

Federatie Nederlandse Vakbeweging v. Uber B.V.; The Court of Amsterdam Introduces the “Modern Employment Relationship”

I. OVERVIEW 433
II. BACKGROUND 435
III. THE COURT’S DECISION..... 441
IV. ANALYSIS 444
V. CONCLUSION 447

I. OVERVIEW

Unseen from the digital ether, Uber unilaterally exerts fine-tuned control over its drivers’ working conditions through the use of its ride assignment algorithm.¹ On paper, drivers using Uber’s app have been classified as self-employed rather than employees of Uber.² Uber has routinely changed drivers’ working conditions, and, since drivers are required to agree to the company’s terms and conditions each time they sign into the app to begin working and driving, Uber has done so unilaterally with no input from drivers.³ After agreeing to Uber’s terms and conditions and logging into the app, drivers are subjected to Uber’s ride assignment algorithm, which determines how rides are assigned to drivers, factoring in a number of data points in its decision-making process.⁴ Before they may begin transporting riders, drivers are required to submit photos of themselves to verify their identities.⁵ This algorithm, in determining which riders are assigned to which driver, determines which routes the driver takes, the fare of the ride, and the quantity of rides that the driver is assigned.⁶ When a ride is completed, riders are asked to rate the driver, and the driver later receives a portion of the rider’s payment through a subsidiary of Uber—Uber Pay.⁷ Riders’ rating of drivers, among other things, determines how they are treated by the algorithm, since as a

1. See Rb. Amsterdam [Court of Amsterdam] 13 September 2021, NTFR 2021, 3598 m.nt. Westerman (*Federatie Nederlandse Vakbeweging/Uber B.V.*) (Neth.) [hereinafter 2021-09-13-FNV/Uber B.V.].

2. See *id.* ¶ 1.9.

3. See *id.* ¶ 1.10.

4. See *id.* ¶¶ 1.11, 1.14.

5. See *id.* ¶ 22.

6. See also *id.* ¶¶ 1.11-1.14.

7. See *id.* ¶¶ 1.12, 1.15.

driver's rating increases, the likelihood of receiving greater financial benefits increases.⁸ Drivers with a Platinum or Diamond ranking—those drivers with the highest rider ratings—are the first drivers to be assigned more financially lucrative rides by the algorithm.⁹ As a driver's rating decreases, drivers face the risk of being removed from the platform altogether, which happens whenever the driver's rating drops below 4.5 out of 5 stars.¹⁰ If a driver refuses three rides offered by the algorithm, they are automatically logged out of the app, and if drivers' ride assignment rejection rates rise above twenty-percent, drivers face restrictions in access to the app.¹¹

Having experienced the extensive control that Uber exerted over their working conditions, Dutch Uber drivers, along with the *Federatie Nederlandse Vakbeweging* (FNV), the Federation of the Dutch Trade Unions, sued Uber claiming that they were bound by an employment contract, making Uber legally bound to comply with the terms of the Collective Labor Agreement for Taxi Transport.¹² This agreement set a compensation scheme, among other things, for Dutch taxi drivers, and Uber had not been in compliance with this agreement since it went into effect.¹³ The drivers claimed that the contract between Uber and its drivers fulfilled the elements of an employment contract set out by Section 7:610 of the Dutch Civil Code: labor, wages, and authority.¹⁴ Uber argued to the contrary, saying that it is not a transportation services company, but instead a technology company, and that provision of a technological platform, not transportation services, is the core function of its business operations.¹⁵ Uber argued that it merely provides a platform on which drivers and riders come into contact with one another and enter into individual contracts with one another.¹⁶ It asserted that the relationship between it and its drivers should not be examined under Section 7:610, but that a number of factors should be taken into consideration: "history, social position, . . . [an] explanation of the commitments that the parties have [to] one another" as well as conventions in the taxi industry.¹⁷ Failing this, Uber contended,

8. See also *id.* ¶¶ 1.12, 1.17.

9. See *id.* ¶ 1.17.

10. See *id.* ¶ 1.13.

11. See *id.* ¶ 1.12.

12. See *id.* ¶¶ 2(I)-(II).

13. See *id.* ¶ 2(III).

14. See *id.* ¶¶ 3, 4.

15. See *id.* ¶ 9.

16. See *id.*

17. See *id.* ¶ 10.

even if subject to review under Section 7:610, its relationship between it and its drivers did not amount to an employment contract.¹⁸ Uber argued that individual drivers did not labor on its behalf, but rather on their own behalf; that drivers were not paid by Uber, but instead Uber Pay, which forwards payments from riders; and that drivers were not under the authority of Uber, but were instead free to determine their own working conditions.¹⁹ The Court of Amsterdam *held* that Uber drivers are Uber's employees, and Uber is therefore legally bound to comply with the Collective Labor Agreement for Taxi Transport. Rb. Amsterdam [Court of Amsterdam] September 13, 2021, NTFR 2021, 3598 *m.nt. Westerman (Federatie Nederlandse Vakbeweging/ Uber B.V.)*, ¶¶35, 39 (Neth.).

II. BACKGROUND

Technology corporations and the algorithms they employ have been a major concern for European courts for a number of years now and for a number of reasons. Uber and similar services have brought about many social and economic changes, both foreseen and unforeseen, with some more problematic than others. Uber has been the subject of widescale protests since its entrance into the European marketplace, and these protests have continued throughout much of the present day.²⁰ In the beginning, traditional taxi drivers, like London's black cab drivers, protested Uber's entrance into the marketplace, arguing that it provided an inferior service while threatening the superior service that they offer, having had to memorize every road in London in order to become a driver.²¹ At the same time, traditional taxi drivers in Madrid were worried that Uber's entrance into the marketplace would lure demand away from them, threatening their ability to repay loans taken out to buy their taxi medallions.²² Protesters have sent mixed messages to both Uber and regulators, though, with protests in years past being directed at Uber and seeking government regulation while more recent protests have directed ire at the very regulators called on for help in the past.²³ In fact, Uber

18. *See id.* ¶ 11.

19. *See id.*

20. *See* Ari Shapiro, *Across Europe, Anti-Uber Protests Clog City Streets*, NPR (June 11, 2014, 2:27 PM), <https://www.npr.org/2014/06/11/321012068/across-europe-anti-uber-protests-clog-city-streets>; *Taxi Drivers Stage New Protest Against Uber in Amsterdam*, NL TIMES (Feb. 27, 2020, 4:00 PM), <https://nltimes.nl/2020/02/27/taxi-drivers-stage-new-protest-uber-amsterdam>.

21. *See* Shapiro, *supra* note 20.

22. *See id.*

23. *See* Hanne Cokelaere et al., *Drivers Rage Against Brussels' Uber Ban*, POLITICO (Mar. 4, 2021, 4:44 PM), <https://www.politico.eu/article/drivers-rage-against-brussels-uber-ban/>.

recently joined Brussels drivers' protests calling on the city government to lift its ban on using the Uber app to provide services to riders within the city.²⁴

Ever since Uber entered the European marketplace, Member States or their cities' local governments have attempted to regulate Uber's services within their borders.²⁵ Hungary²⁶ and Bulgaria²⁷ have banned Uber outright, while other Member States have restricted Uber and its subsidiaries' business activities within their borders to varying degrees.²⁸ Where government action has fallen short, individual workers, taxi companies, labor unions, and workers' rights activist groups working in individual Member States have filed suit in attempts to regulate Uber and its subsidiaries' activities, usually to much success.²⁹

24. See *id.*

25. See generally Loi 2014-1104 du 1er Octobre 2014 relative *aux taxis et aux voitures de transport avec chauffeur* [Law 2014-1104 of Oct. 1, 2014 relating to taxis and transport cars with drivers], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Oct. 2, 2014 (instituting new requirements for taxi drivers, like professional licensure); Press Release, Senatsverwaltung für Stadtentwicklung, Bauen und Wohnen [Senate Department for Urban Development, Construction and Living], Untersagungsverfügung zum Schutz des Fahrgastes [Prohibition Order to Protect Passengers] (Aug. 13, 2014), available at https://www.stadtentwicklung.berlin.de/aktuell/pressebox/archiv_volltext.shtml?arch_1408/nachricht5326.html (describing Berlin's State Office for Citizens and Regulatory Affairs' general ban on all of Uber's services within Berlin); Paul Barbu, *Romanian Government Passes Bill Legalizing Alternative Transport Services Like Uber, Bolt*, BUS. REV. (June 26, 2019, 12:14 PM), <https://business-review.eu/business/auto/romanian-government-passes-bill-legalising-alternative-transport-services-like-uber-bolt-202620> (discussing Romanian law requiring taxi drivers to receive an authorization to operate from the Minister of Communications and Information Society); Pablo Rodero, *Spain Taxi Drivers End Uber Strike After License Limits Agreed*, REUTERS (Aug. 2, 2018, 12:46 AM), <https://www.reuters.com/article/us-uber-spain-strike/spain-taxi-strike-over-uber-ends-after-six-day-stand-still-idUSKBN1KN0JH> (describing Spanish government's agreeing to impose a limit on the number of licenses granted to Uber to allow its drivers to legally operate in Spain).

26. Krisztina Than & Krisztina Fenyo, *Uber to Suspend Operations in Hungary Due to Government Legislation*, REUTERS (July 13, 2016, 3:20 AM), <https://www.reuters.com/article/us-uber-hungary-exit/uber-to-suspend-operations-in-hungary-due-to-govt-legislation-idUSKCN0ZT0RS>.

27. *Uber Suspends Services in Bulgaria*, SOFIA GLOBE (Oct. 6, 2015), <https://sofiaglobe.com/2015/10/06/uber-suspends-services-in-bulgaria/>.

28. Sam Shead, *Uber's Rocky Road to Growth in Europe: Regulators, Rivals, and Riots*, FORBES (May 10, 2019, 3:58 AM), <https://www.forbes.com/sites/samshead/2019/05/10/ubers-rocky-road-to-growth-in-europe-regulators-rivals-and-riots/?sh=6bffbca5c67>.

29. See generally Press Release, Der Bundesgerichtshof [The Federal Court of Justice], Mietwagen-App "UBER Black" unzulässig [Car rental app "UBER Black" prohibited] (Dec. 13, 2018), available at <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2018&nr=90389&pos=14&anz=198> (detailing the German Federal Court of Justice's ruling in favor of Taxi Deutschland); Cour de cassation [Cass.] [supreme court for judicial matters], *soc.*, Mar. 4, 2020, 19-13.316 (Fr.) (French Court of Cassation ruling in favor of taxi driver plaintiffs, finding that they are Uber's employees); Case C-434/15, *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, ECLI:EU:C:2017:981, ¶¶ 15, 33 (Dec. 20, 2017)

Typically, Uber’s activities have been sued under the European Union’s “information society service” laws, with arguments usually attempting to distinguish Uber as a transport service rather than an information society service, which, if successful, would allow Member States to have more control over Uber’s activities within their borders.³⁰ Under these laws, an information society service is “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”³¹ For example, in *Asociación Profesional Élite Taxi v. Uber Systems Spain SL*, a primary question before the Court of Justice of the European Union was whether Uber was a taxi transport service, and thus within the purview of Directive 2006/123 and amenable to Spanish laws, or an information society service and thus afforded more protection from Member State regulation under Directive 2000/31, Articles 3(2) and 3(4).³² The Court ruled that Uber is not an information society service, and is instead a transport service, requiring Uber to comply with governing Spanish laws.³³ The court arrived at its ruling by finding that a service like Uber is “more than an intermediation service consisting of connecting, by means of a smartphone application, a non-professional driver using his or her own vehicle with a person who wishes to make an urban journey.”³⁴ Additionally, the Court found that Uber and its ride assignment algorithm exert influence over its drivers’ working conditions, determine fare prices, act as an intermediary for rider payments, and seek to control the quality of drivers’ vehicles and skills, with the possibility that drivers can be removed from the app if Uber determines this is necessary.³⁵

[hereinafter *Élite Taxi*] (ruling in favor of plaintiff professional taxi association, which argued that Uber should be classified as a transport service and made amenable to governing Spanish laws).

30. See generally Council Directive 98/34/EC, art. 1(2), 1998 O.J. (L 217) 18, 20 (defining information society service) [hereinafter Directive 98/34]; see also Council Directive 2000/31/EC, Recitals 1, 5, 2000 O.J. (L 178) 1 (advocating for regulation of information society services by the European Union and noting that “[t]he development of information society services within the Community is hampered by a number of legal obstacles . . . aris[ing] from divergences in legislation and from the legal uncertainty as to which national rules apply to such services.”) [hereinafter Directive 2000/31].

31. Directive 98/34, *supra* note 30, art. 1(2).

32. See *Élite Taxi*, ECLI:EU:C:2017:981 ¶¶ 15, 33; see also Council Directive 2006/123/EC, recital 21, 2006 O.J. (L 376) 36, 39 (defining and exempting “transport services from scope of Member State regulatory abilities); Directive 2000/31, *supra* note 30, at arts. 3(2)-(4).

33. See *Élite Taxi*, ECLI:EU:C:2017:981, ¶¶ 40, 47.

34. See *id.* ¶ 37.

35. See *id.* ¶ 39.

The Court of Justice of the European Union reached a notably different conclusion while considering another ride-sharing app.³⁶ Star Taxi is a Romania-based app that connects those looking for taxi services with drivers offering such services.³⁷ When a user logs onto this app, she sees a list of available drivers and is required to select a driver from that list, provided with information like driver ratings and rider comments to inform her decision.³⁸ Star Taxi does not assign riders to drivers, set the fare price, act as an intermediary for rider payments, control the quality of drivers' vehicles, or control driver behavior through its app.³⁹ Like in *Élite Taxi*, one of the primary questions before the Court in *Star Taxi* was whether Star Taxi is an information society service or a taxi transport service.⁴⁰ Despite some superficial similarities to Uber, the Court ruled Star Taxi to be an information society service rather than a taxi transport service.⁴¹ The Court distinguished the service in *Star Taxi* from the one in *Élite Taxi*, finding that Star Taxi app, unlike Uber, entered into contracts with individual drivers who were qualified to provide taxi transport; did not set the fare price for rides; did not serve as an intermediary that received payments from drivers and then passed along payments to drivers; and did not exercise control over drivers' behavior.⁴² The Court's reasoning in distinguishing Star Taxi from Uber vaguely traces along the lines of algorithms' responsibilities (or lack of responsibility in *Star Taxi*) in managing drivers' activities on those apps.⁴³ These cases marked something of the beginning of European courts' concerns with algorithms and their responsibilities generally, but particularly as they are implemented by Uber and similar ride-sharing applications, and those concerns have become more explicit in recent cases.⁴⁴

36. See generally Case C-62/19, *Star Taxi App SRL v. Unitatea Administrativ Teritorială Municipiul București prin Primar General, Consiliul General al Municipiului București*, ECLI:EU:C:2020:980, (Mar. 12, 2020) [hereinafter *Star Taxi*].

37. See *id.* ¶ 25.

38. See *id.* ¶ 27.

39. See *id.* ¶¶ 27, 28.

40. See *id.* ¶ 41.

41. See *id.* ¶¶ 48, 54, 55.

42. See *id.* ¶ 34.

43. Compare *Star Taxi*, ECLI:EU:C:2020:980 ¶¶ 27, 28 (describing *Star Taxi* as not assigning riders to drivers, setting fare prices, controlling the quality of drivers' vehicles, or otherwise algorithmically controlling drivers' behavior), with *Élite Taxi*, ECLI:EU:C:2017:981, ¶ 39 (describing Uber as exerting "decisive influence" over drivers' working conditions, primarily by determining fare prices and controlling drivers' conduct and vehicle quality, without explicitly mentioning that this is accomplished through the use of an algorithm).

44. Compare *Élite Taxi*, ECLI:EU:C:2017:981, ¶ 39 ("Uber exercises *decisive influence*... [by determining] maximum fare by means of the *eponymous application* . . . [and controlling] the

After the Court of Justice of the European Union clearly distinguished Uber from its competitors by ruling that it is a taxi transport service rather than an information society service, and thus more vulnerable to Member State laws, a number of suits were brought in The Netherlands to bring Uber and similar services into compliance with the country's labor and employment laws.⁴⁵ The development of Dutch case law on the relationship between algorithmic management of workers on apps and those workers' employment status largely began with the Court of Amsterdam's consideration of a Deliveroo courier's employment status in 2018.⁴⁶ That courier's employment status was analyzed under Article 7:610 of the Dutch Civil Code, which defines an employment contract as existing where an employee seeks to perform work "in the service of" the employer for a specified period of time in exchange for wages.⁴⁷ A relationship of authority between the parties may contribute to a finding that an employment contract existed between the parties.⁴⁸ Specifically, the court looked to whether being subjected to Deliveroo's order assignment algorithm, named Frank, and the courier's other work conditions indicated that a relationship of authority existed between Deliveroo and the couriers on its platform.⁴⁹ Using this framework to determine the courier's employment status, the court ultimately determined that no employment contract existed between the courier and Deliveroo.⁵⁰ The court reasoned that the amount of freedom that couriers had in registering for time slots in which to perform work, rejecting assigned orders, working in other delivery zones, performing work out of uniform and with their own equipment, and performing work for competing food delivery services suggested that no employment contract

quality of the vehicles [and] the drivers and their conduct."), with 2021-09-13-FNV/Uber B.V., *supra* note 1, ¶ 23 ("Uber receives [a] request for [a] taxi ride and then determines—via the algorithm—to which driver [a] ride is offered, the route[,] and the expected fare.") (emphasis added).

45. See generally Rb. Amsterdam [Court of Amsterdam] 23 Juli 2018, NTFR 2018, 2055 m.nt. van Waaijen (X./Deliveroo Netherlands B.V.) (Neth.) [hereinafter 2019-07-23-X./Deliveroo Netherlands B.V.]; Rb. Amsterdam [Court of Amsterdam] 15 Januari 2019, NTFR 2019, 286 m.nt. Arets (Federatie Nederlandse Vakbeweging/Deliveroo Netherlands B.V.) (Neth.) [hereinafter 2019-01-15-FNV/Deliveroo Netherlands B.V.]; Hof Amsterdam [Amsterdam Court of Appeal] 16 Februari 2021, NTFR 2021, 777 m.nt. Westerman (Deliveroo Netherlands B.V./Federatie Nederlandse Vakbeweging) (Neth.) [hereinafter 2021-02-16-Deliveroo Netherlands B.V./FNV].

46. See generally 2019-07-23-X./Deliveroo Netherlands B.V., ¶ 3.

47. See *id.* ¶ 6; Art. 7:610 BW.

48. See 2019-07-23-X./Deliveroo Netherlands B.V., ¶¶ 9, 14-18 (explaining that consideration of a potential employment relationship must take into account the "various legal consequences that the parties have attached to their relationship," of which authority is one).

49. See *id.* ¶ 29.

50. See *id.* ¶ 28.

existed between the courier and Deliveroo.⁵¹ The court recognized, however, that the state of Dutch labor and employment law at the time was likely not developed to such a point that it could adequately address issues arising from work performed on apps like Deliveroo.⁵²

The Court of Amsterdam considered a Deliveroo courier's employment status again in 2019.⁵³ The court called attention to its earlier decision that no employment contract existed between Deliveroo and a courier using its app, and expressed hesitation in applying that case to the one currently before it, expressing that the rapid development of case law on these matters may necessitate a different approach.⁵⁴ The court again analyzed the courier's claim under Article 7:610 of the Dutch Civil Code and again devoted significant discussion to whether a relationship of authority existed between Deliveroo and the courier such that an employment contract existed between the parties.⁵⁵ It noted that couriers' freedom in how and when work should be performed, couriers' ability to find a substitute for their shift, and couriers' ability to refuse orders are particularly important considerations in determining whether a relationship of authority exists between the parties.⁵⁶ On the first consideration, the court found that the courier was not actually free to determine how and when work should be performed.⁵⁷ The court reasoned that the evidence presented at the hearing indicated that if the courier wanted to maximize his income, he had to make himself available to Deliveroo as much as possible and perform as well as possible in order to curry favor with the company's algorithm, which takes the courier's past availability and order acceptance rate into account when making future order assignments.⁵⁸ This contributed to the court's finding that the courier did not have total freedom to reject orders, as the courier's rejection rate factored into the algorithm's future order assignments, with more rejections leading the algorithm to treat the courier negatively.⁵⁹ Further, the court determined that the mere fact that the courier could have someone serve as a substitute for his shift did not eliminate the possibility

51. *See id.* ¶ 29.

52. *See id.* ¶ 30.

53. *See generally* Rb. Amsterdam [Court of Amsterdam] 15 Januari 2019, NTFR 2019, 286 m.nt. Arets (Federatie Nederlandse Vakbeweging/Deliveroo Netherlands B.V.), ¶ 2 (Neth.).

54. *See id.* ¶ 24.

55. *See id.* ¶¶ 17, 26.

56. *See id.* ¶¶ 26, 38.

57. *See id.* ¶ 33.

58. *See id.* ¶¶ 33, 36, 37.

59. *See id.* ¶ 36.

that a relationship of authority existed between Deliveroo and the courier.⁶⁰ The court also considered the subjective intentions of the parties when entering into the contract, but quickly found that they were irrelevant because Deliveroo unilaterally developed the contract and the courier was not allowed to negotiate the terms of the contract, so the contract could not be read as containing any of the courier’s intentions or representations.⁶¹ Taken together, these findings led the court to conclude that a relationship of authority, and therefore an employment contract, existed between Deliveroo and the courier.⁶²

Deliveroo appealed the Court of Amsterdam’s decision, and the Amsterdam Court of Appeal decided the case in early 2021.⁶³ Between this case’s first instance and appeal, the Supreme Court of the Netherlands determined that parties’ subjective intentions when entering into a contract no longer played a role in determining whether an employment contract existed between parties.⁶⁴ Instead, the only factors that should be considered in making an employment status determination are whether the contracted party performed work “in the service of” the contracting party; whether the contracting party paid wages to the contracted party; whether the work was done during a specified period of time; and whether the contracted party performed labor for the contracting party.⁶⁵ Even with this new test in place, however, the Amsterdam Court of Appeal reached the same conclusion—that an employment contract existed between Deliveroo and the courier.⁶⁶

III. THE COURT’S DECISION

The Court of Amsterdam noted that the issue before it in this case is whether the relationship between Uber and its drivers amounts to an employment contract, and, if so, whether Uber is bound by and required to compensate drivers according to the Collective Labor Agreement for Taxi Transport.⁶⁷ The court dismissed the latter part of the issue quickly,

60. *See id.* ¶ 40.

61. *See id.* ¶ 21.

62. *See id.* ¶¶ 54-55.

63. *See generally* Hof Amsterdam [Amsterdam Court of Appeal] 16 Februari 2021, NTFR 2021, 777 m.nt. Westerman (Deliveroo Netherlands B.V./Federatie Nederlandse Vakbeweging), ¶ 3 (Neth.).

64. *See id.* ¶ 3.4.

65. *See* 2021-02-16-Deliveroo Netherlands B.V./FNV, ¶ 3.5 (citing HR [Supreme Court of the Netherlands] 11 Juni 2020, NTFR 2020, 3309 m.nt. Schouten (X./Gemeente Amsterdam), ¶¶ 3.2.1-3.2.2 (Neth.) [hereinafter X./Gemeente Amsterdam]).

66. *See* 2021-02-16-Deliveroo Netherlands B.V./FNV, ¶ 3.14.

67. *See* 2021-09-13-FNV/Uber B.V., ¶ 14.

finding that since FNV is a party to the Collective Labor Agreement for Taxi Transport, it had a right to Uber's compliance with the Collective Labor Agreement for Taxi Transport if there was, in fact, an employment contract between Uber and its drivers.⁶⁸ Therefore, the only remaining question before the court was whether an employment contract existed between Uber and its drivers.⁶⁹

The test for determining whether the relationship between Uber and its drivers rises to the level of an employment contract is outlined in Section 7:610 of the Dutch Civil Code and has been further developed in Dutch case law.⁷⁰ The following three factors identify an employment contract: (1) personal performance of work; (2) done "in the service of" another party; (3) in exchange for the payment of wages.⁷¹ Resolving whether work has been done "in the service of" another party can be accomplished by determining whether a relationship of authority exists between the parties at issue.⁷² The court noted that no single factor is decisive when making this determination.⁷³

As to the first factor, the court found that drivers personally perform work for Uber.⁷⁴ The court reasoned that it logically follows from the fact that drivers are required to accept Uber's terms and conditions in order to access its platform and the riders using that platform that drivers offer transportation services on Uber's behalf.⁷⁵ Further, the court found that the drivers' performance of work in delivering transportation services is done personally by the drivers, which is supported by the fact that Uber requires its drivers to upload a photo of themselves in order to check that the rides performed are performed personally by the driver.⁷⁶

As to the second factor, the court found that Uber pays a wage to the drivers on its platform.⁷⁷ The court reasoned that the mere fact that riders' payments went first to Uber Pay, which then issued payments to drivers after deducting fees Uber took for itself, did not transform the payment to drivers into something other than a wage.⁷⁸

68. See *id.* ¶ 15 (citing X./Gemeente Amsterdam, ¶¶ 3.2.1-3.2.2).

69. See 2021-09-13-FNV/Uber B.V., ¶ 14.

70. See *id.* ¶ 17.

71. See *id.* ¶ 18.

72. See *id.*

73. See *id.* ¶ 17.

74. See *id.* ¶ 20.

75. See *id.*

76. See *id.* ¶ 22.

77. See *id.* at ¶ 23.

78. See *id.* ¶ 24.

Upon considering the third factor, the court decided that this factor is decisive in making a determination of whether an employment contract exists, departing from its earlier assertion that no single factor is decisive.⁷⁹ The court recognized that this case presented unique challenges to its classical model of analyzing employee-employer relationships, saying that “[i]n today’s technology-dominated age, the criterion of ‘authority’ has taken on a more indirect (often digitally) controlling interpretation . . . Employees have become more independent and perform their work at more variable (self-chosen) times.”⁸⁰ However, the court did not allow this change in the way that employee-employer relationships appear to the naked eye to allow corporations to escape judicial scrutiny, identifying and announcing a new type of relationship that still satisfies the “authority” factor—the “modern authority relationship.”⁸¹ The court then identified two ways that Uber’s algorithm created this modern relationship of authority: by creating and perpetuating disciplinary effects as well as providing financial incentives for drivers.⁸²

The court pointed to a number of facts to find that Uber’s algorithm created and perpetuated a disciplinary effect. First, it pointed to Uber’s ability, through the use of its algorithm, to unilaterally determine its drivers’ working conditions, unilaterally change its drivers’ working conditions, and enforce those changes by requiring drivers to accept its non-negotiable terms and conditions before being allowed to log in to the Uber app.⁸³ It also found that Uber unilaterally assigned rides to drivers, as well as the route and fare price for those rides.⁸⁴ The court found the effect to be particularly disciplinary because Uber changed individual drivers’ working conditions in response to riders’ ratings of those drivers.⁸⁵ The court found that, in effect, the algorithm disciplined drivers by restricting the range of rides offered to them as their rating decreased and threatened drivers with removal from the platform if their rating dropped below a certain point.⁸⁶ The algorithm further disciplined drivers for having low ratings by barring them from achieving Platinum or Diamond status, which would have allowed them to receive financially lucrative ride

79. *See id.* ¶ 17, 25.

80. *See id.* ¶ 26.

81. *See id.*

82. *See id.* ¶ 33.

83. *See id.* ¶ 27.

84. *See id.* ¶ 28.

85. *See id.* ¶ 29.

86. *See id.*

assignments.⁸⁷ The court also found that the algorithm's logging drivers out of the app after rejecting three rides served to create a disciplinary effect.⁸⁸

Further, the court found that while enacting its disciplinary effect by restricting drivers' access to the Uber platform and the opportunities on it, the algorithm also created a financial incentive for drivers to conform their behavior in ways that Uber deemed desirable.⁸⁹ Uber allowed drivers with higher rider ratings greater access to its platform and more financially lucrative rides, presumably because they had provided riders with satisfactory experiences, thus incentivizing drivers to conform their behavior to riders' expectations.⁹⁰ By logging drivers out of its app and in turn restricting drivers' ability to profit off of rides during that period of being logged out, Uber incentivized drivers to accept as many rides as possible, something Uber deemed crucial as its system would allegedly not function properly if rides were repeatedly declined.⁹¹

Finally, the court found that upon signing into the Uber app, drivers became subject to Uber's algorithm, and upon being subject to Uber's algorithm, drivers were subject to Uber's authority.⁹² Therefore, when it considered all relevant factors together, the court found that an employment contract existed between Uber and its drivers.⁹³

IV. ANALYSIS

The Court of Amsterdam's "modern employment relationship" concept is a new addition in the case law addressing the employment status of drivers and couriers using apps like Uber and Deliveroo.⁹⁴ The way the court arrived at this new concept in its analysis of the case can certainly be read as controversial. The court, at one point in its opinion, lists the factors that constitute the test for determining whether an employment contract exists between parties and notes that no one factor in the test is decisive.⁹⁵ Then, at a later point in its opinion, the court labels the "relationship of

87. *See id.*

88. *See id.* ¶ 31.

89. *See also id.* ¶ 33.

90. *See also id.* ¶¶ 29-33.

91. *See id.* ¶ 31.

92. *See id.* ¶ 33.

93. *See id.* ¶¶ 34-35.

94. *See id.* ¶ 26.

95. *See id.* ¶ 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 [Supreme Court's decisions in Groen/Schoevers and X./Gemeente Amsterdam] . . . *Not one single characteristic is decisive.*") (emphasis added).

authority” factor as decisive in answering the question of whether an employment contract exists between parties.⁹⁶ This inconsistency conveniently occurs in the paragraph immediately preceding the one in which the court announces its conception of the “modern authority relationship.”⁹⁷ Placing this announcement at the beginning of its analysis of the relationship between Uber and its drivers under the “relationship of authority” factor makes it look more like an assumption about Uber—that because it algorithmically manages the drivers on its app, an employment contract must exist—borne out of a hunch rather than an application of existing law.⁹⁸ The court then devotes the rest of its opinion justifying this assumption rather than first applying the tests and frameworks developed in existing case law in order to reason toward a conclusion that, by satisfying those tests, the relationship between Uber and drivers amounts to a “modern employment relationship.”⁹⁹ While the location of the court’s conclusion within its opinion might be of little consequence ultimately, it certainly makes the court vulnerable to criticism that its final judgement was motivated more by policy than by the results of an application of the law available to it. After all, the court likely could have arrived at the same conclusion using existing law without frontloading an announcement of an entirely new doctrine.¹⁰⁰

The court’s policy motivations are made clear when it writes that “[i]n 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.”¹⁰¹ This statement seems to indicate that the court sees itself as responding to a social issue that its case law, largely developed in response to classical authority relationships, does not adequately equip it to handle. While betraying the court’s policy-driven motivations, this statement may also temper the potentially controversial nature of the way the court approached this case in that it seems to indicate that the court has no intention of abandoning its existing case law, but that

96. *See id.* ¶ 25 (“The question of whether there is a relationship of authority is still the most characteristic criterion in the distinction between an employment contract and another employment relationship, and thus *decisive* [in answering the question of whether an employment contract exists.]”) (emphasis added).

97. *See id.* ¶¶ 25-26.

98. *See id.* ¶ 26.

99. *See id.*

100. The Court of Amsterdam has routinely found apps that algorithmically manage workers on those apps to formally employ those who use those apps to perform work. *See generally* 2019-07-23-X./Deliveroo Netherlands B.V., ¶ 29; 2019-01-15-FNV/Deliveroo Netherlands B.V., ¶¶ 54-55; 2021-02-16-Deliveroo Netherlands B.V./FNV, ¶¶ 3.11.5-3.14.

101. *See id.*

it is instead interested in adapting its existing case law to the changing realities of employment. It assumes the responsibility of thinking more broadly about what employment really means, taking into account the ways app-based employment may be substantially different in superficial ways from classical forms of employment but are yet functionally similar, or even identical, in legally-relevant ways.

Being motivated at least in part by policy is not the worst criticism to receive, however, especially in a matter like this. Before the Court of Amsterdam ruled that Uber drivers are the company's employees, drivers were subject to all of the vulnerabilities of being employed without any of the safeguards that attend formal, legally recognized employment.¹⁰² Allotting app-based workers more protections through employment law is growing increasingly important, especially where algorithms are concerned. Given that algorithms are developed by humans and are tuned using data fed back into them by humans, they are susceptible to the same biases observed in humans.¹⁰³ A number of disturbing instances of algorithm-enacted employment discrimination have been observed in the time since they were first employed to supplement or replace human decision-making in employment, and chief among them has involved Uber's facial recognition algorithm, which is used to identify drivers before they begin their shifts.¹⁰⁴

The urgency the Court of Amsterdam seems to have felt in adapting existing case law to better equip itself to handle issues arising out of a rapidly evolving digital economy is justified in light of recent events. Recently, an Uber driver in the United Kingdom reported that he has been locked out of the Uber app since March because Uber's identity-verifying facial recognition software does not recognize him.¹⁰⁵ The Independent Workers' Union of Great Britain (IWGB) and other Uber drivers claim that Uber's facial recognition algorithm has difficulty identifying drivers

102. See 2021-09-13-FNV/Uber B.V., ¶ 8.

103. See generally, Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019); see generally Rachel S. Fleischer, *Bias in, Bias Out: Why Legislation Placing Requirements on the Procurement of Commercialized Facial Recognition Technology Must Be Passed to Protect People of Color*, 50 PUB. CONT. L.J. 63 (2020); James Manyika et al., *What Do We Do About the Biases in AI?*, HARV. BUS. REV. (Oct. 25, 2019), <https://hbr.org/2019/10/what-do-we-do-about-the-biases-in-ai>.

104. See generally Eloise Barry, *Uber Drivers Say a 'Racist' Algorithm Is Putting Them Out of Work*, TIME (Oct. 12, 2021, 6:24 PM), <https://time.com/6104844/uber-facial-recognition-racist/>; Chris Vallance, *Legal Action Over Alleged Uber Facial Verification Bias*, BBC (Oct. 8, 2021), <https://www.bbc.com/news/technology-58831373>.

105. See Barry, *supra* note 104.

with darker skin tones.¹⁰⁶ The driver submitted an appeal to Uber, requesting that his account be reactivated, but his appeal was denied.¹⁰⁷ After IWGB offered its assistance, Uber reactivated the driver's account but promptly deactivated it again after the driver submitted another verification photo that was rejected by the company's facial recognition software.¹⁰⁸ Two other drivers in the United Kingdom have brought employment tribunal claims against Uber, citing racial discrimination by Uber's facial recognition software and subsequent account deactivation.¹⁰⁹

These events are particularly relevant to the case law developments in the Netherlands because the court in the noted case found that Uber utilizes a similar software in the Netherlands.¹¹⁰ It is a matter of time before similar issues arise in the Netherlands, and had the court not ruled in the way it did in the noted case, drivers would have been left largely defenseless. Now that Uber drivers have been declared Uber's employees, there is at least a possibility that the company can be held liable for discrimination when similar issues arise in the Netherlands.¹¹¹ Now that the Court of Amsterdam has communicated an understanding of algorithms' influence on the conditions of people's lives, it may continue to develop its case law to respond to and allow for claims against discrimination and other forms of employers' algorithm-related misconduct.

V. CONCLUSION

The Court of Amsterdam's decision to introduce the "modern authority relationship" concept was bold and potentially controversial but completely necessary given the urgent need for case law to adapt to the rapid changes in the digital economy.¹¹² The court's decision in the noted case will pave the way for further developments in case law on employment status and workers' rights with respect to app-based employment. Granting Uber drivers employee status gives them much-

106. *See id.*

107. *See id.*

108. *See id.*

109. *See* Vallance, *supra* note 104.

110. *See* 2021-09-13-FNV/Uber B.V., ¶ 22.

111. *See* Algemene wet gelijke behandeling [General Equal Treatment Act], 2 Maart 1994 [2 March 1994], Art. 1 §§ 1, 5(1)(c) (Neth.) (defining discrimination and proscribing discrimination in "the commencement or termination of an employment relationship").

112. *See* 2019-07-23-X./Deliveroo Netherlands B.V., ¶ 30 ("It may be the case that current employment law does not take into account the industrial relations resulting from the (relatively) new platform economy.").

needed protections that traditional workers have had for many years now, protections that will likely be called upon in the near future given recent allegations of racial bias in Uber's facial recognition in other countries.¹¹³ As the world continues to become ever more digitized and digitally connected, the court's decision in the noted case will be crucial to protecting app-based and other digital workers' rights in the face of algorithmic management by their employers from afar.

Logan B. Fontenot*

113. *See generally* Vallance, *supra* note 104.

* © 2022 Logan B. Fontenot, J.D. Candidate 2023, Tulane Law School. The author would like to thank his family and friends for their support, as well as members of the Tulane Journal of International and Comparative Law for their efforts in preparing and publishing this piece.