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**Authority**

Amsterdam Court of Appeal

**Date of decision**

16-02-2021

**Publication date**

16-02-2021

**Case number**

200.261.051/01

**Areas of law**

Civil law

**Special features**

Appeal

**Content Indication**

Declaration for justice; claim art. 3:305a Dutch Civil Code. Based on all the circumstances of the case, the meal delivery drivers' agreement with Deliveroo qualifies as an employment contract.

**Findings**

Rechtspraak.nlAR-Updates
.nl 2021-0171 with annotation by J.H. BennaarsViditax
(FutD), 16-02-2021

[Enriched pronunciation](https://linkeddata.overheid.nl/document/ECLI%3ANL%3AGHAMS%3A2021%3A392)

**AMSTERDAM COURT OF APPEAL**

civil and tax law department, team I

case number : 200.261.051/01

Case number of the Amsterdam District Court : 7044576 CV EXPL 18-14763

**judgment of the multiple civil chamber of February 16, 2021**

regarding

**DELIVEROO NETHERLANDS B.V.** ,

established in Amsterdam,

appellant,

lawyer: M.M. Govaert, Amsterdam,

against

**FEDERATIE NEDERLANDSE VAKBEWEGING,**

established in Utrecht,

respondent,

lawyer: J.P. Boot, Utrecht.

**1The proceedings on appeal**

The parties are hereinafter referred to as Deliveroo and FNV.

By summons dated 10 April 2019, Deliveroo appealed a judgment of the Subdistrict Court in the District Court of Amsterdam (hereinafter: the Subdistrict Court), dated 15 January 2019, rendered under the above-mentioned case number between FNV as plaintiff and Deliveroo as defendant (hereinafter: the contested judgment).

The parties then submitted the following documents:

- statement of grievances, with exhibits;

- statement of reply, with productions.

The parties argued the case at the hearing on 11 September 2020, Deliveroo by Mr Govaerts and Mr C.C.M.M. Daniels, of the Amsterdam Bar, and FNV by Mr Boot and Mr H.C.S. van Deijk-Amzand, of the Utrecht Bar, each by means of pleadings which were submitted. Both parties have also brought products into the proceedings.

Subsequently, the parties were given the opportunity by the court of appeal to respond by deed to the judgment of the Supreme Court of 6 November 2020, ECLI:NL:HR:2020:1746 (X/Gemeente Amsterdam). The parties each did so on 8 December 2020.

Finally, judgment was sought.

Deliveroo moved that the Court of Appeal set aside the contested judgment and - as yet provisionally enforceable - dismiss the claims of FNV, ordering FNV to pay the costs of the proceedings in both instances, with subsequent costs and statutory interest.

FNV has moved for confirmation, with - as the Court understands it - an order for Deliveroo to pay the costs of the appeal proceedings.

Both parties offered evidence of their contentions on appeal.

**2Facts**

In the contested judgment under 1.1 through 1.10 the Subdistrict Court established the facts that it took as starting point. These facts are not in dispute on appeal and therefore also serve the Court of Appeal as starting point, on the understanding that part of these facts have been superseded by the lapse of time since the judgment under appeal was rendered. Summarized and where necessary supplemented with other facts that have been established as on the one hand stated and on the other hand not or insufficiently contested, the facts come down to the following.

2.1

Deliveroo began operations in the Netherlands in June 2015. Through a digital platform, independent restaurants are linked to customers through an ordering and payment system. In doing so, Deliveroo offers an online meal ordering and payment system, as well as a delivery service from the restaurants to the customers.

2.2

From September 2015 through the course of 2018, Deliveroo employed delivery drivers on fixed-term contracts (for up to 23 months). This was a min-max on-call contract with a minimum of one hour and a maximum of 160 hours per month. Payment was made in accordance with the statutory (youth) minimum wage.

2.3

According to the employment contract and House Rules, the employee was required to work at least one shift on weekends and one evening shift per week. Shifts of three, four or five hours were located between 11:00 a.m. and 10:30 p.m. The employee was required to indicate his availability before a certain deadline. He was required to respond to a call in his assigned shift. In so far as there were insufficient registrations for a shift, it was also possible to subscribe to it later. During the shift, the employee had to collect meals from various restaurants using his own means of transport and transport them to customer addresses provided by Deliveroo. Three times failing to respond to a call would, according to the employment contract, constitute an urgent reason for instant dismissal. During his work, the employee had to be dressed in Deliveroo clothing and transport the meals in a Deliveroo thermobox. The employee was not allowed to work for other (food) delivery services. He had to provide his own smartphone or tablet to log into Deliveroo's delivery system.

2.4

As of February 2018, Deliveroo has decided not to renew the employment contracts with its delivery drivers. Since July 1, 2018, delivery drivers have only been working on the basis of an assignment agreement. The assignment agreement used by Deliveroo until 21 September 2018 included that the delivery driver had to register as an entrepreneur in the trade register of the Chamber of Commerce and have a VAT number. Since September 21, 2018, Deliveroo has used two types of assignment agreements: the *Regular agreement* and the *Unlimited agreement*. Under the *Regular agreement*, a maximum of €603.92 (2019 level; 40% of the regular minimum wage; in August 2020 €620.32 per four weeks) can be earned per four weeks and, due to tax regulations, no VAT payment is required. When using the *Unlimited agreement*, more than €603.92 per four weeks can be earned, and the delivery driver must charge and remit VAT. Payment in both cases is made per delivered delivery and on an invoice basis, with the normal practice being for Deliveroo to prepare the invoice addressed to Deliveroo on behalf of the delivery driver. Deliveroo also keeps track of the fact that when using the *Regular agreement*, no more than the aforementioned amount of €603.92 is earned every four weeks: if the delivery person has earned 80% of that amount, Deliveroo sends a message, and also when 90% of that amount is reached. If the full amount has been earned no further assignments can be accepted that month. The assignment contract can be terminated by the delivery person immediately, and Deliveroo is subject to a notice period of one week. Normally, Deliveroo does not terminate the assignment agreement, even if the deliverer no longer performs work. The amount of payment per delivered delivery has been changed by Deliveroo over time.

2.5

Delivery drivers must use an app to receive orders on their phones. A delivery person can log in through this app. Until March 2020, Deliveroo used the *self-service booking tool* (hereafter SSB system). Using this, the delivery person could choose if, when, where, and for how long they wanted to work. In the SSB system, the delivery person could reserve sessions or cancel reserved sessions, whereby some delivery persons were given the opportunity to reserve those sessions at an earlier time (*priority access*) than other delivery persons were given the opportunity to do so. Also, the delivery person could log in at any time without having reserved in advance. He could also decide not to log in at all during a reserved session (a "*no-show*"), log in later (a "*late log in*") or log out early during a session (an "*early log out"*). Since March 2020, Deliveroo has been using the so-called *Free Login* system instead of the SSB system. This system means that sessions can no longer be reserved in advance. Every delivery driver can log in at the time of his choice, although only at a time and place where Deliveroo sees a need for delivery drivers. Only deliverers who are logged in can be offered an order. An offered order can be refused, for which one of the following reasons can be given in the system: restaurant too far away, restaurant waiting time, roads closed, car trouble/bicycle trouble, end of availability, '*dislike delivery area'* or other.

2.6

Deliveroo uses an algorithm called "Frank" (hereinafter "Frank") when assigning meal delivery. Deliverers who have entered into the agreement can log in via this app. When Deliveroo used the SSB system, delivery drivers could report immediate availability and/or reserve future sessions in an area zone in which they wanted to work for Deliveroo; with the introduction of the *Free Login system*, delivery drivers can report (only) immediate availability. Furthermore, the app allows delivery drivers to chat with (an employee of) Deliveroo when they have problems delivering orders.

2.7

Deliveroo pays its delivery drivers a fixed amount per delivered order. At the time the SSB system was used (the situation as it was when the proceedings in the first instance were conducted), a fixed amount per delivered order of on average € 6.00 applied in 2018, in 2019 on average € 5.00 per delivery. If a meal had to be delivered from a restaurant to two different addresses, that second delivery was considered a '*stacked order*', for which €3.75 was paid. Deliveroo also awarded bonuses. The criteria for these bonuses and their amounts have changed several times over the course of time. At the time the contested judgment was rendered, the amount of the bonus depended on the number of deliveries in a fourteen-day period, whereby the amount of the bonus differed per period and per delivery area, but always implied that the higher the number of deliveries in a certain period, the higher the bonus. The bonus could also vary by region.

2.8

With the introduction of the *Free Login system* as of March 2020, both the amount of the fixed amount to be paid per delivery and the way bonuses are determined have changed. Since then, short trips are paid an average of €3.50 per delivered order, long trips an average of €4.80 per delivered order. In addition, bonuses continue to be awarded. A message from Deliveroo on May 6, 2020 states: "The weekly incentives are uploaded once a week on Monday. (...) The incentives per order depend on the location where the restaurant is located."

2.9

Before delivery drivers (or their replacements) can begin self-employment with Deliveroo, they must have watched a number of Deliveroo instructional videos.

2.10

According to the contract, delivery drivers can be substituted to have the delivery done by another person, provided that the substitute shows a valid ID and proof of the right to work in the Netherlands before the work begins.

2.11

The material is provided by the delivery person, at least a smartphone and the means of transportation (a bicycle, motorcycle, car or scooter).

**3Assessment**

This case is about whether Deliveroo's delivery drivers work under an employment contract or not.

3.1

In the first instance FNV claimed a declaratory judgment stating that the Deliverers work on the basis of an employment contract. Deliveroo put forward a defense and argued that FNV should be declared inadmissible because the requirements of Section 3:305a of the Dutch Civil Code had not been met, and that if the Subdistrict Court were to decide on the substance of the case, the claim should be dismissed. The Subdistrict Court granted the claim. The Subdistrict Court held that the requirements of Section 3:305a of the Dutch Civil Code had been met and that FNV was therefore admissible. The relationship between Deliveroo and its delivery drivers can be regarded as an employment contract, since the nature of the work and the legal relationship between the parties have not changed substantially since the beginning of 2018 compared to the situation in which Deliveroo used employment contracts. The (extensive) considerations of the Subdistrict Court are discussed below, insofar as relevant.

3.2

With its grounds 1 and 2 Deliveroo argued that FNV should (as yet) be declared inadmissible in its claim, because the claim at issue does not lend itself to the application of Section 3:305a of the Dutch Civil Code. Deliveroo does not dispute that (i) FNV is an association with full legal capacity, (ii) with a description of its objective in the articles of association that is sufficient for this claim, and (iii) that FNV has sufficiently attempted to achieve the claimed results through consultation with Deliveroo. The Court of Appeal derives from the statement of grievances that Deliveroo also does not dispute (iv) that the interests of the persons on whose behalf the proceedings were instituted are sufficiently safeguarded and FNV has a sufficient interest in the legal action. Insofar as Deliveroo intended to dispute what is stated under (iv), the Court of Appeal dismisses this dispute. Delivery agents who do not agree with the judgment of the Court of Appeal in these proceedings may oppose it on the grounds of Section 3:305a(5) of the Dutch Civil Code. It follows from the FNV's Articles of Association that its aim is to promote the interests of workers. FNV has argued - and Deliveroo has not refuted this refutation with sufficient grounds; in its statement of grievances under 8.8 Deliveroo also endorses the importance of effective and/or efficient legal protection - that it benefits the legal protection of workers, because it is more effective if an in principle general opinion about the legal position of the deliverymen is given than if this would have to take place in numerous individual proceedings. Requirements (i) to (iv) above have therefore been met. In its grievances, Deliveroo explicitly argued that the Subdistrict Court erred in assuming that the interests represented by FNV are similar and lend themselves to bundling, as Section 3:305a of the Dutch Civil Code also requires. In brief, Deliveroo argued that this was not the case, because each employment relationship must be assessed individually and this cannot be done in a general sense. FNV refuted this and pointed to a number of judgments by the Supreme Court (including those about PhD students on scholarships (ECLI:NL:HR:2006:AU9722) and prostitutes (ECLI:NL:HR:2014:2653)) in which an opinion was also given in a general sense about the qualification of the employment relationship concerned. The Court of Appeal endorsed FNV's position, to which it can be added that Deliveroo currently only uses two types of contracts ('*Regular*' and '*Unlimited'*), and that the way in which these contracts are performed does not in itself differ per delivery driver. The fact that the motives on the basis of which the delivery drivers perform their work may differ (greatly) does not make this any different. The qualification of an employment relationship - as will be explained in more detail below - concerns the establishment of the rights and obligations agreed between the parties (which do not differ for the two groups of deliverymen) and the qualification that this results in. Grounds 1 and 2 fail.

3.3

With grievances 3 through 12, Deliveroo argued - subdivided into a number of arguments relating to various aspects that led to this - that the Subdistrict Court erred in ruling that the employment relationship between Deliveroo and its delivery staff qualifies as an employment contract. These grievances lend themselves to joint consideration. Before specifically addressing the grievances, the Court will make a number of general remarks for a proper understanding of this case.

*Changes of situation during first instance and appeal proceedings*

3.4

By subpoena dated June 27, 2018, FNV sought a declaratory judgment that the employment relationship between Deliveroo and its delivery drivers is an employment contract. This declaratory judgment was granted in the contested judgment of 15 January 2019. The agreements concluded by Deliveroo with its deliverymen have changed significantly since 27 June 2018, as well as the way in which Deliveroo prescribes that the deliverymen should perform their work, or at least how this work is structured. The court will pay attention to these changes. For that matter, the changes mean that some of the arguments used in the case documents (sometimes described in detail) have in any case lost their relevance. Furthermore, on November 6, 2020, the Supreme Court rendered a judgment in the case of X v. Municipality of Amsterdam (ECLI:NL:HR:2020:1746). In that judgment, the Supreme Court held that it is not important whether or not the parties actually intended the agreement to fall under the regulation of the employment contract; what matters is whether the agreed rights and obligations meet the legal description of the employment contract. That description implies that the employee undertakes to perform work in the service of the employer for a certain period of time against remuneration. If that is the case, the agreement must be regarded as an employment contract. With this judgment it has become clear that the intention of the parties does not play a role in the question whether the contract should be regarded as an employment contract (the qualification phase). What the parties have said in the court documents in the present proceedings about the 'party intention' referred to above under point 2.2.1.

*Legal framework to qualify the agreement*

3.5

In the aforementioned judgment of November 6, 2020, the Supreme Court ruled that for the qualification of an employment relationship, the elements 'employed', 'wages', 'for a certain period of time' and 'work' must be considered. This qualification must be made on the basis of the rights and obligations that the parties have agreed upon. Which rights and obligations these are must be established on the basis of the Haviltex criterion. The Supreme Court refers here - without distancing itself - to the earlier judgment Groen/Schoevers (ECLI:NL:HR:1997:ZV2495). The Groen/Schoevers judgment and the subsequent Supreme Court rulings on the qualification of the employment contract show that all circumstances of the case must be considered. The Court of Appeal understands that Deliveroo and FNV are also assuming - as evidenced by their deeds taken as a result of the 6 November judgment - that an assessment should still take place on the basis of all circumstances of the case, albeit that the party's intention with regard to the qualification of the agreement no longer plays a role. The Court of Appeal also assumes this, so that the circumstances mentioned by the parties, where relevant, must be taken into consideration.

*Determination of rights and obligations agreed between the parties*

3.6

On the basis of the rights and obligations agreed upon between the parties, it must be assessed whether the elements 'work', 'pay', 'in service' and 'for a certain period of time' have been met. By 'in service' is generally meant - and that is also how it has been discussed by the parties - whether there is a relationship of authority. The FNV paid attention to the element 'during a certain time'. In the first instance it argued - without the Subdistrict Court expressing an opinion on the matter - that because of the scope and duration of the employment relationship the legal presumption mentioned in Section 7:610a of the BW had been met; FNV also argued that there was no question of an employment relationship of negligible scope. For these reasons, the element 'during a certain time' will also be discussed. The interpretation of the concepts of work and pay will be discussed below.

*Labor*

3.7.1

It is not disputed that the deliverymen, when they have accepted an assignment (in the neutral sense of the word) and also carry it out, are performing work. However, the parties do differ in opinion about the (contractual or actual) freedom of the delivery staff to accept or refuse an assignment. Also at issue is the role this work plays in Deliveroo's organization: is it core labour for the business operations (as argued by FNV) or not (as argued by Deliveroo, noting that the question of whether or not it constitutes core labour is also not relevant to the qualification question).

3.7.2

Until February 2018, the delivery drivers performed their work for Deliveroo - as contemplated - on the basis of an employment contract. Deliveroo notes that at that time the company was still in its start-up phase, and that there were not always sufficient delivery activities to be performed by the delivery drivers, and that (for that reason) they were also deployed to raise awareness of the company, including by distributing leaflets. As of February 2018, Deliveroo only uses an agreement with the heading 'Assignment Agreement'. Until March 2020, the SSB system applied, whereby every Monday it was possible to sign up for shifts for the following week, and whereby some delivery drivers (the ones with the best '*rating*') were given the opportunity to sign up for the shifts most favorable to them earlier (namely as early as 11:00 that Monday), other delivery drivers as of 13:00, and the rest of the delivery drivers as of 17:00. The *rating* was determined by how high the delivery drivers scored on statistics related to their attendance, late cancellations, and peak participation. In addition to signing up in advance for certain shifts, a delivery driver could also sign up for work 'on the spot', provided Deliveroo still needed it at that time. The Court of Appeal deduced from the documents in the case that the popular and attractive services (at the busiest times with the lowest waiting times) were often already 'taken' by the reservation system and that the 'at the moment' registration therefore mainly concerned the less popular times. Being able to sign up for certain services on Monday at 11:00 a.m. was therefore attractive to delivery drivers. In the judgment under appeal, the Subdistrict Court concluded from this system that Deliveroo exercised influence on the way in which the delivery drivers performed their work, because Deliveroo could determine which delivery drivers could already sign up on Monday at 11.00 a.m. and which delivery drivers could only sign up later. Deliveroo abolished this system in March 2020 and has been using the *Free Login system* ever since. With this, it is no longer possible for delivery drivers to reserve time blocks in advance, but can only sign up 'at the time'.

3.7.3 ‘

'Frank' offers the order, to the delivery person who can fulfill the order most efficiently. Deliveroo calls the algorithm system 'Frank' crucial to its organization and says it has spent and continues to spend a great deal of time and expense developing this system. It can therefore be assumed that this is a sophisticated system. The criteria used to determine which delivery driver can perform the trip most efficiently are described by Deliveroo as follows:

"*To make this determination (offering a particular order to the delivery person who can most effectively complete it, court), Frank processes data about the delivery person's location relative to the restaurant, the vehicle type, an estimate of when the order will be ready for delivery, and the estimated delivery time. In this, the algorithm does not and cannot distinguish the person or manner in which a delivery person offers their services. This data is neither available nor relevant to Frank.* ”

Of the delivery people who have signed up at a certain moment ('are online') the whereabouts (GPS position) are known. For a given order, it is also known at which restaurant the order is to be picked up and at which address it is to be delivered. It has not become clear whether Deliveroo uses 'Frank' to offer the order to the delivery driver solely on the basis of distance ('the delivery driver with the bicycle nearest to the restaurant will be offered the order') or whether other criteria are also used (such as the speed with which a particular delivery driver usually handles his orders). The Court of Appeal notes that it has not been established that Deliveroo can exert influence in this respect, but - in view of the advanced system that 'Frank' apparently is according to the documents in the case - this cannot be excluded either.

3.7.4

Under the *Free Login system*, the delivery person can accept or not accept an order offered to him within one hundred seconds. If he does not accept an offered order within one hundred seconds up to three times, the Deliveroo delivery driver will receive an app message stating that it is assumed that he has taken a break, or that he has logged out. Deliveroo has stated that under the *Free Login system,* taking such a break or logging out is not subject to any adverse consequences. FNV pointed out that under the SSB system (prior to March 2020) there were indeed adverse consequences, since this led to a deterioration of the '*rating*' that a delivery driver had, and thus a reduction of the chance that a delivery driver could sign up for the most favorable time slots on Mondays as early as 11:00 a.m. The FNV did not point out that this was the case. Deliveroo did not substantiate its refutation of the latter point. With regard to the *Free Login system*, the FNV did not dispute the fact that a delivery driver can refuse an offered order without this leading to immediate consequences. However, refusing an offered order means that the delivery driver loses out on the earnings from that order. The court is of the opinion that the *Free Login system* currently used by Deliveroo gives delivery drivers a large degree of freedom to sign up when they want, and to accept or not accept offered rides. If a ride is accepted it will, in principle, have to be carried out, but that does not detract from the freedom to log in and subsequently accept or not accept an order.

3.7.5

Deliveroo pointed out that delivery drivers are also free to substitute themselves, and that this too is an indication that there is no employment contract. This substitution can take place because a delivery driver shares his 'app data' with a substitute, who then signs in using this app. FNV argued that under the SSB system (until March 2020) a delivery driver may have had some interest in being replaced, but no longer under the *Free Login system*. FNV also pointed out that it is practically impossible to be replaced for a ride once it has been offered (after all, this ride must be carried out within approximately thirty minutes), but FNV did not dispute that it is conceivable that a delivery driver would make his app data available to a replacement. The court ruled as follows. According to the Terms of Reference used by Deliveroo, it is permitted for a delivery driver to be replaced; however, the replacement must have his ID checked. This is necessary because under the Labour Act for Aliens it is not permitted for Deliveroo to have work performed by someone who is not entitled to do so in connection with his or her residence status; violations of this Act are punishable by high fines. Deliveroo itself takes into account that delivery drivers will be replaced and that this replacement will not always have registered with Deliveroo in advance. Indeed, the provisions on insurance taken out by Deliveroo for its delivery drivers (against damage resulting from an industrial accident) state in general terms that this insurance also applies to replacements who have not yet been registered. Deliveroo has submitted a large number of statements from delivery drivers, and a number of them mention that they sometimes allow themselves to be replaced. The court therefore assumed that this substitution possibility is present, in the sense that it is permitted by contract, as well as that it is used in practice. Payment is made to the delivery driver with whom Deliveroo has contracted. Using the app data of a delivery driver, only one person at a time can perform work, the delivery driver himself or a possible substitute. The situation where a delivery driver contracts with Deliveroo and has his work performed by all kinds of other replacements at the same time does not seem possible. In this respect the situation at hand differs from the Post.nl cases - to which Deliveroo repeatedly refers - in which it was possible for parcel deliverers to outsource their assignments to various others who performed work simultaneously and where this could become a revenue model. Deliveroo has an interest in keeping an eye on the deliverers (or their replacements) who work for it, because of the aforementioned Foreign Nationals (Employment) Act, but also because of other responsibilities that are involved in having work performed for a principal or other client. In that context, FNV has uncontested that anyone who observes an unsafe situation involving a Deliveroo delivery person can report this to Deliveroo. This means that Deliveroo will want to have some insight into who is making deliveries for the company. The Court of Appeal is therefore assuming that in this case there is a situation in which a delivery person can be replaced on occasion, but that it has not become apparent that a situation occurs in which a delivery person is permanently replaced by someone else, without this being accepted by Deliveroo. The present situation thus differs from that in the Zwarthoofd/Het Parool judgment cited by Deliveroo (ECLI:NL:HR:1957:3). Given the relatively simple nature of the work to be performed in this case, Deliveroo apparently imposes few requirements on the permission it gives to a delivery driver to be replaced. The possibility of substitution that delivery drivers have is thus not incompatible with the existence of an employment contract, since also within an employment contract there is the possibility that the employee, with the permission of the employer, allows himself to be substituted.

3.7.6

FNV also argued that the labor performed by the delivery drivers for Deliveroo was core labor. Deliveroo has refuted this argument. This circumstance will be discussed below under the heading 'employed by'.

3.7.7

Deliveroo has pointed out that delivery drivers are free to work for a competing company. The court of appeal is of the opinion that this circumstance, certainly now that more than two-thirds of the Deliveroo delivery drivers work as a hobby and thus earn less than 40% of the regular minimum wage, is not a circumstance that is of great importance for the presence or absence of an employment contract.

3.7.8

The freedom with which the work can be performed as outlined above may indeed indicate the absence of an employment contract, but in the opinion of the court of appeal it is not of such a nature that the qualification 'employment contract' is incompatible with it.

*Wage*

3.8.1

Deliveroo pays its delivery drivers for the work they perform. This means that the wage requirement of Section 7:610 (1) of the BW has already been met. The following applies to the question of whether the method of payment constitutes an indication for or against the qualification of the employment contract. Deliveroo pays the workers per delivered order. The amount of the amount paid per delivered order has been changed by Deliveroo a number of times in the course of the proceedings in the first instance and on appeal. In the first instance reference was made to payment of an average basic amount of €6.00 per delivered order, later €5.00 per delivered order. Currently the amount for a 'short journey' averages €3.90 and for a 'long journey' €4.80. On top of these amounts a bonus can be 'earned', but Deliveroo has not provided much insight into what these bonuses are based on. It is clear from the unrefuted production 12 to the memorandum of reply that since August 2019 the frequent acceptance of *stacked orders* leads to an increasingly higher bonus. The normal situation is that Deliveroo itself provides the invoices based on which Deliveroo pays out bi-weekly. Deliverers may request to be paid immediately, but a fee (of €0.50 per payment) is charged for this. Deliverers can also have their payment 'remunerated' by 'Verloning.nl', as Deliveroo calls it. The Court of Appeal understands that the effect of such an arrangement is to settle any VAT owed, not that the deliverers will be employed by (the company behind) 'Verloning.nl'. The regular procedure described by Deliveroo (an automatic two-weekly payment by Deliveroo to the delivery driver) therefore more closely resembles the procedure for an employment contract, in which the employer must pay the wages himself, than that for an assignment contract, in which the contractor invoices himself.

3.8.2

FNV pointed out that it is important that the wage level is set (and changed) unilaterally by Deliveroo and that the delivery drivers cannot influence this, and that this is more in line with the rights and obligations associated with an employment contract than with an assignment contract. Deliveroo has argued that the deliverers do have influence on the level of the wage: if at a certain moment there are few deliverers available but there is a great demand for meals, then the algorithm will offer a higher price (the so-called *multiplier*). Deliveroo calls this the operation of the market. The Court of Appeal agreed with FNV that changing the salary level through market forces does not mean that the individual delivery drivers have influence on the salary level. Nor has it become apparent that the delivery drivers have had any influence in any other way, for example as a result of collective actions.

3.8.3

During the proceedings in the first instance, the parties and the Subdistrict Court (ro. 42: "Deliveroo will prepare a draft invoice every two weeks with regard to the services provided by the delivery person or his replacement, and the first payment will be made after the submission of the Chamber of Commerce and VAT number") assumed that a delivery person was liable for VAT. On appeal, it became clear that most delivery drivers are not. Work for which the remuneration is less than €603.92 per month (2019 level; that is 40% of the regular minimum wage) is classified by the Tax Authorities as 'hobby-like', in which case no VAT is due. Deliveroo has stated that 'an overwhelming majority' (Statement of Objections, no. 8.7.1) works as a hobby, during the oral hearing Deliveroo stated that this concerns 67% of the delivery drivers. FNV has not refuted this statement. The Court of Appeal therefore assumes that more than two-thirds of the delivery drivers earn less than 40% of the (regular) minimum wage, and that the Tax Authorities consider their work to be a hobby. In the FNV KIEM judgment of the ECJ (ECLI:EU:C:2014:2411), a distinction is made between being an employee and being an entrepreneur. Being an entrepreneur is thus an indication of not being an employee. The lack of entrepreneurship can thus be an indication of being an employee. Over two-thirds of Deliveroo's delivery drivers, at least when it comes to sales tax, do not consider themselves entrepreneurs. In view of the name that Deliveroo gives to its contracts, it assumes that the absence of VAT liability (i.e. working as a hobby) is the starting point, now that this contract is called '*Regular*'.

3.8.4

In the opinion of the court, the way in which the payment of wages by Deliveroo takes place indicates the presence rather than the absence of an employment contract.

*Employed by*

3.9.1

Deliveroo argues that there is no relationship of authority between it and the deliverymen. FNV argues that this is indeed the case. Deliveroo points out that the deliverers are free to carry out their work in any way they see fit, more specifically, that they are free to determine the route they want to take. The FNV points out that this freedom is very relative, since meals must be delivered quickly, and a delivery driver will therefore usually (have to) choose the fastest route. In addition, the FNV points to a number of other circumstances that indicate the presence of a relationship of authority. These circumstances will be discussed below.

3.9.2

The documents in the case do not show that deliverymen are prescribed a time within which they must deliver an order. The Subdistrict Court considered that, on average, a delivery driver delivers two to three orders per hour. Deliveroo did not raise a grievance against this finding. Deliveroo has made it known in numerous communications that it strives for an average remuneration of €11.00 to €13.00 per hour. Assuming that the rate charged per delivery (at the time) was approximately €6.00, this would also amount to approximately two orders per hour. The documents in the case - without being contested - mention an average delivery time of 32 minutes. All these circumstances lead the Court to assume an average ordering time of approximately thirty minutes. In that time the delivery person must drive from his departure location to the restaurant, wait until the meal is ready and then bring the meal to the specified address. It can be assumed that the delivery driver will then choose the fastest route, possibly taking into account a safe bicycle route. The freedom of the deliverer to determine the exact route himself is thus relative, and in the opinion of the Court of Appeal does not indicate the absence (nor the presence) of an employment contract. After all, even a truck driver in paid employment usually has that freedom.

3.9.3

The nature of the work, collecting and delivering food, is such that few instructions are needed. So the nature of the work means that the extent to which instructions are given does not in itself say much about the presence or absence of an employment contract.

3.9.4

FNV pointed out that the work in question constitutes 'regular company work' or a core activity (the Court of Appeal will use both these terms) for Deliveroo. Deliveroo disputed this, but first of all argued that whether or not it constitutes a core activity is not relevant for the qualification of an (employment) agreement. The court of appeal ruled as follows. In the case law of the Central Appeals Tribunal, as FNV has argued without contradiction, the question of whether or not work is to be regarded as ordinary business work or a core activity has regularly been discussed, in the sense that the performance of ordinary business work indicates the presence of an employment contract. The Supreme Court has not often ruled on this issue. However, the Supreme Court did consider on November 17, 1978 (NJ 1979, 140, ponstypiste):

"*The same* (not violating a rule of law, court of appeal) *applies to allowing the circumstance that the work performed by Queijssen was part of IVA's ordinary business work to be taken into account, by which the court apparently meant the work performed by subordinates working in IVA's business*."

The court of appeal derives from this that the Supreme Court (at the time) intended that the performance of ordinary company work could indicate a relationship of authority. This assumption is fed by the circumstance that a company has a large degree of knowledge of its own work, and is therefore able to give instructions and exercise authority in this respect (earlier), while this need not be the case with respect to incidental work.

3.9.5

Deliveroo has further disputed that delivering meals is a core activity for it. It argued that it is an IT company and that the delivery of meals is of minor importance. The Court of Appeal cannot follow Deliveroo in this. On the Deliveroo website (referred to by FNV) there is a short film with the title "Meal delivery is the heart of our organization" and further that the deliverers are the heart of Deliveroo. The terms and conditions used by Deliveroo state, "Our goal is to connect you with the restaurants we work with ("Partner Restaurants") and to allow you to order Items for delivery (our "Service")." Deliveroo's name also indicates the delivery of goods. Deliveroo has not refuted that the vast majority of the persons performing work for it are delivery drivers. The court thus concluded that the delivery of meals is a core activity of Deliveroo. The fact that Deliveroo also provides other services, such as market information to restaurants (under the name '*Virtual Brands*' and '*Editions*') does not alter this.

3.9.6

Deliveroo has not only repeatedly changed the form of contract on the basis of which deliverers perform their work (first employment contract, then assignment contract, with a choice later between *Regular* and *Unlimited*), but also the way in which the work is organized (first through the SSB system, since March 2020 through the *Free Login system*). The fact that it is Deliveroo that keeps unilaterally changing the content of the contracts and the way the work is organized also indicates that Deliveroo exercises authority over the deliverymen. After all, in a general sense, an employment contract is more often an adhesion contract drawn up by the employer, which may or may not be accepted by the employee, whereas between the client and the contractor, the content of the contract is more likely to be negotiated.

3.9.7

The core of Deliveroo's working method is, as it has argued uncontested, the 'Frank' algorithm. Of great importance is the location of the delivery person in relation to the restaurant where the meal must be picked up and the address where this meal must be delivered. For that reason, the GPS location of a delivery driver is continuously tracked as soon as he or she logs in. It is important for Deliveroo to know where a delivery driver, who is logged in but not making a delivery, is located so that he or she can be called. As soon as the delivery driver, on the basis of the GPS data, is close to the restaurant (or less than eighty meters away), Deliveroo notifies the restaurant through the automated system. Once the delivery driver has left the restaurant for the customer, the customer can follow the delivery driver continuously through his GPS data. The GPS system thus provides Deliveroo with a far-reaching means of monitoring the delivery driver's working methods. FNV has pointed out, and this also seems plausible to the Court of Appeal, that this GPS recognition also puts pressure on the delivery driver. The customer counts on the delivery of a meal at a certain time; if, for example, a delivery driver starts to cycle slower, the customer (and thus Deliveroo) will be disappointed about this, which is something a delivery driver will humanly try to avoid. The GPS system therefore gives Deliveroo (whether through its customers or not) a far-reaching monitoring possibility, which can also be considered a form of authority.

3.9.8

The aforementioned organization of Deliveroo's working method affects the way in which the work is actually performed. Whereas in the past a limited number of deliverers were assigned to a particular session, and a deliverer assigned to that time therefore knew that there was a good chance that he would be called, under the *Free Login system* a large number of deliverers may be registered at a particular time. Competition, especially at convenient times, to be assigned a particular ride, has thus increased. FNV also pointed this out, without being refuted. The allocation of a ride is done by 'Frank', whereby - as considered above - it is not clear on the basis of which criteria this happens exactly. This means that Deliveroo, which designed and continuously adjusts the 'Frank' algorithm, has a great deal of interference in the way work is carried out. This is also understandable, because Deliveroo has pointed out, for example, that it was difficult for it to deliver the so-called *stacked orders* (rov. 2.7). Initially Deliveroo set a lower remuneration for these orders (€3.75 compared to €6.00 for a regular order). Deliverers turned out not to find this attractive (the *stacked-order* address could be very far away from the first *order address*). In order to make it more attractive to take such a *stacked order*, Deliveroo changed its remuneration system to (now) fixed differentiated amounts for a short journey and a long journey respectively, supplemented where appropriate with a bonus (for example, if a certain number of meals are delivered without interruption). FNV pointed out - which Deliveroo did not dispute, or disputed with insufficient grounds - that since the introduction of the *Free Login system* the number and type of bonuses have increased enormously. That this has happened is not illogical to the Court, because the basic payment for a delivered trip has dropped considerably since the introduction of the Free *Login system* (from €6.00 per trip to an average of €3.50 or €4.80). Awarding bonuses increases Deliveroo's ability to influence the behavior of the delivery drivers (e.g., accepting rides that the delivery drivers would not have accepted without the bonus). Also, the payment model set unilaterally by Deliveroo indicates a far-reaching interference by Deliveroo in the delivery process, and thus constitutes an indication of authority.

3.9.9

Deliveroo has pointed out that the deliverers must carry out their work using their own means of transport and that they are free to use their own '*gear*' (delivery bag and (rain) clothes). The FNV has argued that the means of transport in this case (usually a bicycle) is an item of daily use, and therefore does not indicate an investment by an entrepreneur. FNV also points out that it is encouraged by Deliveroo to use '*gear*' provided by Deliveroo, since the items offered by Deliveroo are of good quality and offered at a discount and delivery drivers therefore often choose to use them.

3.9.10

FNV also pointed out - undisputed - that there is no evidence whatsoever that the deliverymen manifest themselves as entrepreneurs in social life, especially not towards the restaurants Deliveroo works with and the customers where the meals are delivered. According to the FNV, these restaurants and customers see the delivery drivers as part of Deliveroo and not as independent entrepreneurs. In the opinion of the Court of Appeal, Deliveroo has not convincingly refuted this. The regulations drawn up by Deliveroo are also based on the assumption that the delivery staff must be (re)recognizable as Deliveroo delivery staff. For example, customers can file a complaint with Deliveroo about a particular delivery person. This is not possible if the customer does not know that the delivery person works for Deliveroo.

3.9.11

The intermediate conclusion is that the manner in which Deliveroo allows work to be performed by delivery drivers is indicative of an authority relationship, rather than the absence of an authority relationship.

3.9.12

In addition, FNV has pointed out that the delivery drivers cannot be regarded as entrepreneurs. Deliveroo (statement of objections, 8.17) has argued that (the presence or absence of) 'entrepreneurship' is not a decisive circumstance in the qualification of an (employment) agreement and (statement of objections, 8.72) 'is only a point of view in the holistic consideration'. The court of appeal ruled as follows. It is true that for the qualification of an agreement not one aspect is decisive. At present, civil law does not attach any significance to whether or not an employee is an entrepreneur for the question of whether or not an agreement qualifies as an employment contract. However, in the Groen/Schoevers judgment, reiterated in the Notaries judgment (ECLI:NL:HR:2012:BU8926), the Supreme Court did consider that the social position of the parties may be of importance in determining the rights and obligations agreed upon, and thus the qualification as an (employment) agreement. More specifically, it may be of importance at whose initiative certain contractual provisions have been agreed upon. For the ECJ, at least when answering some questions, the distinction between the employee and the 'real' entrepreneur is important. The Court established that more than two-thirds of the deliverymen present themselves to the Tax Authorities (and in the context of the turnover tax) as 'hobbyists', and therefore not as entrepreneurs. It has also not been shown that a more than negligible number of the deliverymen present themselves as entrepreneurs. Deliveroo in particular points out that the work for the deliverymen is usually a side job. The absence of entrepreneurship of most of the delivery drivers is in accordance with the above-mentioned interim conclusion that, as far as the delivery drivers are concerned, the presence of a relationship of authority is more likely than the absence thereof.

*For a certain period of time and the legal presumption of article 7:610a Civil Code*

3.10.1

In the first instance FNV argued that the average duration of the assignments (more than three months and more than twenty hours per month) justified the legal presumption of the existence of an employment contract. Deliveroo contested this and argued that FNV had not substantiated its position. The Subdistrict Court did not pay any cognizable attention to the presence or absence of the aforementioned legal presumption. Since Deliveroo itself stated that the determination of the aforementioned legal presumption can only take place on an individual basis (first instance pleading, randnr. 4.2) and the average employment relationship with a delivery driver lasts four months, in the opinion of the Court of Appeal it was up to Deliveroo to substantiate why the criteria of Section 7:610a of the BW have nevertheless not been met. After all, Deliveroo has demonstrated that it has very detailed information about its delivery drivers. For example, the overview of the delivery staff submitted by Deliveroo as production 54 and 55 shows how many hours per month they worked, which from January 2018 through August 2020 amounts to an average of more than twenty hours per month. Such data should be available from all delivery drivers. Deliveroo should have provided more detailed reasons for its objection to the legal presumption pursuant to Section 7:610a of the Dutch Civil Code. The fact that the legal presumption can only be applied in individual cases is incorrect. It is not clear why in a general sense (i.e. in collective actions) the aforementioned legal presumption could not be assumed (with, of course, the possibility that the legal presumption will be negated in individual cases). The Court of Appeal therefore assumed that on the basis of Section 7:610a of the Dutch Civil Code there is a legal presumption of the presence of an employment contract. As will appear below, this legal presumption has no influence on the (final) judgment of the Court of Appeal.

3.10.2

FNV further argued that for the delivery workers, there is no work of a negligible magnitude, referring to the criterion of at least five hours per week, as found in social security legislation. In the Transparent Employment Conditions Directive (EU 2019/1152), the obligations contained therein do not apply if an average of less than three hours per week is worked. Although Deliveroo has argued that some of the delivery drivers with whom an assignment contract has been concluded do not perform work for months on end, and that the delivery drivers who actually no longer perform work do not terminate the contract either (these contracts therefore continue to exist as 'empty shells'), Deliveroo has not provided any insight into the extent to which the delivery drivers who do perform work regularly do so on average, whereas this would have been in its remit.

3.10.3

Deliveroo has pointed out that 60% of the delivery drivers who provide services to Deliveroo do not make deliveries for at least one month or more. If that is correct, then that is not saying much, because an employee also has at least four weeks of vacation per year: therefore, the interruption of work for one month per year can also fit in with working under an employment contract.

3.10.4

In conclusion, the Court of Appeal is of the opinion that it has not become apparent that the deliverymen who work for Deliveroo do so to a negligible extent as just mentioned. In the opinion of the Court of Appeal, the criterion set out in Section 7:610 of the Dutch Civil Code that the work must be performed for a certain period of time has therefore been met.

*Other circumstances*

3.11.1

The Supreme Court considered in the judgment X/Gemeente Amsterdam (ECLI:NL:HR:2020:1746) that the rights and obligations agreed upon between the parties should be established, and on that basis the qualification of the agreement should take place. In this respect the Court of Appeal considers the following to be important, in addition to the considerations set out above. Deliveroo has pointed out that it has taken out accident insurance for its delivery drivers (which is also paid for by Deliveroo), pursuant to which delivery drivers who suffer an accident while performing their work are compensated for their damage (which could also follow from Section 7:658(4) of the BW). On the basis of this insurance, these deliverers will also be compensated for lost income during the time they are unfit for work as a result of such an accident (which need not follow immediately from Section 7:658 (4) of the BW). The limited continued payment of these deliverymen during illness is in line (to the same limited extent) with the rights and obligations that apply on the basis of an employment contract.

3.11.2

For the question whether the rights and obligations agreed upon between the parties are in line with what is usual on the basis of an employment contract, the Court of Appeal also considers the following to be important. It has been considered above that an average delivery takes about thirty minutes, which means that a delivery driver can make an average of two deliveries per hour. In numerous documents Deliveroo has stated that it is striving for a model that can earn an average of €11.00 to €13.00 per hour. FNV has pointed out, and this has not been contradicted by Deliveroo, that such remuneration is insufficient to take out insurance as a self-employed person against the risks of incapacity for work and to make provisions for other circumstances (for example unemployment) for which the employment contract does (generally) provide a provision. The amount of the wages to be earned by delivery personnel may, as Deliveroo argued, be (clearly) higher than the minimum youth wage that applies to some delivery personnel; however, the amount of the wages to be earned as a delivery personnel is not such that this can be regarded as a contraindication for the assumption of an employment contract, in the opinion of the Court of Appeal.

3.11.3

Whereas in the assignment agreements submitted by the parties in the first instance the delivery driver had to take out liability insurance, in the '*Regular*' example submitted by Deliveroo (prod. 48, appeal) this liability insurance is offered by Deliveroo free of charge. Such insurance paid for by the work provider fits the situation of an employment contract rather than that of an assignment contract of self-employed workers.

3.11.4

Since July 1, 2018, Deliveroo has been presenting its delivery drivers with an assignment agreement based on the Tax and Customs Administration's "no employer" General Model Agreement. The Court of Appeal considers it less important that the Tax Authorities consider working in accordance with this agreement as not being an employment relationship. After all, the model concerns an agreement drawn up in advance, without taking into account (and being able to take into account) the specific rights and obligations that are important for the civil qualification of whether or not there is an employment contract. Deliveroo also argued that the tax and civil legal positions do not necessarily coincide.

3.11.5

Even when work constitutes a side job (as considered above under 3.9), there may be a need for the protection given to employees by labor law. Deliveroo points out in many places that its delivery drivers prefer to work on the basis of an assignment contract (as a self-employed person), rather than on the basis of an employment contract. At the time of the appeal hearing, the Court of Appeal asked Deliveroo why, if that was the case, the delivery drivers were not given the choice of working on the basis of an employment contract or an assignment contract. Deliveroo did not answer this question, at least not in a satisfactory manner.

3.11.6

This is still separate from the question whether the parties are free to determine the qualification of an agreement (which was answered in the negative by the Supreme Court on November 6, 2020). The position repeatedly taken by Deliveroo, that a large number of its delivery drivers prefer an assignment contract to an employment contract, is therefore not considered relevant by the Court of Appeal, even if it is correct.

*Conclusion*

3.12.1

Taking all the circumstances together, the court of appeal finds that only the freedom given to the deliverymen with regard to the performance of work is a circumstance that points to the absence rather than the presence of an employment contract. All other elements, including the method of payment of wages, the exercised authority, the certain time (with legal presumption), as well as the mentioned other circumstances point more to the presence of an employment contract than to its absence. Moreover, the freedom given to the deliverymen with regard to the performance of work is not incompatible with the qualification of the contract as an employment contract.

3.12.2

The court still addressed the question of whether a distinction should be made between the different types of assignment agreements that Deliveroo used from the beginning of 2018. Until 21 September 2018, it was prescribed that the delivery drivers had to have a VAT number (which could rather indicate entrepreneurship, and thus the absence of an employment contract). On the other hand, during (most of) that time Deliveroo used the SSB system, which allowed for a greater degree of influence on the working methods of the delivery drivers. Since the introduction of the option of concluding only a *Regular* or an *Unlimited contract*, over two-thirds of the delivery drivers are working 'hobby-like', and thus - by sales tax standards - not as entrepreneurs. On the other hand, it may be assumed that the approximately one-third of the delivery drivers who work on the basis of an *Unlimited contract* earn more than € 603.92 per month (40% of the minimum wage) and are therefore more dependent for their livelihood on the earnings obtained from Deliveroo than their hobbyist colleagues. The court of appeal has considered that, in view of the level of the income (€11.00 to €13.00 per hour), it is not very well possible to make adequate provisions for incapacity for work and unemployment. Precisely that group therefore has a greater need for the agreement to be qualified as an employment contract, since employment law does grant them those provisions. All in all, the Court of Appeal is of the opinion that in view of the above-mentioned arguments, there is insufficient reason to make a distinction between the various contracts and thus in the qualification of the various deliverymen as they have been working since the beginning of 2018.

3.13

The parties have offered no evidence of facts and circumstances which, if proven, would lead to a different verdict.

3.14

In conclusion, the court finds that Deliveroo's delivery drivers are employed on the basis of an employment contract. The grievances, which are all based on a contrary opinion, fail. The judgment of which appeal will be upheld. Deliveroo will be ordered to pay the costs of the appeal proceedings as the unsuccessful party.

**4Decision**

The Court:

upholds the judgment of that appeal;

order Deliveroo to pay the costs of the appeal proceedings, estimated to date on the part of FNV at EUR 741 in disbursements and EUR 2,228 in salary;

declares this order for costs to be provisionally enforceable;

Rejects the more or otherwise claimed.

This judgment was rendered by mrs. G.C. Boot, A.S. Arnold and I.A. Haanappel-van der Burg and was pronounced in public by the court clerk on 16 February 2021.