# WHICH ARE THE KEY INDICATORS FOR THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP? – A DETAILED ANALYSIS OF CASE LAW IN THE REPUBLIC OF SLOVENIA

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*The key research objective of this paper is to analyse and compare the relevance of various indicators of the existence of an employment relationship through a detailed analysis of Slovenian case law. We have analysed accessible Slovenian courts' decisions relating to the (non-)existence of an employment relationship under Article 4 of the Employment Relationship Act (ZDR-1). We conclude,* inter alia*, that of all the analysed indicators, the question of the worker's autonomy in organising working time is of paramount importance in determining the existence of an employment relationship. In contrast, indicators that point to the existence of business integration or economic dependence of a worker carry no relevant weight when determining the existence of an employment relationship.*

*Key words: existence of an employment relationship; personal dependence; economic dependence; integration of the worker; direction and control; case law; Slovenia*

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## 1. INTRODUCTION

An important issue in labour law doctrine concerns the distinction between employed and self-employed persons.[1] This issue is becoming increasingly complex, as persons performing work (*e.g.* platform workers) often have both indicators indicating autonomy and independence (on the one hand) and indicators indicating dependence and subordination (on the other hand). There

[1] The topic is particularly important in the light of the emergence of platform work. On the issue of determining the employment status of platform workers, see, *inter alia*, Todolí-Signes, A., *The End of the Subordinate Worker? The On-Demand Economy, the Gig Economy, and the Need for Protection for Crowdworkers*, International Journal of Comparative Labour Law and Industrial Relations, *vol.* 33, no. 2, 2017, pp. 241 – 268; Fusco, F., *Rethinking the Allocation Criteria of the Labour Law Rights and Protections: A Risk-Based Approach,* European Labour Law Journal, *vol.* 11, no. 2, 2020, pp. 131 – 141; Prassl, J., *Humans As a Service: The Promise and Perils of Work in the Gig Economy*, Oxford University Press, Oxford, 2018; Hendrickx, F., *Regulating New Ways of Working: From the New 'Wow' to the New 'How'*, European Labour Law Journal, *vol.* 9, no. 2, 2018, pp. 195 – 205; Ales, E., *Subordination at Risk (of Autonomisation): Evidences and Solutions from Three European Countries*, Italian Labour Law e-Journal, *vol.* 12, no. 1, 2019, pp. 65 – 70; Davidov, G., *The Status of Uber Drivers: A Purposive Approach*, Spanish Labour Law and Employment Relations Journal, *vol.* 6, no. 1-2, 2022, pp. 6 – 15; Aloisi, A., *Platform work in Europe: Lessons learned, legal developments and challenges ahead*, *vol.* 13, no. 1, 2022, pp. 4 – 29; Bjelinski Radić, I., *Critical Reflections on the European Commission's Proposal for a Directive on Improving Working Conditions in Platform Work*, Zbornik Pravnog fakulteta u Zagrebu, *vol.* 72, no. 6, 2022, pp. 1467 – 1491; Fita Ortega, F., *The 'App-Based'' Employment Relationship: The Spanish Case*, in: Carinci, M. T. *et al*. (eds.) *Platform Work in Europe: Towards Harmonisation?*, Intersentia, Cambridge, 2021, pp. 97 – 126; Gruber-Risak, M., *Classification of Platform Workers: A Scholarly Perspective*, in: Gyulavári, T.; Menegatti, E. (eds.), *Decent Work in the Digital age: European and Comparative Perspectives*, Hart Publishing, Oxford, 2022, pp. 85 – 104; Davidov G.; Alon-Shenker P., *The ABC Test: A New Model for Employment Status Determination?*, Industrial Law Journal, *vol.* 51, no. 2, 2022, pp. 235 – 276; Katsabian, T.; Davidov, G., *Flexibility, choice, and labour law: the challenge of on-demand platforms*, University of Toronto Law Journal, *vol.* 73, no. 3, 2023, pp. 348 – 379; Prugberger, T.; Solymosi-Szekeres, B., *Legal Doctrinal and Sectoral Problems of Digital Platform Contracts in the European Union Resulting in Conflicts Between Workers and Platforms*, Merits, *vol.* 5, no. 3, 2025; Menegatti, E., *The Classification of Platform Workers through the Lens of Judiciaries: A Comparative Analysis*, in: Gyulavári, T.; Menegatti, E. (eds.), *Decent Work in the Digital age: European and Comparative Perspectives*, Hart Publishing, Oxford, 2022, pp. 105 – 126; De Stefano, V. *et al*., *Platform work and the employment relationship,* ILO Working Paper no. 27, 2021; De Stefano, V., *The rise of the "just-in-time workforce": on-demand work, crowdwork and labour protection in the "gig-economy"*, International Labour Office Conditions of Work and Employment Series No. 71, 2016.

is no single definition of the employment relationship at global level. The ILO has only adopted the Employment Relationship Recommendation No. 198 (2006) (hereinafter: ILO Recommendation 198)[2], which only provides guidance to countries on definitions and indicators of the existence of the employment relationship.[3]

In Slovenia, the elements[4] of the employment relationship are already set out in law. Article 4 of the Labour Relations Act (*Zakon o delovnih razmerjih* – hereinafter referred to as ZDR-1[5]) defines an employment relationship as a relationship between a worker and an employer in which the worker voluntarily engages in an organised work process of the employer and, in return for remuneration, personally and continuously performs work under the instructions and supervision of the employer. According to the legal doctrine, this means that the essential distinction between an employment relationship and self-employment (civil law relationships, the object of which is personal work) is subordination or personal dependence of the worker. The legal doctrine also points out that if the performance of work fulfils the elements of an employment relationship, that work may not be performed on the basis of civil law contracts. These persons are recognised as workers and thus have all the rights arising from the employment relationship (see Articles 13 and 18 ZDR-1).[6] Also, the Slovenian

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2 International Labour Organisation, Employment Relationship Recommendation No. 198 (2006).

3 See Senčur Peček, D., *Koga naj varuje delovna zakonodaja*, Podjetje in delo, *vol.* 37, no. 6-7, 2011, pp. 1162 – 1173. See in particular point 13 of ILO Recommendation 198, which states that Members should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship. The Recommendation goes on to list a number of possible indicators.

4 The legal term under the Slovenian Labour Relations Act is "elements" of an employment relationship (slo. *elementi delovnega razmerja*). The decision whether the elements in question are present is influenced by various concrete indicators that are present or not in each specific case. For example, an indicator pointing to the existence of the element "work under the direction and supervision of the employer" is the obligation to perform work at the time specified by the employer.

5 Zakon o delovnih razmerjih (ZDR-1) [Labour Relations Act], Uradni list Republike Slovenije [Official Gazette], no. 21/13, 78/13 - corrected, 47/15 - ZZSDT, 33/16 - PZ-F, 52/16, 15/17 - Decree of the US, 22/19 - ZPosS, 81/19, 203/20 - ZIUPOPDVE, 119/21 - ZČmIS-A, 202/21 - Decree of the US, 15/22, 54/22 - ZUPŠ-1, 114/23, 136/23 – ZIUZDS, and 70/25 – ZUTD-I.

6 Kresal, B.; Senčur Peček, D., *Definicija delovnega razmerja* (4. člen), in: Belopavlovič, N. *et al*. (eds.), *Zakon o delovnih razmerjih (ZDR-1): s komentarjem, 2. posodobljena in dopolnjena izdaja*, Lexpera GV Založba, Ljubljana, 2019, p. 35. See also Končar, P.,

legal doctrine has already addressed in a number of contributions the question of to whom and to what extent to grant labour law protection.[7]

However, none of the works to date discusses in detail the case law of Slovenian courts, which in concrete cases assess whether the elements of an employment relationship are fulfilled through the existence of various indicators. In practice, it is the content of these indicators that is of key importance, as the content of the elements of the employment relationship itself is not specified in detail at the statutory level (with the exception of the aforementioned definition under Article 4 of the ZDR-1). As a result, the courts play a key role in formulating the substantive standards for establishing the existence of an employment relationship.

The key research objective of this paper is to analyse and compare the relevance of various indicators of the existence of an employment relationship – for the final determination of the existence of an employment relationship in a particular court case – through a detailed analysis of Slovenian case law. It is to be expected that certain specific indicators carry more weight, while certain indicators carry less weight for the final determination of the existence of an employment relationship. The detailed analysis in the present paper is therefore of exceptional importance for the analysis of the development of the Slovenian legal order in this area.

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*The Concept of 'Employee': The Position in Slovenia*, in: Waas B.; van Voss, G. H. (eds.), *Restatement of Labour Law in Europe: Volume I. The Concept of Employee*, Hart Publishing, Oxford, 2017, pp. 641 – 656; Tičar, L., *Primerno in učinkovito delovnopravno varstvo: izziv za sedanjost in prihodnost*, Litteralis, Ljubljana, 2020, pp. 113 – 116. The latter also points out that Slovenia maintains the traditional definition of an employment relationship based on the existence of a personal dependence of the worker (see Tičar, L., *Ekonomsko odvisne osebe*, in: Kresal Šoltes, K. *et al.* (eds.), *Prekarno Delo: Multidisciplinarna Analiza*, Pravna fakulteta, Ekonomska fakulteta, Ljubljana, 2020, pp. 69 – 70). For more on the issue of disguised employment relationships in the Slovenian legal framework, see also Senčur Peček, D.; Franca, V., *From student work to false self-employment: how to combat precarious work in Slovenia?*, in: Kenner, J.; Florczak, I.; Otto, M. (eds.), *Precarious Work: The Challenge for Labour Law in Europe*, Edward Elgar Publishing, Northampton, 2019, pp. 114 – 132.

7 See, *inter alia*, Tičar, *op. cit.* (fn. 6); Senčur Peček, *op. cit.* (fn. 6); Tičar, L., T*he ILO Concept of Economic Dependence in Slovenian Labour Law*, Zbornik Pravnog fakulteta u Zagrebu, *vol.* 70, no. 4, 2020, pp. 513 – 537; Senčur Peček, D., *Navidezni samozaposleni in prikrita delovna razmerja*, in: Kresal Šoltes, K. *et al.* (eds.), *Prekarno Delo: Multidisciplinarna Analiza*, Pravna fakulteta, Ekonomska fakulteta, Ljubljana, 2020, pp. 45 – 66; and Senčur Peček, D., *Samozaposleni, ekonomsko odvisne osebe in obstoj delovnega razmerja*, Delavci in delodajalci, *vol.* 14, no. 2-3, 2014, pp. 201 – 220.

Nonetheless, the implications of the scientific findings are also of wider importance, as foreign national courts are also confronted with the question of the assessment of the existence of an employment relationship. The present paper may consequently serve as an in-depth comparative law example which will also be helpful to foreign national courts in their decision-making.

The paper will be divided into several chapters. Chapter 2 will explain in more detail the methodological background of the research. Chapter 3 (which will be divided into sub-chapters) will present the results of the analysis of Slovenian case law. The latter will be categorised into individual sections or different indicators of the existence of an employment relationship (as will be explained in the methodological background). In doing so, we will also provide an outgoing analysis on the relevance of a particular indicator for establishing the existence of an employment relationship. The final chapter 4 will summarise the key findings and discuss the results.

## 2. METHODOLOGICAL STARTING POINTS FOR THE ANALYSIS OF INDICATORS FOR ESTABLISHING THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP ACCORDING TO SLOVENIAN CASE LAW

In the context of the Slovenian legal system, a number of court decisions have been adopted concerning the determination of the existence of an employment relationship under the Labour Relations Act (ZDR-1).[8] In terms of content, the case law relates to two groups of cases. The first group concerns self-employed persons (*e.g.* journalists, drivers, waiters, *etc.*) who have performed work on the basis of civil and commercial law contracts (*e.g.* contract for service, business cooperation agreements, *etc.*) and have sought judicial protection to establish the existence of an employment relationship. The second group refers to persons who have carried out work in the context of a special form of work "occasional and temporary student work" (so-called "student work") and have sought judicial protection to establish the existence of an employment relationship. The case law from both the above mentioned groups is relevant for our study, as in all cases the courts were faced with the fundamental question – whether in a given case all the elements of an employment relationship under Article 4 of the ZDR-1 are fulfilled and, as a consequence, the work should be performed in an employment relationship

[8] The renewed Labour Relations Act (ZDR-1) was adopted and came into force in year 2013.

based on an employment contract (consideration of the different indicators for establishing the existence of an employment relationship).

Nevertheless, it is worth noting that, contrary to some comparative law regimes, Slovenian courts have not yet dealt with cases establishing the existence of an employment relationship in the field of platform work. Therefore, the Slovenian case law on platform work cannot be included in the study.

In total, we have analysed the court decisions issued and published until 1st September 2025 relating to the determination of the existence of an employment relationship under Article 4 of the ZDR-1.[9] We considered court decisions publicly available on the official portal of Slovenian case law, which is maintained by the Supreme Court of the Republic of Slovenia.[10] In doing so, we considered all accessible decisions in which the existence of an employment relationship was established, as well as all accessible decisions in which the existence of an employment relationship was not established. Of these, we considered cases of the Supreme Court of the Republic of Slovenia (*Vrhovno sodišče Republike Slovenije* – hereinafter Supreme Court), cases of the Higher Labour and Social Court (*Višje delovno in socialno sodišče* – hereinafter Higher Court) and cases of the Administrative Court of Republic of Slovenia (*Upravno sodišče Republike Slovenije* – hereinafter Administrative Court). The jurisdiction of the Administrative Court is relevant in practice in cases where an action is brought against an administrative act of the Labour Inspectorate of the Republic of Slovenia. The latter has competence to identify covert employment relationships (bogus self-employment) and to order to perform work on the basis of an employment contract.[11]

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[9] This means that we took into account court cases in which the newly adopted ZDR-1 (in force from 12 April 2013) was applied (in light of the aim to maintain a controllable/reasonable number of researched and examined court decisions).

[10] See Supreme Court of the Republic of Slovenia, portal "Sodna praksa". It is worth pointing out that the portal does not contain the judicial decisions of the first instance labour courts. The Slovenian court system is organised in such a way that the Labour Court decides at first instance (there are a total of four courts at first instance which resolve labour disputes according to their territorial jurisdiction). At 2nd instance, the Higher Labour and Social Court, based in Ljubljana, decides on the appeal. In the case of a permitted extraordinary appeal, the Supreme Court of the Republic of Slovenia decides at 3rd instance. See the Zakon o delovnih in socialnih sodiščih (ZDSS-1) [Labour and Social Courts Act], Uradni list Republike Slovenije [Official Gazette], no. 2/04, 45/08 - ZArbit, 45/08 - ZPP-D, 47/10 - US Decree, 43/12 - US Decree, 10/17 - ZPP-E and 196/21 - ZDOsk.

[11] See article 19 of Zakon o inšpekciji dela (ZID-1) [Labour Inspection Act], Uradni list Republike Slovenije [Official Gazette], no. 19/14, 55/17.

Based on an analysis of all the court decisions, we have drawn conclusions according to the following categories and parameters. In doing so, we have taken into account the elements of the employment relationship under the ZDR-1, as well as other indicators on the existence of an employment relationship according to ILO Recommendation No 198.

We have organised the subsections according to the following elements and indicators of the existence of an employment relationship:

- Work under the direction and supervision of the employer (an element of the employment relationship under ZDR-1). In this context, we further consider the relevance of the indicators:
  - o an obligation to work at certain times;
  - o nature of the work;
  - o the intensity of the instructions in relation to the work to be done.
- Integration into the employer's organised work process (element of the employment relationship under ZDR-1).
- Continuity of work (element of the employment relationship under ZDR-1).
- Personal performance of work (an element of the employment relationship under ZDR-1).
- Performing work for remuneration (an element of the employment relationship under ZDR-1).
- The remaining relevant indicators according to ILO Recommendation 198, which are not already explicitly covered by the other elements of the employment relationship under Article 4 of ZDR-1:
  - o the worker is performing the work exclusively or primarily for (the interests of) another;
  - o the contracting authority provides the means of work (tools, materials, machinery, *etc.*);
  - o remuneration for work is the worker's main/only source of income;
  - o recognition of benefits (such as weekly rest entitlements, annual leave, payment of travel costs to and from work);
  - o no financial risk on the part of the worker.

## 3. RESULTS OF THE ANALYSIS OF SLOVENIAN CASE LAW

As a preliminary point, it should be pointed out that the case-law has established the principle of the primacy of facts as regards the determination of the existence of the elements of an employment relationship, since what is essential

is "the actual content of the legal relationship between the parties and not the formal or written agreement by which the parties have called their relationship. It is therefore the substance of the actual relationship, and not merely the formal relationship, which is decisive."[12]

### 3.1. Work under the direction and supervision of the employer

The subject-matter element of the employment relationship has the greatest weight in Slovenian case law. In the remainder of this subsection, the analysis will be systematised according to the individual indicators relevant for establishing the existence of work under the direction and control of the employer.

The fundamental standard set in case law is the concept of "employer's power of direction". In more recent court decisions, the most frequently cited case is the Supreme Court Judgment VIII Ips 236/2016 (no finding of the existence of an employment relationship), in which the court stated that "it is particularly important to emphasise the element of the continuous performance of work under the direction and control of the employer (the so-called power of direction of the employer), since the employment relationship differs from other legal relationships primarily in the degree of personal dependence by which a person is obliged to perform a particular work. The employer's power of direction may relate to the content, performance, time, duration and place of the work."[13] The above constitutes a key distinguishing point in establishing the existence of an employment relationship under Slovenian case-law.[14] For example, in Higher Court Judgment Pdp 178/2022 the court stated that, in particular, the absence of the defendant's instructions and supervision and the plaintiff's free

[12] Administrative Court Judgment I U 68/2017-14, at 17. See also Administrative Court Judgment VIII Ips 77/2018, at 11 and 20; Administrative Court Judgment and Decision VIII Ips 171/2018, at 22; Administrative Court Judgment I U 923/2015, at 14 and 15; Administrative Court Judgment Pdp 673/2017, at 36; and Administrative Court Judgment I U 1883/2015, at 15.

[13] Supreme Court Judgment VIII Ips 236/2016, point 11.

[14] The above-mentioned Supreme Court Judgment VIII Ips 236/2016 (with the concept of the employer's power of direction at issue) is explicitly cited in a number of subsequent court decisions, including: Higher Court Judgment Pdp 178/2022, point 12; Higher Court Judgment Pdp 803/2019, point 12; Higher Court Judgment Pdp 829/2017, point 8; Higher Court Judgment Pdp 536/2021, point 14; and Higher Court Judgment Pdp 336/2018, point 10. The cases concern both the determination of the existence of an employment relationship in the context of student work and the independent work of self-employed persons.

allocation of working time confirm the correctness of the conclusion that the defendant did not exercise over him, during the period under indictment, the employer's power of direction, which is an important distinguishing element of the employment relationship from other forms of work.[15]

### *3.1.1. Obligation to work at a fixed/specific time*

The question of the worker's autonomy in organising working time (or the obligation to work at certain times) is of paramount importance in assessing whether the elements of an employment relationship or of the employer's power of direction (the element of work under the direction and control of the employer) are fulfilled. The above is also key to assessing whether a person is performing work under a sufficient degree of personal dependence.

In all the analysed cases, in which the existence of an employment relationship was not established[16], the freer use of working time (indicating a lower degree of personal dependence of the worker on the employer) played an essential role in justifying the decision for not establishing an employment relationship. For example, the reasoning of the courts shows that workers were free to set their own working hours; free to determine when to work (to schedule and design their working time); not subject to the same dependence on the setting (and recording) of working time as other workers; able to influence their work schedule without the employer's consent; they did not come to work at fixed, pre-determined hours; work was not carried out on a daily basis, but depended on customer demand; they were free to set their own days off work (they did not have to declare annual leave); they did not have to report (sick leave) absences; *etc.*[17]

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[15] Higher Court Judgment Pdp 178/2022, point 12.

[16] With the exception of Higher Court Judgment Pdp 463/2017, points 12 and 13 (franchising model), where the grounding argument for the judgment was not the free disposal of working time (working time was linked to the working hours of the shop), but the employment relationship was not established because the work was not performed personally and for remuneration within the meaning of the elements under ZDR-1 – the entrepreneur also employed other workers.

[17] See Higher Court Judgment Pdp 829/2017, point 8; Higher Court Judgment Pdp 506/2019, point 7; Higher Court Judgment Pdp 65/2021, point 13; Higher Court Judgment Pdp 272/2016, point 11; Higher Court Judgment Pdp 252/2019, point 12; Higher Court Judgment Pdp 214/2017, point 12; Higher Court Judgment Pdp 697/2016, point 9; Higher Court Judgment Pdp 282/2020, point 8; Higher Court Judgment Pdp 126/2018, point 10; Higher Court Judgment and Decision Pdp

Nevertheless, the courts rarely deal with the question of whether the worker's greater freedom to organise working time (as manifested, *inter alia*, through the facts listed above) was in fact "genuine" (and even when this question is addressed, there is no more precise assessment present).[18]

Similarly, in the vast majority of decisions finding the existence of an employment relationship, the key facts are that: the employer ordered the work; the worker did not decide when to work; the worker had to adhere to the work schedule set by the employer (annual timetable, daily timetable; absences (sickness, annual leave, *etc.*) had to be announced in advance; the use of annual leave had to be agreed with the employer (no free choice of days off); the obligation to record attendance at work (as for other regular workers).[19]

However, the courts have found the existence of an employment relationship in certain cases, even where the working time arrangements were more flexible. For example, in Higher Court Judgment and Decision Pdp 860/2014, the court took into account the nature of the work of a creative director or copywriter – and consequently rejected objections that the worker did not work every day in the office, *etc.*[20] Moreover, in Higher Court Judgment and Decision Pdp 74/2022, the court took into account that the flexibility of the schedule is a consequence of the adaptation to the worker's family life. As the court pointed out, "it was essential for the existence of the employment relationship that, despite such a schedule, the applicant worked continuously and that his working hours were comparable on a weekly basis to those of a full-time regular worker".[21] Similarly, in Higher Court Judgment Pdp 468/2018 and Supreme Court Judgment and Decision VIII Ips 212/2016, it was not essential that the worker could leave

452/2021, point 11; Higher Court Judgment Pdp 178/2022, point 12; Supreme Court Judgment VIII Ips 236/2016, point 13; Higher Court Judgment Pdp 336/2018, point 10; Higher Court Judgment Pdp 536/2021, point 11.

18 This is mentioned, for example, in the Higher Court Judgment Pdp 697/2016, as each of the pharmacy promoters could have rejected the work schedule prepared by the employer without any consequences (in this case, he was replaced by another promoter) (point. 7). However, the court decision does not provide any further reasoning on the basis of which the court came to the conclusion that the rejection of the work schedule could have taken place without any consequences.

19 See Higher Court Judgment and Decision Pdp 134/2015, point 18; Higher Court Judgment and Decision Pdp 352/2018, point 10; Higher Court Judgment Pdp 1007/2016, point 11; Higher Court Judgment Pdp 687/2015, point 12; Supreme Court Judgment VIII Ips 335/2017, point 13; Higher Court Judgment Pdp 375/2018, point 10; Higher Court Judgment Pdp 599/2015, point 13.

20 Higher Court Judgment and Decision Pdp 860/2014, point 9.

21 Higher Court Judgment and Decision Pdp 74/2022, points 22 and 23.

work whenever she wished – what was essential was the actual volume of work and the comparison of that volume with that of a regular worker.[22] It is also worth noting as very important that in certain cases the court has expressly emphasised the importance of the principle of the priority of facts as opposed to the consideration of the formal possibilities of the contractor to refuse to perform the work (obligation to perform the work). In the Administrative Court Judgment I U 923/2015, and Administrative Court Judgment III U 83/2018-33 the court upheld the finding of the existence of an employment relationship, pointing out that while it is true that workers have the option to refuse to be transported and that they are independent as to whether or not to work continuously. However, the option they have is not essential to the decision. What is essential is the actual performance of the work, which the workers have undisputedly performed on a continuous basis.[23]

### *3.1.2. Taking into account the nature of the work performed*

It is apparent from an analysis of the case-law that, in assessing whether the worker was bound by the instructions, the courts have in certain cases taken into account the nature of the work performed by the worker. It has been pointed out that the very nature of the worker's work may imply a higher degree of autonomy, but that does not mean that the employment relationship does not exist in the present case. The cases concerned in particular creative professions characterised by a higher degree of autonomy of the worker in the performance of his work (*e.g.* work as a copywriter, teacher and proofreader).

For example, in the aforementioned Higher Court Judgment and Decision Pdp 860/2014 the court took into account the nature of the work of a "creative director or copywriter" (higher degree of autonomy and independence) and refused to challenge the existence of the elements of an employment relationship on the grounds of circumstances such as the worker's working from home on his own computer, with his own telephone and his own organisation of work.[24] Similarly, in Higher Court Judgment and Decision Pdp 260/2017 (finding the existence of an employment relationship) the court took into account the nature of the work of a teacher, as the employment relationship is not necessarily about

[22] Higher Court Judgment Pdp 468/2018, point 9; Supreme Court Judgment and Decision VIII Ips 212/2016, points 14 and 15.

[23] Administrative Court Judgment I U 923/2015, point 14; Administrative Court Judgment III U 83/2018-33, point 21.

[24] Higher Court Judgment and Decision Pdp 860/2014, point 9.

instruction and supervision in terms of the content of the work – the autonomy to perform the work also depends on the nature of the work performed by the worker.[25] In the Higher Court Judgment Pdp 829/2017 the court took into account the nature of translation work, which by its very nature requires a high degree of autonomy and independence from instructions. However, in the present case, the degree of power of direction of the employer (the plaintiff was not bound by the defendant's instructions as to the content of the work, the place and time of work, the disposition of working time, the choice of work, *etc.*) was not sufficient to constitute an employment relationship.[26]

### *3.1.3. Intensity of work-related instructions*

Initially, it should be noted that the aspect relating to the instructions concerning the organisation of working time has already been dealt with in the above subsection. Next, based on the analysis of case law, we note that in certain cases the existence of instructions does not necessarily mean that there is an employment relationship – as instructions may also be present in other contractual forms of work performance. This is the case where the instructions given are merely indicative in nature and do not interfere with the autonomy of the contractor in organising (operationalising) his activity. For example, in Higher Court Judgment Pdp 282/2020 (provision of transport services in outpatient sales), the court stated that, according to the contract, the plaintiff was indeed obliged to follow the defendant's instructions – nonetheless, following the instructions of the sender is also typical of a transport contract (according to the Obligations Code[27]), "whereby the meaning of the concept of following instructions in the context of a transport contract is not the same as the concept of working under the instructions and supervision of the employer". In the case of a contract for transport under the OZ, "the instructions given by the consignor or the principal to the carrier are of an indicative nature and do not interfere with the carrier's autonomy in organising its activities". In the present case, the defendant "merely gave the plaintiff indicative instructions (concerning the specific conditions for the carriage of eggs and egg products and the characteristics of the vehicle, *etc.*), but did not interfere with the operational work of the carrier or with the actual performance of the transport".[28]

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25 Higher Court Judgment and Decision Pdp 260/2017, point 11.

26 Higher Court Judgment Pdp 829/2017, point 8.

27 Obligacijski zakonik (OZ) [Obligations Code], Uradni list Republike Slovenije [Official Gazette], no 97/07, 64/16 – odl. US in 20/18 – OROZ631.

28 Higher Court Judgment Pdp 282/2020, points 9 and 10.

Furthermore, for example, it follows from the Higher Court Judgment Pdp 506/2019 (work of a protocol driver) that the presence of more detailed/specific instructions does not necessarily mean that the position of the person carrying out the work is subordinate, as these instructions may arise from the very nature of the service performed. As the Court states, "the fact that the applicant was required to be well groomed in the workplace, wearing dark trousers, a light shirt and a tie, does not automatically constitute a subordinate position, but rather a proper neatness in the performance of the work – that of a protocol driver".[29]

It follows from the Slovenian court decisions in question that it is essential that, when carrying out independent work (under civil law contracts), the instructions do not interfere with the autonomy of the contractor (*e.g.* the carrier) in organising its activities – or that they do not interfere with its operational work (the actual performance of the transport). Similarly, certain more specific instructions may be necessary because of the very nature of the service provided.

### 3.2. Integration into the employer's organised work process

Based on the analysis of case law, it follows that indicators used by the courts to justify inclusion in an organised work process include: the employer providing resources (*e.g.* a computer, work clothes, telephone, e-mail, *etc.*)[30]; the worker is included in the employer's collective meetings[31]; the worker records attendance at work[32]; the worker is included in the employer's training[33]; the worker's work and tasks are identical to those of the systematised job in the em-

[29] Higher Court Judgment Pdp 506/2019, point 7.

[30] See Higher Court Judgment and Decision Pdp 860/2014, point 9; Higher Court Judgment Pdp 560/2019, point 12; Higher Court Judgment and Decision Pdp 260/2017, point 12; Supreme Court Judgment VIII Ips 236/2016, point 12; Higher Court Judgment and Decision Pdp 348/2017, point 14. However, in Higher Court Judgment and Decision Pdp 134/2015 (point 18) the court pointed out that, given the specificities of the work of a journalist or photographer, even the worker's use of his own equipment does not mean that the worker was not involved in the work process.

[31] See Higher Court Judgment and Decision Pdp 260/2017, point 12. However, in Higher Court Judgment and Decision Pdp 134/2015 (point 18), the Court pointed out that, given the specificities of the work of a journalist or photographer, even non-attendance at a "morning meeting" does not mean that the worker was not involved in the working process.

[32] See Supreme Court Judgment VIII Ips 236/2016, point 12.

[33] See Higher Court Judgment and Decision Pdp 348/2017, point 14.

ployer's systematisation act[34]; and that the worker performs the work according to the employer's organised timetable (or in the same way as other workers)[35].

Indicators justifying the absence of an element of involvement in an organised work process usually relate to issues related to flexibility of working time and whether the worker has been involved in an organised work process in the same way as other regular workers. The latter is not the case, for example: where the worker was free to choose the days of annual leave; where the worker was not obliged to record arrivals and departures from work; where the worker was free to determine the place of work (*e.g.* working from home); where the work was not carried out on a daily basis and at a regular time and pace.[36] In such cases, the fact that the employer has provided the worker with the space and equipment (resources) to carry out the work (*e.g.* clothing with the employer's insignia, an e-mail address) is not sufficient to conclude that the worker was engaged in an organised work process.[37] These circumstances "do not in themselves carry such weight as to establish the existence of the elements of an employment relationship between the parties".[38]

It is also a regularly applied test in case-law to determine whether the applicant's working arrangements (involvement in an organised working process, adherence to instructions on the organisation of working time, volume of work, *etc.*) were the same as those of the defendant's regular workers. This approach is relevant both in cases where the existence of an employment relationship has been established by the court[39] and in cases where the existence of an employment relationship has not been established[40].

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34 See Higher Court Judgment and Decision Pdp 860/2014, point 9.

35 See Higher Court Judgment and Decision Pdp 260/2017, point 12; Higher Court Judgment and Decision Pdp 134/2015, point 18.

36 See Higher Court Judgment Pdp 126/2018, point 10; Higher Court Judgment Pdp 252/2019, point 12.

37 See Higher Court Judgment Pdp 126/2018, point 11; Higher Court Judgment Pdp 214/2017, point 19.

38 Higher Court Judgment Pdp 214/2017, point 19.

39 *Inter alia*: Higher Court Judgment and Decision Pdp 134/2015, point 18; Higher Court Judgment and Decision Pdp 352/2018, point 10; Higher Court Judgment and Decision Pdp 828/2016, point 16; Higher Court Judgment Pdp 687/2015, point 12; Supreme Court Judgment VIII Ips 16/2015, point 10;

40 *Inter alia*: Higher Court Judgment Pdp 214/2017, point 12; Higher Court Judgment Pdp 282/2020, point 10; Higher Court Judgment Pdp 536/2021, point 11.

The importance of this indicator can be seen, for example, in the Higher Court Judgment Pdp 214/2017, where the court stated that "the plaintiff was not involved in the organised working process at the defendant in the same way as the regular workers (*e.g.* he was not obliged to keep records of his arrivals and departures from work and was allowed to go home at any time after work), it is irrelevant for the decision in the case that he (also) performed his work on the defendant's premises, that he used the defendant's working means and employer's email address. In fact, all those circumstances do not, in themselves, have such weight as to establish the existence of the elements of an employment relationship between the parties".[41] Similarly, in Higher Court Judgment Pdp 536/2021 the court found "that the plaintiff's scope and regime of work was not the same or identical to that of a regular worker (in terms of daily work commitments) and that the degree of his dependence as regards the disposition of his working time was different from that of an worker (in terms of his decision-making – when and how much he would work)". Consequently, the existence of an employment relationship was not established. The Court expressly points out that those conclusions are not affected by the fact that the work was carried out on the defendant's premises and with the defendant's means of work.[42]

However, in certain cases, the test in question is also taken into account in order to justify, by comparison with other workers (of the same employer), any lesser attachment to the employer's instructions as to the time of work, *etc.* For example, in Higher Court Judgment and Decision Pdp 828/2016 the court stated, in the case of a photographer, that "the working hours were flexible, like those of the other workers, given that the work of journalists and photographers is field-based. No working time records were kept for any of the photographers (including the plaintiff). In terms of the scope of his work, the applicant was on a par with the other photographers employed, but the fact that he used his own camera and his own computer in his work does not affect the finding that all the elements of an employment relationship were present. Given that the applicant coordinated his days off with the other photographers, it is irrelevant that he was not obliged to announce his leave."[43]

41 Higher Court Judgment Pdp 214/2017, point 19.

42 Higher Court Judgment Pdp 536/2021, points 11 and 15.

43 Higher Court Judgment and Decision Pdp 828/2016, point 16. Similarly, the court also ruled in the case of a photographer in Higher Court Judgment and Decision Pdp 134/2015, point 18.

### 3.3. Continuous work

The principle of the primacy of facts is also essential for assessing the element of continuous work. As the Administrative Court stated in Judgment III U 83/2018-33, it is true that "workers have the option of refusing to work and, in that sense, the choice of whether or not to work continuously. However, this possibility is not essential to the decision. What is essential is the actual performance of the work." The workers were performing work continuously.[44]

Furthermore, it is very important to note that in a number of cases the court has found the existence of an employment relationship even where the scope of work was not the same as for other regular workers – in these cases it found the existence of a part-time employment relationship or took into account the possibilities of unequal distribution of working time under Article 148 of the ZDR-1. However, it should be noted that the above finding does not apply to entire case law, as there are differences in court's approach to a particular case at hand. In some cases, the court did not base its decision on those options (which allow for greater flexibility as regards the distribution and quantity of hours worked over a given period) – but nevertheless held that the work has been only temporary and occasional in its nature (meaning that it was not the performance of work that is typical of an employment relationship).

First, we highlight the judgments in which the court has found the existence of an employment relationship in the light of the above reasoning. For example, in the Higher Court Judgment Pdp 311/2018 the court emphasised that if the relationship at issue otherwise has all the elements of an employment relationship, it is possible to establish the existence of an employment relationship even for part-time work.[45] The same was also held in the Higher Court Judgment Pdp 574/2017, where the existence of a part-time employment relationship was established, where the work was carried out for an average of 60 hours per month or 3 hours per day.[46] In the Higher Court Judgment Pdp 559/2015 (finding the existence of an employment relationship), the court emphasised that "the time frame of the work is not relevant for the existence of an employment relationship. A worker may work shorter hours because the ZDR-1 does not provide for a lower limit on working hours."[47] Moreover, in the Higher Court Judgment

44 Administrative Court Judgment III U 83/2018-33, point 14.

45 Higher Court Judgment Pdp 311/2018, point 7. In this case, the duration was 7 hours or 7.5 hours per day.

46 Higher Court Judgment Pdp 574/2017, point 11.

47 Higher Court Judgment Pdp 559/2015, point 12.

and Decision Pdp 348/2017, the court took into account both the possibility of working part-time (Article 65 of the ZDR-1) and the possible agreement between the worker and the employer for an unequal distribution of working time in accordance with Article 148 of the ZDR-1 when establishing the existence of an employment relationship.[48]

Particularly important was the consideration of Article 148 of the ZDR-1 (possibility of flexible organisation of working time) in the more recent Higher Court Judgment and Decision Pdp 74/2022, where the court emphasised that the journalist's flexibility of schedule (he came at different times, on what days he was off, *etc.*) was the result of the employer's adaptation to the worker's family situation (childcare). This type of practice is also justified in the ZDR-1 (*e.g.* Article 148, paragraph 3 ZDR-1). In this context, "it is essential for the existence of an employment relationship that, despite such a schedule, the applicant's work was continuous and his working hours were comparable to those of a full-time regular worker on a weekly basis".[49] Even an average absence of five days per month (mostly once a week) does not mean that the work was not carried out continuously, since those days off were necessary to accommodate the worker's family situation. On other days, the journalist worked more than eight hours (nine to ten hours), which means that the worker was comparable to a full-time worker in terms of the amount of work – and the days off can be taken into account as compensatory hours.[50]

All of the above is also taken into account in the Administrative Court Judgment III U 83/2018-33, where the court states that continuity of work can be established even if workers did not work every day or 40 hours a week, since it is not necessary for the existence of an employment relationship that the worker works full-time. Nor does the fact that the workers perform work for other entities preclude a finding that the elements of an employment relationship exist. It is also necessary to take into account the variety of forms of employment relationship provided for in the ZDR-1, since a worker may have an employment contract with several employers (up to the extent of full-time work) or work hours may be irregularly distributed – in all these cases, he or she is still working under an employment contract.[51]

By contrast, in some other cases, the courts have not found the existence of an employment relationship (when the work was not comparable to other

48 Higher Court Judgment and Decision Pdp 348/2017, point 15.

49 Higher Court Judgment and Decision Pdp 74/2022, point 22.

50 *Ibid.*, point 23.

51 Administrative Court Judgment III U 83/2018-33, point 21.

workers in its continuity and scope). For example, in the Supreme Court Judgment VIII Ips 236/2016 the court stated that the worker "did not have a fixed (or even short) working day, as she did not come to work according to a fixed schedule and did not work the same number of hours each day (in fact, she did not have a 20-hour working week, she worked approximately the same number of hours on average each month, and not the same number of hours each month). It follows from the above that her workload was not the same as that of a regular worker and that the degree of dependence on her as regards the use of her working time was not the same as that of an worker in an employment relationship. … The nature of the applicant's work was intermittent in that she did not work in the same way, under the same regime and to the same extent as a regular worker (the mere fact that the defendant engaged the applicant as a student to work on foreclosures for two and a half years is not sufficient to conclude that she worked continuously)."[52] Similarly, in the Higher Court Judgment Pdp 803/2019 the element of continuity of work was not established, since the scope and regime of the plaintiff's work was different from that of a regular worker (both in terms of daily, monthly and yearly work commitments).[53] In Higher Court Judgment Pdp 697/2016 the Court stated that "continuity of work as an element of the employment relationship means that the worker normally performs work every working day, during regular working hours, at a fixed place of work, *etc.*". In the present case, the applicant did not work continuously (or even required to work continuously), as he was not even involved in promotions during certain periods. Nor did he carry out promotions every day, but only once or twice a week.[54]

A similar decision was rendered also in the Higher Court Judgment Pdp 126/2018, where it stated that work "which varied from month to month, both in terms of the number of working days and in terms of the distribution itself, the duration of the daily work commitment, and which depended entirely on the demand of the clients, does not constitute, even in the opinion of the Higher Court, continuous work, but rather work on an as-needed basis". There was no continuous need for work on the part of the employer, since in only four months out of the ten months in 2016 did the applicant's work reach or exceed

[52] Supreme Court Judgment VIII Ips 236/2016, points 12–14.

[53] Higher Court Judgment Pdp 803/2019, point 12.

[54] Higher Court Judgment Pdp 697/2016, points 7 and 8. In Higher Court Judgment and Decision Pdp 828/2016, and Higher Court Judgment Pdp 375/2018, the court found that the work was continuous (the workers worked every day in the same way as other regular workers).

20 working days – consequently, the applicant's allegations of continuous work are unfounded.[55]

We further note that the fulfilment of continuous work element may be affected by prolonged interruptions. For example, in the Higher Court Judgment Pdp 272/2016 the court found that the plaintiff did not perform his work continuously, as he did not work for the defendant for more than 3 months (from 1 June 2014 to 14 September 2016).[56] Similarly, in the Higher Court Judgment Pdp 214/2017, where the plaintiff was not found to have continuously performed his work, as he did not perform work for more than two months in 2015 (in the period from 4. 6. 2015 to 20. 8. 2015) – such a long absence was not usual for workers employed by the defendant (this period is also not comparable to the period of annual leave taken by regular workers).[57] Also in the Higher Court Judgment Pdp 336/2018 the existence of the element of continuity (in the case of student work) was not established, as the plaintiff often did not perform work on his own wish for several weeks or months.[58]

On the other hand, in the case of only occasional interruptions of work (when calculating the volume of work and assessing the existence of the element of continuity of work), the courts also take into account any short absences due to sickness and the right of workers to take annual leave (Article 159 of the ZDR-1). Such absences do not necessarily mean that the work was performed only occasionally and temporarily (and therefore not continuously).[59]

Finally, it is worth noting that the question of the minimum period of time required for the duration of the work (that the element of continuity is met) is rarely the subject of judicial review (except in cases of student work). An exception is the Higher Court Judgment 506/2019 (employment relationship of a driver working as a sole entrepreneur was not established), where the court also took into account "that the plaintiff provided transport services for the defendant from 16 April 2018 to 23 May 2018, i.e. for one month and eight days, so that for this short period of time it is difficult to consider that all the elements of an employment relationship existed".[60] However, there are several court decisions in the field of student work where continuous work (and not only temporary and

[55] Higher Court Judgment Pdp 126/2018, point 14.

[56] Higher Court Judgment Pdp 272/2016, point 12.

[57] Higher Court Judgment Pdp 214/2017, point 14.

[58] Higher Court Judgment Pdp 336/2018, point 11.

[59] Higher Court Judgment Pdp 468/2018, points 8 and 9. In this sense also Higher Court Judgment and Decision Pdp 348/2017, point 15.

[60] Higher Court Judgment Pdp 506/2019, point 9.

intermittent work) has been established where students have been employed by an employer for a longer period of time (*e.g.* one year or more).[61]

### 3.4. Personal performance of work

The existence of this element of the employment relationship has been challenged in a few court cases. In some cases, the court rejected arguments that there was no personal performance of work if the worker had the option of being replaced by another person. The decisive factor was that the worker had *de facto* personally performed his work (or the work he had taken over). For example, in Higher Court Judgment Pdp 126/2018 the court explained that the fact that the plaintiff was able to change his appointment with another driving instructor without the defendant's consent (and thereby influence the work schedule) did not mean that he did not personally perform his work.[62] Similarly, in Administrative Court Judgment III U 83/2018-33 the court rejected the reasoning that there is no personal performance of work where the work "was not necessarily performed by a particular worker, meaning if that particular worker did not have time, he could have handed the work over to another worker. What is relevant for the assessment of the existence of an employment relationship is the manner in which the work was actually performed by the particular worker, and in the present case if the work was taken over by that worker, the work was performed by the worker himself."[63]

On the contrary, in the light of the contractually agreed and actually implemented clause on the possibility of using a substitute carrier, the Higher Court found in Judgment Pdp 282/2020 that the driver did not perform the work personally.[64] However, the decision does not provide details as to how often (and in which cases) this substitution option was used.

Finally, case-law shows that there is no personal performance of work where a self-employed person (the alleged worker) would delegate part of the work tasks to his own workers. As is apparent from the Higher Court Judgment Pdp 463/2017 (franchising business model), the plaintiff did indeed perform part of

[61] See Supreme Court Judgment and Decision VIII Ips 212/2016, points 13 and 14; Higher Court Judgment Pdp 599/2015, point 13; Administrative Court Judgment I U 1279/2015, point 10; Higher Court Judgment Pdp 16/2017, point 8.

[62] Higher Court Judgment Pdp 126/2018, paragraph 13. In the present case, the court did not find the existence of other elements of an employment relationship.

[63] Administrative Court Judgment III U 83/2018-33, point 22.

[64] Higher Court Judgment Pdp 282/2020, points 11 and 13.

the tasks herself – yet she delegated part of the tasks to her two female workers, and therefore did not perform the entirety of the tasks personally.[65]

### 3.5. Work shall be carried out for remuneration

The existence of this element of the employment relationship is generally not disputed in Slovenian case law. An exception is the Higher Court Judgment Pdp 463/2017, in which the court did not find or establish the existence of an employment relationship under the franchising business model (where the claimant itself acted as employer in establishing the existence of an employment relationship). As is apparent from the court's reasoning, there was no element of work for remuneration, since the remuneration in question was based both on the work carried out by the applicant itself and on the work carried out by the two female workers of the applicant (and on the turnover of the shop as a whole). The remuneration received was partly intended to pay the wages of the applicant's workers and partly retained by the applicant itself.[66]

### 3.6. Other relevant indicators of the existence of an employment relationship according to ILO Recommendation 198

In the following, we will discuss the presence and relevance of the other indicators under ILO Recommendation 198 in the reasoning of Slovenian court decisions. In doing so, we will only mention here those indicators that have not yet been explicitly covered in the above analysis of the elements of the employment relationship under ZDR-1. In this way, we will gain insight into the weight and importance of possible other indicators on the assessment of the existence of an employment relationship in the Slovenian legal order.

In general, it is worth noting that direct references to ILO Recommendation 198 by Slovenian courts are rare. In any event, the reference does not play a decisive role in the determination of the existence of an employment relationship. For example, the Supreme Court, in its Judgment VIII Ips 77/2018, emphasises that the Recommendation in question may serve as an aid in the proper interpretation of formal sources of law (despite its non-binding nature), and therefore courts may refer to it in their reasoning.[67] An example of this type

[65] Higher Court Judgment Pdp 463/2017, point 13.

[66] *Ibid.*

[67] Higher Court Judgment Pdp 641/2017, point 9.

is the Higher Court Judgment Pdp 641/2017, in which the court confirms the correctness of the first instance court's reference to ILO Recommendation 198 when determining the existence of an employment relationship.[68]

#### *3.6.1. Worker performs the work exclusively or primarily/mainly for (the interests of) another*

This ILO Recommendation 198 employment relationship indicator has been problematised in case-law, in particular from the point of view of the situation where the worker is also supposed to have worked for other contracting entities during the same period (and also with regard to the possible (non-)existence of a non-compete prohibition). It also relates to the indicator that the remuneration for the work is the worker's main/sole source of earnings. However, in none of the cases does this indicator constitute a main or important reason for the decision on the (non-)existence of an employment relationship.

For example, in Higher Court Judgment and Decision Pdp 352/2018, the court found the existence of an employment relationship and noted in its reasoning that the plaintiff occasionally worked for other clients. Yet his work was almost entirely performed for the defendant. The Court points out that short-term or occasional work for other clients does not exclude the existence of an employment relationship with the defendant. Even salaried workers may occasionally carry out work which enables them to earn additional income.[69] Consequently, the foregoing did not constitute a reason to suggest (or exclude) the existence of an employment relationship. Similarly, the Higher Court also ruled in Judgment Pdp 849/2017, where the plaintiff had performed proofreading work (to a lesser extent) for a different client than the defendant. That did not exclude the existence of an employment relationship during the period at issue.[70]

However, the Court did not find the existence of an employment relationship in Higher Court Judgment Pdp 272/2016, where the plaintiff also performed work for other clients and received from the defendant only less than one-fifth of the total income. As a result, most of the income was generated by other clients.[71] That circumstance did not carry any particular weight, since the other facts also pointed to the non-existence of the elements of an employment rela-

[68] Supreme Court Judgment VIII Ips 77/2018, point 15.

[69] Higher Court Judgment and Decision Pdp 352/2018, point 11.

[70] Higher Court Judgment Pdp 849/2017, point 14.

[71] Higher Court Judgment Pdp 272/2016, points 12 and 13. Similarly, in Higher Court Judgment Pdp 65/2021, point 13, the court did not specifically address this

tionship. Similarly, the Higher Court in Judgment Pdp 829/2017 did not find the existence of an employment relationship as there was not a sufficient degree of power of direction of the employer. This was indicated, *inter alia*, by the fact that the plaintiff, throughout her cooperation with the client, also cooperated with other users of her services.[72] However, in Higher Court Judgment Pdp 252/2019 the fact whether or not the plaintiff worked solely for the defendant was irrelevant to the court. What was relevant was that the plaintiff had the opportunity to work for another client, which, as a worker of the defendant, he could not have done without the defendant's approval. Nor did the civil contracts concluded with the defendant restrict the plaintiff from concluding similar contracts with other clients.[73]

Similarly, the question of the (non-)existence of a non-compete prohibition (in the sense of an obligation to work for one party only) was not of relevance in any of the cases to establish the existence of an employment relationship (not even as an additional factor that could carry some weight/relevance).

For example, in the Higher Court Judgment Pdp 697/2016 the court explicitly stated that "even a non-compete prohibition agreed in Article 4 of the contract does not prove the existence of an employment relationship", as such a clause is also prescribed as an element of a civil law relationship in Article 807 of the Obligations Code.[74] Similarly, in the Higher Court Judgment Pdp 126/2018 the court stated that the fact that the business cooperation agreement contained a non-compete prohibition clause did not affect the existence of the elements of an employment relationship.[75]

The converse is also true – the absence of a non-compete prohibition has no bearing on the finding that an employment relationship exists. For example, in the Administrative Court Judgment I U 923/2015 (in which the court confirmed the finding of the existence of an employment relationship) it is stated that the non-compete prohibition according to Article 39 ZDR-1 is not absolute and may be waived by the employer. Consequently, the fact that none of the workers in question had a non-compete prohibition in their contract cannot be regarded as a circumstance which would have led the court to decide otherwise.[76]

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circumstance that only a part (approximately one third) of the income was derived from the defendant.

72 Higher Court Judgment Pdp 829/2017, point 9.

73 Higher Court Judgment Pdp 252/2019, points 12 and 16.

74 Higher Court Judgment Pdp 697/2016, point 11.

75 Higher Court Judgment Pdp 126/2018, point 17.

76 Administrative Court Judgment I U 923/2015, point 14.

*3.6.2. Client shall provide the means of work (tools, materials, machinery, etc.)*

This ILO Recommendation 198 indicator is regularly mentioned as one of the indicators confirming the worker's involvement in the employer's organised work process. Consequently, that indicator (in judgments finding the existence of an employment relationship) is regularly mentioned as one of the relevant circumstances confirming the existence of an employment relationship.[77] However, in none of the cases does that indicator carry decisive (significant) weight.

Moreover, it is settled case-law (where the existence of an employment relationship has not been established) that reference to this indicator is irrelevant in the absence of other circumstances justifying the existence of an employment relationship. In Higher Court Judgment Pdp 214/2017 the court found that the plaintiff was not involved in an organised work process at the defendant in the same way as the defendant's regular workers (in this specific case, the worker performed the work of a film director on the basis of several civil-law contracts). However, it is irrelevant for the decision in the case that he (also) performed his work on the defendant's premises, using the defendant's working means and his work email address. "All those circumstances do not, in themselves, have such weight as to establish the existence of the elements of an employment relationship between the parties."[78] More specifically, in Higher Court Judgment and Decision Pdp 452/2021 (on the case of a journalist) the court stated that the fact that the journalist prepared the articles using the defendant's working means (technical equipment) does not establish the existence of an employment relationship. According to the provisions of Chapter XI of the Obligations Code (civil law contract for service), the material for the production of the thing or the performance of the work may also be provided by the principal.[79] Also in the Higher Court Judgment Pdp 126/2018 – where the court defined that the work was "on an as-needed basis" – it was found that the provision of work equipment, resources (including workwear with the defendant's insignia) and

[77] See Higher Court Judgment and Decision Pdp 352/2018, point 10; Higher Court Judgment and Decision Pdp 260/2017, point 12; Higher Court Judgment Pdp 560/2019, point 12; Higher Court Judgment Pdp 687/2015, point 12.

[78] Higher Court Judgment Pdp 214/2017, point 19. Similarly, in Higher Court Judgment Pdp 536/2021, point 13; and Higher Court Judgment Pdp 65/2021, points 6 and 8, where the employer provided the plaintiff with materials for repairing the stands), the court further stated that the fact "how the plaintiff was seen by third parties (either as an worker of the defendant, or as a business partner of the defendant) is not relevant for the decision".

[79] Higher Court Judgment and Decision Pdp 452/2021, point 13.

space for the conduct of safe driving courses do not justify the conclusion that the plaintiff was involved in an organised work process.[80]

### *3.6.3. Remuneration for work is the worker's main/only source of income*

This indicator is linked to the already mentioned indicator ""the worker performs work exclusively or primarily for (the interests of) the employer". As already noted, that indicator does not have a significant impact on the final assessment of the existence of the elements of an employment relationship.

This indicator means taking into account the existence of economic dependence as a relevant fact to justify the existence of an employment relationship.[81] With the exception of the Higher Court Judgment Pdp 463/2017 (franchising) the concept of economic dependence has not been addressed in the context of case law. However, in that case too, the court rejected the relevance of the assessment of economic dependence in determining the existence of an employment relationship, stating that "the finding that the plaintiff was not in a *de facto* (actual) employment relationship with the defendant is also not affected by the fact that she was economically weaker in relation to the defendant or that she was economically dependent on the defendant. Contracts between business entities may also involve differences in the (economic) power of the parties, and one business entity may generate the majority of its turnover with a single business partner, yet this does not change the legal nature of those contracts (they are not employment contracts)."[82]

### *3.6.4. Recognition of benefits (such as weekly rest entitlements, annual leave, payment of travel expenses to and from work)*

This is an indicator that relates to the indicators already presented under the elements of the employment relationship under ZDR-1. The indicator in question does not have any significant weight in the context of case law – such facts are usually mentioned in court cases as one of the circumstances which, in a specific case, confirmed that a person is working under the same work regime

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80 Higher Court Judgment Pdp 126/2018, point 11.

81 For more on the concept of importance/relevance of economic dependence in employment relationships, see, among others, Tičar, *op. cit.* (fn. 7); and Končar, *op. cit.* (fn. 6).

82 Higher Court Judgment Pdp 463/2017, point 12.

as regular workers. Specific reference was made to travel expenses in the Higher Court Judgment Pdp 697/2016, in which promoters (who, admittedly, had not been found to be in an employment relationship) were reimbursed for their travel expenses (and when they used the defendant's official car they refuelled it at the defendant's expense). All of the above, however, did not mean that the promoters were entitled to reimbursement of the costs of their commuting to and from work (in their capacity as workers) within the meaning of Article 130 of ZDR-1 (the payment of transport costs was also agreed in Article 5 of the contract).[83] Moreover, the absence of any agreement on the reimbursement of travel expenses does not mean that there is no employment relationship. For example, in the Higher Court Judgment Pdp 641/2017, where the court found the existence of an employment relationship between the worker and the employer in the catering sector, the court rejected as irrelevant the employer's allegations that it had not agreed with the worker on the reimbursement of travel expenses and meals.[84]

### *3.6.5. Absence of financial risks on the part of the worker*

This is an indicator that is not addressed or taken into account in Slovenian case law. None of the decisions considers whether the worker was (or was not) the bearer of the financial risks associated with the performance of the work.

## 4. CONCLUDING ANALYSIS AND SYNTHESIS

We note that the indicators for establishing the existence of an employment relationship under the Slovenian legal system are initially set out at the statutory level. The elements of an employment relationship (which must be fulfilled cumulatively) are defined in Article 4 of the ZDR-1, which defines an employment relationship as a relationship between a worker and an employer in which the worker voluntarily engages in an organised work process of the employer and, for remuneration, performs work in person and on a continuous basis, under the instructions and supervision of the employer. The actual content of the elements of an employment relationship is not defined in detail at statutory level. We note that case-law is of key importance in further interpreting and determining the content of the indicators for establishing the existence of an employment relationship.

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[83] Higher Court Judgment Pdp 697/2016, point 11.

[84] Higher Court Judgment Pdp 641/2017, point 11.

We note that the fundamental standard set in the case law is the concept of the "power of direction of the employer". In more recent judicial decisions, the most frequently cited case is the Supreme Court Judgment VIII Ips 236/2016 (no finding of the existence of an employment relationship), in which the court stated that "it is particularly important to emphasise the element of the continuous performance of work under the direction and control of the employer (the so-called power of direction of the employer), because the employment relationship differs from other legal relationships primarily in the degree of personal dependence by which a person is obliged to perform a particular work. The employer's power of direction may relate to the content, performance, time, duration and place of the work."[85] The above constitutes a key distinguishing point in establishing the existence of an employment relationship under Slovenian case-law.[86]

In this context, the issue of the worker's autonomy in organising working time (or the obligation to work at certain times) is of paramount importance in assessing whether the elements of an employment relationship or the employer's power of direction (the element of working under the direction and control of the employer) are satisfied. It is the foregoing that is crucial in the context of Slovenian case-law for assessing whether a worker performs work with a sufficient degree of personal dependence.

Furthermore, we conclude that the same degree of attachment to the established work regime (in particular with regard to the organisation of working time, i.e. recording of absences, attachment to the ordered amount of work and schedule, *etc.*) as is applicable to regular workers[87], is also crucial for the establishment of the existence of worker's integration into the organised work process.

The courts do not take into account other similarities that may indicate the existence of integration into an organised work process (*e.g.* working on the employer's premises, use of a work email address, use of the employer's work equipment, *etc.*) as sufficient in themselves to establish the existence of an

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85 Supreme Court Judgment VIII Ips 236/2016, point 11.

86 The above-mentioned Supreme Court Judgment VIII Ips 236/2016 (with the concept of the employer's power of direction at issue) is explicitly cited in a number of subsequent court decisions, including: Higher Court Pdp 178/2022, point 12; Higher Court Pdp 803/2019, point 12; Higher Court Pdp 829/2017, point 8; Higher Court Pdp 536/2021, point 14; Higher Court Pdp 336/2018, point 10. The cases concern both the determination of the existence of an employment relationship in the context of student work and the independent work of self-employed persons.

87 In this respect, the issue of comparing the volume of work with that of full-time workers is also relevant.

employment relationship. It is true that in cases where the existence of an employment relationship is established, for example, the fact that the employer has provided the means of work is regularly mentioned as one of the circumstances confirming the worker's involvement in the employer's organised work process. However, in none of the cases does that indicator carry decisive (significant) weight. The same applies in cases where the existence of an employment relationship has not been established – reference to this indicator is irrelevant in the absence of other circumstances justifying the existence of an employment relationship.

The decisive weight is still on the same degree of personal dependence (as that of the regular workers of the employer) in relation to the disposition of working time. The integration of the worker into the organised work process is thus understood primarily as a reflection of a sufficient degree of power of direction on the part of the employer (especially in terms of the organisation of working time and in comparison with other regular workers of the employer).

Moreover, aspects (consequences) of the integration of the worker which are of a particular business nature (*e.g.* whether the worker exercises entrepreneurial control over important business decisions; bears business risks, *etc.*) are not discussed or even mentioned at all. Similarly, the fact that the client of the work provides the means of work is of little relevance.

Next, the "continuous performance of work" element of the employment relationship is also largely related to aspects of the existence of the employer's power of direction (element of working under the direction and control of the employer) which we have already addressed above. It is true that the Slovenian case-law in relation to the determination of the existence of continuity of work is not entirely uniform and differs to a certain extent. However, we note that the prevailing approach of the courts (including of the influential Supreme Court Judgment VIII Ips 236/2016) is to analyse whether the worker has performed the work in the same manner, under the same regime and to the same extent as regular workers employed at the particular employer (in particular in terms of the link to the scheduling of working time by the employer).[88]

We conclude that other indicators according to ILO's Recommendation 198 do not carry any significant weight in Slovenian case law. In none of the cases do these indicators constitute a carrying or overriding reason for the decision on the (non-)existence of an employment relationship. This is the case for all the additional (to statutory employment relationship definition in Slovenian

[88] See the important decision in Supreme Court Judgment VIII Ips 236/2016, points 12–14.

Labour Relations Act) ILO Recommendation 198 indicators considered: the worker performs work exclusively or primarily for (the interests of) another; the client of the work provides the means of work (tools, materials, machines, *etc.*); the remuneration for the work constitutes the worker's main/only source of income; the recognition of benefits (such as the right to weekly rest, annual leave, payment of travel expenses to and from work); and the absence of financial risks on the part of the worker.

Furthermore, it is clear that economic dependence does not bear any relevance as to the determination of existence of an employment relationship in Slovenian case law. In Higher Court Judgment Pdp 463/2017 (franchising), the court even explicitly stated that "the finding that the plaintiff did not have an actual (*de facto*) employment relationship with the defendant is also not affected by the fact that she was economically weaker in relation to the defendant, or that she was economically dependent on the defendant. Contracts between business entities may also involve differences in the (economic) strength of the parties, and one business entity may generate the majority of its turnover with a single business partner, yet this does not change the legal nature of those contracts (they are not employment contracts)."[89]

Thus, *de lege lata,* the Slovenian courts do not consider issues that address the economic dependence of the worker and the worker's business integration to be of any relevance in their case law. The key determining factor for existence of an employment relationship, is thus the determination of the sufficient degree of the employer's directorial power and the personal dependence of the worker.

The question for further research is whether the position of the case-law needs to be further developed. We are still awaiting the first court case on platform work in Slovenia, yet it should be noted that platform work will rise important questions of the appropriate interpretation of the elements of the employment relationship under the ZDR-1 in the changed world of work. Especially the current Slovenian court's interpretation of the paramount importance of the obligation of workers to perform work at a specified working time regime (schedule). In platform work (and other similar business models) also other indicators (not just specified working hours) that indicate work performed under the instructions and supervision of the employer and integration into the employer's organized work process, will therefore have to come to the centre of legal reasoning (on the existence of an employment relationship).

[89] Higher Court Judgment Pdp 463/2017, point 12.

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## Sažetak

**Aljoša Polajžar** *

# KOJI SU KLJUČNI POKAZATELJI ZA POSTOJANJE RADNOG ODNOSA? – DETALJNA ANALIZA SUDSKE PRAKSE REPUBLIKE SLOVENIJE

*Ključni istraživački cilj ovog rada jest analizirati i usporediti relevantnost različitih pokazatelja postojanja radnog odnosa kroz detaljnu analizu slovenske sudske prakse. Analizirali smo dostupne odluke slovenskih sudova koje se odnose na (ne)postojanje radnog odnosa prema članku 4. Zakona o radnim odnosima (ZDR-1). Zaključujemo, među ostalim, da je pitanje autonomije radnika u organizaciji radnog vremena najvažnije od svih analiziranih pokazatelja pri utvrđivanju postojanja radnog odnosa. Nasuprot tomu, pokazatelji koji upućuju na postojanje poslovne integracije ili ekonomske ovisnosti radnika nemaju relevantnu težinu pri utvrđivanju postojanja radnog odnosa.*

*Ključne riječi: postojanje radnog odnosa, osobna ovisnost, ekonomska ovisnost, integracija radnika, usmjeravanje i kontrola, sudska praksa, Slovenija*

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