2 A Jurisprudence of Consequences as Impact Assessment in Light of Legal Principles: Evaluating the 'Deliveroo judgment'

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1 Introduction

How should a 'jurisprudence of consequences', as introduced by Miller (1965), be structured, and why is it significant in legal scholarship? These are some of the questions we seek to address in this contribution on the classification of platform workers in the Netherlands. Miller (1965) defines a 'jurisprudence of consequences' as an approach that examines the outcomes of judicial decisions and evaluates them based on how effectively they advance societal goals (p. 368). While he acknowledges that this idea is not entirely novel – having been implicitly referenced by Jeremy Bentham and central to the legal realism movement (pp. 400-401) – his interpretation emphasises that judges must not only anticipate the future by managing its trajectory (p. 365) but also reflect on the past to determine "what the law is" (p. 373).

Expanding on Miller's concept within a civil law context, we argue that a 'jurisprudence of consequences' should assess the potential impact of a judgment on a specific group of people in light of the legal principles and values it upholds. This approach not only enhances the law's effectiveness but also respects its normative function. To illustrate this, we investigate, first, the extent to which the Dutch Supreme Court's Deliveroo decision provides clarity in classifying work relations (of platform workers) as either employment or self-employment.[1] Based on these findings, we then evaluate whether and how the Deliveroo decision aligns with the societal goals reflected in labour law's internal values or fundamental labour: the efficient regulation of the labour market and employee protection (Cabrelli & Zahn, 2018; Davidov, 2016; Zekic, 2019).

For Miller, judges should consider the possible consequences of their rulings *before* making a decision. However, this study takes a different approach. We

1. Supreme Court 24 March 2024, ECLI:NL:HR:2023:443.

conducted a qualitative *ex-post evaluation* of the Dutch Supreme Court's decision, analysing its real-world implications and assessing whether the anticipated effects align with the values and principles underpinning labour law. Nonetheless, based on the findings we will also reflect on the possible impact of a recent legislative proposal on the clarification of the assessment of employment relationships and legal presumption.[2]

To assess the impact of the *Deliveroo* ruling, we apply the Court's criteria for determining employment status to solo self-employed hospitality workers – such as waiters, hosts and cooks – who find work through the platform Temper in hotels and restaurants (hereafter Temper workers). Temper workers, registered on the platform, can respond to job offers via the Temper app, typically for single shifts at restaurants and hotels (the hirers). The hirers select the self-employed worker they wish to engage and pay them directly or through the Temper platform on completion of their shift.

Using Temper workers as a case study, this research explores two questions:

1. What are the potential effects of the Deliveroo decision on the classification of the work relationship between Temper workers and the hotels, restaurants or catering services they serve?
2. How do these effects align with societal goals reflected in the fundamental principles of labour law?

Our qualitative empirical-legal analysis concludes that the *Deliveroo* judgment provides insufficient clarity on the employment status of Temper workers and ultimately falls short in upholding labour law's fundamental principles. Moreover, our findings suggest that the proposed legislative reforms offer a more effective framework for safeguarding these principles. It is thus highlighted how (qualitative) empirical-legal research that explicitly engages with normative issues can not only enhance judicial decision-making but also inform and guide legislative reforms.

In addition to further developing and applying Miller's concept of a 'jurisprudence of consequences', this study explores the value of solicited oral diaries as a research method for assessing the impact of law in relation to its underlying principles. To our knowledge, this method has not been applied in empirical-legal research and remains underutilised in qualitative studies on workers' experiences, with only a few notable exceptions (e.g. Crozier & Cassell, 2016; Gebhard & Wimmer, 2023). In this regard, the study aims to contribute to the still-limited body of qualitative empirical-legal research on platform work (Dubal, 2019; Zeng & Eleveld, 2024).

2. Wet VBAR (Wet Verduidelijking Beoordeling Arbeidsrelaties en Rechtsvermoeden (Documenten bij Wijz Boek 7 BW ivm maatregelen verduidelijken onderscheid werknemers en zzp'ers en rechtsvermoeden | Overheid.nl | Wetgevingskalender).

This chapter is structured as follows: Section 2 outlines our analytical framework, and Section 3 presents our data and research methodology. We then discuss our findings in relation to the two research questions in Sections 4 and 5. Finally, Section 6 summarises and discusses our findings and highlights their implications for future legal developments in work classification.

2 Analytical Framework

Under Dutch labour law, judges often consider the broader consequences of their rulings for the affected parties. For example, when an employee is lawfully dismissed, the judge may factor in the dismissal's impact when determining severance pay. In individual cases, such assessments typically do not require empirical research, as a worker's financial situation can be directly evaluated. However, when a ruling has significant implications for a broader group of workers, a more systematic impact assessment may be necessary – an approach consistent with the 'jurisprudence of consequences'. The *Deliveroo* ruling on the classification of workers as either employees or self-employed exemplifies such a decision, extending beyond the specific case at hand. This is particularly relevant given the sharp rise in solo self-employment in the Netherlands, where the number of solo self-employed individuals grew from 630,000 in 2003 to 1.2 million in 2022 – an increase from 8% to 12% of the total workforce (CBS, 2024; see also Conen & Schippers, 2019).

Miller's concept of a 'jurisprudence of consequences', which evaluates legal decisions in light of their societal impact, bears similarities to the broader movement of Empirical Legal Research in the Netherlands (Bijleveld et al., 2020). In the (critical) literature this type of evaluative research – often referred to as 'legal policy research' – has been criticised for primarily serving to legitimise governmental objectives (Bell, 2016; Sarat & Silbey, 1998). Miller, however, emphasises that a 'jurisprudence of consequences' is not solely forward-looking in that it evaluates the expected effects of the law; it also requires that judicial decisions align with existing legal principles. In a civil law context, we interpret this retrospective aspect as ensuring that legal consequences remain consistent with the fundamental principles underpinning the law.

In our impact assessment of the Deliveroo decision, this dual perspective – looking forward and looking backward – guides our evaluation. We assess whether the expected consequences of the ruling align with the societal goals reflected in labour law's internal values. This approach distinguishes empirical legal research from traditional policy evaluation, as it grounds the analysis in legal principles rather than external policy objectives (see further Eleveld, 2024).

This study proposes a two-step framework for interpreting a 'jurisprudence of consequences':

Step I – Empirical analysis: examining the actual or potential consequences of a legal decision (Section 2.1).

Step II – Normative assessment: evaluating these consequences against the societal goals reflected in the fundamental principles of labour law (Section 2.2).

2.1 *Step I: The Impact of the Deliveroo Decision on the Classification of Platform Workers in the Hospitality Sector*

Under Dutch law, workers are classified either as employees or as self-employed workers, with no intermediate category. In the Deliveroo decision the Dutch Supreme Court interpreted the definition of the employment contract stipulated in Article 7:610 of the Dutch Civil Code:

> An employment contract is an agreement whereby one party, the employee, commits to performing *work* for the benefit of another party, the employer, for a *certain period of time*, *under the authority of the employer*, and in exchange for *remuneration*. (italics are added by the authors)

This definition allows for interpretation, especially regarding whether a worker operates under an employer's authority. In the Deliveroo decision the Dutch Supreme Court, for the first time, formulated a (non-exhaustive) list of key considerations determining whether a work relationship qualifies as an employment contract while additionally emphasising that the final determination of the employment relation depends on all circumstances of the case.[3] The Court's key considerations are summarised in Table 1.

Table 1 Criteria from the Delivery Judgment

1. The nature and duration of the work;
2. The manner in which the work and working hours are determined;
3. The integration of the work and the person performing the work within the organisation and operations of the entity for which the work is performed;
4. The existence or absence of an obligation to perform the work personally;
5. The manner in which the contractual arrangement governing the relationship between the parties came into being;
6. The way the remuneration is determined and paid;
7. The amount of the remuneration;
8. The question of whether the person performing the work bears commercial risk in doing so;
9. Also relevant may be the question of whether the person performing the work behaves or can behave as an entrepreneur in the economic sphere, for example, in acquiring a reputation, engaging in acquisition, with regard to tax treatment, and considering the number of clients for whom they work or have worked and the duration for which they typically commit to a particular client;

3. Supreme Court 24 March 2024, ECLI:NL:HR:2023:443, para. 3.2.5.

10. The weight given to a contractual provision in determining whether an agreement qualifies as an employment contract also depends on the extent to which that provision has actual significance for the person performing the work.

For this research, we focus particularly on the considerations that define the concept of 'working under the authority of the employer'. Traditionally, a key indicator of authority has been the direct material supervision of the worker (e.g. consideration 2). However, as even genuinely self-employed workers may receive some instructions from clients, this factor alone has not been considered decisive in classifying employment relationships. In addition, the definition of 'working under the authority of the employer' needs further explanation in the context of platform work (Kocher, 2022). In recent years, organisational control and regulation has become more significant in assessing the degree of control exercised by the employer (Houweling, 2023). This criterion has been further elaborated in the Deliveroo decision in which the Court, following the Advocate-General's (A-G) recommendations, introduced two additional key considerations for assessing whether a worker is under the authority of an employer:

- Integration within the organisation (consideration 3): The extent to which the work and worker are embedded in the organisation's structure and operations. Greater integration suggests an employment relationship.
- Entrepreneurial behaviour (consideration 9): Whether the worker operates with business autonomy, also outside of the specific contractual relationship. This would indicate self-employment.

As these considerations play a central role in the A-G's advice on the Deliveroo decision – albeit phrased differently[4] (see also Houweling, 2023) – this study examines them using the more traditional approach of assessing whether a worker operates under the control of another person, specifically through direct material supervision (consideration 2).

2.2 *Step II: Evaluating the Deliveroo Decision against Societal Goals in Labour Law*

The Advocate-General's opinion on the Deliveroo decision,[5] as well as her opinion on the earlier *Amsterdam v. X* ruling,[6] emphasises several societal goals related to the correct classification of workers. These include maintaining legal institutions built around the employment contract, fostering social cohesion and solidarity among workers, ensuring adequate social security and employment protection for

4. A-G De Bock, 17 June 2022, ECLI:NL:PHR:2022:578.
5. Ibid.
6. A-G De Bock, 17 July 2020, ECLI:NL:PHR:2020:698.

all employees and promoting equal opportunities for secure employment.[7] These societal goals are reflected in the two core principles of labour law, as identified in theoretical labour law literature (Cabrelli & Zahn, 2018; Davidov, 2016; Zekic, 2019):

1. Protection of the dependent worker: safeguarding employees from the power imbalance inherent in employer-employee relationships.
2. Efficient labour market regulation: ensuring a stable, well-regulated labour market that supports economic productivity.

The relationship between societal goals and labour law principles can be explained as follows: protection under labour law safeguards dependent workers from unjust dismissal and grants them access to permanent employment contracts. Additionally, being covered by labour law ensures access to solidarity-based social security insurance. In both respects, the principle of protection of the dependent worker fosters the social goals of solidarity and social cohesion while preventing the emergence of a marginalised class of precarious workers. Furthermore, the social goal of securing legal institutions built around employment contracts contributes to the efficient regulation of the labour market – the second fundamental principle of labour law.

Both fundamental principles of labour law reinforce one another. Employment protection, including access to social security, enhances market stability, which is crucial for effective labour market regulation. At the same time, distinguishing between employees and self-employed workers remains justified, as entrepreneurial activity drives innovation and job creation (Verhulp, 2021). However, tensions arise when efficiency is prioritised over worker protection. This occurs when employers are allowed to hire unprotected, low-paid solo self-employed workers to respond efficiently to fluctuations in the market and reduce administrative burdens for businesses (Zekic, 2019).

In sum, this study applies a 'jurisprudence of consequences' approach to assess the impact of the Deliveroo decision on platform worker classification in the hospitality sector. By combining empirical research with normative evaluation, we aim to determine whether the ruling effectively advances the societal goals reflected in the fundamental principles of Dutch labour law.

3 Data and Methodology

The data for this research comprises semi-structured interviews with 30 solo self-employed platform workers in the hospitality sector, along with eight oral diaries maintained by eight of these workers who participated in follow-up interviews. Additionally, we organised a focus group with three solo self-employed platform

7. Ibid., paras. 3.16-3.19; A-G de Bock, 17 June 2022, ECLI:NL:PHR:2022:578, para. 8.20.

workers in the hospitality sector and conducted eight semi-structured interviews with managers in the hospitality sector.

The platform workers interviewed in our study were all recruited through the platform Temper. The interviews were carried out between September 2023 and August 2024. We recruited respondents by distributing flyers in bars, restaurants and hotels in the Amsterdam area, as well as by advertising through mailing lists of the Stichting Vrij Platform Werk. We also employed a snowball sampling method, allowing initial respondents to refer additional candidates.

Most of the solo self-employed workers interviewed were engaged through the platform Temper. Their roles varied widely, including those of bartender, kitchen chef, waitress, host, receptionist, barista, breakfast runner, catering staff and cleaning personnel. A minority had previously worked through Temper but were, at the time of the interviews, directly hired by their employers as self-employed workers. Almost all respondents were based in the Randstad region of the Netherlands. To focus on those primarily dependent on solo self-employment for their income, we excluded students from the sample. Ultimately, eighteen respondents were entirely dependent on this income, eight were partially dependent, and four considered it a significant supplementary income. In most cases, respondents worked for a minimum of 12 hours per week in the hospitality sector.

Our sample achieved a balanced gender distribution, comprising 50% male and 50% female respondents. In terms of age, we ensured an even representation between 21 and 65 years. Over half of the respondents were from the Netherlands, while the rest were migrant workers, over a quarter of whom were from non-EU countries and less than a quarter from EU countries.

All interviews were conducted in person at the Vrije Universiteit Amsterdam and lasted approximately 2 hours, for which each respondent received a gift voucher. Our interview guide covered five key themes: 1) motivations for working via platforms, 2) instructions on the work floor, 3) collaboration with colleagues, 4) labour conditions and 5) work-life balance.

In October 2024 the outcomes of the interviews were discussed and reflected on in a focus group consisting of three Temper workers we had previously interviewed.

In addition to the interviews, eight respondents maintained oral diaries for 6 to 12 weeks, providing one to three recordings of approximately 10 to 15 minutes each week. We chose to use oral diaries in conjunction with semi-structured interviews in view of several limitations of the latter method. While semi-structured interviews allow respondents to share their perspectives, they also enable the intentional construction of narratives. In the context of platform work, for example, interviewed workers often frame their experiences through the lens of entrepreneurship – a narrative actively promoted by the platforms themselves. This portrayal of workers as autonomous and enterprising does

not necessarily align with the reality of their situation, where their autonomy is severely constrained (Gregory, 2021; Rosenblat, 2018). Respondents may also unconsciously adapt their narratives to fit their restricted circumstances, a tendency noted in qualitative research on precarious workers (Léné, 2019).

Moreover, because semi-structured interviews rely on respondents' memories, valuable details about their daily interactions with employers, managers, clients or others in positions of power may be lost or distorted. In contrast, solicited oral diaries require workers to record their activities, experiences, thoughts, feelings and observations in a systematic and natural way over a defined period (Bartlett & Milligan, 2015).

The diaries maintained by the eight respondents addressed topics aligned with the themes discussed in the semi-structured interviews. Respondents recorded their diaries on returning home after their shifts, guided by brief written instructions. They subsequently uploaded their recordings to our project website. To encourage ongoing participation, fees for their recordings were issued in two instalments, with an initial trial diary discussed briefly over the phone with researchers. For those who maintained oral diaries, we conducted a second round of semi-structured interviews via Teams, each lasting 1 hour.

In addition to interviews with self-employed workers, we conducted interviews with eight managers in the hospitality sector in the Amsterdam area, lasting between 15 minutes and 1 hour. Seven of these in-depth conversations occurred on-site, one of which was conducted via Teams. During these discussions, managers elaborated on their motivations for using platforms, their past experiences – both positive and negative – with hiring platform workers, the instructions given to these workers, and the dynamics of labour relations between employees and platform workers. These interviews provided valuable contextual information for the research project.

All qualitative data was transcribed and coded using ATLAS.ti. We employed both deductive and inductive coding methods. Deductive codes were derived from the five core themes – motivations, instructions on the work floor, collaboration with colleagues, labour conditions and work-life balance – and thorough readings of all interviews. To enhance inter-rater reliability, we initially deductively coded two full interview transcripts, comparing and discussing our codes to clarify any discrepancies in their application to specific segments of the text. This coding process facilitated the construction of several themes relevant to our research question.

Ethical approval for the study was obtained from the ethics committee of the Law Faculty prior to commencing the research.

4 Possible Impact of the Deliveroo Decision

In this section, we examine the potential impact of the Deliveroo decision on the classification of the working relationship between Temper workers and the hotels, restaurants or catering services they serve (research question 1). Section 4.1 outlines the structure of self-employed hospitality work through Temper, drawing primarily on information available on the Temper website, which has been verified through the interviews. This section addresses six of the ten considerations outlined in Section 2. As mentioned in that section, three considerations (2, 3 and 9) will be examined in greater depth using interview data and oral diaries. Section 4.2 explores how solo self-employed platform workers in the hospitality sector receive instructions and how their working hours are determined (consideration 2). Section 4.3 analyses the extent to which these workers and their roles are embedded within the organisations they serve (consideration 3). Section 4.4 examines whether and to what extent these workers operate as entrepreneurs (consideration 9). Wherever relevant, these sections will also address additional considerations. Finally, Section 4.5 presents the conclusions from this initial step of our impact assessment.

4.1 Organisation of Temper Work

Temper workers can be employed as waiters, cooks and hosts in restaurants and hotels, as previously mentioned. Registered workers can apply for single gigs through the Temper platform but may continue working at the same establishment for several months. Temper workers are allowed to cancel a shift, but if they cancel it 24 hours before the start and cannot find a replacement, a fine of €100 will be imposed. Many hotels and restaurants maintain 'flexpools' of Temper workers whom they have had positive experiences with. Workers in these pools receive priority for shifts if they respond promptly on the platform. Companies can assign workers ratings, which are visible within the system. The remuneration for each gig is displayed on the Temper website and is paid either by the hotel/restaurant or by Temper itself. When Temper handles the payment, a 3% fee is deducted. The average pre-tax pay for hospitality workers is around €20 per hour, and specialised cooks earn more. If a hirer cancels a shift within 24 hours of its start, they must compensate the worker with 50% of the agreed payment. Temper is responsible for drafting the contract, including the 50% cancellation rule. This rule shifts part of the risk of lower-than-expected business onto the worker. Beyond this, however, Temper workers do not bear any commercial risk.[8]

8. The conditions for Temper workers and hirers are posted on the Temper website: https://go.temper.works/nl-nl/ons-verhaal.

4.2 *Work Instructions, the Determination of Working Hours and the Weight Given to the Contractual Arrangements*

Self-employed workers, unlike employees, do not formally work under the authority of an employer. However, the findings show no significant differences when it comes to following instructions and determining working hours.

First of all, similarly to employees at a hotel or restaurant, self-employed workers attend briefings that provide detailed guidance for the workday, perform tasks assigned by supervisors, and must seek permission to take breaks or leave early at the end of their shifts. As one hotel manager stated, "Temps are here to listen to us" (Hotel Manager 1).

In addition, nearly all interviewees – except for cooks – reported feeling they had little autonomy when working as part of a team. Even when they disagree with the instructions, most platform workers know that not following these directives is not an option. One respondent explained, "I do everything they ask me. I say 'okay' with a smile. Even if I don't like it, I do it. I get paid, finish, and go home" (Respondent 4). Another added, "You just have to do it. That's it" … "Anything they tell you to do, you just have to do it. And be fast" (Respondent 13). In high-end hotels, where Temper workers often handle simpler tasks during busy periods, the strictness of instructions and oversight leaves little room for individual initiative. Self-employed workers reported being publicly humiliated by hotel staff when they had failed to comply with instructions at prestigious hotels. Non-compliance can also negatively impact their ratings, which range from 0 to 5 stars. These ratings are crucial because access to shifts and income is often tied to maintaining high ratings. More than half of the respondents expressed dissatisfaction with this system, feeling that it gives employers excessive arbitrary power over them.

Some of the respondents also raised concerns about the consequences of not adhering to instructions on arrival times, dress codes, breaks and phone use. They could be sent home by strict hotel and restaurant managers, and there were fears of losing future shifts at specific locations, especially since some establishments reportedly keep 'blacklists'. Some respondents also shared experiences of large hotels cancelling shifts at the last minute without paying for the required portion of the shift, warning workers not to claim the money (50% of the remuneration) if they wanted to continue receiving future shifts. The lack of control is also evident in disputes over clock-out times or missed breaks. Many workers felt powerless in these situations and ultimately absorbed the financial loss, choosing not to claim the pay they believed they were owed.

The dependency of Temper workers on the hotels and restaurants they work for, combined with their limited ability to control working hours, is especially evident in the oral diaries. These diaries often describe days when self-employed workers, unlike employees, worked more hours than agreed. For example, for

one respondent, overwork was the rule rather than the exception. In about a quarter of his submissions, he mentioned doing extra work, often remarking, "This extra work is not in my task description, but I don't mind doing it when the employees don't want to" (Respondent 11). Four respondents maintaining oral diaries described working despite feeling unwell in order to ensure future shifts. The diaries, even more than the interviews, also revealed how the lack of control over tasks and working hours contributed to both physical and mental exhaustion.

In addition, while Temper workers are officially free to set their own working hours, the interview and diary data suggests their ability to do so is often constrained. For example, many platform workers expressed concerns about their financial stability, particularly in winter, when competition for shifts is intense. During this 'dead zone', only a limited number of shifts are available, often at rates just above the minimum wage. To increase their chances of securing work, some workers proactively reach out to hotels or restaurants through the platform, while others constantly monitor the app for newly available shifts. Some also apply for zero-hour or part-time positions as back-up options to ensure financial security. In sum, from the viewpoint of Consideration 2, our empirical data suggests that the work relation of Temper workers points to an employment relation, instead of self-employment.

In this context, recall that Temper workers are allowed to appoint a replacement to cover their shifts. While this contractual arrangement provides them with a degree of freedom not typically granted to employees, most respondents were not inclined to find substitutes, as securing enough shifts was already challenging. Additionally, they viewed the €100 fine for failing to arrange a replacement as excessively high, placing a significant financial strain on their monthly income.

Consideration 10 examines whether a contractual provision holds actual significance for the worker. This consideration is based on the idea that certain clauses may be included primarily to suggest that the contract does not constitute an employment agreement. The replacement clause appears to serve this purpose, as it did not provide Temper workers with genuine flexibility to cancel shifts at will. On the contrary, data from the oral diaries indicates that instead of feeling free, many workers felt compelled to work even when they were ill or facing personal emergencies.

4.3 Integration in the Organisation

Consideration 3 pertains to the integration of both the work and the worker within the organisation and operations of the entity for which the work is performed. While the Supreme Court does not provide a precise definition of this consideration, it generally refers to the extent to which the type of work is central to the organisation and whether employees also perform similar tasks.

The interviews and diaries revealed that the respondents' *work* is clearly embedded within the organisation (i.e. the hotel or restaurant). However, due to their (very) short-term contracts – often lasting only a single shift – Temper workers and other solo self-employed hospitality workers themselves are usually not well integrated in the organisation. This lack of embeddedness of the Temper worker is evident in several ways: they are often excluded from sharing in tips, denied fixed access passes, prohibited from performing tasks reserved for employed staff (e.g. cashiering, administrative duties or using walkie-talkies) and required to pay for their own meals while employees receive them for free. Temper workers are usually also not provided with company uniforms, which they must supply themselves. In addition, one manager noted that Temper workers received a smaller Christmas gift package than employees, even if they had been working at the hotel for a longer period. Not being formally integrated into the organisation also means that Temper workers typically have no formal recourse when facing workplace harassment from hotel or restaurant managers. One respondent stated:

"I cannot say anything because I don't work in the firm. I don't have the right to say anything about my managers. In the end, it's my problem" (Respondent 1).

Also from a social perspective, many Temper workers feel like outsiders. For example, several respondents expressed frustration in their diaries over managers not knowing their names – even after they had worked at the same location for an extended period – or managers completely ignoring them on the work floor and interacting exclusively with employees.

However, in cases where Temper workers or other solo self-employed workers consistently return to the same workplace over time, they may begin to feel more like part of a team. As one respondent noted in her diary about her so-called 'favourite employer': "I have been working at this location so often now that my colleagues consider me more like an employee than a Temper worker" (Respondent 28). Additionally, when self-employed workers stay longer at a specific workplace, they may be entrusted with greater responsibilities, such as organising the order of kitchen tasks, suggesting new menu items or mentoring less experienced self-employed colleagues. However, even then they are not personally embedded in the organisation as employees – except for being scheduled on the work roster alongside them.

4.4 Entrepreneurial Behaviour

'Entrepreneurial behaviour' is a newly introduced consideration in determining whether an employment relationship qualifies as an employment contract. This addition is particularly remarkable, as the concept of 'entrepreneurial behaviour' is not mentioned in the definition of an employment contract under Article 7:610 of the Civil Code. According to the wording of Consideration 9, the assessment focuses on whether workers present themselves as entrepreneurs in the broader

economic sphere. Notably, this consideration does not evaluate whether a worker acts as an entrepreneur within a specific legal relationship – such as their engagement with platform Temper or with the restaurant/hotel they work for through Temper.

Our findings present a mixed picture regarding Consideration 9. Some respondents own a registered business and use Temper as a supplementary source of self-employed income, primarily to meet the requirements for special tax deductions available to self-employed workers. Although these entrepreneurial activities are unrelated to the hospitality sector, Temper workers engaged in entrepreneurial behaviour beyond their work with Temper would be likely to meet the criteria outlined in consideration 9. In addition, some of the respondents who do not engage in self-employed activities outside of their work via Temper described themselves as entrepreneurs in interviews – referring to themselves as 'their own boss' or as 'risk-takers' – and demonstrated entrepreneurial behaviour in their interactions with hotels and restaurants. For example, they sometimes negotiate their hourly rates and contribute to menu development. By contrast, other Temper workers are primarily drawn to platform work because of the relatively high earnings they could achieve as self-employed individuals in the hospitality sector. These financial benefits are largely due to minimal or non-existent tax obligations and the absence of mandatory social security contributions. This latter group of respondents actually prefer financial stability and secure employment over uncertain entrepreneurship. As a result, they show entrepreneurial behaviour neither within their Temper work relationship nor outside of it.

4.5 Conclusion

Based on our findings discussed in the previous subsections, we conclude that applying the considerations from the Deliveroo judgment to Temper workers does not provide a definitive answer regarding their employment status. First, in examining the overall organisation of the work in Section 4.1, we found mixed indicators. While the manner in which the contractual arrangement is established and the remuneration is determined suggests an employment relationship (consideration 5, how the contract came into being; and consideration 6, determination of the remuneration), other characteristics are less conclusive. For instance, the short duration of gigs (consideration 1, nature and duration of the work), the sharing of risks (i.e. the 50% rule) in the absence of sufficient work (consideration 8, commercial risk), and the lack of an obligation to perform the work personally (consideration 4, obligation to perform the work personally) suggest that the relationship does not necessarily constitute an employment contract. Furthermore, workers can choose to 'hire' others to take over their shifts, effectively using this flexibility as a business model.

In Sections 4.2, 4.3 and 4.4, we examined the potential impact of key considerations based on our empirical research. Our findings in Section 4.2 indicate that most Temper workers, much like employees, operate under the authority of another party (the employer). They are expected to follow the employer's instructions regarding both the tasks they perform and their working hours. In some cases, employers appeared to exert even greater control over Temper workers than over employees, as Temper workers often felt pressured to secure sufficient shifts (consideration 2, determination of the work and working hours). Additionally, we argued that the contractual clause allowing Temper workers to appoint a substitute (consideration 4) has little practical significance (consideration 10, actual significance of the provision for the worker), as they are generally seeking more rather than fewer shifts. Taken together, the findings in Section 4.1 strongly indicate an employment relationship.

On the other hand, Section 4.3 highlighted that Temper workers are not embedded within the organisations they work for (consideration 3, integration of the work and the worker in the organisation), unlike traditional employees, suggesting a degree of self-employment. Moreover, as noted in Section 4.4, Temper workers form a diverse group: some exhibit entrepreneurial behaviour by negotiating their pay (consideration 7, amount of remuneration) or actively developing independent businesses outside of their Temper work (consideration 9, behaviour as an entrepreneur), while others do not engage in any entrepreneurial activities.

Overall, our findings suggest that while some self-employed Temper workers could be classified as employees, others – despite working under the hirer's authority – might still be considered self-employed. However, since the Deliveroo judgment does not provide clear guidance on how these considerations should be weighed, the exact classification will ultimately depend on the specific circumstances of each case.

5 Societal Goals and Legal Principles

The second step in our 'jurisprudence of consequences' involves assessing the judgment against the societal goals reflected in the two fundamental labour law principles described in Section 2 – the regulation of efficient labour markets and its role in protecting workers from power imbalances in the employer-employee relationship.

First and foremost, the ongoing uncertainty surrounding the classification of Temper workers weakens the regulatory framework of labour law, as the rights and obligations of a growing number of workers and their hirers remain unclear. As long as this ambiguity persists, labour law fails to fulfil its regulatory function for an increasing segment of the workforce, many of whom continue to be misclassified as self-employed. Ultimately, this misclassification threatens to erode

the institutions built around employment contracts, such as collective bargaining and collective social security. Moreover, it risks triggering a race to the bottom in employment conditions, as employees are forced to compete with (bogus) self-employed workers who perform the same tasks but without the protections of social security contributions or job security, exerting additional pressure on labour standards.

In addition, the ongoing misclassification of dependent workers as self-employed not only weakens their legal standing but also undermines another core principle of labour law: the protection of dependent workers. As noted in Section 2, the regulation of efficient labour markets can sometimes conflict with the need to safeguard worker rights. This tension is particularly evident in the rise of platform-based work and the related increasing flexibilisation of the labour market. While laws permitting businesses to engage flexible self-employed workers may contribute to the efficient functioning of labour markets, this efficiency must not come at the expense of worker protection. However, the current situation suggests that the misclassification of dependent workers as self-employed is widening the gap between those protected by employment law and those who, despite being equally dependent on their hirers, remain unprotected.

Moreover, as suggested in the previous section, misclassified workers often become even more dependent on their hirers than regular employees. For instance, Temper workers may feel pressured to work additional hours to secure future job opportunities. They may also hesitate to claim their right to 50% compensation when a hirer cancels a shift within 24 hours or choose to continue working despite illness, fearing they will not be rehired. Leaving these workers at the mercy of market forces – despite their clear need for protection against the inherent power imbalance in the employer-employee relationship – risks severe social consequences, including the emergence of a marginalised underclass reminiscent of the impoverished day labourers of 19th century Europe. At this point it should be noted that alternative legal solutions are available which are more in line with both fundamental labour law principles. For example, Platform James Horeca, which operates similarly to Platform Temper, offers a temporary agency contract to workers registered on the James Horeca platform.[9]

In conclusion, the findings suggest that the Deliveroo decision contributes insufficiently to societal goals, such as fostering social cohesion and solidarity among workers, ensuring adequate social security and employment protection for all employees, promoting equal opportunities for secure employment and safeguarding legal institutions built around employment contracts, all of which are reflected in the two fundamental labour law principles.

9. See: https://www.jameshoreca.com

6 Discussion and Conclusion

In our view, a 'jurisprudence of consequences' should assess the potential impact of a judgment on specific groups, considering the legal principles and values it upholds. With this in mind, we explored whether and to what extent the Deliveroo decision clarifies the classification of platform workers, such as those employed by Temper. To achieve this, we used both oral diaries and qualitative interviews as methods of 'a jurisprudence of consequences impact assessment'. The oral diaries proved particularly useful in shedding light on the dependence of Temper workers on the hotels and restaurants they serve, highlighting issues such as stress, lack of control over working hours, and limited autonomy.

We subsequently evaluated the findings against two core labour law principles: the regulation of efficient labour markets and the protection of dependent employees. Our analysis concluded that the Deliveroo decision offers insufficient clarity regarding the employment status of Temper workers, ultimately failing to adequately uphold important societal goals, which are reflected in the two fundamental labour law principles.

A potential counter-argument to our position is that workers choose to work as self-employed through platforms like Temper due to higher remuneration. However, we rebut this argument by pointing out that the higher earnings stem from the fact that these workers do not contribute to social security and often benefit from tax deductions intended for genuinely self-employed individuals. As a result, society bears the costs of these employment arrangements, as these workers may still rely on publicly funded social assistance. Additionally, as previously discussed, this trend threatens the sustainability of collective insurance systems.

The preference for self-employment in the hospitality sector also creates a seemingly inescapable dilemma: while workers opt for self-employment to secure sufficient income, achieving better wages and conditions would require collective action as employees. The most effective way to resolve this tension is by establishing clearer criteria for determining employment status, such as the legislative proposal we will discuss shortly.

First, it should be noted that the classification issue extends beyond Temper workers and is crucial for addressing bogus self-employment across various sectors, particularly in an economy where an increasing number of workers operate as solo self-employed individuals. In this regard, the advice of the Advocate General in the Deliveroo provides greater clarity compared to the Supreme Court's ruling. First, the A-G argued that while the embeddedness of the *work* within an organisation is indicative of an employment relationship, the embeddedness of the *worker* is irrelevant. Our findings suggest that had the Supreme Court adopted this reasoning, it would have been relatively easy to establish that the *work* carried out by Temper workers is embedded in

the organisation. Second, the A-G focused on the worker's behaviour within the contractual relationship (e.g. with the Deliveroo platform) to determine employment status,[10] which aligns with the reasoning of the Court of Justice in the FNV Kiem case.[11] In the Deliveroo judgment, the Supreme Court, by contrast, also considers entrepreneurial activities outside the specific contractual relationship. Our research indicates that limiting the assessment of entrepreneurship along the lines proposed by the A-G would considerably simplify the classification process. For example, in such a scenario, a worker's ownership of a separate business would be irrelevant in assessing their employment status with Temper.

Interestingly, a legislative proposal published on 4 July 2024[12] – aimed at clarifying the assessment of employment relationships and introducing a legal presumption – partly aligns with the Advocate General's (A-G's) advice. Based on our findings, we believe that implementing this proposal would offer much needed clarity in determining the nature of employment relationships. Like the A-G's opinion, the proposal emphasises the embedment of the *work* (rather than the *worker*) within the organisation as a key indicator of an employment relationship. This is considered alongside other factors, such as the employer's authority to issue instructions, the degree of control exercised over the worker, and the structural integration of the work into the organisation. Under the proposal, a worker will be classified as an employee if the work is embedded within the organisation, has a structural character, is subject to organisational control and is performed alongside employees. However, if there are stronger indicators of genuine self-employment – such as the worker presenting themselves as self-employed in a manner recognisable to third parties – then the worker must be classified as self-employed. The proposal further clarifies that entrepreneurial activity outside the specific work context is relevant only when it involves similar work. Overall, the various indicators used to assess the nature of the contractual relationship are explained in greater detail.

Applied to our research, we believe that our respondents would overwhelmingly be classified as employees under this proposal. Their work is embedded in the organisation, they are subject to organisational control, there is little evidence that they present themselves as self-employed to third parties, and the entrepreneurial activities are not related to the hospitality sector. Moreover, under the proposed framework, a worker earning less than €33 per hour would be presumed to be an employee – a threshold that most Temper workers do not meet.

In this context, it is noteworthy that the Council of State, in its advice on the legislative proposal, questioned the necessity of new legislation, arguing

10. A-G De Bock, 17 June 2022, ECLI:NL:2022:578, paras. 8.1-8.25. See, particularly, para. 8.13.
11. CJEU, 4 December 2014, C-413/13 (*FNV Kiem*), ECLI:EU:C:2014:2411.
12. Wet VBAR (Wet Verduidelijking Beoordeling Arbeidsrelaties en Rechtsvermoeden (Documenten bij Wijz Boek 7 BW ivm maatregelen verduidelijken onderscheid werknemers en zzp'ers en rechtsvermoeden | Overheid.nl | Wetgevingskalender).

that it merely codifies existing Supreme Court case law and that all relevant circumstances should ultimately be considered.[13] Instead, the Council suggested expanding social security coverage to include self-employed workers and reducing tax advantages for the self-employed. While we agree with the latter recommendation (also see Barrio, 2024; Becker et al., 2024), our case study clearly demonstrates the advantages of the proposed legislation. Under this law, nearly all Temper workers in the hospitality sector would be classified as employees, whereas under the Deliveroo decision, their employment status remains ambiguous.

In conclusion, our research demonstrates that a 'jurisprudence of consequences' incorporating qualitative empirical research can play an important role in improving the law. While our *ex-post* impact assessment of the Dutch Supreme Court's decision comes 'too little, too late', we hope it will still offer valuable insights for the legislative process surrounding the Law on clarification of the assessment of employment relationships and legal presumption. More broadly, this study underscores the significance of a 'jurisprudence of consequences' that explicitly integrates the fundamental values and principles of the law, particularly in legal decisions with far-reaching implications beyond the specific case before the court.

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13. Council of State, Advice legislative proposal on the clarification of the assessment of employment relationships and legal presumption, W12.24.00156/III, https://www.raadvanstate.nl/adviezen/@144529/w12-24-00156-iii.

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