A thin blurred line

Private policing of labour conditions of Dutch temporary agency workers

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1. *Introduction*

Some people say, that temporary agency work is precarious as such. Temporary agency workers do not enjoy the same rights and protection as workers with a indefinite term contract of employment. Therefore, the use of temporary agency work should be restricted, regulated and at the very least be an exception to the rule (contract of employment) according to the view held in quite a lot of countries.

There are those, and the Netherlands seems to be an representative of that line of reasoning, that hold the view that nothing is wrong with temporary agency work *per se*. It offers employers the necessary flexibility in their workforce on the one hand, and offers workers an opportunity for gainful employment they otherwise would not have had. Having said that, the position of temporary agency workers needs to be regulated of course, but in a way they are not dissimilar to 'normal' employees as far as their need for legal protection is concerned. They are both dependent of and subservient to their employer(s).

Temporary agency workers, however, run a higher risk of being subject to poor working conditions, troubles in effectively ascertaining their (meager) rights and downright exploitation even. A considerable number of them have to work in a precarious position.

In this paper I would like to discuss the so called 'CBA-police', that is the body established in the collective (bargaining) agreement applicable to temporary work agencies which is responsible for monitoring and, if necessary, enforcing working conditions laid down in said collective agreement.

Having given some general background information on collective agreements and temporary agency work in the Netherlands (2), I will discuss the special need for protection of temporary agency workers and the general characteristics of the CBA-police (3). In paragraph 4 I go into some problems and possible limitations of private enforcement of labour conditions, using recent case law on some of those issues. In paragraph 5 I will draw some lessons from those issues and the case law, which might be of interest to upholding basic rights of employees in a precarious position in other jurisdictions. Under 6 I make some concluding remarks.

2. *Background information on labour law in the Netherlands*

Collective agreements cover approximately 85% of the employees in the Netherlands. That includes temporary agency workers too.

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Collective agreements are legally binding for members of trade unions and employers' associations that have concluded the agreement. Individual members of employers' associations are obliged to offer the working conditions laid down in the collective to their entire workforce, irrespective of their (lack) of trade union affiliation. This obligation exist vis a vis both individual employees[2] and the trade unions. Therefore, employers are treated as if they themselves voluntarily entered into a contractual obligation to (e.g.) pay a certain wage to their workers with the trade union. Deviation from collective agreements is null and void. Conditions laid down in a collective agreement are considered as clauses of the individual employment contracts covered by it.

Collective agreements tend to be concluded for a limited period of time. It happens sometimes that employers' associations and trad4 unions fail to reach an agreement on a new collective agreement. In 2015 this occurred in the catering industry and in 2016 in primary education. In that case the working conditions laid down in the expired agreement still form an integral part of the individual employment contracts that were concluded or continued during the time it was in force. However, deviation is no longer null and void. Employers are free to negotiate other conditions with new employees too.

Employers that have chosen not to become members of employers' associations are not obliged to follow the collective agreement. However, at the request of the concluding parties, a collective agreement may be extended to an entire sector of trade or industry by the Minister of Social Affairs and Employment. In that case a collective agreement is legally binding for all employers in the particular sector, irrespective of their affiliation to an association. Both individual employees and the parties to the collective agreement can claim breach of contract if and when an employer does not apply the collective agreement. After expiration of the extension, workers 'fall back' on the employment conditions they had before the collective agreement was extended. Those in employment of a non- unionized employer will therefore lose the rights they derived from the collective agreement.

Under Dutch law, temporary agency contracts are considered as contract of employment, concluded between the worker and the agency.[3] Some obligations, such as ensuring health and safety rules, rest on the enterprise the worker is posted to, but in the core of the working condition is laid down in the contract between the agency and the worker. Associations of temporary agencies have concluded collective agreements with trade unions, therefore the employment conditions of temporary agency workers are to a large extent determined by said agreements. [4] As a rule, as time goes by and a worker is in employment of an agency longer and longer , the more 'normal' his or her position becomes. Both the ABU and NBBU-collective agreements have a characteristic 'phase system'. In time blocks of 26 weeks (first 26 weeks of employment, second 26 weeks of employment and so on and so forth) the temporary agency worker gains extra rights and exceptions to general rules for 'normal' employees expire. Over time, the gap between both types of employees becomes shrinks considerably. After the first 26 weeks of employment, a temporary agency worker is even

[2] With the exception of non union members: in their case only the parties to the collective agreement enjoy the right to seek legal redress for breach of contract.
[3] Par. 7:690 Netherlands Civil Code (NCC).
[4] The agreements concluded by NBBU (Nederlandse Bond voor Bemiddelings- en Uitzendbedrijven) and ABU (Algemene Bond voor Uitzendbureaus) are the most important ones. The NBBU and ABU collective agreements contain similar provisions.

eligible for participation in the pension scheme devised by the temping sector, to give but one example.

Temporary agency workers basically enjoy the same rights as 'normal' employees, but some exceptions have been to allow for flexibility. The possibility to use zero hour contracts (on call work) exists longer for temporary agency workers tan for normal employees, for example. Furthermore more fixed term contracts, for a longer period of time, can be concluded with temporary agency workers than with other employees. "

Under the Temporary Work Agency Act a temporary agency worker is entitled to the same wages as employees performing the same work in the enterprise he is posted to. However, the collective agreement applicable to that enterprise may stipulate otherwise, or the collective agreement of the temporary work agency. [5] Usually the principle of equal pay is not set aside altogether and indefinitely, but for a limited period of time (26 weeks again).

3. Why could temping be precarious nonetheless?

Is everything alright and hunky dory then? Temporary agency workers, at least over time, enjoy the same rights as other employees. But all is not well.

An important limitation to the equality set out above, is the requirement of employment for a longer period of time in order to enjoy the rights normal workers do as of day 1 of their employment. A substantial number of temporary agency workers does not sty long enough with one agency to achieve 'normalcy'. That may be alright for some of them, e.g. students of pensioners who are not dependent on a steady income out of employment to sustain themselves. The flexibility may even be beneficial to them, since temporary agency work can be fitted in smoothly in their schedule (exams, care of grandchildren etc.) and perhaps better than regular work. However for other groups temporary agency work is permanent, albeit for different agencies and perhaps interspersed with periods of unemployment. Workers with a lack of skills and education can end up permanently in the flexible fringe of the labour market. Temping is for them not a stepping stone on their way to regular and permanent employment, but a mere link in a chain of temporary jobs and unemployment. They are hanging onto employment by their fingertips, and usually employment under poor conditions at that.

Workers such as these do indeed have a precarious position, which makes them more prone to non-compliance with statutory rules and employment conditions laid down in collective agreements or even downright exploitation.

A nasty cocktail of factors makes a part of the temporary work agency workers vulnerable and less willing and able to assert their rights.

They may be, as was mentioned above, poorly trained and educated. They utterly dependent on having some kind of work. Any work will do, and that does not improve their bargaining position. "Trouble makers" can quiet easily be excluded, since the agencies basically can take their pick from a vast reservoir of (potentially) unemployed as far as filling simple low skilled jobs are concerned. Not all temping work is that simple, but a considerable portion of it is. Thus problem may be even worse

[5] Par. 8 Wet allocatie arbeidskrachten door intermediairs (WAADI).

for workers coming from other countries and therefore lacking language skills and connections to help them.

A second ingredient to the cocktail is the 'casuality' of relationship between employer and employee. The later only works for a brief time, and therefore the other party has no incentive to invest in the working conditions of the worker. A related problem is that ascertaining one's rights, such as being paid the minimum wage or holiday allowance, is more trouble than it's worth when the employment relationship lasts a few weeks or even months. Again this problem might be worse for workers from other countries; the practical obstacles for enforcement of their rights might be even higher having spent a limited amount of time working in the Netherlands and then returning home. In 2006 warning signals were issued because of the danger of criminals taking over in the posting of foreign workers to the Netherlands. Workers from ´new´ EU member states were liable to be underpayed, maltreated or even exploited.[6]

A third factor is the lack of clarity involved in multiparty employment relationships. It may well be that the temping agency is deemed to be the employer under the law, but in actual fact it may not be so clear to the employee involved who he's actually working for. Especially when work is divided over contractors, subcontractors and several temporary work agencies posting worker to different entities. Once the actual employer has been identified, it may have closed down or gone into receivership. (As of July 1, 2015 a form chain liability for payment of (minimum) wages was introduces in par. 7:616a et seq. NCC in order to deal with this problem.)[7]

Having regard to this cocktail of precariousness, it would seem that close supervision of and strict enforcement of decent working conditions for temporary workers are in called for. The workers themselves are poorly placed to ensure that their rights are respected. The risks are high, certainly for the types of workers and types of work mentioned above. Not only for the workers involved, but also for competitors who try to abide by the rules. Agencies breaking them have a competitive edge over those bona fide agencies.

However, the Netherlands Labour Inspectorate is of a modest size.[8] The Inspections has approximately 1100 members of staff, at a working population of around 9 million people. It should be mentioned that health and safety rules are the main focus of this organization, not the minimum

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[6] As an article in the newspaper *de Volkskrant* ("CBA police to te rescue of exploited Poles") of 15 march 2006 suggests, see: http://www.volkskrant.nl/economie/cao-politie-moet-uitgebuite-pool-redden~a786828/. Quite a few hits via google mention news articles on temporary agencies when searching for 'exploitation of foreign workers'.

[7] The Wet aanpak schijnconstructies (Stb. 2015, 233), "Labour Market Fraud (Bogus Schemes) Act", contains several measures to improve compliance with basic employment conditions, such as timely payment and payment in full of the statutory minimum wage. The chain liability is one of those measures, another is 'naming and shaming' of employers acting in contravention of employment and health and safety rules. The Labour Inspectorate mentions the employers inspected and the results of the inspection on it's website, (https://www.inspectieresultatenszw.nl/. Furthermore, the Inspectorate may pass on information to trade unions/employers' associations if the inspectorate's findings are relevant to implementation of employment conditions laid down in a collective agreement, par. 18p(7) of the Wet minimumloon (Minimum wage act).

[8] The inspectorate will downsize over the coming years, and temporary staff hired for inspection of bogus and fraudulent constructions set up by a.o. temporary agencies will leave by 2018 at the latest. See: http://www.jaarplan2016inspectieszw.nl/bedrijfsvoering.

wage or other working conditions.[9] Whether or not a collective agreement is respected or not is to a large extent a question outside the inspectorate's remit.[10] However, the Inspectorate can facilitate trade unions, employers' asscociations and their CBA police by sharing the results of inspections. The result of these inspections may give rise to an investigation by those private parties into correct implementation of the collective agreement by an employer who is found at fault as far as working times and payment of minimum wage is concerned. In a rather ironic shit of roles, it is not a private citizen of organization that reports unlawful behavior to the authorities, but it is the other way around. The Inspectorate can be seen, in a way, as a 'grass' that helps private parties with their enquiries.

To fill the gap between public police – with limited resources and powers - and private, individual enforcement, a so called CBA police has been established in several sectors. Temporary work agencies and trade unions have established the SNCU (*Stichting Naleving CAO voor Uitzendkrachten*). This foundation's aim is to enforce the collective agreement on behalf of the workers and the parties to the collective agreement.

4. Private policing in practice: challenges

Over the last decade some challenges to the enforcement of labour law through private parties have emerged. It should be stressed that even a brief glance at the case law shows that the SNCU has been quite active and successful over the last few years.[11]

A problem, that maybe peculiar to the Dutch system, is that extension of collective agreements by the Minister has no after effect. Once the extension period terminates, the collective agreement is no longer binding to non-unionized employers. The SNCU derives its powers from a collective agreement.

In several court cases employers argued that they could not be investigated by the SNCU, since it's powers to do so had disappeared long since. The Hoge Raad (Supreme Court) held that expiration of the collective agreement limits the period that can be investigated by the SNCU, i.e. the time the extension was in force. However, the SNCU may still do so after the collective agreement and the extension have expired. Retrospective enforcement should be held possible according to the Hoge Raad because otherwise enforcement would become (almost) illusory.[12] Even though collective agreements, and in the Netherlands especially extension of them, have a temporary validity, bodies established by them do not lose their powers after the collective agreement has expired.

A second problem is how to get the information required to determine whether the collective agreement was respected, or not. And perhaps even more importantly, how to get the information

[9] In 2016 the Inspectorate plans to make 15.000 to 16.000 health and safety inspections, 4.000 inspections of permits for foreign workers and payment of minimum wage and a mere 285 inspections of compliance with collective agreements and bogus self employment and other bogus co0nstructions. See: http://www.jaarplan2016inspectieszw.nl/bedrijfsvoering.

[10] Cf. M. Kullmann, 'Privaatrechtelijke handhaving door de Stichting Naleving CAO voor Uitzendkrachten', ArA 2015-3, par.4.1.1.

[11] In 2013 816 possible cases were reported to SNCU. It investigated 307 of them. From these investigations it followed that temporary agency workers did not receive approximately € 14.2 they were entitled to under the collective agreement in force.

[12] Hoge Raad 28 November 2014, ECLI:NL:HR:2014:3458 and 18 December 2015, ECLI:NL:HR:2015:3620.

required for a successful 'prosecution'. Unlike the police or the labour inspectorate, the SNCU has no statutory investigative powers.

To deal with the information problem, an annex to the collective agreement requires employers to hand over certain documents and information to the SNCU. The SNCU has, for example, the right to receive pay slips, salary administration, working time sheets and proofs op payment. [13] Failure to provide the information may lead to a fine and a reversal of the burden of proof that the agency has met its obligations. That means that, when not enough information is provided, it is up to the agency to prove that the obligations have been fulfilled. The SNCU can make a reasonable estimate of the amounts involved (e.g. short payment of salaries) , the agency then has to show that and why this estimate is not correct.

Unlike the labour inspectorate, the SNCU does not have the authority to summon witnesses or to instigate a search. In a way the SNCU lets the agency under investigation do the necessary work: it needs to provide the information that all was done correctly. Therefore there's no need to enter the agencies premises or hear it's management. It could be argued that the SNCU to a certain extents enjoys more powers than public authorities, since the *nemo tenetur* principle limits the duty of a suspect to cooperate with his own prosecution.

Having said that, small agencies operating close to or being downright illegal may stay 'under the radar'. The resources of the SNCU and similar organizations are limited as well.

A third problem is how to calculate damages and how to award them. A collective agreement gives workers certain entitlements, such as wages and supplements. The problem is that not all the workers involved with a breach of collective agreement can be contacted by the SNCU, which is basically taking action on their behalf. Therefore the collective agreement stipulates that the SNCU may seek payment of the amounts due to the individual employees involved, and upon failure of the employer to do so – and delivering proof of having done so -, may claim damages to the amount of the sums not paid out to the workers in lieu of direct payment to the workers. Furthermore the collective agreement stipulates that the agency has to pay so called supplementary damages to cover the administrative and handling costs of the SNCU. The awards collected by the SNCU cover its operating costs or will be paid through to the various institutions the agency would have had to pay on behalf of his employees, e.g. contributions to a foundation responsible for professional education of workers in the sector.

A related problem which turned up before the courts is the question whether it is possible for SNCU to claim performance of the collective agreement i.e. paying the wages due and payment of fines. [14] It could be argued that a creditor cannot both have his cake and eat it, an order to (at long last) deliver performance and a fine for non-performance. However a distinction should be made between the duties the agency still is required to perform and the duties that have been broken. A fine for non-compliance with an investigation is another matter than payment of wages due.

5. Lessons learned

[13] Cf. Court of Appeals Den Haag 17 february 2015, ECLI:NL:GHDHA:2015:223.
[14] Kullmann discusses this issue in ArA 2015/3, par. 4.2.

Are the expriences in the Netherlands useful to other countries? They might be. At least the Dutch case shows that thought should be given to the conciliation of temporary existing collective agreements with permanent supervisory bodies.

Furthermore, for private policing to work, it needs to be able to operate on both an individual and collective level. In the Netherlands parties to collective agreements may claim on the basis of breach of individual contract as if an employer took it upon him to guarantee to those parties that the collective agreement will be met in all individual cases. In the temporary agency sector the powers of the unions in this respect have been delegated to the SNCU.

Having a specialized organization in place, makes it possible to build up specific (practical and legal) knowledge and expertise in enforcing a collective agreement. Furthermore, such an organization may develop policies and strategies for focusing its' resources to types of activities and enterprises that are more likely than others to act in contravention of a collective agreement. This is likely to be more effective than reacting on an ad hoc basis to complaints or on information received from the Labour Inspectorate. Another possible advantage of establishing a specialized authority, it sends out the clear message that the parties to the collective agreement mean business when they say that the agreement should be implemented correctly. A separate entity may be easier to find for workers and organisations that wish to lodge a complaint, or at least have a case looked into, than a department within a trade union or employers' association.

Another lesson is that private police seems to work better as an auxiliary force than as an alternative force. In the Netherlands, the several CBA police forces, do not replace public enforcement by the Labour Inspectorate or – in exceptional cases – the 'real' police and the criminal courts. They act, perhaps not always harmoniously or efficiently but still, in tandem. They may strengthen each other by sharing information on their findings on a structural basis. The Labour Market Fraud (Bogus Schemes) Act[15] has made it possible for the Labour Inspectorate share its findings with organisations involved with a collective agreement if and when that agreement might be applied incorrectly or not at all. It is too early to say how this whistle blowing by this authority will function in practice, and whether or not naming and shaming of misdemeanors by employer on the Inspectorate's website will have an effect. The Act entered into force on July 1, 2015. However, the least that can be said is that cooperation and mutual help must surely lead to improvement of the enforcement of collective agreements. In so far as protecting employees in a precarious position are concerned, improved enforcement of collective agreements may alleviate one of the important 'symptoms' of having a precarious position.

Another issue is the calculation of damages and the distribution of them. In case of the SNCU they tend not to go to individual employees, due to practical problems. A system which is more inclined toward individuals might deserve some consideration. As far as the calculation is concerned, fixed amounts (or percentages of back pay) are by far easier to apply and collect than 'real' damages. It might therefore be advisable to introduce a scheme of fines (fixed amounts) in a collective agreement. It would therefore be advisable to opt for a lump sum or fixed rate approach.

A disadvantage of that approach – in which the amounts due are not directly related to the real costs and damages - might be that private CBA police forces start to operate as 'bounty hunters'. They

[15] See footnote 7, supra.

need to claim successfully in order to finance its own costs and existence. This might lead to focusing on solvent agencies, or for adding a substantial 'profit margin' to fixed damages/fines. However, I have not been able to find any evidence for the existence of bounty hunting (mal)practices. It might be a merely theoretical problem in the case at hand, but it might need some consideration when a new force is established for another collective agreement or in another country. It should be noted that SNCU has been quite active in trying to find possible transgressions over the last few years, this suggest that monetary awards in some way or another may operate as an incentive for SNCU.[16]

A last observation is that the Dutch experience show that the amounts involved can accrue to considerable sums. If and when non-compliance goes on for some years, the back pay may add up to impressive sums. In addition, payment of fixed amounts ('fines') and handling costst lead to an even higher amount. It might even lead to bankruptcy of the agency involved. Even though this may lead to job losses for the workers still in employment of the agency, this does not mean that enforcement should be refrained from. It just goes to show that a private police force is not a miracle worker and may sometimes fail to collect the debts. For the sake of continuity of employment, it could be argued that debt settlement, temporary debt suspension or arrangements for payment in installments should be an important part of collective agreements establishing a CBA police force. At the very least, that body should be sensitive to the balancing the interests of continued employment and upholding the relevant employment conditions. It would of course be dependent of the kind and severity of the transgressions involved, and the intentions and attitude of the agency involved, whether or not a subtle or a more Shylockian approach is called for.

6. Concluding remarks

Private CBA police may offer a useful addition to the enforcement of labour law tool kit. It depends on the status of collective agreements whether this is a viable option for a country. In a way it is a combination of the best of both worlds: *individual* issues are aggregated on a collective level. Even though it is colloquially referred to as police, it is a private body. That means that it has other goals an opportunities public authorities, such as the labour inspectorate. From a human rights perspective it might be questionable, or even objectionable, to invest private bodies with far reaching investigative powers. On the other hand, the investigation usually is restricted to files, records and written data. From the perspective of enforcement, it is quite a big step that working conditions above the basic level upheld by public authorities are systematically and professionally under the scrutiny of a private police force.

[16] Cf. District Court Gelderland 17 November 2015, ECLI:NL:RBGEL:2015:6807. In this one of many cases SNCU argued that posting workers from one subsidiary of a group of undertakings to other subsidiaries of the same group falls within the scope of the collective agreement for temporary work. The court followed SNCU's reasoning, but the case law is divided on this issue. In a similar case that now is before the Supreme Court a ruling is expected in the autumn of 2016. On 15 April the Attorney General at the Supreme Court argued in favour of a broad concept of temporary agency work, which might include intra-group posting. Conclusion of A-G Van Peursem 15 april 2016, ECLI:NL:PHR:2016:238.