

European Case Law Identifier	ECLI:NL:RBAMS:2021:5029
Judicial authority	Court of Amsterdam, The Netherlands
Date court ruling	13-9-2021
Case number	8937120 CV EXPL 20-22882
Legal areas	Civil law
Special characteristics	First instance - multiple

Content indication

Drivers who have associated themselves in person with Uber and who transport passengers through the Uber app come under the Dutch Collective Labour Agreement for Taxi Transport [*CAO Taxivervoer*]. The legal relationship between Uber and these drivers meets all the characteristics of an employment contract. Modern employer authority.

judgment

COURT OF AMSTERDAM

Private Law Department - subdistrict team [*team kanton*]

case number: 8937120 CV EXPL 20-22882

judgment of: 13 September 2021

fno.: 25/33494

Judgment by the subdistrict court judges [*kantonrechters*]

C o n c e r n i n g

the Dutch incorporated association Trade Union Confederation [*Federatie Nederlandse Vakbeweging*, abbreviated to **FNV],**

located in Utrecht, The Netherlands

plaintiff

hereinafter referred to as FNV

authorised representatives: J.H. Mastenbroek LLM and J.F.A. Terpstra LLM

a g a i n s t

the private limited company Uber B.V.

located in Amsterdam

defendant,

hereinafter referred to as Uber

authorised representatives: J.M. van Slooten LLM and M. Jovovic LLM



Facts

1. As stated and not (not sufficiently) contradicted, the following is established:

1.1.

FNV's objective – inter alia – is to represent the interests of workers. To this end, it negotiates and enters into collective labour agreements (hereinafter also referred to as CLA) on behalf of its members/employees, and monitors compliance with these.

1.2.

FNV is a party to the Dutch Collective Labour Agreement for Taxi Transport (CLA for Taxi Transport). The CLA for Taxi Transport has been declared universally binding on several occasions in recent years.

1.3.

Uber is part of the internationally operating Uber Group. It develops and maintains different technological solutions, with which a variety of services are being offered. It includes a digital application (hereinafter also referred to as the Uber app), to mediate around passenger transport by car against payment (hereinafter also referred to as taxi transport).

1.4.

Various rules and regulations apply to the Dutch taxi transport sector, including the Dutch 2000 Passenger Transport Act [*Wet Personenvervoer 2000*, abbreviated to Wp2000], the Passenger Transport Decree 2000 [*Besluit personenvervoer 2000*, abbreviated to Bp2000, and various (ministerial) regulations. Furthermore, supplementary provisions may apply at the municipal and provincial levels. According to Article 76, par. 1 of the Wp2000, the person, under whose responsibility and for whose account and risk people are transported by car, requires a permit. This is referred to as a business permit [*ondernemersvergunning*]. This permit may be issued to a legal person/entity or a natural person.

1.5.

Pursuant to Article 81, par. 3 of the Bp2000, taxi drivers are required to have a driver's card. In this respect, several requirements must be met, including possession of a driving licence B, a medical certificate, a certificate of conduct [*Verklaring Omtrent het Gedrag*, abbreviated to VOG], and a certificate of completion of the taxi driver training course.

1.6.

In major Dutch cities and at Schiphol Airport, among other locations, for reasons of public order it has become mandatory that the 'pick-up market' ('*opstapmarkt*', non-pre-booked passenger transport) is served by drivers who are part of an organisational group: an Approved Taxi Organisation [*Toegelaten Taxi Organisatie*, abbreviated to TTO]. The local authorities of a number of major cities, particularly Amsterdam, require the TTOs to monitor compliance with municipal rules and regulations, such as the obligation to transport consumers at their first request and not to refuse or discontinue rides, unless this cannot reasonably be requested of the driver. Uber is not a TTO.

1.7.

Uber focuses on the 'call-and-order market'. In this regard, passenger transport is booked by telephone or ordered digitally through an application such as the Uber app.

1.8.

Uber offers taxi drivers the opportunity to actively engage in the call-and-order market through the Uber platform. To this end, they need to register on the website or the Uber app. After creating an account and entering some basic data, three options for taxi drivers are shown:

- a. taxi drivers who have no driver's card or business permit cannot (yet) actively take part in the Uber platform;
- b. taxi drivers who have a driver's card but no business permit can commence driving for a 'Fleet Partner' in the capacity of a 'driver under partner'. Fleet Partners are drivers who deploy other drivers to provide transport services;
- c. taxi drivers who have both a driver's card and a business permit can gain direct access to the Uber platform to offer taxi transport as an 'independent Uber Partner' through the Uber app.

1.9.

To gain actual access to the Uber platform, the drivers must agree with the 'Requirements for independent Uber drivers'. These requirements (version effective from 12 July 2020), insofar as relevant here, state:

1.10.

Uber (with some regularity) unilaterally changes the requirements, which drivers must agree to when opening and before using the Uber app.

1.11.

After logging into the Uber app, the driver can be offered taxi rides. The rides offered include the pick-up location, the anticipated driving time, and the 'rating' (average score given by Uber drivers based on previous rides) of the passenger. If a ride takes more than 30 minutes, this will also be stated. Uber provides an expected fare price to the passenger. The actual route the driver takes, in consultation with the passenger, determines the definitive fare.

1.12.

Next, the driver has the option of accepting, ignoring, or declining the ride by clicking on the appropriate button in the app. If, on being logged in, the driver ignores an offered ride three times, he will automatically be logged out. He can then log in again. After the driver has accepted a ride, he can still cancel it. If a driver's cancellation rate is more than 20%, Uber can block access to the Uber app. The passenger is asked 'to rate' the driver on a scale of 1 to 5 on completion of the ride.

1.13.

Uber can unilaterally exclude a driver from the Uber app. Reasons for denying access to a driver include non-compliance with government rules and regulations, fraud, unacceptable conduct, or dangerous driving. An average low rating (less than 4.5 out of 5) may also lead to exclusion.

1.14.

On offering the ride via its app, Uber makes use of an algorithm, referred to as the 'batched matching system'. In other words, on the basis of all relevant data gathered from all drivers and passengers in a certain group ('batch') at a particular time, such as the pick-up location and destination of the passengers as well as the drivers' location and travel direction, Uber's algorithm determines who will be offered which ride. The ride will be allocated to the first driver who accepts it.

1.15.

The passenger pays the fare to Uber. Through Uber Payments B.V. (hereinafter referred to as Uber Pay), Uber pays the drivers on a weekly basis (or daily if requested) the total amount earned from the rides undertaken. An amount of 25% in service costs is deducted from the fare.

1.16.

Disputes between a passenger and a driver, about the fare price, for example, are handled and decided by Uber. Uber may unilaterally return (part of) the fare paid by the passenger, after which the driver will be paid the lower amount.

1.17.

Uber applies a Gold, Platinum, or Diamond status or ranking system for drivers. To achieve a certain rank, in addition to a minimum number of points (obtained with rides), a driver must have a rating of at least 4.85 (out of 5) and a cancellation rate (i.e. cancellation of rides after accepting them) of no more than 4 per cent. Furthermore, extra points can be earned at certain times. The status gives the driver certain advantages with regard to rides. At Schiphol airport, for example, drivers with a Platinum or Diamond status are given priority over a rematch (a situation where multiple drivers are situated at the departure hall at the same time), and drivers with a Diamond status are 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. In addition to these rankings, Uber also applies other available ranking options, such as UberPro, which affect payment.

1.18.

FNV called for Uber to comply with the CLA for Taxi Transport. Uber has refused to do so.

(...)

Judgment

14. In essence, the dispute comes down to the question of whether the relationship between Uber and the drivers, who, in person, transport passengers by road with a passenger car through the Uber app, should be qualified as a contract of employment. If so, it should then be assessed whether the CLA for Taxi Transport is applicable, and what this further implies for the various components of the claim. Fleet Partners or drivers who offer taxi services as 'Drivers under Partner' through the Uber app are therefore not taken into account.

Article 3 AVV Act¹

15. It should be noted at the outset that an employees' organisation that is a party to a *collective labour agreement* [CLA] such as FNV, can, as a contracting party, of its own accord demand the fulfilment of obligations included in that CLA from an employer who is a member of the contracting employers' organisation. Insofar as a CLA has been declared universally binding, this also applies to employers who are not affiliated with the employers' organisation under the CLA. In order to be able to file such a claim, it is not required that employees have resisted or objected to the conduct of their employer. After all, as a contracting party, the employees' organisation has its own interest in and right to compliance (cf. ECLI:NL:HR:2021:413 [*party*], r.o. 3.3.2). FNV bases its claims on the assertion that Uber falls under the universally binding CLA for Taxi Transport [*CAO Taxivervoer*]. FNV is a party to this collective labour agreement, and therefore has its own interest and right of action. Insofar as the defence is directed against this, it fails.

Employment contract?

16. Unlike in *Groen/Schoevers* (ECLI:NL:HR:1997: ZC2495) and *X./Gemeente Amsterdam* (ECLI:NL:HR:2020:1746), in view of FNV's claim it involves all drivers who have registered in person and drive through the Uber app, so that no review of the agreement between an individual driver and Uber takes place. Only the general characteristics 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 to determine whether it involves an employment contract is formed by Article 610 of Book 7 of the Dutch Civil Code [*Burgerlijk Wetboek*, abbreviated to BW], further elaborated by, among other things, the two judgments referred to above. This means that the content of the rights and obligations of the

¹ Dutch Binding and Non-Binding Status of Provisions of Collective Labour Agreements Act [*Wet op het algemeen verbindend en het onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*, abbreviated to Wet AVV].

parties should be determined with respect to each other, whereby, if necessary, an explanation based on the Haviltex standard [*Haviltex maatstaaf*²] and the actual (material) relationship the parties envisaged may 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 established in this manner, it can then be determined whether the agreement contains the characteristics of an employment contract, or, for example, of a service provision agreement [*Overeenkomst van Opdracht*, abbreviated to OvO]. In this respect, no single factor is decisive, but the different legal effects that the parties have attached to their relationship should be examined in relation to each other.

18. In brief, 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.

Performing work (in person)

19. There is no doubt that the drivers carry out work for Uber. They transport passengers for Uber through the Uber app. The activities are also useful for Uber, now that they have added value for the company through the use of the Uber app, because it is entitled to a percentage of the fare.

20. Uber's defence that it is merely a technology company running a platform on which users can interact and enter into agreements with each other, including taxi services, is rejected. After all, as a result of the fact that drivers have to agree to the conditions set by Uber to be admitted to its platform, they enter into an agreement with Uber to offer transport services. Moreover, transport services are the core of Uber's activities, and Uber's entire organisation is geared towards ensuring that as many rides as possible are made, and that enough drivers are active on all days and at all hours to carry out these transport services for Uber. That is Uber's revenue model.

21. The fact that the relationship with the drivers is constructed by Uber in the form of a subscription to the Uber app, and that the drivers pay a fee of 25% of the fare for using that app, does not change this. The point is that the drivers actually carry out the transportation of people that is offered through the Uber app for Uber.

22. Regardless of whether the requirement that the work must be carried out in person applies or whether the personal performance of work must be regarded as instructional authority [*instructiebevoegdheid*] and therefore as authority, Uber explicitly verifies, by means of a selfie to be taken by the drivers, whether the work is performed in person. It makes no difference that the reason for this lies in the legal requirement that a driver must have the aforementioned permits and therefore cannot be replaced by a substitute driver. It is clear that a driver carries out in person any ride accepted by him.

Pay

23. Wage is the consideration agreed on for the work performed. The fact that the drivers receive compensation for a taxi ride is not disputed. The actual procedure is as follows. In line with the agreement with the drivers, Uber receives the request for the taxi ride, and then determines – through the algorithm – which driver is to be offered the ride, as well as the route and the expected fare. On completion of the ride, Uber receives the fare and pays the driver minus the service costs. The fare is payment for transporting those passengers (the drivers' work).

24. The fact that the passengers pay the fare to Uber Pay (another entity), and that Uber Pay pays the drivers the portion due to them, does not mean that the drivers do not receive a wage from Uber for their work. Neither the name of the wage nor the form of payment is important.

In the service of: relationship of authority

25. The question as to whether there is a relationship of authority is still the most characteristic criterion when distinguishing between an employment contract and another type of employment relationship, and is therefore decisive for the question of whether it involves an 'employee' or, for example, a self-employed person without personnel [in Dutch referred to as *zelfstandige zonder personeel*, abbreviated to zzp'er]. 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 digital) monitoring function that deviates from the classical model. Employees have become more independent, and conduct 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 through the Uber app. The conditions under which they can start using the Uber app are non-negotiable; they must first fully accept all conditions in order to be able to provide taxi rides by way of the app. Uber unilaterally determines the terms under which the drivers work, which Uber can also unilaterally change. This happens frequently. The drivers cannot reject these changes; if they are to continue driving through the Uber app, they must accept the changed conditions before they can log in again.

² Under the so-called Haviltex standard (named after a ruling of the Dutch Supreme Court), the literal wording of a written contract is not necessarily decisive in determining parties' rights and obligations. The decisive element for the purposes of interpretation is the intention of the parties and the circumstances surrounding the conclusion of their agreement.

28. The algorithm of the Uber app then determines how the rides are allocated and prioritised. It does this on the basis of the priorities set by Uber. As explained by Uber at the hearing, when a ride is offered, Uber provides a limited amount of data, so that the driver cannot accept only those rides most advantageous for him. The Uber app determines which driver is to be 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. Although the customer and the drivers can mutually agree to adjust the fare by taking a route other than the one proposed, there is no question of free negotiation between passenger and driver. After all, it is very unlikely that a passenger will agree to a different route if this results in a higher fare.

29. The Uber app also has a disciplinary effect. After all, the drivers are given a rating via the Uber app and are therefore assessed, which may affect access to the Uber platform and the rides offered. A low average rating can result in removal from the platform, while a high average rating is an important criterion to qualify for the extra Platinum or Diamond status with Uber, which yields (financial) benefits for the driver. For example, a driver with a Platinum or Diamond status will be first to be offered the financially attractive rides from Schiphol Airport.

30. Furthermore, at the hearing it was stated on behalf of Uber that Uber – to put it simply – can ‘control the buttons of the app’ and change the settings. This change affects the ranks to be achieved by the drivers and, in connection with this, the rides offered. As a result, the entrepreneurial freedom so argued by Uber is essentially absent.

31. Although Uber emphasises that a driver may cancel an *already accepted ride* at all times, the frequent cancellation of rides will lead 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. Nonetheless, it is Uber that determines through 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 adjustment of the agreed fare. The driver can object to this, but the final decision rests with Uber.

33. In this way, the algorithm acts as a financial incentive and has a disciplining and instructing effect. The fact that the drivers – to a certain extent – are free to refuse a ride, determine their own hours, and use different apps or other booking systems at the same time does not change this. Once they use the Uber app and are logged in for this purpose, they are subject to the operation of the algorithm designed by Uber, and are therefore subject to Uber’s ‘modern employer authority’.

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 will work as independent entrepreneurs. It is possible that (some of) the drivers actually intended to do so. Given the circumstances, however, this intention must – to a great extent – be put into perspective now that it will be mainly motivated by the desire to work for Uber, the significantly stronger party in economic terms. As discussed above, the configurations of the system constructed by Uber means that the actual performance contains all the features of an employment contract. In that case, ‘reality’ has precedence over ‘semblance’, and, in view of the mandatory nature of Dutch labour law, and to protect the weaker position of the worker, it is necessary to look beyond the phrasing chosen in the contract (also refer to ECLI:NL:RBMNE:2021:3667).

35. The agreements between Uber and the drivers who have associated themselves in person with Uber must therefore be qualified as an employment contract as referred to in Article 610 of Book 7 of the Dutch Civil Code.

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

Claim I: applicability of the CLA for Taxi Transport:

37. The question then arises whether, as a consequence of this judgment, the CLA for Taxi Transport applies to Uber’s employment relationship with in-person drivers, at least for the period during which it has been declared universally binding. The answer is that it does.

38. After all, the CLA for Taxi Transport, which was most recently declared universally binding until 31 December 2021 (cf. the Dutch Government Gazette – *Staatscourant* – 2021, No. 1100), applies in accordance with Article 1.2 of said CLA ‘to companies, employers and employees of any labour organisation established in the Netherlands:

- *who carry out the transport of persons against payment, with a passenger car, pursuant to a permit under the Passenger Transport Act 2000 (in force since 1 January 2001, Act of 6 July 2000, Dutch Bulletin of Acts and Decrees No. 314 of 2000 [‘Stb. 2000, 314’]);*
- *and/or who carry out the transport of persons for payment, with a passenger car, by road or on roads other than those open to public traffic.’*

Furthermore, the concepts of employee and employer terms are defined as follows in Article 1.5 of the CLA:

'c. Employer

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

d. Employee

The person who has entered into 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 performing work in the Netherlands within the meaning of Article 1.2 of the CLA for Taxi Transport, it falls under the scope of said CLA. Uber must apply this to the employment contracts of the drivers, insofar as the CLA for Taxi Transport has been declared universally binding. This means that the declaratory judgment claimed by FNV under Claim I can be granted.

Claims II, IV, and V: Wages in arrears and related claims

40. Uber must comply with the provisions of the CLA for Taxi Transport relating to drivers who have associated themselves in person with Uber. This means that Uber must pay wages in arrears to the drivers who qualify. FNV did not claim otherwise under II. By its nature, the claim can only relate to drivers who are entitled to such an undertaking on the part of Uber (cf. ECLI:NL:HR:1997:ZC2532 CNV/ [party] and ECLI:NL:HR:2021:413 [party]), which may be subject to a statute of limitations. The claim under II is therefore also allowable, taking into account the following.

41. Uber argued that whether the drivers *are entitled to* claim an employment contract, and whether they actually *wish* to do so in view of the possible fiscal consequences, is a relevant perspective. Insofar as Uber has requested that this be taken into account in the operative part, the following applies.

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

43. As to whether the drivers *can* claim back-payment under the CLA for Taxi Transport, the payroll calculations to be made by Uber and the specifications based thereon should reveal to what extent individual drivers are entitled to a back payment of wages.

44. The discussion concerning the fact that drivers are (can be) logged into different apps at the same time and may refuse or not accept rides, and the impact on the question of whether drivers are entitled to wages during the waiting time, because, according to Uber, in that case the willingness to perform work is absent, are factors that fall outside the scope of the assessment of this dispute, and need not be answered. It involves an explanation of the CLA for Taxi Transport. The only question in these proceedings is whether the CLA for Taxi Transport applies to the employment contracts concerned.

45. The claim under II will, in accordance with this judgement, be partially granted. The claims under IV and V are premature and are rejected, also because it is not (yet) transparent 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 Article 305a of Book 3 of the Dutch Civil Code (a class action), which Uber has actually not argued, the claim lacks independent significance and is too indeterminate to be awarded in addition to the declaratory ruling 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 CLA for Taxi Transport, and therefore required to pay the wages in arrears to which the drivers are entitled under said CLA. These wages in arrears will have to be calculated in the manner provided for in the CLA for Taxi Transport. The claim under III is dismissed.

Claim VI: penalty

47. Under VI, FNV claims an order against Uber on pain 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 and specified monthly supplementary payment 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. The allocation of a penalty, to be paid to FNV, while the specification must be provided to the driver, and only the driver can assess whether the specification is correct, inevitably leads to implementation problems, and therefore does not appear appropriate. Insofar as it concerns payment to the drivers themselves, a penalty cannot be linked to a payment obligation.

Claim VII: compensation to FNV

48. Under Article 3, par. 4 of the AVV Act, FNV can claim compensation for the damage it suffers due to Uber's failure to comply with the CLA. 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 a loss of recruiting power.

49. It is plausible that FNV has suffered damage because Uber fails to comply with the CLA for Taxi Transport [*CAO Taxivervoer*]. Furthermore, FNV has submitted a one-page overview of the damage, which has remained undisputed by Uber, but this overview is lacking in specifics, 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 CLA, 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 allocated.

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 CLA for Taxi Transport has been (or was) declared universally binding, the employment conditions of this CLA apply to drivers who have associated themselves in person with 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 CLA for Taxi Transport has been (or was) 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;

(...)

Disclaimer

In the event of any dispute as to the interpretation of the translated text, the Dutch text shall prevail at all times.