrongful Discharge From Employment Act* (*WDFEA*) van 1987 behelst een *just cause standard*, die overeenkomt met de standaard in CAO's. De WDFEA is tot stand gekomen op initiatief van werkgevers als reactie op exorbitant hoge schadevergoedingen die Amerikaanse rechters aan werknemers toekenden in geval van een zogeheten *wrongful discharge*. Het probleem van de WDFEA is dat in de praktijk lager opgeleiden bescherming ontberen, omdat overtreding van de *just cause standard* 'slechts' leidt tot een contractuele schadevergoeding. Het probleem is dat advocaten in de regel plegen te procederen op grond van een *contingency fee* basis. Dit betekent dat zij procederen op grond van *no cure, no pay* enerzijds, evenwel een (hoog) percentage van de opbrengst van een gewonnen zaak bedingen anderzijds. In de praktijk leidt dit ertoe dat advocaten in de regel alleen zaken aannemen die leiden tot een hoge opbrengst. Het gaat dan om *tort claims* die resulteren in zogeheten *punitive damages* of *contract claims* van hoger opgeleiden. Met *punitive damages* wordt beoogd de overtreder te straffen, in tegenstelling tot een contractuele schadevergoeding die beoogt de daadwerkelijk geleden schade te compenseren. Hoewel de WDFEA tracht het probleem van afwijzing van *contract claims* door advocaten tegen te gaan door in beginsel arbitrage voor te schrijven, weigeren werkgevers in de praktijk arbitrage, waardoor werknemers alsnog zijn aangewezen op het zogeheten *contigency fee system*. Lager opgeleiden ontberen veelal de financiële middelen om zich te laten bijstaan door een advocaat op uurbasis.

De overige staten hanteren nog steeds als uitgangspunt de *at-will rule* in het ontslagrecht. De uitzonderingen die de rechters vanaf eind zeventiger jaren en begin tachtiger jaren maakten op deze regel behelzen kort samengevat de (1) *public policy exception*, een uitzondering gebaseerd op strijd met de openbare orde; (2) *good faith and fair dealing exception*, een uitzondering gebaseerd op strijd met de redelijkheid en billijkheid; en (3) *contract exception*, bestaande uit de (i) *handbook exception*, een uitzondering gebaseerd op arbeidsvoorwaarden; en (ii) *implied-in-fact (good cause) contract exception*, een uitzondering gebaseerd op de omstandigheden van het geval. Ten aanzien van voornoemde uitzonderingen die door rechters gemaakt werden nam Californië het voortouw. Californië nam echter tevens het voortouw om de reikwijdte van de uitzonderingen op de *at-will rule* in te perken. Inperking geschiedde eerst ten aanzien van de norm, later ook ten aanzien van de sanctie. Zo duidde de *good faith and fair dealing exception* aanvankelijk op het vereiste van een redelijke grond voor ontslag voor werknemers, maar het bereik werd al snel beperkt tot uitzonderlijke gevallen van slecht werkgeverschap. Ook werd de schadevergoeding van *punitive damages* uitgesloten ten aanzien van de *good faith and fair dealing exception*. Voorts resulteren de uitzonderingen die een redelijke grond voor ontslag vereisen, te weten de *handbook exception* en de *implied-in-fact (good cause) contract exception,* slechts in contractuele

schadevergoedingen. Lager opgeleiden ontberen daarom in de regel bescherming onder deze uitzonderingen. Ook kunnen werkgevers *just cause protection* contractueel uitsluiten ten aanzien van de *handbook exception* door zogeheten *at-will disclaimers*. Hoewel werkgevers *at-will disclaimers* eveneens opnemen om de *implied-in-fact (good cause) contract exception* te ondergraven, is dit niet in al de gevallen met succes. Een *at-will disclaimer* onder deze uitzondering wordt door rechters beschouwd als slechts een van de omstandigheden om te bepalen of een redelijke grond voor ontslag is vereist. Deze uitzondering heeft dus een steviger basis dan de *handbook exception*. De *implied-in-fact (good cause) contract exception* wordt anderzijds – in tegenstelling tot de *handbook exception* – slechts door een minderheid van staten aanvaard.

NEDERLANDS ONTSLAGRECHT (hoofdstuk 3)

In hoofdstuk 3 beschrijf ik het Nederlandse ontslagrecht. Gelijk als in het vorige hoofdstuk ga ik na in hoeverre werknemers met een arbeidsovereenkomst voor onbepaalde tijd bescherming genieten tegen een willekeurig ontslag in het algemeen, overeenkomstig de bedoeling van de wetgever. Deze luidt dat een werkgever een werknemer tegen zijn wil kan ontslaan met inachtneming van een redelijke grond voor ontslag, *zonder* dat de werkgever de mogelijkheid heeft om deze ontslagbescherming af te kopen. In het bijzonder ga ik na of de vooronderstelling juist is dat werknemers deze bescherming genieten op grond van het BBA 1945, artikel 7:681 BW en artikel 7:685 BW. Als eerste beschrijf ik het duale ontslagstelsel. Dit behelst kort samengevat dat werkgevers die tot een beëindiging van de arbeidsovereenkomst willen komen tegen de wil van de werknemer in verplicht zijn om (1) een vergunning te vragen bij het Centrum voor Werk en Inkomen (CWI) om de arbeidsovereenkomst op te kunnen zeggen; of (2) de Rechtbank, Sectie Kanton (hierna Kantonrechter) te verzoeken de arbeidsovereenkomst te ontbinden. Het CWI toetst of sprake is van een redelijke grond voor het ontslag. De Kantonrechter toetst of sprake is van een gewichtige reden. Het onderzoek toont aan dat in de praktijk deze gronden voor ontslag op hetzelfde neerkomen, echter de Kantonrechter minder stringente normen dan het CWI hanteert om te bepalen of sprake is van een redelijke grond voor ontslag. Na een beschrijving van het BBA 1945, artikel 7:681 BW en artikel 7:685 BW trek ik de volgende conclusies ten aanzien van de mate waarin werknemers met een arbeidsovereenkomst voor onbepaalde tijd in Nederland bescherming genieten.

Ik concludeer dat op grond van het *BBA 1945*, nader uitgewerkt in het Ontslagbesluit en de Beleidsregels Ontslagtaak CWI, en studies die zijn verricht naar de praktijk van het CWI en haar voorgangers, werknemers bescherming genieten tegen een willekeurig ontslag in het algemeen, overeenkomstig de bedoeling van de wetgever. Het feit dat dit niet steeds als zodanig wordt ervaren, is omdat het merendeel van de verzoeken om een vergunning door het CWI wordt toegewezen. Dit laat onverlet dat het CWI de regelen van het BBA 1945,

het Ontslagbesluit en de Beleidsregels Ontslagtaak CWI consistent toepast. Voor werknemers is het CWI niet altijd de aangewezen weg. Het CWI kan namelijk geen vergoeding toekennen. Echter, een werknemer heeft de mogelijkheid om na een (on)geldig gegeven ontslag een vergoeding te verzoeken op grond van artikel 7:681 BW.

Artikel 7:681 BW schrijft voor dat wanneer een ontslag kennelijk onredelijk is, de rechter een vergoeding toe moet kennen. Het vereiste van een kennelijk onredelijk ontslag is *niet* synoniem aan het vereiste van een redelijke grond voor ontslag in het algemeen. Hoewel veelal wordt aangenomen dat artikel 1639s – de rechtsvoorganger van artikel 7:681 BW – de introductie van een *iusta causa dimissionis* behelsde in het Nederlandse ontslagrecht, is dit niet juist. In de eerste plaats heeft de wetgever dit uitdrukkelijk niet gewild, evenwel de rechter slechts een discretionaire bevoegdheid willen geven om op grond van de omstandigheden van het geval te oordelen of een ontslag kennelijk onredelijk is. Voorzover de wet een ontslag zonder redelijke grond als een kennelijk onredelijk ontslag kwalificeert, behelst dit slechts een voorbeeld en geldt het als een van de omstandigheden die *kan* leiden tot een kennelijk onredelijk ontslag. In de tweede plaats ligt bij artikel 7:681 BW het accent vanaf het arrest *Lampe/De Vries (1961)* veeleer op de (financiële) gevolgen van het ontslag voor de werknemer. Ten slotte kan men zich afvragen in hoeverre sprake is van bescherming tegen een willekeurig ontslag in het algemeen, wanneer de werkgever deze ex artikel 7:681 BW kan afkopen als de werknemer om herstel van de arbeidsovereenkomst verzoekt.

Artikel 7:685 BW vereist *wel* uitdrukkelijk een redelijke grond voor ontslag. Uit de wetsgeschiedenis volgt dat artikel 1639w – de rechtsvoorganger van artikel 7:685 BW – een gewichtige reden voor ontslag vereist die bestaat uit (1) een dringende reden; of (2) een verandering van omstandigheden. Artikel 1639w werd aanvankelijk restrictief uitgelegd. De reden hiervoor was tweeërlei. In de eerste plaats vloeide uit de rechtspraak omtrent een ontslag op staande voet voort, dat van een dringende reden slechts sprake kon zijn als de werkgever de werknemer na kennisneming van de dringende reden *terstond* ontsloeg. Bij een verzoek uit hoofde van een dringende reden ex artikel 1639w bleef de werknemer echter in dienst tot de datum van de ontbinding. Deze rechtspraak stond hiermee de facto een ontbinding op grond van een dringende reden in de weg. In de tweede plaats werd artikel 1639w restrictief uitgelegd, omdat de wetgever bij een verandering van omstandigheden slechts dacht aan uitzonderlijke gevallen, waardoor ontbindingen op deze grond eveneens zelden plaats vonden. In 1953 besloot de wetgever artikel 1639w op te rekken, ter compensatie van de langere opzegtermijnen die werden geïntroduceerd om werknemers een betere ontslagbescherming te bieden. In de eerste plaats werd bepaald dat de rechtspraak omtrent het ontslag op staande voet ontbindingen op grond van een dringende reden niet langer in de weg stonden. In de tweede plaats werd bepaald dat de verandering van omstandigheden – behalve bedrijfseconomische omstandigheden en disfunctioneren – een verstoorde

arbeidsverhouding kon behelzen. Ook maakte de wetgever het voor de Kantonrechter mogelijk om bij een ontbinding op grond van een verandering van omstandigheden een vergoeding toe te kennen. Ondanks deze flexibilisering werd artikel 1639w nog steeds beperkt toegepast. Dit veranderde na de tweede oliecrisis in de tachtiger jaren toen de voorganger van het CWI de toestroom van verzoeken om ontslagvergunningen niet langer aankon. Bij wijze van alternatief wendden werkgevers zich tot de Kantonrechter om ontbindingen van de arbeidsovereenkomst op grond van artikel 1639w te verzoeken. De populariteit van de Kantonrechter werd alleen maar groter nadat werkgevers bleek dat Kantonrechters soepeler omgingen met zogeheten *pro forma* procedures. Het gaat bij deze procedures om een formeel protest van de werknemer – partijen zijn het in beginsel eens over beëindiging van de arbeidsovereenkomst – tot behoud van een werkloosheidsuitkering. Voor werkgevers is de ontbindingsprocedure inmiddels een volwaardig alternatief voor de vergunningenprocedure geworden. De laatste wordt met name aangewend voor verzoeken op grond van economische redenen, die door het CWI worden getoetst aan de hand van het BBA 1945, het Ontslagbesluit en de Beleidsregels Ontslagtaak CWI. De ontbindingsprocedure wordt met name aangewend voor een verandering van omstandigheden, bestaande in een verstoorde arbeidsrelatie. Deze dienen te worden afgewezen wanneer een redelijke grond voor ontslag ontbreekt. Uit rechtspraak volgt evenwel dat Kantonrechters ertoe neigen om bij afwezigheid van een gewichtige reden een vergoeding toe te kennen in plaats van een verzoek af te wijzen. Dit zien we met name bij verzoeken op grond van een verstoorde arbeidsverhouding die niet aan de werknemer te wijten is. Eveneens zien we dit bij zogeheten voorwaardelijke verzoeken op grond van een dringende reden, die in de regel door werkgevers worden ingediend na een ontslag op staande voet. Wij zien het ook, in mindere mate, bij verzoeken die worden ingediend op grond van een economische reden – door een zeer ruime toepassing van de marginale toetsing door Kantonrechters – en bij verzoeken die worden ingediend op grond van ziekte die langer duurt dan twee jaren.

AMERIKAANS EN NEDERLANDS ONTSLAGRECHT
IN HET LICHT VAN IAO CONVENTIE 158 (hoofdstuk 4)

Amerika en Nederland zijn beide lidstaten van de Internationale Arbeidsorganisatie (IAO), die sinds 1946 deel uitmaakt van de Verenigde Naties (VN). De IAO houdt zich binnen de VN bezig met sociale vraagstukken. In hoofdstuk 4 heb ik onderzocht in hoeverre de mate van bescherming die werknemers in Amerika en Nederland genieten tegen een willekeurig ontslag, voldoet aan de eis die hieraan gesteld wordt door artikel 4 van IAO Conventie 158. Het valt op dat beide landen zich ontwikkelen in de richting van deze *international just cause standard*. Nederland is ook voornemens tot ratificatie van IAO Conventie 158 over te gaan, in tegenstelling tot Amerika. De reden om IAO Conventie 158 desalniettemin tot uitgangspunt te nemen, is dat op niet-ratificerende landen de voortdurende plicht rust om na te gaan in hoeverre

ratificatie mogelijk is, en kennisname van de huidige stand van zaken van het Amerikaanse en het Nederlandse ontslagrecht met het oog hierop van belang blijft.

Het onderzoek toont aan dat in *Amerika* werknemers op wie een CAO van toepassing is, bescherming genieten tegen een willekeurig ontslag overeenkomstig artikel 4 van IAO Conventie 158. Ook de *Montana Wrongful Discharge From Employment Act of 1987* behelst een *just cause standard* overeenkomstig artikel 4, echter ontberen lager opgeleiden veelal bescherming. Het laatste geldt ook voor de *implied-in-fact (good cause) contract exception*, welke in de rechtspraak het meest artikel 4 van ILO Conventie 158 nadert. De meerderheid van Amerikaanse werknemers is derhalve feitelijk nog steeds onderworpen aan de *at-will rule*. Deze meerderheid zou een ratificatie van IAO Conventie 158 verwelkomen. Zoals hiervoor opgemerkt is de Amerikaanse regering niet voornemens de Conventie te ratificeren. De situatie in *Nederland* is een geheel andere. In Nederland genieten werknemers bescherming tegen een willekeurig ontslag in het algemeen, overeenkomstig artikel 4 van IAO Conventie 158, op grond van het BBA 1945, nader uitgewerkt in het Ontslagbesluit en de Beleidsregels Ontslagtaak CWI. Het Nederlandse ontslagrecht laat werkgevers evenwel de ruimte om in plaats van een vergunning te vragen aan het CWI, zich ex artikel 7:685 BW te wenden tot de Kantonrechter om ontbinding van de arbeidsovereenkomst te verzoeken op grond van een gewichtige reden. Deze procedure heeft aan populariteit gewonnen, niet in de laatste plaats vanwege het gegeven dat Kantonrechters bij het ontbreken van een gewichtige reden, in plaats van verzoeken af te wijzen, arbeidsovereenkomsten ontbinden onder toekenning van een vergoeding. Geconcludeerd kan worden dat Kantonrechters artikel 7:685 BW niet conform de bedoeling van de wetgever toepassen. Ergo, door de minder stringente toepassing van de wet, prefereren vele werkgevers de ontbindingsprocedure. Werkgevers die met het oog op de toenemende internationale concurrentie werknemers gemakkelijker willen kunnen ontslaan, dringen er bij de overheid in dit kader tevens op aan om het BBA 1945 – die bedoeld was als tijdelijke na-oorlogse wetgeving – af te schaffen. De overheid, op zoek naar een balans tussen flexibiliteit voor werkgevers enerzijds en ontslagbescherming voor werknemers anderzijds, heeft afschaffing ook overwogen. De conclusie ten aanzien van Nederland onder het huidige duale ontslagstelsel luidt dat wanneer de Nederlandse regering het BBA 1945 afschaft om het ontslagrecht flexibeler voor werkgevers te maken, het – de toepassing van – artikel 7:685 BW heroverweegt alvorens tot ratificatie van ILO Conventie 158 over te gaan.

VERGELIJKING VAN AMERIKAANS EN NEDERLANDS ONTSLAGRECHT (hoofdstuk 5)

In hoofdstuk 5 heb ik het Amerikaanse en Nederlandse ontslagrecht vergeleken met betrekking tot de mate van bescherming die werknemers met een arbeidsovereenkomst voor een onbepaalde tijd genieten tegen een willekeurig

ontslag in het algemeen. De conclusie is dat het Amerikaanse ontslagrecht zich ontwikkelt in de richting van ontslagbescherming voor werknemers. Het Nederlandse ontslagrecht ontwikkelt zich in de richting van een flexibel ontslagrecht voor werkgevers. Op het eerste gezicht groeien de beide ontslagstelsels dus naar elkaar toe. Beide ontslagstelsels verschillen echter nog steeds significant van elkaar. In Amerika is de hoofdregel nog altijd dat een werkgever een werknemer *at will* kan ontslaan, dus zonder – redelijke – grond voor ontslag. In Nederland is de zogeheten *iusta causa dimissionis* nog steeds de hoofdregel. In het algemeen kan overigens niet gesteld worden dat de ene regel beter is dan de andere. Desalniettemin wordt de laatste als de betere regel ervaren. Dit is gedeeltelijk te verklaren door de consensus die hierover is bereikt op internationaal niveau in 1963 in IAO Aanbeveling 119 (*ILO Recommendation 119)*, de voorganger van IAO Conventie 158. Vanuit economisch oogpunt wordt de *at-will rule* evenwel als de betere regel beschouwd c.q. de *just cause rule* als belemmerend ervaren om flexibel te kunnen reageren op ontwikkelingen in de markt, hetgeen noodzakelijk is geworden door de toenemende internationale concurrentie als gevolg van het proces van economische globalisering.

Het onderzoek laat ook overeenkomsten zien. Ten eerste, dat een werknemer in Amerika net zo afhankelijk is van zijn werkgever als een werknemer van zijn werkgever in Nederland. Het onderzoek toont aan dat de mate van ontslagbescherming met name wordt bepaald door de economische of sociale invalshoek van degenen die 'recht maken'. Ten tweede, waar het proces van economische globalisering *Amerikaanse* rechters vanaf de tachtiger jaren noodzaakt om de arbeidsverhouding te benaderen vanuit een *sociaal* oogpunt, noodzaakt het de *Nederlandse* regering om de arbeidsverhouding te benaderen vanuit een *economisch* oogpunt. In Amerika heeft dit geleid tot meer zekerheid voor werknemers tegen een willekeurig ontslag in het algemeen, om zodoende tegenwicht te bieden tegen misbruik van werknemers door machtige werkgevers waaronder *multinationals*. In Nederland heeft dit geleid tot meer flexibiliteit voor werkgevers c.q. een versoepeling van het ontslagrecht teneinde werkgevers in staat te stellen beter in te kunnen spelen op ontwikkelingen in de markt om hun internationale concurrentiepositie te verstevigen. Het proces van economische globalisering heeft Amerika *en* Nederland met andere woorden gedwongen tot het zoeken naar een nieuwe balans tussen flexibel ontslagrecht voor werkgevers enerzijds, en ontslagbescherming voor werknemers anderzijds. De strijd tussen de tegenovergestelde belangen van werkgevers en werknemers leveren echter knelpunten op, waardoor het debat in *Amerika* zich toespitst op ontslagbescherming voor werknemers enerzijds, en behoud van de *at-will rule* voor werkgevers anderzijds. In *Nederland* spitst het debat zich toe op een flexibeler ontslagrecht voor werkgevers enerzijds, en het behoud van het duale ontslagstelsel voor werknemers anderzijds. De vergelijking laat zien dat Amerika en Nederland van elkaar kunnen leren ten aanzien van het oplossen van voornoemde knelpunten.

Amerika

Ten aanzien van *Amerika* ben ik tot de conclusie gekomen dat een minderheid van werknemers bescherming tegen een willekeurig ontslag in het algemeen geniet, en dat op de meerderheid van werknemers feitelijk nog steeds de *at-will rule* van toepassing is. Deze regel heeft zich ontwikkeld in de rechtspraak. Dit behelst dat een *just cause rule* zich tevens kan ontwikkelen in de rechtspraak. Rechters hebben in feite reeds vanaf eind jaren zeventig, en begin jaren tachtig, uitzonderingen gemaakt op de *at-will rule*. Zoals het ernaar uitziet zal het initiatief ook van rechters uit *blijven* gaan, hetgeen voor een belangrijk deel te verklaren is door het zogeheten *common law system* van Amerika. Dit laat onverlet dat de nationale wetgever in beginsel eveneens kan handelen. Nationale wetgeving die de *at-will rule* opzij zet is echter niet te verwachten, vanwege de politieke macht van werkgevers en advocaten die in staat zijn deze wetgeving tegen te houden. De ontwikkeling van *just cause protection* ligt dan ook vooralsnog in handen van Amerikaanse rechters. Uit rechtspraak volgt dat de meeste Amerikaanse rechters de arbeidsovereenkomst als een overeenkomst als elke andere beschouwen, en dientengevolge algemene regels van het contractenrecht op de arbeidsovereenkomst toepassen. Dit leidt tot knelpunten. Zo blijkt het mogelijk op grond van deze algemene regels van het contractenrecht een redelijke grond voor ontslag contractueel uit te sluiten, komt aan de werkgever een ruime discretionaire bevoegdheid toe om werknemers te ontslaan in bedrijfseconomische ontslagen, en rust de bewijslast voor het ontbreken van een redelijke grond voor ontslag op de werknemer. Een ander knelpunt is dat lager opgeleiden in de praktijk veelal ontslagbescherming ontberen vanwege het zogeheten *contingency fee system* van advocaten. Op grond van dit systeem – waarbij advocaten een percentage van de vergoeding bedingen – is het voor advocaten slechts aantrekkelijk zaken aan te nemen die kunnen resulteren in zeer hoge vergoedingen. De *handbook exception* en de *implied-in-fact (good cause) contract exceptions* leiden 'slechts' tot *contract damages*.

Mijn suggesties om voornoemde knelpunten op te lossen zijn de volgende. In de eerste plaats zou Amerika gesubsidieerde rechtshulp gelijk als in Nederland kunnen invoeren. Deze komt erop neer dat werknemers slechts een deel van de advocatenkosten betalen en de advocaat de overige kosten kan verhalen op de staat. Dit stelt werknemers met zogeheten *contract claims* in staat zich te laten bijstaan door een advocaat op uurbasis. Een zogeheten *Wet op de Rechtsbijstand* zal het echter naar alle waarschijnlijkheid niet halen in Amerika vanwege de politieke macht van advocaten om een dergelijk wetsvoorstel tegen te houden. Zoals hiervoor opgemerkt, zijn zij tezamen met werkgevers ook in staat om *national just cause legislation* tegen te houden. Het is met andere woorden aan Amerikaanse rechters om een *just cause rule* te ontwikkelen. Een aanvang door rechters kan worden gemaakt door, gelijk als in

Nederland is geschied, het bijzondere karakter van de arbeidsovereenkomst ter discussie te stellen. Een realistischer optie op korte termijn is de *Drafters* van de *Restatement of Employment Law* te adresseren. Kort samengevat zijn zij vanaf 2005 doende om uitzonderingen op de *at-will rule* vast te leggen als leidraad voor rechters in de toekomst. Tot op heden hebben zij de *public policy exception* en de *handbook exception* erkend als uitzonderingen op de *at-will rule*. Mijn suggestie is hen onder meer door publicaties te bewegen tevens de *implied-in-fact (good cause) contract exception* te erkennen die nog steeds goed recht is in Californië en in een aantal andere staten, en te erkennen dat de *handbook exception* niet langer contractueel door een *at-will disclaimer* kan worden uitgesloten. De *Restatement of Employment Law* zou in dit opzicht dienen te behelzen dat voor een wijziging van de eis van een redelijke grond voor ontslag uit hoofde van de *handbook exception* de werkgever instemming behoeft van de werknemer overeenkomstig de algemene regels van het contractenrecht, zoals ook wordt betoogd door een aantal staten en wetenschappers in Amerika.

Nederland

Ten aanzien van *Nederland* ben ik tot de conclusie gekomen dat de *wetgever* een belangrijke rol speelt om werknemers bescherming te bieden tegen een willekeurig ontslag in het algemeen. Dit is voor een deel te verklaren door het zogeheten *civil law system* van Nederland. Dit systeem verwacht in beginsel van *rechters* dat zij de wet consistent toepast. Voorzover rechters dit niet doen, ondermijnen zij in beginsel de mate van de bescherming die de wetgever beoogt werknemers te bieden. Anderzijds kan het ook een signaal naar de wetgever toe zijn dat deze regels wijziging behoeven. Ook met de Wet Flexibiliteit en zekerheid van 1998 reageerde de overheid, gedeeltelijk op rechtspraak, gedeeltelijk op het proces van economische globalisering dat de noodzaak van een flexibel ontslagrecht onderstreepte. Het proces van economische globalisering heeft de overheid in 2005 wederom de noodzaak van een soepel(er) ontslagrecht doen onderkennen. De centrale vraag voor de overheid is dan ook niet *of* een soepeler ontslagrecht noodzakelijk is, maar *hoe* zij dit moet bewerkstelligen. In dit kader is meerdere malen vanuit overheidswege, en in de literatuur, de suggestie gedaan het vergunningenstelsel van het BBA 1945 af te schaffen.

Ik heb bij de afschaffing van het BBA 1945 erop gewezen dat men niet uit het oog moet verliezen dat werknemers die onder de werkingssfeer van het BBA 1945 vallen, maar niet onder het bereik van Boek 7 Titel 10 BW, bij afschaffing van het BBA 1945 bescherming tegen een willekeurig ontslag zullen ontberen. Voorts heb ik erop gewezen dat bij het uiten van de wens voor een flexibeler ontslagrecht, men te snel voorbij gaat aan het feit dat het BBA 1945, het Ontslagbesluit en de Beleidsregels Ontslagtaak CWI duidelijke regels bevatten teneinde bescherming tegen een willekeurig ontslag in het algemeen te waarborgen. Dit in tegenstelling tot artikel 7:685 BW en/of de Kantonrechtersformule. Het feit dat het CWI deze regels stringent hanteert zou

geen negatieve beoordeling behoren te krijgen, maar een positieve met het oog op rechtszekerheid en rechtsgelijkheid. Aan de andere kant, de negatieve beoordeling door werkgevers en rechters is een teken voor de overheid dat deze regels wellicht te rigide zijn. Dit betekent – zoals ook inmiddels door de overheid erkend – dat de overheid moet handelen. Dit betekent niet dat de overheid het BBA 1945 moet afschaffen. In feite, wanneer men zich te veel richt op de afschaffing van het BBA 1945, werkt dit eerder polarisering tussen werkgevers en werknemers in de hand dan dat partijen in staat zullen zijn een compromis te bereiken, hetgeen door de overheid noodzakelijk wordt geacht om in te kunnen spelen op het proces van economische globalisering.

Ik concludeer na een beschrijving van het Nederlandse ontslagrecht in hoofdstuk 3, dat onder het huidige duale ontslagstelsel het CWI en de Kantonrechter over dezelfde gronden voor ontslag beslissen. Uit rechtspraak volgt dat Kantonrechters ertoe neigen bij het ontbreken van een gewichtige reden, om een vergoeding toe te kennen, in plaats van het verzoek af te wijzen. Het CWI wijst in beginsel het verzoek bij het ontbreken van een redelijke grond voor ontslag af. Deze verschillende behandeling leidt tot rechtsonzekerheid en rechtsongelijkheid voor werknemers.

In een bezinning over het huidige ontslagstelsel richt ik mij dan ook in de eerste plaats op de vraag hoe deze rechtsonzekerheid en rechtsongelijkheid kan worden opgeheven, waarbij ik mij steeds afvraag in welk opzicht het CWI en de Kantonrechter hieraan kunnen bijdragen. In de laatste, maar niet in de minste plaats richt ik mij op de vraag op welke wijze een nieuwe balans kan worden bereikt tussen een flexibel(er) ontslagrecht voor werkgevers enerzijds, en ontslagbescherming voor werknemers anderzijds. Kort samengevat pleit ik ervoor om het duale ontslagstelsel te behouden, en de taken tussen het CWI en Kantonrechters te verdelen. Het CWI wordt uitsluitend bevoegd om over bedrijfseconomische ontslagen te oordelen, Kantonrechters worden uitsluitend bevoegd om over alle andere ontslagen te oordelen. In tien aanbevelingen werk ik vervolgens uit hoe dit nieuwe ontslagstelsel flexibeler moet worden voor werkgevers en werknemers enerzijds, met behoud van het vereiste van een redelijke grond voor ontslag anderzijds.

CWI: bedrijfseconomische ontslagen

1.
Mijn suggestie is het CWI te laten oordelen over individuele en collectieve ontslagen op grond van economische gronden, nader gespecificeerd in de Beleidsregels Ontslagtaak CWI. Reeds uit de rechtspraak vloeit voort dat werkgevers in de regel het CWI adiëren met betrekking tot bedrijfseconomische ontslagen, en Kantonrechters het CWI de geëigende instantie achten om te oordelen over bedrijfseconomische ontslagen. Mijn *eerste* aanbeveling luidt dan ook om in de Wet Melding Collectief Ontslag (WMCO) het CWI exclusieve

bevoegdheid toe te kennen met betrekking tot collectieve ontslagen in de zin van deze wet.

2.
Mijn *tweede* aanbeveling is een logisch gevolg van de tweede, en luidt om artikel 3:1 van het Ontslagbesluit en artikel 7:685 BW te wijzigen in dier voege dat het CWI en Kantonrechters slechts bevoegd zijn te oordelen over bedrijfseconomische ontslagen, respectievelijk een gewichtige reden, bedrijfseconomische gronden uitgesloten.

De ratio van deze aanbevelingen is de volgende. Vooralsnog laat het WMCO een werkgever de keuze om ten aanzien van collectieve ontslagen van 20 of meer werknemers in een en hetzelfde CWI-district, te kiezen of hij zich richt tot het WMCO of de Kantonrechter. In de praktijk wordt steeds vaker gebruik gemaakt van de Kantonrechter omdat deze andere – flexibeler – criteria voor ontslag toelaat dan voorgeschreven door het Ontslagbesluit, waaronder een selectie van werknemers in bedrijfseconomische ontslagen op grond van kwaliteit.

Het onderzoek laat zien dat Kantonrechters niet eensgezind zijn over hun bevoegdheid ten aanzien van collectieve ontslagen. Dit leidt tot grote rechtsonzekerheid en rechtsongelijkheid voor werknemers *en* werkgevers. De hiervoor genoemde aanbevelingen voorkomen dat verschillende instanties over dezelfde ontslaggrond oordelen, en heffen tevens genoemde rechtsonzekerheid en rechtsongelijkheid op.

3.
Een gevolg van voornoemde verdeling van taken tussen het CWI en Kantonrechters is dat werkgevers bij collectieve ontslagen niet langer kunnen selecteren op grond van kwaliteit. Het Ontslagbesluit kent slechts een selectie in bedrijfseconomische ontslagen op grond van het afspiegelingsbeginsel. Anderzijds, de Minister van Sociale Zaken heeft in het recente verleden voorgesteld partijen in WMCO-ontslagen de ruimte te laten om eigen ontslagcriteria te ontwikkelen. Deze behoefte bestaat ook in de praktijk, met name de behoefte om te kunnen selecteren op grond van kwaliteit, hetgeen door de Kantonrechter reeds toegestaan wordt. Vorenstaande ontwikkelingen lijken een duidelijk signaal naar de wetgever toe dat de regels omtrent de selectie van werknemers in bedrijfseconomische ontslagen nadere wijziging behoeven.

Mijn *derde* aanbeveling luidt daarom om het kwaliteitscriterium voor WMCO-ontslagen op te nemen in het Ontslagbesluit. Om misbruik van dit criterium tegen te gaan betoog ik dat het – gelijk het afspiegelingsbeginsel en voorheen het anciënniteitsbeginsel – moet voldoen aan de eisen van redelijkheid, objectiviteit en controleerbaarheid, overeenkomstig de rechtspraak van Kantonrechters. Met betrekking tot de redelijkheid stel ik een marginale toets voor. Met betrekking tot de objectiviteit en controleerbaarheid stel ik een verplichte scholingsplicht voor – eveneens neer te leggen in het Ontslagbesluit –

voor werkgevers ten aanzien van werknemers die in beginsel als gevolg van het kwaliteitscriterium moeten afvloeien.

4.
Gekoppeld aan de derde aanbeveling, luidt mijn *vierde* aanbeveling om werkgevers vervolgens een keuze te laten tussen het afspiegelingsbeginsel en het anciënniteitsbeginsel al dan niet in combinatie met het 'nieuwe' kwaliteitscriterium in WMCO-ontslagen. De ratio van dit voorstel is dat het werkgevers in WMCO-ontslagen meer flexibiliteit biedt enerzijds, en ten gunste is van zogeheten *outsiders* en *newcomers* anderzijds. Tevens gaat dit voorstel minder ver dan het voorstel van de Minister van Sociale Zaken in het recente verleden om partijen in WMCO-ontslagen ruimte te laten om eigen ontslagcriteria te ontwikkelen, en aan hen de supervisie te laten.

Een bezwaar is dat de door mij voorgestane flexibiliteit mogelijk ten koste gaat van oudere werknemers. Vooropgesteld, ook het afspiegelingsbeginsel – dat sinds 1 maart 2006 het uitgangspunt is in bedrijfseconomische ontslagen – leidt in de praktijk tot meer ontslagen van oudere werknemers. Echter, een verplichte scholingsplicht voor werkgevers ten aanzien van werknemers die in beginsel als gevolg van het kwaliteitscriterium afvloeien, conform mijn derde aanbeveling, kan het ontslag van (oudere) werknemers gedeeltelijk voorkomen. Voorts wijs ik erop dat het uitgangspunt op de middellange termijn conform het SER MLT-Advies deel 1 is om participatie in het arbeidsproces van *allen* in de samenleving te bewerkstelligen.

5.
Mijn *vijfde* aanbeveling is feitelijk een aanvulling op de scholingsplicht, in de zin dat ook deze aanbeveling in de praktijk naar alle waarschijnlijkheid ten goede zal komen aan oudere werknemers. Deze luidt dat werkgevers verplicht worden de dienstjaren van werknemers bij bedrijfseconomische ontslagen te compenseren, primair tot uiting komend in een vergoeding, en subsidiair in outplacement. De ratio hierachter is dat van werknemers bij het merendeel van bedrijfseconomische ontslagen feitelijk verlangd wordt baan te maken voor anderen opdat de werkgever in staat zal zijn de internationale concurrentie het hoofd te bieden. Zonder deze werknemers had de werkgever echter niet kunnen overleven. Compensatie van dienstjaren bij bedrijfseconomische ontslagen is ook gerechtvaardigd om de volgende reden. Kantonrechters kennen bij neutrale ontbindingen aan werknemers in beginsel een vergoeding toe waarbij rekening wordt gehouden met het aantal dienstjaren. Bij de door mij voorgestane herverdeling van taken tussen het CWI (bedrijfseconomische ontslagen) en Kantonrechters (overige ontslagen) valt dit 'recht' voor werknemers feitelijk weg.

De verplichting van compensatie van dienstjaren zou wat mij betreft tot uiting kunnen komen in de Beleidsregels Ontslagtaak CWI. Het niet nakomen van deze plicht kan niet tot afwijzing van een verzoek door het CWI leiden wanneer sprake is van een redelijke grond voor ontslag. Het CWI kan

daarentegen zijn twijfel over een geldig 'habe-nichts'-verweer in de vergunning kenbaar maken en de werknemer hiermee een handvat aan kunnen reiken om een vergoeding ex artikel 7:681 BW, waarbij alsnog rekening wordt gehouden met de dienstjaren, te vorderen.

Kantonrechter: overige ontslagen

6.
Vorenstaande aanbevelingen brengen met zich dat Kantonrechters exclusief bevoegd zullen zijn om te oordelen over ontslagen, met uitsluiting van bedrijfseconomische. De Kantonrechtersformule bevat ten aanzien van (deze) ontslagen echter geen duidelijke regels. De Beleidsregels Ontslagtoets CWI bevatten deze wel.

Mijn *zesde* aanbeveling luidt met het oog op rechtszekerheid en rechtsgelijkheid dat derhalve de Kring van Kantonrechters een *Kantonrechtersformule voor de Toepassing van de Gewichtige Reden* ontwikkelt, waarbij de Beleidsregels Ontslagtaak CWI als leidraad kunnen dienen. Voor het aanhaken bij de Beleidsregels Ontslagtaak CWI bestaat geen juridisch obstakel. Met name ten aanzien van ontbindingen op grond van de verstoorde arbeidsrelatie zijn duidelijke regels nodig. Overeenkomstig de bedoeling van de wetgever zou een ontbinding bij een verstoorde arbeidsrelatie alleen mogelijk moeten zijn wanneer de verstoorde arbeidsrelatie het opereren van de onderneming ernstig frustreert c.q. herplaatsing onmogelijk is. Nog steeds komt het echter voor dat Kantonrechters de arbeidsovereenkomst ontbinden met toekenning van een vergoeding. Veelal is de reden dat in de praktijk na een afwijzing van het verzoek partijen alsnog voor het gerecht verschijnen vanwege de vertroebelde verstandshouding. Kantonrechters maken tevens geen onderscheid tussen een verstoorde arbeidsrelatie die wel, en die niet aan de werknemer te wijten is. Aan een niet aan de werknemer te wijten verstoorde arbeidsrelatie kan echter een non-existente reden ten grondslag liggen. Dit laatste is van belang, omdat de wet niet toestaat dat bij de afwezigheid van een – gewichtige – reden voor ontslag, de Kantonrechter de arbeidsovereenkomst ontbindt.

7.
Voornoemde praktijk van Kantonrechters is een signaal dat meer flexibiliteit ten aanzien van de regels omtrent ontslag is gewenst. Mijn *zevende* aanbeveling luidt daarom om artikel 7:685 BW in die zin te wijzigen dat het de Kantonrechter mogelijk wordt gemaakt om bij het ontbreken van een gewichtige reden de *werknemer* een keuze te laten tussen de voortduring van de arbeidsovereenkomst *of* afkoop van ontslagbescherming tegen een vergoeding, waarbij factor C de hoogte gaat bepalen. De werkgever heeft daarop de keuze het verzoek in te trekken als het kostenplaatje voor hem te hoog uitvalt. Deze flexibiliteit komt de werknemer ten goede. De laatste kan baat hebben bij een verandering van zijn baan. Ook komt deze flexibiliteit ten goede aan outsiders

en newcomers, die bij 'afkoop' de mogelijkheid hebben in te stromen in het arbeidsproces. Deze flexibiliteit kom werkgevers ten goede, omdat zij – tegen betaling – ontslagbescherming kunnen afkopen. Het nadeel is dat de ontbindingsvergoedingen reeds vrij hoog liggen in Nederland.

8.
Ten aanzien van het laatste luidt mijn *achtste* aanbeveling daarom om duidelijke regels te stellen voor de – hoogte van de – afkoopsom neer te leggen in de *Kantonrechtersformule voor de Toepassing van de Gewichtige Reden*, en de factor leeftijd uit de Kantonrechtersformule te lichten. Kort samengevat, de factor A (aantal dienstjaren) in de formule AxBxC betreffen 'gewogen' jaren. Dienstjaren voor het 40^{e} levensjaar tellen voor 1, van het 40^{e} tot 50^{e} jaar voor 1,5 en elk dienstjaar vanaf het 50^{e} levensjaar telt voor 2. De redenen om de 'gewogen' dienstjaren om te zetten in dienstjaren 'sec' zijn tweeërlei.

In de eerste plaats hebben de 'gewogen' dienstjaren tot gevolg dat het voor werkgevers onaantrekkelijk is om oudere werknemers in dienst te houden of te nemen. Hiermee doet de Kantonrechtersformule de facto teniet wat de overheid met maatregelen tot behoud, investering en aanname van oudere werknemers beoogt te bewerkstelligen. In de tweede plaats is de Kantonrechtersformule mijns inziens in strijd met de Wet gelijke behandeling op grond van leeftijd. De aanname is dat oudere werknemers moeilijk aan het werk komen, en dus (meer) inkomenszekerheid behoeven. Voor een objectieve rechtvaardiging voor discriminatie gelden evenwel de eisen van legitimiteit, doelmatigheid en proportionaliteit. Dit houdt in dat (1) de ter bereiking van het doel gekozen middelen dienen te beantwoorden aan een werkelijke behoefte (legitimiteit); (2) geschikt moeten zijn om dat doel te bereiken (doelmatigheid); en (3) en hiervoor noodzakelijk moeten zijn (proportionaliteit). Men kan zich echter afvragen of (ad 1) de aanname dat ouderen moeilijker aan het werk komen geldt voor *alle* werknemers; (ad 2) het doel wordt bereikt wanneer een 36-jarige (oude) werknemer met 15 dienstjaren factor 15 krijgt toegekend, en een 59-jarige (oude) werknemer met 10 dienstjaren (9x2) + (1x1.5) = 19.5 krijgt toegekend; en (3) de noodzaak bestaat wanneer factor C het mogelijk maakt rekening te houden met de omstandigheden van het geval, waaronder de positie van de (oudere) werknemer op de arbeidsmarkt.

9.
Mijn *negende* aanbeveling ziet eveneens op een ontbinding van de arbeidsovereenkomst zonder dat sprake is van een gewichtige reden. Ik doel op de door de werkgever ingediende voorwaardelijke verzoeken op grond van een dringende reden. Deze worden veelal toegekend onder toekenning van een vergoeding, terwijl feitelijk een (dringende) reden ontbreekt. De nieuwe *Kantonrechtersformule voor de Toepassing van de Gewichtige Reden* zou moeten voorschrijven dat op deze verzoeken consistent de rechtspraak omtrent een ontslag op staande voet moet worden toegepast, en bij afwezigheid van een dringende reden deze verzoeken moeten worden afgewezen, tenzij de

werknemer en werkgever akkoord gaan met afkoop van ontslagbescherming overeenkomstig mijn zevende aanbeveling.

10.
Mijn *tiende* aanbeveling, ten slotte, ziet op hen die onder het bereik van de BBA 1945 vallen maar geen arbeidsovereenkomst hebben. Bij de door mij voorgestane verdeling van taken tussen het CWI en de Kantonrechter ontberen zij bescherming tegen een willekeurig ontslag op grond van een andere reden dan een bedrijfseconomische. Waar zij voorheen deze bescherming voorheen genoten, luidt mijn aanbeveling dat zij, uit hoofde van een *nieuwe* bepaling in Boek 7 Titel 10 BW, bescherming tegen een willekeurig ontslag ex artikel 7:685 BW genieten.

APPENDIX I

BRIEF REVIEW ON DISMISSAL LAWS IN THE WORLD

Introduction

The aim of this survey is to give a brief overview of dismissal laws in the world *as regards just cause protection* of countries involved in the process of economic globalization. That is, that time does not allow me to concentrate on all states on the one hand, and the interest of this thesis is on the process of economic globalization on the other. Hence, I have used the World Investment Report (WIR) of 2003 of the United Nations Conference on Trade and Development (UNCTAD)[1] as a starting point. In the WIR, the UNCTAD carries an analysis of the trends in foreign direct investment (FDI) in both developed and developing countries, ranking the largest transnational corporations (TNCs) in the world by its foreign assets. Subsequently, I will make a distinction between the regional groups of: (a) Africa; (b) America; (c) the Arab States; (d) Asia, and; (e) Europe.

Africa

Countries in the continent of Africa have shown little progress in their effort to penetrate the world market. Especially the so-called sub-Saharan African countries, including Cameroon, Cote d'Ivoire, Ghana, Kenya, Tanzania, Zambia and Zimbabwe have shown little progress, mainly in view of their low rate of export of manufactured goods that is believed to support sustained overall growth.[2] One of the explanations given for their low rate is that these countries have extensive natural resources on the one hand, but a poorly educated labour force on the other hand.[3] As a result these – and other – sub-Saharan countries are not involved in the process of globalization. An exception is South Africa that differs from these countries in a way that its economy operates at a higher level of industrialization, it holds a democratically elected government – which makes it a more stable country for foreign direct investments -, and last but not least, views at education and job training and/or occupational retraining as a key determinant of long-term economic performance, as a result of which it plays a – more - pronounced role in the global economy as compared to the rest of the continent.[4] With regard to offering protection to individual private sector employees, South Africa applies ILO Convention 158, without (yet) having ratified the Convention. The just cause protection for individual employees can be found in the Labour Relations Act of 1995. It, in sum, determines that the employer needs a fair reason for a discharge. When an employer dismisses an employee on a discriminatory ground this is automatically unfair even if there were other good reasons for the dismissal.[5]

America

The United States (of America) and its neighbor Canada are important countries in the process of globalization. They both belong to world's top 30 foreign direct investment (FDI) recipients. The United States further hosts the largest transnational corporations in the world

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1 The UNCTAD was established in 1964 and is aimed at promoting the development-friendly integration of developing countries into the world economy. See www.unctad.org

2 Mazumdar and Mazaheri 2003, p. 3. See also ILO World Employment Report 1995-1996.

3 Mazumdar and Mazaheri 2003, p. 349 and 356.

4 Mannah 2001, p. 37. The main export product of South Africa is gold. Hayter, Reinecke and Torres 2001, p. 39.

5 International Labor and Employment Laws, Keller (ed.),Vol. I, 1997, Chapter 33, South Africa, Christopher Alberteyn, p. 9 and 10 and 16; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Volume 12, South Africa, J. Piron and P.A.K. le Roux. See also Hayter, Reinecke and Torres 2001, p. 79.

such as General Electric, Exxon Mobil Corporation, Ford Motor Company and General Motors.[6] In fact, the majority of multinationals - ranked in the top ten in 2001 - are American, and for this reason, the United States is referred to as the wealthiest nation in the world.[7] Historically, it further played an important role in international trade when in 1947 it invited nineteen countries to negotiate bilateral trade agreements that became the multilateral General Agreement on Tariffs and Trade (GATT), operative in 1948, meanwhile, known as the World Trade Organization (WTO).[8] As regards employment termination the United States adheres to the at-will rule, which in general means that employer can dismiss an employee without cause. Under common law this rule has been interpreted in a way, however, that an employer can dismiss an employee for a good reason, no reason or a *bad* reason.[9] Although statutory and common law has eroded the pure concept, the ILO International Labour Office correctly states that, notwithstanding, the at-will rule in the United States '(…) is still predominant, particularly when one compares it to employment security law in other Western and developed countries.'[10] In contrast, in Canada, termination of employment must be justified by a valid reason. That is, that the employer may dismiss an employee for cause without notice. Under case law just cause, for example, includes unauthorized absences, theft, fighting, disobeying orders, drug use in the workplace and incompetence or negligence in the performance of work.[11]

In Latin America, the Southern part of the continent, Argentina, Brazil, Chile, Mexico and Venezuela play an important role in the process of globalization, although there was a fall of foreign direct investments (FDI) at the beginning of the 21st century, due to economic and political uncertainties.[12] As regards employment termination, the majority of countries in Latin America require a just cause for dismissal.[13] Mexico was the first to recognize in its Constitution of 1917 that workers should not be dismissed without justification. Other countries in Latin America from the 1920s on started to incorporate this principle in their laws as well.[14] Influenced by the Termination of Employment Recommendation 119 that was adopted by the ILO International Labour Conference in 1963, countries further adapted their labour legislation as regards employment termination. Most of these Latin American countries were also founding members of the ILO.[15] Under Mexican law, if an employee is dismissed without a valid reason, the termination is void, hence, the employee can ask for

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6 It concerns multinationals that in 2001 all belonged in the top ten of foreign assets. WIR 2003, p. 4 and 5.

7 WIR 2003, p. 5; Gould 2001, p. 3.

8 The WTO succeeded the GATT (General Agreement on Tariffs and Trades) in 1995. As of April 2004, the WTO has 147 members, covering about 90 per cent of world trade. Among the still absent countries are China, Taiwan and the Russian Federation. See also Van Roozendaal 2001, p. 32; Validire 2001, p. 51and 52; Munck 2002, p. 128 and 129; Mandle 2003, p. 12.

9 See below under § 15.2.

10 Termination of employment digest, ILO 2000, p. 355 and 356. See also International Labor and Employment Laws, Keller (ed.), Vol. I, 1997, Chapter 23, USA, Patrick Hardin; Zondag 2001, p. 422-426; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 14, USA, Alvin L. Goldman and Rebecca H. White.

11 International Labor and Employment Laws, Keller (ed.), Vol. I, 1997, Chapter 21, Roy L. Heenan and Thomas E.F. Brady, p. 7; Termination of employment digest, ILO 2000, p. 96; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 4, Canada, D.D. Carter, G. England, B. Etherington and G. Trudeau.

12 WIR 2003, p. 3 and 9.

13 Bronstein 1990, p. 599.

14 Bronstein 1990, p. 593 and 594; Bronstein 1995, p. 164.

15 Bronstein 1990, p. 596.

reinstatement.[16] Under Argentina law that requires a just cause for dismissal as well, the employer must pay compensation if he acts contrary.[17] Venezuela is the only country in Latin America that adopted ILO Convention 158. Other countries in Latin America – such as Bolivia, Ecuador, Haiti, Honduras, Nicaragua and the Dominican Republic - still adhere to the at-will rule (known as *desahucio*), on the sole condition that notice is given.[18] Chile that adhered to the at-will rule, until 1990, abolished the concept of *desahucio* by the requirement of just cause.[19] Brazil, finally, takes a unique position in a way that it has an Act establishing the Length-of-Service Guarantee Fund (LSGF) that requires neither notice nor justification for the dismissal. Under this mechanism, introduced in 1966, an employer is required to deposit each month in an escrow account opened for each employee a sum equal to 8 per cent of the remuneration paid to him or her during the preceding month. When the employment relationship is terminated, for whatever cause, the worker can draw the money deposited in the account.[20] Moreover, by virtue of a constitutional provision, an Act promulgated in 1989, implicitly recognized the right of employees not to be dismissed without justification.[21]

Arab States

In the Middle East, the states of Israel and Saudi Arabia play a role in the process of globalization.[22] Whereas Israel adheres to the at-will rule, it eroded somewhat by jurisprudence.[23] The law of Saudi Arabia, on the other hand, determines that a discharge may be effectuated for a valid reason only. Good cause, for example, includes well-documented unsatisfactory performance or inadequate completion of an employer's assignment.[24]

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16 The same principle applies to Cuba, Panama and Peru. Bronstein 1990, p. 599. For Mexico, see Termination of employment digest, ILO 2000, p. 226 and 228; International Labor and Employment Laws, Keller (ed.), Vol. I, 1997, Chapter 22, Mexico, Nestor de Buen Lozano, Carlos de Buen Unna and Jorge F. Perez-Lopez; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 9, Mexico, Nestor de Buen.

17 Bronstein 1990, Termination of employment digest, ILO 2000, p. 37; International Labor and Employment Laws, Keller (ed.), 2001, Vol. II, Chapter 27, Argentina, Jordan W. Cowman, Carlos A. Dodds and Jorge Daniel Orlansky; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 3, Argentina, Mario Ackerman and Adrian O. Goldin. The same principle applies to Columbia, Costa Rica, El Salvador, Guatemala and Urugay. See Bronstein 1990, p. 599.

18 Bronstein 1990, p. 599.

19 For its remedy, see Termination of employment digest, ILO 2000, p. 103 and 104; International Labor and Employment Laws, Keller (ed.), 2001, Vol. II, Chapter 28, Chile, Jeffrey A. Van Detta, Diane L. Prucino, Charles M. Rice, Luis Perez-Eguiarte and Oscar Aitken; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 4, Chile, Emilio Morgado Valenzuela and Francisco Walker Errazuriz.

20 Bronstein 1990, p. 599 footnote 14.

21 Bronstein 1990, p. 599 and 600; Termination of employment digest, ILO 2000, p. 67, 69 and 70; International Labor and Employment Laws, Keller (ed.), 1997, Vol. I, Chapter 30, Brazil, W. Gary Vause; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 4, Brazil, A.F. Cesarino Junior and Marly A. Cardone.

22 For Israel, see Shalev 1996, p. 143, 149 and 157.

23 Termination of employment digest, ILO 2000, p. 186; International Labor and Employment Laws, Keller (ed.), Vol. II, 2001, Chapter 38, Israel, Frances Raday; International labour law and industrial relations, Blanpain (ed.), Vol. 8, Israel, R. Ben-Israel and H. Bar-Mor.

24 International Labor and Employment Laws, Keller (ed.), Vol. II, 2001, Chapter 39, Saudi Arabia, Nabhan, p. 33.

Asia

In Asia, the process of globalization, led by Japan, delivered 'winners' such as Singapore, Hong Kong (part of China)[25] and Korea, countries that have become known as the Asian Tigers, achieving phenomenally high growth rate by emphasizing exports during the 1970s.[26] Also China, Indonesia and India became involved in the process of globalization. Important in this respect is that India changed from a socialist-orientated, centrally planned economy into a liberated economy in the late 1980s.[27] In the beginning of the 21st century there was a fall of foreign direct investments (FDI). Notwithstanding, Asia still plays an important role in the process of globalization.[28] As regards employment termination there is a number of countries that adhere to the at-will rule. The law in India, for example, starts from the premise that an employer has a right to terminate the services of an employee without a reason. For dismissals for *misconduct*, however, this right has been affected by legislative intervention. The reasons that justify a dismissal in this respect include (i) wilful insubordination or disobedience; (ii) theft or dishonesty; (iii) wilful damage or loss of employer's property; (iv) bribery; (v) habitual lateness or absence; and (vi) striking unlawfully.[29] Also Singapore adheres to the at-will rule. The Employment Act of 1968, as amended, presumes employment is at will, although notice periods for termination are in effect. An employer may end an employment agreement without notice, however, if there is a wilful breach of a contract condition or the employer is willing to pay the employee a sum of money. Evidence of an express or implied contract can rebut the presumption of at will.[30] In Japan, the Civil Code is based on the principle of freedom of termination as well. Under case law dismissals without justifiable cause, however, are held invalid as an abuse of the employer's right of dismissal. If the cause referred to is not considered serious enough the dismissal will be held abusive.[31] The at-will rule, thus, under case law is replaced by a just cause rule. The same applies to Malaysia where the relevant statutes do not set out a prohibition against unfair dismissal either, but like Japan, courts have developed a principle against dismissals based on just cause.[32] In China, the new Labor Code that has become effective as per 1 January 1995, applying to both domestic enterprises and so-called FIES (Foreign Invested Enterprises). Under this Act an employee can be dismissed – with respect of a notice period - for limited reasons only.[33] Thailand lists specific circumstances under which employment may be terminated as well. An employer may dismiss an employee who willfully disobeys or habitually neglects the lawful commands of his or her employer; absents himself or herself from service; is guilty of gross misconduct;

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25 See International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 4, China, Chen, Ke and Vol. 7, Hong Kong, L. Nagy.

26 Mandle 2003, p. 13.

27 Scrase, Holden and Baum 2003, p. 5.

28 WIR 2003, p. 9.

29 Termination of employment digest, ILO 2000, p. 172 and 173; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 7, India, Chandra Kumar Johri.

30 International Labor and Employment Laws, Keller (ed.), Vol. II, 2001, Chapter 35, Singapore, Ellen L Lyons, p. 6, 7 and 9. See also Termination of employment digest, ILO 2000, p. 297.

31 International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 8, Japan, A. Hanami and Fumito Komiya; Heerma van Voss 1992, p. 441-448; International Labor and Employment Laws, Keller (ed.), Vol. I, 1997, Chapter 32, Japan, Tomio Fukui, p. 4 and 9-10; Termination of employment digest, ILO 2000, p. 199; Zondag 2001, p. 443 and 444.

32 Termination of employment digest, ILO 2000, p. 216; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 9, Malaysia, Ponniah Arudsothy.

33 Termination of employment digest, ILO 2000, p. 108; International Labor and Employment Laws, Keller (ed.), Vol. I, 1997, Chapter 33, China, Joe Ramirez, John H. Curley and Anne Stevenson-Yang, p. 5 and 10; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 4, China, Chen, Ke.

or, otherwise acts in a manner incompatible with the due and faithful discharge of his or her duties.[34] A country that explicitly requires a just cause for a dismissal is South Korea. Generally, just cause is considered to include a lack of attitude, continuing unsatisfactory work, debilated disease, breach of the employment contract, egregiously unacceptable misconduct or misbehavior on the job, misrepresentation or previous school or work experience, an improper relationship with another employee or serious criminal violation.[35] Indonesia takes a unique position in Asia. Indonesian law requires prior authorization of the government for termination of employment. An employer will obtain a permit only if it is clear that a discussion about the intention to terminate the employment agreement has taken place and that they failed to reach an agreement. Further, as regards a dismissal based on misconduct or poor performance, the requirement of three warnings applies.[36] Australia and New Zealand, finally, play a role in the process of globalization. Australia adopted ILO Convention 158. New Zealand, too, requires that there must be a good reason for an employee to be dismissed at the employer's initiative.[37]

Europe

Western European countries, long before 1990, played an important role in the process of globalization with the creation of – the predecessor of – the European Union (EU).[38] With the extension to other countries – among which southern, central and eastern European countries – all countries started to play a role in the process of globalization either adhering to the at-will rule or the just cause rule.[39] In Western Europe, the law in Austria, Belgium, Denmark and Switzerland, however, starts from the *premise* that an employer has a right to terminate the services of an employee at will. In Austria and Denmark this freedom is curtailed in case of *summary* dismissals for which a valid reason is required by specific occupational legislation.[40] Belgium developed the doctrine of *abusive dismissal*. Under this doctrine, a distinction is made between blue and white-collar workers. A blue-collar worker who is dismissed for reasons unrelated to his conduct or ability or for economic reasons is qualified under case law as abusive, pursuant to which the employee is entitled to a six-month salary payment. A white-collar worker who proves that he is dismissed without cause can ask for

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34 International Labor and Employment Laws, Keller (ed.), Vol. II, 2001, Chapter 37, Taiwan, Lee and Lee, p. 12 and 14-15. See also Termination of employment digest, ILO 2000, p. 336 and 337.

35 Termination of employment digest, ILO 2000, p. 207 and 208; International Labor and Employment Laws, Keller (ed.), Vol. II, 2001, Chapter 36, South Korea, C.W. Hyun and Paul Cho, p. 15 and 18; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 12, South Korea, Chi Sun Kim.

36 Termination of employment digest, ILO 2000, p. 175-178.

37 Termination of employment digest, ILO 2000, p. 247 and 248; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 10, New Zealand, John M. Howells.

38 The European Economic Community was established on March 25, 1957 in Rome. The change in name from European Economic Community into European Community took place with the Maastricht Treaty in 1992, and the change in name from European Community to European Union took place with the Amsterdam Treaty in 1997. See Kooijmans 2000, p. 209; Blanpain 2003, p. 41-43.

39 Fouarge 2002, p. 3 and 4.

40 For Austria, see Termination of employment digest, ILO 2000, p. 48; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 2, Austria, Rudolf Strasser. For Denmark, see International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 5, Denmark, Per Jacobsen and Ole Hasselbalch.

even higher damages.[41] Belgian courts, however, apply a marginal test in determining abuse, in that the latter is not assumed easily.[42]

In Switzerland, the employer who dismisses an employee without notice in the absence of a valid reason will have to compensate the employee with what he would have earned if the employment relationship had been terminated by observing the notice period.[43] Countries that explicitly require a just cause for dismissal – besides the countries of Finland, Sweden, Luxembourg, France, Portugal and Spain that all adopted ILO Convention 158[44] – are Italy and the United Kingdom. Italy deems any dismissal automatically unfair, unless it is for just cause or a justified reason. Just cause, according to case law, requires very grave conduct which, when evaluated both subjectively and objectively, constitutes a serious and irremediable breach of the contract of employment. Justified reason is defined as the obvious failure of the employee to fulfill contractual obligations; or, reasons inherent in the production process, the organization of work or the smooth running of the undertaking.[45] Under the law of the United Kingdom employees are not to be dismissed unfairly. According to the Employment Rights Act an employer has to show that the reason for a dismissal was one of the five statutory fair reasons (i) capability of or lack of qualification of the employee for performance of work; (ii) employee's conduct; (iii) employee's job was redundant; (iv) continued employment would have meant that the employer or employee would have been breaking the law; or (v) there was some other substantial reason that justified a dismissal. The foregoing only applies to those employees with at least twelve months' service. The latter does not apply to automatically unfair dismissals connected with a discriminatory reason.[46] Germany also explicitly lists the reasons, which render dismissals lawful. These are reasons that relate to (i) the employee's incapability; (ii) the employee's misconduct; or (iii) redundancy, due to urgent operational reasons. On the other hand, if the cause of dismissal is for one of the reasons listed above, the dismissal is considered to be unlawful if the employee can be transferred to a comparable job immediately or after reasonable job training and/or occupational retraining.[47] The Netherlands, finally, take a unique position in Europe – and in

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41 Blanpain en Vanachter 1993, p. 176 and 177; Industrial Labor and Employment Laws, Keller (ed.), Vol. I, 1997, Chapter 2, Belgium, Bevernage, p. 16, 17 and 20; Termination of employment digest, ILO 2000, p. 7 and 58; Hugo Sinzheimer Instituut Research 99/03, p. 31 and 32; Zondag 2001, p. 346-350; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 3, Belgium, R. Blanpain.

42 Loonstra en Zondag 2000, p. 1274.

43 Termination of employment digest, ILO, 2000, p. 322 and 324; International encyclopaedia for labour laws and industrial relations, Blanpain (ed.), Vol. 13, Switzerland, Alexandre Berenstein and Pascal Mahon.

44 For a discussion of French law, see Loonstra en Zondag 2000, p. 1275 and 1276.

45 International Labor and Employment Laws, Vol. I, 1997, Chapter 5, Capua, p. 13 and 15; Termination of employment digest, ILO, 2000, p. 191; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 8, Italy, T. Treu; Loonstra en Zondag 2000, p. 1276.

46 Despite its division into England, Scotland, Wales and Northern Ireland, for the purposes of employment law it can be treated as one national jurisdiction. See International Labor and Employment Laws, Keller (ed), Vol. I, 1997, Chapter 7, United Kingdom, Henderson; HSI 1999/03, p. 66-71; Termination of employment digest, ILO 2000, p. 348; Zondag 2001, p. 399-403; International encyclopaedia for labour and industrial relations, Blanpain (ed.), Vol. 6, Great Britain, Bob Hepple, Sandra Fredman, Glynis Truter; Loonstra en Zondag 2000, p. 1276 and 1277.

47 Kuip 1993a, p. 291-346; International Labor and Employment Laws, Keller (ed.), Vol. I, 1997, Chapter 4, Germany, Leuchten, Solmssen and Dichter, p. 13-14;Termination of employment digest, ILO, 2000, p. 157; Loonstra en Zondag 2000, p. 1275; Zondag 2001, p. 379-382; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Germany, Manfred Weiss and Marlene Schmidt.

the world – to the extent it has a so-called dual just cause dismissal system, requiring that the employer who wishes to unilaterally terminate an employment agreement either needs consent of the government, or needs to address the District Court, Cantonal Section, to ask for dissolution of the employment agreement. In effect, both the government and the court will only grant a permit when there is a just cause for a dismissal.[48] In Central and Eastern Europe – besides the countries that adopted ILO Convention 158, such as Latvia, Slovenia and Turkey – most countries that play an important role in the process require a just cause for dismissal.[49] Termination of employment at the initiative of the employer may only be effective for a valid reason in Bulgaria,[50] in Poland,[51] and in the Russian Federation.[52] Under the *Bulgarian* Labor Code valid reasons include (i) lateness; (ii) absenteeism; (iii) failure to fulfill the requirements of the job; (iv) non-compliance with safety standards; (v) damaging the employer's property; and (vi) production of low-quality products.[53] Under the *Polish* Labor Code, these include (i) the breach of the employee's duties; (ii) lack of required qualifications and skills; (iii) failure to perform a superior's orders; (iv) negligence and/or carelessness in the performance of the employee's duties; (v) absence from work without leave; (vi) loss of confidence in the employee; or (vii) violation of non-competititon obligations.[54] The *Russian* Labor Code, on the other hand, includes a general principle against unfair dismissals.[55] Moreover, like *Czech* Republican law, it qualifies a valid reason as a reason connected with the capacity or conduct of the employee, or based on the operational requirements of the undertaking.[56] *Hungarian* law, in effect, requires the same, in that the reason *for notice* must be connected with conduct, ability or operations of the company.[57] Overall, the majority of countries in the world, involved in the process of economic globalization, require a just cause for dismissal. Among developed industrialized countries, the United States take a unique position for the at-will rule, in effect, is still the basic rules undergirding the employment relationship. The Netherlands take a unique position, in that it

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48 Termination of employment digest, ILO, 2000, p. 243 and 244. International Labor and Employment Laws, Keller (ed), Vol. II, 2001, Chapter 9, The Netherlands, Van Arkel en Loonstra, p. 21, 22 and 26; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 10, A.T.J.M. Jacobs.

49 Turkey gained most from the development of globalization when between 1923 and 1980 it evolved from a predominantly agrarian economy into one of the most industrialized economies in Eastern Europe. Berik and Bilginsoy 1996, p. 37.

50 Termination of employment digest, ILO 2000, p. 76; International Labor and Employment Laws, Keller (ed.), Vol. II, 2001, Chapter 14, Bulgaria, W. Gary Vause and Kalina Sarmova. International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 4, Bulgaria, Vassil Mrachkov.

51 International Labor and Employment Laws, Keller (ed.), Vol. II, 2001, Chapter 17, Poland, Czopski 2001, p. 18; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 11, Poland, Maria Matey.

52 Termination of employment digest, ILO 2000, p. 287.

53 Termination of employment digest, ILO 2000, p. 76.

54 Czopski 2001, p. 17.18.

55 Termination of employment digest, ILO 2000, p. 287.

56 Termination of employment digest, ILO 2000, p. 128; International Labor and Employment Laws, Keller (ed), Vol. II, 2001, Chapter 15, Czech Republic, Catherine Adams and Lubos Tichy; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 5, Czech Republic, M. Kalenska and Belina.

57 Termination of employment digest, ILO 2000, p. 168; International Labor and Employment Laws, Keller (ed.), Vol. II, 2001, Chapter 16, Hungary, Catherina Adams, Agnes Diviny, Peter Demeny, Gergely Pakh, Katalin Hollo and Emese Koranyi, p. 23 and 24; International encyclopaedia for labour law and industrial relations, Blanpain (ed.), Vol. 7, Hungary, L. Nagy.

adheres to a so-called dual just cause dismissal system, in which a preventive review by the government or court on just cause takes place.

APPENDIX II

INTERNATIONAL LABOUR CONFERENCE

Convention 158

CONVENTION CONCERNING TERMINATION OF EMPLOYMENT AT THE INITIATIVE OF THE EMPLOYER

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixty-eighth Session on 2 June 1982, and

Noting the existing international standards contained in the Termination of Employment Recommendation, 1963, and

Noting that since the adoption of the Termination of Employment Recommendation, 1963, significant developments have occurred in the law and practice of many member States on the questions covered by that Recommendation, and

Considering that these developments have made it appropriate to adopt new international standards on the subject, particularly having regard to the serious problems in this field resulting from the economic difficulties and technological changes experienced in recent years in many countries,

Having decided upon the adoption of certain proposals with regard to termination of employment at the initiative of the employer, which is the fifth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this twenty-second day of June of the year one thousand nine hundred and eighty-two the following Convention, which may be cited as the Termination of Employment Convention, 1982:

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.
2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:
(a) workers engaged under a contract of employment for a specified period of time or a specified task;
(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.
3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.
4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.
5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.
6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under Article 22 of the Constitution of the International Labour Organisation any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms termination and termination of employment mean termination of employment at the initiative of the employer.

PART II. STANDARDS OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

The following, inter alia, shall not constitute valid reasons for termination:
(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
(e) absence from work during maternity leave.

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.
2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.
2. Where termination has been authorised by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.
3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.
2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:
(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;
(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.
3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

DIVISION D. PERIOD OF NOTICE

Article 11

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to-
(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or
(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or
(c) a combination of such allowance and benefits.
2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).
3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
(a) provide the workers' representatives concerned in good time with relevant information, including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.
2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
3. For the purposes of this Article the term *the workers' representatives concerned* means the workers' representatives recognised as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.
2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.
3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

PART IV. FINAL PROVISIONS

Article 15

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 16

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General.
2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.
3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 17

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.
2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another

period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 18

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organisation of the registration of all ratifications and denunciations communicated to him by the Members of the Organisation.
2. When notifying the Members of the Organisation of the registration of the second ratification communicated to him, the Director-General shall draw the attention of the Members of the Organisation to the date upon which the Convention will come into force.

Article 19

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 20

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 21

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides-
(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 17 above, if and when the new revising Convention shall have come into force;
(b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 22

The English and French versions of the text of this Convention are equally authoritative.

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