

Report

Expert Meeting on the Legal Position of (Migrant) Domestic Workers

3 October 2008

- Bonded Labour in the Netherlands (BLinN)
- ABVAKABO FNV
- The Dutch Association Women and Law
- RESPECT NL



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The Report is written by Leontine Bijleveld.

The Legal Position of (Migrant) Domestic Workers

On 3 October 2008 an expert meeting was organised by the Dutch Association Women and Law (Vereniging Vrouw en Recht Clara Wichmann), ABVAKABO FNV, RESPECT NL (Network of Migrant Domestic Workers in the Netherlands) and Bonded Labour in the Netherlands (BLinN).

The main objective was to explore the possibilities of strengthening the legal position of (migrant) domestic workers.

Some 34 participants representing 18 Organisations attended the meeting. A list of participants is attached in Annex 1.

Welcome

Professor Irene Asscher-Vonk (Radboud University Nijmegen) was chair of the meeting. She welcomed the participants and shared her experiences. In her professional capacity she has published several articles about the position of domestic workers in Dutch social law. She also supervised doctoral dissertations related to the subject. Like many other working women she also has the experience of employing domestic workers herself. So she feels connected to the subject of the expert meeting.

Leontine Bijleveld (the Dutch Association Women and Law) presented a paper about the legal position of workers in private households in the Netherlands. Together with Eva Cremers she is working on a research project about the subject. They are investigating amongst others whether the requirements of international antidiscrimination legislation are being met with respect to domestic workers. They also assess whether the working conditions of domestic workers in the homecare (in Dutch: *alfahulpen en PGB-zorgverleners*) meet the requirements of the labour legislation. The research will be finalised later this autumn (available via www.vrouwenrecht.nl).

She started explaining that domestic Workers are workers. This might seem obvious, but it is not. Often people wrongly assume that domestic workers are self-employed. The employment relation of most domestic workers however meets the requirements of art. 7: 610 BW (the Civil Code): the work has to be done by the worker in person, the employer has to pay the wage and is the boss of the worker, can give orders. Whether there is a written employment contract or not is not decisive. The fact that a domestic worker is a worker implies that she ought to enjoy social rights and legal protection. For instance: statutory minimum wage, paid leave (4 weeks) and holiday allowance.¹

Bijleveld continued explaining the categories of domestic workers, which enjoy less social rights than other workers: those who work for a private employer in the household of that person on usually less than three days. Since 2007 the maximum number of days has been extended to maximum three. The number of hours per day is irrelevant, as is the number of employers. These domestic workers are excluded of participation in social security schemes (no access to disability and unemployment benefits) and of employment protection. With respect to some other social rights they

¹More information in *Your rights as domestic worker in a private household* ABVAKABO FNV http://www.abvakabofnv.nl/docs/bijlagen/200807/Je_rechten_als_huishoudelijke_hulp_bij_een_priv%C3%A9-persoon_thuis.pdf

have limited entitlements: in case of illness the employer has to pay the wage during 6 consecutive weeks, in contrast to 104 weeks for other workers.

The employer of a domestic worker has limited administrative responsibilities: not needing deducting taxes from the gross wages, nor reporting the payment of wages to the tax office. In the opinion of Bijleveld this is the cause of informalisation of the sector: why would domestic workers volunteer to declare their income to the tax authorities, when nobody knows?

With respect to migrant domestic workers Bijleveld stated that labour legislation as summarized above is applicable for undocumented workers. Working without a permit is not punishable in itself, but there is a risk being expelled to the home country when caught. Employers do risk a fine of 4.000 EURO, but Bijleveld has not found any examples of fining. Police and labour inspection do not pay much attention to undocumented workers in private homes.

According to Bijleveld the special position of domestic workers in labour legislation is problematic and needs to be addressed. Proposals suggested at the request of Parliament by the Council for Work and Income (Raad voor Werk en Inkomen, RWI) dating from 2006 might offer opportunities for improvement. Though at least two notions are absent in the debate up till now: the fact that domestic work is predominantly women's work (consequently no attention is being paid to the concept of indirect discrimination). The second is the existence of quite a few migrant domestic workers in the Netherlands.

The RWI proposes to introduce a dual fiscal system. The first track is maintaining more or less the existing situation for domestic workers working on less than four days, but allowing them tax exemption for the earnings up to 500 Euro a month. The second track is tax deduction for the person who buys domestic and personal services on the formal labour market. Formal implies the labour market with all the social rights and obligations, which are applicable in all other sectors of the labour market. The domestic and personal services in this track can be delivered by workers employed by a cleaning company or an temporary work agency, or a homecare company etc., or by self-employed workers (ZZP in Dutch), or by someone who has an full employment relationship with the employer, without all the exclusions and limited rights which are described above. Bijleveld concluded that the first track is problematic, but that the second track offers quite a few possibilities for improvement, which will be elaborated by the next speakers.

Corine van Egten (E-Quality) described the Canadian example of a special permit for live in caregivers. This permit offers the possibility for migrants with some qualifications to work with a temporary permit as live in caregiver for children, elderly or handicapped persons. After two years of work as a live in caregiver a permanent permit of residency can be obtained.

In the opinion of E-Quality it is worthwhile to discuss the example mainly because it puts in place a special provision for a work permit for domestic work. At present under Dutch immigration legislation it is impossible to obtain a work permit for domestic work, because the institutions (IND and CWI) assume that domestic work is unskilled work like any other and can be performed by any unemployed unskilled worker. In the Netherlands and in the EU there are many unemployed unskilled workers. Individuals or families experience difficulties to find a domestic worker, but they cannot prove that. Therefore it would be easier to apply for a work permit under a special provision for domestic work. There are other special provisions for other

kinds of work where employers do not have to prove in every individual case that there is a shortage on the labour market.

E-Quality does not mean to advocate the live-in option over a live-out option for domestic work. The main reason for exploring the live-in option is strategic: it seems easier to convince parliament to change immigration legislation by explaining that there is definitely a shortage of live-in help.

In the view of E-Quality a domestic worker, live-in as well as live-out, is an employee according to Dutch labour law, entailing rights like the minimum wage, maximum working hours etc.

Speaking from the audience **Marina Quindiagan (Princess Urduja Foundation)** adds that a live in caregiver in Canada needs to find another employer (or sponsor) within a few months when you are dismissed by the former one. If not, one becomes undocumented after all.

Sarah van Walsum (Free University) points at an article of Audrey Macklin of the University of Toronto about the live-in example: On the Inside Looking In.²



Sarah van Walsum (Free University) presented self-employment as another route to regularization for migrant domestic workers. There are a number of reasons for exploring this route: most domestic workers do not live-in and the work pattern of most migrant domestic workers does resemble in her opinion a self-employed worker working a few hours a week for several different households. Moreover: there is a trend towards self-employment in household services, in the health care and in the childcare.

² In Giles, Wenona; *Maid in the Market: Women's Paid Domestic Labour* Halifax, Fernwood Publishing 1994

While acknowledging disadvantages of the self-employment model (responsibilities and risks like VAT and tax administration, private insurances and no protection by labour legislation), Van Walsum thinks the advantages of the model have to be highlighted as well: the focus on the contribution of domestic workers to Dutch economy, rather than on qualification “unskilled labour”. In this self-employment model migrant domestic workers seem in a less dependent position vis a vis their “sponsor” in the live-in model.

She pointed out that in the past protection of the Dutch market one of the main objectives of Dutch immigration policies was. This applied to migrant employees as well as to self-employed. Recently the lines of immigration policy have been changed: for labour migrants a two-tier system has been introduced. For high paid foreign employees (> € 25.000 - € 45.000) the labour market test has been abolished, but for low paid workers not. So for migrant domestic workers this is not a solution. Interesting is that for self-employed migrants the local market test has been abolished. Instead, a new credit system has been introduced (personal qualifications, added value and financial viability). This might offer possibilities for migrant domestic workers.



Marcel Reurs (Everaert Advocaten Immigration Lawyers) started his presentation with the conclusion that the current immigration policies for employment-based migration do not provide a basis for a migrant domestic work immigration status, neither as employee, nor as self-employed person. When one looks at what actually gives credit in the credit system (last 4 pages of the reader for the expert meeting) it is quite impossible for a migrant domestic worker to get the required minimum credits.

In Reurs' opinion it is not likely that the government will adopt a special immigration status for migrant domestic workers. The philosophy behind the new policy, as described in the Blueprint for a Modern Migration Policy, offers however some interesting starting-points: it aims to be appealing for immigration categories for which there is a high demand. In the Blueprint this is still limited to highly skilled categories. Another interesting starting-point is the upgrading of the position of the sponsor. Once accepted as sponsor it is relatively easy to obtain a visa and a residence permit for employees. A third interesting starting-point is that, according to the blueprint, in the low skilled segment of the labour market some categories can be temporarily excluded from the labour market test.

Before sketching a possible solution for migrant domestic work Reurs discussed criteria which in his view must be met in order to make a solution feasible for the IND and for politicians. There must be a clear demand for migrant domestic workers. Risks of fraud and of abuse of the worker must be minimised. The model should not lead to more demand for social protection schemes and it should guarantee supervision ensuring compliance and assertion (in Dutch: toezicht en handhaving). In the current system institutional sponsors with an intermediary position between an immigrant and a Dutch host are acknowledged in the category of Exchange Programmes. Reurs suggested exploring the idea of establishing an institutional sponsor for or by domestic workers and their hosts that would act as a necessary intermediary in order for the migrant to obtain a residence permit and for the host to obtain a migrant domestic worker. One could think of an institute certifying host and migrant worker, which is approved and recognised by the government. This organisation should be run by reliable parties, like trade unions, migrant organisations, advocacy-groups and employer organisations or organisations representing the hosts. It should be responsible for supervision and scrutinising workers and hosts. Via standard employment contract or terms of references social rights and decent remuneration can be guaranteed.

Answering questions from the audience Reurs explains that the Exchange Programs provide a temporary, non-extendable residence right. Whenever that is not desirable, one could try to lobby for a qualifying period (like in Canada). It is questionable whether this solution is suitable for migrant domestic workers who are already living in the Netherlands. Under present legislation they have to travel to the country of origin to apply for permit (in Dutch MVV). Maybe the prospect of acquiring a legal status will help to overcome hesitations to travel back. Another question is whether host families will be prepared to pay more for a migrant domestic worker than they do now. Maybe the prospect of continuity in the domestic work will help.

Sarah van Walsum continued after Reurs' presentation with a parallel between domestic workers and artists and musicians, both being not particularly well supplied with capital. Another thing they share is that performance weighs heavier than formal qualifications and in that sense both bring added value to the Netherlands. Van Walsum acknowledges that the self-employment model is offering many challenges but she feels that those can be met, especially if an organisation like Marcel Breurs suggested is being set up. In her view this offers more protection for domestic workers than the one to one relation between the migrant domestic worker and her many employers.

Margriet Kraamwinkel (FNV Bondgenoten) starts her presentation with sharing her experiences in the mail sector, which offers starting-points for the subject of the expert meeting about migrant domestic work. 10 years ago it was possible to earn a substantial income in the mail delivery, enough to support a family. Nowadays that is more difficult with the new companies showing up in the sector after the liberalisation of the mail. The main costs of mail-delivery consist of personal costs. In order to compete the new companies try to reduce those costs. So Terms of Reference (TOR, in Dutch: overeenkomst van opdracht), with a payment for delivery of the mail in certain streets, is offered to the post(wo)men instead of a labour contract (with a tariff per hour). Consequently those so-called self-employed workers in the mail sector do not participate in social security schemes, do not receive any income when they are ill and often end up with an income far below the minimum wage. FNV Bondgenoten contested the status of self-employment of those workers and started negotiations for a collective agreement. Kraamwinkel underlines that under Dutch law one cannot choose freely between the status of employee or self-employment. There are certain rules. She thinks moreover that self-employment is not suitable in the lower levels of the labour market - one can end up too easy below decent work standards. Neither is the use of pay rolling a solution in her view.

With respect to domestic work two issues need to be solved: who is the employer party with which the unions can start collective bargaining and how can we convince the government that this country needs migrant domestic workers.

Having listened to Marcel Reurs' presentation Kraamwinkel thinks an organisation as suggested by him could act as the employer party. One could imagine a kind of temporary work agency specialised in domestic work, employing migrant domestic workers, who work with families, which pay via the agency a decent wage.

Mari Martens (FNV Bondgenoten) explains that to make it possible for a domestic worker to earn a net hourly wage of 10 Euro a tariff of 23 Euro has to be paid (for the gross wage, social security and pension rights). This cannot be achieved as long as the informal market offers cheap alternatives. Therefore tax deduction has to be introduced (the RWI proposal) to make this model realistic.

Kraamwinkel continued with explaining that when the organisation acts as the employer the exemptions in the labour legislation (as explained by Leontine Bijleveld) can be avoided. In that case the host families are not acting as employers anymore and the migrant domestic workers can earn a decent wage including social security and pension rights. That organisation could also apply for the work permits for the future migrant domestic workers.

She fears however that a model with such an employer's organisation, if feasible, is not a solution for the migrant domestic workers, who already work in the Netherlands, unless they are willing to travel back.



Discussion

After the break the chair started with the observation that to improve the position of migrant domestic workers one has to recognise that immigration law and labour law are intertwined. In fact both have to be changed.

The discussion focussed first on the model presented by Margriet Kraamwinkel.

Marcel Reurs said that the adoption of his idea - an employer's organisation instead of an intermediary organisation - could be viable. This enables a collective labour agreement. **Margriet Kraamwinkel** adds that a specialised temporary agency, with trade unions, self-organisations and employer organisations in the board, could be brought under the scope of the collective agreement of the cleaning sector (de Schoonmaakcao). Such an organisation might be acceptable for the IND as a sponsor. A certification procedure has to be developed, which should include the families where the domestic work has to be done as well. Both the organisation and the families are responsible for health and safety and proper labour conditions.

Whenever the IND accepts such an organisation as a sponsor, probably other organisations will arise and try to operate in the same field. The question was raised whether this could entail a certain risk of trafficking.

Heleen de Jonge van Ellemeet (Bureau Nationaal Rapporteur Mensenhandel) does not think that the risk of trafficking will increase whenever another legal channel for migration of domestic workers will be created. In her opinion the model is very interesting and could work for future domestic workers.

Jenneke van Pijpen (ABVAKABO FNV) points out that we also should talk about improving the market for domestic work. We need to get rid of the exclusion for domestic work in labour law and social security law; this means change of legislation. We should lobby for the RWI-proposal of tax deduction.

In all three models the crux is whether the need for migrant domestic work can be proven. Someone suggests starting a signature campaign. Another participant suggests there is a need for more research, while others think there is enough research being done. That there are hardly Dutch or documented unemployed prepared to do the domestic work is proven by the failure of the 'wittewerkstersregeling', according to another participant. Someone else points out that the need for migrant domestic work is obvious since the extension of the au pair regulation (30 instead of 20 hours light domestic work). But another participant said one should separate domestic work and au pairs. Au pairs have to live-in. Most participants seem to think that the live-in model for regularisation of migrant domestic work is not feasible.

Grace Punongbayan pleads for a political campaign: migrant domestic work is work, it is valued work, migrants are adding value and domestic work has to be done. Many domestic workers are undocumented and because of that they cannot claim rights. She thinks that there are disadvantages in any model, but all models should be explored.

Fé Jusay and **Petra Snelders** (both representing **RESPECT NL**) share that their organisation has already started a campaign. Other participants underline the need for a joint campaign.

The chair poses the question whether self-employment is feasible. Some participants think it might be, others are more hesitant. There are examples of self-employment in domestic work: for instance when the work is being done in the absence of the principal. Since social security is linked to the labour relationship self-employment cannot offer a solution for the lack of social security, but it might offer better chances for residence status.

In contrary with the Netherlands, other EU countries try to find a solution. Reference was made to some other models, like the Greek model. But – next to more substantive criticism at the model – the model also doesn't meet the criteria Marcel Reurs described (to be acceptable for the IND and for politicians). At the Global Forum for Migration & Development the idea for a temporary status and circular migration has been launched. This seems similar to the possibilities diplomats have for their domestic workers: a temporary permit for domestic workers who have to stick to domestic work. Other participants point out that circular migration is opposite to improving the position of migrant domestic workers.

The chair concluded that there had been an interesting discussion, but no choice of a certain model has yet been made. On behalf of the organisers she asks whether participants and especially the organisations they represent are in favour of a follow up. The idea of a follow up is:

- * Elaborate one or more proposals for improving the position of migrant domestic workers

- * Campaigning and lobbying for the required change of legislation

Several participants express their approval with such a follow up, but the proposed dates do not suit. In the end it was agreed that the organisers of the expert meeting would take the initiative to establish a date for a follow up meeting.



Participants

Prof. Irene Asscher-Vonk (Radboud Universiteit Nijmegen, Faculteit Rechtsgeleerdheid)
Marijke Bijl (OKIA)
Leontine Bijleveld (Vereniging Vrouw en Recht)
Petra Boers (Contrast)
Sjoukje Botman
Katrien Depuydt (ABVAKABO FNV)
Corine van Egten (E-Quality)
Pim Fischer (Fischer Advocaten)
Liset Hamming (Allen & Overly Advocaten)
Fe Jusay (RESPECT NL)
Margriet Kraamwinkel (FNV Bondgenoten)
Julianto Kresnadi
Tessel de Lange (Universiteit van Amsterdam)
Mario van de Luytgaarden (FNV Mondiaal)
Mari Martens (FNV Bondgenoten)
Lorie Matulay
Genibe Molabin
Rio Mondelo
Joe Obi
Jenneke van Pijpen (ABVAKABO FNV)
Grace Punongbayan
Marina Quindiagan (Princess Urduja Foundation)
Marcel Reurs (Everaert Advocaten)
Abling de los Reyes
Anacoreta de los Reyes
Evelyn Schwarz (Diaconie)
Petra Snelders (RESPECT NL)
Virginie Tonogan
Deborah Villafuerte
Sarah van Walsum (Vrije Universiteit, Faculteit Rechtsgeleerdheid)
Marjan Wijers
Eline Willemsen (BLinN)
Romaine Zuidema (BLinN)

Apologies

Laila Abid (FNV Vrouwenbond)
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Eva Cremers (Vereniging Vrouw en Recht)
Rian Ederveen (St. LOS)
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