Dutch court: Deliveroo-rider is a self-employed worker

On the 23rd of July 2018, the first Dutch Deliveroo-case was published. The Dutch district court ruled that Deliveroo-rider Sytze Ferwerda is a self-employed worker, and not an employee.

Legal framework: the employee and the self-employed worker in Dutch labour law

In Dutch labour law, a worker is either an employee or a self-employed worker. While the employee is protected by labour law and social security law, the self-employed worker (generally) lacks this protection. As an effect of this binary system, the consequences of being qualified as a self-employed worker can be quite invasive.

Article 7:610 of the Dutch Civil Code (hereafter: CC) states that the employment contract is a contract between two parties: the employer and the employee. The employee commits himself to work for a certain period of time, under the direction of the employer, for which the employer owes the employee remuneration. Article 7:659 CC states that, in principle, the employee must perform his work personally. Substitution is only allowed with the permission of the employer. In 1997, the Dutch Supreme Court ruled that when determining whether a person is an employee or not, all circumstances must be considered. This means that the court must not only consider what parties intended when they entered the contract, but that the court must also consider how parties implemented the contract. Furthermore, the social position of the parties involved should be taken into account. This method is also referred to as the *'holistic approach'*.[1]

If the requirements deriving from article 7:610 CC and 7:659 CC are not met, the contract does not qualify as an employment contract, but as different type of (commercial) contract. In that case, the worker is considered a self-employed worker and not an employee. The main difference between an employee and a self-employed worker, is that the self-employed worker is not subordinate to his contractor. Furthermore, the self-employed worker is generally not obliged to perform his work personally.

Deliveroo-rider: not an employee, but a self-employed worker

In the present case, the court had to determine whether Deliveroo-rider Ferwerda can be considered an employee. Ferwerda is a (now) 20-year-old student that has been working for Deliveroo since June 2016, at first as an employee. At a certain point Deliveroo decided that starting February 2018, Deliveroo would exclusively contract with self-employed workers. In response, Ferwerda terminated his employment contract – which would ultimately end on the 3rd of February 2018 – and started working as a self-employed worker in November 2017. In the present procedure, Ferwerda states that his contract should however still be qualified as an employment contract.

The Dutch district court ruled that the contract between Deliveroo and rider Ferwerda can in fact not be qualified as an employment contract, so that Ferwerda is not an employee, but a self-employed worker. In the following, several elements of this case will be highlighted, mainly in order to clarify how and why the court came to this decision, but also to illustrate the difficulties when it comes to the legal qualification of platform work in general.

[1] Dutch Supreme Court, 14th of November 1997, ECLI:NL:HR:1997:ZC2495 (*Groen/Schoevers).*

Intention: employment or entrepreneurship?

According to the court it was clear that Deliveroo and Ferwerda did not intend to establish an employment contract. Not only was this explicitly stated in the contract: Ferwerda also acted on this intention by acquiring a VAT-number and registering as a sole proprietor in the Commercial Register of the Chamber of Commerce. Although this indeed seems to implicate that both parties intended to establish a so-called 'contract for services'[2], several remarks can be made. One of these remarks is that Ferwerda initially started working as an employee for Deliveroo. As said, Deliveroo at one point decided to exclusively work with self-employed workers, after which Ferwerda registered as a sole proprietor. It can be questioned if Ferwerda can truly be considered an entrepreneur. In the aforementioned Commercial Register, the goal of his enterprise is described as *'delivering food for Deliveroo'.* Hence, he started his sole proprietorship solely so he could continue working for Deliveroo. Furthermore, Deliveroo determined Ferwerda's tariffs and even drew up Ferwerda's invoices. At the very least it can be said that this is not very common for *true* entrepreneurs. All in all, it can be questioned whether Ferwerda really wanted to work as a self-employed worker, or if he simply wanted to *work.*

The implementation of the contract in practice: no subordination

The court ruled that the way parties implemented the agreement in practice, also points in the direction of a contract for services, and not an employment contract. More specifically, the court ruled that Ferwerda is not subordinate to Deliveroo, mainly since he is not bound by any instructions and is not obliged to perform his work personally. Ferwerda is free to decide how, when and even *if* he wants to work at all. If he does not want to work, he can simply choose to not log onto the app. Once logged in, he is still allowed to refuse and even cancel shifts, would he already have accepted them. The fact that Ferwerda's working materials (i.e.: his bicycle) have to meet certain safety requirements, also does not qualify as subordination. According to the court, imposing safety requirements on workers is not *'illogical'* and does not necessarily mean that a worker is subordinate to the other party.

Ferwerda stated that regardless of the aforementioned, he is in fact subordinate to Deliveroo, since Deliveroo (indirectly) has a say in his working hours (and ultimately, his income). More specifically, according to Ferwerda subordination can be derived from the fact that deliveries are not assigned *randomly* to riders. The assignment of deliveries is arranged by an algorithm that gives priority access to deliverers with better 'results' when it comes to attendance, super peak participation, and late cancellation. According to Ferwerda, this implies (some form of) subordination. However, the court ruled otherwise: the single fact that deliveries are not assigned randomly, is insufficient to accept subordination. Here, the court found it particularly relevant that the algorithm did not result in Ferwerda being deprived from sufficient income.

Two remarks can be made here. Firstly, it can be questioned whether the fact that the algorithm does not deprive workers from sufficient income should be considered a contra-indication for the existence of an employment contract. This fact could also be interpreted as an indication of subordination, since it implies that the worker is (financially) dependent on the employer. Secondly, the algorithm could as well be explained as a tool to assess the workers' job performance, since it – apparently – rewards good job performance by abilitating the worker to work more shifts, and (ultimately) generate more income. A tool that assesses the workers' job

[2] Article 7:400 CC.

performance, could (also) fit in an employment contract. Nonetheless, in the present case, the conclusion of the court that there is no subordination – and thus: no employment contract – is understandable. As said, according to the Dutch Supreme Court, *all* circumstances should be taken into account when determining whether a worker is an employee or not. In this case, there are simply many (more) circumstances that indicate self-employment: after all, Ferwerda had *absolute* freedom in deciding if, how and when he wanted to work.

The role of the social and economic position

According to the Dutch Supreme Court, the social and economic position of the contracting parties can also play a role when determining the legal status of a worker. In the present case, Ferwerda stated that due to his (weaker) social and economic position, the contract he entered into with Deliveroo should not be qualified as a contract for services, but as an employment contract. The court did not adopt this argument. Since Ferwerda not only signed the contract for services, but also acted on it – for example by acquiring a VAT-number and registering himself as a sole proprietor in the Commercial Register of the Chamber of Commerce – he seemed to deliberately and consciously have chosen to be an entrepreneur. As said before: it can be questioned however if Ferwerda truly chose to be an entrepreneur. It seems to be clear that he initiated his sole proprietorship so he could continue working for Deliveroo, and not necessarily because he aspired to be an entrepreneur.

Determining the legal status of the platform worker

Given the circumstances, the decision of the court that Ferwerda is not an employee, is understandable. However, this outcome also exposes some issues when it comes to determining the legal status of workers that perform low-skilled work, such as (some) platform workers. Assuming that platform workers that perform low-skilled work (generally) hold a weaker social and economic position, it would be expected that these types of workers would (sooner) be protected by labour law. Paradoxically, in case of low-skilled work it seems to be (generally) easier to avoid employment. After all, in many cases it is not likely or even possible to give instructions on *how* the worker should perform his work, because of the 'simple' nature of the job. When workers are also free to choose *if* and *when* they want to work – which is mainly the case in the platform economy – it is even less likely that the worker qualifies as an employee. Furthermore, when it comes to low-skilled work it is not unusual that the worker is allowed to replace himself without permission, which makes it even harder to determine employment.

A consequence of the aforementioned is that vulnerable workers at the 'bottom end' of the labour market seem to be more likely to lack labour law protection. This seems to be in conflict with one of labour law's main goals: protecting vulnerable workers. Although the outcome in the present case does not seem legally incorrect, it does raise some questions regarding the way the legal status of (platform) workers is determined, for example regarding subordination: is the way we define subordination still fit for purpose? And, what should the role of the social and economic position of the worker be in this regard?

Towards new legislation?

In the present case, the court recognizes that the Dutch legal framework is not (yet) modelled to tackle the challenges that the platform economy brings along. However, the court also states that the outcome in this case does not lead to such unacceptable consequences that the decision

in this case should be otherwise. According to the court, it is up to the legislator to come up with a solution for this problem – if necessary.

This solution may possibly be found in a measure that was proposed in 2017 after the formation of the new Dutch government.[3] The idea is that an employment relationship will be assumed to exist when a worker works below a certain tariff (max. 125% of the minimum wage) for longer than three months. If the contract does not exceed the duration of three months, an employment contract is still assumed when the worker performs work that corresponds to the 'regular activities' of the employer.[4] If the aforementioned requirements are met, the contract is qualified as an employment contract, regardless of whether the worker is subordinate to the employer, or whether the worker is obliged to perform his work personally. This measure is particularly meant to protect workers at the 'bottom end' of the labour market and to avoid 'bogus self-employment'.

Although this seems like a viable solution for vulnerable (platform)workers, it can be questioned to which extent this measure will be effective. For now, it seems as if an employment contract can easily be avoided by stipulating a tariff (just) above 125% of the minimum wage. There are no details available yet on how the legislator plans on implementing (and upholding) the proposed measure. The expectation is that this measure will be implemented in 2020. Of course, ELW will keep you updated!

mr. S. Said
Tilburg University

[3] Coalition Agreement 2017 – 2021, *'Vertrouwen in de toekomst' ('Faith in the future')*.
[4] And again, combined with a tariff below a maxixum of 125% of the minimum wage.