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JOB SECURITY OR EMPLOYMENT SECURITY: WHAT'S IN A NAME?

Nuna Zekic¹

Abstract

The main aim of the article is to survey and conceptualise the place of employment security in labour law, and to explore a number of important legal questions relating to this concept. After scrutinising the notion of employment security, the author endorses the view that job security that exists on the basis of dismissal law is more complex than reform proposals usually suggest. In addition, the author argues that dismissal protection serves other goals and interests than job security alone and that these aspects of dismissal protection legislation cannot be replaced by (an increased) employment security (coupled with income security). A further development of true employment security can, however, certainly complement job security and benefit workers, since they have never had absolute job security and this job security seems to be eroding.

Keywords: dismissal protection; flexicurity; employability; EU employment policies; fundamental social rights

1. INTRODUCTION

Employment security and *employability* have become important notions in the labour market policies in recent years. They are often used and proposed as an alternative to *job security*, which is generally understood as the security of staying in the same job with the same employer. Job security is believed to be a traditional form of security for workers and a notion that has dominated employment relations until recently. Employment security, on the contrary, is presented as a new notion: one that needs to be further developed. It is usually explained as the possibility to easily find a job at every stage of active life. While assuming that lifetime employment is eroding, many politicians and policy makers are increasingly claiming that workers' income security should not depend (entirely) on their current employment – their current job – but on their ability to find new employment on the labour market. Workers should derive their security, in other words, from their employability. Some scholars call this type of security *employability*

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security or *labour market security*.² In this line of reasoning, legal norms that govern the employment relationship, whether they are based on legislation or collective agreements, should be steered towards employment security instead of job security. In practice, that usually means less dismissal protection, but more investments in workers' employability and more (public) assistance for workers to make the necessary job-to-job-transitions preferably without becoming unemployed. The goal is eventually to have more labour market mobility and as less unemployment as possible. Individual employability and mobility (or transitions) are the two main pillars of this employment security policy.

Replacing the notion of job security with employment security forms one of the core aims of the European Commission's *flexicurity* policy. Employment security represents the 'security side' of flexicurity. Although heavily criticised by a stream of labour law scholars, flexicurity is still the Commission's guiding principle for the European employment policies. Many Member States of the EU have indeed taken flexicurity as the basic principle for the 'modernisation' of labour law.³ However, also taken apart from the flexicurity context, employment security as a replacement of job security remains an attractive idea to those who believe that businesses need flexibility in order to stay economically competitive, but who also believe that more flexibility can increase the risk of unemployment for workers. Employment security, explained as enhanced employability and better and quicker job-to-job-transitions, can in an easier way be combined with the desired flexible labour market than job security can. The appeal of the concept of employment security extends further than the EU flexicurity policy.⁴

It is clear that the notion of employment security touches the core of labour and employment law, namely the question: how should the workers be protected? At the same time, the notion of employment security is still very much underdeveloped, at least in the legal doctrine. In fact, both job security *and* employment security are ambiguous phrases; they may even be called elusive. There exist no fixed (legal) definitions. What can the 'capability to easily find a job' mean in the legal sense, and more precisely, in the employer-employee relationship? Moreover, it is far from clear if and how this notion fits into the existing framework of labour law. To what extent can we say that the current labour and employment laws are directed towards job or employment security? Can we identify any rights or duties in the positive labour law that in any way seem to enhance the objective of employment security, or is it true that job security is labour law's (only)

² See, e.g., P. Auer, P., 'What's in a Name? The Rise (and Fall?) of Flexicurity', *Journal of Industrial Relations*, 2010 Vol. 52, No. 3, p. 381.

³ See, e.g., M. Rönmar and A. Numhauser-Henning, 'Swedish Employment Protection in Times of Flexicurity Policies and Economic Crisis', *International Journal of Comparative Labour Law and Industrial Relations* 2012 Vol. 28, No. 4, p. 443-468.

⁴ See, e.g., for an Australian approach to flexicurity, M. Vranken, 'Employee Protection: An Outmoded Notion in Australian Labour Law?' *International Journal of Comparative Labour Law and Industrial Relations*, 2010, Vol. 26, No. 2, p. 231-246.

objective? Furthermore, how is one to judge whether one objective is better than the other when we take the foundations of labour law as the starting point of debate?

The purpose of this article is a general exploration of this concept in its legal context. The central, overarching question is: How does employment security as a policy objective relate to the labour law framework? By 'labour law framework' it is meant all legal norms that govern the employment relationship. By placing this concept in its legal framework, we can analyse its possible legal meaning, but also, and more importantly, we can explore the questions the proposed shift from job security to employment security brings up for the scholarly legal debate. The primary purpose is not to search for definitive answers, but to identify questions that can be made the subject for continued discussion. A justification for this thorough inquiry into the notion of employment security can also be found in the labour law's own 'identity crisis'.⁵ Precisely because employment security seems to pose more questions than answers for labour law, while at the same time being a popular policy term that touches the very much debated core of labour law, it deserves to be included in that very debate.

The next section firstly explains the notions of job security and employment security in their policy framework. For the purpose of clarity, they are considered in the context of European Union's flexicurity policy. In order to pinpoint as precisely as possible what these notions (can) mean in the legal context, the third section further zooms in on the two notions and seeks to discover to what existing rights and duties in labour and employment law these notions are linked. The fourth section addresses the question to what extent one can claim that the current labour and employment laws are indeed directed towards job or employment security. It is clear that both notions fall within the scope of employment policy, meaning the policy of a State to create opportunities for its people to gain employment and income. Employment policy has a legal footing. It is formulated as a fundamental right in several legal conventions: *the right to work*. In an attempt to place the two notions within the labour law framework, the notions are addressed through this particular lens in the fifth section of this article. An alternative lens through which the notions of job security and employment security can be investigated in their legal context is introduced in the same section. In both cases, the usefulness of these approaches is examined in the sense that it is sought to determine what these approaches can bring to the debate. The sixth section explores whether turning to the 'foundations' or 'principles' of labour law instead of legal notions or theories, can provide useful arguments for the question whether employment or job security should be the objective for labour law. The seventh section contains some concluding remarks

⁵ B. Langille, 'Labour Law's Theory of Justice' in G. Davidov and B. Langille (eds.), *The idea of labour law*, Oxford: Oxford University Press 2011, p. 101: '(...) many lawyers agree (...) that labour lawyers and labour law face an identity crisis.'

about the place of employment security as a policy objective in the labour law framework.

2. EMPLOYMENT SECURITY IN THE FLEXICURITY DISCOURSE

The EU flexicurity policy has become quite well-known in academic literature. This is not surprising, since flexicurity is the guiding principle in the European Employment Strategy (EES) and the Employment Guidelines.⁶ In addition, the European social policy seems to be guided by the same flexicurity idea.⁷ A key document on flexicurity is still the Communication from the European Commission from 2007 on the ‘Common principles of flexicurity’.⁸ In the recent years – perhaps due to the financial crises – the European Commission has not issued new documents on flexicurity. Some even say that the consensus on flexicurity as a guiding principle has broken down.⁹ The concept flexicurity is, however, again mentioned in the ‘European Pillar of Social Rights’.¹⁰ Flexicurity is, moreover, still very much ‘alive’ in labour law literature.¹¹

Flexicurity’s impact lies mainly in the principle – or promise – that both flexibility and security in the labour market can be enhanced simultaneously. Two questions are usually addressed when flexicurity is debated in the literature: a) whether the European policy truly pursues both flexicurity and security, since its use in practice seems to induce merely deregulation of labour law;¹² and b) what this policy precisely implies. Flexibility and security can indeed have different meanings.¹³ A broad scale of subjects and policies can be gathered under this heading.¹⁴ It is at first sight an open and even vague term; it is nevertheless controversial. Flexicurity reflects the bigger ambition to combine the

⁶ Most recent guidelines: Council Decision EU 2015/1848 of 5 October 2015, L 268/28.

⁷ The term also appears in ‘hard law’: e.g. Temp Agency Work Directive (2008/104/EC).

⁸ *Common principles of flexicurity: more and better jobs through flexibility and security*, COM (2007) 359.

⁹ G. Schmid, ‘Sharing Risks of Labour Market Transitions: Towards a System of Employment Insurance’, *British Journal of Industrial Relations* 2015 Vol. 53 No. 1, p. 70.

¹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 8 March 2016: Launching a consultation on a European Pillar of Social Rights, COM (2016) 127 final. It is interesting to note that in this document, job security is mentioned, and not employment security.

¹¹ See, e.g., S. Laulom, ‘Dismissal Law Under Challenge: New Risks for Workers’, *ELLJ* 2014 Vol. 5 No. 3-4, p. 231-254; P. Loi, ‘Risk: A New Paradigm to Face Market Challenges’, *ELLJ* 2014 Vol. 5 No. 3-4, p. 390-409; I. Senatori, ‘Occupational Welfare Arrangements Negotiated at the Transnational Level’, *ELLJ* 2015 Vol. 6 No. 3, p. 215-238; E. Keane, ‘The Flexicurity System in Ireland’ *ELLJ* 2016 Vol. 7 No. 2, p. 310-320; G. Davidov and E. Eshet, ‘Intermediate Approaches to Unfair Dismissal Protection’, *Ind Law J* 2015 Vol. 44 No. 2, p. 167-193.

¹² E.g. J. Julén Votinius, ‘Young Employees – Securities, Risk Distribution, and Fundamental Social Rights’ *ELLJ* 2014 Vol 5 No 3-4, p. 366–389.

¹³ T. Wiltshagen, F. Tros, and H. van Lieshout, ‘Towards ‘flexicurity’?: balancing flexibility and security in EU Member States’, *EJSS* 2004 Vol. 6 No. 2, p. 113-136.

¹⁴ Auer has called it a ‘catch all’ concept; see P. Auer, ‘What’s in a Name? The Rise (and Fall?) of Flexicurity’, *Journal of Industrial Relations* 2010 Vol. 52 No. 3, p. 374.

economic and social goals in the European integration policy.¹⁵ The criticism that flexicurity receives is usually closely linked to how the EU integration policy is seen in general. There is a widespread view in labour law literature that the European social policy should always be read in the context of economic integration: the economic goals are always given priority by the EU.¹⁶ The EU flexicurity discourse has been criticised in the same manner for focusing predominantly on labour market flexibility and deregulation.¹⁷

Having a closer look at the *security side* of flexicurity, we can see that the literature distinguishes four elements of security on which the EU flexicurity is based:¹⁸

- Job security – the expectation regarding the job tenure of a specific job;
- Employment security/employability security – the expectation regarding remaining in work (not necessarily with the same employer);
- Income security – the degree of income protection in the event that paid work ceases;
- Combination security – the ability/inability to combine paid work with other private or social activities.

The shift from job security to employment security is probably the most controversial part of this already controversial policy. In the process of arriving at a common set of flexicurity principles in 2007, the Commission was compelled to somewhat weaken the initial strong focus on transition from job security to employment security.¹⁹ We can still see, however, that flexicurity promotes a type of security that is for a large part based on people's ability to adapt to changes on the labour market.²⁰ This explains the emphasis on lifelong learning and assistance with job-to-job-transitions. Moreover, it is commonly believed in economic literature that such a type of security would bring an optimal allocation of labour in sight that increases productivity and job creation.²¹ It is exactly

¹⁵ F.H.R. Hendrickx, 'Regulating Flexicurity and Responsive Labour Law', in F.H.R. Hendrickx (ed.), *Flexicurity and the Lisbon Agenda. A Cross-Disciplinary Reflection*, Antwerpen: Intersentia 2008, p. 132.

¹⁶ See, e.g., C. Barnard, *EC Employment Law*, Oxford University Press 2006, p. 7-10.

¹⁷ E.g. Rönnermar and Numhauser-Henning 2012, p. 446.

¹⁸ Wilthagen, Tros, and Lieshout 2004, p. 115.

¹⁹ M. Mailand, 'The common European flexicurity principles: How a fragile consensus was reached' *European Journal of Industrial Relations* 2010 Vol. 16 No. 3, p. 241–257.

²⁰ See, e.g., G. Schmid, *Full employment in Europe. Managing labour market transitions and risks*, Edward Elgard 2008, p. 324-325; A. van den Berg, 'Flexicurity: what can we learn from the Scandinavian experience?' *EJSS* 2009 Vol 11 No 3, p. 254; Loi 2014, p. 395; T. Novitz and P. Syrpis, 'The place of domestic work in Europe', *ELLJ* 2015 Vol. 6 No. 2, p. 124.

²¹ See, e.g., C. Ramaux, 'Flexicurity : quels enjeux théoriques ?', *Economie et institutions* 2006 No 9 - 2e Semestre, p. 14; *OECD employment outlook 2010: moving beyond the jobs crisis*, p. 167-210.

this type of security that the European Commission has envisaged for some time. In 1997 the Commission considered the following.²²

‘There is a need for a radical rethink of all relevant labour market systems – employment protection, working time, social protection and health and safety – to adapt them to a world of work which will be organised differently, in which the concept of security for workers has to be reformulated, focusing more on security based on employability in the labour market rather than security in a specific job.’

Even though it must be noted that some nuances have been introduced as a result of the economic crisis²³ and the flexicurity policy has a broad(er) agenda, it is undeniable that the Commission deliberately reduces the importance of job security in favour of employment security.²⁴

‘The main thrust of the EU recommendation on flexicurity is to encourage a shift from job security towards employment security.’²⁵

The obvious reason is that employment security can more easily be reconciled with a flexible labour market than job security can, as it will be further elaborated below. However, the Commission also argues that the workers themselves have a greater need for employment security rather than job security ‘as fewer have the same job for life.’²⁶

The main elements of employment security are, according to the Commission, investments in training in order to boost the employability of individuals on the one hand, and on the other hand, income support through unemployment benefits ‘carefully balanced’ with ‘an appropriate “activation” strategy designed to facilitate transitions into employment and boost career development’.²⁷ Employability and job-to-job-transitions are in short two main pillars or elements of employment security. For this last element, the Commission has often used Denmark as an example, because of its extensive Active Labour Market Policies (ALMP). This example has been criticised for being too costly; for example, the maximum duration of benefits has been reduced in Denmark in recent years.²⁸ Arguably, flexicurity envisions a far more extensive model of social safety than

²² EC, *Employment in Europe 1997*, COM (97) 479 fin., p. 20. Also D. Ashiagbor, ‘Flexibility and Adaptability in the EU Employment Strategy’, in: H. Collins, P. Davies, and R. Rideout, *Legal Regulation of the Employment Relation*, London/The Hague: Kluwer Law International 2000, p. 392.

²³ EC Communication, *An Agenda for new skills and jobs: A European contribution towards full employment*, COM (2010) 682 def., 23 November 2010.

²⁴ See, e.g., J. Heyes, ‘Flexicurity, employment protection and the jobs crisis’ *Work, Employment & Society* 2011 Vol. 25 No. 4, p. 644.

²⁵ EC, *Employment in Europe 2006*, p. 78.

²⁶ COM (2007) 359 fin., p. 3.

²⁷ *Idem*, p. 7.

²⁸ Heyes 2011, p. 650.

has ever existed in many Member States.²⁹ In addition, the effectiveness of the activation measures has been called into question.³⁰ ALMP are, however, not the only way in which assistance transitions on the labour market can be facilitated. The Commission sees an important role for the social partners in this regard.³¹ For example, in the framework of collective bargaining, it has been purposed to exchange (long) notice periods or (high) severance payments for more employability advancing measures.³²

The first element, employability, is in fact a concept with a similar meaning to employment security. Employability typically refers to ‘the ability of workers to remain attractive for the labour market in terms of their skills and qualifications, by reacting and anticipating changes in tasks and the work environment, facilitated by the human resources development opportunities offered to them’.³³ This concept implies – even more than employment security – a normative move ‘from a systemic view of the labour market to a focus on individuals and their qualities’.³⁴ It has been labelled as a concept that characterises workers ‘as yet another mobile factor of production, to be reallocated as and when the market so determines’.³⁵ Indeed, if the concept of employment security would solely mean *employability security*, then labour relations are strongly individualised and most of the responsibility for finding employment is placed on the individual.³⁶ However, employment security seems to entail more than just employability, since it also underlines the need for actual assistance with transitions between jobs. It also seems to imply a degree of responsibility on the employers’ side in terms of investments in employability. In addition, the term itself carries in it a stronger sense of ‘safety’ or even of an ‘assured future’ because of the word *security*. Nevertheless, to a large degree it remains unclear exactly how much more it is than a policy aimed at advancing employment opportunities.

²⁹ Julén Votinius 2014, p. 371.

³⁰ W. van Oorschot, ‘Balancing work and welfare: activation and flexicurity policies in the Netherlands, 1980–2000’ *International Journal of Social Welfare* 2004 Vol. 13 No. 1, p. 25.

³¹ COM (2007) 359 fin., p. 8.

³² E.g. A. Baris, *De grondslagen van de ontslagvergoeding*, Deventer: Kluwer 2009, p. 232.

³³ Eurofound, *Employment Security and Employability: A Contribution to the Flexicurity Debate*, Dublin: European Foundation for the Improvement of Living and Working Conditions 2008, p. 14. Also see T. Berglund et al, ‘Is job insecurity compensated for by employment and income security?’ *Economic and Industrial Democracy* 2014, Vol. 35, No. 1, p. 168.

³⁴ C. Garsten and K. Jacobsson, ‘Learning to be employable: An introduction’ in: C. Garsten and K. Jacobsson (eds.) *Learning to be Employable: New Agendas on Work, Responsibility and Learning in a Globalizing World*, Basingstoke: Palgrave Macmillan 2004, p. 2.

³⁵ M. Bell, ‘Between flexicurity and fundamental social rights: the EU Directives on atypical work’ *European Law Review* 2012 Vol. 37 No. 1, p. 35.

³⁶ M. Rigaux, *Labour Law or Social Competition Law? On labour in its relation with capital through law*, Antwerpen: Intersentia 2009, p. 8.

3. PLACING JOB AND EMPLOYMENT SECURITY IN THEIR LEGAL CONTEXT

As important as both terms are, it can be surprising that they have no defined definitions. This is probably due to the fact that in most Member States they are not legal terms in the sense that they have statutory definitions. Both terms are, however, quite often used in the English language legal literature,³⁷ but even there the terms tend to get mixed up. The official documents on flexicurity have introduced even less familiar terms in other languages. Employment security is translated in German as '*Beschäftigungssicherheit*', and job security as '*Arbeitsplatzsicherheit*'.³⁸ The French translation is hazier: '*sécurité dans l'emploi*' for employment security, and '*sécurité de l'emploi*' for job security.³⁹ It is easy to see that these terms can cause confusion. The distinction is, however, very important, since the EU policy clearly favours the one over the other, as was explained above. So, what do these terms mean exactly?

Both terms are clearly related to employment, or in more general terms, paid work.⁴⁰ Both terms refer to the probability that an individual will maintain to gain an income true paid work *in the future*. Both terms are, therefore, related to the risk of unemployment.⁴¹ Both concepts do not, however, involve the risk of unemployment caused by disability; they in principle assume the worker is healthy and able to work.⁴² The difference is that job security refers to the continuity of one's current employment, while employment security refers to the continuity of one's career. The concepts by themselves are, therefore, certainly not mutually exclusive: a worker can have both job and employment security. However, like argued before, the Commission does purpose a shift from job security to employment security.

Auer states that there are flaws in the flexicurity discourse regarding these terms. In line with the usage of the terms in industrial relations and labour economics, *job security* should relate to the probability of retaining employment in the *current job*, and *employment security* to retaining a job with the *current employer*.⁴³ Arguably, this shift already took place in the 1980s. It implies more internal flexibility and a duty for the redundant employee to accept other work offered to him by his employer if that work is

³⁷ See, e.g., H. Collins, 'The Meaning of Job Security', *Industrial Law Journal* 1991 Vol. 20 No. 4, p. 227-239.

³⁸ The Dutch translation is similar: '*werkzekerheid*' vs. '*baanzekerheid*'. The same can be said for Swedish: '*sysselsättningsstrygghet*' vs. '*anställningsstrygghet*'.

³⁹ The Spanish translation seems to be more precise: '*seguridad del empleo*' vs. '*puesto de trabajo*'.

⁴⁰ A potential social security payment is reserved for 'income security', as shown in the flexicurity matrix above.

⁴¹ Loi 2014, p. 405.

⁴² Disability as a cause for unemployment is in most cases not part of the job security/employment security discourse.

⁴³ Auer 2010, p. 380.

considered 'suitable'. What the EU flexicurity policy envisions should, according to Auer, be called, *labour market security*, since according to him that is the decisive and critical shift at hand.

Auer's arguments nicely illustrate one of the possible confusions caused by these (non-legal) terms. I would argue that in the legal doctrine, *job security* has become an established term, but it is usually understood in a broader sense than Auer explains. It does not (longer) entail the security of keeping the exact same job or position with the employer. It rather refers to the legal right of employees not to be unfairly deprived of employment.⁴⁴ Job security is thus dependent on the level of dismissal protection (designed either through legislation or collective agreements) and on the type of the employment contract. This is how job security is nowadays used in the legal literature.⁴⁵ However, in countries where there are (still) strict job demarcations in collective agreements, there can be less room for functional flexibility and job security can still mean the security of keeping the same position within the company.⁴⁶

The Commission defines employment security as 'the possibility to easily find a job at every stage of active life and having a good prospect for career development in a quickly changing economic environment'.⁴⁷ At first sight, this definition does not seem to relate to *any* legal norms stemming from labour and employment law, because it does not refer to the employer-employee relationship. Instead, it refers to the worker's chances of finding employment on the labour market. Perhaps *labour market security* would indeed be a more adequate term, since the term itself provides somewhat more clarity on what is envisaged. For legal interpretations, however, a name change would not be sufficient, since we still need to know what labour market security means or can mean *in legal terms*. If job security relates to dismissal protection, to what does employment security or labour market security relate?

For employment security to have a 'labour law footing', it needs to involve specific rights or duties between an individual employer and an individual employee. Employment security, as defined by the Commission, firstly relates to matters as recruitment, placement, employment services, and vocational guidance. Matters that are traditionally placed in the policy sphere, and to a lesser extent in the labour law sphere. The only existing 'right' that employment security immediately brings to mind is the *right to work*, which only applies between the individual parties in a limited manner, as will be

⁴⁴ This will, roughly speaking, usually contain the right not to be dismissed unless there is a 'just cause' and unless the 'right procedure' has been followed. The questions 'how much job security a worker has?' and 'what are the main legal norms that constitute job security?' are addressed in the fourth paragraph.

⁴⁵ See, e.g., Davidov and Eshet 2015, p. 167.

⁴⁶ M. Rönmar, 'The Managerial Prerogative and the Employee's Obligation to Work: Comparative Perspectives on Functional Flexibility', *Industrial Law Journal* 2006 Vol. 35 No. 1, p. 71.

⁴⁷ COM (2007) 359 fin., p. 4.

explained below.⁴⁸ Auer's definitions of the related terms prove, however, to be useful in this regard, since his explanation forces us to recognise that dismissal law nowadays implies a degree of internal flexibility both on the side of employer as on the side of the employee. Especially where economic dismissals are concerned, the rules on dismissals will in most Member States require the employer to search for alternative solutions to dismissal. This is often referred to as the *ultima ratio* principle. If redundancies are at stake, the employer is compelled to investigate whether the employee in question can be relocated to another job in the same firm. In some countries, the employer is even obliged to offer the employee training in order to make him suitable for the vacancies in the same firm or organisation. Even when (statutory) law does not require the employer to mitigate the consequences of economic dismissals, (usually large) employers will often choose to do that voluntarily, because they know collective dismissals often have negative consequences for the firms themselves.⁴⁹ Therefore, the social plans, which often accompany collective dismissals, frequently include, beside severance payments, provisions for occupational (re)training, provisions for assistance with job search, and sometimes financial compensation for employees who agree to (internal or external) relocation. In other words, arrangements are set up to help the redundant workers make a transition to a new job preferably without becoming unemployed. The new job is in first instance sought within the same firm or organisation, thus with the same employer, but (usually after some time) the search can be extended to other jobs with other employers.⁵⁰

We can see that there is a mix of job and employment security. We can also see that for a redundant worker job security can contain elements of employment security, namely training and transitions. When he receives training for a new job, his overall *employability* can increase, even when the new job is with the same employer. The mere fact that he has changed jobs can also increase his employability.

The question is whether training and (assistance with) transitions are indeed part of dismissal law in every Member State, and if they are, how far they extend. Research shows that measures taken to facilitate job-to-job transitions are becoming more common in all Member States: While in the past such measures often displayed a rather 'passive' character (such as early retirement, severance payment packages and voluntary redundancies), a development has taken place of more pro-active measures and schemes of job transition, connected to occupational re-orientation, training, and qualification as

⁴⁸ The fifth section elaborates on what this legal norm entails and what implications we can derive from it for the concept of employment security.

⁴⁹ There can, for example, be a loss of goodwill and unrest among the workers. See, e.g., J. Rojot, 'Security of Employment and Employability', in R. Blanpain (ed.) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 2014, p. 530-533.

⁵⁰ Usually this is done by calling in an outplacement service; see, e.g., Rojot 2014, 530-533.

well as outplacement.⁵¹ There are, however, significant differences with regard to legal sources, types of support measures, scope, co-financing by enterprises, and the status of workers. Moreover, these schemes and measures seem to be in a constant state of flux. We can say, therefore, that transition *can* indeed be seen as an element of dismissal law and practices in Europe, but that it is still unclear what (permanent) positive duties exist on the side of the employer and the employee in this regard, and how far they extend. The same is in fact to be said for training. Is there a right to training within the employment relationship, and to what extent? Does it, for example, only apply to redundant workers who have a chance to get a new job, or do workers whose jobs are not (immediately) threatened also have a right to be trained? If they do, does that include training for other professions, or only training for the current job?

If training and transition are indeed already present in labour law and practices throughout Europe, they are not fully embedded. That means that employment security is not embedded either. Employee training is, for example, still very much orientated towards persevering existing employment and in a much lesser degree towards employability beyond the current employer. In 2015, major changes were introduced in the statutory labour law in the Netherlands – another ‘flexicurity example’, according to the Commission.⁵² The Civil Code now contains an obligation for the employer to ‘enable his employee to receive training’ that is necessary for the performance of his duties in the job, and – ‘as far as that can reasonably be expected’ from the employer – training that is necessary to continue the employment relationship when the employee has been made redundant or when he no longer is able to perform his job.⁵³ With this, the legislator has codified for the first time a general duty on the employer to train his employees, yet this duty does not extend as far as to include a duty to train the employee for work outside the employing entity.⁵⁴

The new law, furthermore, does not alter the existing possibilities to compel the employee by a way of contract to repay the training costs if he decides to leave the employer. These are the so-called *repayment of training costs clauses* in or outside the employment contract. That means that labour law allows *voluntary* labour market mobility to be hampered by employers who want to tie the employees of their choice, as is the case in most Member States. These contractual constraints on labour mobility have not yet been included in the discussion of employment security, or flexicurity for that

⁵¹ E. Voss et al, *Organising Transitions in response to restructuring. Study on instruments and schemes of job and professional transition and re-conversion at national, sectoral or regional level in the EU*, EC 2010.

⁵² The reform – under the heading of Employment and Security (*Werk en Zekerheid*) – has led to the most fundamental changes in the field of the termination of employment contracts since the Second World War; see, e.g., N. Gundt, ‘Employment and Security in the Netherlands’ *ELLJ* 2015 Vol. 6 No. 4, p. 364-372.

⁵³ Art. 7:611a CC.

⁵⁴ E. Verhulp, *Tekst en Commentaar Burgerlijk Wetboek*, comments on Art. 7:611a CC.

matter, while it can very well be argued that they deserve to be taken into consideration as well. When so much emphasis is placed on the benefits of labour market mobility, it would be strange to leave the practices on contractual constraints completely untouched. Obviously, the *non-compete covenants* are an even better example of contractual constraints on labour mobility.⁵⁵ Non-compete covenants waive (part of) the employee's right to compete with the employer after employment has ceased, usually by taking up new employment with the direct competitor of the old employer.⁵⁶ Courts usually scrutinise non-compete covenants with particular care because they are often the product of unequal bargaining power and because of the workers' needs to find employment in order to make a living, but it is doubtful that the courts are currently able to take into consideration the increased importance of 'labour market security' for workers.⁵⁷ It is highly questionable whether the existing laws on non-compete covenants give employees enough room to 'acquire, retain, and deploy their human capital' in an optimal way.

This proves, furthermore, that the transition element – if it is indeed already part of the worker's job security – is even more orientated towards preserving the existing employment. As shown above, when dealing with redundant employees, relocation to another job can constitute part of the legal duty of the employer. However, it concerns primarily internal relocation, meaning within the employing entity. Moreover, a few important rights or entitlements of workers operate in such way that workers are encouraged *not* to change employers because they risk losing these acquired entitlements. The main example is the seniority rule, which can be shortly explained as follow: with build-up seniority, the worker acquires better dismissal protection and usually higher financial compensation in case of dismissal.⁵⁸ Because of such rights, it can be advantageous to remain with the same employer even in cases when the worker would rather leave to find other employment. One could say that with every move to a new job, the advantage of seniority is lost.⁵⁹ It can be argued that in this respect, the flexicurity policy is right to state that dismissal protection can inhibit labour market mobility. However, the suggested 'tenure track approach' in which the worker receives progression

⁵⁵ The before mentioned law reform in the Netherlands has introduced *some* constraints on the use of non-compete covenants in fixed-term contracts; see Art. 7:653 para. 2 CC.

⁵⁶ C.L. Estlund, 'Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law' *University of Pennsylvania Law Review* 2006 Vol. 155, p. 379–445.

⁵⁷ K.V.W. Stone, 'Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace' *Connecticut Law Review* 2002, Vol. 34, p. 721–763.

⁵⁸ The priority and selection of employees is to be made according to the last-in-first-out principle, that is, according to each employee's total length of employment with the employer. See, for the Swedish example (and the recent debates), Rönmar and Numhauser-Henning 2012, p. 443–467. In the Netherlands, a similar rule applies: redundant workers are first divided into age categories before the last-in-first-out principle is applied. The age groups are: 15 to 25 years, 25 to 35 years, 35 to 45 years, 45 to 55 years, and 55 years and up.

⁵⁹ Obviously, workers with a very good labour market position can negotiate such advantages for themselves with the new employer. We can assume, however, that those are exceptional cases.

into better employment conditions⁶⁰ have the same ‘disadvantage’ of retaining workers with the same employer.⁶¹

The employability discourse does not only involve investments in training alone, but also a high degree of flexibility on the side of the worker.⁶² The worker is not only expected to cope with the changes in the working environment and changes on the labour market through (lifelong) learning, but he is also expected to accept *other* work as long the work is considered suitable for that particular worker. Labour law has a detailed elaboration of what can be considered suitable work, with in every jurisdiction certain differences, but the EU flexicurity policy shows little consideration to the legal understanding of ‘suitable work’. No references are made in this regard to the legal framework.

It is important to notice that employment security can also be developed and increased by more demand-oriented policies. Surely, employability and labour mobility are not the only determinants of employment security.⁶³ One can think of government subsidies to boost jobs or other types of governmental help. Indeed such policies are present in many countries, but they are very diverse and variable. Because the intent of this article is to place the concept of employment security in the legal framework of the employment relationship, these public measures are not taken into further analysis since they usually do little to change the (contractual) relationship between the employer and the employee. It is, however, important to note that in the recent years the incentives to hire are increasingly designed in such way that they offer entrants less entitlements than usually would apply.⁶⁴

4. TO WHAT EXTENT IS LABOUR LAW CURRENTLY DIRECTED TOWARDS JOB OR EMPLOYMENT SECURITY?

In order to explore to what extent it can be said that dismissal laws provide for job and/or employment security, it is, firstly, important to distinguish between the types of employment contracts. Generally, only workers with open-ended contracts (sometimes referred to as ‘the insiders’) enjoy the full employment protection legislation, while an

⁶⁰ COM (2007) 359 fin., p. 13.

⁶¹ Such rules of course also have advantages as is acknowledged in the flexicurity documents; they can encourage employers to invest in training and they promote loyalty and higher productivity of employees.

⁶² J. J. Votinius, ‘Having the Right Attitude: Cooperation Skills and Labour Law’ *International Journal of Comparative Labour Law and Industrial Relations*, 2012 Vol. 28 No. 2, p. 223–248; M. Rönmar, ‘The Managerial Prerogative and the Employee’s Obligation to Work: Comparative Perspectives on Functional Flexibility’, *Industrial Law Journal*, 2006 Vol. 35 No. 1, p. 56–74.

⁶³ One can also mention the whole body of employment laws on health and safety and discrimination as other important determinants of employment security. They fall out of scope of this particular study, because the concept of employment security would in that case include so much, that it would risk losing its independent meaning.

⁶⁴ See, e.g., Julén Votinius 2014, p. 378–385.

increasing number of ‘outsiders’, including workers working on other types of contract than the open-ended employment contract, benefit much less of such protection.⁶⁵ The number of atypical workers in Europe has been growing since the 1980s.⁶⁶

Secondly, we need to acknowledge that there is a taxonomy of dismissals in the law of dismissal.⁶⁷ In most Member States, there is a distinction between dismissals for economic reasons on the one hand and dismissals for individual reasons on the other.⁶⁸ In this case we are mainly concerned with the laws on economic dismissals (also addressed as dismissals for reasons of redundancies), because these are clearly linked to the EU flexicurity discourse.⁶⁹ A closer study of dismissal laws reveals, however, a further differentiation between dismissals and results in a taxonomy of dismissal protection. As Collins explains (for UK law, but what is to a large degree true for most Member States): ‘Each type has its own criteria for fairness, its own type of remedy, and implicitly its own conception of job security.’⁷⁰ The conception of job security of every type of dismissal is what we are concerned with for the purpose of this article.

A. JOB SECURITY AND NON-STANDARD EMPLOYMENT

Very relevant as regards job security is the – now quite well-known – distinction between the (permanent or) open-ended contracts (also called contracts for indefinite duration), on the one hand; and the so-called flexible contracts, on the other. The same, albeit rough, distinction is meant when one speaks of standard and non-standard or typical and atypical employment. The distinction is relevant, because in most countries only workers with open-ended employment contracts enjoy the ‘full fruits’ of dismissal protection. Within one organisation, the protection of the employees with open-ended contracts can even be at the expense of the ‘flexible’ workers when economic dismissals are concerned. For example, the law may often prescribe that use of temporary agencies workers is put to a stop or that temporary contracts need to be terminated first, before open-ended contracts can be terminated.⁷¹

In most countries, the fixed-term contract – the most common form of atypical employment contract – will simply expire when the set date is reached or an agreed task has been completed, leaving the worker without a job while legally no dismissal has

⁶⁵ C. Villiers, ‘Why Employee Protection Legislation is Still Necessary’ *Comparative Labor Law and Policy Journal* 2012 Vol. 33 No. 3, p. 481–492.

⁶⁶ This is especially the case in Poland, the Netherlands, Italy, Germany, and Great Britain. See EUROSTAT, ‘The European Union Labour Force Survey, 2003.’

⁶⁷ Collins 1991.

⁶⁸ The latter are also called dismissals for a cause.

⁶⁹ See also Rönmar and Numhauser-Henning 2012, p. 452.

⁷⁰ Collins 1991, p. 232.

⁷¹ Art. 7:671a sub 5 Dutch Civil Code.

taken place.⁷² In contrast to workers with open-ended contracts, the fixed-term workers – but usually also other flexible workers – do not have a claim to job continuity in the future. Temporary agency work is another example of flexible employment that is legally designed in such way that it gives very little claim to job continuity.⁷³

A general conclusion is that temporary or flexible workers enjoy (much) less job security than employees with open-ended contracts. Seeking to improve the position of atypical workers, one of the main ways to achieve this has been in EU labour law to advance their chances of obtaining an open-ended contract. When the Directive on Fixed-term Work (97/81/EC) is considered, it becomes apparent that the protection of these ‘atypical’ workers is sought through realisation of equal treatment of these workers – when compared to the standard workers with an open-ended contract – and through prevention of abuse of successive fixed-term contracts. Abuse is supposed to be prevented either by requiring justification by objective reasons for renewal of such contracts, or by setting a maximum total duration of successive fixed-term employment contracts or a maximum number of renewals of such contracts.⁷⁴ In countries where the latter ways are chosen to prevent abuse, the employer is compelled to convert the fixed-term contract into an open-ended contract after the maximum number or total duration is reached.⁷⁵ Both the Fixed-Term Work Directive and the Temporary Agency Work Directive (2008/104/EC) prescribe, furthermore, that the fixed-term workers and the temp agency workers respectively are informed of any vacant posts in the (user) undertaking to give them the same opportunity as other workers in that undertaking ‘to find or secure *permanent employment*’.⁷⁶ An open-ended contract that ensures a degree of job stability is, in other words, still the pursued goal of EU law.

In the Framework Agreement on Fixed-Term Work, the European social partners expressed their opinion that ‘employment contracts of an indefinite duration are the general form of employment relationships and contribute to the quality of life of the workers concerned and improve performance’.⁷⁷ The Court of Justice (CJEU) has used this opinion and slightly modified it into a premise that ‘the benefit of stable employment

⁷² Termination of the fixed-term contract before the final date is, however, in many cases strictly regulated, which means the worker enjoys a fair deal of job security for the specific time the contract is made. Cf. A. Ludera-Ruszel, “Typical” or “Atypical”? Reflections on the Atypical Forms of Employment Illustrated with the Example of Fixed-Term Employment Contract – A Comparative Study of Selected European Countries, *Comparative Labor Law and Policy Journal* 2016 Vol. 37, p. 407.

⁷³ Country specific forms of contracts can be mentioned here as well, like the Employee Shareholder Status from the UK.

⁷⁴ Clause 5 of Directive 1999/70/EC.

⁷⁵ The employer can also choose not to continue the employment relationship.

⁷⁶ Clause 6 sub 1 of the Directive 1999/70/EC; Art. 6 sub 1 of the Directive 2008/104/EC.

⁷⁷ Preamble no. 6 of the Council Directive 1999/70/EC concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

(...) constitutes a major element in the protection of workers'.⁷⁸ This has been one of the central considerations in several CJEU rulings on the Directives such as the Fixed-Term Directive. The rulings of the CJEU have been interpreted as favouring permanent employment contracts – meaning open-ended employment contracts – as a rule over flexible ones.⁷⁹

Several authors have noticed here a 'certain degree of contradiction' between what applies as Community Law and in most cases national law on the one hand, and what official national and European labour market policy prescribe on the other hand.⁸⁰ The latter prescribe employment security, while the first (still) seems to be focused on job security, or at least employment stability.

B. JOB SECURITY AND DISMISSAL LAW

Dismissal law is for the most part still a national matter; it is only partly regulated at EU level. Most important are the already mentioned Fixed-Term Work Directive, the Directive on Transfer of Undertakings (2001/23/EC), and the Directive on Collective Dismissals (1998/59/EC).⁸¹ Article 30 of the EU Charter of Fundamental Rights ('Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices') should also be mentioned, even though a direct application of this Article is still to come. Very relevant is the ILO Convention No. 158, even though it has not been rectified by a large number of countries.⁸² Its main requirements for the termination of employment can nevertheless be found in most countries that can be qualified as having rather extensive (statutory) dismissal protection rules. Most important (and perhaps most contested) is the requirement of having a *valid reason* (or: just cause) for termination.⁸³ Other important requirements follow from the

⁷⁸ *Mangold Case* – CJEU 22 November 2005, C-144/04, para. 64. The Court has later repeated such or similar considerations in several other rulings. For a recent judgment, see CJEU 26 February 2015, C-238/14, *Commission v Luxembourg*, para. 36, 50-51.

⁷⁹ A.G. Veldman, 'The Coherency of European Social Policy: The ECJ caught between Flexible Employment Policies and Upholding European Employment Rights' in F.J.L. Pennings, Y. Konijn, and A.G. Veldman (eds.) *Social Responsibility in Labour Relations: European and Comparative Perspectives* (Kluwer Law International, 2008) 96.

⁸⁰ E.g. F. Gaudu, 'Collective Redundancies for economic motives: convergences and controversies' *ELLJ* 2011 Vol. 2 No. 1, p. 7-8.

⁸¹ It should be noted that the most extensive involvement of the EU in dismissal law has taken place in the area of discrimination. EU law does not only forbid direct discrimination in dismissals, but also unjustifiable indirect discrimination. Cf. A.T.J.M. Jacobs, *Labour and the law in Europe* Wolf legal publisher 2011, p. 71.

⁸² ILO Convention No. 158 adopted in 1982. Among the countries that have not rectified the Convention are Belgium, Germany, and the Netherlands.

⁸³ The requirement of a 'valid reason' can be formulated differently depending on the country. The norm can be, for example: socially-justified dismissal, reasonable and serious reason, objective and legally-recognised grounds. See, for example, T. van Peijpe, *Employment Protection under Strain (Sweden, Denmark, The Netherlands)* The Hague: Kluwer Law International 1998, p. 45.

entitlement of the worker whose employment is to be terminated to be given a reasonable period of *notice* (or compensation in lieu thereof) and the entitlement to a *severance allowance* (or: compensation).⁸⁴ In most legal systems, there is a combination of these rules coupled with procedural preconditions. The strength of the protection from unilateral termination depends on the combination of all these components.⁸⁵

All EU Member States have in common that they allow for unilateral termination of the employment contract. The requirement of having a valid reason for termination prevents dismissals on arbitrary grounds or merely subjective motives of the employer.⁸⁶ As addressed earlier, valid or legitimate reasons for dismissal can relate to the worker's behaviour – his (in)capacity to perform the job, his (mis)conduct, *etc.* – or to the 'operational requirements' of the firm. Reasons related to the 'operational requirements' are often referred to as economic reasons or redundancies. Redundancy is seen as a legitimate ground for dismissal, which is, moreover, relatively easily granted by the legislator and the courts. Dismissing workers for economic or cost-cutting reasons is permitted by the law in most countries. There need not be any compelling financial reasons. Case law shows that most courts generally show considerable understanding to the employers' view on what constitutes 'an efficient business operation' and what number of workers they need to employ.⁸⁷ This is in line with the so called managerial prerogative. It is, furthermore, difficult for judges – or public authorities – to assess whether the use of economic arguments to dismiss workers by the employer is valid, especially when these arguments relate to the longer-term operation of the firm.⁸⁸

Even though dismissal protection in case of redundancies may not be high, dismissals for economic reasons can be costly for employers. The concept of employment security has been brought up in the literature as justification for lowering those costs. The reasoning is that when workers can easily and quickly find another job, then the income loss does not occur – or it is (very) limited – by which the basis for a severance payment is almost entirely eliminated.⁸⁹ In addition, the aforementioned seniority rules that apply in case of redundancies are often subject of debate and reform.⁹⁰

⁸⁴ Another important right is obviously the right of the worker to appeal against the termination to an impartial body such as a court. Supplementary provisions for economic dismissals from the ILO Convention No. 158 concern the consultation of workers' representatives (Article 13) and the notification to the competent public authority (Article 14).

⁸⁵ Davidov and Eshet 2015, p. 171.

⁸⁶ Cf. Art. 4 of the ILO Convention No. 158 and Art. 24 of the European Social Charter.

⁸⁷ A.C.L. Davies, *Perspectives on Labour Law*, Cambridge University Press 2009, p. 168; Rönmar and Numhauser-Henning 2012, p. 453; S. Deakin and W. Njoya, 'The Legal Framework of Employment Relations' in P. Blyton e.a. (eds.) *Handbook of Industrial Relations*, London: SAGE 2008, p. 293.

⁸⁸ Judges can have difficulties assessing business accountancy; they are, furthermore, dependent on the information provided by the employer.

⁸⁹ E.g. E. Verhulp, 'Ontslagvergoeding in beweging?' in E. Verhulp et al (eds.) *De ontslagvergoeding in beweging*, Den Haag: Sdu 2008, p. 13.

⁹⁰ E.g. Rönmar and Numhauser-Henning 2012, p. 451 and further.

Economic dismissals are often collective dismissals, but need not be. In the case of collective dismissals, the law provides for an additional protection mechanism since the consultation of employee representatives is prescribed. The EU Directive on Collective Dismissals has played an important part in the development of these legal norms. In all Member States, employers are obliged to consult workers' representatives *before* collective dismissal can take place. This consultation does not have to result in an agreement, but the law does have as its objective to allow the workers' representatives to challenge the number of dismissals and the conditions under which they will occur.⁹¹ The EU Directive even prescribes that the consultations need to at least, 'cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, *inter alia*, at aid for redeploying or retraining workers made redundant'.⁹² Some authors interpret this requirement even as an obligation for the employers and the employees to find alternative solutions to dismissals, hence, the dismissal being a last resort also in EU law.⁹³

The case of dismissals relating to personal reasons reveals another story of job security. The employer must in that case demonstrate fault or inadequacy on the part of the employee in the form of misconduct or incompetence. This usually implies for the employer some sort of keeping records over a certain period of time. These records need to give account of employee's behaviour, but also the conduct of the employer. Has the employer informed the employee of his shortcomings? Has the employer investigated the matter properly? Has he given him sufficient opportunities for improvements, *etc.*? Dismissal protection in such cases can be labelled as high. The individual employee has in the first place (more) control over the occurrence of such reasons for dismissal. Furthermore, the individual employee can question every statement of the employer more easily than in the case of redundancies. Moreover, the courts will usually give less room for the managerial prerogative than they will with economic dismissals. If dismissal protection is high, does that automatically mean there is a high degree of job security? Not necessarily: 'the conception of job security that emerges is not one which grants job tenure to employees'.⁹⁴ After all, economic dismissal can still occur. The worker, rather, has a degree of security that dismissal *for certain reasons* will not occur, because he himself has a degree of control over the situation.

There are also certain reasons for dismissal that are marked automatically unfair or that are even forbidden. An example of an automatic unfair dismissal is a dismissal where the principal reason is connected to the employee's trade union membership. Dismissal

⁹¹ The extent of the obligation can vary with the size of the firm.

⁹² Art. 2 paragraph 2 of the Directive 1998/59/EC.

⁹³ H. Lamponen, *The Principle on Employee Protection in a Merger and a Transfer of an Undertaking* Helsinki University Print 2008, p. 204.

⁹⁴ Collins 1991, p. 237.

protection is in this particular example closely connected to the protection of fundamental rights, in this case the freedom of association.⁹⁵ The same can be said for dismissal protection in the case of discriminatory dismissals. Legislation concerning these types of dismissals protects the worker from usage of certain reasons for dismissal. Legislation does not prohibit the dismissals from occurring; it only prohibits dismissals for certain reasons. Dismissal because of temporary absence from work due to illness or injury is another example of automatically unfair dismissal.⁹⁶ In the Netherlands, for example, it is forbidden to dismiss a sick employee during the first two years of illness. Arguably, such an employee enjoys a high degree of job security *during* that time of his illness.⁹⁷ However, this job security is closely connected to (functional) flexibility on the side of the employee, because he needs to cooperate in the employer's attempts to 'reintegrate' the employee, meaning that the employee needs to accept and perform (other) suitable work.⁹⁸ It is not so much the protection of civil liberties that is at stake in this area, but the way responsibilities for risks are shared in a society.⁹⁹

To summarise, one can conclude that the current labour law in a sense does pursue a degree of job security, but that this job security is never absolute¹⁰⁰ and that this is not where the primary protection of the employee is located. Labour law seeks to protect the employee against *unjustified* dismissal and through this, a certain continuity of the employment relationship is guaranteed. However, if reasonable grounds for dismissal exist, which can be also entirely founded on economic considerations of the employer, then the continuity of employment is no longer guaranteed. Furthermore, different conceptions of job security correspond with different types dismissals.

However, flexicurity discourse does not take this taxonomy into account, and other comparable policies aimed at deregulation of dismissal law rarely do. As indicated above, it is easy to discern that flexicurity is primarily concerned with economic dismissals, but it remains unclear to what extent the law on dismissals for individual reasons would remain untouched. It is not inconceivable that deregulation of these types of dismissals is also envisaged by the flexicurity discourse. The question is: What would be the lower limit to flexibility in this regard? No reference is made to the fundamental workers' rights that need to be upheld at all times anywhere in the policy documents on flexicurity.

Another reason for underlining the fact that job security is to be understood in relative terms lies in the reforms of statutory dismissal law protection of the last decades, which

⁹⁵ Collins 1991, p. 231.

⁹⁶ Art. 6 ILO Declaration No. 158.

⁹⁷ Art. 7:670 paragraph 1 of the Dutch Civil Code.

⁹⁸ Art. 7:660a of the Dutch Civil Code.

⁹⁹ Another way for risk distribution in case of illness is of course through social security system.

¹⁰⁰ Gaudu 2011, p. 9.

have mostly had deregulation as primary goal. The restrictions on the employer's right to unilaterally terminate the employment contract have been reduced in most Member States.¹⁰¹ Particularly after the financial crisis and the rising unemployment, concrete dismissal law reforms have been presented in several Member States as a necessary response to these problems.¹⁰² The reforms put in place are permanent and structural in nature.¹⁰³

If job security is relative and this is not where the primary protection of the employee is located, what are, then, the goals of dismissal protection? As indicated above, labour law seeks to protect the employee against *unjustified* dismissal. Arbitrary and merely subjective grounds are prohibited. The dignity of the worker is protected in this way.¹⁰⁴ Protection against unjustified dismissal supports, furthermore, a large number of other workers' rights.¹⁰⁵ Some even believe it plays a crucial role in the execution of the whole body of labour law.¹⁰⁶ One may indeed wonder what practical use for example the right to holiday leave would have if the employer is allowed to dismiss the employee immediately after he makes use of this right. Not only does dismissal law protect employees against sudden termination of employment or on the basis of arbitrary or unjustified grounds, it also allows him to act autonomously in the organisation where he is employed as a citizen.¹⁰⁷

5. EMPLOYMENT AND FUNDAMENTAL RIGHTS: WORK AS A RIGHT OR WORK AS PROPERTY?

A. THE RIGHT TO WORK

As stated in the introduction, both job and employment security are related to the broader issue of (full) employment and the right to work.¹⁰⁸ This right does not entail for the individual a right to be employed; as such it cannot be enforced in court.¹⁰⁹ Still, most States have recognised this right, 'which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts', and they have committed

¹⁰¹ A. Ojeda Avilés and J. García Viña, 'Regulation of the Labour Market', in B. Hepple and B. Veneziani (eds.) *The Transformation of Labour Law in Europe*, Oxford: Hart publishing 2009, p. 93.

¹⁰² Laulom 2014, p. 231-254.

¹⁰³ J. Prassl, 'Contingent Crises, Permanent Reforms: Rationalising Labour Market Reforms in the European Union', *ELLJ* 2014 Vol. 5 No. 3-4, p. 211-230.

¹⁰⁴ Cf. Collins 1991, p. 237. See further, paragraph 6.

¹⁰⁵ E.g. Davies 2009, p. 162; also see W. Vandeputte, *Ontslagrecht en de arbeidsmarkt. Naar een modernisering van het Belgische ontslagrecht*, diss. K.U. Leuven 2012, p. 558-560 (sub 926-932).

¹⁰⁶ E.g. G.J.J. Heerma van Voss, *Ontslagrecht in Nederland en Japan* Deventer: Kluwer 1992, p. 9.

¹⁰⁷ Cf. Van Peijpe 1998, p. 38.

¹⁰⁸ Rojot 2014, p. 519.

¹⁰⁹ D. Ashiagbor, 'The Right to Work', in G. de Burca and B. de Witte (eds.), *Social Rights in Europe*, Oxford University Press 2005, p. 241-259.

themselves to ‘take appropriate steps to safeguard this right’.¹¹⁰ Even though not everyone agrees that this is indeed a fundamental human right, and even though some question whether any legal norms can be derived from this right,¹¹¹ the right to work is seen by many as an important notion for labour law.¹¹² We can indeed find it in many Constitutions. It has a prominent place in the European Social Charter in its first article and many ILO Declarations can be seen as an elaboration of this right.¹¹³ Its interpretation (by for example the European Committee of Social Rights) is nevertheless ‘weak’, in the sense that the notion does not entail more than an obligation for the State to have a labour market policy in place, which is targeted towards full employment.¹¹⁴

This is, however, a rather restricted look at the right to work. Firstly, it concerns not only a social right in the sense of a state obligation, but also a civil right, since it also entails the right to earn one’s living in a *freely chosen* occupation.¹¹⁵ This has implications for access to employment: it must be free of discrimination. The freely chosen occupation, furthermore, implies a prohibition of forced or compulsory labour.¹¹⁶ The freedom from discrimination (on the labour market) and the prohibition of forced labour are usually considered to fall in the realm of civil rights, while the obligation on the State to promote employment is usually seen as a social right. However, in most Constitutions and Charters the ‘free choice of work’ and the pursuit of (full) employment are strongly connected. Secondly, we can deduct normative implications also from the right to work as a social right if we look closely to its interpretation by, for example, the European Committee of Social Rights. The fundamental right to work requires that the government – while increasing employment opportunities for everyone – also pays attention to the *quality of work* that is, or becomes, available on the labour market. A right to work means a right to decent work.¹¹⁷ The ‘decent work agenda’ of the International Labour Organisation (ILO) serves as a starting point in defining what decent work is. Respect for fundamental human rights is central to this agenda, as well as the rights of workers in terms of conditions of work safety and remuneration. Referring to the ILO Declaration No. 158, the European Committee of Social Rights explicitly mentions ‘the right not to

¹¹⁰ Art. 6 (1) of the International Covenant on Economic, Social and Cultural Rights.

¹¹¹ See, e.g., H. Collins, ‘Theories of Rights as Justifications for Labour Law’, in G. Davidov and B. Langille (eds.), *The Idea of Labour Law*, Oxford: Oxford University Press, 2011, p. 137-155; M. Risse, ‘A right to Work? A Right to Leisure? Labor Rights as Human Rights’ *Law & Ethics of Human Rights* 2009 Vol. 3 No. 1, p. 11.

¹¹² E.g. European Committee of Social Rights, *Conclusion I*, 1969, p. 13.

¹¹³ See, e.g., ILO Declaration No. 122 and No. 168.

¹¹⁴ Ashiagbor 2005, p. 244-245.

¹¹⁵ See, e.g., Art. 1, paragraph 2 of the European Social Charter (Revised).

¹¹⁶ For an assessment of the workfare schemes in relation to the free choice of employment, see A. Paz-Fuchs and A. Eleveld, ‘Workfare Revisited’ *Industrial Law Journal* 2016 Vol. 45 No. 1, p. 29-59.

¹¹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment no. 18*, UN Doc. E/C.12/GC/18, 2005, p. 3.

be unfairly deprived of employment’ under the normative content of the right to work.¹¹⁸ A right to work is indeed an extremely limited ‘right’ if it would entail that a person may lose that work at any given moment and on any ground.

A State responsibility not only to promote employment, but also to promote *decent* employment is a strong normative claim. Indeed, ‘the objective of full employment will serve to undermine the right to work if it is not accompanied by a commitment to the creation of high quality jobs’.¹¹⁹ What does this observation mean for our conceptualisation of employment security? The right to work can provide *legitimacy* for EU policy that pursues employment security. Pursuing employment security – with its specific emphasis on employability and job-to-job-transitions – can indeed be a way for a government to realise the fundamental right to work. With employment security policy the government does not intend to give an enforceable right to a job to everyone, but the fundamental right to work does not require the government to do this. Such a task for the government has never been accepted in our social system.¹²⁰ Besides the shared objective, the right to work and employment security discourse share the *value* attached to work. Paid work is not only seen as a source of income necessary for one’s livelihood, but it has a ‘social value as well: ‘it can be an act of self-expression and self-fulfilment, and a venue for socialisation’.¹²¹ In this respect, they can also share the same criticism: there are other ways possible to secure the necessary means for subsistence and self-fulfilment and socialisation can also be found outside the labour market.¹²²

However, in order to refer to the right to work and find legitimacy in it, employment security needs to involve a degree of job security. Arguably, employment security discourse needs to incorporate the decent work agenda in order to pay attention to quality of jobs.

B. PROPERTY OF WORK

Another legal framework in which it is possible to assess the notions of job security and employment security is the well-known *right to property*. It is, however, a less obvious framework since it concerns a rather controversial claim that workers have property rights in the employing firm.¹²³ The notion that workers possess property rights has,

¹¹⁸ Ibid. Also see Ojeda Avilés and García Viña 2009, p. 61.

¹¹⁹ Ashiagbor 2005, p. 248.

¹²⁰ B. Hepple, ‘A right to work?’ *Industrial Law Journal* 1981 Vol. 10 No. 1, p. 65-83.

¹²¹ G. Mundlak, ‘The Right to Work - The Value of Work’ in D. Barak-Erez and A.M. Gross (eds.) *Exploring Social Rights. Between Theory and Practice*, Oregon: Hart Publishing 2007, p. 344.

¹²² See Mundlak’s discussion of the right to work in relation to basic income, Mundlak 2007, p. 341-366.

¹²³ We are already much more familiar with the assumption that it is the employer who has property rights, from which he draws various powers in the employment relationship, or with the assumption that shareholders are the owners of the company. See T. Novitz, ‘Labour Rights and Property Rights:

however, gained contemporary significance due to the jurisprudence of the European Court of Human Rights (ECtHR) on the 1st Article of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights (ECHR)). This case law has given impetus to a new literature strand on the topic. Novitz, for example, has shown that the idea of workers' property is not new, but even goes back to John Locke.¹²⁴ The renewed idea that workers have property rights in the firm in the framework of job security would mean that employees have a claim to continuation of their employment. The idea does not seek to undermine established systems of property ownership by employers; it rather views the interests of the workers in the continuation of employment as 'proprietary in nature', which can exist alongside the employer's property rights.¹²⁵

The first paragraph of Article 1 of Protocol No. 1 of the Convention reads: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' In the interpretation of this Article, the ECtHR applies a broad and autonomous (i.e. regardless the classification under national or EU law) definition of what constitutes a 'possession'. For example, the Court has declared pensions (whether contributory or non-contributory)¹²⁶ and unemployment benefits¹²⁷ to constitute 'possessions' under the Article. The condition is that these (pecuniary) rights or entitlements can be claimed with 'a legitimate expectation'.¹²⁸

The question is whether a job or employment can also fall under this broad definition of property. Various labour law scholars have argued that workers may indeed have 'property in a job'.¹²⁹ Taking the above-mentioned case law into consideration, the argument that the worker's entitlement to wages¹³⁰ constitutes a 'possession', would, in

Implications for (and Beyond) Redundancy Payments and Pensions?' *Industrial Law Journal* 2012 Vol. 41 No. 2, p. 136-165.

¹²⁴ Novitz 2012, p. 139-143.

¹²⁵ P. Davies and M. Freedland, *Labour Law: Texts and Materials*, London: Weidenfeld and Nicolson, 1984, p. 428.

¹²⁶ ECtHR, 1 October 1975, Application No. 5849/72 *Müller v Austria*; 18 February 2009, Application No. 55707/00 *Andrejeva v Latvia*; 15 September 2009, Application No 10373/05 *Moskal v Poland*.

¹²⁷ ECtHR, 16 September 1996, Application No. 17371/90 *Gaygusuz v Austria*; 8 December 2009, Application No. 18176/05 *Wieczorek v Poland*.

¹²⁸ ECtHR 28 September 2004, Application No. 44912/98 *Kopecky v Slovakia*.

¹²⁹ Meyers pioneered the concept of job property, see F. Meyers, *Ownership of jobs: a comparative study*, Los Angeles: Institute of Industrial Relations, 1964. Important in this regard is also the work of Njoya, even though she draws different conclusions from the concept regarding remedies to dismissal, see W. Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm*, Aldershot: Ashgate, 2007. Also see J. Howe. 'Poles Apart? The Contestation between the Ideas of No Fault Dismissal and Unfair Dismissal for Protecting Job Security' *Industrial Law Journal* 2013 Vol. 42 No. 2, p. 122-151.

¹³⁰ E.g. ECtHR 13 February 2007, Application No. 75252/01 *Evaldsson v Sweden*.

my opinion, carry more weight. That would mean that there is an obligation for the State to ensure that there are appropriate legal mechanisms in place to pay workers the wages to which they are entitled, without any undue deductions, unless the worker so consents.¹³¹ However, also the right to ‘peaceful enjoyment of one’s possessions’ cannot be understood in the absolute sense, since it can be taken away. This would have to be (and it is) ‘subject to the conditions provided for by law’, in the public interest, and while pursuing ‘a legitimate aim by means reasonably proportionate to the aim sought to be realised’.¹³² Several justifications can be mentioned for (legally) allowing employment contracts to be terminated, including the need to enable enterprises to adapt their workforce to the changing (economic) circumstances. However, case law also requires that there is proportionality (a ‘fair balance’) between the aim of the government (namely, to give employers discretion in organising the business) and the interests of the ‘owners’ of wage entitlements (i.e. employees). The fair balance condition also means, among other things, that the infringement on property may not be disproportionate; it may not impose an ‘excessive burden’ on the person concerned.¹³³ Under circumstances, compensation or a transitional period may also be justified to achieve a ‘fair balance’.

These conditions – as briefly explained here – imply a certain degree of employment protection. Arbitrary and (evidently) unfair dismissal would not, in my opinion, stand the test of fair balance. In the right to property we can therefore find additional grounds for (a level of) job security. However, as we have seen above, the exact level of job security can vary according to jurisdiction and the exact interplay of the various components of dismissal law. Especially in the case of economic dismissals, it can be very well argued that ‘far from securing an employee’s property right in a job’, dismissal legislation ‘tends only to improve job security marginally’.¹³⁴ Nevertheless, besides providing an additional legal ground for employment protection, the right to property also implies a direct legal relation between the worker and his job. It can remind us that protection of private property does not always ‘point towards the prioritisation of employer’s interests’.¹³⁵

¹³¹ Novitz 2012, p. 147-148.

¹³² Novitz 2012, p. 151; T. Barkhuysen, M.L. van Emmerik, and H.D. Ploeger, *De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht*, Preadviezen voor de Vereniging voor Burgerlijk Recht, Deventer: Kluwer 2005, p. 60.

¹³³ ECtHR 20 July 2004, Application No. 37598/97 *Bäck v Finland*.

¹³⁴ Collins 1991, p. 233-234. Cf. Rubin, who states that property is not a right, but an instrumentality necessary to establish a market and fully subject to governmental control. E.L. Rubin, ‘The Illusion of Property as a Right and Its Reality as an Imperfect Alternative’ *Wisconsin Law Review* 2013 No. 2, p. 573–606.

¹³⁵ Njoya 2012, p. 477. Cf. Novitz 2012, p. 165.

6. EMPLOYMENT SECURITY IN THE LIGHT OF FUNDAMENTAL PRINCIPLES OF LABOUR LAW

Much has been written about the economic implications of job security and dismissal protection. The arguments are well known by now. Governments are warned not to have excessively strict dismissal legislation, which hampers the ability of businesses to stay competitive and in the end can lead to fewer jobs. And indeed, across the EU, deregulation seems to have taken place in the last years.¹³⁶ Legal scholars, on the other hand, are usually mainly concerned with the fact that dismissal protection is increasingly being confined to the workers in the ‘core’, while more and more workers in the ‘flexible work arrangements’ are exempt from this protection.¹³⁷ The call for more flexibility seems to be so strong that only a few will argue that (full) dismissal protection should be extended to include flexible workers. Some are for that reason looking for ‘intermediate job security solutions’.¹³⁸ Also in this respect, the purposed shift from job to employment security is brought up.

How is one to judge whether one objective is better than the other when we take the *foundations of labour law* as a starting point? Even though there is no consensus on what these foundations precisely comprise, there is a common belief under labour law scholars that ‘respect for the *human dignity* of the worker’ is at least one of them, if not the most important foundation.¹³⁹ In its quest to give meaning to the statement that ‘labour is not a commodity’, upholding human dignity serves as the pursued objective of labour law. For many scholars, *protection of the worker* is labour law’s primary objective - its very *raison d’être*.¹⁴⁰ Arthurs describes it as follows: ‘Whatever its substantive content, we can at least be sure that labour law is about “labour”, that it operates in the context of “employment”, that it is designed to protect “workers”.’¹⁴¹ This may be, however, a debatable premise, because it uses a narrow scope to the field. Labour law, in my view, has always taken into account the interests of employers and business enterprises alongside the interests of the workers. This is particularly true for (national) legislation enacted since the 1980s, but also for older legislation.¹⁴² Simply by taking into consideration that all protective norms in labour law exist in the framework of

¹³⁶ See paragraph 4.

¹³⁷ E.g. S. Deakin and G.S. Morris, *Labour Law*, Oxford: Hart Publishing 2009, p. 513.

¹³⁸ Davidov and Eshet 2015.

¹³⁹ E.g. M. Rood, ‘Internationalization: a new incentive for labour law and social security law’, in *Labour law at the crossroads: changing employment relationships. Studies in honour of Benjamin Aaron*, Den Haag: Kluwer Law International, 1997, p. 149. Also see Collins 1991 and the contributions to the book *The Idea of Labour Law* as mentioned here.

¹⁴⁰ M. Vranken, *Death of Labour Law? Comparative Perspectives*, Melbourne: Melbourne University Press, 2009.

¹⁴¹ H. Arthurs, ‘Labour law after Labour’, in G. Davidov and B. Langille (eds.) *The Idea of Labour Law*, Oxford University Press 2011, p. 18.

¹⁴² E.g. N. Bruun and B. Hepple, ‘Economic Policy and Labour Law’, in Hepple and Veneziani 2009, p. 31.

subordination,¹⁴³ which is affirmed and formalised by the law, a wider look on labour law appears, one in which considerations for employer's interests become clearer.¹⁴⁴ Nevertheless, while it may not be its only goal, it is beyond doubt that many labour law norms were indeed designed to protect the worker (against exploitation) as the weaker party to the employment contract. Therefore, for most *legal* scholars the mere fact that (a form of) employment security might be better suitable for a flexible and dynamic labour market may be a relevant argument, but it is not decisive for the question of what the goal of labour law should be. That is why the question remains, how employment security as a goal fits into the 'protective nature' of labour law.

It is, in my opinion, possible to unite employment security with the protective function of labour law. Investing in employability and employment security can indeed be interpreted as a form of worker protection. Protection is in this case targeted against the risks on the labour market and to a lesser degree against (the supremacy of) the employer, as protection in labour law is traditionally understood. In the case of a loss of the current job – something that dismissal legislation has always permitted to happen, as argued above –, the worker will need to find another job. Financial compensation – for example, in the form of severance payment, but in a lot of cases also in the form of social security benefits – will usually not be sufficient to provide for one's livelihood.¹⁴⁵ Being employable on the labour market, in the sense that the worker can easily change jobs when he or she wishes so, or whenever this is necessary, can, furthermore, contribute to worker's resilience. It can, thus, in this way serve to reduce the bargaining inequality, since it improves the worker's position on the labour market. A worker who has worked for one employer for his entire life is likely to be more dependent on that same employer than someone who was able to develop diverse skills through successfully changing jobs. A labour law that supports voluntary transitions on the labour market would, moreover, fit the modern life better in which less and less people choose to have one career with one employer.¹⁴⁶ Employment security, therefore, does not have to be incompatible with the protective function of labour law. Surely, it is the reduction of dismissal protection, which employment security as a policy is often linked to, that can be at odds with this protective function. Not only because job security is being decreased in this way, but because workers continue to have an interest in protection against unfair or unreasonable dismissal, even if they are highly employable, and can quickly find other employment.

¹⁴³ P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law*, London: Stevens, 1983, p.18.

¹⁴⁴ After all, the protective goals of labour law have been developed in the framework of a market economy. As Fudge has put it: 'Labour law, even during its golden period, was concerned with *production* and *protection*.' J. Fudge, 'Labour as a 'fictive commodity'', in Davidov and Langille 2011, p. 123.

¹⁴⁵ Also keeping in mind that most social security systems in Europe have reintegration in the labour market as the ultimate goal.

¹⁴⁶ W. Njoya, 'Job Security in a Flexible Labour Market: Challenges and Possibilities for Worker Voice' *Comparative Labor Law and Policy Journal* 2012 Vol. 33, No. 3, p. 459-479.

An interesting question would be what workers' representatives should strive for when bargaining on collective agreements: job security or employment security. If a level of dismissal protection is secured through statutory legislation and there is room for negotiations on this topic, should the workers' representatives aim at advancing job or employment security? They could, for example, 'trade' (parts of) notice periods or severance payments for investments in employability or support in job-to-job transitions.¹⁴⁷ Since job and employment security both benefit workers and are in line with the protective nature of labour law, what should they choose if advancing both is not an option? This is indeed a conceivable question, but not easy to answer. It is difficult to determine in advance what contributes *more* to power balancing or what is more beneficial to workers. That may vary from company to company and from sector to sector, or even from one county to another. In addition, the overall employment situation is very important. During an economic downturn it can be more feasible to try to preserve existing employment. However, it cannot be taken for granted that job security is by definition a better option.¹⁴⁸

However, the fact remains that employment security is a form of 'security' that can only partially be exercised against the employer.¹⁴⁹ Where job security concerns the employer-employee relationship, employment security is about the worker's possibilities on the labour market. The employer can be obliged to invest in worker's employability and, under circumstances, to help him find another job, but whether the worker will in fact be able to find another job is something that is not entirely dependent on the former employer (or the employee for that fact). The extent to which the worker will be able to redeem the investment made in his employability remains uncertain. This may be one reason for trade unions to continue pursuing job security: employment security can seem less tangible in this regard.¹⁵⁰

Employment security is, however, not so distant from the 'fundamental principles' of labour law that they would be incompatible. Employment security can certainly supplement job security as a way to protect the workers, but it cannot (fully) replace the interests that workers have in job security and dismissal protection. Being able to find work at any time on the labour market does not say anything about the quality of that work, while having a good job also says nothing about one's ability to find another job if that job disappears.

¹⁴⁷ C. Lyhne Ibsen et al., 'Bargaining in the crisis – a comparison of the 2010 collective bargaining round in the Danish and Swedish manufacturing sectors' *Transfer* 2011 Vol. 17 No. 3, p. 323-339.

¹⁴⁸ Njoya 2012, p. 459-479. Cf. Rigaux 2009, p. 74.

¹⁴⁹ Julén Votinius speaks of 'partially relocating the employee's security to a place outside the employment relationship', Julén Votinius 2014, p. 370.

¹⁵⁰ Auer 2010, p. 371-386.

7. CONCLUDING OBSERVATIONS

This article is concerned with two notions: job security, a concept referring to the continuity of one's current employment; and employment security, which refers to the continuity of one's career and labour market prospects. Both terms are not legal terms in the sense that they have statutory definitions. Even though they are frequently used in the English legal literature, their exact meaning remains hazy and can cause confusion. More importantly, without a precise understanding of the exact goals and functions of these concepts, it is difficult to have a discussion of various dismissal law reform proposals that gives justice to this important subject. The discussion on dismissal laws will remain limited if we continue using simplified assumptions about both job and employment security. These simplified assumptions form neither a good basis for legislative proposals for dismissal law.

The European flexicurity strategy rightfully addresses the importance of employment security, since fewer people have a job for life and since people increasingly place value on having the opportunity to move freely on the labour market and to take up employment that suits their interest the best. This article intends to explore the questions the proposed shift from job security to employment security can bring up for scholarly legal debate. The first question would then be what employment security (or labour market security, if that is the preferred term) means or can mean in legal terms. Employability and labour market mobility are the two main pillars of employment security policy. For employment security to have a 'labour law footing', it needs to involve specific rights or duties between an individual employer and an individual employee. The debate should then be about the distribution of responsibilities on these issues between the State, the workers, and the employers.

The article found that in labour law there is currently a mix of job and employment security. Just because the rules on dismissals in most Member States require the employer to search for alternative solutions to dismissal, arrangements are often set up to help the redundant workers make a transition to a new job preferably without becoming unemployed. Training (for the new job) is almost always one of the possible measures in this regard. Therefore, modern dismissal law implies a degree of internal flexibility both on the side of employer and on the side of the employee. The question is whether training and (assistance with) transitions are indeed part of dismissal law in every Member State, and when they are, how far they extend. There are significant differences between the Member States in this respect and the measures seem to be in a constant state of flux. For employment security to truly be embedded in labour law, permanent positive duties on the side of the employer need to be developed further. In addition, the article found that contractual constraints on labour mobility have not yet been included in the discussion of employment security and labour market mobility, while there are strong arguments for a

need of a systematic and comparative analysis of these issues as well. What can still justify the use of non-compete covenants in the era of knowledge society when we search for ‘a better skills match on the labour market that increases productivity and leads to greater innovation and competitiveness’?¹⁵¹

Even though dismissal law already contains elements of employment security, it is still mainly orientated towards job security.¹⁵² However, different conceptions of job security correspond with different types of dismissals. Flexicurity discourse does not take this taxonomy in dismissal law into account. It also fails to take into account that both job security and employment security serve in different contexts. Job security – as important as it can be for workers – is never absolute and this is not where the primary protection of the employee is located. Dismissal law seeks to protect the employee against *unjustified* dismissal in order to protect the dignity of the worker. This protection upholds other workers’ rights *in a job*. The article argues, therefore, that attention should be paid to both the continuity of one’s career and to the continuity of one’s current employment. An average worker needs protection *on the labour market* and at the same time protection against *unfair* dismissal.

¹⁵¹ COM (2007) 359 fin, p. 3.

¹⁵² An important exception here are all types of flexible employment arrangements that are legally designed in such way to give very little claim to job continuity.