
ECLI:NL:RBAMS:2021:5029

Body	Court of Amsterdam
Date of judgment	13-09-2021
Date of publication	13-09-2021
Case number	8937120 CV EXPL 20-22882
Jurisdictions	Civil rights
Special characteristics	First instance - multiple
Content indication	Drivers who have personally connected with Uber and who transport passengers via the Uber app are covered by the Collective Labor Agreement for Taxi Transport. The legal relationship between Uber and these drivers meets all the characteristics of an employment contract. Modern employer authority.
Locations	Rechtspraak.nl

Pronunciation

—
verdict

COURT OF AMSTERDAM

Private Law Department - Canton Team

case number: 8937120 CV EXPL 20-22882

verdict of: September 13, 2021

fno.: 25/33494

Judgment of the subdistrict court judges

about

the association of the Dutch Trade Union Federation (Federation of Dutch Trade Unions) owning legal personality

located in Utrecht

plaintiff

hereinafter referred to as: FNV

authorized representatives: mr. JH Mastenbroek and mr. JFA Terpstra

in return for

the private limited company Uber BV

Based in Amsterdam

defendant

hereinafter referred to as: Uber

authorized representatives: mr. JM van Slooten and mr. M. Jovovic

COURSE OF THE PROCEDURE

The course of the procedure is apparent from:

- the summons of 15 December 2020, with attachments;
- the statement of defense, with annexes, of 1 March 2021;
- Uber's request to deal with this matter multiple times dated March 1, 2021, to which FNV has agreed;
- the instruction judgment of 15 March 2021;
- the day determination of the oral hearing;
- the further deed of submission of exhibits, also deed of statement and deed containing conditional reduction of the claim of FNV of May 31, 2021;
- the objection against the deed of FNV of Uber dated 2 June 2021;
- the further deed of submission of exhibits by FNV dated June 18, 2021.
- the deed of reply also deed of release of exhibits by Uber dated June 23, 2021.

The oral hearing took place on 29 June 2021. [name 1] appeared before FNV, assisted by the authorized representatives. [name 2] (statutory director) appeared on behalf of Uber with the authorized representatives. In addition, several employees, advisors and drivers from both sides were present and other interested parties were able to attend the session digitally.

The parties have explained their standpoints, partly on the basis of notes from the pleadings, and answered questions from the subdistrict court judges. Several employees, advisors and drivers spoke.

Finally, a judgment has been requested, which has been (further) determined today.

FOUNDATIONS FOR THE DECISION

Facts

1. As stated and not (sufficiently) contradicted, the following is established:
 - 1.1. FNV aims - among other things - to represent the interests of workers. Partly to this end, it negotiates and concludes collective labor agreements (hereinafter also referred to as: a collective labor agreement) on behalf of its members/employees and monitors compliance with these.
 - 1.2. FNV is a party to the Collective Labor Agreement for Taxi Transport. The Collective Labor Agreement for Taxi Transport has been declared generally binding at various times in recent years.
 - 1.3. Uber is part of the internationally operating Uber group. It develops and maintains various technological solutions, offering a variety of services. This includes a digital application (hereinafter also: the Uberapp), which mediates around passenger transport by car for a fee (hereinafter also: taxi transport).
 - 1.4. Various regulations apply to Dutch taxi transport, including the Passenger Transport Act 2000 (Wp2000), the Passenger Transport Decree 2000 (Bp2000) and various other (ministerial) regulations. In addition, additional provisions may apply at municipal and provincial level. According to article 76 paragraph 1 Wp2000, the person under whose responsibility and for whose account and risk persons are transported by car, needs a permit: the so-called business permit. This permit can be issued to a legal person or a natural person.
 - 1.5. A taxi driver is required to have a driver card on the basis of article 81 paragraph 3 Bp2000. A number of conditions must be met for this, such as possession of a driving license B, a medical certificate, a certificate of good conduct (a VOG) and a certificate of completion of the taxi driver training.
 - 1.6. In the major cities and at Schiphol, among other things, it has been made compulsory for reasons of public order that the so-called 'opstapmarkt' (passenger transport that has not been booked in advance) is served by drivers who are part of an organizational group: an Authorized Taxi Organization (TTO). In a number of large cities, in particular Amsterdam, the municipality obliges the TTOs to monitor compliance with municipal rules, such as the obligation to transport consumers at their first request and not to refuse or suspend rides unless it is not reasonable to do so. may be required of the driver. Uber is not a TTO.
 - 1.7. Uber focuses on the 'call and order market'. Passenger transport is booked by telephone or ordered digitally via an application such as the Uber app.
 - 1.8. Uber offers taxi drivers the opportunity to be active on the calling and ordering market via the Uber platform. To do this, they must register on the website or the Uber app. After creating an account and entering a number of basic information, three options for taxi drivers are shown:
 - a. taxi drivers who do not have a driver card or business license cannot (yet) become active on the Uber platform;
 - b. taxi drivers, who have a driver card but no business license, can drive for a "Fleet Partner" as a "driver under partner". Fleet Partners (or: fleet partners) are drivers who deploy other drivers to provide transportation services;
 - c. taxi drivers, who have a driver card and a business license, can gain direct access to the Uber platform to offer taxi transport as an "independent Uber Partner" via the Uber app.
 - 1.9. In order to actually access the Uber platform, drivers must agree to the "Terms and Conditions for Independent Uber Partners". These terms and conditions (version effective as of July 12, 2020), state, insofar as relevant here:

"Key Principles
Uber BV owns the rights to the Partner app through which you interact with Passengers. With the Partner app you have options to offer rides to Passengers in the Netherlands with a driver card and/or taxi permit.

When you offer a Ride, you enter into an agreement directly with the Passenger.

If you agree to these Uber Partner Terms, you are doing so as a sole trader, not as our employee. You decide whether, when and where you use the Partner App.

(...).

Article 6 Your obligations.

"a. To access the Partner App and maintain access, you must (i) hold a valid driver's license and have all other required driver or taxi licenses, cards, licenses, approvals and authorizations applicable to and (ii) comply with all relevant legal requirements.

b. When using the Partner App to provide Rides, you must behave in a professional and efficient manner, befitting a responsible driver with a driver's, taxi, or other approved permit (or card) to provide transportation services. You must provide Rides using proper skill, care and diligence. For example, you must follow the most efficient route (unless you agree on a different route with the Passenger).

c. You must adhere to the Community Guidelines.

d. When you use the Partner App, you do so in good faith and you will not misuse it or attempt to defraud us or the Passengers.

e. You may not display the Uber name, trademarks or logos on your car or clothing (except where required).

f. You may only take Trips with a vehicle identified in your Uber account. Your vehicle must be suitable for use through the Partner App (which may vary from time to time), be properly registered, licensed and suitable for use as a taxi, and in good condition in accordance with industry and legal safety and maintenance standards.

g. You are responsible for all surcharges (such as road tax (...)) and all taxes and charges that may arise from the performance of a Trip, unless such charges are passed on to the Passenger in accordance with these Uber Partner Terms. (...)

j. You may not contact a Passenger or otherwise use personal data for any reason other than to provide the relevant Ride.

k. Your Uber account is personal. (...).

l. You must comply with these Uber Partner Terms and all applicable laws while using the Partner App.

7. Using the Partner App.

a. You are not required to log into or use the Partner App. You can decide whether to log in to the Partner app and where and when you do so.

b. You decide whether, when, where and for how long you use the Partner App and when you accept, decline or ignore a Ride Request. (...)

d. You are completely free to make rides through other companies, including competitors of Uber, if you prefer. You may therefore also run rides through other companies while using the Partner App (referred to as "multi-apping"). (...)

f. If you are not available to offer Rides, you agree to log out of the Partner App until you are available again. This is because when Uber partners are signed in to the Partner app but don't actually want to take Trips, it can lead to Passengers and Uber partners having to wait a long time for Trips. (...). If you appear to be unavailable to take Rides, you may be automatically logged out of the Partner app. (...)

g. You will receive important information about a Trip Request in the Partner app before you decide whether you want to enter into an agreement with the Passenger. This information includes the destination requested by the Passenger (...), the pick-up location and the assessment.

h. The Passenger will also receive identification information about you, including your first name, photo, rating, location and information about the car.

i. It is your sole responsibility to choose the most effective and safest way to reach the destination (...).

j. After you have confirmed that you wish to accept a Ride Request, you can still cancel the Ride in accordance with our current cancellation policy.

k. After a ride you will be asked to rate the Passenger. Conversely, he or she can also assess you. You may be denied access to the Partner App as a result of your review, as described in the Community Guidelines. Passengers will see your rating in the Passengers app and this may influence their decision whether or not to request a Ride from you.

l. We will only charge you the Service Fee for using the Services.

8. Ride Prices.

a. You have the right to charge your Passenger a Fare for each Journey. (...) Fares (...) may also be adjusted at our discretion based on local market factors. We will notify you of any change to a base rate or applicable distance and/or time charges. (...).

9. The Service Charges. *Our Service Charges are calculated per Trip.*

a. The Service Charge is a percentage of the Trip Price or cancellation fee (including Trip Price related taxes, but excluding surcharges and gratuities). If applicable, we charge VAT on the Service Charges.

b. You pay us the Service Fee in exchange for using our Services. The percentage of Service Charges may vary per product and can be adjusted at our discretion. We will notify you in advance of any change. (...).

10. Receipts of Payment.

At the end of a Trip, we automatically send an electronic payment receipt to the Passenger on your behalf. This contains a breakdown of the amounts charged and certain information about you and the Trip (...).

11. Taxes.

You must comply with applicable laws regarding the mandatory declaration, calculation and payment of taxes for your Trips. (...) You are responsible for your own taxes, including your own turnover. (...)

- 1.10. Uber (with a certain regularity) unilaterally changes the Terms and Conditions, with which the drivers must first agree when opening the Uber app before use.
- 1.11. After logging into the Uber app, the driver can be offered taxi rides. The offer contains the pick-up location, the expected driving time and the 'rating' (average rating by Uber drivers based on previous trips) of the passenger. If it is a journey of more than 30 minutes, this will also be mentioned. Uber will provide the passenger with an expected fare. The final route that is driven by the driver, in consultation with the passenger, is decisive for the final fare.
- 1.12. The driver then has the choice to accept, ignore or refuse the ride by clicking on the appropriate button in the app. If the driver ignores an offered ride three times in a row after logging in, he is automatically logged out. He can then log in again. After a ride has been accepted by the driver, he can still cancel the ride. With a cancellation rate of more than 20%, access to the Uber app may be blocked by Uber. After completing the ride, the passenger is asked to rate ('rate') the driver on a scale of 1 to 5.
- 1.13. Uber can unilaterally exclude a driver from the Uber app. Reasons for denying a driver access include, for example, non-compliance with government regulations, fraud, unacceptable behavior or dangerous driving. An average low rating (less than 4.5 out of 5) can also lead to exclusion.
- 1.14. When offering the ride via its app, Uber uses an algorithm, the "batched matching system". In short, it means that Uber's algorithm, based on all relevant data from all drivers and passengers at a certain time in a certain group ("batch"), such as the pick-up point and destination of the passengers and the location and direction of travel of the drivers, determines who is offered which ride. The driver who accepts the ride first will be allocated the ride.
- 1.15. The passenger pays the fare to Uber. Uber pays the drivers weekly (or, if requested, daily) the total sum of journeys made via Uber Payments BV (hereinafter Uber Pay). An amount of 25% of service costs will be deducted from the fare.
- 1.16. Disputes between a passenger and a driver, such as about the fare, are handled and decided by Uber. Uber can unilaterally return (part of) the fare paid by the passenger, after which the driver will be paid the lower amount.
- 1.17. Uber has Gold, Platinum or Diamond status or rank for drivers. To achieve a certain rank, a driver must, in addition to a minimum number of points (obtained with journeys), a rating of at least 4.85 (out of 5) and a cancellation percentage (being the cancellation of the journey after acceptance) of no more than have 4%. There are also certain times when extra points can be earned. The status gives the driver advantages with regard to the journeys. For example, a driver with Platinum or Diamond status at Schiphol is given priority over

a rematch (in a situation where several drivers are at the departure hall at the same time) and a driver with Diamond status at Schiphol is automatically placed at the front of the (digital) queue. About 4.7% (Platinum) and 2.1% (Diamond) respectively of the drivers have such a status.

1.18. FNV has called Uber to account for compliance with the Collective Labor Agreement for Taxi Transport. Uber has denied that.

Claim FNV

2. After having conditionally reduced its claim, FNV claims by judgment to be provisionally enforceable as far as possible:

- I. Declare that for the periods in which the Collective Labor Agreement for Taxi Transport has been or has been declared generally binding, the employment conditions of this Collective Labor Agreement of apply to drivers who have personally committed themselves to Uber to transport persons by road in a passenger car;
- II. Order Uber to comply with it in full towards the drivers referred to under I who request it and to pay the (overdue) salary to which they are entitled under this Collective Labor Agreement for the periods that the Collective Labor Agreement for Taxi Transport has been or has been declared generally binding. submission of a proper specification for each month in which the driver has worked for Uber;
- III. more specifically, to order Uber to provide any of the drivers referred to under I who so requests and has provided it with the information required pursuant to the ANWB Calculating Vehicle Costs Module, while submitting a proper specification to each driver, for the period that the CAO has been/was declared generally binding and he is or has been working for Uber to pay a wage in accordance with the Collective Labor Agreement for Taxi Transport, which means that Uber has logged in to the driver in question for the time that he is logged in with his driver app during the declaration of generally binding agreement of the Collective Labor Agreement for Taxi Transport has been paid to him with retroactive effect and calculated per month, the hourly wage owed pursuant to this Collective Labor Agreement (incl. holiday allowance, surcharge of 9.7% for holidays not taken and a bonus of 20% for overtime), with settlement of what Uber has already paid the driver in question for the journeys performed during that time, insofar as the payment made exceeds the fixed and variable costs incurred by the driver for the kilometers driven on behalf of Uber. For this supplementary payment, the fixed and variable costs incurred by the driver per kilometer must be calculated in accordance with the ANWB module 'calculate car costs'. Only in the event that it is judged that the proceedings would have to be referred or stayed because this part must be regarded as a claim under Section 3:305a of the Dutch Civil Code, does FNV want to be deemed not to uphold this part of the claim in order to prevent whether arrest delays the procedure;
- IV. Order Uber to pay the drivers the statutory increase pursuant to Section 7:625 of the Dutch Civil Code for the supplementary payment referred to under II and III;
- V. Order Uber to pay the statutory interest to the drivers, to be calculated on the amount owed under II and III from the due dates until the date of payment;
- VI. Order Uber to pay a penalty payment to FNV of € 10,000.00 per day for every driver who, after a request as referred to above under II and/or III, does not have a correct supplementary payment specified per month within fourteen days of that request receive;
- VII. Order Uber to pay FNV € 500,000.00, or an amount to be paid by the subdistrict court in good justice in compensation;
- VIII. Order Uber to pay the costs of the proceedings.

3. To this end, FNV states in summary the following. Pursuant to Article 3, paragraphs 2 and 4 of the Act on generally binding and non-binding provisions of collective labor agreements (the AVV Act), FNV has its own right to invoke the nullity of stipulations between an employer and an employee. that are in conflict with a collective agreement. The drivers who drive in person for Uber work on the basis of an employment contract. Uber is their employer, so they fall under the generally binding Collective Labor Agreement for Taxi Transport. After all, Uber carries out the transport of persons by means of the drivers against payment, with a passenger car, by road or on roads other than those open to public traffic, which is the scope of the Collective Labor Agreement for Taxi

Transport. Uber is much more than a bulletin board that brings supply and demand together, as she would have you believe. Uber organizes the transport services in detail. It selects the drivers, the cars, sets the rates unilaterally and adjusts the supply of taxis to local demand by adjusting those rates. In addition, Uber steers the behavior of the drivers with regulations and regulations, ratings, differentiated rates, warnings, blockades of the app, and monitors the driving behavior of the drivers. Uber determines which conditions apply between driver and customer, drivers must perform the work in person and Uber decides in the event of a disagreement about the fare. In addition, Uber invoices the ride and the customer pays Uber. Uber also advertises itself as a transportation service. There is no question of a driver actually running his own business, as Uber would have you believe; of actually making own choices as an entrepreneur either. Many drivers drive 80-90% of their time for Uber and have only registered with the Chamber of Commerce to be able to work for Uber.

4. Pursuant to Section 7:610 of the Dutch Civil Code, there is an employment contract, since the requirements of labour, wages and authority stated therein are met. If there is no immediate question of an employment contract, it must be assumed that the drivers have performed the journeys under an employment contract, now that they meet the conditions set out in Section 7:610a of the Dutch Civil Code.

5. According to FNV, the average Uber driver earns around € 9.05 gross per hour, while the minimum wage is € 11.19 and the collective labor agreement wage is at least € 13.36. The hourly wage of approximately € 24.48 quoted by Uber is flattering for all sorts of reasons. For example, the waiting time between journeys and all kinds of additional activities such as refueling and car washing are not included. However, the Collective Labor Agreement for Taxi Transport prescribes a higher hourly wage, so drivers are entitled to overdue wages.

6. A reasonable application of the Collective Labor Agreement for Taxi Transport also means that the time that the drivers have switched on the Uber app but are still waiting for a ride, counts as paid time. After all, they are available for journeys during that time and waiting time is working time according to the Collective Labor Agreement for Taxi Transport. Furthermore, only part of the fee paid by Uber to the drivers can be regarded as wages.

7. FNV claims compliance with the Collective Labor Agreement for Taxi Transport and therefore subsequent payment of wages. To this end, FNV has its own right of action pursuant to Article 3 of the AVV Act. Only if it is judged that the settlement of car costs essentially concerns an action for compensation on the basis of Article 3:305a of the Dutch Civil Code, will FNV reduce its claim in this regard in order to avoid delay.

8. FNV also claims compensation pursuant to Article 3(4) of the AVV Act for failure to comply with the Collective Labor Agreement for Taxi Transport. This damage consists of material damage, being the many hours that its staff had to spend investigating the violation of the collective labor agreement, including in the form of interviews and an inventory of contracts and regulations. It concerns at least 5527 hours, of which the damage is estimated at € 400,000. In addition, FNV suffered immaterial damage consisting of reputational damage and the loss of recruiting power of € 100,000.

Defense Uber

9. Uber puts forward a defense that seeks to reject FNV's claims. In summary, Uber argues that the drivers are not employees, and are not employees because they use the Uber app. Moreover, they cannot all be lumped together. Uber is not an employer, but a technology company. She runs a platform on which users come into contact with each other and enter into agreements with each other, including those for taxi transport. Uber mediates in the creation of those agreements and supports parties by creating an attractive marketplace. In fact, Uber (only) has IT

systems and programs that help users, such as the Uber app. Driver work is not part of Uber's core business.

10. Uber believes that no driver using the app is an Uber employee. In addition, according to Uber, the case law requires an individual test, which must look at the history, social position and explanation of the commitments that the parties have entered into with each other. And even if a single driver were under Uber's authority, a hugely diverse group of more than 10,000 drivers could not be turned into employees all at once. Secondly, the rules and customs in the taxi world must also be examined. Other taxi companies such as the Amsterdam TTOs are also not regarded as employers, even though they mediate in a similar way. Thirdly, a holistic assessment must take place, according to the case law of the Supreme Court.

10. The legal relationship between Uber and the drivers does not meet the requirements of Section 7:610 of the Dutch Civil Code. For example, the drivers do not work for Uber and there is no contract to perform work for payment by Uber. Uber is the contractor for the drivers, who gain access to the Uber app for a fee and thus receive a service from Uber. The drivers do not receive wages from Uber. The compensation is received by the drivers from the passenger, Uber Pay only forwards it. Drivers are completely free to determine when they work, they can refuse unlimited rides and can also cancel a percentage of the rides after acceptance. In addition, a driver must have a Chamber of Commerce registration.

10. It is also questionable whether the drivers want to claim an employment contract. This means that no penalty payments can be attached to a possible conviction. In addition, the wage claims may not be assignable due to a lack of willingness or availability of a driver to perform the offered ride. The fact that a driver is online does not mean that he is also available, and moreover, the driver can also earn other income at that time.

10. In the assessment, the positions of the parties will be discussed in more detail, insofar as relevant.

Judgement

14. In essence, the dispute boils down to the question of whether the relationship between Uber and the drivers, who personally transport passengers by road via the Uber app with a passenger car, should be qualified as an employment contract. If so, it must then be assessed whether the Collective Labor Agreement for Taxi Transport is applicable and what this further means for the various parts of the claim. Fleet Partners or drivers who offer taxi transport as so-called Driver under Partner via the Uber app are therefore not taken into account.

Article 3 AVV . Act

15. It should be noted in advance that an employees' organization that is a party to a collective labor agreement, such as FNV, can, as a contracting party, claim fulfillment of obligations included in that collective labor agreement for an employer that is a member of the contracting employers' organisation. Insofar as a collective labor agreement has been declared universally binding, this also applies to an employer who is not a member of the employers' organization under the collective agreement. In order to be able to file such a claim, it is not required that there are employees who have resisted or objected to the conduct of their employer. After all, as a contracting party, the employees' organization has its own interest in and right to compliance (cf. ECLI:NL:HR:2021:413 [party], r. 3.3.2). FNV bases its claims on the assertion that Uber falls under the collectively binding collective labor agreement for Taxi transport. FNV is a party to this collective labor agreement and therefore has its own interest and right of action. To the extent that the defense is directed against this, it fails.

Labor contract?

16. Unlike in *Groen/Schoevers* (ECLI:NL:HR:1997: ZC2495) and *X./Gemeente Amsterdam* (ECLI:NL:HR:2020:1746), in view of the FNV's claim, all drivers are have registered and drive through the app for Uber, so that no review of the agreement between an individual driver and Uber takes place. Only the general features of the legal relationship between the drivers and Uber are involved in this case. Contrary to what Uber has argued, this does not preclude a substantive assessment of the legal relationship, since the principles are the same for every driver who uses the Uber app.

17. The assessment framework for assessing whether there is an employment contract is formed by Section 7:610 of the Dutch Civil Code, further elaborated by (among other things) the two judgments mentioned above. This means that the content of the rights and obligations of the parties must be determined mutually, whereby, if necessary, an explanation based on the so-called Haviltex standard and the actual (material) relationship that the parties have in mind can play a role, as well as the way in which the parties have actually implemented the agreement. On the basis of the content of the agreement determined in this way, it can then be determined whether the agreement contains the characteristics of an employment contract, or, for example, of a contract for services. Not one single characteristic is decisive,

18. In short, the characteristics of an employment contract are labour, wages and authority, now that it has been widely accepted in case law that 'in the service of' implies a relationship of authority. With regard to these elements, the following is considered on the basis of the established facts and the proceedings at the hearing.

The (personal) performance of work

19. There is no doubt that the drivers work for Uber. They transport passengers for Uber via the Uber app. The activities also make sense for Uber, now that they are of added value to her through the use of the Uber app, because she is entitled to a percentage of the fare.

20. Uber's defense that it is merely a technology company running a platform on which users can interact and enter into agreements, including for taxi services, is rejected. After all, it follows from the fact that drivers have to agree to the conditions set by Uber in order to be allowed on its platform, that they enter into an agreement with Uber to offer transport services. In addition, transportation services are the core of Uber's activities and Uber's entire organization is designed to ensure that as many trips as possible are made and that enough drivers are active on all days and hours to carry out those trips for Uber. That is Uber's business model.

21. The fact that the relationship with the drivers is molded by Uber in the form of a subscription to the Uber app and the drivers pay a commission of 25% of the fare for the use of that app does not change this. The point is that the drivers actually carry out the transport of people offered via the Uber app for Uber.

22. Irrespective of whether the requirement applies that the work must be performed personally or whether the personal performance of work must be regarded as an instructional authority and therefore as an authority, Uber explicitly checks by means of a selfie to be taken by the drivers whether one is personally the work performed. It makes no difference that the background to this lies in the legal requirement that a driver must have the aforementioned permits and therefore cannot be replaced. It is established that a driver personally carries out a journey accepted by him.

Salary

23. Wage is the agreed consideration for the work performed. It is not in dispute that the drivers receive compensation for a taxi ride. The actual state of affairs is as follows. According to the agreement with the drivers, Uber receives the request for the taxi ride and then determines – via the algorithm – to which driver the ride is offered, the route and the expected fare. Uber receives the fare after the ride and pays it to the driver minus the service costs. The fare is the reward for the transport of those passengers (the work of the drivers).

24. The fact that the passengers pay the fare to Uber Pay (another entity), and that Uber Pay pays the drivers their due amount, does not mean that the drivers do not receive a salary from Uber for their work. The name of the wage is not important; neither is the form of payment.

In the service of: relationship of authority

25. The question of whether there is a relationship of authority is still the most characteristic criterion when distinguishing between an employment contract and another employment relationship, and is therefore decisive for the question of whether there is an 'employee' or (for example) a self-employed person without personnel (self-

employed). It plays a key role in the assessment.

26. In today's technology-dominated age, the criterion of 'authority' has taken on a more indirect (often digitally) controlling interpretation that deviates from the classical model. Employees have become more independent and perform their work at more variable (self-chosen) times. It is judged that the relationship between Uber and the drivers involves this "modern relationship of authority". The following applies by way of explanation.

27. The drivers can only register with Uber via the Uber app. The conditions under which they can start using the Uberapp are non-negotiable for them; they must first fully accept all conditions in order to be able to perform taxi rides via the Uber app. Uber unilaterally determines the conditions under which the drivers work, which conditions can also be unilaterally changed by Uber. That also happens regularly. The drivers cannot refuse those changes, they must – if they want to continue driving via the Uber app – accept the changed conditions before they can log in to the Uber app again.

28. The algorithm of the Uberapp then determines how the rides are allocated and which priorities are set. The algorithm does this based on the priorities set by Uber. As explained by Uber at the hearing, when offering a ride, Uber only provides a limited amount of data, so that the driver cannot accept only the trips that offer him the most benefit. The Uber app determines which driver is offered a ride (first). A route is recommended on which the fare indicated to the customer is based. The drivers have no influence on that price, as Uber sets the fares. It is true that the customer and the drivers can adjust the fare by mutual agreement by taking a route other than the one proposed, but there is no question of free negotiation between passenger and driver. After all, it is not obvious that a passenger will agree to a different route if this leads to a higher fare.

29. The Uberapp also has a disciplinary effect. After all, the drivers are given a rating via the Uber app and are therefore assessed, which can affect access to the Uber platform and the offer of the rides. A low average rating can lead to removal from the platform, while a high average rating is an important condition to qualify for the extra Platinum or Diamond status with Uber, which provides (financial) benefits for the driver. For example, a driver with a Platinum or Diamond rank is more likely to be offered the financially attractive rides from Schiphol.

30. In addition, it was stated at the hearing on behalf of Uber that Uber can – simply put – "turn the buttons of the app" and change the settings. This change affects the ranks to be achieved by the drivers and, in connection therewith, the range of rides. As a result, the entrepreneurial freedom so advocated by Uber is essentially absent.

31. Although Uber emphasizes that a driver may cancel an *already accepted* ride at any time, the regular cancellation of a ride leads to exclusion from the use of the Uber app. Rejecting an *offered* ride three times also means that the driver is logged out of the system and therefore no longer offered rides until he is logged in again. Uber has argued that its system will not function properly if rides are repeatedly declined. However, this does not alter the fact that Uber is the one who determines via the algorithm whether and when a driver is logged out and allowed to log in again.

32. Finally, it is Uber that decides unilaterally about a possible solution in the event of customer complaints, including an adjustment of the agreed fare. The driver can object to this, but the final decision rests with Uber.

33. In this way the algorithm assumes a financial incentive and a disciplining and instructing effect. The fact that the drivers are to a certain extent free to refuse a ride, to determine their own hours and to use different apps or other booking systems at the same time does not alter this. Once they use the Uber app and are logged in to do so, they are subject to the operation of the algorithm designed by Uber, and are therefore subject to a "modern employer authority" of Uber.

Conclusion

34. In conclusion, it is established on the basis of the aforementioned assessment framework that the parties have only agreed "on paper" that the drivers are self-employed. It may be that (a number of) the drivers actually intended to do so, but in the given circumstances that intention must be put into perspective – far-reaching – now that it will be mainly motivated by the desire to use Uber, the significantly stronger in economic terms. party to be

employed. As discussed above, the combination of the system set up by Uber means that the actual performance contains all the features of an employment contract. In that case, 'orphans' takes precedence over 'appearances' and, in view of the mandatory nature of labor law and to protect the weaker position of the worker,

35. The agreements between Uber and the drivers who have personally committed themselves to Uber must therefore be qualified as an employment contract as referred to in Section 7:610 of the Dutch Civil Code.

36. It is acknowledged that this judgment can give rise to organizational problems at Uber – as it has rightly argued – and that not all drivers who have personally committed themselves to Uber wish to have an employment contract. However, this does not change the judgment.

Claim I: applicability of the Collective Labor Agreement for Taxi Transport:

37. The question then arises as to whether this judgment has the consequence that the Collective Labor Agreement for Taxi Transport applies to Uber's employment relationship with drivers driving in person, at least for the period during which it has been declared universally applicable. That is the case.

38. After all, the Collective Labor Agreement for Taxi Transport, which was last declared generally binding until 31 December 2021 (cf. Government Gazette 2021, 1100), applies in accordance with Article 1.2 of the Collective Labor Agreement for Taxi Transport " *to companies, employers and employees of any labor organization established in the Netherlands:*

ie carries out the transport of persons against payment, with a passenger car, pursuant to a license under the Passenger Transport Act 2000 (in force since 1 January 2001, Act of 6 July 2000, Stb. 2000, 314);

and/or who carries out the transport of persons for payment, by passenger car, by road or on roads other than those open to public traffic."

Furthermore, the terms employee and employer are defined as follows in Article 1.5 of the collective labor agreement:

c. Employer

Any natural or legal person who has one or more employees perform work in the Netherlands as referred to in Article 1.2.

d. Employee

The person who has concluded an employment contract with the employer for a definite or indefinite period of time."

39. Since Uber is a legal entity that has one or more employees perform work in the Netherlands within the meaning of Article 1.2 of the Collective Labor Agreement for Taxi Transport, it falls under the scope of this Collective Labor Agreement. Uber must apply this to the employment contracts of the drivers, insofar as the Collective Labor Agreement for Taxi Transport has been declared generally binding. This means that the declaration of law claimed by FNV under I. can be granted.

Claim II, IV and V: Delinquent wages and related claims

40. Uber must comply with the provisions of the Collective Labor Agreement for Taxi Transport with regard to drivers who have personally associated themselves with Uber. This means that it must pay back wages to the drivers who qualify for this. FNV did not claim otherwise under II. By its nature, the claim can only relate to drivers who can claim such a service from Uber (cf. ECLI:NL:HR:1997:ZC2532 *CNV/ [party]* and ECLI:NL:HR:2021:413 [*party]*), where prescription may play a role. The claim under II is therefore also allowable, taking into account the following.

41. Uber argued that whether the drivers claim *to* make a contract and whether they also *want to* do in view of the possible tax effect, is a relevant point. Insofar as Uber has requested that this be taken into account in the operative part, the following applies.

42. Now that there is an employment contract and Uber falls within the scope of the Collective Labor Agreement for Taxi Transport, which has been declared generally binding, it is legally obliged to comply with the obligations towards the drivers arising from the collective agreement, even if the drivers do not *want to do so*. A conviction that is 'purely dependent on the will' of the employee could amount to a 'way out' that puts pressure on the effectiveness of the system of universally binding collective agreements (cf. AG Hartlief, ECLI:NL:PHR:2020:958). Insofar as the claim is that compliance with the collective labor agreement only applies to drivers who request Uber to do so, this part of the claim is not included in the operative part. In this regard, it is considered that the phrase "who request it" in FNV's claim is understood as a legal interpretation that – as considered above – finds no support in law and is therefore unnecessarily included. Against that background, the omission of this phrase in the operative part means that there is no question that more is awarded than claimed by FNV.

43. As to whether the drivers claim *to* make an additional payment under the CAO Taxi is that the by Uber payroll calculations and the resulting specifications will reveal how individual drivers are entitled to back payment of wages.

44. The discussion about the fact that drivers (can) be logged in to different apps at the same time and may also refuse or not accept rides, and what this means for the question of whether they are entitled to wages during the waiting time because in that case, according to Uber the willingness to perform work is absent, falls outside the scope of the assessment of this dispute and does not need to be answered. It is a question for the explanation of the Collective Labor Agreement for Taxi Transport. The only question in these proceedings is whether the Collective Labor Agreement for Taxi Transport applies to the relevant employment contracts.

45. The claim under II will, in accordance with this opinion, be partially granted. The claims under IV and V are premature and are rejected, also because it is not (yet) clear who is entitled to which supplementary payment.

Claim III: car costs

46. Irrespective of the question of whether the claim under III should be regarded as a claim under Section 3:305a of the Dutch Civil Code (a class action), which Uber has not argued, the claim is too indeterminate and lacks independent interest. , to be awarded in addition to the declaration of justice claimed under I and the performance claim under II. If the claim under II is granted, Uber will already be ordered to comply with the Collective Labor Agreement for Taxi Transport and therefore to pay the overdue salary to which the drivers are entitled under the Collective Labor Agreement for Taxi Transport. That wage arrears will have to be calculated in the manner provided for in the Collective Labor Agreement for Taxi Transport or the law. The claim under III is dismissed.

Claim VI: penalty payment

47. Under VI, FNV claims that Uber is sentenced under penalty of a penalty of €10,000 per day for any driver who, following a request as referred to under II, has not received a correct supplementary payment, specified per month, within 14 days of the request. Insofar as FNV means by its claim that the penalty relates to the provision of a specification, it is considered that that claim must be rejected. Allocating a penalty, to be paid to FNV, while the specification must be provided to the driver and only the driver can judge whether the specification is correct, inevitably leads to execution problems and therefore does not appear appropriate. Insofar as it concerns the payment to the drivers themselves, a penalty cannot be linked to a payment obligation.

Claim VII: FNV . compensation

48. Under Article 3(4) of the AVV Act, FNV can claim compensation for the damage it suffers due to Uber's failure to comply with the collective labor agreement. In that context, FNV is claiming € 400,000 in material damage due to the many hours spent on research, and € 100,000 in immaterial damage due to reputational damage and loss of recruiting power.

49. It is plausible that FNV has suffered damage because Uber does not comply with the Collective Labor Agreement for Taxi Transport. In addition, FNV submitted an overview of 1 page of the damage, which has remained undisputed by Uber, but this overview is hardly specified and without further explanation – which is missing – it is insufficient to award compensation for material damage up to the amount of € 400,000. . It has also remained undisputed that FNV has suffered reputational damage as a result of Uber's failure to comply with the collective labor agreement and that there is a loss of recruiting power.

50. All things considered, compensation of a total of €50,000 (€25,000 in material and €25,000 in immaterial damage) is considered reasonable. This will be assigned.

Process costs

51. With this outcome of the proceedings, Uber will be ordered to pay the costs of the proceedings.

DECISION

The subdistrict court judges:

declare that for the periods that the Collective Labor Agreement for Taxi Transport has been or has been declared generally binding, the employment conditions of this Collective Labor Agreement apply to drivers who have personally committed themselves to Uber to transport people by road with a passenger car;

order Uber to comply in full with regard to the drivers referred to under I for the periods that the Collective Labor Agreement for Taxi Transport has been or has been declared generally binding;

order Uber to pay FNV €50,000 in damages;

order Uber to pay the costs of the proceedings, estimated to date on the part of FNV at:

writ € 105.50

salary € 1,496.00

court fee € 124.00

----- -- a

total of € 1,725.50

where applicable, including VAT;

order Uber to pay the costs incurred after this judgment, estimated at € 62.00 in salary of the authorized representative, to be increased by an amount of € 68.00 and the writ costs of service of the judgment, all this including VAT, insofar as applicable, under the condition that Uber has not fully complied with this judgment within fourteen days of being notified and that the judgment has not been served until fourteen days after being notified;

declare the convictions provisionally enforceable;

reject the more or otherwise advanced.

This judgment was rendered by Mrs. MV Ulrici, E. Pennink and FJ Lourens, subdistrict court judges, and pronounced in public by mr. MV Ulrici on September 13, 2021 in the presence of the clerk of the court.

Registrar Subdistrict Court