The right to strike and the atypical worker / new forms of work

(Prof. Dr. A.T.J.M. Antoine Jacobs, Tilburg University, Tilburg, Netherlands)

The right to strike is nowadays recognised in most European states. Nevertheless it is still much debated. One of the debates is about its limitations. Another is about its scope *ratione personae.* In this last aspect many people will think immediately of the civil servants, the police forces and the military. Do they enjoy the right to strike? I would leave that aside and concentrate myself on *the right to strike and the atypical workers, or the worker in the new forms of work.*

I am formulating the theme of my paper precisely so broad because I do not want to limit it to the question: do the a-typical workers have the right to strike? Certainly, I shall start with asking myself that question but I want to see it broader. In the second part of my paper I intend to say something about the question whether atypical workers can effectuate the right to strike and about the impact of the increasing use of atypical workers on the system of industrial relations and on the right to strike.

On the notion of atypical worker I must be a bit more precise. We all have more or less an idea of the categories of workers one has to think of. If you like definitions I may refer to the definition of *non-standard forms of employment* developed in the ILO.[1] The atypical workers/workers in the new forms of work are not the same in various countries of Europe but they are in most countries comprising:

- Workers on a fixed-term contract of employment
- Workers on casual contracts, such as zero-hours contracts, labour on call, marginal part-time work, etc.
- Temporary agency workers and other contractual arrangements involving multiple parties
- Disguised employment relationships, dependent self-employment.

The numbers of those types of workers have dramatically risen in the last three decades, sometimes up to 15 or 20 percent of the labour market; among freshly concluded contracts they may already be the majority.

The first group – the workers on fixed-term contract of employment – are so unequivocally working on a contract of employment that there can be no doubt that they have the right to strike as much as all workers in standard forms of employment. And – in numbers – this still is the greatest group among the atypical workers.

Somewhat more doubts can be heard about the right to strike of the atypical workers of the second and the third group. Their contracts are not always qualified as contracts of employment. In Italy for example there were until a few months ago millions of persons in domestic households, in sport clubs, restaurants, etc. working on vouchers. And the courts in

[1] See the ILO report on Non Standard Employment around the world, Geneva, 2016.

Italy and most writers confirmed that these workers were not working on a contract of employment. The temporary agency workers are in some countries regarded as working on genuine contracts of employment, in others not. In my view the contracts of all these types of atypical workers should be qualified as a contract of employment or an employment relationship – there is work, there is payment and there is subordination. And even if for whatever reason legislators or courts think they cannot qualify these contracts as a contract of employment, nevertheless all logic points to a recognition of the right to collective action for the workers on these contracts. In the Netherlands even the employers have implicitly recognised the right of strike of the temporary agency workers.[2]

The basis for the affirmation of the right to strike for these two groups should be found in the various definitions of this right in constitutional and international sources. Most of them are using the word "worker" (CFREU, ESC), some (ICESCR; the French and Italian constitutions) do not even mention who enjoys the right to strike. However one finds an overwhelming support in all literature that the word 'worker' should be taken in a very wide sense and the same goes for the interpretation of texts in which no mention is made of who owns this rights.

For instance the European Committee on Social Rights, that is charged with the interpretation of the European Social Charter has come to a broad definition: "In the light of the travaux préparatoires the Commission arrived at the conclusion that in principle the term "worker" was intended to cover both employed and self-employed persons…….[3]

So I think for these first three categories of atypical workers there should not be any problem in recognising their right to strike. If I have to deal with the right of strike of these workers it is more in the field of the realities: can they exercise in practice the right to strike? And what impact does the massive spread of these categories of workers have on the functioning of the right to strike in the system of industrial relations? I come to those aspects in the last part of my paper.

Then, however, I come to the most debated category: the independent workers. That is a very broad category. Such persons may have a real business, they may have a small number of personnel in their service, they may be the so-called free professions (medical doctors, avocats, etc) or free lance workers like journalists. All these "workers" have in common that they do not work in subordination. And therefore it is not so obvious that they have a right to collective action.

Do the self-employed, the independent worker have the right to strike? Many people would think that this is a strange question. Why should those people strike? They are their own masters. Would not they shoot in their own feet when striking?

Nevertheless in the last decades in several countries one has seen various phenomena of strikes or other collective actions by other types of workers than those working on standard employment contracts. Most of them, however, were not staged by the atypical workers as I

[2] By way of an agreement between the majority trade union (Industriebond FNV) and the main employers' organisation ABU and Start, 1996.

[3] Although it was added "…….but that this interpretation could not be applied in cases. Where the context so requires the term "worker" may be considered as restricted to employed persons" See .A.F. Bungener, Het recht op collectieve actie voor zelfstandigen; de tandarts op de blokken, SMA 2002, p. 555.

described them above, but by the characteristic classic independent workers, the lawyers, the farmers, small businessmen, the journalists, etc.

France has seen various situations in which farmers blocked highways or threw away their products dissatisfied with the agricultural policies of their government and that of the EU. Italy has seen strikes of lawyers and medical doctors against governmental regulations. In Milano there was a strike of shopkeepers against the introduction of restrictions on the access of cars to the city centre. In Germany there was a large strike of medical doctors in 2006 and in the Netherlands we have seen protest actions of bailiffs, tribunal-interpreters, dentists, etc.

Such actions in the past often received much media coverage and they have got some legal attention in the few court cases that they have provoked. Can these court cases, although they are not concerning the atypical workers, help us in our search for the right to strike of the atypical workers?

Collective actions staged by the self-employed atypical workers are not so many but this may become a rising phenomenon:

In Italy the strike of both self-employed and employee taxi-drivers against the advancement of Uber; in The Netherlands the actions of the franchisees of the supermarket chain Albert Heijn and of PostNL, and a spontaneous action of the bogus(sham) independent postmen, at European level actions of self-employed drivers against new draft rules in road transport.

In preparing my paper I was much puzzled by the similarities and the differences between the collective actions between the classic independent workers – lawyers, farmers, journalists, etc. - and the actions staged by the self-employed atypical workers, like a gardener, a plumber, an IT-specialist, a musician, a disc jockey, a voice-over actor, a clown, a mannequin, a personal shopper, a pizza-courier, a person transporting people or goods with his own car, etc. My God, the world seems to be full of them.

Then I discovered that – whatever the differences there may be between those two groups of old and new self-employed - when it comes to the subject of collective actions they seem to have much in common. And that is that such persons are not as easily as the standard employee taking collective actions. The standard employee can more easily participate in a strike because he has so many colleagues nearby who all have one and the same opponent to put pressure on: the employer. However, who is the opponent of all these independently working persons, whether they are classic or atypical? They do independently business with a large variety of opponents. It makes no sense to put pressure on those various opponents by strike action – it indeed mostly would harm their own businesses; their colleagues may profit from such actions. Collective actions of independently working persons only make sense if they have a large opponent in common. And that from time to time happens. It may be the government, a municipality, the European Commission, an insurance company, etc. that is dominating the rule-setting or the price-setting on the markets in which these independents must operate. This is often the environment in which you find the collective actions of doctors and lawyers. Or it may be large companies and institutions which hold sway over the conditions that most independently working persons in such sectors can obtain: a great landlord who makes use of numerous independent gardeners, a radio/tv company that employs an entire army of independent reporters and photographers, an internet-company that organises independent persons for transporting people (Uber), a Postal service that sends out

independent persons as postmen, a big farmer who has the cherry-picking done by independent persons, an orchestra which frequently fills vacancies by independent musicians as replacements; a leading editing house that engages freelance translators; a European institution making large scale use of independent interpreters.

In all these cases one can see the ratio for collective actions by independent workers and on that very moment the difference seem to vanish between the classic independent workers in the free professions like the lawyers, the freelance journalists and the small businessmen in farming or commerce on the one hand, and the rising numbers of independent workers in the modern services economy, the self-employed gardener, plumber, IT-specialist, voice-over actor, etc. on the other hand.

Interestingly already in the 1960s and 1970s Italian literature had come to the conclusion that the right to strike should be recognised to everyone who are in a condition of contractual and economic weakness.[4] And this was affirmed by the Italian Constitutional Court in 1975[5] and the Italian Corte di Cassazione in 1978 which have given a wide interpretation to the ownership of the right to strike. In the words of the C. di Cassazione[6]: …..the right of strike can be exercised not only within the ambit of the subordinate employment relationship in strict legal technical sense but also each time in which the one who performs a certain work is in a weak position towards his opponent…….

Nevertheless the Italian Corte di Cassazione avoided to lump together the right to strike of the classic independent workers and the independent workers in the modern service economy. It only recognised the right to strike for the category of the "liberi professionisti lavoratori parasubordinati" (free professions in para-subordination). The "liberi professionisti lavoratori autonomi" ("free professions in autonomy) do not have the right to strike based on art. 40 It. Const (the right to strike) but the "right to abstention" based on art. 18 (the right to association).[7]

In France it was Alain Supiot who in 2001 advocated the recognition of the right to collective action for all independent workers who are in a situation of "parasubordination".[8] This idea was supported in 2008 by the state committee on a statute for the protection of economically dependent workers (the Antonmattei/Sciberras Committee).[9] And in 2016 the Loi El Khomri, amending the French Civil Code, devoted a special article to "social guaranties during "concerted stoppages for the defence of the professional demands of workers connected to the

[4] M. Forlivesi, La sfida della rappresentanza sindacale dei lavoratori 2.0, in Diritti delle Relazioni industriali, Numero 3/XXVI, 2016
[5] C. Cost. 17.7.1975, nr. 222.
[6] "...che il diritto di sciopero può essere esercitato non solo dell' ambito del rapporto di lavoro subordninato in senso-technico-giuridico, ma anche tutte le volte che si verifichi una posizione di debolezza del prestatore d'opera nei confronti della controparte, dalla quale deriva la "predisposizione al conflitto" che da luogo a quel "diritto al conflitto" costituente il fondamento stesso dell'organizzazione sindacale e, quindi, del diritto di sciopero". Cass. 29.6.1978, n. 3278.
[7] C. Cost. 27.5.1996, nr. 171/96; see B. Caruso e Gabriella Nicosia, Il conflitto collettivo post moderno: lo "sciopero" dei lavoratori autonomi, WP C.S.D.L.E. Massimo D'Antona, IT – 43/2006, p. 16; M.T. Carinci, Attività professionali, rappresentanza colletiva, strumenti di autotutela, WP C.S.D.L.E. Massimo D'Antona, IT – 69/2008, p. 26.
[8] A. Supiot, Revisiter les droits d'action collective. Droit Social 2001, p. 696.
[9] Committee Antonnmattei/Sciberras, Le travailleur économiquement dépendant. Quelle protection?, November 2008, p. 17/22.

so-called numerical platforms like Uber, Delivroo, etc.[10] However, also in this text, like in Italy, the words “droit de grève” were avoided for these independent workers.

How can we defend the right to strike for independent workers? Can we defend it with the same arguments as the right to strike for standard forms of employment?

For the workers on the standard forms of employment the right to strike is mostly argued because those workers standing alone are not powerful enough to negotiate decent working conditions. Only by uniting forces they can do so and then they should have the weapon of the strike; without it collective bargaining would be collective begging, as the German Federal Labour court once said. It is submitted that this reasoning also applies to all independent workers who are confronted with a single mighty opponent.

For those who are inclined to derive the right to strike from the right to trade union association[11] it may be important to know that the ILO Committee of Experts of the Application of Conventions and Recommendations, interpreting the personal scope of ILO Conv. 87 (freedom of association), took de position that this Convention is applicable to all workers, without distinction whatsoever, including self-employed workers and those employed under civil law contracts.[12]

The opinion of the European Court of Human Rights - in the cases Demir[13] end Enerji[14] - is, that if the right to trade union association is recognised it should follow that one also has the right of collective bargaining and the right to strike.

However, this reasoning was not followed by the Court of Justice EU in the FNV-Kunsten case.[15] In this case the Court recognised the right to collective bargaining for “false self-employed”, thus implicitly denying it for the genuine independent workers. Why? The reasoning is that the right to collective bargaining for genuine independent workers would violate the EU anti-competition rules, which forbid “combinations” of enterprises. It is the same conflict between the fundamental social rights and the freedoms of the market, which we all know since the CJEU judgments in the Viking[16] and Laval[17] cases.

When a Dutch court had to rule in the postmen case the Dutch judge did not follow the line of thinking of the ECtHR (the right to trade union association implies the right to collective bargaining which implies the right to strike) but he followed the reasoning of the CJEU: no right

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[10] Art. 7342-5 CdT: Les mouvements de refus concerté de fournir leurs services organisés par les travailleurs mentionnés à l'article L. 7341-1 en vue de défendre leurs revendications professionnelles ne peuvent, sauf abus, ni engager leur responsabilité contractuelle, ni constituer un motif de rupture de leurs relations avec les plateformes, ni justifier de mesures les pénalisant dans l'exercice de leur activité.

[11] See the ECtHR Apr. 21, 2009, No. 68959/01 (Enerji Yapi-Yol Sen v. Turkey.
[12] See ILO Committee – Report No. 363, March 2012 case Poland, nrs. 1066-1087.
[13] ECtHR November 12, 2008, App. No. 34503/97 (Demir & Baykara).
[14] ECtHR April 21, 2009, App. No. 68959/01 (Enerji Yapi-Yol Sen).
[15] CJEU 4 December 2014, C-413/13 (FNV-Kunsten).
[16] CJEU 11 December 2007, C-438/05 (Viking).
[17] CJEU 18 december 2007, C-341/05 (Laval).

to collective bargaining for genuine independent workers, therefore no right to collective action for genuine independent workers. Only for the false-self-employed.[18]

In my view that is a much to narrow interpretation. The right to collective bargaining and the right strike need to be recognised not only for the false self-employed but also for the genuine self-employed. In my view it is acceptable that – because of the rules on free competition - the genuine self-employed should not be to allowed to make price agreements to be applied to the general public. However when the genuine self-employed are confronted with a very mighty opponent they must be free to have a collective bargaining with that opponent and to take collective actions against it.

That's all about the right to collective action for the self-employed.

I return to the first three categories of atypical workers of which I said: whether they have the right to strike is – in my opinion – not the real problem. They have. I think the core problematic of the right to strike of all these categories of workers lies in the problem whether they can exercise the right to strike.

To effectively exercise the right to strike there must be a good organisation. However, all those independent workers are they as much unionised as the standard workers? And how are they unionised?

The rate of unionisation of atypical workers is presumably smaller than of those in standard forms of work. The traditional unions have difficulties of organising non-standard workers. But are they welcome in the traditional unions? Are these unions prepared to embrace the atypical worker and to defend the specific interests of these workers? Trade unions leaders may confirm their interest in representing the atypical workers, but the rank and file of the trade unions may not always welcome the atypical workers and the atypical worker may not feel at home in the traditional trade unions. So also special unions for atypical workers as well as more "fluid" forms of organisation (such as "flash-mobs") have emerged. However, also the special unions have difficulties in attracting great numbers and they have not much experience in organising strikes and in harvesting the fruits of a strike in a good collective agreement. That is the first weakness.

Another weakness in the position of atypical workers is that the main instrument of the right to collective actions, the strike, may be more difficult to organise in a legal way or it may not be the most effective form of collective action for the atypical workers. In Britain for example there are all those rules about ballots to be hold before a collective action can be legal, which may impose material obstacles for atypical workers to initiate a legal strike. The same goes for the limitations on secondary action and sympathy strikes. [19] In the Netherlands the judge in the already mentioned postmen case[20] was prepared to assume that the strikers were false self-employed and thus could have the right to strike, but in this case the collective actions of the postmen were spontaneous, wild actions, and the strikers were blocking the entrances of the post stations. Such actions were, according to the judge in this case, not covered by the fundamental right to strike.

[18] Tribunal Midden-Nederland, 20 July 2015, ECLI:NL:RBMNE:2015:5373
[19] Valerio de Stefano, Non-Standard Work and Limits on Freedom of Association: A Human-Rights-Based Approach, Industrial Law Journal, 2016, p. 16-20.
[20] Tribunal Midden-Nederland, 20 july 2015, ECLI:NL:RBMNE:2015:5373

Obviously, if the classic forms of legal collective actions are often not effective for actions of the atypical workers, they more easily than workers in standard relationships may have recourse to other types of collective actions which are under classic dogmatism less legitimate than the strike: Blocking the highways, intimidating fellow workers, not transferring received payments by insurance agents or paying the franchise-fees due by the franchisees, etc. So perhaps recognising the right to collective actions of atypical workers may require more than only that right in principle. It may also require that forms of collective action are justified that until now were not considered as legitimate forms of collective actions for the standard workers.

Third problem: many jurisdictions have created certain protections of the striking workers, that are useful for the standard workers – such as the prohibition of the dismissal of workers that participate in a legal strike. It is doubtful whether those protections are really a shelter for the atypical workers. Standard workers know that they will not being paid during a legal strike but they need not to fear a dismissal because of a legal strike. The atypical worker will not be dismissed either, but he must in reality fear that participating in a strike may be penalised later by a refusal to extend his contract or to provide him further work.[21] Atypical workers are exposed to some mechanisms that may magnify employers' managerial prerogatives.

Then take the position of the temporary agency workers in particular. As I said in the Netherlands already in the 1990s the trade unions concluded an agreement with the largest employers association of temporary agencies that their temporary agency workers would not be harmed if they join in a strike in a user firm. They also have the right to refuse to take over the work of strikers of a user firm. These rights sound nice, but they do not solve the uncomfortable position of temporary agency workers during a strike in the user firm. If the temporary agency worker joins in the strike he is bound to lose his right on pay like the standard worker. But why should he make that offer? Standard workers are also losing the pay but they may hope to see the rewards of their offer in a better collective agreement. The temporary agency worker however is less certain that he ever will see the fruits of the strike in a better collective agreement because he stands a big chance that a next user firm is not bound to that collective agreement.

But then: if he for this reason refuses to join in the strike he is also not sure of his payment if he cannot in fact perform his job because of the strike – this depends on the law on the right to pay of non-striking workers, which contains many uncertainties in various jurisdictions.[22] And if the agency worker can perform his job he will be seen by the other workers as a scab/a blackleg.

Having written that I come to the last theme of my paper, viz. whether the very phenomenon of the increasing number of atypical workers is undermining sound industrial relations and the right to strike of the standard workers.

Organising strikes has become more onerous the more workplaces are filled by atypical workers. Such workplaces impose excessive hardship on the trade unions in organising a lawful strike because in such workplaces the workers have become more detached from their colleagues, they are less accessible for the trade unions and other workers representatives. The

[21] In the case of the Dutch postmen-strike Post NL indeed refused to prolong the contract of services with the militant postmen. See Valerio de Stefano, op. cit., p. 6-7.
[22] A.T.J.M. Jacobs, The law on Strikes, in R. Blanpain, Comparative Labour Law and Industrial Relations in Industrialised Market Economies, XIth edition, Kluwer, Alphen a/d Rijn, 2014, p. 780-782.

differences of interests between standard employment workers and the atypical workers is frustrating the growth of solidarity and may even cause tension between these groups. There may be frictions and reluctance of the standard unionised workforce to work together with the atypical workers exactly because the standard workers may fear that the atypical workers will not be loyal with them during a strike.

One of the special problems caused by the mass-employment of atypical workers is in the field of the deployment of blacklegs/scabs.

In the USA the courts have recognised the right of employers to keep their company running by bringing in replacement workers.[23] This employment of blacklegs/scabs is traditionally very much criticised by the trade unions and their members. In most European countries this is seen as a violation of the right to strike. As a consequence of this in several jurisdictions the temporary agencies have been prohibited to send replacements to workplaces which are on strike.[24] However this is not always a watertight prohibition of the deployment of replacements. Our modern labour markets have seen the rise of firms which are specialised in taking up all the sorts of activities that big firms are nowadays outsourcing: the catering, the security, the cleaning, IT-work, etc. When workers are going on strike, their managers may react by concluding a temporary outsourcing-agreement with another firm (not being a temporary agency) to have these activities continued, thus circumventing the prohibition of replacement of striking workers by temporary agency workers.[25] So the old enemies of the trade unions, scabs/blacklegs, have acquired a new face thanks of the practice outsourcing.

We may conclude that the increasing use of atypical workers and of the practice of outsourcing is disturbing the balance of our traditional systems of industrial relations. The best way of restoring that balance may be to reduce the outsourcing and the number of atypical workers. High numbers of atypical workers as well as the fragmentation of the workforce through outsourcing and subcontracting – the fissurisation of the workplace - leads to limitations of the power of trade unions and workers' representatives and are threatening the effective exercise of the right to strike. Unfortunately that is not recognised by all those politicians and economists who do not cease to pressure for more flexibility on the labour markets.

I agree with Di Stefano's conclusion, that existing standards of regulation of freedom of association and related collective rights are failing to keep pace with the growth of the atypical workforce in modern labour markets. They need to be revised.[26]

[23] Supreme Court NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 333, 1938.
[24] See whereas nr. 20 of Directive 2008/104/EC: The provisions of this Directive…..are without prejudice to national legislation or practises that prohibit workers on strike being replaced by temporary agency workers.
[25] See for a Dutch case Court of Amsterdam, 24 January 2008 (NedTrain), JAR 2008/105.
[26] E. di Stefano, op. cit. p. 22.