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Technological Disruption in Employment and Labour Law in the Netherlands

Evert Verhulp

I INTRODUCTION

Since the Dutch debate about the digitisation of labour is often reduced to a debate about how to qualify a contract between a worker and the platform they work through, or work for, the definition of the term 'employment contract' deserves a lengthy discussion. This approach means that the other effects of technological changes, such as changes in the organisation of work owing to changing structures of authority, receive far less attention. In Section II, I examine the definition of an employment contract and the obligations associated with employment contracts, partly to distinguish them from contracts for services. I also discuss the incentives for avoiding employment contracts or the associated obligations. As a result, Section II also includes discussions of flexible employment relationships, domestic work, and, of course, contracts for services, each – to the extent possible – in light of technological developments. In Section III, I go more deeply into the effects that technological changes have on the legal design of labour, and I discuss the legal proceedings conducted against platforms in the Netherlands. Sections IV and V deal with the absence of labour regulation for and by platforms, and trade union strategies developed in response to the technological developments. In Section VI I discuss the platform as intermediary or temporary agency and in Section VII I go more deeply into the proposed legislation and other initiatives to regulate platform labour.

II THE ARCHETYPE

A *The Definition of an Employment Contract*

The legal definition of an employment contract in the Netherlands dates back to 1907 and is based on three characteristic components: labour must be performed, in exchange for payment of wages, by the employee in the employer's employ. The first two components are not so problematic for a qualification of employment contracts. In the case-law, the term 'labour' is construed such that it must involve productive labour that is not exclusively aimed at acquiring knowledge, which distinguishes interns from employees.[1]

The term 'wages' distinguishes an employment contract from a volunteer contract, although many volunteers in the Netherlands receive excessive expense allowances. That part of the payment that reimburses more than expenses could be regarded as wages. The lack of an

[1] Dutch Supreme Court, 29 October 1982, LJN AC0442 (*Hesseling* v. *St de Ombudsman*).

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obligation to pay wages is often used as a supporting argument for not accepting the existence of an employment contract.[2]

The key component in the definition of an employment contract is the relationship of authority that is created as the employment contract is concluded. The employee enters the employer's employ and becomes subordinated to that employer as a result. This structure of authority entails responsibilities for the employer. The employer carries the risk of continued payment of wages if the employee is unable to perform the labour, if the reason for not working is at the employer's expense and risk. This involves not only business risks but also continued payment of wages in the event of illness. In the Netherlands, the employer is obliged to continue paying the employee's wages during illness for the first two years of incapacity for work. The employer is also obliged to rehabilitate the employee, if possible, by offering suitable employment and to keep records of its efforts. Many employers take out insurance against the risk of continued payment of wages, but they still bear the administrative burden. Concluding an employment contract also entails an obligation for the employer to pay all sorts of contributions, for example employee insurance contributions, such as those payable under the Unemployment Insurance Act and under the occupational disability benefit schemes. A substantial portion of pension contributions – which are often obligatory in the Netherlands – is paid by the employer, and the employer is required to remit taxes for its employees. The various collective bargaining agreements also oblige employers to participate in sectoral schemes requiring them to pay contributions towards training funds, to offer internships and traineeships, and in some cases to continue paying wages in the event of parental leave. Employers are subject to far-reaching obligations pertaining to the conditions under which employees work and to the education and training of employees. Employers are compelled to consider their employees' personal circumstances. Pursuant to the Flexible Working Act,[3] an employee may demand that their employer adjust working hours, the number of hours to be worked, and, under certain circumstances, the workplace, according to the employee's requirements.

An elaborate system of legislation governing the termination of employment has been set up in order to prevent employers from simply evading the obligations imposed on them and to ensure that employees are able to enforce their rights. The system protects against unfair or rash dismissal, but is an impediment to employers who, for example, wish to dismiss underperforming employees. If an employer is able to dismiss an employee after all, it is required to pay the employee one-third of this employee's monthly salary for every year of service, which is known as a 'transition payment'.

Imposing responsibilities on employers and providing employees with sufficient options for enforcing the rights that employers must offer is often the most efficient route for the government. The government itself tends to be unable to create schemes that are sufficiently in line with employers' operations and has insufficient means and possibilities to enforce employees' rights. However, the legislature does realise that employment contracts come with numerous responsibilities and has attempted to accommodate employers who object to this, by permitting some form of flexibility in employment contracts.

B *Flexible Employment Relationships*

Some of the objections that employers have raised against the burden placed on employment contracts have been met by the option of concluding flexible employment contracts. For

[2] The Hague Court of Appeal, 28 April 2020, ECLI:NL:GHDHA:2020:879 (*organist*).

[3] Bulletin of Acts and Decrees 2015/246, https://wetten.overheid.nl/BWBR0011173/2016-01-01/0/informatie.

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instance, a temporary employment contract may be concluded that ends by operation of law, even in cases where an employer would not be permitted to terminate a permanent employment contract, for example if an employee falls ill. The employer avoids the relatively stringent dismissal law by concluding a temporary employment contract. In order to prevent any misuse of temporary employment contracts, and in accordance with Directive 99/70 EU, limits have been imposed on the number and duration of temporary employment contracts that the same parties may conclude. The rule is, briefly, that if more than three successive temporary employment contracts are concluded or if successive temporary employment contracts exceed a period of thirty-six months, a permanent employment contract is created by operation of law.

Employers may conclude on-call contracts if they wish to deploy employees at variable hours. It may be agreed for a period of six months that an employee will not receive any wages if that employee does not work, even if this lack of work should be at the employer's expense and risk. The employee may rely on a legal presumption regarding the scope of the employment contract, which allows the employee to demand payment for that number of hours after these six months. The scope is presumed to be equal to the average number of hours worked per month for the past three months, but the employer may attempt to prove that, on account of special circumstances, the scope should be determined based on a longer, more representative period.

If the employee has worked without a fixed number of hours for a year and if the employment contract continues, the employee is entitled to an offer from the employer to work for a fixed number of hours per month or per year. The employer must make the employee an offer based on the average of the past twelve months. Statutory provisions have been in force for this type of on-call contract since 2020, which are intended to better protect on-call employees against arbitrariness. For instance, a call must be made at least four days before the start of the labour; if not, the employee may refuse the call. If a call is not withdrawn at least four days before the work commences, the employee retains the right to wages for the period for which the employee was called.

Another way to avoid the rules imposed on an employer under an employment contract is to transfer the employer status. This may be done by putting an employee to work as an agency worker. In that case, the temporary employment agency has recruited and employs the employee and may put the employee to work somewhere else. A special type of placement is the situation where a user company acquires an employee but arranges that the employee enters the employment of another employer, which makes the employee available to the user company. It is often agreed in such cases that the employee cannot be made available to other user companies. This is actually 'payrolling'. As the employee is not employed by the company that puts the employee to work (the user company), the employee is not subject to the terms of employment applicable at the user company, either. This structure allows employers to have employees work for them at lower costs than the costs they would incur if they were to employ these employees themselves. This means that it is an option for companies with expensive terms of employment in particular. Payrolling surged in the Netherlands in the past few years; approximately 300,000 employees (roughly 4 per cent of the working population) worked on this basis in 2018. The legislature intervened and decided that, as from 2020, employees subject to payroll hiring would be entitled to the terms of employment applicable at the user company.[4] Payrolling has lost virtually all of its appeal to this group of employers since 2020 and is now used to a substantially lesser extent.[5]

[4] Section 7:692a of the Dutch Civil Code, Act of 29 May 2019, Bulletin of Acts and Decrees 2019/219 (Wet Arbeidsmarkt in Balans (Balanced Labour Market Act)).

[5] *Het Financieele Dagblad*, 10 September 2020.

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A new development is the 'outsourcing' or 'contracting' of work, where an employer outsources a separable part of its production process to another employer. Examples of litigation in the Netherlands include a chicken slaughterhouse leasing one of its production lines to a Polish entrepreneur, who operates the entire production line with his own staff and sells the finished product back to the owner of the production line,[6] and former state postal service PostNL, which outsources the distribution of parcels in distribution centres to a third party as an independent activity.[7] PostNL, delivering approximately half of all parcels in the Netherlands, has three-quarters of deliveries made by 'subcontractors'. These subcontractors undertake to deliver all parcels in a specific district or neighbourhood at a predetermined rate.[8] The Minister of Social Affairs and Employment has already stated that he considers this outsourcing of core business to be an undesirable practice and that he will explore how this can be prevented.[9] However, the problem is that the outsourcing of some activities in the periphery of operations, such as cleaning and catering in the company restaurant, is not considered undesirable and is common practice in the Netherlands. It is hard to draw a distinction between undesirable types of contracting and permissible or common types of contracting. Partly for this reason, the Minister's intention to regulate matters has not resulted in legislation so far.

C *Domestic Work*

A separate category of employees are those who perform work for another private individual's household. The private individuals who provide the work are hardly able – if they are even to be considered employers – to perform the obligations associated with an employer status. A private individual cannot easily deduct taxes and occupational disability and unemployment insurance contributions from payments they make to another person, pay pension contributions or rehabilitate an employee by offering suitable labour in the event of incapacity for work. That is why several European countries have regulated this labour in a different way from the usual labour, for example by service vouchers in Belgium and by a 'home services regulation' in the Netherlands.[10] The latter regulation entails that the employer, that is, the private individual who uses the household services, is not required to deduct taxes and that much of the employment protection applicable to regular employees does not apply to those 'performing services for households'. For instance, dismissal law (section 7:671(1)(d) of the Dutch Civil Code) does not apply and continued payment of wages in the event of illness is required only for a period of six weeks. I will return to this type of labour and the applicable rules in Section IV, because this work in particular is often 'arranged' through platforms.

D *Self-Employed Persons*

Despite the options of concluding flexible employment contracts or transferring the employer status, it proves to be attractive for employers to have labour performed on the basis of contracts for services rather than employment contracts. In 1997, the Dutch Supreme Court gave

[6] Den Bosch Court of Appeal, 20 August 2019, ECLI:NL:GHSHE:2020:3098 (*chicken slaughterhouse*).
[7] Overijssel District Court, 7 May 2020, ECLI:NL:RBOVE:2020:1538 (*PostNL*).
[8] *De Monitor*, 14 September 2020, https://demonitor.kro-ncrv.nl/onderzoeken/pakketbezorgers.
[9] Letter to the Dutch House of Representatives, 13 May 2019, https://bit.ly/4720490.
[10] Home Services Scheme, www.rijksoverheid.nl/documenten/regelingen/2015/09/30/regeling-dienstverlening-aan-huis; regarding the regulation and similar regulations in other EU countries, see PHS-Quality Project: Quality and Industrial Relations in the Personal and Household Services Sector – VS/2018/0041, https://aias-hsi.uva.nl/en/projects-a-z/phs-quality/phs-quality-project.html.

judgment,[11] finding that the parties' intention was indicative of the qualification of the contract. The matter involved a tax law lecturer who was offered an employment contract but who was only willing to perform labour based on a contract for services. When that contract was terminated without observing the rules under labour law, he took the position that he was employed based on an employment contract and sought payment of substantial amounts of money on account of a violation of those rules. His claim was dismissed as it was assumed that no employment contract existed. The impression we get here is that this lecturer was trying to have it both ways and was unsuccessful in his attempt. This judgment gave way to the thought that the parties themselves can decide to qualify a contract as an employment contract, or not. Although the Supreme Court itself in later jurisprudence seems to consider this case-law outdated to a large extent, it was only in November 2020[12] that the Supreme Court expressly judged that the intent of parties regarding the qualification of the contract of employment is not relevant to the qualification of the contract. This is because an employment contract arises – irrespective of what the parties themselves have in mind – if the requirements imposed by the law are met. Meanwhile, the room that was created in qualifying a contract as a contract for services rather than an obligatory employment contract has been widely used in the Netherlands.

Consequently, employers feel a need to avoid employment contracts and some workers also believe an employment contract as a basis for performing labour is a less attractive option, and there is room to avoid an employment contract. First of all, some work is hardly offered in the form of employment contracts. Examples of these are technical or executive positions in the culture sector. Nearly all substitutes – musicians who replace regular musicians in orchestras, for example – work as self-employed persons.[13] As an aside, I note that these substitutes are considered 'false' self-employed persons under European law, as is evident from case-law of the European Court of Justice.[14] From my own observation, I conclude that the desire of some employees to perform labour based on a contract for services is stronger where the labour is a side activity, that is, where it is performed in addition to a regular job or other activities, such as studying. Because of their private lives, employees may also feel compelled to perform labour at greatly varying hours, so much so that this is incompatible with regular employment. Another reason to opt for labour on a self-employed basis is that some groups in the labour market have difficulty finding paid employment. This may be related to discrimination,[15] to insufficient education in line with labour market requirements, or to partial incapacity for work.[16] For these groups of people, working as a self-employed person is a way to generate income after all.

Some employees regard the obligations that employment contracts impose on them as impediments. Many nurses are known to consider working on the basis of an employment contract less attractive since the number of nights they are permitted to work in paid employment is limited, and the applicable collective bargaining agreement caps employees' salaries. The trade unions consented to this cap to keep the costs of healthcare under control, but the current lack of nursing staff allows self-employed persons to demand higher fees than the wages

[11] Dutch Supreme Court, 14 November 1997, NJ 1998/149 (*Groen* v. *Schoevers*).
[12] Dutch Supreme Court, 2 November 2020, ECLI:NL:HR:2020:1746 (X/gemeente Amsterdam).
[13] SER advisory report 2017/07, *Passie gewaardeerd*, www.ser.nl/-/media/ser/downloads/adviezen/2017/passie-gewaardeerd.pdf.
[14] ECJ, 4 December 2014, ECLI:EU:C:2014:2411 (*FNV KIEM*).
[15] R. Florisson and I. Mandl, *Platform Work: Types and Implications for Work and Employment – Literature Review*, Working Paper WPEF18004 (Dublin: Eurofound, 2018), 48, https://bit.ly/43EGhd3.
[16] Niels van Doorn, 'Platform labor: On the gendered and racialized exploitation of low-income service work in the "on-demand" economy', *Information, Communication & Society*, 20(6) (2017), 898–914, https://doi.org/10.1080/1369118X.2017.1294194.

paid under the collective bargaining agreement. Other studies have also revealed that many self-employed persons regard the options of working more flexibly as a major benefit of working without an employment relationship. Approximately 65 per cent of self-employed persons state that this freedom is the reason for their desire to work on a self-employed basis.[17] Self-employed persons are also able to evade all sorts of administrative work, which is generally experienced as less satisfactory, because they are not subordinates or do not feel as if they are subordinates.

What is more, the Dutch government has created a highly favourable tax regime for self-employed persons in order to encourage entrepreneurship. A study conducted by several ministries[18] has found that a self-employed person who earns EUR 25,000 gross per year is left with a net annual amount that is EUR 6,000 higher than an employee with the same gross income. This difference does not become smaller as the income rises: an income of EUR 90,000 gross per year yields a difference of nearly EUR 18,000 net. However, these income differences are partly explained by employees being covered by unemployment, occupational disability, and pension schemes, whereas self-employed persons are not. It is known that self-employed persons tend not to take out such insurance, which means that they run a greater risk of income losses than employees. As this also became apparent during the Covid-19 crisis, separate income schemes were created for self-employed persons.[19] Obviously, this substantial income difference is a major incentive for employees to work as self-employed persons.

The Dutch Tax and Customs Administration is to enforce employment contracts in the context of taxation and the levy of social security contributions. However, this enforcement has been a problem for years, as large groups of self-employed persons oppose the qualification of their contracts as employment contracts. As a result, this is a highly sensitive political issue. The Ministry of Finance has announced that the tax authority will not enforce taxation regulation for bogus self-employed until 2025.[20] The recommendations from the 2018 OECD Economic Survey of the Netherlands[21] are aimed at ensuring a more level playing field, particularly in terms of tax treatment, between self-employed persons and other workers. More than 15 per cent of the working population work on the basis of contracts for services by now; in some cases employers prefer self-employed persons over employees where work is to be performed. Especially where the activities are easily split into several duties and little to no instruction is needed for the performance of those duties, the work is offered only to subcontractors and not to employees. Platforms seem to be capitalising on this option.

In summary, room was created in the Netherlands to structure employment relationships in ways other than by means of permanent employment contracts, and this room is used to the fullest extent because concluding an employment contract is onerous or financially less attractive to both the employer and the employee. As a result, the percentage of people working on a self-employed basis in the Netherlands is higher than average in the European Union (EU) countries. Exceptions to the rules have been created for employees working for other people's

[17] *Eindrapport IBO: zelfstandigen zonder personeel [Final Report IBO: Self-Employed without Employees]* (2 October 2015), 25, www.rijksoverheid.nl/documenten/rapporten/2015/10/02/eindrapport-ibo-zelfstandigen-zonder-personeel.

[18] *Eindrapport IBO*, annexes, https://bit.ly/3ruFKNl.

[19] Temporary Bridging Scheme for Self-Employed Persons [*Tijdelijke overbruggingsregeling zelfstandig ondernemers (Tozo)*] https://bit.ly/44yxtXB.

[20] Letter of 24 June 2022 of the staatssecretaris van Financiën en van de minister van Sociale Zaken en Werkgelegenheid [State Secretary of Finance and of the Minister of Social Affairs and Employment], https://bit.ly/3rxohkm.

[21] OECD, 'Economic Survey of the Netherlands – 29 June 2023', www.oecd.org/economy/netherlands-economic-snapshot/.

households, since private individuals cannot be expected to bear the responsibilities that come with being an employer.

III THE CHANGING NATURE OF WORK: SUBORDINATION AND TECHNICAL INNOVATION

The relationship of authority is the key component in the definition of an employment contract. If there is no authority, there is no employment contract. It is often believed that an employer's authority is found in the employer's power to give employees instructions on the work to be performed. I do not believe that this is correct. A high degree of freedom in a worker's performance of duties does not preclude the existence of an employment contract; nor does the fact that an employer does not have the right to order the employee to perform specific acts.[22] Consequently, the fact that employees are increasingly professionals who do not need or accept any substantive control in performing their work does not preclude an assumption that an employment contract exists.

The relationship of authority is characterised by a worker forming part of the employer's organisation and accepting the applicability of the rules issued by the organisation, as well as the customs and practices applicable there.[23] This modern approach to relationships of authority is important because the direct authority that employers exercise is waning, and activities are increasingly controlled through apps and other electronic means. This is referred to as 'algorithmic management'. It remains to be seen whether employees can be subordinate to such systems and whether this entails subordination to their employers.[24]

The Amsterdam cantonal judges decided that subordination in the sense of employment contracts can also exist if employers leave it to electronic systems to control their employees' activities. This is not altered by the fact that such systems may not give direct instructions but rather control workers' behaviour by nudging and through incentives.[25] The Amsterdam Court of Appeals supported this view in its decision, deeming Deliveroo to be the employer of the food deliverers it uses for its services.[26] This case was taken to the Supreme Court, which delivered its decision on 24 March 2023; it stressed that the deliverers are subordinate to the system and therefore employees.[27] Modern employers also prefer to persuade employees to perform work rather than giving direct instructions. In my view, the fact that the system is filled by customers' feedback and not by the employer does not make much of a difference in terms of attributing the relationship of authority to the employer.[28] A modern approach to relationships of authority also entails that subordination exists if a worker is part of the employer's organisation and is subject to the rules, customs, and practices applicable there. In her Opinion before this case, the Advocate General recommends that the Supreme Court find that the relationship of authority should be construed by taking into account the organisation embedment of the worker.[29] When the worker is part of the organisation of the work provider, submitted to its regulations, not distinguishable

[22] Dutch Supreme Court, 12 September 2014, ECLI:NL:HR:2014:2653, JAR 2014/260 (*cooperative of prostitutes*).
[23] Dutch Supreme Court, 1 May 2015, ECLI:NL:HR:2015:1172 (*Kriterion*).
[24] Valerio De Stefano, *'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection*, Employment Working Paper No. 246, Employment Policy Department (Geneva: ILO, 2018), 13.
[25] Rechtbank Amsterdam, 13 September 2021, ECLI:NL:RBAMS:2021:5029 (*FNV/Uber*).
[26] Amsterdam Court of Appeal, 16 February 2021, ECLI:NL:GHAMS:2021:392 (*Deliveroo/FNV*).
[27] Dutch Supreme Court, 24 March 2023, ECLI:NL:HR:2023:449 (*Deliveroo*).
[28] J. Kloostra, 'Ondergeschikt aan het algoritme [Subordinate to the algorithm]', *TRA (tijdschrift Recht en Arbeid) [Law & Labour Magazine]*, 71 (2020), 10–18.
[29] Conclusie A-G de Bock, 16 June 2022, ECLI:NL:PHR:2022:578 (Deliveroo).

from other workers in the organisation, and when the worker is not able to perform the work as a real entrepreneur (setting own prices, advertising own activities, etc.), that worker is deemed to be an employee. What is also relevant is that an entrepreneur markets their own product and independently determines the price of the product, whereas an employee is unable to do so. This modern approach to relationships of authority is more in line with the current organisation of work. The Supreme Court decided that the existence of a relationship of authority depends on a judgement of all relevant aspects of the case, and specified nine elements that have to be taken into account. One of them is the embedment of the worker; another is the exercise of authority by the employer, possibly using digital means such as an app. In the *Deliveroo* case, an evaluation of the elements led to the conclusion that the workers are subordinate and therefore employees.[30]

Previously, the advisory committee set up by the Minister of Social Affairs and Employment already recommended that the statutory definition of an employment contract be adjusted to embed the modern interpretation of relationships of authority in the law.[31] This modern approach is also far more in line with the European approach to the term 'subordination'.[32]

It is generally assumed that an employee's right to arrange for a replacement in the performance of labour at the employee's own discretion precludes a relationship of authority. If the employee could evade an instruction given by the employer by sending a replacement, little is left of the employer's authority. In my opinion, however, the worker's option of arranging for a replacement does not automatically mean that no employment contract can be assumed to exist.[33] It is striking that the contracts that professional clients conclude with their workers are often drafted in such a way as to create a paper reality that can hardly be refuted by the facts. Therefore, although – practically speaking – the provision on replacement is of no use or cannot be of any use in some instances, it does sometimes achieve the purpose that the client intended at law (i.e. to prevent an employment contract from being created or from being assumed to exist in court).

In the *Pimlico* decision, the UK Supreme Court also grappled with a replacement clause and arrived at the opinion that where a worker's right to arrange for a replacement is limited to workers approved by the 'client', that replacement does not preclude an assumption that the worker is required to perform the labour personally and is therefore a subordinate.[34] This seems a proper point of departure to me. Only if the worker arranges for a replacement by way of an earnings model will it be difficult to establish personal labour and therefore to assume the existence of an employment contract with the provider of the work.[35] After all, if such an earnings model exists, the worker is an entrepreneur. In that case, the entrepreneur earns their income not only by means of personal labour but also by other people's labour, and the entrepreneur runs a business risk as a result. It is often assumed in the case-law of the lower courts that the possibility of replacement precludes the existence of an employment contract.[36]

[30] See *supra* note 27.

[31] Work Regulation Committee, *In wat voor land willen wij werken? [What Kind of Country Do We Want to Work In?]* (23 January 2020), 70, www.rijksoverheid.nl/documenten/rapporten/2020/01/23/rapport-in-wat-voor-land-willen-wij-werken.

[32] E. Verhulp, *The Notion of 'Employee' in EU-Law and National Laws: A Thematic Working Paper for The Annual Conference of the European Centre of Expertise (ECE) in the Field of Labour Law, Employment and Labour Market Policies* (Frankfurt: Hugo Sinzheimer Institute (HSI), 2017), https://hdl.handle.net/11245.1/a8c0b0b6-084c-45d2-b897-a5706ee0b2c8.

[33] Gelderland District Court, 17 January 2017, ECLI:NL:RBGEL:2017:224 (*pilot*).

[34] UK Supreme Court, 13 June 2018, Judgment in *Pimlico Plumbers Ltd* v. *Smith*, (2018) UKSC 29, para. 34.

[35] Compare with Amsterdam Court of Appeal, 30 January 2018, ECLI:NL:GHAMS:2018:314 (*PostNL Pakketten Benelux B.V.*).

[36] See, for example, the proceedings of parcel deliverers against PostNL, Limburg District Court, 1 March 2018, ECLI:NL:RBLIM:2018:2029.

IV THE CHANGING NATURE OF WORK: NEW JOBS AND NEW ORGANISATIONS

It has been discussed already that employers cut up work and offer these separate activities in order to have the labour performed without being required to enter into an employment relationship. This development of the fissured workplace is not a national development.[37] Increased digitisation of labour and the application of artificial intelligence allows employers to cut up positions into several duties in a better and simpler way than they could before. Some of the work that bank employees previously performed is now performed by customers themselves, who now make payments through smartphone apps. The remaining activities of desk clerks who used to accept and process payments were split up and offered as packages to be performed as self-employed labour. In some cases these duties may even be performed by people who are not workers, for example where the duties are included in a game.[38]

This means that we see shifts in the labour market that are mainly caused by digitisation. This affects the organisation of the labour market. The average term of employment contracts is decreasing, whereas the number of flexible employment relationships is increasing.[39] In the Dutch labour market the industry used to provide a substantial part of the jobs, but employment opportunities are diminishing there.[40] Another large part of the jobs could be found in the business services sector. Especially in the financial services sector, at banks and insurance companies, the number of jobs is still decreasing because of digitalisation.[41] This decrease is mainly seen in 'middle management' positions, among employees who were responsible for direct customer contact. Many of the activities these employees carried out are now performed by customers themselves through smartphone apps. The Covid-19 crisis seems to have accelerated rather than slowed down the development of jobs being cancelled in the middle labour market – such as positions involving customer contact, for example shop assistants and desk staff – although no clear studies have come to my knowledge.

Partly because of the Covid-19 crisis, the number of jobs is on the rise in other sectors, such as online shops and other services performed by platforms. This involves work in such sectors as the transport sector, which includes the transport of goods rather than passenger transport. The transport of goods is a true growth sector in terms of carrying out and delivering orders placed online. This pertains to the delivery of both orders placed with large platforms such as Amazon and Alibaba, and meal and grocery deliveries. These activities, such as grocery shopping and delivering takeaways, were previously not regarded as paid work.

The outsourcing of duties that were previously not automatically regarded as work does not stop with parcel delivery and meal delivery. It is a trend that Arlie Hochschild described as 'the outsourced self' as early as 2013[42] and that is about the outsourcing of duties that used to be far more private and were therefore previously performed by people themselves. Examples of these are organising children's parties, dog walking services and potty training, as well as care for

[37] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2019).

[38] See Marion Crain, Winifred Poster, and Miriam Cherry, *Invisible Labor: Hidden Work in the Contemporary World* (Oakland, CA: University of California Press, 2016).

[39] P. de Beer and E. Verhulp, *Dertig vragen en antwoorden over flexibel werk [Thirty Questions and Answers about Flexible Work]* (Amsterdam: University of Amsterdam, Amsterdam Institute for Advanced Labour Studies, 2017), 10, https://pure.uva.nl/ws/files/39049347/Dertig_vragen_en_antwoorden_over_flexibel_werk_DEF.pdf.

[40] Employment Structure of Statistics Netherlands 1999–2019, https://bit.ly/3D051eP.

[41] Statistics Netherlands, *Structurele afname werknemers in financiële sector [Structural Decrease in Employees in the Financial Sector]* (17 December 2018), www.cbs.nl/nl-nl/nieuws/2018/51/structurele-afname-werknemers-in-financiele-sector.

[42] Arlie Russel Hochschild, *The Outsourced Self: Intimate Life in Market Times* (New York: Metropolitan Books, 2013).

parents or other loved ones. The last does not just include activities necessary to obtain medical care but also simply keeping in touch in order to prevent loneliness. The outsourcing of duties that used to be part of the private domain is undeniably on the rise.[43]

In the context of this book, it should be noted that this also results in an increase in the number of 'non-professional employers'. I mean to say here that a growing number of private individuals engage other private individuals to perform work. It has been set out earlier that such employers are subject to special – less stringent – employment rules.

Typical of many of the activities in which a growth in the number of jobs can be seen or is to be expected is that platforms act as intermediaries. Orders placed online are mostly delivered by organisations that have a minimum amount of work performed by employees and that outsource the delivery work as self-employed labour. The people delivering meals work through one of the 'order platforms', such as Uber Eats or Deliveroo, generally as self-employed persons. Platforms such as Helpling act as intermediaries between cleaners and households requiring domestic help. Services for private individuals' households are offered through all sorts of other platforms, such as babysitting[44] and grocery services,[45] as well as certain types of 'keeping people company'.[46]

Organisations are also changing owing to increasing digitisation. The distinction between sectors is blurring, making the effects of sectoral schemes less explicit. An example here is the increase in grocery shopping in digital shops. The groceries are collected and packed in a distribution centre and then delivered to consumers at home. The question is what sector this virtual supermarket should be considered to be part of. The trade unions took the position that the collective bargaining agreement for supermarkets should also apply to the staff of this digital shop. If this were any different, this digital shop could compete with physical shops as regards terms of employment. However, the digital supermarket stated that this should apply only to a small number of staff and that, for the rest, the rules governing storage, distribution, and transport, or governing information technology, should apply. The employer was successful in legal proceedings on this issue.[47] The digital supermarket has now concluded its own collective bargaining agreement with a small trade union for staff working in the distribution centres.

V LEGAL STATUS OF PLATFORM LABOUR: WORKING FOR THE PLATFORM

Before the lower courts in the Netherlands, the type of contract – the parties concluded a contract for services – plays a major role in the qualification of the contract applicable between the parties. Workers commit themselves to a platform that generally goes to great lengths not to regard these workers as employees. Platforms do so, first of all, by designing the contracts being concluded in such a way that no employment contract seems to exist. This practice tempted the London Employment Tribunal into finding:

> Any organisation (a) running an enterprise at the heart of which is the functioning of carrying people in motor cars from where they are to where they want to be and (b) … (c) requiring

[43] SER [Social and Economic Council], *Markt voor persoonlijke dienstverlening in internationaal perspectief [Market for Personal Services in an International Perspective]*, Exploratory Study 20/06 (The Hague: SER, 2020), 24, www.ser.nl/-/media/ser/downloads/adviezen/2020/markt-persoonlijke_dienstverlening.pdf. See also the references there (especially p. 24).

[44] Sitly, www.sitly.nl/over-sitly; Nina.care, https://nannynina.nl/.

[45] Picnic, www.picnic.app/nl/.

[46] Vertroetel je Ouders [Pamper Your Parents], https://vertroeteljeouders.nl/; Mantelaar [Cloak], www.mantelaar.nl.

[47] Amsterdam District Court, 3 December 2019, ECLI:NL:RBAMS:2019:8968 (*Picnic*).

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> drivers and passengers to agree, as a matter of contract, that it does not provide transportation services . . . and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism.[48]

In the Netherlands, it is especially the lower courts that have difficulty keeping such a distance to the contract; they prefer to follow the letter of the contract. In the first Deliveroo case,[49] the subdistrict court deemed it relevant that the worker was aware that he had concluded a contract for services and considered this relevant to the qualification of the contract. The court also deemed it relevant that the contract stated that the rider/worker could freely arrange for a replacement in the performance of the work. The question is why a platform worker, who can simply turn off the app or reject a delivery job through the app if they do not wish to perform any labour, would ever feel a need to arrange for a replacement to perform the work.

In my opinion, a qualification of a contract between a platform worker and a platform should include an assessment of whether a relationship of authority exists. It is possible that the worker performs labour based on an employment contract, especially if we take the modern relationship of authority as a basis. For performing the work, the worker depends on an app they can turn on or off as they wish, but when the app is turned on, a record is kept of how often the employee accepts an offer of work, and this has consequences for subsequent offers of work. When the worker turns on the app, they become part of the organisation that operates the app, which implies subordination and the existence of an employment contract. A record is also kept of how the worker performs the work, or customers are asked to do so. The platform attaches consequences to the information collected in this way, affecting the possibilities of performing labour. The worker cannot determine the price of their services; the platform (or the app) does this and payment is made to the platform rather than to the worker. In most cases, no actual entrepreneurship is involved. All these components in the relationship between a worker and their platform seem to point towards an employment contract.

VI WORKING THROUGH THE PLATFORM

Among the work platforms that provide services to customers, I distinguish between those where workers do not work at customers' premises and those where workers do perform the work at customers' premises. The first group includes well-known platforms such as Uber and Deliveroo. In the case of such platforms, it is hard, if not impossible, to construe an employment relationship between a worker and a customer, owing to the short and intermittent relationship. The question is whether the platforms belonging to the second group are themselves to be regarded as employers or just intermediaries, and whether the relationship created between a platform customer and a worker is to be qualified as an employment contract. A number of legal proceedings are currently pending on this issue. In late October 2020, the largest Dutch trade unions announced that they had served a summons on the Temper platform.[50] In its own words, Temper acts as an intermediary to help self-employed persons (and not employees) find work at third parties, especially in the hospitality industry and, since the Covid-19 crisis, also at distribution centres. It is indeed highly doubtful whether it is even possible to work at another party's hotel or catering establishment or distribution centre as a self-employed person, in particular if we take the 'modern' definition of relationships of authority as a basis. The case is still pending.

[48] London Employment Tribunal, 26 October 2016, Case No. 2202550/2015, *Aslam, Farrar & Others* v. *Uber BV*.

[49] Amsterdam District Court, 23 July 2018, ECLI:NL:RBAMS:2018:5183 (*Deliveroo I*).

[50] Yvette de Vries, 'FNV en CNV dagen Temper voor de rechter om schijnzelfstandigheid [FNV and CNV take Temper to court for bogus self-employment]', *FNV* (22 October 2020), https://bit.ly/3O76pr4.

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In the case of Helpling, a platform that matches cleaners and households, workers clean customers' homes. Customers pay Helpling an amount per hour, and Helpling pays part of the amount to the cleaners. Helpling contractually excludes employment contracts with cleaners, but is not clear about whether it forms employment contracts between cleaners and customers. In proceedings initiated by the largest Dutch trade union, the Amsterdam District Court ruled that Helpling is not the employer in this structure; rather, the customers are the employers of the cleaners. This is because Helpling does not give any instructions or directions on how cleaners are to perform their duties. In view of the modern interpretation of relationships of authority that I have advocated, it is doubtful whether this is sufficient to assume that no employment contracts exist. According to the court, the relationship of authority is found with customers, who are able to give cleaners instructions and specify where the work is performed. The court is of the opinion that Helpling is engaged in job placement;[51] it creates employment contracts between other parties. The Dutch Placement of Personnel by Intermediaries Act regulates job placement; section 3 of the Act prohibits intermediaries from demanding that employees pay for the intermediary services, as a result of which Helpling had to change its earnings model.[52] The discission of the Amsterdam District Court was overruled by the Amsterdam Court of Appeals. This Court holds the opinion that Helpling is in fact to be regarded as the employer.[53] In this case the platform is to be regarded as an employment agency. This means that the platform is deemed to have concluded employment contracts with cleaners and subsequently makes these people available to third parties (households). This situation occurs where the platform exercises employer duties that go beyond what is necessary for providing labour intermediary services. As a result of the labour law exceptions for employers who have employees perform services for households, as discussed in Section II.C, the burden to be borne by customers/households as employers is not excessive. If the platform is to be regarded as an employer, these exceptions do not apply and the price of the labour increases significantly.

VII WHAT NEXT / QUO VADIS?

The debate on platform labour in the Netherlands seems to focus on the qualification of employment contracts. The Dutch government has not yet taken any specific measures under labour law aimed at platform labour or at another structure of labour in respect of digitisation or the application of artificial intelligence. In view of the limited extent of platform labour in the Netherlands, which is estimated to be 1 per cent of the labour market, the government does not feel a need to take regulatory action immediately. However, the government did set up a Work Regulation Committee in 2018 to advise on labour market developments and on the right structure for the labour market, partly in view of increasing robotisation and digitisation of and in labour. The committee delivered its final report to the government in 2020, paying attention to platform labour but hardly to other types of digitisation of labour.[54] An important conclusion of the committee is that it is necessary – also in connection with platform labour – to distinguish more clearly between self-employed persons and employees. The opinion does not contain any recommendations for regulating platform labour, nor any recommendations to

[51] Amsterdam District Court, 1 July 2019, ECLI:NL:RBAMS:2019:4546 (*Helpling*).

[52] See, in this regard, E. Verhulp, 'On the applicability of the Temporary Agency Work Directive to platform labour' in Olaf Deinert et al. (eds.), *Demokratisierung der Wirtschaft durch Arbeitsrecht, festschrift für Thomas Klebe [Democratisation of the Economy through Labor Law: Commemorative Publication for Thomas Kleber]*, 397 (Frankfurt: Bund Verlag, 2018).

[53] Amsterdam Court of Appeals, 21 September 2021, ECLI:NL:GHAMS:2021:2741 (*Helpling*).

[54] Work Regulation Committee, *supra* note 31.

impose rules regarding the digitisation of labour. Meanwhile, at the request of the Dutch House of Representatives, the Social and Economic Council of the Netherlands has also examined the Dutch platform economy.[55] Its report was published in October 2020 and contains much information about the platforms, but hardly any policy recommendations. This report, too, emphasises that some platforms use the indistinct dividing line between employment contracts and contracts for services to obtain a competitive advantage and recommends that the lack of clarity be removed. The report of the Social and Economic Council is not clear about how this is to be achieved. The Work Regulation Committee, accepting the modern approach to relationships of authority, recommends that the type of contract selected by the parties should no longer be deemed relevant. The government announced that as of 1 January 2025 accurate taxation of the employment contract will be fully enforced by the Tax Authority, which will affect a large group of self-employed (see Section II.D), and that additional legislation will be issued to enable the Tax Authority to carry out this task. The additional legislation will entail a clarification of the definition of the employment contract, where the embedment of the worker as indication of a relation of authority will be key, in line with the conclusion of the Advocate General in the *Deliveroo* case (see Section III). The government also announced that a legal presumption of an employment agreement will be introduced for workers earning less than €30 to €35 an hour.[56] If implemented, it will affect the position of the platform worker because most platform workers earn less than this threshold.

Contrary to what is often believed to be the case, the Dutch Competition Act, ensuing from Article 101 of the Treaty on the Functioning of the European Union, does not automatically preclude the making of arrangements for self-employed persons on remuneration or other terms of employment. The Dutch competition authority permits such arrangements for self-employed persons who are comparable to employees.[57] As set out in Section II.D, the Netherlands has many of such self-employed persons.

However, the problem with trade unions in the Netherlands is that they have insufficient power to force the platforms to make arrangements. This is partly because workers who are in fact willing to take part in campaigns are not automatically prepared to endorse the demands of regular trade unions. A campaign conducted by Uber drivers made it clear that the drivers are not looking for employment protection, as the regular trade unions are advocating, but they do want a higher percentage of the proceeds.[58] The trade unions take the position that employment contracts are the normal situation for performing labour and argue that the use of contracts for services should be reduced. They believe that the current legislation is interpreted too broadly and that platforms wrongly generally use contracts for services. The trade unions take the position that platforms within the meaning of the law are ordinary employers of their workers and attempt to have this position confirmed in legal proceedings. As set out in this chapter, they have had only limited success so far.

The uncertainty about the qualification of contracts, including between workers and platforms, is partly resolved by the Supreme Courts *Deliveroo* decision. Also, the government's

[55] SER, *Hoe werkt de platformeconomie? [How Does the Platform Economy Work?]*, Advisory Report 20/09 (The Hague: SER, 2020), www.ser.nl/-/media/ser/downloads/adviezen/2020/platformeconomie-hoe-werkt.pdf.

[56] Letter of the Minister of Social Affairs and Employment, 3 April 2023, p. 17, https://open.overheid.nl/documenten/ronl-078cd037707d5a6045449d118efb550d9ab00e9e/pdf.

[57] 'Guidelines for rate agreements for self-employed persons without employees, *ACM* (7 February 2023), www.acm.nl/nl/publicaties/leidraad-tariefafspraken-zzpers-0.

[58] Marc Kruyswijk, 'Staking Uber: "Wij dragen alle risico's, dat is oneerlijk" [Strike Uber: "We bear all the risks, that's unfair"]', *Het Parool [The Watchword]* (19 March 2019), www.parool.nl/nieuws/staking-uber-wij-dragen-alle-risico-s-dat-is-oneerlijk~b5f6259a/.

proposals regarding the labour market will, when implemented, clarify the distinction between the employment contract and the contract of services. If the Tax Authority does indeed enforce the taxation of the employment contract, a major incentive to wrongly use a contract of services will be neutralised. But the tendency to avoid an employment contact will only be cancelled when the burden placed on permanent employment contracts is alleviated. If this is not done, the urge to find alternatives will not disappear. These alternatives, such as contracting, are more easily available as a result of technological developments. The more far-reaching technological developments are also changing existing employment relationships. The regulation of algorithmic management under labour law has hardly been considered, and I am not aware of any policy intention to change employers' organisations or employers. The legal design of employment contracts is flexible and able to encompass many types of labour, but in the end it cannot include any labour that is so fragmented that no employer can be identified or for which the only identifiable employer is hardly, if at all, able to bear the responsibilities that come with being an employer.