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Employee status of Deliveroo riders: a long-awaited decision (NL)

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Summary

On 24 March 2023, the Dutch Supreme Court finally ruled on the employment status of Deliveroo riders in the Netherlands. The Supreme Court has followed the earlier ruling of the Amsterdam Court of Appeal and ruled that Deliveroo riders qualify as employees (instead of self-employed workers). Even though the Advocate General of the Supreme Court advised the Court to develop new criteria for determining whether a worker qualifies as an employee or not, the Supreme Court applied roughly the same criteria as it had done in the past. The Supreme Court considered that developing new general rules for determining whether a worker is self-employed or employed is up to the national and European legislators.

Legal background

Article 7:610 of the Dutch Civil Code ('DCC') defines an employment contract as an agreement in which one party, the employee, undertakes to perform work in the service of the other party, the employer, in return for payment of a wage for a certain period of time. From this article the following three conditions can be distinguished: (i) *work* is to be carried out by the employee, (ii) the employee receives *remuneration* (wages) for their work, and (iii) there is a relationship of authority. If these three conditions are met, the labour relationship qualifies as an employment relationship. The third condition is the most important in practice and, in many cases, crucial in assessing whether a worker is in fact an employee or not.

A self-employed worker is generally contracted on the basis of a contract for services. A contract for services is (according to Article 7:400 DCC) defined as a contract for services when activities are conducted that consist of anything other than the creation of a work of a material nature, the retention of property, the publication of a work or the carriage or transportation of persons or property.

Facts

Deliveroo, a digital food delivery platform linking independent restaurants to customers via an ordering and payment system, started operating in the Netherlands in June 2015. From the moment Deliveroo started its activities, Deliveroo riders were employed on the basis of fixed-term employment contracts. From February 2018, Deliveroo decided not to renew these employment contracts, but from then on only enter into contracts for services and thus treat the riders as self-employed workers.

In 2018, the trade union FNV started legal proceedings against Deliveroo in which it claimed that the Deliveroo riders were in fact employees. FNV stated that the legal relationship between Deliveroo and its riders should be considered as an employment relationship. FNV argued that all the criteria were met: work, wages and a relationship of authority.

Both the subdistrict court and the Amsterdam Court of Appeal (the 'Court of Appeal') ruled in favor of FNV. The contracts between Deliveroo and the riders qualified as employment contracts instead of contracts for services.

Deliveroo challenged the judgment of the Court of Appeal. It is worth noting that during the appeal to the Supreme Court Deliveroo terminated its activities in the Netherlands (late in 2022).

Judgment

Prior to the judgment of the Supreme Court, the Advocate General of the Supreme Court, RH de Bock ('AG de Bock') advised the Court. In her substantial opinion she advised that the main factor in deciding whether a working relationship qualifies as an employment relationship should be whether the work the worker performs is 'organizationally embedded' in the company. According to AG de Bock, when the work performed by

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the worker forms part of the company's core activities, the work is organizationally embedded in the business of the company and in that case the 'relationship of authority' criterion is met. Only if the worker can be considered as a truly self-employed person ('an independent entrepreneur') will the worker not be considered to be an employee. AG de Bock thus advised the Supreme Court to apply new criteria for determining whether a relationship of authority exists (being essentially new criteria for determining whether a worker has to be considered as an employee or not).

The Supreme Court upheld the earlier judgment of the Court of Appeal. The Deliveroo drivers were qualified as employees instead of self-employed workers. The Supreme Court did not follow the advice of AG de Bock and applied roughly the same criteria as it had done in previous rulings.

The Supreme Court first considered – in line with earlier case law (*Groen – v – Schroevers* and *X* – v – *Gemeente Amsterdam*) – that in order to assess whether an agreement can be qualified as an employment contract the rights and obligations the parties have agreed on must be determined on the basis of the 'Haviltex' standard. All relevant facts and circumstances must be taken into account. Secondly, it must be assessed whether the agreed rights and obligations meet the legal requirements of the definition of employment contract in Article 7:610 DCC. For this qualification, it is irrelevant whether the parties intended to conclude an employment contract. The Supreme Court then considered that whether an agreement should be qualified as an employment contract depends on all the circumstances of the case in relation to each other (the 'holistic weighing'). The following 'elements' may be relevant:

- the nature and duration of the work;
- the manner in which the work and working hours are determined;
- the embedding of the work and of the person performing the work in the organization and business operations of the entity for whom the work is performed;
- the existence or non-existence of an obligation to personally perform the work;
- the way in which the agreement between the parties was established;
- the manner in which remuneration is determined and paid;
- the amount of remuneration;
- whether the person performing the work incurs a commercial risk in doing so;
- whether the person performing the work is acting or can act as an entrepreneur when participating in economic activities; and
- the weight given to a contractual clause, depending on whether the clause has actual significance for the person performing the work.

The Supreme Court saw no reason to formulate new general rules regarding the assessment of whether an agreement qualifies as an employment contract, such as the embedding of the 'work' in the organization as a leading element (as advised by AG de Bock). As these topics currently have the attention of both the Dutch and European legislatures, the Supreme Court saw no reason for development of the law on these topics.

With regard to the arguments raised by Deliveroo in appeal, the Supreme Court ruled that the freedom of the riders to decide whether or not to accept an assignment (work) does not in itself preclude the existence of an employment contract.

Commentary

In the Netherlands this decision of the Supreme Court has been long-awaited. The Supreme Court did not make use of the possibility to develop new criteria for the question of whether a worker qualifies as an employee. This is however not entirely surprising as the Dutch legislator is working on this topic.

The outcome of this judgment confirmed that the question of whether someone qualifies as an employee (or a self-employed person) still depends on a holistic weighing of all the circumstances of the working relationship. In practice these criteria can be difficult to predict whether a court will rule that a worker is an employee or not. The Supreme Court did not introduce a new framework for the classification of agreements as employment contracts or for distinguishing between employment and self-employment. The Supreme Court did add that embedding of the work (and embedding of the person performing the work) in the organization is one of the circumstances that should be taken into account in the assessment. It is however not a decisive element, as AG de Bock suggested it should be. It further follows from the judgment that the Supreme Court still underlines the importance of the actual work performed by the worker, rather than the formal type of contract entered into by the parties. Besides, the Supreme Court also seems to pay more attention in the assessment to the question of whether the worker behaves as independent in economic activities.

The Minister of Social Affairs and Employment initiated (in December 2022) a clarification of the rules regarding the assessment of an employment relationship. The government wants to clarify the open norm of 'relationship of authority' as included in Article 7:610 DCC by elaborating on three main elements: (i) material authority, (ii) the embedding of the work in the organization, and (iii) entrepreneurship. It is now up to the Dutch and the European legislatures to decide on a new legal framework. To be continued.

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Comments from other jurisdictions

Austria (Lukas Wieser and Gaudenz Küenburg, Zeiler Floyd Zadkovich): In Austria, the approach towards questions as to the qualification of contractual relationships for people working in the so-called gig economy (i.e., food delivery etc.) is similar to the underlying approach taken by the Dutch Supreme Court. However, Austrian law offers an additional type of agreement, apart from the employment contract, that could be considered for the underlying contractual relationships – the freelance contract (*Freier Dienstvertrag*) to which a few employment law provisions apply analogously.

The defining characteristic of an Austrian employment contract is that the employee is economically and personally dependent on the employer. This typically means that an employee is integrated within the organization of the employer's business, has to comply with instructions and has to carry out the obligations personally. Freelance contracts, on the other hand, are characterized by the fact that freelance workers are not personally dependent on the employer and therefore enjoy much more autonomy when rendering their services. The legal qualification of the contractual relationship as a freelance or employment contract is subject to an analysis of the actual day-to-day relationship between the parties, irrespective of the labelling of the agreement or its content.

Thus, whether the conditions for an employment contract are met in the case of bicycle couriers depends on an overall picture of the actual contractual relationship. With regard to the riders' freedom to decide whether or not to accept an assignment, the Austrian Supreme Court would likely decide in a similar way to the Dutch Supreme Court that this does not preclude the existence of an employment contract.

Overall, the Austrian approach towards workers in the gig economy can be considered similar to the approach taken by the Dutch Supreme Court. However, one special Austrian feature worth mentioning is the collective bargaining agreement for bicycle couriers. It was introduced in 2019 as the world's first collective agreement for bicycle couriers and regulates working conditions for employees in this particular part of the gig economy. It includes, for example, the right to reimbursement of costs for the use of private bicycles and cell phones. However, the precondition for the applicability of the collective agreement is the existence of an employment relationship.

Germany (Fritz Conzen, Luther Rechtsanwaltsgesellschaft mbH): We had already commented on the decision of the Amsterdam District Court that preceded this decision (**EELC 2022/19**) At that time, we compared it with the only decision in Germany to date that had dealt with the employee status of a crowdworker/digital platform worker. In summary, the German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') came to the conclusion that external circumstances and indirect constraints caused by contractual terms can establish personal dependence and thus establish an employment relationship. Now, similar in its reasoning, the Dutch Supreme Court emphasized the significance of economic dependence by weighing all the factual circumstances of the working relationship, rather than sticking closely to the formal type of contract. With the Dutch Supreme Court's confirmation of the lower court's decision, our last comment stays valid.

Beyond that, there was only one other judgment in Germany that dealt with digital platform work. In this case the BAG did not have to decide on the employee status of the worker, as that was undisputed. However, the judgment (BAG, 5 AZR 334/21) further consolidates the classification of digital work relationships as employment contracts, putting certain characteristics ('bring your own device') to one side. The case concerned an employee who worked as a bicycle supplier and got his deployment plans over an app. Due to a clause in his contract, he had to use his own bike, smartphone and mobile data allowance. The BAG explained that it is at the heart of an employment contract that the employee owes their work performance only while the employer provides the needed work equipment. Since there was no grounds to justify an exception to that rule, the BAG ruled that the employee was entitled to the provision of essential work equipment.

Nevertheless, the question of the employment status of digital platform workers is ultimately not yet resolved, for these decisions are issued on a case-by-case basis. While the Dutch Supreme Court may have refrained from establishing new criteria due to an ongoing process of the legislator, similar restraint cannot be expected from German courts. In fact, the relevant law, namely Section 611a of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB'), was only recently codified in 2017 and was based on the principles established by the jurisprudence of the BAG. There seems to be an expectation by the German legislator that these new types of work relationships can also be covered by the existing law. Further national legislative projects are not apparent at the moment. However, this could change, as efforts are being made at an EU level to bring more transparency to its 28 million digital platform workers. In early June 2023, the Council adopted a proposal of the European Commission, aiming to "[…] improve the working conditions of persons performing platform work by ensuring correct determination of their employment status […]". As of now, Article 3 of that proposal requires Member States to "have appropriate procedures in place to verify and ensure the correct determination of the employment status". Interestingly, and not far from the rulings of the two courts, that determination "shall be guided primarily by the facts relating to the actual performance of work […], irrespective of how the relationship is classified in any contractual arrangement". It remains to be seen if such a proposal takes form in a similar shape and how Member States will react. To be continued.

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