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Contradictory court rulings on the status of Deliveroo workers in the Netherlands

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Publication date:
2019

Document Version
Peer reviewed version

Link to publication in Tilburg University Research Portal

Citation for published version (APA):
Zekic, N. (2019, Jul 1). Contradictory court rulings on the status of Deliveroo workers in the Netherlands. Illinois College of Law. https://cllpj.law.illinois.edu/dispatches

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Download date: 23. Jan. 2025

Dispatch No. 17 – Netherlands – "Contradictory court rulings on the status of Deliveroo workers in the Netherlands", by Nuna Zekić[1]

July 1, 2019

I. Introduction

On January 15th, 2019, two verdicts were issued regarding Deliveroo workers in the Netherlands. One was on the classification of Deliveroo riders as employees,[2] and the second on the application of the collective agreement 'Road transport and haulage over the road' on meal delivery by Deliveroo riders.[3] Both cases were commenced by *Federatie Nederlandse Vakbeweging* (FNV), the largest trade union in the Netherlands. Especially the verdict on the employment status is important, because a half of year earlier, the same court ruled in a case commenced by one individual Deliveroo rider that he in fact was an independent contractor and not an employee.[4] Why do courts in comparable situations come to such contradictory rulings?

II. The Employment Contract in the Netherlands

The Netherlands does not have a specialised labour court, like some other countries do; instead regular civil law courts deal with labour and employment cases. The employment contract is defined in the Dutch Civil Code as a contract whereby one party, the employee, commits himself to perform labour in service of the employer, in exchange for remuneration.[5] The part 'in service of the employer' implies that the employee is working under control of the employer. When there is no obligation on the side of the worker to perform labour, Dutch labour law scholars will often decide that there is no employment relationship.[6] As in other systems, the control-element is considered to be the characteristic feature of the employment contract. The three elements – labour, remuneration, and control – are important to determine whether a worker is indeed working under an employment contract, but they can be present in other working arrangements too, such as contracts with independent contractors.

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[2] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:198.
[3] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:210.
[4] Court of Amsterdam July 23, 2018, ECLI:NL:RBAMS:2018:5183.
[5] Article 7:610 Civil Code.
[6] E.g. W.H.A.C.M. Bouwens, R.A.A. Duk, & D.M.A. Bij de Vaate, *Arbeidsovereenkomstenrecht*, Deventer: Kluwer 2018, p. 4.

Freedom of contract is important in Dutch labour law. The Dutch Supreme Court finds that in principle, the parties on the labour market can contract for work under (many) different agreements. What is applicable between parties is determined by what they had in mind when concluding the agreement, while also taking into account the way in which they actually performed the agreement.[7] That means that the intentions of the contracting parties are very relevant for the classification of the contract, as well as the conduct of the parties. In fact, all the relevant facts and circumstances of the case have to be taken together, without a single circumstance being decisive. This is called the 'holistic approach', which is the leading approach in the Dutch jurisprudence. In this approach, also the social status or the social position of the worker can be relevant: the more economically dependent the worker is, the likelier it is that the judge will rule the worker to be an employee.[8]

The employment qualification-test has only won in importance in recent years. In the Netherlands, workers can only be classified either as employees or as independent contractors (e.g. solo self-employed workers). However, the increase of the use of nonstandard types of employment contracts has been considerable in the Netherlands in the past decade.[9] Flexible employment as well as the number of solo self-employed workers are rising. In 2015, 21% of the workers had a flexible contract, while in 2003, this was 13,6%.[10] It seems that especially the most flexible and unsecure types of employment contracts, such as zero-hours contracts, are on the rise.[11] Moreover, the transitions from flexible work to more permanent positions has decreased.[12]

III. Deliveroo Rulings

Deliveroo has been active in the Netherlands since 2015. Initially, *Deliveroo* concluded employment contracts with the riders, but from 2017 it stopped using employment contracts and started concluding agreements with riders as independent contractors. The judge in the latest case (the FNV-ruling) therefore chose as the central question to assess whether the character of the legal relationship between *Deliveroo* and its riders has *changed* in such a way that the elements of the employment contracts – notably the element of subordination – are no longer met. In the

[7] Supreme Court November 14, 1997, ECLI:NL:HR:1997:ZC2495 (*Groen/Schroevers*).
[8] W.H.A.C.M. Bouwens, R.A.A. Duk, & D.M.A. Bij de Vaate, *Arbeidsovereenkomstenrecht*, Deventer: Kluwer 2018, p. 11.
[9] L. Köster & W. Smits, 'Tijdelijk werk: Nederland in Europees perspectief', in: *Dynamiek op de Nederlandse Arbeidsmarkt 2014*, CBS 2015, p. 147-148; A. Heyma & S. van der Werff, 'De sociaaleconomische situatie van langdurig flexibele werknemers', Amsterdam: SEO 2013.
[10] CPB, *De flexibele schil van de Nederlandse arbeidsmarkt*, CPB Achtergronddocument November 17, 2016. Other documents report an increase from 16% in 2003 to 27% in 2017, Statistics Netherlands (CBS), *Werkzame beroepsbevolking; positie in de werkkring*, https://opendata.cbs.nl/statline (website visited on 19 March 2018).
[11] CPB 2016.
[12] Köster & Smits 2014, p. 147-148. Also see R. Dekker, 'Doorstroom van Flexwerkers', *ESB Arbeidsrecht* 2012 (4628), p. 70-73.

first *Deliveroo*-ruling the judge does not consider this fact. Both judges use the above explained 'formula' established by the Dutch Supreme Court in which not only the rights and duties are considered that the contracting parties had intended to agree, but also the way in which they virtually executed their agreement.[13]

In the first *Deliveroo*-ruling, the judge stays close to the wording of the contract and emphasizes that the contract explicitly mentions that the parties do not have the intention to go into an employment contract. Furthermore, the judge finds that the rider was aware that he would be working as an independent contractor, since he asked for this contract himself and since he had registered as independent contract at the Chamber of Commerce. In the FNV-ruling, however, the judge chooses to emphasize that the contract used by *Deliveroo* is a standard type of contract that is completely and unilaterally formulated by *Deliveroo* and that this contract is in fact non-negotiable.[14] In such situations, the written contract cannot be of overriding importance in determining the intention of the contracting parties. The court remarks that it understands the need for flexibility on the side of *Deliveroo* and even on the side of some riders, but it rules that the parties cannot decide to opt-out of labour law given its imperative and protective nature.[15] The court then contemplates on the meaning of 'independent contractor' and decides that a certain element of *entrepreneurship* must be present. Something this judge finds is missing in *Deliveroo* riders. On the contrary, the work performed by the riders forms the core of the *Deliveroo* business. Even though *Deliveroo* stresses the technology side of the company and the fact that it is exploring and developing other possible markets, delivery of meals is an essential part of (the identity of) the company; something that is reflected in the name as well.[16] In sum, in the FNV-ruling, the judge pays less attention to the contract and the intentions of the contracting parties. This is where this ruling differs from many other court rulings in the Netherlands.

As said, the judge examined whether the legal relationship between *Deliveroo* and its riders has changed in such a way that the elements of the employment contracts are no longer met. Since *Deliveroo* riders were first employees and then later were labelled independent contractors, the judge assessed how much their work and the working relations with *Deleveroo* have changed in the meantime. Notably, the judge does find that the *contractual* obligation to accept and perform work has changed considerably since the riders became independent contractors. When they were employees, they were obliged to be available for work during a certain minimum of time and they were obliged to accept and perform the offered 'rides' during their shift.[17] Declining deliveries (time and again) would result in a summary dismissal. On the contrary, there is no obligation to be available for work and to perform work for *Deliveroo* riders as independent contractors. They are free to decide if and when they log in the app. The obligation to perform

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[13] Supreme Court November 14, 1997, ECLI:NL:HR:1997:ZC2495 (*Groen/Schroevers*); Supreme Court March 25, 2011, ECLI:NL:HR:2011:BP3887 (*Gouden Kooi*).
[14] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:198, sub 21.
[15] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:198, sub 22.
[16] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:198, sub 25.
[17] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:198, sub 29.

work only arises when the rider has accepted a delivery in the app. That may be the case, but the judge stresses that it is important to assess whether the obligation to be available for work has *really* changed when one looks at the actual situation in practice. The judge assumes it not plausible that *Deliveroo* and the rider sign the contract for incidental delivery. The small remuneration that the rider receives for one delivery compared to the costs of purchasing the meal box and the entry in the register of business names at the Chamber of Commerce are signs that the rider does not intend to work for *Deliveroo* only incidentally. This is also not *Deliveroo*'s intention, the judge finds. The system 'Frank' that *Deliveroo* uses to assign deliveries to riders, works in such a way that riders who have applied for shifts in advance are given priority. That means that *Deliveroo* prefers that riders log in and are available for shifts.[18] *Deliveroo* also monitors riders' performance. Riders who deliver often and well can also get 'priority access' to certain shifts and areas, which increases their chances of getting assigned deliveries in popular shifts. There is also a bonus system that encourages the riders to work as much as possible and to perform the work well. If the rider wishes to generate enough income, it is in his best interest to log in for a shift and to perform the work well. In addition, if the rider declines a delivery offer, he/she needs to fill in a reason for the decline. *Deliveroo* can use this – even when the rider fills in no reason – to measure performance. Overall, the judge finds there is no complete freedom to decide whether or not to (be available for) work on the side of the riders. *Deliveroo* tried to convince the judge otherwise and presented a monthly survey of all deliveries, which shows that 44,5% of all deliveries offered to riders were in fact declined. This was not enough to change her mind, however, since the judge could not conclude from this survey why the deliveries were declined or what were the consequences

Deliveroo also referred to the fact that the riders are not obliged to perform the work in person. The contract states they are free to find a replacement, as long as the substitute has shown beforehand a proof of identity and a permit to work in the Netherlands.[19] However, the judge finds this of little substance. There is very little time to find a replacement when one has accepted the delivery, so the need and the ability to make use of this contractual possibility are small. The law indeed states that the employee is obliged to perform the work in person; in performing his work he/she can only be replaced by a third party with employer's permission.[20] The judge finds this not to be a distinguishing criterion. According to Dutch law, a subcontractor is obliged to perform work in person as well, unless otherwise agreed.[21] Besides, the possibility of replacement in *Deliveroo*'s contact can be seen as permission given by the employer.

The judge concludes that when the riders are at work, there is unabated control. It may be the case that there are only general instructions on how to perform the work and there are no concrete instructions every time the rider needs to make a delivery, but with such 'simple, unskilled standard tasks', no additional instructions are needed. It is sufficient to give general

[18] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:198, sub 31.
[19] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:198, sub 38.
[20] Article 7:659 Civil Code.
[21] Article 7:404 Civil Code.

instructions.[22] There is a clear contradiction here with the first *Deliveroo*-ruling from July 2018 where the judge placed these general instructions under the heading of 'safety' and remarked that such instructions are not 'illogical' in view of the nature of the service. In the context of reliability and safety, *Deliveroo* is allowed to impose such rules on 'those who perform work under its flag'. Such (safety) rules can be given both to independent contractors and to workers. That distinction is not relevant in this case according to the judge, since the rules are rather related to the nature of the service and not so much to the relation between *Deliveroo* and the riders.[23] In addition, the judge clearly remarks that these are general rules and not case-specific.

IV. Analysis

In the FNV-ruling, the judge declares that the central question is whether there is (still) a subordinate relationship between *Deliveroo* and its riders. The main arguments there are that real freedom is missing and that the possibility of replacement is an empty shell. The judge stresses the underlying mechanisms, which restricted the real freedom of riders to decide on when and if to work for the platform, such as low salaries and the consequences of rejecting shifts. The Dutch judges clearly disagree on the question whether or not *Deliveroo* exercises control over *how* the riders perform their work. Both see that *Deliveroo* only gives general instructions, but for one judge (in FNV-case) this is enough to establish control, because the type of work does not require other instructions. The other judge that ruled that *Deliveroo*-riders are self-employed found that these general rules are related to and necessary for the type of service *Deliveroo* is providing and that they do not indicate an employment relationship. The judge in the FNV-ruling stresses that GPS-control offers a possibility for *Deliveroo* to follow and monitor the riders.

One of the important aspects in such cases is whether or not the riders are required to use a certain uniform or a meal box and whether or not they have to operate under the logo of the platform. Through the Dutch cases, it is clear that *Deliveroo* has changed its strategy on this point, at least in the Netherlands. In the first ruling – July 2018 – it was not clear whether the use of *Deliveroo*-material was mandatory. In the second ruling – January 2019 – it was clear that since *Deliveroo* stopped using employment contracts, they also no longer require from riders to use their material. This change of strategy was not enough to convince the judge in the second case that there is no subordination. Indeed, there still might be strong incentives for the workers to use the uniforms and the meal boxes, because of the convenience and the need to be recognisable as meal deliverers both in traffic and with consumers.

As said, the Dutch test for employment status takes a holistic view: all the circumstances of the case need to be considered in relation to one another. The Supreme Court explicitly mentioned the social status of the parties as one of the circumstances that can be considered. In this context,

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[22] Court of Amsterdam January 15, 2019, ECLI:NL:RBAMS:2019:198, sub 54.
[23] Court of Amsterdam July 23, 2018, ECLI:NL:RBAMS:2018:5183, sub 20.

the economic dependency of the worker in question plays an important role as well. In other words, the judge will often examine whether the worker truly and deliberately chose to be an independent contractor. However, not one factor is decisive in this test. The consequence of this holistic view is that very similar cases can have very different results. Courts can come to different conclusions even in cases where the same employer and the same type of work is concerned. This seems to be the result, at least in part, to differences in the importance given to different elements of the test to determine employment status.