Legal Strategies: The Dutch Deliveroo cases

Legal definitions

In the Netherlands, the legal definitions of both an employment contract and an agreement for services are very similar. Both have:

- an obligation to work for the worker;
- an obligation to pay for the person hiring the worker; and
- the right to give instructions to the worker.

De difference is in the little things. If you tell the worker to paint your house red, it's an agreement for services. If you tell him to be there at eight in the morning, dressed in your companies' white uniform, using a two inch brush and start at the windows on the east-side, it's probably an employment agreement. But not necessarily so.

Legal consequences

De differences in the legal definitions may be small, the differences in legal consequences could not be any greater. In the case of an employment agreement:

- the employer has to pay social securities' benefits;
- the employer is likely to be subject to a mandatory pension scheme;
- the employee is entitled to vacation allowance, paid vacation time, paid sick leave; and
- the employee is protected against unfair dismissal.

In the case of an agreement for services none of the above apply. The worker does enjoy certain tax benefits for a limited amount of time. So that makes it extremely cheaper and more flexible to hire workers on the basis of a services agreement compared to an employment agreement. That is why it is seen as an attractive business model.

Supreme Court

In qualifying agreements, the Dutch Supreme Court has developed the holistic approach. It means that all circumstances must be taken into account. Courts will have to look at what it was that parties wanted to agree to, also taken into account how parties have executed the agreement as well as the type of relation between the parties. These factors will all have to be taken into consideration and this must lead to an outcome: employment agreement or agreement for services.

Tax authority

Mind you: this type of qualifying difficulties have existed for decades. What changed, is that workers in the Netherlands used to be able to get a statement from the tax authority, saying that they would not be treated as employees, but as independent contractors. This was called the VAR. The VAR was abolished in 2016. Since then the government said that companies should have some time to look at their own workforce with a critical eye, and then determine whether it should use employment or service agreements. The tax authority would not uphold the law, and not impose penalties under tax law, except for cases of gross misconduct or abuse of the law. I heard that happened about five times. So with the legislator leaving room for interpretation, the Supreme Court caught in its own holistic approach and the tax authority bound and gagged in a corner, it clearly was a matter of time before that void would be exploited to the max.

Deliveroo

This is what someone at Deliveroo must have thought. Deliveroo terminated all of its employed agreements and re-hired the very same meal couriers as independent contractors. Nothing else really changed, except that the couriers were now paid per delivery, as opposed to an hourly wage. Obviously that is rally a big change: you could end up sitting in the town square waiting for a delivery and not getting paid at all. No job security, no vacation allowance, no vacation time, and also none of the other rights that flexible workers usually have.

Legal strategy: sue 'm

There was one of the Deliveroo riders who not only thought this was not right, but who was alo willing to do something about it. His name is Sytze Ferwerda, he was at the time a 19 year old, second year political sciences student at the University of Amsterdam and also a part time meal courier for Deliveroo. We came into contact and we discussed the possibilities for suing Deliveroo for employment. We came to the conclusion that from a legal point of view, the working relation between hem and Deliveroo should be qualified as an employment agreement. We came to this conclusion on the basis of a number of reasons:

- nothing really changed since Sytze started working under his so called services agreement;
- Deliveroo was in fact giving directions as to how the work should be done. From our point of view, it did not matter that these directions were give through an app on Sytze's phone. Directions are directions, also when they come from an algorithm
- Sytze signed a contract for services, but this contract was purely windowdressing. In fact he had to do the work himself and he was integrated into the company through the app and the other materials and support offered by Deliveroo.

Win win

But you wanted to talk strategy. Suing Deliveroo was only part of the strategy. Because everyone who has ever been into court knows, or should know, that there is no such thing as a sure thing. Sytze could either win this case or lose it. The strategy therefore involved a second pillar, which entailed the political motive to raise attention to this type of employers' or employment strategies, being implemented into our society. This worked particularly well, since in the Netherlands it was the first case of an employee suing a so called 'platform' or 'newconomy' company and publicly opening their employment strategy for debate. Sytze of course had and had a very clear idea about this, and it appeared that he had a lot of support for his point of view: not only from the left wing but also from the right wing and the media. The objective was to create a win-win situation: if we win the case, Deliveroo did something bad and nobody should do what they did, but if we lose the case, then the system is bad and needs to be changed.

Succes

It became the latter. The case drew an unprecedented amount of media attention. Questions were asked about this case in Dutch parliament, on various occasions. It was a case before the cantonal court, which is the lowest judge in the hierarchy of the Dutch judicial system. I think as we speak, literally hundreds of cantonal judges throughout the Netherlands are dealing with traffic fines, rent disputes and small claims. But came Sytze's day in court, he had to make our way through a demonstration which was in front of the Amsterdam court house, the case had to be moved to the large court hall which is usually only used for ceremonies, there were two camera teams and the front benches were reserved for the writing press of every self-respecting newspaper. This part of

the plan had come together. The judge did not rule in favour of Sytze, saying that it should not be up to a court to decide on these matter, but the legislator should do this. This ruling was criticised by notable Dutch employment law scientists and lawyers. But maybe more importantly: a lot of Dutch lawyers wrote something about this case on their website, or twitter. Deliveroo was all over the place, and so was the debate about employment agreements versus services agreements.

VAAN

I am a member of the Dutch association of employment law attorneys. Coincidently, the day after the court session in the Deliveroo case there was a conference about the platform economy and new types of employment. And the discussion went on about whether this type of development was desirable how we could find a better balance and what legislation should look like to be fairer. I tried to get into it, but I found this discussion to be difficult and tiresome. The reason for this, is because I figured that this was a conference, only for lawyers. Not for legislator or politicians and a good lawyer should be able to stay away from an abstract concept such as what is fair and what not. Fair is in the eye of the beholder. Lawyers sue people. And here I was at this conference of about 800 employment lawyers, but I was the only one who actually sued a platform company.

Why suing

The Deliveroo case has shown that suing companies can be an effective way of activism. The company sued is forced to show up and publicly defend its business decisions, which may be difficult if your business reasons are confined to exploiting already underpaid law wage employees. You may look bad, which is bad for business. Also, by doing this, you can bring a company at great risk. Surely if only Sytze had to be paid his holiday allowance this would nog constitute that big of a problem to a well funded company such as Deliveroo. But all of its workers? Over an undefined period of time, five years in retrospect? With no hiding form the tax authority? The battle is truly brought upon its doorstep. Suing is also better than not suing. Doing nothing has a tendency not to change anything.

FNV

The largest Dutch trade union federacy, the FNV, started litigation against Deliveroo during Sytze's case. FNV argued on behalf of its members that anyone working for Deliveroo should be considered an employee and subject to Dutch employment law. It also sued for application of the collective bargaining agreement for transportation of goods on the road. The case did not draw as much media attention as the first Deliveroo case, but contrary to the first case, the court this time ruled in favour of the employees. Deliveroo said to appeal the decision, which to me demonstrated its own vulnerability: it can do little else than appeal.

Conclusion

The Deliveroo cases have demonstrated that court rooms can be an excellent place for legal activism. It puts the risk of being sued by employees and/or trade unions on the decision making agenda of companies. I think we are thereby helping these companies, setting boundaries not just for them but for their entire industry.