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Deliveroo riders and Uber drivers qualify as employees: modern employer's authority in platform work (NL)

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Summary

In 2021, Dutch courts held that both Deliveroo riders and Uber drivers are employees. Interestingly, the District Court of Amsterdam considered there to be a 'modern relationship of authority' between Uber drivers and Uber.

Legal background

Dutch labour law is based on the premise that the weaker contracting party needs protection. This protection is reflected in legal provisions that compensate the actual inequality between the employee and the employer. Only employees, i.e. persons working on the basis of an employment contract, enjoy protection under employment law. It follows from a recent judgment of the Supreme Court (*X – v – Municipality of Amsterdam*, ECLI:NL:HR:2020:1746) that two phases must be passed to qualify a contract as an employment contract.
Firstly, the agreed mutual rights and obligations must be determined based on the meaning that the parties could reasonably attribute to the content of the contract in the given circumstances and what they could reasonably expect from each other in this respect. Once the content of the contract is determined, it must be examined whether that content corresponds to the legal definition of employment contract.

Article 7:610 paragraph 1 of the Dutch Civil Code gives a definition of employment contract:

> The contract of employment is the contract in which one party, the employee, agrees to work in the service of the other party, the employer, in exchange for remuneration for a certain period of time.

To qualify as a contract of employment, the contract must therefore fulfil the following four criteria (i) (personal) labour, (ii) remuneration (wage), (iii) in the service of (under the authority of) the other party and (iv) during a certain period of time. The decisive factor is how the contract is actually performed. The parties' intentions are irrelevant to the qualification phase but can play a role in determining the agreed mutual rights and obligations.

Facts

Deliveroo

In the *Deliveroo* case, the Amsterdam Court of Appeal proceeded on the basis of the following facts. Deliveroo started its operations in the Netherlands in 2015. Initially, Deliveroo's riders worked on the basis of fixed-term employment contracts. Since 2018, Deliveroo has only been working with contracts for services. The content of these contracts as well as the way the work is organised has since been repeatedly and unilaterally changed.
Since the last amendments to its processes, Deliveroo's working method can be described as follows. Riders can log in to an app on their phone at any time. Once logged in, they are assigned deliveries based on an advanced algorithm called 'Frank'. A rider can accept or refuse a delivery. Refusal of a delivery does not have any direct negative consequences for the rider. Deliveroo pays its riders a fixed amount per delivered order and awards bonuses based on weekly changing criteria. Finally, the riders can be replaced at their own discretion, and they must provide their own means of transport and be in possession of a smartphone.

Uber

The facts of the *Uber* case are almost identical. Taxi drivers who meet certain requirements can register with the Uber app and, after agreeing to the conditions provided by Uber, can offer their services via this platform at any time. Uber regularly and unilaterally changes its terms and conditions, and drivers must always agree to them before they can use the app.

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The rides are offered on the basis of an algorithm, after which the Uber driver is provided with trip data (pick-up location, expected price, duration and rating of the passenger). The drivers can accept, ignore or refuse the rides offered but this may have consequences for their rating. A high rating can lead to priority in places where there is a high demand for rides. Among other things, a low rating may result in exclusion from the Uber app by Uber. As a rule, Uber pays the total sum of the rides made minus 25% service charge on a weekly basis. If Uber receives a complaint about the driver, it can unilaterally decide to return (part of) the fare to the passenger, after which the driver is paid the remainder.
Both Deliveroo and Uber assert that they have concluded contracts for services with their riders and drivers respectively. FNV, a Dutch union takes the view that an employment contract exists between the riders and drivers respectively and Deliveroo and Uber respectively.

Judgment

Both judgments are made on the basis of the four criteria mentioned in the legal background above and involve an assessment of the employment relationships between the platform and the platform workers in a general sense, not the employment relationship of an individual. They therefore lend themselves to joint review.
Both Courts started with an assessment of the 'labour' criterion. In both cases, it was considered that both the riders and drivers perform (valuable) work for the platform. The 'labour' criterion has therefore been met. In the *Deliveroo* case, the freedom the riders have with regard to their work was at issue. In this respect, the Court of Appeal considered that Deliveroo initially exercised influence on the working method of the riders by attaching benefits to a good rating, but that since 2018 the riders have enjoyed a large degree of freedom with regard to when they log on/off and whether or not they accept deliveries. In the opinion of the Court of Appeal, however, such freedom does not preclude accepting the existence of an employment contract. The fact that the riders are free to replace themselves on occasion does not detract from this opinion, because it has not become apparent that this possibility could lead to a revenue model for the riders.
In the *Uber* case, it was disputed whether transport services are Uber's core business. The District Court considered that from the fact that drivers have to agree to the conditions set by Uber in order to be able to use the app, it follows that they enter into an agreement with Uber to offer transport services. Uber is thus not merely a technology company. In addition, it was established that the work must be performed personally. The fact that this was the result of national legislation does not alter this.
Next, both Courts dealt with the 'wage' requirement. In the *Deliveroo* case, it was considered that this requirement is already met by the fact that the riders are paid for the work they perform. The way in which wages are paid by Deliveroo also indicates the presence of an employment contract rather than its absence. After all, Deliveroo pays the wages to the rider once every fortnight automatically, the rider has no influence whatsoever on the level of the wages since Deliveroo determines the wages unilaterally, and the work of the vast majority of the riders is regarded by the tax authorities as on a hobby basis, so that these riders are not liable for VAT. In the *Uber* case, the Court decided that the fare determined and paid by Uber qualifies as wages. The fact that the payment is made by another entity (affiliated with Uber) does not alter this opinion.
Then both Courts came to what is, in the words of the District Court of Amsterdam, "the most distinguishing criterion in the qualification question", the criterion of 'authority'. In the *Deliveroo* case, the Court of Appeal ruled that the presence of a relationship of authority is more likely than its absence based on the following circumstances. The freedom of a rider to determine the exact route for delivery themself is limited in view of the average delivery time and the hourly wage Deliveroo clearly strives for. It is furthermore irrelevant that Deliveroo hardly gives any instructions to its riders since the work is of a simple nature. The Court of Appeal was also of the opinion that the delivery of meals is Deliveroo's core business. This follows from its promotional videos, its general terms and conditions and its name. The Court of Appeal also deemed it significant that Deliveroo repeatedly unilaterally changes the form of contract, the way in which the work is organised and the payment model, and that Deliveroo has far-reaching control over the way in which the riders work by keeping track of their GPS location and sharing it with the customer. In addition, Deliveroo exercises influence on the behaviour of its riders by awarding bonuses on the basis of weekly incentives. Furthermore, the Court of Appeal considered that the purchase of a bicycle is not a typical entrepreneurial investment, since it is an everyday item, and attached importance to the fact that, although the riders are free to use their own 'gear' (clothing and meal box), Deliveroo encourages them to use Deliveroo's gear. Finally, the Court of Appeal noted in this respect that Deliveroo's riders are seen by both themselves and customers, affiliated restaurants, the tax authorities and Deliveroo itself as part of Deliveroo and not as independent entrepreneurs.
In the *Uber* case, the Court reached the same conclusion, based on comparable circumstances. The conditions under which drivers can use the Uber app are regularly and unilaterally set by Uber and must be accepted by them for every log in. The conditions are thus non-negotiable for the drivers. In addition, the algorithm determines which ride is offered to whom and for which price, and only a limited amount of ride data is provided to the drivers. Finally, the Court considered that the entrepreneurial freedom argued by Uber is absent, because through the rating system used and the consequences that Uber attaches to a certain rating Uber exerts influence on the behaviour of the drivers. More-

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over, Uber unilaterally determines the consequences of a complaint filed against the driver, usually resulting in a reduction of the fare. According to the Court, the algorithm thus has a financial incentive and a disciplining and instructive effect, which qualifies as modern employer's authority.
The fourth and last criterion, 'during a certain period of time', only plays a role in the *Deliveroo* case. With regard to this, the Court of Appeal ruled that it had not been demonstrated that the riders who work for Deliveroo do so to a negligible extent. This criterion was therefore also fulfilled. Finally, the Court of Appeal pointed to a number of other circumstances that indicate the existence of an employment contract. Deliveroo continues to pay the wages of its riders to a limited extent during illness and offers to take out liability insurance for them free of charge. Furthermore, the hourly wage aimed for by Deliveroo is insufficient to be able to take out occupational disability or unemployment insurance as a self-employed person. The fact that Deliveroo uses the fiscal model agreement 'no employers' authority' is also of less importance, since the fiscal and civil positions do not necessarily coincide. The Court of Appeal concluded its assessment with the question why Deliveroo did not give its riders a choice between an employment contract and a contract for services in response to Deliveroo's assertion that its riders prefer a contract for services, notwithstanding the fact that the parties have no influence on the qualification of the employment contract. Deliveroo was unable to provide a satisfactory response.
In both cases the conclusion was that, all circumstances considered, the Deliveroo riders and Uber drivers work on the basis of an employment contract.

Commentary

The legal position of platform workers has been in the spotlight in Europe for some time now. Recently, the European Commission proposed a directive on improving working conditions in platform work (COM/2021/762). In addition, several courts in different Member States have addressed the question of whether certain platform workers work on the basis of an employment contract or, as most platforms claim, on the basis of a contract for services. The *Deliveroo* and *Uber* cases are a good example of how Dutch national courts deal with the qualification question in the case of platform work.
Until recently, it was deduced from the standard judgment on the qualification question (*Groen – v – Schroevers*, ECLI:NL:HR:1997:ZC2495) that in the qualification question great importance must be attached to the parties' intentions. This resulted in the strategic design of contracts and therefore in an erosion of the mandatory labour law protection. Recently, the Dutch Supreme Court revisited the *Groen – v – Schroevers* doctrine and created a (new) review framework as described under the legal background above (*X – v – Municipality of Amsterdam*). The intention of the parties no longer plays a role in the qualification question; what is decisive is the actual legal relationship between the parties. This relationship must be examined against the four criteria of 'labour', 'wage', 'authority' and 'during a certain period of time'. This new approach is more in line with case law of the ECJ concerning the concept of employee, in which the objective characteristics of the employment relationship in question are central (*Lawrie-Blum*, Case C-66/85). Hereafter, the Dutch interpretation of the four criteria is compared to the judgments in the *Deliveroo* and *Uber* cases.
As appears from both judgments, the obligation to perform (personal) labour is quickly met. All activities, mental or physical, that are valuable to the provider of the work, qualify as labour. In the *Deliveroo* judgment an attempt was made to negate the personal character of the work by relying on the free replacement clause, in order to prevent the judgment that the labour criterion had been met. However, this attempt failed, because a free replacement clause does not in itself preclude the existence of an employment contract. Nevertheless, a free replacement clause can be a point of view in the question whether there is a relationship of authority. Incidentally, this is only the case if the free replacement clause results in the worker having the possibility of making it a revenue-generating activity. As long as the exercise of authority remains with the employer, a free replacement clause does not change the original exercise of authority. The imposition of requirements on the substitute, whether as a result of national legislation or not, on the other hand, indicates the exercise of authority.
Under Dutch law, the 'wage' requirement is met if the employer has undertaken with the employee to provide a quid pro quo for the work. Although it is customary for this remuneration to be received from the employer, this is not strictly required, as also follows from the *Uber* case. Furthermore, it is irrelevant whether the remuneration is below the statutory minimum wage and what name the parties give to the remuneration.
In the end, the qualification question usually comes down to whether the criterion 'in service of' has been met. This criterion is equated with the presence of a relationship of authority. It is a difficult distinguishing criterion because (i) the provider of work under a contract for services also has a power of instruction and (ii) it is evident that there is a worldwide trend of increasingly greater independence of employees in their professional practice. In the classical approach, a relationship of authority requires some form of control over the (content of the) work performed or the work discipline. However, authority can manifest itself in various ways. The classical approach does not fit in well with contemporary employment relationships because authority is interpreted in a different way than is traditionally the case. Sticking to the classical approach therefore leads to the erosion of subordination as the distinguishing criterion in the current spirit of the age. An interesting con-

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sideration from the *Uber* case in this respect is (paragraph 26):

> In today's technology-dominated age, the criterion of 'authority' has taken on a different meaning from the classical model, more indirectly (often digitally) controlling. Employees have become more independent and perform their work at more varying (self-chosen) times. It is considered that in the relationship between Uber and its drivers this 'modern authority relationship' exists. […]

With this consideration, the District Court of Amsterdam cuts through the construction set up by Uber and looks at the economic reality. The modern authority relationship is not so much the authority of the employer to give instructions but being part of the employer's organisation and applying the rules issued by that organisation and accepting the customs and habits that apply there.

The existence of authority must be assessed on the basis of a multitude of factors that are not necessarily decisive in themselves. Both Courts therefore devote a great deal of attention to the factors that have contributed to the opinion that authority exists. For example, the (simple) nature of the work may imply that the employee must have some degree of freedom in performing the work. In that case the absence of instructions is not a good indication of the absence of authority (*Deliveroo*). Whether the work concerns a core activity is relevant in the context of the question of whether the work is organisationally embedded in the organisation of the employer. If that is the case, it indicates the presence of authority. Finally, it follows from both cases that modern authority is exercised through, among other things, financial incentives and an assessment system.

The criterion 'during a certain period of time' is dealt with in the *Deliveroo* case but not in the *Uber* case. This is because this criterion does not play a significant role in practice and, according to the prevailing view, does not constitute an independent element of the definition of the employment contract. However, this may be different in the case of platform work because the criterion of authority usually not really helps in clarifying the situation.. Because of the (new) review framework in which the agreed rights and obligations must be established and set off against the four criteria, the Court of Appeal in the *Deliveroo* case pays some attention to other circumstances that point to the existence of an employment contract.

Both Deliveroo and Uber have appealed against the judgment that the riders and drivers respectively work on the basis of an employment contract. To be continued …

Comments from other jurisdictions

Germany (Leif Born, Luther Rechtsanwaltsgesellschaft mbH): The two companies Deliveroo and Uber are not practising their usual business model in Germany. Deliveroo no longer operates in Germany and Uber had to change its business model and works with car rental companies where the drivers are mostly permanent employees. Nevertheless, the legal classification of platform workers or crowdworkers is also being discussed in Germany. In 2020 the first and so far only case was decided by the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG'). The BAG ruled that the plaintiff crowdworker was working as an employee, with similar reasoning as the Amsterdam District Court.

The initial situation in Germany is identical to that in the Netherlands. Only if the crowdworker is classified as an employee do they enjoy protection under labour law, such as minimum wage, annual leave, protection against dismissal, etc. Section 611a of the German Civil Code (*Bürgerliches Gesetzbuch*, 'BGB') defines an employee as someone who is obliged by an employment contract to perform work in the service of another person, under instructions and in personal dependence. The decisive criterion is personal dependence, which can result from being bound by instructions or from being externally determined. Just as in the Netherlands, the actual performance of the contract is relevant and not the contractual agreements or the intention of the parties.

The case decided by the BAG concerned a crowdworker who worked for a crowdsourcing company. His job consisted of controlling the presentation of branded products in retail outlets or at petrol stations. The crowdworker drove to the supermarket or petrol stations and took photos of the products there. According to the terms of the contract stipulated by the company, the crowdworker was not allowed to transfer his account to other persons. The crowdworker was not obliged to accept orders but, if he accepted an order, he was given a time window to complete it, usually about two hours. He was paid per completed task and received in addition experience points for each task. By collecting experience points, he received more lucrative assignments in the long run.

The BAG ruled that an employment relationship was established between the crowdworker and the crowdsourcing company. The contractual conditions stipulated by the company had led to work in personal dependence. Due to the excluded transferability of the account the crowdworker was obliged to provide personal services and due to the simple work tasks and time limits for the tasks he was not free in the way he performed his work. In addition, the system of experience points meant that he was in fact forced to continuously accept orders in order to act economically.

The remarkable aspect of the decision from a German perspective is that the BAG recognised that external cir-

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cumstances and indirect constraints, caused by the contractual terms, can also establish personal dependence. This corresponds to the argumentation of the Amsterdam District Court and the 'modern employer's authority'. Nevertheless, the discussion is not yet over in Germany either, as it was a case-by-case decision by the BAG and the question still arises for other platform operators as to whether the terms of the contract establish a personal dependency of the crowdworkers.

United Kingdom (Bethan Carney Lewis Silkin LLP):
This case is interesting from a UK perspective because there have been several higher court decisions regarding the status of Uber and Deliveroo drivers in the UK, which reached different conclusions on similar facts.
In the UK there are various tests for deciding whether an individual is an employee, a worker or an independent contractor. Employees have full employment rights including the right to claim unfair dismissal. Workers have some, limited, rights (such as the right to paid holiday but not unfair dismissal protection) and independent contractors do not have employment protections.
Key factors in deciding someone's status include whether the individual had an obligation to provide 'personal service', and whether the individual could be genuinely said to be in business on their own account. A worker can be either: (a) an employee (i.e. employed under a contract of employment); or (b) someone who works under a contract through which they undertake to perform work personally, for someone who is not by virtue of that contract their client or customer. In other words, workers agree to work personally and are not running their own business. Independent contractors are genuinely self-employed and running their own business.
In the leading case of *Pimlico Plumbers ltd and another – v – Smith* [2018] UKSC 29 the UK Supreme Court ruled that a sufficiently broad, genuine and unfettered contractual right to appoint a substitute would result in the personal service requirement not being met, meaning that someone could not be an employee or a 'limb (b)' worker.
At the start of 2021, the Supreme Court unanimously decided that Uber drivers were 'limb (b)' workers not employees, so this decision is not identical to the Netherlands case reported here which found Uber drivers to be employees. Uber had argued that the drivers were independent contractors but failed to convince the Court of this. (The UK case *Uber BV and others – v – Aslam and others* [2021] UKSC 5 was reported in EELC 2021/24.)
There are some interesting parallels between the UK and the Netherlands decisions. The UK Supreme Court held that in employment status cases, individuals are claiming the protection of statutory employment rights, created by legislation. This means that the task for employment tribunals is not to identify whether a business has agreed under the terms of its contracts to pay, for example, the national minimum wage or annual leave. Instead, their task is to determine whether individuals fall within the statutory definition of a 'worker' to qualify for these rights irrespective of what had been contractually agreed. As the Supreme Court summarised, the approach must be one of "statutory interpretation, not contractual interpretation". The Supreme Court observed that the general purpose of employment legislation governing working hours and minimum wage etc is to protect vulnerable workers. The fact that a business is often in a position to dictate contract terms gives rise to the need for statutory protections in the first place. It therefore could not be right that a business could use its written contracts to determine who qualifies for protection.
Adopting this approach to determining whether Uber drivers were 'workers', the Supreme Court concluded that, although the drivers had substantial autonomy and independence in some respects, the factual findings of the employment tribunal justified its conclusion that the drivers were workers. In particular, Uber's control over their remuneration was of major importance. The drivers' ability to charge less but not more than the fare suggested by Uber meant that their notional freedom was of no possible benefit to them. Overall, drivers' services were in fact "very tightly defined and controlled by Uber".
As in the Netherlands decision above, the UK Supreme Court and lower courts also found that Uber was not merely a technology company but was in the business of providing driving services. And, as in the Netherlands, it was significant that Uber was exercising a great deal of control over the way the drivers performed the service, including unilaterally reducing the fare if a complaint was made against the driver.
In the UK *Deliveroo* case, however, the UK Court of Appeal held that the riders were not 'limb (b)' workers but were independent contractors. It was held that the Deliveroo drivers had a broad and unfettered right to ask a substitute to perform work in their stead, so did not have a requirement to provide 'personal service'. This was the key factor that resulted in a finding that they could not be either employees or workers. In contrast, it appears that this is not a decisive factor for the Netherlands Court which seems to have found in the case reported above that a genuine and full right of substitution was not incompatible with employment status.

Subject: Employment Status
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