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Deliveroo applied in case law of the lower courts: an overview

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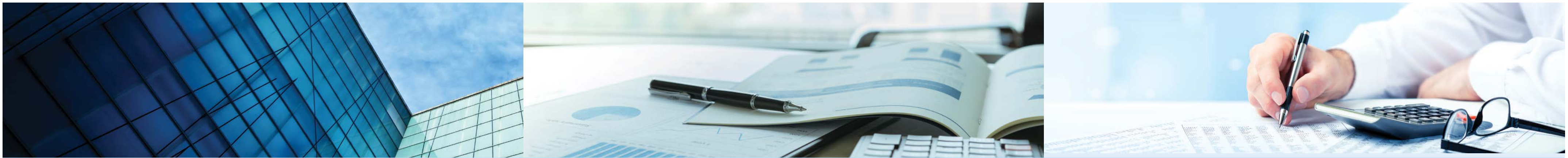

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About Loyens & Loeff

Deliveroo applied in the lower courts: an overview

1. Introduction

The *Deliveroo* ruling by the Supreme Court[1] has caused a considerable stir in the world of employment law. In that ruling, the Supreme Court formulates a number of criteria on the grounds of which it must be assessed whether an individual is working on the basis of an employment contract or on the basis of a contract for services. Following the Supreme Court's ruling, we see the lower courts applying the *Deliveroo* criteria reasonably consistently when assessing this qualification issue, so that we are gradually gaining an understanding of the specific interpretation of these criteria. In this article we will first discuss the *Deliveroo* criteria as formulated by the Supreme Court. We will then discuss the interpretation of these criteria by the lower courts following the *Deliveroo* ruling, after which we will briefly discuss how the *Deliveroo* criteria are dealt with from a tax point of view.

2. The *Deliveroo* ruling

In 2019 the Cantonal Court of Amsterdam judged that the legal relationship between *Deliveroo* and its delivery personnel should be regarded as an employment contract.[2] That judgment was upheld by the Amsterdam Supreme Court in 2021.[3] *Deliveroo* then appealed in cassation, arguing in essence that the freedom the delivery personnel had to substitute someone for themselves and to work or not to work is incompatible with an employment contract. The Supreme Court upheld the Appeal Court's ruling, applying what is known as the two-phase doctrine (*tweefasenleer*). First it must be established what rights and obligations have been agreed between the parties, where all circumstances of the case must be viewed in relation to each other. This is what is known as the 'explanation phase' (*uitlegfase*). In this phase, the Haviltex criterion is applied and the intentions of the parties also play a role. Then, in the second phase, the agreed rights and obligations are examined to decide whether they tip over towards an employment contract or towards a contract for services. This is the 'qualification phase' (*kwalificatiefase*), in which the parties' intentions no longer play a role.[4] To assess whether an employment contract exists, according to the Supreme Court, the following circumstances, amongst others, are important:

(i) the nature and duration of the work,
(ii) the way in which the work and working hours are determined,
(iii) embedding the work and the person performing the work in the organisation, and the business operations of the party for whom the work is being performed,
(iv) whether or not there is an obligation to perform the work personally,
(v) the way in which the contractual arrangement of the parties' relationship has come about,
(vi) the way in which the remuneration is determined and paid,

1 Supreme Court 24 March 2023, ECLI:NL:HR:2023:443.
2 District Court of Amsterdam, 15 January 2019, ECLI:NL:RBAMS:2019:198.
3 Amsterdam Court of Appeal 16 February 2021, ECLI:NL:GHAMS:2021:392.
4 The judgment of the District Court of North Netherlands of 8 May 2024 is therefore incorrect, ECLI:NL:RBNNO:2024:1781.

(vii) the amount of this remuneration,
(viii) the question as to whether the person performing the work bears any commercial risk,
(ix) the question as to whether the person performing the work acts or can act as an entrepreneur in the ordinary course of business (entrepreneurship) and
(x) the weight given to a contractual stipulation.

Article 7:610 of the Dutch Civil Code (**DCC**) is the article that deals with the qualification of an employment contract and lays down (in brief) that if the elements of wages, labour and authority have been met, an employment contract exists. In itself, Article 7:610 DCC is not holistic; that means that one cannot say that if one element is missing (such as payment of wages) this can be compensated by another element (such as considerable exercise of authority), in order to ultimately arrive at an employment contract. The interpretation of the elements of wages, labour and authority based on the above circumstances is holistic, however, as has been reconfirmed in the Supreme Court's ruling.[5]

These viewpoints are also used when interpreting 'triangular relationships', such as in the question as to whether a temporary employment contract exists. After all, the temporary employment contract is a special variant of the employment contract.[6]

We will consider the circumstances referred to by the Supreme Court in more detail below and also discuss the interpretation of these circumstances by the lower courts following the *Deliveroo* ruling.

3. The nature and duration of the work

As far as the nature of the work is concerned, the question arises as to whether certain kinds of work by definition come under an employment contract, and other kinds of work come under a contract for services. In general, one cannot put it that way. It is sometimes argued that if the work provider has no economic or commercial interest in its objectives, no work under an employment contract can be performed by the worker at that work provider. However, that has proved to be an incorrect assumption. A worker may very well perform work within the meaning of Article 7:610 DCC, such as for a non-profit foundation.[7] The nature of the work can also be important to determine the value of the absence of instructions. The absence of instructions is sometimes used as an argument to demonstrate that an employment contract does not exist. If it involves straightforward work, usually no instructions are needed, but that does not mean by definition that this constitutes a contract for services.[8]

As regards the duration of the work, things are less clear. Although Article 7:610 DCC mentions performing work 'during a certain period', this period can be very short. It can therefore be assumed that an employment contract with a duration of one day or even a few hours is possible.[9] So, where should we draw the line? We do see that the court sometimes takes the fact that the work is of long duration as an argument for the existence of an employment contract.[10]

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5 See also J. Seghrouchni (in Dutch), *Het arrest van de Hoge Raad inzake Deliveroo: iets om bezorgd over te zijn?* (The ruling of the Supreme Court on *Deliveroo*: something to be concerned about?) BB 2023/20.

6 See the District Court of Amsterdam 10 July 2024, ECLI:NL:RBAMS:2024:3987, where the Court considered the following two viewpoints to determine the formal employer's authority at Temper: (i) the way in which the work and working hours are determined and (ii) the way in which the contractual arrangement of the parties' relationship has come about.

7 See, for example, District Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513.

8 See District Court of North Netherlands, 11 July 2023, ECLI:NL:RBNNE:2023:2863, concerning the driver's work in truck transport.

9 See E. Herlaar in SDU T&C Artikelsgewijs and E. Verhulp in *T&C Arbeidsrecht*, Kluwer.

10 See, for example, District Court of Rotterdam, 5 September 2023, ECLI:NL:RBROT:2023:12118, where the worker had already been working for 4 years for the work provider. In District Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513 the worker had been working for 9 years for the work provider.

The long duration is generally not very compatible with the concept of a contract for services, because such a contract generally has to be completed within a certain period of time.

4. The way in which the work and working hours are determined

The question here is not what work or what working hours are involved, but the way in which they are determined.

When it comes to determining the work, what matters is whether the worker can determine, to a significant extent, where[11] and how he or she can perform the work. If, for example, regular job appraisal and progress interviews are held, this can be an indication of an employment contract.[12] Sometimes the worker performs such highly specialised work that the work provider can give virtually no work instructions, but it can still be the case that an employment contract exists if the work provider can determine where and when work will be performed, and sets the parameters within which the work must be performed.[13] The working conditions may be such that that the worker has little or no control over the way he or she performs the work.[14]

In addition, it may be important whether the work provider gives instructions on what the worker should do when ill[15], or imposes other rules of conduct.[16] The work instructions need not be given by the work provider itself.

It may also be that the work provider has instructed or delegated this to someone else.[17] On the other hand, the fact that a clear result has been agreed with the work provider, where the worker decides to a large extent how to achieve the result, may be an indication of the existence of a contract for services.[18]

As regards working hours, the extent to which the work provider takes account of the worker's wishes is important. If, for example, the worker gives his or her availability and the work schedule is made on that basis, this is an indication of whether or not there is a relationship of authority.[19] If the fact that the worker has other work to be performed for other work providers is specifically taken into account when determining the working hours, this may also be an indication that the worker is self-employed.

11 See, for example, District Court of the Central Netherlands 12 February 2024, ECLI:NL:RBMNE:2024:1231.
12 See, for example, District Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513 and Arnhem-Leeuwarden Court of Appeal 2 May 2023, ECLI:NL:GHARL:2023:3701.
13 See, for example, District Court of Zeeland-West-Brabant 4 July 2024, ECLI:NL:RBZWB:2024:4597.
14 See, for example, Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3, where the delivery round for newspaper delivery personnel had been set and could not be deviated from.
15 District Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513.
16 See, for example, Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3, where the worker had to conform to a detailed handbook.
17 District Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513. See also Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3.
18 District Court of Limburg 16 May 2023, ECLI:NL:RBLIM:2023:3404, concerning an individual involved in camera work for television programmes.
19 District Court of Limburg 16 May 2023, ECLI:NL:RBLIM:2023:3404. See also District Court of the Central Netherlands 22 November 2023, ECLI:NL RBMNE:2023:6218.

5. Embedding the work and the person performing the work in the organisation, and the business operations of the party for whom the work is being performed

'Embedding' is a new viewpoint in case law of the Supreme Court, and can in fact be split into two components. First, embedding the work, and second, embedding the worker in the work provider's organisation. For embedding the work it will usually be work that is part of the work provider's normal business operations.[20] The work of a window cleaner, for example, will not form part of a law firm's normal business operations. If the work does not form part of the work provider's normal business operations, the worker is more likely to be regarded as self-employed.[21] Still that will not always be easy to establish either. An example mentioned in the literature is a worker who works as a lecturer at a university; that work is clearly embedded. But the same worker could also work in the HR department of that university. That work is also embedded in the organisation of a part of the university.[22] If it concerns an entirely new position within an organisation, it may be a circumstance for assuming that the work is not embedded.[23]

What also may be relevant is whether the worker's job is performed by his or her colleagues at that work provider on the basis of an employment contract.[24]

When it comes to the embedding of the worker, it may be the case that although he or she performs work that is part of the work provider's normal business operations, he or she is still not embedded in that work provider's organisation. That could be the case because, for example, the worker does not have a permanent access pass to the company, does not have schemes for taking leave, is not provided with work equipment such as a laptop, iPhone etc., is not listed on the company's website, does not have a company email address[25], has his or her own licence to perform the work or is not obliged to take part in certain company activities[26] or courses that are indeed obligatory for the work provider's employees, and furthermore would have to pay for these himself/herself if the worker were indeed to participate in them.[27] The fact that a worker sometimes is required to wear certain company clothing and use certain company equipment does not necessarily indicate an employment contract if there is an objective reason for this relating to the nature of the business.[28]

20 See, for example, Amsterdam Court of Appeal 3 October 2023, ECLI:NL:GHAMS:2023:2220 (Über drivers). See also District Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513 (handball player with a foundation whose object was to promote handball) and Court of North Netherlands, 11 July 2023, ECLI:NL:RBNNE:2023:2863 (truck driver with a transport company).

21 District Court of the Central Netherlands 29 November 2022, ECLI:NL:RBMNE:2022:5294.

22 A.R. Houweling (in Dutch), Kw*alificeren na Deliveroo* (Qualification after *Deliveroo*). In: ArA, 2023 (20) 2, p. 33.

23 's-Hertogenbosch Court of Appeal 4 May 2023, ECLI:NL:GHSHE:2023:1419.

24 See, for example, District Court of Noord-Holland 7 May 2024, ECLI:NL:RBNHO:2024:4468 where the worker worked as a doorman and the other doormen at the work provider all worked on the basis of an employment contract.

25 A.R. Houweling, *Kwalificeren na Deliveroo*. In: ArA, 2023 (20) 2, p. 32.

26 See, for example, District Court of the Central Netherlands 15 November 2023, ECLI:NL:RBMNE:2023:6072.

27 District Court of Limburg 16 May 2023, ECLI:NL:RBLIM:2023:3404.

28 See, for example, District Court of Limburg 16 May 2023, ECLI:NL:RBLIM:2023:3404. The case involved a worker who performed camera and studio work and had to wear dark clothes and use certain equipment. This had to do with the ultimate picture quality. See also District Court of the Central Netherlands 22 November 2023, ECLI:NL RBMNE:2023:6218, concerning a worker at a security firm who had to wear certain company clothing because this would come across to clients as more professional.

It cannot be ruled out that a client stipulates basic rules for a contractor's work and checks that these are followed.[29] On the other hand, the fact that the worker cannot be distinguished in any way from the work provider's employees would strongly indicate an employment contract.[30] Whether a worker specifically refers to himself/herself as a self-employed worker without employees (*zzp'er*), for example, can also be important.[31]

Finally, it is possible that both the work and the worker are embedded, but there is still no employment contract. An example is a partner of a law firm. Running commercial risk and having a significant say over the organisation and his or her work does not necessarily mean that an employment contract is in place.[32]

With this 'embedding criterion', inspiration can be drawn from case law on the grounds of social security and tax legislation. In tax case law, until 2 January 2006 the Central Appeals Tribunal (*Centrale Raad van Beroep* – **CRvB**) was still the highest authority charged with judging whether an employment relationship existed within the meaning of social security legislation. Since 1 January 2006 this has been the task of the Supreme Court, because the social security premiums are no longer paid to the Employee Insurance Agency (*Uitvoeringsinstituut Werknemersverzekeringen* – **UWV**), but to the tax authorities. On the basis of case law of the CRvB and the lower courts, Emmerig[33] drew up a summary of circumstances that could indicate an embedding of the worker in the work, some of which we are now seeing in civil-law case law following *Deliveroo*. He lists the following circumstances, amongst others:

a. The worker works (virtually) full-time for a single work provider.
b. The worker performs work similar to that of the work provider's employees[34] or previously performed the same work on the basis of an employment contract.[35]
c. The work is in line with the work provider's core activities.[36]
d. The work is performed within the work provider's organisational framework.
e. The work is part of the work provider's primary production or service process.[37]
f. The work is regularly, structurally and systematically performed.
g. The worker participates in internal consultations, such as management team meetings, and discussions with clients.
h. The worker is frequently present at the work provider's office.
i. The worker participates in team trips.
j. The worker coordinates holidays and other absences with the work provider.
k. The worker makes use of the work provider's business systems and facilities and has little or no business equipment of his/her own.[38]
l. The worker attends training sessions, courses, conferences etc. at the work provider's expense.

29 See, for example, District Court of Zeeland-West Brabant 26 April 2024, ECLI:NL:RBZWB:2024:3259 concerning work in security.
30 Arnhem-Leeuwarden Court of Appeal 20 June 2023, ECLI:NL:GHARL:2023:5180.
31 Court of the Central Netherlands 15 November 2023, ECLI:NL:RBMNE:2023:6072.
32 J.B.B. Heinen and P.J. Mauser (in Dutch), *Bezorgt de Hoge Raad iets nieuws? – Over de kwalificatievraagstuk Deliveroo* (Is the Supreme Court giving something new? – About the *Deliveroo* qualification issue). In: TAP no. 4, June 2023, p. 8.
33 B. Emmerig (in Dutch), *Inbedding als hoofdelement van de dienstbetrekking* (Embedding as the main element of employment). In: WFR 2023/249.
34 Arnhem-Leeuwarden Court of Appeal 20 June 2023, ECLI:NL:GHARL:2023:5180.
35 District Court of North Netherlands 11 July 2023, ECLI:NL:RBNNE:2023:2863.
36 See Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3 (depot manager of a newspaper publishing firm).
37 The Court of Amsterdam 6 February 2024, ECLI:NL:RBAMS:2024:685, held, for example, it to be important that a corrector at the Volkskrant newspaper evidently had played a central role on the editorial board for more than a decade.
38 Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3.

m. The worker temporarily fills an existing (employee) vacancy.
n. Job appraisal interviews are held with the worker.
o. The rules issued by the work provider and the ensuing customs and habits also apply to the worker.
p. The worker works within a team of the work provider.

6. Whether or not there is an obligation to perform the work personally

The obligation to perform the work personally or not has now become just one viewpoint, where previously it was considered an independent criterion. The Supreme Court emphasises that the freedom to turn up at work or not and to accept assignments (the ‘free substitution clause’ (*vrijevervangingsbeding*)), does not in itself rule out the existence of an employment contract. Conversely, it may also be the case that the agreement that the work must be performed personally does not immediately indicate the existence of an employment contract. After all, that agreement can also be made in the context of a contract for services.[39] Consider, for example, the commission to a portrait painter who already has a certain reputation. The client will probably demand that the painter himself paint the portrait, but this still will not constitute an employment contract.

In the case of a free substitution clause, it should be noted that the meaning of such a stipulation will also depend on its actual meaning for the worker (see also the discussion below of the last criterion used by the Supreme Court). In other words: does the worker himself/herself actually have an interest in the free substitution? The Supreme Court goes on to say that it ultimately comes down to whether the worker (a) can be permanently substituted with the consent of the work provider, (b) can have several persons deputising for him or her at the same time, and (c) (as a result) can make a business model out of the free substitution clause. This can be related to the level of remuneration. If this is very low, it is less likely that an earning model can be made out of it.[40] Also, free substitution is unlikely if the work provider decides who the substitute will be.[41] If the work provider imposes all kinds of subjective requirements on the substitute, the court may also rule that the agreed free substitution is an empty shell.[42] In other cases the work provider has no choice and certain objective requirements must be imposed. After all, a specific licence, diploma or certification is required for some kinds of work, such as security officer, taxi driver, truck driver or medical professionals. In such a case, the court may decide that the imposition of certain requirements by the work provider does not in itself say much about the criterion as to whether or not the work has to be performed personally.[43]

39 See Court of the Central Netherlands 15 March 2024, ECLI:NL:RBMNE:2024:1673, concerning a worker who was the COO at the work provider.
40 A.R. Houweling, M.M.W.D. Merkx and T. El Ouardi (in Dutch), *Deliveroo in perspectief* (*Deliveroo* in perspective). In: MBB Belasting Beschouwingen no. 9, June 2023, p. 10.
41 See, for example, Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3, where the substitute had to come from a permanent pool of 4 people.
42 See, for example, Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513 where the work provider had stipulated that the worker had to have a ‘legitimate’ reason for engaging a substitute. The work provider decided for each situation what that legitimate reason was.
43 See, for example, Amsterdam Court of Appeal 3 October 2023, ECLI:NL:GHAMS:2023:2220, concerning Über drivers, who therefore needed to have a driver’s diploma.

Sometimes it is judged that the fact that a worker has never been substituted is a strong indication of an employment contract[44], but this reasoning is also sometimes used in reverse: because someone has not been substituted *de facto* says little about the question as to whether someone was required to perform the work personally (and therefore this would constitute an employment contract).[45]

7. The way in which the contractual arrangement between the parties has come about

The social position of the parties may play a role in the way in which the contractual arrangement between the parties has come about.[46] Another important factor is whether the work provider and the worker share an equal negotiating position.[47] Does the worker simply have to accept a standard contract?

Were there genuine negotiations on the terms of employment[48] or has the worker clearly been given the opportunity to negotiate?[49] Of course, even with a genuine employment contract certain terms of employment may have been intensively negotiated (such as bonus conditions, restrictive clauses etc.).[50] If that is the case, the other points of view mentioned by the Supreme Court will therefore have to be taken into account to assess whether this still does not constitute an employment contract.

The fact that a worker becomes a co-shareholder of the work provider's company does not necessarily mean that there is a contract for services. It also depends on the reasons for becoming a co-shareholder and how much will change compared to the situation if the worker had remained in salaried employment.[51]

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44 See, for example, Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3, where the worker had only been substituted twice in 20 years.

45 District Court of the Central Netherlands 12 February 2024, ECLI:NL:RBMNE:2024:1231. In this case, many *Deliveroo* criteria pointed to a contract for services. The 'substitution argument' therefore appears in this case to be something of a foregone conclusion. See also District Court of the Central Netherlands 15 November 2023, ECLI:NL:RBMNE:2023:6072.

46 In District Court of Limburg 31 March 2023, ECLI:NL:RBLIM:2023:2514 the fact that the worker was the owner of the business premises and the surrounding land and therefore received rent, contributed to the fact that there was no employment contract.

47 In 's-Hertogenbosch Court of Appeal 4 May 2023 the fact that there were two equal parties (namely that the worker presented himself from the start as an independent entrepreneur and took the initiative in negotiations), indicated that there was no employment contract. In District Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513, the fact that, with the exception of the level of remuneration, there were no negotiations on the contents of the contract, and the provisions were included in the contract on the initiative of the work provider, precisely indicated that an equal negotiating position did not exist.

48 See, for example, Arnhem-Leeuwarden Court of Appeal 20 June 2023, ECLI:NL:GHARL:2023:5180, where the contract was presented to the worker during the worker's night shift as a doorman at a cafe, while he was standing at the door. See also Arnhem-Leeuwarden Court of Appeal 2 May 2023, ECLI:NL:GHARL:2023:3701.

49 See, for example, District Court of Limburg 16 May 2023, ECLI:NL:RBLIM:2023:3404, where it was apparent that other independent workers had indeed negotiated and the Subdistrict Court therefore concluded that this worker must also have had this opportunity.

50 J.B.B. Heinen and P.J. Mauser, *Bezorgt de Hoge Raad iets nieuws? – Over de kwalificatievraagstuk Deliveroo*. In: TAP no. 4, June 2023, p. 8.

51 See, for example, District Court of North Netherlands, 11 July 2023, ECLI:NL:RBNNE:2023:2863, where the subdistrict court judged that the only difference between the employment contract and the co-shareholdership in this case was a difference in the tax treatment of the expenses. For the rest, everything else had remained the same compared to the situation when the worker was still in salaried employment.

It is also important to note in this context that if some of the provisions in the agreement are very similar to provisions that are also found in an employment contract, or have the same legal consequences that apply in employment law, this may be an indication of the existence of an employment contract.[52]

8. The way in which the remuneration is determined and paid

The way in which the remuneration is determined could include how the level of remuneration has been agreed, for example, whether the level of remuneration has been negotiated.[53]

The way in which wages are paid (invoiced by or from a business of the worker) or are, in fact, not paid (think of continued payment during illness or holiday) helps to define the elements of wages and authority respectively.[54] The fact that the worker sends an invoice each month and charges VAT can indicate entrepreneurship.[55] The same applies when no payroll taxes and no contributions are deducted from the amount paid.[56] Conversely, the fact that the work provider arranges payment through the payroll administration may again indicate an employment contract.[57] Sometimes a court will assume that the fact that payment is not or only partially made if no work is performed is indicative of the fact that performing the work is not voluntary and therefore an employment contract exists.[58] This appears somewhat to be a foregone conclusion, because on the other hand it could well be argued that a contract for services is precisely characterised by the fact that nothing is paid if work is not done.

9. The level of this remuneration

The level of remuneration may raise the question of whether the remuneration is such that the worker who wants to qualify as self-employed can pay his own insurance, pension and the like from it. If the level of remuneration differs little or not at all from the remuneration received by the work provider's employees who do virtually the same work as the worker, this may be an indication of the existence of an employment contract. Conversely, the fact that the worker receives significantly more than the employees for the same work may indicate the opposite.[59]

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52 See, for example, Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3, in which a notice period was very similar to a period referred to in Article 7:672 DCC and a provision on liability was very similar to that in Article 7:661 DCC.

53 See Court of the Central Netherlands 12 February 2024, ECLI:NL:RBMNE:2024:1231, where negotiations were held each year on the level of remuneration. In Court of Rotterdam, 5 September 2023, ECLI:NL:RBROT:2023:12118 the work provider argued that all contractors received the same hourly rate. That was an indication for the subdistrict court that negotiating the hourly rate, which indicates autonomy, was evidently not an option.

54 Court of the Central Netherlands 12 February 2024, ECLI:NL:RBMNE:2024:1231. See also A.R. Houweling, *Kwalificeren na Deliveroo*. In: ArA, 2023 (20) 2, p. 28 and 30.

55 's-Hertogenbosch Court of Appeal 4 May 2023, ECLI:NL:GHSHE:2023:1419. The invoices contained the description: 'Advanced Management Fee', because the worker clearly intended to become a shareholder of the work provider's business. See also Court of the Central Netherlands 22 November 2023, ECLI:NL:RBMNE:2023:6218 and Court of the Central Netherlands 15 March 2024, ECLI:NL:RBMNE:2024:1673.

56 Court of the Central Netherlands 15 November 2023, ECLI:NL:RBMNE:2023:6072. See also Court of Limburg 31 March 2023, ECLI:NL:RBLIM:2023:2514. In 's-Hertogenbosch Court of Appeal 4 May 2023, ground 3.9.7, the fact that no agreements had been made about pensions and holidays indicated that no employment contract existed.

57 In this context, it may also be important whether wage slips have been issued, or annual statements have been received and whether an employer's statement has been issued. See also Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513.

58 Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513. The subdistrict court held that the fact that this agreement was contrary to Article 7:650 DCC was not relevant.

59 Court of Limburg 16 May 2023, ECLI:NL:RBLIM:2023:3404. See also Court of the Central Netherlands 22 November 2023, ECLI:NL RBMNE:2023:6218 and Court of the Central Netherlands 12 February 2024, ECLI:NL:RBMNE:2024:1231 and Court of the Central Netherlands 15 November 2023, ECLI:NL:RBMNE:2023:6072.

10. The question of whether the person performing the work bears any commercial risk

In the case of a contract for services, usually a particular end result is agreed, and it is arranged that if the end result is not achieved, or not entirely achieved, within a certain period, less or no remuneration will be paid. This is essentially different to an employment contract where on the grounds of Article 7:628 DCC the employer is bound to pay wages, even if no work is done, unless the employer can demonstrate that the absence of work is at the employee's risk and expense. The question is therefore whether the worker runs any commercial risk that can result, for example, in him or her not receiving wages for a certain period of time, or even must pay a supplement, such as in the event of disappointing turnover, high costs, operational risks, the market and/or competition.[60] In addition, the worker having to take out his or her own client's liability insurance or making use of the Small Business Scheme (*Kleine Ondernemersregeling*) are indications that a commercial risk is being run.[61]

If, however, the work provider incurs costs on behalf of the worker without charging these to him or her, it can point to the existence of an employment contract.[62]

11. Entrepreneurship

Entrepreneurship is also a new criterion introduced here by the Supreme Court.
The Supreme Court gives a little more definition to entrepreneurship, by saying that entrepreneurship can be apparent from acquiring a reputation, by acquisition, as regards tax treatment, and in view of the number of clients for whom the worker works or has worked, and the duration for which he or she generally commits to a particular client.
A listing with the Chamber of Commerce as a sole trader or private limited company (B.V.), for example, can also indicate entrepreneurship.[63] As can the fact that an individual originally worked on the basis of a Declaration of Independent Contractor Status (*Verklaring Arbeidsrelatie* – **VAR**) or on the basis of the tax authorities' model agreements.[64]
A worker can, for example, serve various clients alongside each other, and on this basis is only available for the work provider on a limited basis, but can also demonstrate on the basis of his history that he is an entrepreneur, such as by means of a track record of a number of assignments in the past three years.[65]

In a case that was brought before 's-Hertogenbosch Court of Appeal, the worker clearly presented himself as an entrepreneur in response to a vacancy (which was, incidentally, for an employee).[66] In this context, it can also be important whether the worker has to

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60 See, for example, District Court of the Central Netherlands 15 March 2024, ECLI:NL:RBMNE:2024:1673, where the worker had put his own money into the work provider's business. See further 's-Hertogenbosch Court of Appeal 4 May 2023, ECLI:NL:GHSHE:2023:1419. See also District Court of North Netherlands, 11 July 2023, ECLI:NL:RBNNE:2023:2863, in which it was agreed that if the worker had to pay extra tax as a co-shareholder, the work provider would pay this. That was therefore a contra-indication for being an entrepreneur.

61 See, for example, District Court of Zeeland-West Brabant 26 April 2024, ECLI:NL:RBZWB:2024:3259.

62 See Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3, where the work provider had taken out accident insurance on behalf of the worker.

63 See District Court of Limburg 16 May 2023, ECLI:NL:RBLIM:2023:3404 and District Court of the Central Netherlands 12 February 2024, ECLI:NL:RBMNE:2024:1231. Incidentally, registration is meaningless if that registration has been done at the instigation of the work provider. See Arnhem-Leeuwarden Court of Appeal 20 June 2023, ECLI:NL:GHARL:2023:5180.

64 District Court of Limburg 16 May 2023, ECLI:NL:RBLIM:2023:3404.

65 A.R. Houweling, *Kwalificeren na Deliveroo*. In: ArA, 2023 (20) 2, p. 34.

66 's-Hertogenbosch Court of Appeal 4 May 2023, ECLI:NL:GHSHE:2023:1419.

pay rent in order to use the workspace,[67] has invested in his own business equipment, and whether the worker makes use of this business equipment to perform the work.[68] The fact that a worker has no other clients is again an indication of the existence of an employment contract, certainly if the worker works so many hours for a single work provider that having other clients is in fact an illusion.[69] Or if it is apparent from the worker's website, for example, that it is so outdated that one can deduce that the worker is hardly performing any entrepreneurial activities.[70] A restrictive stipulation can indicate a barrier to acting as an entrepreneur, because the worker is thus restricted in the extent to which he or she can serve other clients.[71]

The Supreme Court mentions 'behaving or being able to behave as an entrepreneur'. In other words, when performing a particular assignment the worker must be able to continue to present and manifest himself/herself as an entrepreneur by being able to take calls from potential new clients, attend networking meetings in his or her own right, and so on. In the Supreme Court's approach, it is conceivable that the worker performs work that is organisationally embedded, while that same worker presents as self-employed in commercial dealings.

The literature cites the example of an IT worker who performs work at a bank that is organisationally embedded in the bank's organisation. The IT worker performs the work for 25 hours a week, but also has two other IT jobs, invests in his own website and his professional development through courses, participates in numerous acquisition activities, and is registered with the tax authorities as self-employed. It is also conceivable that two workers carry out the same work within the business, one working under an employment contract and the other under a contract for services, simply because of their behaviour in the commercial dealings and therefore their behaviour outside the employment relationship concerned.[72] In the *Deliveroo* case, the Supreme Court therefore seems to view entrepreneurship in a general sense, and not per se in the legal relationship between the worker and work provider.[73] The Supreme Court may have wanted to express that if the worker behaves in the course of business as an entrepreneur, presumably the parties rather envisioned that the legal relationship was intended to be a contract for services and not an employment contract.[74] For that reason, the Amsterdam Court of Appeal[75] requested a preliminary ruling from the Supreme Court. The Court of Appeal asked whether it is possible that, if one were to disregard entrepreneurship, someone could qualify as an employee, while if one did include entrepreneurship, that same worker would qualify as a contractor. And if so, is it possible that two workers who do exactly the same

67 See, for example, District Court of Rotterdam, 5 September 2023, ECLI:NL:RBROT:2023:12118, where the worker did not need to pay this and the subdistrict court ultimately concluded that an employment contract existed.

68 See Amsterdam Court of Appeal 9 January 2024, ECLI:NL:GHAMS:2024:3, which ruled that the purchase of a moped and a computer cannot be considered as a major investment by the worker. See Distrct Court of North Netherlands, 11 July 2023, ECLI:NL:RBNNE:2023:2863, which judged that the goods vehicle driven by the worker remained in the ownership of the work provider.

69 See, for example, District Court of Rotterdam, 5 September 2023, ECLI:NL:RBROT:2023:12118, where the worker worked 28 hours a week for a single work provider.

70 District Court of Amsterdam 6 February 2024, ECLI:NL:RBAMS:2024:685.

71 See, for example, District Court of Limburg 5 February 2024, ECLI:NL:RBLIM:2024:513. See also Arnhem-Leeuwarden Court of Appeal 20 June 2023, ECLI:NL:GHARL:2023:5180.

72 F.G. Laagland (in Dutch), *Het Deliveroo-arrest: jongleren met alle omstandigheden van het geval* (The *Deliveroo* ruling: juggling with all circumstances of the case). In: TRA 2023/50.

73 The District Court of the Central Netherlands 12 February 2024, ECLI:NL:RBMNE:2024:1231, considered, for example, that little significance needs to be given to other business activities if these activities do not entail the type of work that in essence is performed for the work provider.

74 N.M.Q. van der Neut (in Dutch), *De Hoge Raad 'delivers': een nieuw kwalificatiehoofdstuk*. (The Supreme Court 'delivers': a new qualification chapter). In: ArbeidsRecht 2023/29.

75 Amsterdam Court of Appeal 3 October 2023, ECLI:NL:GHAMS:2023:2220.

thing at the same employer could qualify differently (one as an employee, and the other as a contractor) due to the fact that one of them qualifies as an entrepreneur, this being the Court of Appeal's question.[76]

The literature indicates that merely being an entrepreneur is a curious point of view in the light of Article 7:610 DCC. After all, what element of Article 7:610 DCC is being interpreted or defined by this? 'Authority', might then be the answer. But does the circumstance that someone behaves or can behave as an entrepreneur indeed give substance to the 'authority' element in relation to the contractual relationship with the employer to be assessed? After all, being an entrepreneur in commercial dealings alone does not say much. Indeed, many modern workers are also entrepreneurs on the side. They work a few days in salaried employment and have their own web shop or paid hobby (photographer, editorial work, make-up artist for children's parties and so on). Because they are 'entrepreneurial' outside of work, are they less likely to be working under an employment contract?[77]

12. The weight given to a contractual stipulation

All kinds of contractual rights and obligations that describe the opposite of the employment contract, but have no 'significance' for the worker, will have less or no weight, according to the Supreme Court. We have already briefly discussed this under the criterion 'whether or not there is an obligation to perform the work personally'. Some regard this circumstance as a corrective mechanism to prevent a number of agreements, inserted for purely strategic reasons, from excluding employment law.[78] The contents of the agreement as such are therefore not at issue, only the value of that agreement.[79] Incidentally, the literature does raise the legitimate question of what exactly the Supreme Court means by 'significance'. Is this intended as 'realistic value' or rather as 'important' for the worker?[80]

13. How do the tax authorities and the UWV deal with the *Deliveroo* criteria?

The question of how the tax authorities will deal with the criteria from the *Deliveroo* ruling will probably not have a clear answer until 1 January 2025. For the moment, the Assessment of Employment Relationships (Deregulation) Act (*Wet Deregulering Beoordeling Arbeidsrelaties* – **DBA Act**) still applies. After the VAR was abolished as of 1 January 2016, the tax authorities published 'model agreements' with the introduction of the DBA Act. If the parties use such a model agreement and act accordingly in practice, it is clear that there is no employment relationship. In practice, however, the work was not and is not always done in accordance with what is agreed in the model agreements. This also creates a risk from a tax point of view, namely that it does turn out in retrospect to be an employment relationship and payroll taxes and social security contributions must still be paid. However, on 18 November 2016 the tax authorities decided to impose an enforcement moratorium. Specifically, this means that when using enforcement tools only corrective action will be taken (consisting of the imposition of corrective obligations, additional levies and possibly fines) in the two situations below:

76 See the critical note by Jansen and Van der Neut to this ruling in JAR 2023/268.

77 A.R. Houweling, M.M.W.D. Merkx and T. El Ouardi, *Deliveroo in perspectief*. In: MBB Belasting Beschouwingen no. 9, June 2023, p. 9. See also the article by M. de Zwart (in Dutch), *Bezorgt Deliveroo ondernemerschap?* (Does *Deliveroo* deliver entrepreneurship?) In Ars Aequi, January 2024.

78 J.B.B. Heinen and P.J. Mauser, *Bezorgt de Hoge Raad iets nieuws? – Over de kwalificatievraagstuk Deliveroo*. In: TAP no. 4, June 2023, p. 7.

79 J.B.B. Heinen and P.J. Mauser, *Bezorgt de Hoge Raad iets nieuws? – Over de kwalificatievraagstuk Deliveroo*. In: TAP no. 4, June 2023, p. 8.

80 J. Seghrouchni, *Het arrest van de Hoge Raad inzake Deliveroo: iets om bezorgd over te zijn?* BB 2023/20.

1. There is malicious intent. This is understood to mean that clients intentionally create or perpetuate a situation of evidently false self-employment.
2. Clients do not (or inadequately) follow instructions by the tax authorities within a reasonable period of time. The tax authorities explicitly indicate what combination of facts the tax authorities believe to underline an employment relationship. An adjustment must then be made to the working method or agreement in order to work without an employment relationship, or the employment relationship must be included in the payroll administration.

The Government's ambition is to completely lift the enforcement moratorium on 1 January 2025. As of that date, if an employment relationship is incorrectly qualified, the tax authorities will no longer restrict itself to issuing an instruction for the work provider to take measures to prevent the subsequent levying of payroll taxes by the tax authorities. We expect that starting 1 January 2025, the tax authorities (and the tax courts) will also use the *Deliveroo* criteria to assess whether there is an employment relationship under tax law.[81] The 'free substitution' model agreement has already been withdrawn since 1 January 2024. We are therefore taking into account the possibility that as of 1 January 2025 the tax authorities' other model agreements will also be withdrawn.

The qualification issue can also arise in social security law, such as when a former worker wishes to apply for unemployment benefit. After all, unemployment benefit is not granted to the self-employed. The CRvB[82] recently used the *Deliveroo* criteria to reach the conclusion (in that specific case) that there was no employment contract. Although the civil court had already reached the same judgment, the CRvB did emphasise that the administrative court did not by definition need to follow the judgment of the civil court, but that a different judgment must be supported by reasons such that it was also comprehensible to the civil court.

14. Practical tips

When entering into a contract to perform work, it is sensible to bear the *Deliveroo* criteria in mind because case law shows that these criteria are consistently applied by lower courts when the question arises as to what type of contract is involved. Should there be no intention to conclude an employment contract, keep an eye on the following:

1. Look at the person of the contractor. Is this someone who has been presenting himself or herself as an entrepreneur for some time? For example, by operating their own business, having several clients, having their own website, acquisition etc.
2. When entering into the contract, make sure it does not contain provisions typical of an employment contract, such as continued pay during illness or holidays, and avoid restrictive clauses where possible.
3. Ensure that the agreed hourly rate is higher than that of employees doing the same work, while agreeing that all costs incurred by the contractor (for business equipment, etc.) are factored into that hourly rate. Agree that monthly invoices including VAT will be sent by the contractor. Do not pay payroll taxes and social security contributions (unless it is clear that there is in fact an employment contract, of course).
4. Avoid exercising any form of authority in relation to the contents of the work. Preferably agree on a clear end result to be achieved within a certain period of time.

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81 On 19 June 2024 's-Hertogenbosch Court of Appeal (ECLI:NL:GHSHE:2024:2002), in a dispute between a work provider and the tax authorities, reference was indeed made to the *Deliveroo* ruling, but the *Deliveroo* criteria were not considered individually.

82 CRvB 20 June 2024, ECLI:NL:CRVB:2024:1240.

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