The Netherlands

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EMPLOYEE STATUS IN DUTCH CASE LAW

This contribution discusses the long-awaited judgement by the Dutch Supreme Court (*Hoge Raad*) on the existence of employment contracts regarding Deliveroo riders[1]. Similar cases have already been decided in several surrounding countries (e.g. France[2] and the UK with Uber[3], Germany with crowdworking)[4], but the Dutch lower courts still lacked guidance. This lack of guidance is clearly visible from wildly differing judgements in first instance courts[5].

I - FACTS OF THE CASE

Deliveroo has been economically active in the Netherlands since 2015, and originally employed the riders on fixed-term employment contracts. This practice was discontinued after legal proceedings had been started by individual riders, and as of July 2018, the riders worked on so-called contracts for services (*opdrachtovereenkomst*). The riders are paid for each order that is delivered, delivery prices are laid down (and changed) unilaterally by Deliveroo. The riders need to use a mobile phone application to be able to get orders, the app operates on the individual riders' private phones.

The court of appeal (*gerechtshof*)[6] examined whether the facts of the case and the circumstances of its execution match the description of the employment contract laid down in art. 7:610 Dutch Civil Code (*Burgerlijk Wetboek*, *BW*) and therefore require qualification of the contracts as employment contracts. Art. 7:610 BW necessitates requalification of any contract as an employment contract if it fits the statutory description given there. The main elements are labour that must be provided, in exchange for payment by another person and the work must be done under someone else's direction and control. The court of appeal examines the facts and finds that the riders provide labour as they physically cover distances between the restaurants and the persons who ordered the meals and deliver the meals to those who ordered. There also is payment in return for the work done. The payment is

1 Hoge Raad 24 March 2023, ECLI:NL:HR:2023:443.
2 https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/374_4_44522.html
3 *UK Supreme Court Uber v Aslam*: Uber BV & Ors v Aslam & Ors [2021] UKSC 5 (19 February 2021) (balii.org).
4 BAG, Urt. vom 1.12.2020 - 9 AZR 102/20, BeckRS 2020, 41799.
5 See e.g. Rechtbank Amsterdam, 15 January 2019, ECLI:NL:RBAMS:2019:198 vs Rechtbank Amsterdam, 23 juli 2018, ECLI:NL:RBAMS:2018:5183.
6 Gerechtshof Amsterdam, 16 February 2021, ECLI:NL:GHAMS:2021:392.

automatically done every two weeks - something that is not consistent with methods of payment in a contract for services where the worker sends a bill to be paid. The riders cannot influence the payment - there is no question of a bargain between the two sides but a unilateral decision made by one party which, generally speaking, is not compatible with the existence of a contract for services of a truly self-employed person. Finally, about two thirds of the riders earn less than 40 % of the minimum wage and their work is considered a hobby by the tax services. The tax authorities do not tax them in the same way as they would do with « proper » self-employed. This is an indication that the riders might be employees. The main issue of the case is the question of direction and control of Deliveroo over the riders. The Supreme Court finds that the work itself does not necessitate much direction, but that the app allows far-reaching control regarding the route of delivery, time-management and the like. The algorithm « Frank » which in the app decides who gets which rides and decides on the rules applicable for bonuses and other parameters also offers far-reaching possibilities of direction and control concerning the riders' behaviour. To conclude on the elements of art. 7:610 BW, the Supreme Court states that the elements of art. 7:610 BW are presents. The Court then switches to the circumstances in which the work is executed. Here, the Court find that riders do not present themselves as self-employed. Secondly, Deliveroo should have rebutted the legal presumption of an employment contract in greater strength. Finally certain aspects of how the contracting parties organised liability point towards an employment relation. On the basis of all facts and circumstances the court decides that - overall - the facts and circumstances necessitate a qualification of the contractual relation as an employment contract.

II - JUDGEMENT

The Supreme Court starts by reiterating that art. 7:610 BW necessitates a mandatory statutory requalification of any contract that fits the description given in the law. To find out whether a contract fits the description, any court must start by establishing the rights and duties the parties have agreed to. If these are to provide work under the direction and control of someone else in return for money, the contract is an employment contract. The parties' intentions are then irrelevant.

Under point 3.2.5, the court formulates nine[7] (some scholars say ten)[8] factors that need assessing in a holistic manner when determining whether a given contract is an employment contract. These factors are: type and duration of the work, the manner in which work and working times are regulated, whether or not the work and the person working are structurally part of the organisation of the party that pays for the work (*ingebed in de onderneming*), whether or not the work must be done in person, the manner in which the contract has taken form, the way in which the amount of pay is agreed and paid, whether the person runs a commercial risk, and whether the person behaves like a truly self-employed person, for example by

7 See e.g. M. D Ruizeveld, « Deliveroo: De kwalificatievraag is nog niet definitief beantwoord », *TRA*, 2023/70.

8 A. R. Houweling, « Deliver-hoe of Deliver-moe? Het kwalificeren van de arbeidsovereenkomst na Deliveroo », *AR-updates*, 2023-400.

acquiring work on their own, having a business network, and finally the duration and exclusiveness of the contractual relation.

The Court then states that, due to the recent proposals for legislation on national and EU level, it will refrain from discussing appropriate minimum wage levels or other decisive/absolute indicators for an employment relationship. To conclude, the Supreme Court states that the appeal court took into account all facts and circumstances it had to consider. The mere fact that a rider may replace himself by someone else does not as such indicate the absence of an employment contract, as the work needs little to no supervision and there is no possibility that this becomes a sub-contracting system. The appeal court could in reasonableness find that the contractual relations fulfil the conditions of an employment contact and the motivation is sufficient.

III - DISCUSSION

The judgement offers some much-needed clarity concerning the relevant factors regarding the qualification of employment contracts, but has also met sharp criticism in the literature. While it is generally agreed that the judgement follows the system established in earlier case law, Ruizeveld sees this case as a missed opportunity[9]. She agrees that the catalogue of factors may be helpful but laments that it lacks indications as to the respective weight of the different aspects. Therefore, the outcome of cases may vary according to the depth of fact-finding that the judges in first and second instance are doing. This, in turn may be influenced by time constraints, factual difficulties or the parties' unwillingness to disclose certain information. These insecurities coupled with the leeway concerning the relative weight of the different factors may not lead to the uniformity the lower instances are craving.

The fact that the Supreme Court does not offer guidance as to the relative weight of the different factors is the more disappointing as the Advocate General had expressly invited the Supreme Court to rule that the organisational embedding of the work was to be the central starting point of any qualification and main criterion. The Court declined, however. While the question of being a structural part of the organisation is mentioned, the fact that this is required for the work as well as for the worker, substantially limits the functional value of this criterion[10]. Including the « embeddedness » of the worker opens the possibility of the work being embedded, e.g. someone working as a « freelance nurse » but seeing themselves as a service provider because that offers the possibility to not having to work night shifts etc. In that case, the parties' intentions start playing a role again in qualifying the contract, a factor that was severely limited by a judgement in 2020[11]. Now, it seems that if

9 M. D. Ruizeveld, « Deliveroo: De kwalificatievraag is nog niet definitief beantwoord », *op. cit*.

10 A. R. Houweling: « Deliver-hoe of Deliver-moe? Het kwalificeren van de arbeidsovereenkomst na Deliveroo », *AR-updates*, 2023-400 point 2.2.

11 Hoge Raad, 6 november 2020, ECLI:NL:HR:2020:1746, X/Amsterdam.

the worker does not consider himself « embedded » in the organisation, this may influence the qualification of the contract. It could also imply that a unilateral change is possible, once the worker considers himself embedded. The clarity which a criterion of the work being central to the business could offer, is therefore significantly weakened by the requirement that the worker must be embedded as well.

Among scholars, there is general agreement that all factors can be traced back to the requirements of art. 7:610 BW. Literature generally agrees that the factors 3 and 9 (or 8, depending on the way of counting) are the most important ones. They also reinforce each other. If someone's work is embedded in another organisation and is part of the business model, this implies that the person working there at that moment is part of the business and dos not behave like an economically independent entity[12]. Laagland adds the combined weight of points 5 and 10 which both focus on the position of the contracting parties and their relative power in the bargaining process.

An aspect which has drawn quite some comment is the way the Supreme Court deals with the aspect of « personally engaging in the work » - the *intuitu personae* nature of the employment contract. Before this judgement, art. 7:610 BW was read by many scholars to also imply an obligation that the work had to be carried out in person[13]. The Advocate General had already stated that she thought this to be a consequence of the fact that an employment contract exists, but not one of the constituting elements of such a contract[14]. The Supreme Court follows that line. Houweling[15] and Grosheide[16] applaud this development. In their view, this shows that the Supreme Court is aware of the danger of just inserting a clause concerning a right to replace oneself in a contract to prevent this from being an employment contract, a danger that Said had already spotted[17]. Now, the court demands that a replacement clause needs to be checked for « real meaning » (*daadwerkelijke betekenis*), which means that in case the worker can use the clause without sanctions or may use this for types of sub-contracting, this points towards a real contract for services. In the last case, also other factors point towards the person being a « real » self-employed, as they act as real contractors.

Finally, Houweling in particular points towards a much more fundamental question: all cases dealing with qualification of contracts deal with very peculiar cases. Deliveroo is about a platform that acts as go-between to have meals delivered,

12 See e.g. E. F. Grosheide, « Maaltijdbezorgers van Deliveroo zijn werkzaam op basis van een arbeidsovereenkomst », *JAR*, 2023/107; A. R. Houweling, « Deliver-hoe of Deliver-moe? Het kwalificeren van de arbeidsovereenkomst na Deliveroo », *op. cit.*, point 2; M. D Ruizeveld, « Deliveroo: de kwalificatievraag is nog niet definitief beantwoord », *op. cit.*

13 A. R. Houweling, « Arbeidsrechtelijke themata », *Boom juridische Uitgevers*, 2023, p. 162/3, with further sources in footnotes 25 and 26.

14 A-G R. H. de Bock, ECLI:NL:PHR :2022 :578.

15 A. R. Houweling, « Deliver-hoe of Deliver-moe? Het kwalificeren van de arbeidsovereenkomst na Deliveroo », *op. cit.*, point 3.

16 E. F. Grosheide, « Maaltijdbezorgers van Deliveroo zijn werkzaam op basis van een arbeidsovereenkomst », *op. cit*.

17 S. Said, « De arbeidsovereenkomst: een bewerkelijk begrip », *Deventer*, Kluwer 2022, p. 62.

X/Amsterdam concerned a person trying reinsertion in the first labour market while still receiving benefits. Considering the peculiar facts of these cases, are these the proper basis for developing a new way of qualifying employment contracts?[18]

Conclusion

Generally speaking, formulating factors to take into account can be helpful in shaping case-law and clarifying legal issues. However, in this case, I share the misgivings of the colleagues cited above. The judgement is certainly a missed opportunity in some ways. While the *trias politica* makes clear that judges should refuse from making the law, the confidence the Supreme Court shows towards the national and EU legislators is surprising. After all, the platform directive is embattled and the situation on the national level is even less clear. At the very least, the Court should have provided more insights into the relative weight of the different aspects to be considered. Alternatively, it could have stated that no general rules can be derived from a case as specific as the current one. This judgement will not prevent new cases from arising, as everything remains dependent on the facts and circumstances of the concrete case. The clarification regarding the status of the factor « personal work » is very welcome, but it remains to be see whether this will be upheld in less peculiar work circumstances.

18 A. R. Houweling, « Deliver-hoe of Deliver-moe? Het kwalificeren van de arbeidsovereenkomst na Deliveroo », *op. cit.*