EMPLOYMENT RELATIONSHIPS IN EUROPE'S GIG ECONOMY: A EUROPEAN OVERVIEW

On 23 July 2018, the Amsterdam Subdistrict Court ruled that the employment relationship of a delivery driver of the meal delivery company Deliveroo did not qualify as an employment agreement. This case was the first in the Netherlands that involved a worker in the gig economy, in which enrolling for work can be done through apps or other online based platforms, typically in the form of a short-term contract or services agreement.

The qualification of employment relationships in the gig economy sparked a lively debate, as it can be argued that some of these employment relationships have the characteristics of (more) permanent jobs. As permanent jobs entitle workers to certain rights (such as a right to a minimum wage or protection from working excessive hours), differences of opinion on the qualification of employment relationships in the gig economy led to court cases in various jurisdictions in the European Union. This newsletter highlights a number of such court cases, which took place in November 2017 up to and including the recent judgement of the Amsterdam Subdistrict Court, mentioned above.

Key issues

- No uniform qualification of employment relationships in the gig economy.
- The factual circumstances are crucial when qualifying employment relationships in the gig economy – it therefore is hard to formulate a general rule.
- We expect that legislation on this topic will be forthcoming, as there has been much publicity on these cases and the diverse work models and employment relationships in the gig economy are growing exponentially.

FROM THE UNITED KINGDOM…

In November 2017, the ruling of an English court recognised that Uber drivers are "workers" for the purposes of remuneration (and thus were eligible for the national minimum wage and other statutory rights). The court reasoned that the claimants were workers and that working time started from the moment when the driver switched on the Uber app, thus announcing availability to perform work for the benefit of the employer. This ruling was upheld in appeal, whereby the subsequent court declared that the employment contract is not automatically determinative of employment status; rather, the court will determine employment status having regard to all circumstances, including what happens in reality.

Also in November 2017, in a case against Deliveroo, another English court came to a different conclusion in relation to a meal delivery job in the gig economy. Contrary to the Uber case above, the court did not qualify Deliveroo riders as "workers". This court reasoned that the delivery drivers had an unrestricted right to appoint a substitute to perform the deliveries assigned to them. The court consequently concluded that the workers had no personal obligation and could therefore not be classified as "workers". However, in June 2018, it was decided that there will be a renewed review by a High Court Judge.

VIA ITALY…

In May 2018, an Italian court ruled on the qualification of an employment relationship in the gig economy for the first time. Also in this Italian case, meal delivery drivers were the topic of the debate. The ruling of the Italian court denied the Foodora couriers' claim that their employment relationships were subordinate employment relationships (and therefore denied their claim to additional rights). The reasoning of the Italian court in principal was based on the finding that the delivery drivers were not bound to perform the delivery service as they could freely decide whether to accept each delivery request. The Italian court further reasoned that if Foodora could not demand that the courier performed the service, then it could not exercise any organisational authority over the riders and had no power to direct them, which are essential elements to qualify an employment relationship as a subordinate employment relationship. The court also found that Foodora merely acted as a coordinator, without imparting specific orders and without exercising continued monitoring and control.

After this ruling, the Italian Ministry of Labour has initiated a consultation with the parties involved in order to draft the first National Collective Bargaining Agreement of the Gig Economy. In the event such an agreement is not reached, the Italian government has clarified that it will issue a new piece of legislation in order to ensure the protection of employees in the gig economy.

BACK TO THE UNITED KINGDOM…

In June 2018, the English Supreme Court has handed down a judgement on the qualification of employment relationships. The case did not relate to an employment relationship in the gig economy: it was between a plumber and the company he performed activities for, Pimlico Plumbers (hereinafter: "PP"). However, the viewpoints of United Kingdom's highest court in this case may be relevant when qualifying employment relationships in the gig economy. One of the key elements of this case was that, according to the plumber's working contract, he had to perform work for PP personally but however had a right of substitution. This right of substitution was very limited, since the substitute also had to be a PP plumber subject to PP contractual terms. Other factors, such as that the plumber had to wear a branded PP uniform, drive a PP branded van which was tracked and that the plumber had to closely follow the instructions of the PP control room, also led to the fact that the plumber qualified as a "worker" (and therefore, similar to the Uber case, thus was eligible for the national minimum wage and other statutory rights).

TO THE NETHERLANDS

As referred to in the introduction, on 23 July 2018 the Amsterdam Subdistrict Court ruled in favour of Deliveroo, in a matter on the question whether the employment status of a delivery driver of Deliveroo qualified as an employment agreement or a services agreement. This court ruled that, in this case, the employment relationship does not qualify as an employment agreement (and therefore denied any claims from the delivery driver to additional rights such as protection from dismissal or a statutory right to sick pay). The Amsterdam Subdistrict Court took into account established Dutch case-law, considering (1) the intention of the parties when entering into the agreement; and (2) in what way the parties executed the agreement.

With respect to point (2), the court formulated some relevant viewpoints. It considered there is no employment agreement, because the delivery driver:

- could decide for himself whether to do the work. He could also refuse a delivery, and even had the freedom to not go to work when he reserved a working timeslot (although not without consequences);
- could, when he had not reserved a timeslot, enlist for work (assuming there was work);
- had the option to perform his work with his own equipment (i.e. his own clothes and thermo box) if this equipment met the safety requirements set by Deliveroo;
- was allowed to perform work for competing companies;
- could replace himself by any other person if such others met the safety requirements set by Deliveroo; and
- only generated additional earnings by performing this work (contrary to income from employment).

According to the judgement of the Amsterdam Subdistrict Court, current (Dutch) employment law does not cater for relatively new employment relationships originating from the gig economy and that it is up to the government to take measures to prohibit companies like Deliveroo from offering agreements such as these.

CONCLUSION

Based on the different cases across Europe, the factual circumstances are crucial when qualifying employment relationships in the gig economy – it therefore is hard to formulate a general rule. Examples of such factual circumstances are the organisational authority over the workers, the right of substitution and the possibility to perform work with own equipment. As there has been much publicity on these cases and the diverse work models and employment relationships in the gig economy are growing exponentially, we expect that legislation on this topic will be forthcoming. An example of such legislation might be a proposal of law that captures the intention expressed by the Dutch government to introduce 'minimum tariffs'. This intention entails that an employment relationship automatically qualifies as an employment agreement when a worker does not earn over EUR 15-18 gross per hour.

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