Summary FNV/Deliveroo
In reference to: employment contracts
(ECLI:NL:RBAMS:2019:198)

1. Facts and circumstances

Deliveroo started in the Netherlands in June 2015. Deliveroo is an organisation dedicated to maintaining a digital platform through which independent restaurants offer meals that consumers can order on that platform. In addition, restaurants can make use of the delivery service that Deliveroo has been offering since mid-2015. Deliveroo recruited deliverers, also known as "Riders", on the basis of a temporary contract. As of February 2018, Deliveroo did not extend these contracts and the deliverers can solely carry out activities for Deliveroo under a commission contract, where deliverers make use of an app. When allocating the delivery of meals, Deliveroo makes use of an algorithm. The deliverers receive – just like when they were employed – a bonus depending on the number of deliveries. Before the deliverers can start at Deliveroo, they must first watch a number of instruction videos of the company. The deliverers supply their own working instruments, at least a smartphone and a means of transport. The box for the transport of food/drinks must comply with Deliveroo's safety regulations.

FNV asks for a declaratory judgement that the agreements between Deliveroo and its 'Riders' can be regarded as employment contracts. Deliveroo questions this and it also states that the FNV is not admissible in its claims.

2. Legal questions

1.
Is the FNV admissible in its claims based on a Collective Action (Article 3:305a BW (Dutch Civil Code))?
2.
Is the legal relationship between Deliveroo and its 'Riders' to be regarded as an employment contract (in deviation from the party agreement) as referred to in Article 7:610 BW (Dutch Civil Code)?

3. Legal considerations

Legal question 1 (inadmissibility FNV):
Five requirements apply to the question whether the FNV is admissible for Collective Action:
a. It must concern a foundation or association with full legal capacity;
b. with adequate statutory purpose.
c. The interests defended by the organisation must be similar and sufficiently collective to promote efficient and effective legal protection for the benefit of those concerned.
d. The organisation must have attempted to reach the advanced through consultation with the defendant.
e. The interests of the persons on whose behalf the legal claim is brought, must be sufficiently protected, which also includes that the organisation must have a sufficient interest in the legal claim (3:303 BW (Dutch Civil Code)).

In this context, Deliveroo argued that the FNV should be declared inadmissible because the declaratory judgement contains a qualification request, that does not lend itself to collective interests. The FNV sees no obstacle to the qualification problem. Because the performance of meal delivery is 100% determined in all cases, the interests do lend themselves very well to collectiveness. The FNV is also an association with full legal capacity (a).
The Subdistrict Court also ruled that the FNV has its own independent interest in bringing the claim. The broad description of the statutes includes, inter alia: *"conducting legal proceedings to protect the interests of workers*" and this procedure falls within its scope. In addition to this, it is clear that Deliveroo has refrained concluding employment contracts and switched to

partner contracts, which results in a change in the legal position of the deliverers. FNV is committed to this position. The fact that the FNV did not institute the procedure on behalf of a deliverer is not a requirement for admissibility, since the FNV has an independent interest (b). Furthermore, it is also important whether more legal protection can be expected from Collective Action. The Subdistrict Court ruled that this situation arose. After all, the question of whether an employment contract, is involved in this case affects a large group of workers and also serves the general interest (c).
Finally, in the opinion of the Subdistrict Court, the interests of the deliverers are sufficiently protected. If the Collective Action succeeds, the deliverers who wish to do so can claim an employment contract, but this does not automatically convert the agreements between Deliveroo and the deliverer (e) into employment contracts.

Legal question 2 (Does it concern an employment contract?)
In this case, the question is whether the legal relationship between Deliveroo and its 'Riders' has changed in such a way that, compared to the legal relationship in the period that the Riders were recruited on the basis of an employment contract, the elements of the employment contract are no longer met. This concerns mainly the relationship of authority. What the parties call a contract is not decisive here. If the contract has been negotiated further, more value can be attached to the intentions of the parties (HR 10 December 2004, ECLI:NL:HR:2004:AP2651). However, this was a standard contract which was not negotiable. Then, no decisive significance can be given to what is stated in the contract in terms of the intentions of the parties.

Also, the expression 'in the exercise of his profession or business' (ex. 7:405 BW (Dutch Civil Code)) must indeed be interpreted broadly, however the Subdistrict Court ruled that a certain element of entrepreneurship must be present, where the Subdistrict Court also attaches importance to the fact that the activities of the 'Riders' belong to Deliveroo's core business. In this respect, the Subdistrict Court attaches little importance to the fact that the 'Riders' have registered at the Chamber of Commerce. After all, this has been made obligatory by Deliveroo in order to be allowed to carry out the work.

It is also important whether there is an obligation to carry out work. The question is therefore whether, in practice, the obligation to be available has undergone a substantial change from the actual implementation. In that case, obviously, one has to be available. In view of the factual circumstances, the Subdistrict Court ruled that there can in fact be no question of a general freedom to make oneself available until the moment of acceptance of the order if the deliverer wants to generate (sufficient) income. The fact that Deliveroo uses performance criteria (so that deliverers can log in with priority at certain sessions), also means that the freedom to refuse is considerably less than the contract suggests.

It is important that the employee personally performs the work (although this is also the starting point for the contract of assignment). The Court ruled although the contract with Deliveroo provides ample possibility to be replaced by another deliverer, however there must be permission from Deliveroo for replacement. The supervision during the replacement lies with Deliveroo, and not with the deliverer. Finally, Deliveroo imposes the same requirements on the substitute as on the deliverer. In fact, the whole provision is already meaningless, because there is usually no need or time to find a replacement. Where this is the case, it will only happen in order to avoid certain negative stimuli in the system, for example a drop in the ranking system.

In the context of the remuneration, the Subdistrict Court ruled that the name of the remuneration is not decisive for its nature. The Subdistrict Court ruled that the changes in the fee do not justify the conclusion that there is (or is no longer) a question of salary within the meaning of 7:610 BW (Dutch Civil Code), even if it concerns a variable salary per concrete

performance. In the Deliveroo system there is little or no room for negotiation of the tariff. That prices are actually being discussed, is not stated either.

With regard to the use of its own working instruments, the Subdistrict Court ruled that this material is also for daily use, except for the meal box. All in all, the Subdistrict Court did not consider the changes in respect of the material to be such that they had led to a change in the relationship of authority.

As far as the rest is concerned, the Subdistrict Court noted that this concerns unskilled standard work, for which many indications are inconceivable. In the context of the independence, the deliverers are free to work for competitors. However, this is also possible if an employee has a part-time employment contract.
The Court ruled that the nature of the work and the legal relationship between the parties had not changed to such an extent since the beginning of 2018 that there was no longer any question of carrying out work on the basis of an employment contract.

4. Conclusion

The Subdistrict Court ruled that the FNV is admissible in its claim and declaratory judgement that the legal relationship between Deliveroo and the 'Riders' is (still) to be regarded as an employment contract as referred to in Article 7:610 BW (Dutch Civil Code).

It can also be concluded that the Subdistrict Court has considered a sham arrangement (first employment contracts, then commission contracts) and has mainly examined the actual differences between the period of the employment contracts and the period of the commission contracts.
However, this does not mean that every platform that uses commission contracts, has set up a sham arrangement, where the Court will rule that the agreements should be regarded as an employment contract. The elements cited in the Deliveroo-ruling can be used in the assessment of other work platforms. It is important that the Subdistrict Court in this case ruled under the factual situation, which means that the factual situation must be clearly visible.