



TAKEN FOR
A RIDE:
LITIGATING THE
DIGITAL PLATFORM
MODEL

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INTERNATIONAL
LAWYERS ASSISTING
WORKERS NETWORK

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Table of Contents

Taken for a Ride: Litigating the Digital Platform Model

FOREWORD	5
THE “GIG ECONOMY”: LITIGATING THE CAUSE OF LABOUR	6
The Legal Armoury: “Gig Economy” Corporate Strategies to Avoid Obligations	10
Workers are treated as independent contractors.....	12
Indemnity clauses.....	13
Three-way contractual nexus.....	13
Technology versus transportation services company.....	14
Subsidiary versus parent company.....	15
Mandatory arbitration clause and large upfront payments to commence claims.....	16
Disputes made subject to foreign law.....	16
Overcoming laws designed to target them.....	17
Running or, better yet, hiding in plain sight.....	17
Conclusion.....	18
The Cases: How Workers, Trade Unions, and Governments Have Fared	18
Disregarding the label - substance over form.....	21
Understanding digital control.....	23
Technology versus transportation services company.....	26
Three-way contractual nexus.....	27
Subsidiary versus parent company.....	28
Mandatory arbitration clauses with large upfront costs.....	29
Disputes made subject to foreign law.....	30
Overcoming laws designed to target them.....	30
Lessons and Recommendations	32
Litigation strategy.....	32
Definitions and approach.....	34
Enforcement.....	35
DIGEST OF KEY JUDICIAL DECISIONS	37
Employee, Independent Contractor or Third Way?	38
Australia	
Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats [2020] FWCFB 1698.....	39
Rajab Suliman v Rasier Pacific Pty Ltd [2019] FWC 4807 (12 July 2019).....	40
Klooger v Foodora Australia Pty Ltd [2018] FWC 6836.....	41
Pallage v. Rasier Pacific Pty Ltd [2018] FWC 2579.....	43
Kaseris v. Rasier Pacific V.O.F. [2017] FWC 6610.....	43
Belgium	
Dossier n°: 187 – FR – 20200707.....	44
Brazil	
Marcio Vieira Jacob v. Uber do Brasil Tecnologia Ltda, RR - 1000123-89.2017.5.02.0038.....	46
ADPF 449 / DF.....	47
Conflito de Competência N° 164.544 - MG (2019/0079952-0).....	48
Canada	
Canadian Union of Postal Workers (CUPW) v. Foodora Inc. (2020) OLRB Case No: 1346-19-R (“Foodora”).....	49
Chile	
Alvaro Felipe Arredondo Montoya and Pedidos Ya Chile SPA.....	51
France	
Mr X v. Uber France and Uber BV Ruling No. 374.....	53
Mr B. v. Take Eat Easy (Judgment N 1737).....	54

Germany	
Case No. 9 AZR 102/20.....	55
Italy	
Cass. n. 1663/2020 (Foodora).....	57
Yiftalem Parigi v. Just Eat Italy.....	58
European Union	
B v. Yodel Delivery Network.....	59
Netherlands	
Deliveroo v. Federation of the Dutch Trade Movement (FNV).....	60
New Zealand	
Atapattu Arachchige v. Rasier New Zealand Limited & Uber B.V.....	62
South Africa	
Uber South Africa Technology Services (PTY) Ltd v National Union of Public Service and Allied Workers (NUPSAW) (2018).....	64
Uber South Africa Technology Services (PTY) Ltd v National Union of Public Service and Allied Workers (NUPSAW) (2017).....	64
South Korea	
Do-Hyun Kwak v SoCar et al.....	66
Spain	
Rider v. Glovo App 23, S.L.....	68
Switzerland	
Cour d'appel civile du Canton de Vaud. Ruling no. P317.026539-190917/380 of 23 April 2020.....	69
Décision du 29 mai 2020 n°ATA/535/2020.....	70
United Kingdom	
Uber BV v. Aslam, [2021] UKSC 5.....	72
Independent Workers' Union of Great Britain (IWGB) v. RooFoods Ltd. T/A Deliveroo [2018] EWHC 3342.....	73
Addison Lee Ltd v Lange & Ors UKEAT/0037/18/BA.....	74
Addison Lee Ltd v Gascoigne UKEAT/0289/17/LA.....	74
United States of America	
Matter of Lowry (Uber Tech., Inc—Commissioner of Labor) 2020 NY Slip Op 07645.....	75
Islam, et al v. Cuomo, et al, No. 1:20-cv-02328, 2020 WL 4336393 (E.D.N.Y. July 28, 2020).....	75
Razak v. Uber Techs., Inc. 951 F.3d 137 (3rd Cir. 2020).....	76
Dynamex Operations W., Inc. v. Superior Court (2018) 4 Cal. 5th 903.....	76
Lawson v. Grubhub, Inc., 302 F. Supp. 3d 1071 (N.D. Cal. 2018).....	78
Uruguay	
Esteban Queimada v. Uber BV.....	79
Noteworthy Digital Platform Cases Not Determining the Existence of an Employment Relationship	81
Enforceability of Arbitration Clauses	
Uber Technologies Inc v Heller, 2020 SCC 16.....	82
O'Connor v Uber Techs., 904 F.3d 1087 (9th Cir. 2018).....	83
Wallace v. Grubhub Holdings, Inc., 970 F.3d 798 (7th Cir. 2020).....	83
Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 (1st Cir. 2020).....	84
Competition Law	
Samir Agrawal v. Competition Commission of India & Ors.....	85
Uber Singapore Technology et. al v. Competition and Consumer Commission of Singapore.....	85
Chamber of Commerce v City of Seattle, 890 F.3d 769 (9th Cir. 2018).....	86
Social Protection	
The Independent Workers' Union of Great Britain (IWGB) v. Secretary of State for Work and Pensions, et al. [2020] EWHC 3050 (Admin).....	88
Ahmed Adiatu & Independent Workers Union of Great Britain (IWGB) v HM Treasury [2020] EWHC 1554.....	89
Transportation v. Information Services	
Star Taxi App SRL v. Unitatea Administrativ Teritoiala et. al.....	90
Asociación Profesional Élite Taxi v Uber Systems Spain SL.....	90

Foreword

The ILAW Network is pleased to present the first in its series of special publications. This report, *Taken for a Ride: Litigating the Digital Platform Model*, attempts to respond to requests from ILAW Network members and others for comparative analysis on the litigation taking place around the world against digital platforms such as Uber, Foodora, Deliveroo and many others.

This report is divided into two parts.

Part I is an essay prepared by Jason Moyer-Lee¹ and Nicola Contouris² which surveys the major cases which have been brought by workers against digital platforms concerning the existence of an employment relationship - whether to contest unjust dismissal, to claim a certain wage or benefit or to be able to join a union and benefit from a collective agreement. The essay also takes note of key cases that challenge other aspects of the digital platform model, including for example, the use of arbitration clauses to avoid litigation over employment status. While the trend is certainly towards the finding of an employment relationship, the jurisprudence is mixed among countries (and within countries). The essay usefully frames the caselaw around the many tactics used by the digital platform companies to avoid accountability.

Part II of this report is a digest of key judicial decisions concerning digital platforms, including case summaries from every region and related news and analysis. We want to thank ILAW Network members who have contributed many of these cases.

We acknowledge that this digest is not exhaustive and that there are certainly additional relevant cases concerning digital platforms. The ILAW Network will continue to monitor the developing case law and will issue updates of this digest to ensure it is as comprehensive as possible.

Please contact us at admin@ilawnetwork.com with any missing or new judgments, as well as links to any academic analysis or commentary and we will be sure to include them in subsequent issues.

¹ Practitioner fellow at Georgetown University's Kalmanovitz Institute for Labor and the Working Poor, and former General Secretary of the Independent Workers' Union of Great Britain (IWGB)

² Professor of Labour Law and European Law, Faculty of Laws, University College London

The “Gig Economy”: Litigating the Cause of Labour

By Jason Moyer-Lee¹ and Nicola Kountouris²

The film *Sorry We Missed You* vividly features the plight of millions of workers trying to earn a living while being managed by a ruthless algorithm at the hands of unscrupulous employers operating in the so-called “gig economy”. *Sorry We Missed You* was partly inspired by the even more tragic events that, in January 2018, led to the death of Deutsche Post Delivery (DPD) courier Don Lane. Don had worked for DPD for nearly two decades when, in December 2017, he collapsed at the end of a long and exacting round of pre-Christmas deliveries. It wasn't the first time the diabetes suffering self-employed franchisee had collapsed, including once into a coma while at the wheel of his DPD van.³ DPD had a policy of applying a £150 charge to the company's couriers whenever the latter cancelled a round and were not able to arrange cover, and Don – according to his widow – had missed several hospital appointments because of that. In March 2017, nine months before Don's death, the Chair of the UK House of Commons Work and Pensions Committee, had written a letter to the CEO of DPD UK, Dwain McDonald, requesting explanations about his company's policy.⁴ No action was taken before Don's death, and DPD only changed its contracts, granting self-employed drivers sick pay, in March 2018.

While not all those working in the “gig economy” are exactly in the same position as Don Lane, these forms

of work have become synonymous of uber-precarious and unprotected working and living conditions. What is worse, there is mounting evidence that these unacceptable working conditions have only deteriorated as a consequence of the Covid-19 pandemic. With Covid-19, the traditional structural deficiencies of the “gig economy” business model have compounded with new risks determined by the pandemic, including of course the risk of exposure to the virus itself. As some of the cases analysed in the following paragraphs suggest, “gig economy” workers and their unions often had to litigate just to secure basic personal protection equipment.

There are no standard, let alone universally accepted, definitions for the terms “gig/platform/sharing economy”. There are however, some common features to the business models⁵, in particular in the case of delivery and transportation companies. For example, the companies tend to work and run their businesses via an app, meaning little face-to-face interaction with workers. Via the app the companies often run a number of incentives or send nudges, allowing them to shape worker behaviour without the issuing of mandatory orders. Similarly, performance management is often run through the app. In the case of companies transporting passengers, this is often done via the aggregation of anonymous customer ratings. In the case of food delivery companies, this is often done through company ratings based on a multi-factorial assessment of worker performance. This is a practice frequently relied upon by the businesses to argue that they do not control their workers in the traditional sense of the exercise of managerial prerogative vis-à-vis subordinate employees.

¹ Practitioner Fellow, Georgetown University's Kalmanovitz Institute for Labor and the Working Poor; Associate Member, Centre for Law at Work, University of Bristol Law School; former General Secretary of the Independent Workers' Union of Great Britain (IWGB).

² Professor of Labour Law and European Law, University College London (UCL); Director of Research, European Trade Union Institute (ETUI).

³ Booth, R. (2018). *DPD courier who was fined for day off to see doctor dies from diabetes*. In: The Guardian. 5 February. <https://www.theguardian.com/business/2018/feb/05/courier-who-was-fined-for-day-off-to-see-doctor-dies-from-diabetes>. [Accessed 25 February 2021].

⁴ Letter available at <https://www.parliament.uk/documents/commons-committees/work-and-pensions/Correspondence/Frank-Field-to-Dwain-McDonald-DPD-7-03-2017.pdf>. [Accessed 27 Feb 2020].

⁵ For a comprehensive analysis of the legal and regulatory aspects of the “business model” of these companies, see: Davidson, N.M., Finck, M. & Infranca, J.J. *The Cambridge Handbook of the Law of the Sharing Economy*. CUP, 2018); J. Woodcock and M. Graham, *The Gig Economy: A Critical Introduction* (Polity, 2020). Also see the recently released report: ILO. (2021). *World Employment and Social Outlook: The role of digital labour platforms in transforming the world of work*. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_771749.pdf. [Accessed 27 February 2021].

Some of these companies have obtained a competitive advantage by exploiting tax loopholes or operating at a loss (at times by deploying predatory pricing strategies) while sustained by astronomical investments from venture capital, bolstered by cheap money pumped out by mature economies' central banks in the wake of the Great Recession.⁶ This is not necessarily irrational behaviour from investors; if they invest early and hang on until the IPO, they can often ride the wave of exuberance from other investors, then exit and make a killing despite the company never having turned a profit.⁷

"Gig economy" companies have been controversial, to say the least.⁸ Cities, taxi associations, and other actors have made numerous attempts to ban them entirely, with limited degrees of success. For example, Transport for London, the UK capitals' transportation regulator, has twice refused to renew Uber's required license to operate in the city⁹. Both times Uber was granted its license upon appeal. Similarly, the Brazilian city of Fortaleza passed

a law¹⁰ which effectively banned Uber, Cabify, 99 and similar companies. However, the law was later held by the Supreme Federal Tribunal to be unconstitutional.¹¹ Indeed, Uber alone has had various aspects of its business model impugned before the apex courts of India¹², Brazil¹³,

"Indeed, Uber alone has had various aspects of its business model impugned before the apex courts of India, Brazil, the UK, the EU, Canada, and the US states of Pennsylvania, Massachusetts, and California, a record to which no company would aspire."

⁶ See Marx, P. (2021). *Jeff Bezos: Your Legacy Is Exploitation*. In: The Jacobin Magazine. 3 February. <https://jacobinmag.com/2021/02/jeff-bezos-amazon-exploitation-ceo/>. [Accessed 25 February 2021].

⁷ The model does sometimes pose a problem however when these companies compete on price against each other. For example, Uber's inability to compete against Yandex in Russia and Didi in China led to Uber pulling out of the relevant market in exchange for a minority stake in, or in a joint venture with, its previous competitor. See: CBS News. (2017). *Uber merges with Yandex in Russia*. 13 July. <https://www.cbsnews.com/news/yandex-uber-russia-merger/> [Accessed 3 February 2021]. In the case of South East Asia, Uber's failure to compete effectively against Singapore-based Grab led to a similar deal: Uber sold its regional business to Grab in exchange for a 27.5% stake in its former competitor. This led to regulatory problems however, with the Competition and Consumer Commission of Singapore deciding that the transaction "resulted in a substantial lessening of competition ... in the ride-hailing platform market in Singapore", thereby infringing section 54 of the country's Competition Act. Uber was fined S\$ 6,582,055 (US\$ 4,937,339.40) and appealed the decision, however the appeal was dismissed by Singapore's Competition Appeal Board: *Uber Singapore Technology Pte Ltd & Ors v Competition and Consumer Commission of Singapore* [2020] SGCAB 2; also see: Competition & Consumer Commission Singapore. (2021). Media Release: *Competition Appeal Board Upholds CCCS's Infringement Decision Against Uber for Anti-competitive Merger with Grab*. 13 January. Notwithstanding the above, Grab – which was also fined – was at the time of writing pursuing a merger with Indonesian competitor Gojek. See: PYMNTS. (2021). *Singapore Competition Board: Uber Must Pay S\$6.6 Million Fine Over Merger Deal*. <https://www.pymnts.com/antitrust/2021/singapore-competition-board-uber-fine-over-merger/> [Accessed 18 January 2021].

⁸ For example, see the damning exposé of Uber's operations in Kenya: Sperber, A. (2020). *Uber made big promises in Kenya. Drivers say it's ruined their lives*. In: NBC News. 29 November. <https://www.nbcnews.com/news/world/uber-made-big-promises-kenya-drivers-say-it-s-ruined-n1247964>. [Accessed 25 December 2020].

⁹ For a similar decision in Turkey, which was later reversed, see: Daily Sabah. (2020). 24 December. <https://www.dailysabah.com/business/transportation/court-of-appeals-lifts-access-ban-on-uber-app-in-turkey>. [Accessed 18 January 2021].

¹⁰ Fortaleza Municipal Law n° 10.553/2016.

¹¹ Case ADPF 449 / DF. Minister Luís Roberto Barroso in his concurring judgment considered a law to similar effect of the city of São Paulo (Law n° 16.279/2015).

¹² See: *Agrawal v Competition Commission of India & Ors*. Civil Appeal No. 3100 of 2020. In this case the Supreme Court dismissed an appeal against a decision of the National Company Law Appellate Tribunal, which in turn had dismissed an appeal of a decision of the Competition Commission of India to the effect that Uber and its main competitor in the country, Ola, were not engaging in price fixing in breach of the Competition Act 2002. Interestingly, the case – brought by "an independent practitioner of law" – did not allege anti-competitive collusion between the two companies, despite them dominating the market between them. Instead, it was alleged that "the pricing algorithm used by Ola and Uber artificially manipulates supply and demand, guaranteeing higher fares to drivers who would otherwise compete against one another." It was submitted that the "apps function akin to a trade association, facilitating the operation of a cartel." The type of anticompetitive practice alleged was "hub and spoke", where the apps were the hubs and the drivers the spokes.

The Indian Supreme Court is not the only forum where such an argument against Uber has been made unsuccessfully; see also the case of *Meyer v Kalanick, 2020 U.S. Dist. LEXIS 137704*, the procedural history of which is set out at p3. Also, Advocate General Szpunar, in his non-binding opinion in the Court of Justice of the European Union case of *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (Case C-434/15) noted (at [62], endnote omitted) that:

I must also point out that classifying Uber as a platform which groups together independent service providers may raise questions from the standpoint of competition law. However, I will not develop this point further, as it oversteps the boundaries of the present case.

The relevant endnote specifically refers to the "hub and spoke" form of anticompetitive practice.

¹³ Case ADPF 449 / DF, cited above.

the UK¹⁴, the EU¹⁵, Canada¹⁶, and the US states of Pennsylvania¹⁷, Massachusetts¹⁸, and California¹⁹, a record to which no company would aspire. Indeed, the collection of cases analysed in this report reveals the whopping extent to which these companies are embroiled in litigation around the world. When it comes to workers' rights cases, the companies have been largely – though by no means universally – unsuccessful. However, “gig economy” companies have been more successful in continuing to operate in the world's most lucrative markets. In the preliminary remarks to his concurring judgment in the Brazilian Supreme Federal Tribunal case, Minister Luís Roberto Barroso summed up what has effectively been the approach of the world to these companies:

The challenge of the State is how to accommodate innovation with pre-existing markets, and I think that prohibiting activities in an attempt to contain the process of change, evidently, is not the way forward, as I believe it is akin to trying to stop the wind with your hands.²⁰

¹⁴ *Uber B.V. & Ors v Aslam & Ors* [2021] UKSC 5. This is the lead workers' rights case against Uber in the UK. In it, a unanimous six justice panel upheld the finding that drivers were “limb b workers”, a category in UK law which entitled them to a range of statutory employment rights (more on which below).

¹⁵ See: Asociación Profesional Élite Taxi, cited above. This case concerned whether or not Uber could be properly considered a technology or transportation services company. It was held to be the latter (more on which below).

¹⁶ *Uber Technologies Inc. v Heller*, 2020 SCC 16, concerning the validity to the arbitration clause requiring an Uber driver to arbitrate – rather than litigate before the courts – alleged violations of workers' rights. The clause was held to be invalid (more on which below).

¹⁷ *Lowman v Unemployment Comp. Bd. of Review*, 2020 Pa. LEXIS 3935, which held that drivers were employees for the purposes of unemployment insurance (more on which below).

¹⁸ *Kauders v Uber Technologies, Inc.*, 486 Mass. 557, in which the Supreme Judicial Court of Massachusetts held the arbitration clause in the contract between Uber and its passengers to be invalid as a matter of state law (more on which below).

¹⁹ An emergency petition for writ of mandate and a request for expedited review was filed before, and denied by, the Supreme Court of the State of California (case S266551) by a number of current and former “gig economy” workers as well as the Service Employees International Union (SEIU), arguing that various provisions of Proposition 22 – the successful ballot measure which deprived app-based workers of employee status in California law – were in violation of the California constitution and therefore unlawful (more on which below). A further relevant case (S265881) was – at the time of writing - pending before the state's Supreme Court. This case is the appeal by Uber and Lyft against an injunction compelling the companies to classify their drivers as employees so as to comply with state law. The injunctive relief was previously upheld on appeal before the Court of Appeal of California (more on which below): see *People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266.

²⁰ Authors' translation, from p67 of the judgment.

The question of what constitutes an employment relationship in the “gig economy” – or indeed in the economy more generally - is a particularly vexed one, for both worker and employer, for almost invariably employment status is the primary portal through which a labourer enters the world of workers' rights²¹. As the Magistrate in *Lawson v Grub-*

²¹ There have been some important exceptions to this rule, most notably in New York where the New York City Taxi and Limousine Commission imposed a minimum wage regime and a cap on driver numbers (designed in part to improve driver wages), which applied regardless of employment status. See: Brustein, J. (2018). *New York Sets Nation's First Minimum Wage for Uber, Lyft Drivers*. In: Bloomberg. 4 December. <https://www.bloomberg.com/news/articles/2018-12-04/new-york-sets-nation-s-first-minimum-wage-for-uber-lyft-drivers> [Accessed 3 February 2021]. The American city of Seattle similarly legislated for minimum rates of pay for ride-hailing drivers, as well as sick pay for “gig economy” workers during the Covid emergency: see Baruchman, M. (2020). *Uber will charge significantly more per trip as new Seattle law goes into effect Jan. 1*. In: Seattle Times. 30 December (updated 4 January 2021). <https://www.seattletimes.com/seattle-news/transportation/embargoed-uber-raising-its-prices-starting-jan-1/>. [Accessed 18 January 2021]. Seattle also legislated for a system of collective bargaining – which took effect in January 2016 - whereby independent contractor drivers could, through their trade unions, negotiate with the companies for whom they worked over rates of pay, professional standards, and other terms and conditions. The US Chamber of Commerce and Uber unsuccessfully challenged the law before federal district court on the basis that it violated US antitrust legislation (section 1 of the Sherman Antitrust Act) and was pre-empted by federal private sector collective bargaining legislation (sections 151-169 of the National Labor Relations Act (NLRA)). However, on appeal, the US Court of Appeals for the 9th Circuit, although agreeing the city ordinance was not pre-empted by the NLRA, reversed the District Court on the antitrust decision. See: *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769. This does not mean these sorts of ordinances will always fall foul of federal antitrust legislation. Indeed, the decision discusses at length the conditions required for exemption from the legislation on the basis of the “state-action immunity doctrine”; namely, the anticompetitive ordinance must be “clearly articulated and affirmatively expressed as state policy” and it must be actively supervised by the state (*Ibid.*, p15). Also, as a result of Proposition 22 in California, most “gig economy” app-based workers are now classified as independent contractors for the purposes of state law, but are entitled to a limited number of benefits normally associated with employment status, e.g. minimum rates of pay, company policies on sexual harassment and discrimination, and health care subsidies (subject to eligibility requirements). According to one report, 75% of Uber's drivers would not be eligible for the healthcare subsidy; see: Marx, P. (2021). *After Prop 22, Expect Uber to Escalate Its War on Workers' Rights*. In: Jacobin. 17 January. <https://jacobinmag.com/2021/01/uber-lyft-prop-proposition-22-california/>. [Accessed 18 January 2021]. Uber is now pushing for a similar “third way” regime in the EU, pursuant to which certain benefits are provided yet drivers are not considered to be in an employment relationship; see: Browne, R. (2021). *Uber proposes California-style gig work reforms in Europe*. In: CNBC. 15 February. <https://www.cnbc.com/2021/02/15/uber-proposes-california-style-gig-work-reforms-in-europe.html>. [Accessed 20 February 2021]. For the details of the proposal, see: Uber. (2021). *A Better Deal: Partnering to improve platform work for all*. 15 February. https://uber.app.box.com/s/tuuydpqj4v6ezvmd9ze81nong03om-f11?uclid_id=cd0d49cc-ae7a-4c3f-a40e-9fb24185a8ef. [Accessed 20 February 2021]. In a case brought by a drivers' trade union against Uber and 99, before the Regional Labour Tribunal of the 7th Region in Fortaleza, Brazil, the union did not even contend for an employment relationship between the drivers and the companies. Instead, and on the basis that the 45th amendment to the Brazilian Constitution extended the jurisdiction

hub, Inc. et al., 302 F. Supp. 3d 1071 (N.D. Cal. 2018) put it:

...whether an individual performing services for another is an employee or an independent contractor is an all-or-nothing proposition. If Mr. Lawson is an employee, he has rights to minimum wage, overtime expense reimbursement and workers compensation benefits. If he is not, he gets none. With the advent of the gig economy, and the creation of a low wage workforce performing low skill but highly flexible episodic jobs, the legislature may want to address this stark dichotomy. In the meantime the Court must answer the question one way or the other.

Denying “gig economy” workers employment rights is a way to maximise profits by reducing labour costs. However, it is worth also pointing out that employment status often has a further impact on relations with the state, affecting liability for and/or entitlement to such things as income tax, social security contributions, and unemployment insurance²², among others.²³

of the Labour Tribunals to regulate most forms of work relationships (whether of employment or self-employment), and with some divine inspiration (Pope Francis's Easter message to precarious workers was quoted immediately before enunciating the decision), the union was nevertheless able to win minimum wages, sick pay, and reimbursement for Covid-relevant PPE for the drivers. (ATSum 0000295-13.2020.5.07.0003). Also, in Brazil, as a result of a class action brought by the Ministry of Labour against Colombian delivery company Rappi, a settlement was reached pursuant to which Rappi committed to a number of Covid-relevant health and safety provisions, including PPE and sick pay, despite the employment status of the couriers forming no part of the agreement. Indeed, the agreement specifically stated that “evidence of compliance with the obligations in this agreement will not be used for employment status claims” (authors’ translation, *Ata de Audiência, Ação Civil Pública nº 1000405-68.2020.5.02.0056*). Also see: Carelli, R. (2020). *Rappi WILL HAVE TO PROVIDE protection from the Coronavirus for its couriers*. 22 December. <https://trab21.blog/2020/12/22/rappi-will-have-to-provide-protection-from-the-coronavirus-for-its-couriers/>. [Accessed 18 January 2021].

So far as international law is concerned, the right to freedom of association - as understood in the Constitution of the International Labour Organization (ILO) and ILO Conventions 87 and 98 - applies to all workers “without distinction whatsoever” and as such is not contingent on the existence of an employment relationship. See: ILO. (2006). *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO (Fifth (revised) edition)*, in particular at [209], [216]-[217], and [254]. Also see the discussion in: Murray, J., Boisson de Chazournes, & Lee, J. (2021). *Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts*. 20 January.

²² Various US cases have decided the employment status of drivers for the purposes of unemployment insurance benefits, e.g. *Matter of Lowry (Uber Tech., Inc-Commissioner of Labor)*, 2020 N.Y. App. Div. LEXIS 7854, *Islam v Cuomo*, 2020 U.S. Dist. LEXIS 133082, and *Lowman v Unemployment Comp. Bd. of Review*, 2020 Pa. LEXIS 3935.

²³ For example, the UK’s primary economic support measure during

One point we wish to emphasise from the outset is - technological ingenuity notwithstanding - just how similar these companies’ employment practices are to more “traditional” forms of employment. The companies provide a service and need to hire labour in order to provide that service; they do not simply connect consumers and providers. Indeed “platform” is not only a misnomer, but a testament to the effectiveness of the companies’ PR campaigns. One must be careful to not be seduced by the glitzy rhetoric of Silicon Valley; the fact they use advanced technology and provide a useful service which is popular with consumers cannot detract from the fundamental labour relations at play.²⁴ Indeed, imagine walking into a Starbucks for your morning caffeine boost. As you enter you notice a handful of baristas manning espresso machines, each wearing a hat with a customer rating, e.g. “4.7. Stars”, purporting to identify their coffee-making skills. You chose to order from the barista with the shortest queue. As you wait in line, looking at the Starbucks menu to decide which version of caramel macchiato to order, you notice small script at the bottom of the menu, addressed to customers:

By ordering your coffee, you recognise that you are hiring the barista directly. Starbucks is the barista’s agent, generating customer leads, and takes a commission of the coffee price in return for its services.

“One point we wish to emphasise from the outset is - technological ingenuity notwithstanding - just how similar these companies’ employment practices are to more “traditional” forms of employment. The companies provide a service and need to hire labour in order to provide that service; they do not simply connect consumers and providers.”

Later that night you see on the news that a group of Starbucks baristas have brought a legal case, asserting their right to minimum wage. The Starbucks spokesperson says the baristas are independent contractors and that the company is not even a coffee company at

the pandemic, the Coronavirus Job Retention Scheme (CJRS), applied only to workers on the Pay As You Earn (PAYE) payroll system, a category which overlaps almost entirely with that of “employee” in UK law.

²⁴ This partly explains why more “traditional employers” are now increasingly recurring to similar “technological solutions” to minimise their labour cost bills, maximise control over their workforce, and increase profits.

all, but merely a “platform” connecting coffee drinking consumers with entrepreneurial baristas. Sound ridiculous? The case of Uber et al. is no different. Indeed, as Employment Judge Snelson of the Central London Employment Tribunal put it: “The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common ‘platform’ is to our minds faintly ridiculous.”²⁵

Various analysts and authoritative reports have offered their own conceptual frameworks to assess the ways in which “gig economy” work ought to be defined, classified, and conceptualised.²⁶ The present report analyses how “gig economy” businesses (more specifically companies that deliver food, packages, or transport passengers) have sought to structure their contractual arrangements for the provision of labour in order to optimise its use, typically by seeking to classify workers as independent contractors. Our report does so by focusing exclusively on these cunning and extensive “human resources” strategies as they emerge from the now extensive body of judicial decisions developed, in course of this last half decade, by courts and tribunals in a number of jurisdictions around the world. It is important to note however, that the actions of workers and their unions taken to resist labour exploitation is not limited to merely litigating employment status. Indeed, according to one report, between 1 January 2017 and 20 May 2020 there were 527 “incidents of labour unrest” from food couriers alone, across 36 countries.²⁷

Section 2 of this paper will outline the multiple legal strategies the companies deploy to defeat assertions of employment status. Section 3 will assess how effective these strategies have been. Section 4 will offer conclusory remarks on tactics for worker strategic litigation, employment status definitions and jurisprudential approach, and the importance of state enforcement.

THE LEGAL ARMOURY: “GIG ECONOMY” CORPORATE STRATEGIES TO AVOID OBLIGATIONS

The starting point for any analysis of employment relationships in the “gig economy” is to recognise that the companies are not neutral actors, simply operating technologically innovative modern businesses, the labourers of which may or may not be entitled to workers’ rights. Rather, as noted above, these companies go to extraordinary lengths to construct an impenetrable legal armoury around themselves, requiring workers, unions and/or the state to overcome innumerable hurdles should they wish to impose any employment obligations on the companies acting as “employers”. An evaluation of court cases therefore needs to be conducted through this prism, thereby assessing how successful the laws, unions, workers, and states/public authorities have been in overcoming the formidable obstacles placed before them by Silicon Valley’s best legal brains.

Indeed, for although Uber et al. have tended to fare better against traditional common law-derived employee definitions in the Anglo-Saxon tradition²⁸, it takes rather more creative thinking to skirt around definitions of “employee/worker” as wide as “[anyone] who in any manner assists in carrying on or conducting the business of an employer”²⁹, anyone who works under the direction of another in exchange for remuneration³⁰,

²⁸ For example, very few claimants in “gig economy” cases in the UK have argued that they are “employees”, contending instead for the broader statutory definition of “limb b worker”. Similarly, in Australia, most of the cases we have surveyed have been unsuccessful in establishing the individuals concerned as “employees”. In the US, the narrow, common law-derived definition of employee used in the National Labor Relations Act 1935 (“NLRA”), has posed a similar challenge to “gig economy” workers asserting their rights. In the case of the NLRA however, an additional hurdle was introduced by the National Labor Relations Board’s General Counsel’s Office issuing an Advice Memorandum specifically arguing that Uber drivers were not employees within the meaning of the NLRA (see: National Labor Relations Board Office of the General Counsel. (2019). *Advice Memorandum: Uber Technologies, Inc. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483*. 16 April. For a critique of the Advice Memorandum, see: Mishel, L. & McNicholas, C. *Uber drivers are not entrepreneurs: NLRB General Counsel ignores the realities of driving for Uber*. Economic Policy Institute: 20 September 2019.) Similarly, in the US, the plaintiff in the case against Grubhub was unsuccessful in the State of California where the definition of employee litigated was derived from the common law and considered employer control the primary factor in the definition (e.g. see: *Lawson v Grubhub, Inc. et al.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018)).

²⁹ See Section 213(b) of South Africa’s Labour Relations Act 1995.

³⁰ Autonomous definition of “worker” in EU law, used for, among other purposes, the Working Time Directive, which entitles workers to paid annual leave. See: Risak, M. (2019). *The concept of ‘worker’ in EU law: status quo and potential for change*. ETUI.; Kountouris, N. (2018). *The Concept of ‘Worker’ in European Labour Law: Fragmentation, Autonomy*

²⁵ *Aslam & Ors v Uber B.V. & Ors* (Case Nos: 2202550/2015 & Ors) at [90].

²⁶ See for instance ILO. (2018). *Digital labour platforms and the future of work: Towards decent work in the online world.*, 4; Florisson, R. and Mandl, I. (2018). *Platform work: Types and implications for work and employment - Literature review, Working paper WPEF18004*. Eurofound., 1-2; Z. Kilhoffer et al. (2020). *Study to gather evidence on the working conditions of platform workers - Final Report*. EU Commission., p. 35-43.

²⁷ See: Watson Peláez, M. (2021). *Around the world, platform food couriers are mobilising for basic workers’ rights*. In: Equal Times. 6 January. https://www.equaltimes.org/around-the-world-platform-food#.YEuv_rhKhzo. [Accessed 18 January 2021].

or any worker where the hiring entity cannot establish that the worker is (a) “free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact”; (b) “performs work that is outside the usual course of the hiring entity’s business”; and (c) is “customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.”³¹

And some companies have done a better job of pulling it off than others. For example, in a case brought by a cycle courier against UK company City Sprint³² to establish themselves as a “limb b worker” and therefore entitled to paid holidays, the company did a rather lacklustre job in cascading down its management structures the message that the contention that the couriers were independent contractors was meant to appear genuine. As Employment Judge Wade noted (at [50]):

There is a recording of a conversation between Mr Katona and a controller called Ian. Mr Katona had a problem with an item which he had collected but could not deliver at the end of the day because the premises were shut. As trained in the induction, he telephoned the controller for instructions. When he asked whether he could do what he wanted with the item the controller replied (and I quote from the respondent’s recording):

“no, I’m afraid so, I’m afraid you can’t really – I mean that’s all bull-shit – as we all know isn’t it ... That you self employs [sic] can do exactly what you want – I mean if that was the case we wouldn’t have a business would we, really?”

Employers using legal shenanigans to shirk their duties towards those from whose labour they intend to reap their profits is not a new phenomenon. Indeed, in a UK case decided before Uber was founded³³, Elias J warned (at [57]) that

The concern to which tribunals must be alive is that armies of lawyers will simply

place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.³⁴

The difference here is the level of sophistication and complexity. The greater the lengths to which the companies resort to obscure a putative employment relationship, the more circumspect one should be. As Employment Judge Snelson noted on behalf of the London Central Employment Tribunal³⁵:

... we have been struck by the remarkable lengths to which Uber has gone in order to compel agreement with its (perhaps we should say its lawyers’) description of itself and with its analysis of the legal relationships between the two companies, the drivers and the passengers. Any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, as a matter of contract, that it does not provide transportation services (through UBV or ULL), and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism. Reflecting on the Respondents’ general case, and on the grimly loyal evidence of Ms Bertram in particular, we cannot help being reminded of Queen Gertrude’s most celebrated line:

‘The lady doth protest too much, methinks.’

These legal mechanisms are often accompanied by glossy PR campaigns and communications strategies. In some cases, workers are literally paid – at a significantly higher rate than they would earn as drivers or riders – to appear on camera touting the benefits of self-employment and entrepreneurialism. For example, All of Us Casting – “a real people casting company” – recently posted on its website³⁶:

and Scope. Industrial Law Journal, 192.

³¹ Definition introduced by California state law AB 5, known as the “ABC” test, as summarised in *Olson v California*, 2020 U.S. Dist. LEXIS 34710

³² *Dewhurst v Citysprint UK Ltd* (Case No: 2202512/2016).

³³ *Consistent Group Ltd v Kalwak & Ors* [2007] UKEAT 0535_06_1805

³⁴ This passage was cited with approval by Lord Clarke JSC (with whom Lord Hope, Lord Walker, Lord Collins and Lord Wilson agreed) in the UK Supreme Court in *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41 at [25].

³⁵ *Aslam & Ors v Uber B.V. & Ors* (Case Nos: 2202550/2015 & Ors) at [87]

³⁶ <https://www.allofuscasting.com/current-projects>. [Accessed 26

We've partnered with Uber to search the country for stories to potentially be featured in an upcoming ad campaign. We're looking for genuine, current Uber rideshare and delivery drivers who value the flexibility and consistency of Uber's platform to participate in this paid opportunity. We'd love to feature stories from single parents, military veterans, self-employed entrepreneurs, students, retirees, disabled drivers, and immigrants with family obligations overseas. If you've never been in a commercial before, that's okay! We're looking to tell real stories from real people. If this sounds like you, contact us at...

For participating in one day of filming workers would receive US\$ 500 and an additional US\$1500 if/when the worker's story is used.³⁷

“The contention however, that flexibility and workers’ rights cannot co-exist, as a matter of law, is often incorrect.”

One of the key messages of these PR and lobbying campaigns is that workers are better off as independent contractors, in particular because they would sacrifice all of their flexibility were they to have any workers' rights. Whilst the amount of flexibility allowed is grossly exaggerated (see discussion below on digital control), it is true that the “gig economy” models tend to offer more flexible working arrangements than many forms of standard employment, and it's also true that this element of the model tends to be a popular proposition with workers. The contention however, that flexibility and workers' rights cannot co-exist, as a matter of law, is often incorrect. For example, in the UK it is clear that working flexibly and falling within the definition of a “limb b worker”, are not mutually incompatible.³⁸ Similarly, the Federal District Court in *Olson v California*³⁹, referring to dicta of the California Supreme Court in

January 2021].

³⁷ See: <https://pbs.twimg.com/media/EseC9aUUAAkFue?format=jpg&name=medium>. [Accessed 26 January 2021].

³⁸ For example, in *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5, Lord Leggatt JSC pointed out – as part of his rationale for holding Uber drivers to be “limb b workers” - that [at [96]]:

although drivers have the freedom to choose when and where (within the area covered by their PHV license) to work, once a driver has logged onto the Uber app, a driver's choice about whether to accept requests for rides is constrained by Uber.

³⁹ 2020 U.S. Dist. LEXIS 34710

the landmark employment status case *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903⁴⁰, noted:

And, in fact, *Dynamex* contemplates that “if a business concludes that it improves the morale and/or productivity of a category of workers to afford them the freedom to set their own hours or to accept or decline a particular assignment, the business may do so while still treating the workers as employees.” 4 Cal. 5th at 961. Thus, even if AB 5 enforcement actions require reclassification of gig economy drivers, Company Plaintiffs could still offer Olson and Perez flexibility and freedom while treating them as employees.

Workers are Treated as Independent Contractors

Drivers and couriers are invariably compelled to sign contracts in which they agree they are independent contractors, providing services to the company and/or the customer. The status quo from the get-go is the denial of workers' rights, thereby compelling workers and unions to litigate; more so in jurisdictions with weak or non-existent government enforcement. It is important to note that litigation is not a cost neutral activity nor is it quick and easy. It can take years⁴¹, necessitate ex-

⁴⁰ In this case the Supreme Court of California adopted the ABC test of employment (referred to above) for limited purposes in California law (more on which below).

⁴¹ For example, in the Pennsylvania Supreme Court case of *Lowman v Unemployment Comp. Bd. of Review*, 2020 Pa. LEXIS 3935, which concerned whether or not a driver was an employee of Uber for the purposes of his entitlement to unemployment compensation benefits under state law, one is exhausted simply by reading the Court's (abridged) summary of the proceedings (footnotes and citations omitted):

As required under the Act, Lowman reported his Uber earnings to the Duquesne Unemployment Compensation Service Center (“UC Service Center”). The UC Service Center issued a Notice of Determination on August 17, 2015, finding Lowman's Uber driving rendered him ineligible for continued benefits under [Section 802\(h\)](#) because he was self-employed. Lowman appealed and appeared with counsel at a referee hearing on October 29, 2015. Uber had been given notice of the proceeding as a putative employer and participated in the hearing, as did a representative from the Department of Labor and Industry (“Department”). The referee affirmed the UC Service Center determination, finding that Lowman was self-employed pursuant to the test in [Section 753\(l\)\(2\)\(B\)](#), and, as such, ineligible for benefits. Lowman appealed to the Unemployment Compensation Board of Review (“Board”). Applying [Section 753\(l\)\(2\)\(B\)](#), the Board affirmed the referee's decision on February 12, 2016, declaring Lowman ineligible for continued benefits because he became self-employed when he earned money by providing driver-for-hire services. Lowman filed a petition for reconsideration, which the Board granted. In a new decision, the Board ruled again that Lowman was self-employed and, as such, ineligible for benefits under [Section 802\(h\)](#). Board Decision, 4/22/2016, at 4.

pensive lawyers, and when up against an aggressive litigator can require multiple hearings on preliminary or satellite matters⁴². Denying employment rights, irrespective of any legal obligations, safe in the knowledge that most workers won't sue, is an effective strategy.

Indemnity Clauses

The contracts workers are compelled to sign often have indemnity clauses purporting to create liability for the worker for the company's legal costs should the worker seek to assert their employment status. A typical example of such a clause was summarised by the Full Bench of the Fair Work Commission in the Australian Uber Eats case⁴³:

... Clause 13.2 provides that if "by implication of mandatory law" the deliverer is deemed to be an employee, agent or representative of Uber or Portier Pacific, the deliver[er] is required to indemnify Uber and Portier Pacific against any claims arising from this.

Lowman filed a petition for review in the Commonwealth Court in April 2016. In a published en banc decision, the Commonwealth Court reversed, concluding that Lowman was not self-employed, and therefore he was eligible for benefits. ...

... Using its "positive steps" approach, the Commonwealth Court rejected the Board's ruling that Lowman was self-employed because the Department did not demonstrate that Lowman's Uber driving was an independent business venture. ... Specifically, the Commonwealth Court observed that Lowman did not take any «positive steps» to hold himself out as a commercial driver or prepare for a driver-for-hire business. ...

...

The Board sought allowance of appeal, and we granted review of two questions...

The plaintiff was successful in his case before the Pennsylvania Supreme Court. However, that was not the end of the matter. The Court remanded back to the Commonwealth Court for the "purpose of determining the calculation of [his] unemployment benefits." Five years after first being declared ineligible for continued unemployment benefits, the plaintiff had still not finished the litigation. Clearly the average low paid worker does not have the means or will to undertake five years' worth of litigation in order to obtain a few hundred dollars per week in unemployment benefits.

⁴² For example, see the case brought by Uber Black drivers in Pennsylvania, where Uber filed for multiple motions even before a substantive hearing took place, won in the first instance on a motion for summary judgment, which was then overturned in the court of appeals, only to have the matter remanded back to the first instance for another trial. For the first instance decision see *Razak v Uber Techs., Inc.*, 2018 U.S. Dist. LEXIS 61230. For the appellate decision see: *Razak v Uber Techs., Inc.*, 2020 U.S. App. LEXIS 35211.

⁴³ *Gupta v Portier Pacific Pty Ltd & Ors* [2020] FWCFB 1698. Also see *Kauders v Uber Technologies, Inc.*, 486 Mass. 557 for indemnity clauses in the purported contracts with passengers in the case of Uber in Massachusetts.

Some companies spice up the clause a bit, even requiring the worker to notify the company if at any time they believe themselves to be an employee, as was the case for deliverers for Grubhub in California.⁴⁴

The legal value of these clauses will often depend on the jurisdictions in which the grievances arise, with most legal systems apportioning costs on the basis of equitable considerations. But this is a rather mundane consideration once this type of clause has performed its intimidatory and dissuasive purpose (more on which below).



Three-way Contractual Nexus

Whilst the less sophisticated contracts of yesteryear may have simply asserted that the worker was an independent contractor in a commercial contract with the company as their client, some companies have now attempted to construct an additional hurdle by asserting that they are neither employer nor client; rather, the worker contracts directly with the end-user or business customer of the services provided, with the company acting as intermediary.

One can again look to the Australian Uber Eats⁴⁵ case for a summary of these contractual arrangements (at [34], per Ross J and Hatcher VP, footnote omitted):

It is necessary at this point to note that at first instance and in the appeal, Portier Pacific's position was that, in relation to the Restaurant Agreement, it acted as agent for the restaurant in arranging for the delivery of the meal and in collecting the restaurant's fee from the customer and, in relation to

⁴⁴ See: *Lawson v Grubhub, Inc. et al.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018).

⁴⁵ *Gupta v Portier Pacific Pty Ltd & Ors* [2020] FWCFB 1698

the Service Agreement, as agent for the deliverer in obtaining the deliverer's fee from the restaurant. The contract for the performance of each delivery was, it contended, between the restaurant and the deliverer.

And at [36]:

...it is to be noted that clause 8.3 of the Service Agreement seeks to deny that Ms Gupta is either an employee or an independent contractor of Portier Pacific. It characterises the relationship the other way around, in that it contends that Portier Pacific (together with Uber) provide services to Ms Gupta by way of giving her access to the Partner App and collecting payments on her behalf, and for this she pays a service fee to them.

In the case of Uber drivers, an additional layer is introduced whereby passengers (purportedly) conclude contracts with "partners" who in turn engage drivers. Partners in turn may themselves be drivers ("partner drivers").⁴⁶

The effect of the purported contractual nexus is designed to insulate companies and transfer risk to drivers and riders beyond the sole issue of workers' rights. For example, in one dispute between a passenger and Uber in relation to three drivers' refusal to provide the passenger with rides because he was blind and accompanied by a guide dog, the arbitrator who initially decided the case ruled in favour of Uber on the basis that the drivers were independent contractors.⁴⁷

Notwithstanding the extensive lengths to which these companies go to argue that they are little more than intermediaries between independent contractors and their customers, the compensation provisions the companies drafted in Proposition 22 – which provide for minimum earning levels for drivers – state⁴⁸:

Nothing in this section shall be interpreted to require a network company to provide a particular amount of compensation to an app-based driver for any given rideshare or delivery request, as long as the app-based driver's net earnings for each earnings period equals or exceeds that app-based driver's net earnings floor for that earnings

period as set forth in subdivision (b). For clarity, the net earnings floor in this section may be calculated on an average basis over the course of each earnings period.

This provision recognises in law the companies' obligation to ensure a minimum level of earnings for drivers regardless of what rates passengers may pay, making an absolute mockery of the concept of app-company as intermediary.

Technology Versus Transportation Services Company

Following on from the tactic of holding themselves out to be intermediaries rather than principals, ride-hailing companies will often purport to be technology rather than transportation or food delivery companies. To again cite the Australian Uber Eats case, delivery driver Amita Gupta was compelled to agree to a contractual term stating "You acknowledge and agree that Uber is a technology services provider and that neither Uber, Portier Pacific nor their Affiliates provide delivery services."⁴⁹ In that same case, on appeal before the Federal Court of Australia⁵⁰, a brief exchange between the presiding judge and Uber's counsel demonstrates how far the company is prepared to push the argument:

BROMBERG J: The very name Uber would convey to the ordinary person some form of transportation service; wouldn't it?
MR NEIL: We could not accept that.
BROMBERG J: All right.

This point has also emerged repeatedly in litigation before the European Union's Court of Justice. For instance, in Case C-434/15, Asociación Profesional Elite Taxi v Uber Systems Spain, SL, the company asserted it was

...acting as an intermediary between the owner of a vehicle and a person who needs to make a journey within a city, by managing the IT resources — in the words of [Uber Systems Spain], "smartphone and technological platform" interface and software application'.⁵¹

⁴⁹ per Ross J and Hatcher VP in *Gupta v Portier Pacific Pty Ltd & Ors* [2020] FWCFB 1698 at [14]

⁵⁰ *Gupta v Portier Pacific Pty Ltd. & Another* (No. NSD 556 of 2020). *TRANSCRIPT OF PROCEEDINGS*. 27 November 2020. p52.

⁵¹ At [18]. The Court was unpersuaded and asserted (at [48]):

that an intermediation service such as that at issue in the main proceedings, the purpose of which is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish

⁴⁶ See, for example, *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5 at [23].

⁴⁷ See *Kauders v Uber Technologies, Inc.*, 486 Mass. 557 in the case of Uber in Massachusetts.

⁴⁸ Article 3, Section 7453(e)

Indeed, the only apparent relaxation of Uber’s dogged insistence before the courts that it is a technology platform and not transportation services provider was in *Uber Singapore Technology Pte Ltd & Ors v Competition and Consumer Commission of Singapore* [2020] SGCAB 2. The case concerned an appeal by Uber against a decision of the Competition and Consumer Commission of Singapore (CCCS) to fine the company for the anticompetitive effects of the sale of its South East Asian operations to former competitor Grab. In that case – in which it was in Uber’s interest to downplay the significance of the merger between the two dominant app-based transportation companies – it maintained that street-hail taxi services were an effective substitute for Uber services, “offering a similar product at a similar price”⁵². Indeed, Uber went as far as to suggest that it knew from “experience, consumer surveys and common sense” that it competed in the same market as street-hail taxis.⁵³ In a twist of extraordinary irony, it was the CCCS which argued – against Uber – that Uber should be considered a platform:

...the relevant market is said to be the market for PPT platform services, with the overlapping service between Grab and Uber being the matching service which operates to match riders and drivers, and not the provision of the underlying transport services. This is clear from the terms of use of the merger parties... ...it is misleading for the appellants to submit that public transport providers ... are also competitors.⁵⁴

This did not prevent Uber from arguing in the same proceedings that only the revenue derived from the provision of platform services – i.e. the commissions it took from drivers – should be considered its “turnover” (rather than the revenue it collected from passengers); this is relevant because the fine imposed on the company was calculated as a percentage of turnover, so a lower turnover meant a lower fine.⁵⁵

to make urban journeys, must be regarded as being inherently linked to a transport service and, accordingly, must be classified as ‘a service in the field of transport.

Also see Case C-320/16, *Uber France SAS*.

⁵² At [71].

⁵³ At [171].

⁵⁴ CCCS submissions as summarised by the Competition Appeal Board at [73]; emphasis in original.

⁵⁵ See [168].

Subsidiary Versus Parent Company

This tactic is particularly relevant for multinational companies operating in multiple jurisdictions. For example, in the case of Uber, although drivers mainly deal with the relevant national subsidiary, contractual arrangements are made with Uber BV, a company headquartered in The Netherlands. As noted by Commissioner Everett in the South African Uber case⁵⁶ (at [13]):

Uber BV is registered in the Netherlands. Uber SA operates in South Africa. The contracts are concluded with BV, but there are various communications which come from Uber South Africa and Uber Cape Town.

“As will be seen in more detail below, the confusion as to which Uber company is the correct counter-party in any employment status litigation does not occur by happenstance but is rather created by design. Whilst always denying the existence of any employment relationship, Uber repeatedly argues that if there does exist such a relationship it is with the Dutch company rather than with the national subsidiary with whom the workers are more likely to deal.”

As will be seen in more detail below, the confusion as to which Uber company is the correct counter-party in any employment status litigation does not occur by happenstance but is rather created by design. Whilst always denying the existence of any employment relationship, Uber repeatedly argues that if there does exist such a relationship it is with the Dutch company rather than with the national subsidiary with whom the workers are more likely to deal.⁵⁷ If accepted, this proposition would have the effect of decoupling some of the putative employer functions from the day to day management of the drivers, which in some jurisdictions would result in the putative Dutch employer not being liable for a number of rights of workers that it does not “control” in the canonical sense of the legal test.

⁵⁶ *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & Ors* (Case No: WECT12537-16 & Ors).

⁵⁷ See also, in the case of the UK, *Uber B.V. & Ors v Aslam & Ors* [2021] UKSC 5.

Mandatory Arbitration Clauses and Large Upfront Payments to Commence Claims

Companies routinely insert mandatory arbitration clauses into the contracts with workers, thereby purporting to require any employment status dispute to be brought before an arbitrator rather than a court of law⁵⁸. In Ontario, Canada for example, Uber's arbitration clause

requires all disputes to be submitted first to mandatory mediation and, if that fails, then to arbitration, both according to the International Chamber of Commerce ("ICC")'s Rules. The place of the arbitration is to be in Amsterdam.⁵⁹

The upfront costs of this arbitration amounted to US\$ 14,500 in administration and filing fees.⁶⁰

It is important to note that the common (intended) effect of such mandatory arbitration clauses is not just to oust the jurisdiction of the courts, but also to prevent class actions by requiring disputes to be individually arbitrated. Although this matter is, on the face of it, procedural rather than substantive, in some jurisdictions class actions are the mechanism which make low value claims practically viable. This is a point emphasised by Professor David Doorey⁶¹ in the context of the Canadian Supreme Court case cited above:

Uber v. Heller, like Epic Systems, is a class action lawsuit, but the class action component of the Heller case was surprisingly muted in legal arguments before the Court last week. Apart from submissions made by a few intervenors (including UFCW Canada), there was little emphasis in oral argument to the fact that the Uber mandatory arbitration clause does not just prevent an individual driver such as Mr. Heller from filing an employment standards complaint; it also

⁵⁸ Mandatory arbitration is often also purported to be imposed on customers; see *Kauders v Uber Technologies, Inc.*, 486 Mass. 557 in the case of Uber in Massachusetts. Also see the US (First Circuit) Court of Appeals case of *Cullinane v Uber Techs., Inc.*, 893 F.3d 53, ⁶² (1st Cir. 2018).

⁵⁹ See judgment of Abella and Rowe JJ in *Uber Technologies Inc. v Heller*, 2020 SCC 16 at [9]. See *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & Ors* (Case No: WECT12537-16 & Ors) at [22] for effectively the same provision in the case of South Africa.

⁶⁰ See judgment of Abella and Rowe JJ in *Uber Technologies Inc. v Heller*, 2020 SCC 16 at [2].

⁶¹ Doorey, D. (2019). *Heller v. Uber: Supreme Court Case Must Guard Access to Class Action Lawsuits*. In: Canadian Law of Work Forum. 18 November. <https://lawofwork.ca/heller-class-action/>. [Accessed 25 February 2021].

effectively closes the door on any class action that might be brought by Uber workers.

This is a crucial point that needs to be emphasized. It was at the centre of the fight in the Epic Systems case. The reason why that decision is so devastating to U.S. workers is that it permits employers to block access to employee class action lawsuits to enforce fair labour standards. Class action lawsuits are the most important means by which groups of low-income, precarious workers can overcome systemic barriers to access to justice, including prohibitive costs associated with taking on large corporations and fears of reprisal for challenging employer prerogative.

Uber's herculean effort to disguise its gimmicks as anything other than designed to impede its workers' access to basic rights is at times fantastical. For example, Brown J noted in *Uber Technologies Inc. v Heller*⁶² (at [114]):

During the hearing of this appeal, Uber's counsel would not concede that a clause requiring an upfront payment of 10 billion dollars to commence a civil claim would necessarily be equivalent to a brick wall standing in the way of dispute resolution.

Uber and Lyft even tried to invoke the arbitration clauses in response to a motion filed by the State of California seeking injunctive relief, restitution and penalties for the companies' having misclassified their drivers, something the Superior Court of California generously referred to as a "novel argument"⁶³.

Disputes Made Subject to Foreign Law

In addition to asserting that if an employment relationship does exist, it exists with its Dutch subsidiary, Uber's contractual documentation also purports to make employment status disputes subject to Dutch law, a foreign jurisdiction for the overwhelming majority of Uber drivers and couriers.⁶⁴

⁶² 2020 SCC 16

⁶³ See: *People v Uber Techs.*, Superior Court of San Francisco City and County, No. CGC-20-584402.

⁶⁴ The typical contractual language asserts the contract must be "governed by and construed in accordance with the laws of The Netherlands, excluding its rules on conflicts of laws"; see judgment of Abella and Rowe JJ in *Uber Technologies Inc. v Heller*, 2020 SCC 16 at [9].

Overcoming Laws Designed to Target Them

How Uber, Lyft, Doordash and other “gig economy” companies behaved in relation to the landmark California law AB 5 perfectly exemplifies the degree to which the companies seek to subvert not only the basic rights of their workers, but also the clear purpose of legislation. First, they sought exemptions from the bill before it had been enacted by the California Assembly.⁶⁵ When this did not work, and there was a serious threat of enforcement, they argued the law didn’t apply to them, then tried to obtain an injunction enjoining enforcement action on the basis that the law was unconstitutional and as such “invalid and unenforceable” against them⁶⁶, and then funded a referendum campaign to overturn law⁶⁷. The intellectual incoherence, to put it mildly, of these various strategies was not lost on the California Superior Court⁶⁸:

Defendants argue first that A.B. 5 does not apply to them at all because they are not “hiring entities,” or because they are exempt from that legislation. This argument flies in the face of Uber’s conflicting claims in federal litigation and of Defendants’ concerted effort to overturn the statute. Within days of its enactment, Uber filed suit in federal court asserting that A.B. 5 unconstitutionally “targets” its business, and, as discussed above, it has urged this Court to stay this litigation until its appeal in that case can be decided. And, of course, Defendants are major supporters of Proposition 22, a measure on the November 2020

⁶⁵ Luna, T. (2020). *Uber, Lyft Face Uphill Struggle for Gig-Worker Votes*. In: Los Angeles Times. 23 September. <https://www.governing.com/work/Uber-Lyft-Face-Uphill-Struggle-for-Gig-Worker-Votes.html>. [Accessed 23 February 2021].

⁶⁶ See: *Olson & Ors v State of California & Ors*, Case No. 2:19-cv-10956, *Complaint for violation of federal and California constitutional rights, declaratory, injunctive, and other relief; Demand for jury trial and Olson v California*, 2020 U.S. Dist. LEXIS 34710.

⁶⁷ See: Kerr, D. (2020). *A totally different ballgame: Inside Uber and Lyft’s fight over gig worker status*. In: CNET. 28 August. <https://www.cnet.com/features/uber-lyfts-fight-over-gig-worker-status-as-campaign-against-labor-activists-mounts/>. [Accessed 18 January 2021]. News reports have indicated that “gig economy” companies are looking to join together to combat similar state-level legislation, e.g. in the case of New York, see Reisman, N. (2020). *On-Demand Industry Launches Coalition*. In: Spectrum News. 21 December. <https://www.ny1.com/nyc/all-boroughs/ny-state-of-politics/2020/12/21/on-demand-industry-launches-coalition>. [Accessed: 22 December 2020]. See also: Marshall, A. (2020). *Uber and Lyft’s Gig Work Law Could Expand Beyond California*. In: Wired. 22 December. <https://www.wired.com/story/uber-lyfts-gig-work-law-expand-california/> [Accessed: 23 December 2020].

⁶⁸ *People v Uber Techs.*, Superior Court of San Francisco City and County, No. CGC-20-584402.

ballot that would exempt their businesses from A.B. 5. Defendants make no attempt to explain away these glaring inconsistencies.

When asked to respond to the argument of Uber’s Chief Legal Counsel that AB 5 was inapplicable to Uber, AB 5 sponsor California Assemblywoman Lorena Gonzalez, put the point slightly more bluntly: “well I think he’s full of shit”⁶⁹.



Running or, Better Yet, Hiding in Plain Sight

Even when none of the legal strategies outlined above suffices to prevent a finding of employment status, the companies’ strategies do not end there. Indeed, in Spain, at the time of writing, delivery workers had already won a whopping 41 court cases against “gig economy” companies⁷⁰ – the sheer number alone clearly indicating the problem has not yet been solved – the latest one being against Deliveroo⁷¹. Similarly, the French⁷² Supreme Court of Cassation concluded that the Uber drivers involved in the dispute ought to be classified as subordinate employees of their employing company. In the Foodora case,⁷³ the Italian Court of Cassation demanded that the bulk of employment law protections be awarded to the delivery riders working for the company in spite of their being classified as (hetero-organised) independent contractors. In jurisdictions with weak or non-existent enforcement

⁶⁹ See: 18 September 2019. <https://twitter.com/mikeblountsac/status/1174418362413117440?s=20> [Accessed: 24 December 2020].

⁷⁰ See: Wray, B. (2021). *Ben Wray – Spain’s gig economy riders win 41st court verdict against platform employers*. In: Brave New Europe. 13 January. <https://braveneweuropa.com/ben-wray-spains-social-democrats-and-left-again-betraying-workers>. [Accessed 18 January 2021].

⁷¹ *Sentencia N° 259/2020*, Juzgado de lo Social n° 24 de Barcelona

⁷² Cass. Soc. n. 2020/374, of 4 March 2020.

⁷³ Cass. n. 1663/2020, of 24 January 2020.

regimes the companies can simply issue new contracts to workers, the signing of which becomes obligatory should the workers wish to continue working, and claim that any previous findings related only to the old contracts. This is what CitySprint – a same day delivery company – did in the UK⁷⁴, only to lose again in a second piece of litigation over the “new” contract⁷⁵. Similarly, in New York Uber and Lyft would refuse to provide wage and earnings information to the New York Department of Labor so that their drivers could benefit from unemployment insurance. The Department nevertheless went on to declare hundreds of these drivers employees for the purposes of the relevant legislation. The companies then developed a tactic – referred to by the Federal District Court as “gamesmanship” – of appealing these findings and then abandoning the appeals before a hearing. This had the benefit of delaying any audits by the Department whilst simultaneously avoiding any employment status determination from applying across the board to all drivers⁷⁶. Finally, a company may simply pull out of market in the wake of an employment status determination which it believes impinges on its business model, as did Foodora in Ontario, Canada⁷⁷. The role of the state in enforcing and generalising the effects of these decisions is often the missing ingredient for the rule of law to prevail. As noted by maître Fabien Masson, the lawyer that represented the Uber drivers before the French Court of Cassation

the judgment ... does not question the model of the platforms. For this to happen, it would be important for [the social security authorities] to point the tip of their nose towards the platforms and reclaim the unpaid contributions on the hypothesis that all drivers ought to be considered as employees. Now the [social security authorities] are under the tutelage of the ministers for social and financial affairs. This therefore calls for a political decision but many politicians do not even

understand how that works. We are most certainly not about to live the end of platforms!⁷⁸

Conclusion

Some of the contractual clauses discussed above are designed more to intimidate than to be exercised. For example, even though Uber’s contractual arrangements specifically stipulated that they were subject to Dutch law, in the Canadian Supreme Court case which held the arbitration clause to be unconscionable, of its own volition Uber decided not to lead any evidence on Dutch law, thereby allowing the court to decide the matter on the basis of Ontario law.⁷⁹ Similarly, in the UK Uber case, by the time the matter appeared before the Employment Tribunal (the first instance level), Uber had accepted that the Tribunal had jurisdiction to adjudicate the claims, and that if the drivers were held to be employed by Uber’s UK subsidiary, that English and not Dutch law applied⁸⁰. We are also not aware of the indemnity clauses having been exercised against drivers or delivery workers in any of the cases we have surveyed for this article⁸¹. The real impact of the clauses that the companies choose not to exercise is in the number of cases that have not been brought because of them.

However, most of the strategies outlined above are indeed relied upon by the “gig economy” companies seeking to avoid having to provide workers’ rights or pay the relevant taxes. The advantage of deploying a number of simultaneous strategies is that even when some of them do not work, others may. In the next section we discuss the extent to which these strategies have succeeded.

THE CASES: HOW WORKERS, TRADE UNIONS, AND GOVERNMENTS HAVE FARED

Although ‘gig economy’ workers around the world are facing similar problems, often vis-à-vis the same multinational companies, and many times trigger litigation strategies that come to similar legal conclusions, the absence of the reliance on international law in the cases

⁷⁴ See: *Dewhurst v CitySprint UK Ltd* (Case No: 2202512/2016) and Butler, S. (2017). *CitySprint accused of ‘making a mockery’ of employment rights*. In: The Guardian. 15 November. <https://www.theguardian.com/business/2017/nov/15/citysprint-employment-rights-courier-mini-mum-wage-holiday-pay> [Accessed 25 December 2020].

⁷⁵ *O’Eachtiarna & Ors v CitySprint (UK) Ltd* (Case No’s: 2301176/2018 & Ors).

⁷⁶ For a full discussion on this, see: *Islam v Cuomo*, 2020 U.S. Dist. LEXIS 133082.

⁷⁷ See Doorey, D. (2020). *Thoughts on the Foodora Fiasco: Have Labour Laws Been Violated?* In: Canadian Law of Work. 28 April. <http://lawof-work.ca/thoughts-on-the-foodora-fiasco-have-labour-laws-been-violated/> [Accessed: 24 December 2020].

⁷⁸ Dalloz Actualité. (2020). *Chauffeur Uber : « L’arrêt de la Cour de cassation ne remet pas en cause le modèle des plateformes »*. 16 March. <https://www.dalloz-actualite.fr/interview/chauffeur-uber-l-arret-decour-de-cassation-ne-remet-pas-en-cause-modele-des-plateformes#.%20YClpZmhKg2w>. [Accessed 25 February 2021]. (authors’ translation; emphasis supplied).

⁷⁹ See judgment of Abella and Rowe JJ in *Uber Technologies Inc. v Heller*, 2020 SCC 16 at [50].

⁸⁰ See *Uber B.V. & Ors v Aslam & Ors* [2018] EWCA Civ 2748 at [9].

⁸¹ Although in one of the cases we have reviewed Uber sought to exercise the indemnity clause in a dispute with a passenger (see: *Kauders v Uber Technologies, Inc.*, 486 Mass. 557).

surveyed is striking. Whilst some of the European cases refer to European law (both European Union law and the European Convention on Human Rights), there is scant reference in the cases to the main international legal instrument relevant to the employment relationship: ILO Recommendation 198. Indeed, of the cases surveyed, only the Uruguayan Uber case⁸² relied on Recommendation 198 as the basis of its reasoning⁸³. In fact, decisions are far more likely to refer to decisions adopted in other jurisdictions,⁸⁴ than to ILO instruments or principles. This point is perhaps best illustrated by the jurisprudential earthquake that was the UK Supreme Court decision in the Uber case. Within days, the case had been cited in litigation in Australia against Deliveroo⁸⁵, was suggested by lawyers to be relevant to a class action claim on behalf of Uber drivers in South Africa⁸⁶, and the Kenyan Ministry

of Labour stated it was reflecting on how it could implement the ruling in that country⁸⁷. The ruling of course, was not legally binding in any of these jurisdictions.

International law played an indirect role in the UK Deliveroo case⁸⁸. This is because, due to the English legal doctrine of dualism, international legal instruments, including ILO conventions ratified by the UK, do not normally have legal effects in UK law unless separate domestic legislation is introduced for the purposes of incorporation or implementation⁸⁹. Indeed, workers and trade unions in the UK are able to rely before UK courts on the protections of the European Convention on Human Rights (ECHR) – which is separate to EU law – specifically because domestic legislation in the form of the Human Rights Act 1998 provides such a right. The Convention jurisprudence which emanates from the European Court of Human Rights relies heavily on international law, including – in particular with regard to the trade union rights enshrined in Article 11 ECHR – relevant conventions and other legal instruments from the International Labour Organisation⁹⁰. The European Convention on Human Rights is therefore the portal through which workers and trade unions in the UK are able to access their rights as recognised in international legal instruments promulgated by the ILO.

Interestingly, a Panel of Experts constituted to resolve a dispute under the EU – Korea Free Trade Agreement, has recently decided that South Korea was in breach of the agreement, in part, because the definition of “worker” in the country’s Trade Union and Labour Relations Adjustment Act⁹¹ excluded certain self-employed from access to ILO freedom of association rights, which were incorporated into the agreement.⁹² Although undoubtedly



⁸² QUEIMADA, ESTEBAN *c/* UBER B.V. y otro - Recursos Tribunal Colegiado - IUE No: 0002-003894/2019

⁸³ It is true that Commissioner Everett in *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & Ors* (Case No: WECT12537-16 & Ors) made passing reference – in the context of the need to interpret the Labour Relations Act 1995 so as to give effect to its underlying purposes – to the “obligations incurred by the republic as a member state of the International Labour Organisation” (at [54]). However, this hardly formed a substantive part of the ratio of the decision, and in any case, the decision was overturned by the Labour Court on appeal (see: *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & Ors* (Case No: C 449/17)).

⁸⁴ For instance, the 2020 decision of the Palermo Tribunal in the Foodinho/Glovo case refers to precedents from no less than four other legal systems, see decision 3570 of 24 November 2020. Similarly, the UK Supreme Court in *Uber B.V. & Ors v Aslam & Ors* [2021] UKSC 5 does not refer to ILO material but does refer to a decision of the Canadian Supreme Court at [75].

⁸⁵ Marin-Guzman, D. (2021). *Union deploys Uber UK ruling against Deliveroo*. In: Financial Review. 22 February. <https://www.afr.com/work-and-careers/workplace/union-deploys-uber-uk-ruling-against-deliveroo-20210222-p574p3>. [Accessed 24 February 2021].

⁸⁶ Leigh Day. (2021). *Prominent Human Rights Lawyers Launch Class Action for South African Uber drivers*. 22 February. <https://www.leighday.co.uk/latest-updates/news/2021-news/prominent-human-rights-lawyers-launch-class-action-for-south-african-uber-drivers/>. [Accessed 24

February 2021].

⁸⁷ Ndungu, J. (2021). *Hope for Digital Taxi Drivers as Kenya Considers Historic Directive*. In: Nairobi Times. 24 February. <https://nairobitimes.co.ke/2021/02/24/hope-for-digital-taxi-drivers-as-kenya-considers-historic-directive/>. [Accessed 24 February 2021].

⁸⁸ *R (on the application of the Independent Workers’ Union of Great Britain) v Central Arbitration Committee & Rooffoods Ltd t/a Deliveroo* [2018] EWHC 3342 (Admin) (in particular, see [28]). At the time of writing the decision had been appealed to, and argued before, the Court of Appeal of England and Wales, although a decision had not yet been handed down.

⁸⁹ See *R (on the application of Miller & Anor) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁹⁰ See in particular the judgment of the Grand Chamber of the European Court of Human Rights in *Demir & Baykara v Turkey* (Application no. 34503/97).

⁹¹ Act No 5310, 13 March 1997.

⁹² See: Murray, J., Boisson de Chazournes, & Lee, J. (2021). *Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts*. 20 January. Notably, the “worker” definition in the South Korean legislation cited above

correct as a matter of law, and an important victory for those excluded self-employed workers in South Korea, politically the decision is peculiar, to put it gently; the – for present purposes – analogous Trade Union and Labour Relations (Consolidation) Act 1992 of the UK (until recently the EU’s second largest economy), by virtue of its definition of “worker”, similarly excludes many self-employed from access to basic trade union rights. Indeed, this was the express basis on which the UK Deliveroo case was lost.⁹³ And it could also be argued that similar exclusions arise from the EU Court of Justice jurisprudence in cases such as Case C-413/13, FNV Kunsten, whose exclusionary effects on large swathes of self-employed workers the EU Commission is now trying to address by reference to the broader concept of ‘own labour’ and personal work.⁹⁴

is virtually identical to the autonomous definition of “worker” in EU law, and its interpretation appears to be broad, using a multifactorial assessment similar to many of the other employee/worker definitions reviewed in this paper. According to Supreme Court Decision (Korea) 2014Dul2598, 12604 decided 15 June 2018, cited by the Panel of Experts at [152]:

‘Worker’ under the TULRAA refers to any person who provides labour to another party based on a subordinate relationship and receives wage, etc. in return. Determination as to whether a person may be deemed a ‘worker’ as prescribed by TULRAA ought to consider the following: (i) whether a worker’s source of income is mainly dependent upon a specific employer; (ii) whether an employer unilaterally decides the terms of a contract, including wage, that it concludes with a worker who provides the necessary labour; (iii) whether a worker gains market access by way of providing the essential labour to perform an employer’s business; (iv) whether the legal relationship between the worker and an employer is of a substantially continuous and exclusive nature; (v) whether there exists a certain degree of supervisory/managerial relationship between an employer and a worker; and (vi) whether income, such as wage or salary, that a worker receives from his/her employer is a consideration for provision of labour...

Relevantly for present purposes, South Korea argued before the Panel of Experts that the TULRAA definition of “worker” had been applied to some groups of couriers; in one case in a decision of the Seoul Administrative Court of Korea (at [155]) and in another case by way of a certificate issued by the Korean Government establishing the National Delivery Workers Union as a trade union in Korean law (at [156]). It appears the Administrative Court decision has been appealed to the Seoul High Court ([159]).

⁹³ Although concerning foster care rather than “gig economy” workers, another UK case in which workers were denied trade union rights – in this case the ability to form a trade union – on the basis that they fell outwith the definition of “worker” in the Trade Union and Labour Relations (Consolidation) Act 1992 is *NUPFC v Certification Officer (with the Independent Workers of Great Britain, the Secretary of State for Education, the Local Government Association and the European Children’s Rights Unit intervening)* UKEAT/0285/17/RN. At the time of writing the decision had been appealed to, and argued before, the Court of Appeal of England and Wales, however a decision had not yet been handed down.

⁹⁴ EU Commission. (2021). *Collective bargaining agreements for self-employed – scope of application of EU competition rules – Inception Impact Assessment*. Ref. Ares(2021)102652 - 06/01/2021.

As a general observation, those employment law regimes which have focused on the fundamentals, rather than the symptoms, of the employment relationship have done a better job at keeping up. This approach is exemplified by Ontario’s “dependent contractor” status for the purposes of collective bargaining law. As the Ontario Labour Relations Board noted in the Foodora case⁹⁵ (per Wilson AC, footnote omitted, at [1]):

When Professor Harry Arthurs introduced the notion of “dependent contractor” to Canadian legal lexicon in his seminal 1965 article – a concept that was adopted by the Ontario Legislature in 1975 – he could not have envisioned that it would apply to couriers using electronic software application (“App”) on a smart phone to deliver a customized meal assigned by an algorithm without any direct communication or direct payment with the customer. Foresight of technology was unnecessary because he contemplated a classification of worker to fill the void between an employee and an independent contractor that had sufficient elasticity to adapt to new workplaces and innovative models of service delivery. Fifty-five years later, Professor Arthurs’ proposal has withstood the test of time and made its way into what is colloquially known as “the gig economy”.⁹⁶

The approach of the Ontario Labour Relations Board in the Foodora case stands in notable contrast to that of Deputy President Gostencnik in one of the Australian Fair Work Commission cases against Uber⁹⁷ (at [66]):

The notion that the work-wages bargain is the minimum mutual obligation necessary

⁹⁵ OLRB Case No: 1346-19-R

⁹⁶ A similar approach was taken by the German Federal Labour Court in its recent decision in the Roamler crowdworking case (15.3.1978, 5 AZR 819/76 Rn. 31):

Such an approach does not extend the concept of employee inadmissibly. It is not a question of moving types of contract which have hitherto been considered to be part of the liberal employment contract into the field of labour law. Rather, the aim is to take a correct view of new types of jobs created by technical development and to correctly classify the corresponding legal relationships in our legal system.” (Citation in Helm, R. The Roamler Case: A pending decision at the German Federal Labour Court. Presentation in Brussels, 15 October 2020.)

⁹⁷ *Kaseris v Rasier Pacific V.O.F* [2017] FWC 6610. Deputy President Gostencnik effectively recognised (at [64]) that had the UK’s “limb b worker” definition – which, similar to Ontario’s “dependent contractor”, prioritises substance over form – been applicable in Australia, drivers would be caught by it.

for an employment relationship to exist, as well as the multi-factorial approach to distinguishing an employee from an independent contractor, developed and evolved at a time before the new “gig” or “sharing” economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy. Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy. But until then, the traditional available tests of employment will continue to be applied.”

“Courts in most jurisdictions appear not to ascribe excessive weight to the labelling of the parties. Sometimes the relevant laws expressly stipulate that priority is to be given to substance over form;”

Disregarding the Label – Substance Over Form

Courts in most jurisdictions appear not to ascribe excessive weight to the labelling of the parties. Sometimes the relevant laws expressly stipulate that priority is to be given to substance over form; for example, in Belgium, article 331 of loi-programme (I) of 27 December 2006 states: “priority is to be given to the classification [of the work relationship] revealed by its exercise in practice if this conflicts with the legal classification chosen by the parties”⁹⁸. However, the principle has also been adopted as a matter of jurisprudential approach; for example, the Labour Court in the Chilean case against food delivery company Pedidos Ya⁹⁹ stated:

⁹⁸ Authors’ translation. See: *Dossier n°: 187 – FR – 20200707* (decision of the Commission administrative de règlement de la relation de travail (CRT) – Chambre Francophone, Service public fédéral: Sécurité sociale).

⁹⁹ *Arredondo Montoya v Pedidos Ya Chile SPA* RIT M-724-2019. This decision was upheld on appeal before the Court of Appeal of Concepción (Rol N° 395-2020).

...in employment law the principal of reality reigns supreme; this means that in a case where there is a discrepancy between what happens in practice and what appears in the documents and agreements, the first takes precedence, that is that which occurs in fact.¹⁰⁰

The French Court of Cassation made the same point in the *Take Eat Easy* case¹⁰¹:

...the existence of an employment relationship does not depend on either the expressed will of the parties or on the label they have applied to their agreement, but rather on the actual conditions in which the workers’ activities are exercised.¹⁰²

Indeed, the dicta of Aikens LJ in the UK case of *Autoclenz Ltd v Belcher & Ors* [2009] EWCA Civ 1046 effectively sums up the difference in approach taken by courts throughout the jurisdictions surveyed, between assessing employment and commercial relationships (at [92]):

...the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to ac-

¹⁰⁰ Authors’ translation. The Court of Justice of the European Union (CJEU) applied the same logic in reverse in the case of *AFMB Ltd and Others v Raad van bestuur van de Sociale verzekeringsbank* (Case C-610/18), where the validity of a purported employment relationship was impugned on the basis that the real employer was a different company. There the Court held (at [61]) that:

...while the conclusion of an employment contract between the employed person and an undertaking may be an indication that there is a hierarchical relationship between the former and the latter, that circumstance alone cannot permit a definitive conclusion that there exists such a relationship. It remains necessary, in order to arrive at such a conclusion, to have regard not only to the information formally contained in the employment contract but also to how the obligations under the contract incumbent on both the worker and the undertaking in question are performed in practice. Accordingly, whatever the wording of the contractual documents, it is necessary to identify the entity which actually exercises authority over the worker, which bears, in reality, the relevant wage costs, and which has the actual power to dismiss that worker.

¹⁰¹ Arrêt n° 1737 ECLI:FR:CCASS:2018:SO01737

¹⁰² Authors’ translation. And see words to similar effect from the Spanish Supreme Court (Social Chamber), in a case brought against Glovo (ECLI: ES:TS:2020:2924), at p11.

cept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so.

This passage was cited with approval by Lord Clarke JSC (with whom Lord Hope, Lord Walker, Lord Collins and Lord Wilson agreed) in the UK Supreme Court on appeal (*Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41 at [34]). Indeed, the admonition to tribunals to be “realistic and worldly wise” has been repeatedly cited throughout the employment status jurisprudence in the UK. For example, the majority for the Court of Appeal in *Uber B.V. & Ors v Aslam & Ors* [2021] UKSC 5 expressly relied on this (at [105]):

We consider that the extended meaning of “sham” endorsed in *Autoclenz* provides the common law with ample flexibility to address the convoluted, complex and artificial contractual arrangements, no doubt formulated by a battery of lawyers, unilaterally drawn up and dictated by Uber to tens of thousands of drivers and passengers, not one of whom is in a position to correct or otherwise resist the contractual language.

This point also appears to carry considerable currency in Italian jurisprudence with the Supreme Court of Cassation. In the *Foodora* decision, that resulted in the delivery drivers employed by *Foodora/Glovo* benefiting from the labour protections applicable to “subordinate” workers (under Article 2 of the legislative decree 81/2015, and later revised in 2019); the Court expressly stated that “it is known how much the qualification disputes are influenced in a decisive manner by the effective modalities of the performance of work”.¹⁰³

However, it is perhaps the UK Supreme Court in *Uber B.V. & Ors v Aslam & Ors* [2021] UKSC 5 which has gone the furthest. Developing and extending the holdings in *Autoclenz*, Lord Leggatt JSC, on behalf of a unanimous six justice panel, said (at [69]):

Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts,

Autoclenz had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a “worker” in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

Statutory interpretation, Lord Leggatt JSC went on to say (at [70]), required courts “to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose.” And the purpose of workers’ rights legislation in the case was clear (at [71]):

...to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing).

Bearing in mind this legislative purpose, as well as the dependency of workers/employees on, and subordination to, their employers, and the control to which they are subjected, Lord Leggatt JSC went on to hold (at [76]):

Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a “worker”. To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are desig-

¹⁰³ Authors’ translation; Cass. n. 1663/2020.

nated by their employer as qualifying for it.

On this basis the Court rejected Uber's argument that the proper analysis was for the Court to start with the written contracts, and could only depart from said contracts if the working relationship was shown to be inconsistent with them (at [77]):

The Services Agreement (like the Partner Terms before it) was drafted by Uber's lawyers and presented to drivers as containing terms which they had to accept in order to use, or continue to use, the Uber app. It is unlikely that many drivers ever read these terms or, even if they did, understood their intended legal significance. In any case there was no practical possibility of negotiating any different terms. In these circumstances to treat the way in which the relationships between Uber, drivers and passengers are characterised by the terms of the Services Agreement as the starting point in classifying the parties' relationship, and as conclusive if the facts are consistent with more than one possible legal classification, would in effect be to accord Uber power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers.

The Court further held that due to the statutory prohibitions on "contracting out" of the relevant workers' rights statutes, that (at [85]):

... any terms which purport to classify the parties' legal relationship or to exclude or limit statutory protections by preventing the contract from being interpreted as a contract of employment or other worker's contract are of no effect and must be disregarded.¹⁰⁴

In sum, whilst, as observed above, it is commonplace throughout the jurisdictions surveyed for courts to look to the reality of the situation rather than the classification ascribed to a relationship by the parties, in the UK the Supreme Court has held that: i) the courts should not even use the parties' contracts as the starting point; ii) the contracts should be disregarded if inconsistent with the reality of the relationship; and iii) in any case, any contractual terms which purport to preclude the ap-

¹⁰⁴ A similar point was made by Brown J in his concurring judgement in *Uber Technologies Inc. v Heller*, 2020 SCC 16 at [113]: "there is no good reason to distinguish between a clause that expressly blocks access to a legally determined resolution and one that has the ultimate effect of doing so."

plication of workers' rights legislation are null and void.

Understanding Digital Control

Important as it may be to recognise that reality should trump fiction, the end result of any reclassification exercise can fail to deliver for workers, unless courts resist the technological obfuscation of that reality performed at the hands of algorithms that purport to act as digital intermediaries but in reality exercise substantial levels of technological and digital control over the performance of the work relationship. Some courts have been better than others at seeing through the façade of autonomy upon which "gig economy" companies rely in favour of recognising the more nuanced, technologically innovative and entrepreneurially creative manner in which the companies nevertheless exert control over their workers. For example, in a Brazilian Superior Court case over conflict of jurisdiction¹⁰⁵, Minister¹⁰⁶ Ribeiro was notably unable to see through the façade, saying:

The app drivers do not have a hierarchical relationship with Uber because they provide their services on a casual basis, without pre-established shifts or fixed salaries, which precludes the existence of an employment relationship between the parties.¹⁰⁷



The Spanish Supreme Court (Social Chamber) on the other hand, in a case brought against food delivery company Glovo¹⁰⁸, noted (at p10): "Technological innovation has fostered the establishment of digitalised forms of control

¹⁰⁵ CONFLITO DE COMPETÊNCIA Nº 164.544 – MG (2019/0079952-0).

¹⁰⁶ The term commonly used in Latin America for a high-level judge.

¹⁰⁷ Authors' translation.

¹⁰⁸ ECLI: ES:TS:2020:2924.

over the rendering of services,”¹⁰⁹ and that the concepts utilized for determining the existence of an employment relationship in Spanish law therefore had to be adapted to the times in which they were applied. The Chilean case against Pedidos Ya¹¹⁰ similarly recognised that links of subordination and dependence between worker and employer existed but “not in the traditional manner”¹¹¹. Or as Commissioner Everett put it in *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & Ors*¹¹² (at [45]):

Even though there is no direct or physical supervision, control is exercised through technology, to the point that even the movement of the cell phone can be detected, indicating reckless driving.

Similarly, the French Court of Cassation (Labour Chamber)¹¹³ upheld a Paris Court of Appeal decision that a driver was an employee of Uber on the basis that he was in a relationship of subordination with the company. The subordination existed because:

Far from freely deciding on the organisation of his operations, seeking out a clientele, or choosing his suppliers, he thus joined a transportation service set up and entirely organised by Uber BV and which exists only through this platform. The use of this transportation service did not lead to the obtainment of a proprietary client base for Mr. X... who is not free to set his fares or to determine the terms and conditions for conducting his transportation service business which are entirely governed by Uber BV.

The SPF Sécurité sociale in Belgium, in a case brought by a driver against Uber¹¹⁴, the

Commission described how the passenger ratings system was little more than performance management of the driver by Uber:

This rating of drivers by users does not serve the purpose of providing passengers with the information necessary for them to choose between different drivers on the basis of their average ratings. The passenger effectively never chooses their driver; the driver is designated by the app. User ratings are utilised here as an instrument to monitor each driver's services, encouraging them to do everything possible to maintain a high rating, under penalty of risking exclusion from the platform.¹¹⁵

The Commission in the Belgian case also rejected the contention that the driver was free to organise his working time as he pleased simply because he could choose when to sign on or off the app. Au contraire, the driver had to accept jobs without yet knowing the location or destination of the passenger or the profitability of the work, he was logged off the app automatically after three job refusals in a row, and cancelling too many jobs (after acceptance) could lead to the driver's dismissal.¹¹⁶ The Commission's reasoning is notable as the supposed freedom to organise one's working time is one of the most commonly-touted by “gig economy” companies to argue that drivers are independent contractors. The Commission further held in this case that the driver was not free to organise his work, noting as an example the fact that the driver must follow the route indicated by Uber; if an alternative route ended up costing the passenger more money Uber may reimburse the passenger the difference but the driver would only be paid on the basis of the estimated fare.¹¹⁷

Similar rationales have informed the decisions of a number of tribunals and courts around the world. The recent judgment by the Bologna Tribunal in Italy in the *Deliveroo 'Frank platform'* case, is undoubtedly worth quot-

test for employment status used for the legislation in this case (article 337 of the loi-programme (I) of 27 December 2006) is highly formulaic; if a majority of nine indicators of an employment relationship are present then a presumption of employment is created, which the putative employer can rebut, in particular on the basis of four further criteria (at article 333).

¹¹⁵ *Ibid.*, p10; authors' translation. For a virtually identical description and interpretation of the rating system, see the judgment of Lord Leggatt JSC in the UK Supreme Court case: *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5 at [99].

¹¹⁶ *Ibid.*, p8. Again, similar points were made and held to be relevant in *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5 at [96]-[97].

¹¹⁷ *Ibid.*, p9. Again, the same point was held to be relevant in *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5 at [98].

¹⁰⁹ Authors' translation

¹¹⁰ *Arredondo Montoya v Pedidos Ya Chile SPA* RIT M-724-2019. This case was upheld on appeal before the Court of Appeal of Concepción (Rol N° 395-2020).

¹¹¹ Authors' translation

¹¹² Case No: WECT12537-16 & Ors. The decision in the case, establishing Uber drivers as employees of Uber SA, was overturned on appeal (more on which below).

¹¹³ Ruling n° 374 FP-P+B+R+I.

¹¹⁴ *Dossier n°: 187 – FR – 20200707* (decision of the Commission administrative de règlement de la relation de travail (CRT) – Chambre Francophone, Service public fédéral: Sécurité sociale). The Commission held the driver to be an employee of both Uber and one of Uber's corporate clients to whom the driver rendered service. Also see: RTBF. (2021). *Un chauffeur Uber n'est pas un travailleur indépendant selon le SPF Sécurité sociale*. 13 January. https://www.rtb.be/info/economie/detail_un-chauffeur-uber-n-est-pas-un-travailleur-independant-selon-le-spf-securite-sociale?id=10672483. [Accessed 18 January 2021]. The

ing from, given the discriminatory and anti-union consequences of the digital control exercised by the algorithm.

The rider profiling system adopted by the Deliveroo platform, based on the two parameters of reliability and participation, by treating in the same manner he who does not participate to the pre-booked session for a futile reason and he who does not participate by virtue of being on strike (or because unwell, disabled, or offering care to a disabled person or a ill minor, etc.) in practice discriminate against the latter, ultimately marginalising him from the priority group and therefore significantly reducing his future chances of accessing labour.¹¹⁸

After summing up the various ways in which Uber controlled its drivers in the UK Supreme Court case¹¹⁹, Lord Leggatt JSC set out their significance (at [101]):

Taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill. From the drivers' point of view, the same factors – in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers – mean that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.

A similar divide in the cases can be seen with regard to how courts assess the “tools of the trade” and equipment. Like the existence of control or subordination, tools and equipment often play a role in the assessment of employment status, regardless of jurisdiction. To sum up the question crudely: is the vehicle (provided by the

worker) or the App (provided by the company) the more important tool? The Ontario Labour Relations Board in the Foodora case¹²⁰ recognised the disproportionate importance of the app as compared to the bicycle (at [99]):

While the courier must invest in some of these tools by deciding how much to spend on a bicycle or car, the investment need for the App is the single most important part of the system. If Foodora makes a decision about the App – whether it is to make an improvement or find an efficiency – that decision can directly impact the profit/loss of the enterprise. While the tools used to make deliveries are supplied by both the courier and Foodora, the importance of the App cannot be ignored. It is the single most important part of the delivery process and is a tool owned and controlled by Foodora. ...¹²¹

Similarly, Lord Leggatt JSC in the UK Supreme Court case noted that “the technology which is integral to the service is wholly owned and controlled by Uber and is used as a means of exercising control over drivers”.¹²²

The approach of the Ontario Labor Relations Board and the UK Supreme Court stand in stark contrast to the approach taken by the National Labor Relations Board's Office of the General Counsel in the U.S. in the case of Uber, during the Trump presidency (at pp11-12, emphasis supplied, footnotes omitted)¹²³:

Drivers provided the “principal instrumentality” of their work, the car, the control of which afforded them significant entrepreneurial opportunity. Drivers were also responsible for chief operating expenses such as gas,

¹²⁰ OLRB Case No: 1346-19-R.

¹²¹ In his article commenting on recent Spanish court decisions (*Sobre los trabajadores de plataformas y su condición laboral: una proposición no de ley de Unidas Podemos*) Antonio Baylos also emphasised that the app is the relevant tool but took the point further, suggesting that the fact that riders were compelled to provide some of their tools was not only unsuggestive of an employment relationship but was better characterised as an abuse by the businesses for whom they worked (16 September 2020. <https://www.nuevatribuna.es/articulo/actualidad/trabajadores-plataformas-laboral-proposicionley-unidaspodemos-riders-falsosautonomos/20200915211851179204.html> [Accessed 24 December 2020]).

¹²² *Ibid.* at [98].

¹²³ National Labor Relations Board Office of the General Counsel. (2019). *Advice Memorandum: Uber Technologies, Inc. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483*. 16 April. For a critique of the Advice Memorandum, see: Mishel, L. & McNicholas, C. *Uber drivers are not entrepreneurs: NLRB General Counsel ignores the realities of driving for Uber*. Economic Policy Institute: 20 September 2019.)

¹¹⁸ Authors' translation; FILCAMS CGIL contro Deliveroo Italia srl, N.R.G., 2949/2019, of 21/12/2020, page 19.

¹¹⁹ *Ibid.*

cleaning, and maintenance for their cars. Uber provided only the App, commercial liability insurance, and minor assistance such as reimbursement for the costs of cleaning spills and repairing damage caused by riders.

In particular in the American context, in addition to the law one must take note of the politics, given the heavy politicisation of the judiciary and federal institutions. For example, the five members of the National Labor Relations Board, as well as the Board's General Counsel, are appointed by the President¹²⁴. The General Counsel in place at the time this Advice Memorandum was issued – Peter Robb – was appointed by President Trump. Prior to that he was a Director at the law firm Downs Rachlin Martin PLLC (DRM), whose website boasts it “has one of the largest labor and employment groups in Northern New England, representing employers exclusively”¹²⁵. The Advice Memorandum is particularly significant however as it effectively represents the view of the potential prosecutor in any violations of the National Labor Relations Act 1935.¹²⁶ Biden fired Robb within a matter of hours of becoming President on 20 January 2021. When Robb's chief deputy, Alice Stock, ascended to the role of Acting General Counsel, Biden fired her too.¹²⁷

In an even more egregious example of the failure to recognise reality, in the case of *Lawson v Grubhub, Inc. et al.*¹²⁸, the Court held that “the provision of tools and equipment” factor of the employment status test favoured Grubhub and did not even consider the existence of the app as a tool at all.

Some courts and tribunals have also been able to recognise how employers have used the economics of the trade to lock in commitment from their workers without having to set fixed hours and shifts. For example, in the UK, Richardson J noted in the Addison Lee private hire drivers' case¹²⁹ – in which drivers had to lease their car

from an associated company of Addison Lee's – that (at [16]) “a driver needed to work between 25-30 hours per week to recover the fixed costs of vehicle hire”. Why stipulate in a contract that drivers need to work 30 hours per week – which increases your exposure to employment status litigation – when you can, simply by virtue of your financial arrangements with them, compel them to debt and poverty were they to choose to work less?

“The courts have largely rejected or ignored companies' claims that they provide technology rather than transportation services.”

Technology Versus Transportation Services Company

The courts have largely rejected or ignored companies' claims that they provide technology rather than transportation services. For example, in the Uruguayan Uber case the Labour Court dismissed the entire matter as “irrelevant”¹³⁰. As briefly noted above, the Court of Justice of the European Union on the other hand rejected outright Uber's contention that it was a technology company (providing “information society services”) rather than a transportation company (providing “services in the field of transport”).¹³¹ Interestingly for present purposes, part of the Court's reasoning lay in the extent of control Uber exerted over its drivers and the service provided (at [39]):

...Uber exercises decisive influence over the conditions under which that service is provided by those drivers. On the latter point, it appears, inter alia, that Uber determines at least the maximum fare by means of the eponymous application, that the company

¹²⁴ The NLRB members must be confirmed by the Senate and there is a tradition of appointing/confirming a bipartisan Board such that the President's picks effectively constitute a majority rather than totality of the five members.

¹²⁵ <https://www.drm.com/practices/labor-employment>, [Accessed 19 December 2020].

¹²⁶ Mishel, L. & McNicholas, C. *Uber drivers are not entrepreneurs: NLRB General Counsel ignores the realities of driving for Uber*. Economic Policy Institute: 20 September 2019. P2.)

¹²⁷ Iafolla, R. (2021). *Biden Names Acting Top NLRB Lawyer After a Pair of Firings (1)*. In: Bloomberg Law. 25 January. <https://news.bloomberglaw.com/daily-labor-report/biden-taps-new-nlrp-top-lawyer-after-back-to-back-firings>. [Accessed 26 January 2021].

¹²⁸ 302 F. Supp. 3d 1071 (N.D. Cal. 2018).

¹²⁹ *Addison Lee Ltd v Lange & Ors* UKEAT/0037/18/BA.

¹³⁰ QUEIMADA, ESTEBAN c/ UBER B.V. y otro - Recursos Tribunal Colegiado - IUE No: 0002-003894/2019

¹³¹ *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (Case C-434/15). It is worth pointing out that under EU law this distinction has, potentially, far reaching consequences as the recognition of Uber as a technology company providing “information society services” would have entailed for Uber a wide-ranging right to provide services under the E-Commerce Directive 2000/31, without being subject to the national restrictive rules that, under the exception for transport services contained in Article 2(2)(d) of the Services Directive 2006/123, the Spanish authorities were permitted to adopt and enforce. In the more recent Case C-62/19, *Star Taxi App*, and in a very different factual set of circumstances, the CJEU took the view that it is possible for companies providing genuine (i.e. “does not transfer orders..., does not set the fare for the journey and does not collect that fare from the passengers, who pay the fare directly to the taxi driver”), digital facilitation and intermediary services to taxi drivers and their customers to be able to rely on the E-Commerce Directive.

receives that amount from the client before paying part of it to the non-professional driver of the vehicle, and that it exercises a certain control over the quality of the vehicles, the drivers and their conduct, which can, in some circumstances, result in their exclusion.

In a case against Uber and 99, the Brazilian Regional Labour Tribunal of the 7th Region¹³² similarly dismissed the companies' contention:

...it's possible and necessary to say, incidentally, that the respondents are not mere forwarders and/or providers of technology and apps to drivers for them to use at their pleasure.¹³³

The Superior Court of California¹³⁴ also dismissed Uber and Lyft's contention, in no uncertain terms:

Defendants' insistence that their businesses are "multi-sided platforms" rather than transportation companies is flatly inconsistent with the statutory provisions that govern their businesses as transportation network companies, which are defined as companies that "engage in the transportation of persons by motor vehicle for compensation." It also flies in the face of economic reality and common sense. ... To state the obvious, drivers are central, not tangential, to Uber and Lyft's entire ride-hailing business.

And the Court cited a similar dismissal of Lyft's claims, by the Federal District Court in Massachusetts in *Cunningham v Lyft, Inc.*¹³⁵:

despite Lyft's careful self-labelling, the realities of Lyft's businesses – where riders pay Lyft for rides – encompasses the transportation of riders. The 'realities' of Lyft's business are no more merely 'connecting' riders and drivers than a grocery store's business is merely connecting shoppers and food producers, or a car repair shop's business is merely connecting car owners and mechanics. Instead, focusing on the reality of what the business offers its customers, the busi-

ness of a grocery stores is selling groceries, the business of a car repair shop is repairing cars, and Lyft's business – from which it derives its revenue – is transporting riders.

Three-way Contractual Nexus

The Courts have been similarly suspicious of the purported contractual nexus pursuant to which workers contract directly with restaurants or passengers. For example, in the Australian Uber Eats case¹³⁶, the agency contractual nexus for which Uber contended was shot down¹³⁷, as was the proposition that Ms. Gupta was in business on her own account. However, she was still not held to be an employee as she was not required to perform work at a particular time or in particular circumstances, there was no exclusivity when work was performed, and she was not presented to the public as serving in Uber Eats's business (at [70]). This is a classic example of how the worker was able to breach one of the barriers set in front of her but was nevertheless unable to overcome the remaining obstacles created by Uber to prevent her from obtaining workers' rights. Interestingly however, the case was appealed and argued before the Federal Court of Australia, and a settlement was reached before a judgment was handed down¹³⁸.

The UK tribunals and courts have also correctly recognised this artificial construct for the gimmick it is, notably in the case of Uber¹³⁹, as well as in cases brought against Addison Lee, a UK courier company and the

¹³⁶ *Gupta v Portier Pacific Pty Ltd & Ors* [2020] FWCFB 1698.

¹³⁷ per Ross J and Hatcher VP At [48]:

In summary, we consider that Portier Pacific engaged Ms Gupta to perform delivery services for it, and paid her for them, as part of a business by which it delivered restaurant meals to the general public. On that basis, the minimum reciprocal obligations of work and payment can be said to exist.

Although it should be pointed out that Deputy President Colman dissented on this point.

¹³⁸ See: Bonyhady, N. (2020). *Staring down the barrel of a landmark judgment on its workers' status, Uber folds*. In: Sydney Morning Herald. 30 December. <https://www.smh.com.au/politics/federal/staring-down-the-barrel-of-a-landmark-judgment-on-its-workers-status-uber-folds-20201217-p560ij.html>. [Accessed 18 January 2021]. Uber's decision to settle is notable as it had already won successive rounds of the case and had gone to the expense of arguing the appeal before the Federal Court. The transcript of the federal court appeal does appear to indicate however, a possibly less favourable hearing for the company at that level; see *Gupta v Portier Pacific Pty Ltd. & Another* (No. NSD 556 of 2020). *TRANSCRIPT OF PROCEEDINGS*. 27 November 2020.

¹³⁹ The argument was rejected by the Employment Tribunal, the Employment Appeal Tribunal, the Court of Appeal of England and Wales, and the UK Supreme Court; in the Supreme Court case see *Uber BV & Ors v Aslam & Ors* [2021] UKSC 5 at [56] and [93].

¹³² ATSum 0000295-13.2020.5.07.0003.

¹³³ Authors' translation.

¹³⁴ *People v Uber Techs.*, Superior Court of San Francisco City and County, No. CGC-20-584402.

¹³⁵ (D. Mass. May 22, 2020) 2020 WL 2616302, at *10.

country's second largest private hire operator (after Uber). Addison Lee has both cash customers and corporate account customers and asserted a different contractual nexus between driver/courier, Addison Lee, and client for each arrangement. The contractual gobbledegook is summarised by Richardson J in *Addison Lee Ltd v Lange & Ors* UKEAT/0037/18/BA at [20]:

In respect of account bookings, Clause 1.1 provided that the driver was a sub-contractor of the Respondent for fulfilling the booking. In respect of non-account bookings, Clause 1.2 provided that the driver made the booking as principal, the Respondent acting as the driver's disclosed agent. Consistently with this approach, Clause 2 required the Respondent to pay a fee to the driver for account bookings; and Clause 3 required the driver to pay a booking fee to the Respondent in respect of non-account bookings.

This argument was rejected both in the case of couriers¹⁴⁰ and private hire drivers¹⁴¹.

The Court of Appeal of California took a more nuanced approach, rejecting the companies' proposition that drivers rendered services to passengers rather than to the companies as a "false dichotomy"; there was no reason why drivers couldn't provide services to both companies and passengers simultaneously¹⁴².

Subsidiary Versus Parent Company

Uber has had varying degrees of success in using its multiple company structure to defeat employment status. In the case of the UK, Uber's arguments that if there was any employer it was Uber BV, were shot down, with the Tribunal instead holding that the UK subsidiaries (Uber London Ltd and Uber Britannia Ltd) were the employers¹⁴³. This conclusion was approved by the Supreme

¹⁴⁰ See: *Addison Lee Ltd v Gascoigne* UKEAT/0289/17/LA.

¹⁴¹ See: *Addison Lee Ltd v Lange & Ors* UKEAT/0037/18/BA.

¹⁴² See: *People v. Uber Technologies, Inc.*, 56 Cal. App. 5th 266, p18. The issue was relevant to the ABC test of employment in issue in that case because the definition required that a person must be "providing labor or services for remuneration" to a "hiring entity" (p10). Therefore, argued the defendants, if they were not "hiring entities" receiving services from drivers, then the ABC test did not even get off the ground. The Court also notably rejected the characterisation of this requirement as a "threshold issue" (p19).

¹⁴³ See the reasoning of the Employment Tribunal at [98]:

UBV is a Dutch company the central functions of which are to

Court. Uber's strategy has been more successful however in South Africa. There the Commission for Conciliation, Mediation & Arbitration (CCMA) – effectively the first instance tribunal – held, like the UK Tribunal, that the South African subsidiary, Uber SA, was the employer:

The real relationship between drivers in South Africa is that Uber SA is the employer. Uber SA appoints them and assists them to obtain the necessary licenses. Uber SA approves the vehicle they will drive. The rela-

exercise and protect legal rights associated with the App and process passengers' payments. It does not have day-to-day or week-to-week contact with the drivers. There is simply no reason to characterise it as their employer. We accept its first case, that it does not employ drivers. ULL is the obvious candidate. It is a UK company. Despite protestations to the contrary in the Partner Terms and New Terms, it self-evidently exists to run, and does run, a PHV operation in London. It is the point of contact between Uber and the drivers. It recruits, instructs, controls, disciplines and, where it sees fit, dismisses drivers. It determines disputes affecting their interests.

It should be noted that the factual matrix assessed in the UK litigation was influenced heavily by the private hire regulatory regime, which among other things, prohibits private hire drivers from accepting bookings for rides unless through an operator (e.g. Uber) and imposes several obligations on private hire operators vis-à-vis passengers. Uber in the UK litigation attempted to argue that controls exerted by Uber over its drivers which resulted from such regulation should be disregarded for the purposes of assessing employment status. The Supreme Court rejected this at [102]:

I would add that the fact that some aspects of the way in which Uber operates its business are required in order to comply with the regulatory regime – although many features are not – cannot logically be, as Uber has sought to argue, any reason to disregard or attach less weight to those matters in determining whether drivers are workers. To the extent that forms of control exercised by Uber London are necessary in order to comply with the law, that merely tends to show that an arrangement whereby drivers contract directly with passengers and Uber London acts solely as an agent is not one that is legally available.

The Supreme Court's approach stands in marked contrast to the approach of the National Labor Relations Board (NLRB) in the US, at least as that approach was interpreted by the Office of the General Counsel in the advisory opinion on Uber (National Labor Relations Board Office of the General Counsel. (2019). *Advice Memorandum: Uber Technologies, Inc. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483*. 16 April; at p6, ft 18):

Drivers were subject to certain requirements imposed by state and local governments. We exclude such requirements from our discussion as they do not constitute employer control under well-established Board law.

California jurisprudence on the common law employee definition has similarly disregarded the effect of regulation on the levels of control exerted by the employer: "A putative employer does not exercise any degree of control merely by imposing requirements mandated by government regulation". (*Linton v DeSoto Cab Co.*, 15 Cal. App. 5th at 1223, cited with approval in *Lawson v Grubhub, Inc. et al.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018)).

tionship between drivers and Uber BV is distant and completely anonymized. Uber BV provides the legal contracts, the technology, the collection and payment of monies, but it is Uber SA, the subsidiary and local company, that appoints, approves and controls drivers, and Uber. It is at this point that drivers engage and occasionally negotiate.

However, on appeal the Labour Court overturned the decision¹⁴⁴, stating that Uber SA was not the employer, but leaving open the possibility that Uber BV was the employer. Having, as an interlocutory matter, refused the workers' application to join Uber BV to the proceedings at the appellate level¹⁴⁵, the Labour Court thus required the drivers and unions to start over against Uber BV should they wish to continue their quest for basic workers' rights. Luckily for South African Uber drivers, at the time of writing, a new case – a class action – was being prepared by lawyers to be filed in the Johannesburg Labour Court. This case would name both Uber SA and Uber BV as respondents.¹⁴⁶

Mandatory Arbitration Clauses with Large Upfront Costs

The strategy of relying on mandatory arbitration clauses in order to prevent adverse court rulings on employment status has had mixed results. The American courts have been notably more open to this gimmick than courts in other jurisdictions. For example, in a series of cases the US 9th Circuit Court of Appeals overturned previous district court decisions which had denied Uber's motions to compel arbitration in employment status litigation¹⁴⁷. This does not mean companies' attempts have been universally successful in the US. In some cases, the mandatory arbitration strategy has been partially successful from the companies' perspective. For example, in an employment status case brought before the US Federal Court in the Northern District of California¹⁴⁸, although GrubHub was unable to prevent the litigation altogether as the claimant had opted out of the arbitration clause, the company was able to defeat the class

action element of the case as only one other California driver had similarly opted out during the relevant period.

Workers in the United States face a significant hurdle in overcoming arbitration clauses which seek to prevent class actions due to the US Supreme Court's interpretation of the Federal Arbitration Act in a series of cases, culminating in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612. As Justice Gorsuch, writing the plurality decision, noted (at p16, citations omitted):

In many cases over many years, this Court has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes. In fact, this Court has rejected every such effort to date (save one temporary exception since overruled)...

In this case it was argued that bringing class action suits – whether to be decided by arbitration or the courts – was a “concerted activity”, protected by the National Labor Relations Act, provisions of the Federal Arbitration Act favouring arbitration notwithstanding. In a 5-4 decision, the five justices appointed by Republican presidents rejected the employees' claims; the four Democrat-appointed justices dissented. In her brilliantly written dissent, Justice Ginsburg¹⁴⁹ – pointing out that there “can be no serious doubt that collective litigation is one way workers may associate with one another to improve their lot”¹⁵⁰ – blasted the majority's holding, writing (at p21, citations omitted):

The Court today subordinates employee-protective labor legislation to the Arbitration Act. In so doing, the Court forgets the labor market imbalance that gave rise to the NLGA and the NLRA, and ignores the destructive consequences of diminishing the right of employees “to band together in confronting an employer.” ... Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order.

And Justice Ginsburg also pointed to broader problems when employment rights disputes are resolved by arbitration rather than the courts (at p32):

I note, finally, that individual arbitration of employee complaints can give rise to anomalous results. Arbitration agreements often include provisions requiring that outcomes be kept confidential or barring arbitrators

¹⁴⁴ See: *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & Ors* (Case No: C 449/17)

¹⁴⁵ At [18].

¹⁴⁶ See: Leigh Day. (2021). *Prominent Human Rights Lawyers Launch Class Action for South African Uber drivers*. 22 February. <https://www.leighday.co.uk/latest-updates/news/2021-news/prominent-human-rights-lawyers-launch-class-action-for-south-african-uber-drivers/>. [Accessed 24 February 2021].

¹⁴⁷ See: *Mohamed v Uber Technologies, Inc.* 848 F.3d 1201, 1206 (9th Cir. 2016) and *O'Connor v Uber Techs.*, 904 F.3d 1087 (9th Cir. 2018).

¹⁴⁸ *Lawson v Grubhub, Inc. et al.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018).

¹⁴⁹ Joined by Justices Breyer, Sotomayor and Kagan.

¹⁵⁰ At p24; citations omitted.

from giving prior proceedings precedential effect. ... As a result, arbitrators may render conflicting awards in cases involving similarly situated employees – even employees working for the same employer. ... With confidentiality and no-precedential-value provisions operative, irreconcilable answers would remain unchecked.

Interestingly for present purposes, as Justice Ginsburg pointed out¹⁵¹, the Federal Arbitration Act does contain an exemption for transportation workers' employment contracts, albeit one which has been narrowly construed¹⁵². It is unclear from the cases surveyed for this paper to what extent, if any, "gig economy" workers litigating in the US have attempted to rely on this exemption.

The arbitration ruse has been less successful beyond the US's northern border. In *Uber Technologies Inc. v Heller*, 2020 SCC 16, the Canadian Supreme Court held that the courts of Ontario, rather than an arbitrator in the Netherlands, had jurisdiction to decide whether or not Uber food delivery couriers were "employees" for the purposes of the Ontario Employment Standards Act, 2000, S.O. 2000, c. 41, on the basis that the arbitration clause was unconscionable¹⁵³:

The arbitration clause, in effect, modifies every other substantive right in the contract such that all rights that Mr. Heller enjoys are subject to the apparent precondition that he travel to Amsterdam, initiate an arbitration by paying the required fees and receive an arbitral award that establishes a violation of this right. It is only once these preconditions are met that Mr. Heller can get a court order to enforce his substantive rights under the contract. Effectively, the arbitration clause makes the substantive rights given by the contract unenforceable by a driver against Uber. No reasonable person who had understood and appreciated the implications of the

arbitration clause would have agreed to it.¹⁵⁴

The Uruguayan Labour Court went further, holding (by majority) that arbitration clauses were prohibited from ousting the jurisdiction of the labour courts, as a matter of Uruguayan law and the country's constitution¹⁵⁵.

Disputes Made Subject to Foreign Law

None of the Uber cases we have surveyed were decided on the basis on Dutch law, despite the contractual clause to this effect. This is likely partly down to a lacklustre enthusiasm on the part of Uber for enforcing its own contract on this point (as seen above). To the extent Uber has tried to rely on this provision, however, it has failed.

Paradoxically, this tactic has in fact ended up being a substantial "boomerang" for Uber before the Court of Justice of the EU (CJEU) in the Spanish taxi association case, as the CJEU could defeat any suggestion that the reference by the Spanish court to the CJEU was a "purely internal matter" (which would have resulted in the EU Court not having jurisdiction over the dispute), as

it is apparent from the order for reference, ... that the service at issue in the main proceedings is provided through a company that operates from another Member State, namely the Kingdom of the Netherlands.¹⁵⁶

Overcoming Laws Designed to Target Them

As seen above, the California law AB 5 was expansive and robust. Intended to codify and expand on the decision of the California Supreme Court in *Dynamex Operations West, Inc. v Superior Court of Los Angeles* (2018) 4 Cal.5th 903¹⁵⁷ – which held the ABC test of employment

¹⁵⁴ Judgment of Abella and Rowe JJ in *Uber Technologies Inc. v Heller*, 2020 SCC 16 at [95] (footnote omitted). Commissioner Everett – who, as noted above – was overturned on appeal – put the point more bluntly in *Uber South Africa Technological Services (Pty) Ltd v NUPSAW & Ors* (Case No: WECT12537-16 & Ors) at [57]:

The right to fair labour practices is worth nothing if it is not enforceable, and dispute resolution processes in The Netherlands make it effectively impossible for a driver based in South Africa to challenge the international company.

¹⁵⁵ QUEIMADA, ESTEBAN c/ UBER B.V. y otro - Recursos Tribunal Colegiado - IUE No: 0002-003894/2019.

¹⁵⁶ Paragraph 31 of Case C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*.

¹⁵⁷ The *Dynamex* decision was later held by the Supreme Court of California to apply retroactively to all nonfinal cases which predated it; see: *Vazquez v. Jan-Pro Franchising International, Inc.*, 2021 Cal. LEXIS 1. The issue came before the Supreme Court of California for interpreta-

¹⁵¹ At p29.

¹⁵² See the US Supreme Court case of *Circuit City Stores, Inc. v. Adams*, 532 U. S. 105, 109, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)

¹⁵³ See judgment of Abella and Rowe JJ in *Uber Technologies Inc. v Heller*, 2020 SCC 16 at [60] (citations omitted): "...Unconscionability, in our view, is meant to protect those who are vulnerable in the contracting process from loss or improvidence to that part in the bargain that was made..." In a concurring judgment, Brown J held the arbitration clause to be invalid but on the basis that it undermined the rule of law and was therefore contrary to public policy (at [101]). Interestingly, the plaintiffs' arguments on unconscionability in relation to the arbitration agreements were rejected by the US's 9th Circuit Court of Appeals in *Mohamed v Uber Technologies, Inc.* 848 F.3d 1201, 1206 (9th Cir. 2016).

status applied for the purposes of the “suffer or permit to work” definition of employment under wage orders issued by the Industrial Welfare Commission – the law extended this test to cover the near totality of workers’ rights contained in the Labor Code and Unemployment Insurance code.¹⁵⁸ The employee definitions utilised were wide and self-evidently covered drivers and riders for “gig economy” companies like Lyft, Uber and DoorDash. The bill also increased penalties, including criminal, and specifically provided for enforcement actions by California state and municipal actors. Indeed, it is the breadth of coverage, the likelihood of enforcement, and the consequences of breaching the law that motivated the companies to act so aggressively to resist it. As Uber and Postmates griped in their complaint before the Federal District Court in California¹⁵⁹, in a case in which they sought to assert the unconstitutionality of AB5 (at [51]):

AB 5 states that it may be enforced by the California Attorney General or “a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association.” AB 5 § 2(j). The lawsuits may seek injunctive relief “to prevent the continued misclassification of employees as independent contractors,” “[i]n addition to any other remedies available.” *Id.*

Rejecting the claim, the Federal District Court¹⁶⁰ succinctly summed up the common-sense rationale for why it was in the public interest for states to proactively enforce the law:

Considering the potential impact to the State’s ability to ensure proper calculation of low income workers’ wages and benefits, protect compliant businesses from unfair competition, and collect tax revenue from employers to administer public benefits programs, the State’s interest in applying AB 5 to Company Plaintiffs and potentially hundreds of thou-

sands of California workers outweighs Plaintiffs’ fear of being made to abide by the law.

“In sum, the companies’ attempts to obtain exemptions from the law, prevent the coming into force of the law, and prevent enforcement of the law against them, all failed.”

The Attorney General of California, along with the City Attorneys of Los Angeles, San Diego, and San Francisco, later went on to exercise the enforcement power provided to them by AB 5 by obtaining a preliminary injunction from the Superior Court of California¹⁶¹, compelling Uber and Lyft to, among other things, classify their drivers as employees. As the Court noted, justifying its decision:

While they undoubtedly will incur costs in order to restructure their businesses, the costs are only those required in order for them to bring their businesses into compliance with California law. Moreover, these are costs that Defendants should have begun incurring more than two years ago, when the Supreme Court handed down its unanimous *Dynamex* decision. As another court has observed, “rather than comply with a clear legal obligation, companies like [Uber and] Lyft are thumbing their noses at the California Legislature, not to mention the public officials who have primary responsibility for enforcing A.B. 5”

In sum, the companies’ attempts to obtain exemptions from the law, prevent the coming into force of the law, and prevent enforcement of the law against them, all

¹⁶¹ *People v Uber Techs.*, Superior Court of San Francisco City and County, No. CGC-20-584402. The injunction was stayed for 10 days to allow the defendants to appeal. The Court of Appeal of California also stayed the order during the pendency of the appeal, subject to a number of conditions, including:

On or before September 4, 2020, each defendant shall submit a sworn statement from its chief executive officer confirming that it has developed implementation plans under which, if this court affirms the preliminary injunction and Proposition 22 on the November 2020 ballot fails to pass, the company will be prepared to comply with the preliminary injunction within no more than 30 days after issuance of the remittitur in the appeal.

See: *People v. Uber Technologies, Inc.*, 56 Cal. App. 5th 266, p15. The Court of Appeal upheld the Superior Court’s decision. At the time of writing the defendants had further appealed the decision to the California Supreme Court, before which the matter was pending (case S265881).

tion at the request of the US (federal) Court of Appeals for the Ninth Circuit.

¹⁵⁸ See legislative history in: *Emergency petition for writ of mandate and request for expedited review*, served 12 January 2021, at p34.

¹⁵⁹ *Olson v California*, 2020 U.S. Dist. LEXIS 34710.

¹⁶⁰ At the time of writing this case had been appealed and was pending before the Ninth Circuit Court of Appeals.

failed. However, the companies played the ultimate trump card, funding a US\$ 205 million ballot campaign in favour of Proposition 22 – cynically titled the “Protect App-Based Drivers and Services Act” - which not only succeeded in reversing the effect of AB 5 on “gig economy” companies, but required a seven-eighths majority of the California legislature to overturn its effect.¹⁶² The Prop 22 saga did not end there however; a number of current and former “gig economy” workers and the SEIU trade union attempted to bring a challenge to the (state) constitutionality of Prop 22 before the Supreme Court of California¹⁶³. The claim sought to invoke the Supreme Court’s original jurisdiction¹⁶⁴ to argue that: i) Prop 22 unconstitutionally usurped the state legislature’s power to legislate on workers’ compensation¹⁶⁵; ii) due to a non-severability clause in Prop 22, it necessarily followed that the entirety of Prop 22 was invalid¹⁶⁶; iii) Prop 22 usurped the role of the judiciary by determining what constituted “an amendment”, thereby overly restricting the state legislature’s ability to legislate¹⁶⁷; and

¹⁶² Marshall, A. (2020). *Uber and Lyft’s Gig Work Law Could Expand Beyond California*. In: Wired. 22 December. <https://www.wired.com/story/uber-lyfts-gig-work-law-expand-california/> [Accessed: 23 December 2020].

¹⁶³ Case number: S266551; see: *Emergency petition for writ of mandate and request for expedited review*, served 12 January 2021.

¹⁶⁴ Pursuant to article VI, section 10 of the California Constitution, Code of Civil Procedure sections 1085 and 1086, and Rule 8.486 of the California Rules of Court.

¹⁶⁵ More specifically, article XIV, section 4 of the California Constitution provides: “[t]he Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers’ compensation, by appropriate legislation...”. Petitioners therefore argued that Prop 22, which sought to limit the legislature’s power to legislate in the area of workers’ compensation, fell foul of the “plenary power, unlimited by any provision of this Constitution” provision cited above. (see: *Emergency petition for writ of mandate and request for expedited review*, served 12 January 2021 at [28]-[29]).

¹⁶⁶ More specifically, section 7467(b) of Article 11 of Prop 22 states:

Notwithstanding subdivision (a), if any portion, section, subdivision, paragraph, clause, sentence, phrase, word, or application of Section 7451 of Article 2 (commencing with Section 7451), as added by the voters, is for any reason held to be invalid by a decision of any court of competent jurisdiction, that decision shall apply to the entirety of the remaining provisions of this chapter, and no provision of this chapter shall be deemed valid or given force of law.

The Section 7451 of Article 2 referred to is the section stating app-based drivers are independent contractors and not employees (subject to relevant conditions). Therefore, the petitioners argued, because Section 7451 was invalid so far as it related to the classification of drivers as employees for the purposes of workers’ compensation (pursuant to the preceding argument outlined above), the entirety of Prop 22 was invalidated due to the severability clause. see: *Emergency petition for writ of mandate and request for expedited review*, served 12 January 2021 at [30], [44]

¹⁶⁷ More specifically, the petitioners argued that whilst article II, section

iv) the inclusion of the provisions purporting to define what constitutes “an amendment” were impermissible as they violated the requirement that an initiative measure must only relate to one subject (the single-subject rule)¹⁶⁸. On 3 February 2021 the California Supreme Court denied the petition¹⁶⁹. However, around a week later the petitioners filed the claim before the Alameda County Superior Court.¹⁷⁰ At the time of writing the claim had not yet been argued before this court.

LESSONS AND RECOMMENDATIONS

Litigation Strategy

In light of the discussion above, and given the similar

10 the California Constitution prohibited the state’s legislature from amending statutory initiatives such as Prop 22 unless the statutory initiative provided for that ability, it was nevertheless the role of the judiciary to determine what did and what did not constitute “an amendment”. This is important because, according to the petitioners, the California Constitution permits the state’s legislature “to enact laws addressing the general subject matter of an initiative, or a “related but distinct area” of law, so long as the legislation addresses conduct that an initiative measure “does not specifically authorize or prohibit.” (at [31]). This is relevant because Prop 22 contains two provisions purporting to classify as amendments (p56):

any legislation that distinguishes among drivers based on their classification...including any legislation that provides incentives to companies that treat drivers as employees or incentives to improve the conditions of app-based drivers classified as independent contractors;
and

any legislation authorizing any entity or organization to represent the interests of app-based drivers in connection with their relationship to the gig companies or with respect to their compensation, benefits, or working conditions.

¹⁶⁸ More specifically, article 2, section 8(d) of the California Constitution prohibits an initiative measure from “embracing more than one subject” (at [35]). Petitioners argued (at [37]) that:

The amendment provision of Proposition 22 is a classic example of intentional voter deception. The provision is not mentioned anywhere in the ballot title and summary, analysis, or ballot arguments regarding the measure. Voters who read the measure will not understand how the amendment provision relates to the operational parts of the initiative nor what it means for a measure to define what constitutes an amendment. In short, the voters will have absolutely no understanding that a “yes” vote is a vote to severely limit the judiciary’s oversight over the initiative and the Legislature’s authority to permit collective representation of or bargaining for app-based and delivery drivers.

¹⁶⁹ See: https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2338840&doc_no=S266551&request_to_ken=OClwLSEmTkW9WzBBSCMtSENIUEQQUdxTJSM%2BUz9TLDtIC-g%3D%3D. [Accessed 4 February 2021].

¹⁷⁰ Hussain, S. (2021). *Opponents press challenge to Prop. 22 with lawsuit in lower court*. In: Los Angeles Times. 11 February. <https://www.latimes.com/business/technology/story/2021-02-11/proposition-22-law-suit-refiled-alameda-court>. [Accessed 25 February 2021].

legal strategies deployed by “gig economy” companies regardless of jurisdiction, there are a number of practical things trade union and workers’ advocates can do to improve the effectiveness of their strategic litigation. The very first one is to actually develop a litigation “strategy”, or rather a strategic approach to litigation. The judicial decisions that we had the opportunity to read and review, suggest that a more strategic use of litigation around the “gig economy” is becoming increasingly established. There are three components which we suggest make strategic litigation particularly effective. The first component is the combination with traditional grassroots organising activities, in a way that would seem to transcend the traditional divide between “service” and “organising” union models. Many of the workers bringing claims in the cases we assessed appeared to be trade union members and activists; their legal grievances were developed in a broader context of union mobilisation. This is a point that is receiving growing recognition among those scholars that write about strategic litigation both within and beyond the “gig economy”.¹⁷¹

“Many of the workers bringing claims in the cases we assessed appeared to be trade union members and activists; their legal grievances were developed in a broader context of union mobilisation.”

The second component is the “capacity to link use of the law with other forms of action: collective bargaining where it still exists, media campaigning, political lobbying or pressure put on local authorities”.¹⁷² Strategic litigation is most effective when complemented by collective action, campaigning, and comms strategies. Indeed, the massive press attention given to the issue of workers’ rights in the “gig economy” has not come about by happenstance but rather by design. Put simply, when the overall objective is an improvement in workers’ conditions, dignity, and power, litigation must always be simply one tool in the box, and not the end-all. Campaigns for improved wages or terms and conditions, the invocation of government enforcement actions where possible, and advocating for additional means to improve working conditions can all be run alongside employment status litigation.¹⁷³ Litiga-

¹⁷¹ Kirk, E. (2020). *Contesting ‘bogus self employment’ via legal mobilisation: The case of foster care workers*. In: *Capital and Class*. pp531–539.

¹⁷² Guillaume, C. (2018). *When trade unions turn to litigation: ‘getting all the ducks in a row’*. In: *Industrial Relations Journal*. 49(3): pp.227–241.

¹⁷³ We should note however that there have been various instances

tion can sometimes re-open collective negotiation and bargaining channels that appeared to have dried out. Further, the effectiveness of the strategic litigation itself is often enhanced when complemented by such other actions and strategies. For example, judges are certainly aware of, and undoubtedly at times influenced by, the press and political attention given to the issue of workers’ rights in the “gig economy”¹⁷⁴. Similarly, press attention associated with a case can exert reputational pressure on companies to litigate less aggressively; for example, Deliveroo – off the back of massive press coverage – agreed to cap adverse costs in its litigation with the IWGB union before the High Court in London. Without this it would have been very difficult for the union to proceed.

The third point is one that we shall return to in a few paragraphs, but is already worth mentioning here: enforcement. As noted in the previous paragraphs, strategic litigation can oftentimes lead to favourable judicial decisions that do not affect either the “gig economy” employers’ business model or, at times, the victorious litigants themselves. The positive conclusion of a dispute depends, more often than not, on a “political” intervention of sorts, and therefore strategic approaches to litigation must factor in, from the beginning, their political interlocutors, and make sure they speak to them, including by means of grassroots mobilisation and campaigning activities, as discussed above.

Besides these generic points, the cases we reviewed also suggest a number of more detailed procedural and substantive choices to be made when strategising about litigation.

At a procedural level, it would appear that, in jurisdictions where arbitration clauses are standard but contain opt-

of trade unions or labour groups signing deals with “gig economy” companies which provide for some sort of collective consultation or bargaining. Many of these have been controversial in the labour movement. For example, in the case of Italy, see: Marà, C. & Pulignano, V. (2020). *Collective voice for platform workers: riders’ union struggles in Italy*. In: *Social Europe*. 10 December. <https://www.socialeurope.eu/collective-voice-for-platform-workers-riders-union-struggles-in-italy> [Accessed: 23 December 2020]. In the case of the U.S., see: Marshall, A. (2020). *Uber and Lyft’s Gig Work Law Could Expand Beyond California*. In: *Wired*. 22 December. <https://www.wired.com/story/uber-lyfts-gig-work-law-expand-california/> [Accessed: 23 December 2020]. In the case of the UK, see: Lo, J. (2019). *GMB union strikes deal for Hermes couriers*. In: *Left Foot Forward*. 5 February. <https://leftfootforward.org/2019/02/gmb-union-strikes-deal-for-hermes-couriers/> [Accessed: 23 December 2020]. More generally in Europe, see: Clark, A. (2020). *Uber, Gig Companies Seek Labor Deals to Avoid Workers Becoming Employees*. In: *Wall Street Journal*. 30 December. <https://www.wsj.com/articles/uber-gig-companies-seek-labor-deals-to-avoid-workers-becoming-employees-11609334051>. [Accessed 18 January 2021].

¹⁷⁴ See the various references in the Court of Appeal and Supreme Court decisions on Uber in the UK.

outs, trade unions and labour organisations may wish to run communications campaigns encouraging workers to opt-out en masse so as to improve their chances of class certification in any class actions. Also, in jurisdictions where this is possible, advocates should also consider naming both the national subsidiary as well as the parent company as respondents to any employment status litigation, presenting primary and alternative cases so as to not have to start from scratch were the Court to hold the incorrect counter-party had been named. Furthermore, in jurisdictions where this is feasible, advocates may want to argue for preliminary injunctions compelling compliance with employment rights statutes pending the final resolution of cases. If successful this could prevent a situation where – as seen in a number of cases above – companies repeatedly lose employment status litigation yet continue to treat their workers as independent contractors during the pendency of various years of appeals.

Definitions and Approach

Much has been made in policy circles about the number of employment status categories which exist in a jurisdiction, with the debate inevitably revolving around the question of whether some statuses may be easier to establish in court than others. For instance, it could be argued that the presence of an intermediate, “third category” can offer greater chances for a claimant to remove the independent contractor label that, typically, the contract signed with a “gig economy” company would have attributed to her. This is so because, typically, these intermediate categories are construed around criteria that are less stringent than those underpinning the standard employee/contract of employment definitions. Of course, it can also be argued that the presence of third categories decreases the chances for claimants to successfully establish that they are fully fledged subordinate employees, in that the ability of employers and HR professionals to tweak contractual arrangements in “constructively ambiguous” ways is directly correlated to the number of employment statuses that a legal system recognises.

What the cases we have analysed appear to suggest however, is that what matters most is not the number of categories but rather the width of the definitions, the rights associated with each status, and the purposiveness of the jurisprudential approach to their interpretation. For example, to suggest that the US uses a two-tier system (employee/independent contractor) whilst the UK uses a three-tier system (employee/worker/independent contractor) is, in practice, inaccurate. On any assessment, whilst the UK may have three main categories instead of two, the country uses far fewer categories than the US,

where a panoply of different definitions of employee exists across federal and state statutes¹⁷⁵. In the California case against Grubhub¹⁷⁶, for example, the Federal Court found that the driver was not an employee within the common law-derived definition of the term. However, on the facts found, the driver would have likely been a limb b worker in UK law¹⁷⁷ or an employee under AB 5¹⁷⁸. Similarly, there appears to be no strict correlation between those legal systems that are increasingly leaning towards the view that “gig economy” workers ought to be seen as (technologically subordinate) employees and the presence or absence of an intermediate category. Both Italian and Spanish legislation contemplate quasi-subordinate or economically dependent intermediate categories, but the Supreme Courts in both countries have reached the view that some “gig economy” workers ought to be granted employee-like labour protections or, in the Spanish case, be reclassified as standard employees. The same conclusion has been reached by France, which, on paper at least, maintains a ‘binary’ system. In the UK, on the other hand, nearly all of the high profile “gig economy” workers’ rights cases – including the Supreme Court decision in Uber – have held that the claimants were “limb b workers”. In most of these cases “limb b worker” is in fact the only category for which the claimants contended.

Bearing in mind that employment status is significant because it is the portal through which the worker accesses rights, both litigators and policy makers should focus on: i) how difficult it is to enter the portal; and ii) what rights entering the portal provides.

From our survey of the cases, it appears that the most effective definitions and judicial approaches have two things in common: i) they prioritise substance over form¹⁷⁹; and/

¹⁷⁵ Even the same definition of employee in a federal statute can be given different meaning by the US’s 13 federal court of appeals circuits, each of which builds up a body of case law which is binding only in that circuit’s jurisdiction. For example, see the discussions in *Razak v Uber Techs., Inc* 2020 U.S. App. LEXIS 35211 and in *New York v Scalia*, 2020 U.S. Dist. LEXIS 163498.

¹⁷⁶ *Lawson v Grubhub, Inc. et al.*, 302 F. Supp. 3d 1071 (N.D. Cal. 2018).

¹⁷⁷ The driver was in a contractual relationship with Grubhub, he rendered a personal service as the Court found the substitution clause to be “theoretical rather than actual” and the Court expressly found that the driver was not in business on his own account engaging Grubhub as a client. These three elements satisfy the statutory definition of a “limb b worker” in the Employment Rights Act 1996.

¹⁷⁸ Although the Court found that Grubhub did not control the driver, it did find that the driver was not engaged in a distinct business, this being enough on its own to render him an employee under the ABC test in AB 5.

¹⁷⁹ For example, Ontario’s “dependent contractor”, the EU’s “worker”, the UK’s “limb b worker”, France’s “contrat de travail”, Spain’s “contrato de trabajo”, and the ILO’s Recommendation 198, as adopted by the Uruguayan courts and the European Court of Human Rights.

or ii) they presume an employment status favourable to the worker unless the putative employer can prove a conjunctive list of factors which, cumulatively, set a very high threshold¹⁸⁰. These are, in our view, the criteria that, with a certain degree of generalisation, are likely to indicate whether or not workers who are classified as independent contractors by the companies for whom they work are likely to have a legal entitlement to employment rights.

Another example of an employment status definition – the “personal work relation” which is similarly expansive in scope and designed to be interpreted purposively comes from academe, rather than the case law.¹⁸¹

Enforcement

A law is only as good as one’s ability enforce it. So, unless workers and unions have the means to bring cases and/or the state proactively enforces the law, the preceding discussion is highly academic. Indeed, there is little point in having broad and comprehensive employment status categories if a) workers and unions are confronted with often insurmountable procedural obstacles in terms of accessing and receiving justice (some of which we identified in the pages above), and b) once justice is indeed administered by the courts, its effects are delayed, confined to the individual litigants, or simply ignored. Procedural devices should be put in place that actually facilitate, rather than hinder, the application of the law.

¹⁸⁰ For example, the ABC test adopted by California in AB 5. See also the definition used in Pennsylvania’s Unemployment Compensation Law, discussed in *Lowman v Unemployment Comp. Bd. of Review*, 2020 Pa. LEXIS 3935. This point is to be distinguished – due to the conjunctive nature of the list of factors and the cumulatively high threshold set – from simply placing the burden of proof on putative employers in employment status claims. For courts and tribunals which assess employment status on the basis of the reality of the working relationship rather than the written contract – as most of those courts and tribunals discussed in this paper appear to do – simply placing an onus on the putative employer to disprove employment status achieves next to nothing in practical terms. When the role of the court is to conduct a factual inquiry and then ascribe to the results of that inquiry the correct legal label, little turns on which party technically discharges the burden of proof. In one such case, that of Uber before the UK Supreme Court, Lord Leggatt JSC noted (at [89]):

Section 28(1) of the National Minimum Wage Act establishes a presumption that an individual qualifies for the national minimum wage unless the contrary is established. This is not a case, however, which turns on the burden of proof.

¹⁸¹ For more on this, see: Freedland, M. & Kountouris, N. (2011). *The Legal Construction of Personal Work Relations*. OUP.; Countouris, N. (2019). *Defining and regulating work relations for the future of Work*. ILO. https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/documents/publication/wcms_677999.pdf. [Accessed 27 February 2021]; Countouris, N. & De Stefano, V. (2019). *New trade union strategies for new forms of employment*. ETUC.

The role of the state becomes particularly important when one is confronting companies who have demonstrated they are prepared to openly flout the law. Indeed, the lack of sufficient government enforcement goes a long way to explaining why workers in many of the jurisdictions where they have been found to be entitled to employment rights are still not benefitting from the same. The UK is a notable such case, with a former Director of Labour Market Enforcement pointing out that companies faced a one in five-hundred-year chance of a minimum wage inspection¹⁸². And as we pointed out above, similar concerns are not absent in more dirigiste political traditions, such as the French one.

The same problem has been commented on in the case of Canada. As Josh Mandryk wrote in the Canadian Law of Work Forum¹⁸³:

First, the fact that Foodora appears to be on course to conclude its five years stint in Canada without any interrogation of its (mis)classification of its couriers by Canadian employment standards and tax authorities whatsoever reflects the colossal failure that is our regulation of the gig economy. There has been perhaps no other workplace issue more covered in the media or studied in the academy over the past five years than the gig or platform economy. And yet, despite the centrality of the gig economy in our discussion of the world of work, it does not appear that there have been any targeted inspection blitzes or proactive enforcement actions regarding the status of Foodora couriers or other gig economy workers for employment standards, tax, EI or CPP purposes.

The US federal government, under President Trump, did worse than simply fail to enforce the law; it proactively tried to narrow its scope. This was seen in the context of trade union rights when the NLRB’s Office of the General

¹⁸² On the relevance of enforcement to the UK “gig economy”, see: Moyer-Lee, J. (2018). *The Government Has Utterly Failed ‘Gig Economy’ Workers – Why Don’t We Have A Vote Of No Confidence In The Business Secretary?* In: The Huffington Post. 21 December. https://www.huffingtonpost.co.uk/entry/gig-economy_uk_5c1cefcae4b0407e907a116c [Accessed: 24 December 2020] and Moyer-Lee, J. (2021). *After the Uber ruling, there’s no excuse for government not to enforce workers’ rights*. In: The Guardian. 20 February. <https://www.theguardian.com/comment-isfree/2021/feb/20/uber-ruling-government-workers-rights-conservatives-employers>. [Accessed 25 February 2021].

¹⁸³ Mandryk, J. (2020). *Foodora Canada Saga Highlights the Failure of Canada’s Workplace Protection Regimes*. In: Canadian Law of Work Forum. 1 May. <http://lawofwork.ca/foodora-canada-saga-highlights-the-failure-of-canadas-workplace-protection-regimes/> [Accessed: 24 December 2020].

Counsel issued its advisory opinion to the effect that Uber drivers were not employees¹⁸⁴, as well as in the Department of Labor's issuance of rules designed to narrow the scope of coverage of the Fair Labor Standards Act (FLSA) - which provides for minimum wage among other things.¹⁸⁵

The state enforcement records in the jurisdictions we have surveyed is not universally weak; in California Uber and Lyft were vigorously pursued (although the effect has been somewhat muted due to Proposition 22). More recently, following various employment status court rulings in Italy, authorities fined Uber Eats, Glovo, Just Eat, and Deliveroo €733 million for misclassifying 60,000 couriers. Commenting on the action, Milan's chief prosecutor stated: "It is no longer the time to say that riders are slaves, the time has come to say that they are citizens who need legal protection."¹⁸⁶

Given that the overwhelming majority of low paid workers will not bring employment status litigation, and that trade unions and other labour organisations do not have limitless resource to bring the same, the state must proactively and rigorously enforce the law, applying penalties stiff enough to dissuade unlawful behaviour, if workers are to have any hope of enjoying the basic set of rights to which they should be entitled.

To quote Brown J in his concurring judgment in *Uber Technologies Inc. v Heller*, 2020 SCC 16 at [112]:

It really is this simple: unless everyone has reasonable access to the law and its processes where necessary to vindicate legal rights, we will live in a society where the strong and well-resourced will always prevail over the weak.

In sum, while there is no doubt that "gig economy" work

has visibly emerged as an important new social phenomenon, we are of the view that policy makers should refrain from over-fetichising it to the point of offering only narrowly focused (in terms of their personal scope) or partial (in terms of their material scope) regulatory responses to the many challenges that workers in the "gig economy" are undoubtedly confronted with. Indeed, employers in the "old sectors" are increasingly deploying digital solutions and misclassification strategies in order to evade the moral and legal obligations society has placed on them vis-à-vis their workers. At the end of the day, one should never forget that the "gig economy" is just that, the economy, and that "gig economy" work is indeed work.

¹⁸⁴ National Labor Relations Board Office of the General Counsel. (2019). *Advice Memorandum: Uber Technologies, Inc. Cases 13-CA-163062, 14-CA-158833, and 29-CA-177483*. 16 April.

¹⁸⁵ In *New York v Scalia*, 2020 U.S. Dist. LEXIS 163498, the US Federal District Court for the Southern District of New York struck down a rule purporting to narrow the definition of "joint employer" under the FLSA. In a separate rule, finalised just days before the expiration of President Trump's term, the Labor Department sought to narrow the definition of employee, making it harder for workers to qualify for minimum wage; see: Sumagaysay, L. (2021). *New U.S. rule could boost 'gig economy' companies while costing American workers billions*. In: MarketWatch. 6 January. <https://www.marketwatch.com/story/new-u-s-rule-could-boost-gig-economy-companies-while-costing-american-workers-billions-11609962867>. [Accessed 18 January 2021].

¹⁸⁶ Carter, L. (2021). *Italy demands €733M in fines from food delivery platforms*. 25 February. <https://www.politico.eu/article/italy-demands-733-million-euros-in-fines-from-food-delivery-platforms/>. [Accessed 25 February 2021].

Digest of Key Judicial Decisions

EMPLOYEE, INDEPENDENT CONTRACTOR OR THIRD WAY?

Australia

[Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats \[2020\] FWCFB 1698](#)

Date: April 21, 2020
Tribunal: Fair Work Commission (full commission)
Issue: Unfair Dismissal
Finding: Independent Contractor

Decision:

Gupta, a driver, was suspended from the app on December 21, 2018, and, following a brief restoration, was permanently blocked on January 15, 2019 for allegedly not meeting standards for timely delivery. She filed an unfair dismissal complaint against the Uber Eats with the Fair Work Commission (FWC). The FWC initially determined that she was not an employee and thus unable to file unfair dismissal claim. On August 23, 2019, she sought permission to appeal the decision to the full commission.

The FWC explained that it needed to make two determinations. First, did Gupta perform work for Portier Pacific pursuant to a contract. Second, if so, did she perform the contract as an employee or as an independent contractor.

On the first issue, Portier Pacific (PP) argued that the contract was not between itself and Ms. Gupta, but rather between her and the relevant restaurants whose food she delivered. PP insisted that it acted only as the restaurant's agent in arranging for the driver to pick up and deliver the meal, and as a payment collection agent for the driver. The FWC rejected this claim, finding that the contract was in fact with PP as there was no evidence of a contract with any restaurant, all obligations concerning the delivery work were outlined in the Service Agreement between Gupta, PP and Uber, and payment for that service was entirely within the control and responsibility of PP.

Having concluded that the relationship was with PP, the FWC determined whether Gupta was an employee. The FWC used the multi-factor test set forth in the *French Accent* case to determine classification. As factors weighing in favor of an employment relationship, the FWC found that the work did not require the exercise of any particular skill, that the rate of payment was set by PP, and that PP made this payment on a weekly basis. Further, there was no aspect of the work which could be characterized as an independent business, as she had no means of expanding her customer base, generating additional work or establishing goodwill with any customers or restaurants. She was also not able to delegate the work.

As factors weighing "neutrally", the FWC decided that the fact that she was required to provide her own vehicle and phone did not necessarily point to her being an independent contractor. Further, the degree of control imposed by the service agreement, the guidelines and the rating system did not necessarily point to her being an employee. That she was paid per delivery, had no leave and paid her own taxes did not necessarily lead to her being an independent contractor.

However, the FWC found three factors that weighed decisively to her being classified an independent contractor. First, PP exercised no control over when or how long she worked. Second, even when she was connected, she could accept work for a competitor or perform other types of transportation service. Finally, she was not presented as an emanation of the Uber Eats business.

In conclusion, the overwhelming factors looked at weighed against a finding of an employment relationship.

Australia

Note: This case was appealed to Federal Court. Uber Eats settled the case in December 2020 to avoid what was widely expected to be an adverse ruling finding that such delivery drivers providing their labour via the app were in fact employees. Pointed questions from the Federal Court during a November 2020 hearing indicated that it was very likely to rule in Gupta's favor.

News:

Naaman Zhao, [Uber Eats avoids landmark ruling on workers' status by settling case with delivery rider](#), The Guardian, December 29, 2020

Campbell Kwan, [Sacked Uber Eats delivery worker's Federal Court appeal commences](#), ZDNet, November 27, 2020

David Marin-Guzman, [Uber Eats drivers are not employees entitled to minimum pay and conditions, the Fair Work Commission has ruled](#), Business Insider, April 21, 2020

Analysis:

Anthony Forsyth, [The Uber Eats Decision: Australia's FWC Full Bench misses the chance to see through the gig economy's sophistry](#), Labour Down Under Blog, April 28, 2020

Anthony Forsyth (2020) [Playing Catch-Up but Falling Short: Regulating Work in the Gig Economy in Australia](#), King's Law Journal, 31:2, 287-300

Forsyth, A. (2020). [Collectivising the Gig Economy in Australia](#). *International Union Rights*, 27(3), 18-28.

Forsyth, Anthony, [The Identity of the 'Employer' in Australian Labour Law: Moving Beyond the Unitary Conception of the Employer](#) (June 24, 2020). (2020) 13 Italian Labour Law E-Journal 13

[Rajab Suliman v Rasier Pacific Pty Ltd \[2019\] FWC 4807 \(12 July 2019\)](#)

Date: July 12, 2019
 Tribunal: Fair Work Commission
 Issue: Unfair Dismissal
 Finding: Independent Contractor

Decision:

Suliman was a driver for Uber since August 2017 and was logged on daily for about 12 hours per day. He brought a claim for unfair dismissal when his access to the Uber platform was revoked. Unlike previous cases against Uber (below), Suliman argued that he was a casual employee, not a permanent employee, but nevertheless entitled to an unfair dismissal claim.

The FWC rejected the argument that the relationship between a driver and Uber is the same as that of a casual employee. While a driver cannot be compelled to accept any particular rides a casual employee, if present at work, would be compelled to work for a particular period of time. Further, if a casual employee were to refuse to

Australia

work, the penalty would likely be no future work, but if a driver were to refuse a request, there is no real consequence and no penalty that future rides would not exist.

The FWC then reviewed the factors set out in the *French Accent* case. It found that although Uber exercised some control over its drivers, it was not a high level of control because the drivers had the choice whether to accept a ride or not. It also found no evidence of exclusivity, since drivers could work for anyone else without restriction; the choice of the driver not to do so is not enough to show exclusivity. The FWC found that although Suliman leased his vehicle from Uber, there was no requirement that his vehicle come from Uber since he could have used his own vehicle or rented it from elsewhere. Even though Uber determined the standard of vehicle that could be used, Uber did not provide tools of the trade, because it did not require or provide the vehicles used. The restriction on subcontracting did weigh in favor of employment, since a driver could not give others access to the app and doing so would violate the terms of their agreement. The FWC did not find that he was paid a periodic wage, but rather a fee for task. It determined that while Uber set that rate, he could negotiate a different rate with Uber. Finally, there was no paid leave, just the option for the driver to log off the app or reject rides when he chose to do so.

Thus, the Commission found that based on the factors above, Suliman was not an employee of Uber and is not protected from unfair dismissal.

News:

David Marin-Guzman, [Uber drivers are not like casual employees](#), Australian Financial Review, July 15, 2019

Commentary:

Duvenhage, Jaques (2019) ["Rajab Suliman v Raiser Pacific Pty Ltd" Employer or Independent Contractor?](#), University of Notre Dame Australia Law Review: Vol 21, Article 7

[Klooger v Foodora Australia Pty Ltd \[2018\] FWC 6836](#)

Date: November 16, 2018
 Tribunal: Fair Work Commission
 Issue: Unfair Dismissal
 Finding: Employee

Decision:

Klooger started working for Foodora on March 11, 2016. Quickly, he was promoted to positions of greater responsibility including being a rider captain. This involved helping other riders with their shifts and other administrative issues, for which he was paid extra. In early 2018, he began to publicly complain about the rates set by Foodora, with assistance from the TWU. On February 22, management communicate that it was terminated the contract effective immediately.

Australia

The Commission had to determine whether a courier for Foodora was an employee under the Fair Work Act and, if so, whether the dismissal was in fact unjust. The Commission applied a multi-factor test set forth in *French Accent* to determine whether Klooger was an employee or an independent contractor. The FWC found the following factors weighed in favor of a finding of employment.

- The performance of delivery services was done in accordance with the shifts offered on the app. The start and finish times and the geographical locations were all set by Foodora.
- The terms of the contract were written more like an employment contract, including rostering and acceptance of jobs, the attire to be worn, the nature of the engagement, and compliance with all policies and practice, despite the explicit language indicating couriers are independent contractors.
- Foodora exercised a degree of control over the manner the work was performed, where it was performed and the start and end times of each shift.
- Though couriers are allowed to work for other platform companies, this is analogous to waitstaff at restaurants who work at multiple restaurants.
- The riders also had little capital investment other than the bicycle. In this case, it was also used for non-work transportation.
- Foodora had the ability to suspend and terminate couriers and in fact did so in this case.
- Couriers were presented as part of the business, as they wore Foodora branded clothing and used its logo.
- Couriers were paid on a regular basis in respect of the shifts that had been completed that week.

In the end, the FWC held that “the conclusion that must be drawn from the overall picture that has been obtained was that the applicant was not carrying on a trade or business of his own, or on his own behalf, instead the applicant was working in the respondent’s business as part of that business. Subsequently, the Commission determined that there had been no valid reason for the dismissal related to his capacity or conduct. Klooger had not sought reinstatement and was instead offered compensation as a remedy.

News:

David Chau and Bellinda Kontominas, [Foodora loses unfair dismissal case and is ordered to pay former delivery rider \\$16,000](#), ABC News, November 16, 2018

Commentary:

David Doorey, [Thoughts on the Foodora Fiasco: Have Labour Laws Been Violated?](#), Law of Work Blog, April 28, 2020

Alex Veen, et al, [Redefining workers in the platform economy: lessons from the Foodora bunfight](#), The Conversation, November 27, 2018

Anthony Fortsyth, [Foodora case: first definitive Australian ruling that a gig worker was an employee](#), Law Down Under Blog, November 17, 2018

Anthony Fortsyth, [What does collective representation look like in Australia's gig economy?](#), Labor Law Down Under Blog, October 27, 2018

Australia

Prior Cases:

The Fair Work Commission decided two previous cases with regard to Uber drivers. In each, the FWC found that the driver was an independent contractor and thus had no unjust dismissal claim after being deactivated from the app. The FWC was persuaded by the fact that drivers provided their own equipment, decided when and how long to work, that remuneration was provided per task, and that there were no restrictions on working for more than one company at a time.

[Pallage v. Rasier Pacific Pty Ltd \[2018\] FWC 2579](#)

Date: May 11, 2018
Tribunal: Fair Work Commission
Issue: Unfair Dismissal
Finding: Independent Contractor

[Kaseris v. Raiser Pacific V.O.F. \[2017\] FWC 6610](#)

Date: December 21, 2017
Tribunal: Fair Work Commission
Issue: Unfair Dismissal
Finding: Independent Contractor

Additional Resources:

McDonald, Paula, Williams, Penny, Stewart, Andrew, Mayes, Robyn, & Oliver, Damian (2020) [Digital Platform Work in Australia: Prevalence, Nature and Impact](#), Queensland University of Technology, Australia

Belgium

[Dossier n°: 187 – FR – 20200707](#)

[Unofficial English Translation](#)

Date: October 26, 2020
 Tribunal: Commission Administrative de règlement de la relation de travail
 Issue: Employment Relationship
 Finding: Employee

Decision:

Mr. X, a driver for Uber, X carried out his activity with his own car and has a “limousine operator permit” issued by the Brussels Region. While intending to be an independent business when he started working, he found that that his relationship with Uber resembled that of a salaried employee. He asked the Commission on July 7, 2020, to decide on the true nature of the relationship between himself and Uber. The Commission found that in the light of the presumption of an employment relationship (an exception for transportation services with an official operating license didn’t apply) and manner in which the work was carried out, Mr. X could not be deemed self-employed but rather an employee. In this case, it found that given the close links among the various contracts, both Company W and Company Y (Uber BV) are joint employers of Mr. X.

In order to assess the existence of a contract of employment, the Commission found it was necessary to consider the reality of the subordination and determine who is in fact likely to exercise authority, irrespective of the contracts or documents. In reaching its conclusion, the commission considered the following factors:

- financial or economic risk
- the absence of responsibility and decision-making power concerning the financial means of the enterprise;
- the absence of any decision-making power concerning the purchasing policy of the enterprise;
- lack of decision-making power on the part of the contractor with regard to the pricing policy of the enterprise, unless the prices are legally fixed;
- lack of an obligation of results with regard to the agreed work;
- the guarantee of payment of a fixed indemnity regardless of the results of the enterprise or the volume of services provided by the contractor;
- not to be an employer itself of personnel recruited personally and freely or not to have the possibility to hire personnel or to be replaced for the execution of the agreed work;
- not to appear as a company to other persons or to its contracting partner or to work mainly or habitually for one contracting partner;
- to work in premises of which one is not the owner or the tenant or with equipment placed at its disposal, financed or guaranteed by the contracting partner;
- to work in premises which are not owned or rented by the contracting partner or with equipment placed at its disposal, financed or guaranteed by the contracting partner;

The Commission found that Mr. X does not take any financial risk, has no decision-making power on the finances of W or Y, has no decision-making power on purchasing power, and has no decision-making power on setting prices. The commission also found that he had only an obligation of means, not of result (his responsibility is to provide rides as efficiently as possible). He is not the employer of recruited staff. While Mr. X under the agreement has the possibility of hiring staff, he cannot be personally replaced. While Mr. X is registered and has a business number to drive for Y, to the consumer he is not an independent business. The customer books the ride with Y and has no say on who is the driver and pays the fare to Uber, not the driver. Any complaints go to Uber, not the driver. On the final point, as to the workplace, the Commission found that he does not work in the physical space of W or Y, he works in the digital work environment gov-

Belgium

erned by Y and receives all his instructions from Y in that environment. All of the criteria, with the exception of the fee per ride, point to an employment relationship.

Finally, the Commission found no evidence that the parties agreed for the relationship to be treated otherwise, the freedom of organize working time or the freedom to organize work. Given the control Uber asserts over work once logged on, including the risk of disconnection for refusing rides, the freedom of organize work time is limited. The freedom to organize work is limited by the lack of an ability to deviate from instructions once the ride is started and the inability to set one's on fare.

News:

[Selon la Comission relation de travail, un chauffeur Uber n'est pas un travailleur indépendant : "On ne peut avoir le beurre et l'argent du beurre"](#), DH, 13 janvier 2021

Brazil

While lower courts in Brazil have issued an array of decision on employment status, the higher courts have sided firmly with platform companies like Uber. These three cases are the most significant cases concerning the digital platform model.

[Marcio Vieira Jacob v. Uber do Brasil Tecnologia Ltda, RR - 1000123-89.2017.5.02.0038](#)

[Unofficial English Translation](#)

Date: February 5, 2020
Tribunal: Superior Labour Court
Issue: Unfair Dismissal
Finding: Independent Contractor

Decision:

This case commenced with a complaint from an Uber driver who alleged unfair dismissal once he was deactivated. In the court of first instance, it was decided that he was an employee. This decision was appealed, and the decision was overturned. That decision was appealed resulting in this decision.

On appeal, the Court concluded unanimously that there was no employment relationship between Uber and the drivers for lack of subordination of the former over the latter. The Court found that the rider could be offline without limitation. This reflects the flexibility of the driver in determining his routine, his working hours, where he wishes to work and the number of clients he wants to serve per day. This self-determination is incompatible with the recognition of an employment relationship. Here, the driver used the digital intermediation services provided by Uber, using an app to link the driver and the customers. Among the terms and conditions, the driver is entitled to the equivalent of 75% to 80% of the amount paid by the customer. This percentage is higher than the percentage that the Court has been using to establish a partnership relationship.

Indeed, its conclusion, the Court made very clear its sympathy towards the digital platform model:

“Finally, it is common knowledge how the relationship between the drivers of the Uber app and the company works, which has a global reach and has proven to be an employment alternative and source of income in times of growing (formal) unemployment. In fact, labour relations have experienced intense modifications with the technological revolution, so that it is up to this Specialized Justice to remain attentive to the preservation of the principles that guide the employment relationship, provided that all its elements are present. It is important to emphasize that the intention to protect the worker should not extend to the point of making the emerging forms of work unviable, based on less rigid criteria and that allow greater autonomy in its achievement, through free disposition of the parties.”

Note: The plaintiff subsequently brought a motion to clarify the judgment claiming that the finding that the Plaintiff could go offline did not rule out the possibility of legal subordination because drivers are under the mechanisms of control operated by the Uber. On November 25, 2020, the [court](#) found no defect in the decision below and rejected the motion for clarification. The court went on to issue a fine of R\$ 660 for its “procrastinating purpose.”

News:

Matthew Fischer, [Brazil court rules Uber drivers are independent contractors](#), Jurist, February 6, 2020

Brazil

[ADPF 449 / DF](#)[Unofficial English Translation](#)

Date: May 8, 2019
Tribunal: Federal Supreme Court
Issue: Unfair Dismissal
Finding: Independent Contractor

Decision:

The Supreme Court decided in a 125-page judgment that municipal laws that disproportionately restrict or ban the platform-based passenger transportation services violate constitutional principles of free enterprise and competition. The case was filed against Law 10.553/2016 of Fortaleza, which prohibited the use of private cars for the paid individual transport of people.

Justice Fux, the rapporteur on the case, argued that the laws restricting the use of private cars for individual remunerated transport of people violate the principles of free enterprise, the social value of work, free competition, professional freedom, in addition to consumer protection. He held that a private driver is protected by fundamental freedom and is subject only to regulation defined in federal law. Federal internet law and the National Policy of Urban Mobility guaranteed the operation of paid passenger transport services by apps. Justice Barroso held that free enterprise is one of the foundations of the Brazilian State along with the social value of work. He further indicated that the economic model protected in the Constitution is the market economy and it is not possible to arbitrarily remove a particular economic activity from the market without a constitutional basis. Justice Lewandowski further explained that prohibiting the free exercise of the activity of professional drivers linked to applications weakens free enterprise and free competition, as well as damaging the interests of consumers.

News:

Rosanne D'Agostino e Mariana Oliveira, [STF julga inconstitucional lei municipal que proíbe transporte por aplicativos como Uber](#), G1, 8 maio 2019

Brazil

[Conflito de Competência N° 164.544 - MG \(2019/0079952-0\)](#)

[Unofficial English Translation](#)

Date: 2019
Tribunal: Superior Tribunal of Justice
Issue: Jurisdictional Dispute
Finding: Drivers' claims belong in civil court, not labour court

Decision:

Barbosa, a driver, had filed a claim seeking reactivation and material and moral damages after his account was unilaterally suspended by Uber. The company alleged the driver had engaged in irregular behavior and misused the application, which generated material losses for having rented a vehicle to perform the races. The action was initially brought before the State Court, which declined jurisdiction because it concerned a labour relationship. The Labour Court declined jurisdiction finding that the allegation that was not characterized as an employment relationship. The tribunal was called upon to determine which court had jurisdiction.

Upon review of the facts, the Tribunal determined that the matter was properly before the State Court. The Tribunal found that the plaintiff in the initial petition requested the reactivation of his UBER account so that he can again use the app. The claim arises from the contract signed with company that owns mobile application, eminently civil nature. An employment relationship requires the assumptions of personal and habitual service and subordination. The drivers do not maintain a hierarchical relationship with UBER because their services are rendered on a casual basis, without pre-established fixed hours and do not receive a fixed salary, which finds against an employment relationship between the parties.

Canada

[Canadian Union of Postal Workers \(CUPW\) v. Foodora Inc \(2020\) OLRB Case No: 1346-19-R \(“Foodora”\).](#)

Year: February 25, 2020
 Tribunal: Ontario Labour Relations Board
 Issue: Union representation
 Finding: Dependent Contractors

The Canadian Union of Postal Workers filed an application to be the exclusive bargaining agent for Foodora couriers in Toronto and Mississauga. The question was whether the couriers were dependent contractors, and thus covered by the Labour Relations Act, or independent contractors, who would be ineligible to be represented by a union. A vote was taken in August 2019 but the ballots sealed until the status of the workers could be determined.

Canadian law provides that individuals may be entitled to collective bargaining even if they are not common law employees but are instead dependent contractors. The Board applied a multifactor test set forth in *Algonquin Tavern* to determine whether the couriers should be considered dependent contractors. In applying the facts in the case, the board found:

- The contract between Foodora and couriers does not contemplate substitutes, and in fact substitutes were not allowed.
- While the couriers own some of their own tools (bicycle and helmet), some tools were subject to Foodora’s specifications (phone, delivery bag). However, the most important tool, the app, was owned by Foodora.
- The riders’ ability to make more money by working harder was not evidence of “entrepreneurial activity”. Riders could only increase their income subject to Foodora’s rules and restrictions. Further, riders are unable to advertise their services or skill, develop individual relationships with customers and cannot be paid more than what Foodora allows (except tips). Further, the couriers have no risk of loss.
- The riders cannot sell their services to the market generally, and is expected to give priority to Foodora once connected. The courier cannot sit dormant or reject to many orders.
- The riders have no economic independence or mobility. While riders have some flexibility in the performance of work, the work is controlled by the app’s algorithm which is set up to advance foodora’s business interests. Further, Foodora has several incentives and prohibitions which impact the behavior of the riders. These include the structure, timing and length of shifts, how and whether a shift can be swapped, the thinning of the list of riders on an annual basis based on performance, among others. The fact that couriers could have other sources of income does not suggest that they are economically independent.
- The riders have no ability to negotiate the fee structure.
- The riders are heavily integrated into Foodora’s business. Indeed, the latter is entirely dependent on the former.
- The job requires no special skill.

In conclusion, the Board found that the couriers were dependent contractors and thus able to join a union.

News:

[Foodora couriers are eligible to join union, labour board rules](#), CBC News, February 25, 2020

Pete Evans, [Food delivery service Foodora says it’s closing in Canada on May 11](#), CBC News, April 27, 2020

Canada

Tara Deschamps, [Uber Canada seeks labour law changes to provide benefits to drivers, couriers](#), Yahoo News, March 10, 2021

Commentary:

David Dorrey, [Thoughts on the Foodora Fiasco: Have Labour Laws Been Violated?](#), Canadian Law of Work Forum, April 28, 2020

Josh Mandryk, [Foodora Canada Saga Highlights the Failure of Canada's Workplace Protection Regimes](#), Canadian Law of Work Forum, May 1, 2020

Chile

[Alvaro Felipe Arredondo Montoya and Pedidos Ya Chile SPA](#)
[Unofficial English Translation](#)

Date: October 5, 2020
 Tribunal: Court of Appeal of Concepción (Rol N° 395-2020).
 Issue: Unjust dismissal
 Finding: Employee

Decision:

Montoya was a driver for Pedidos Ya (PY), using a mobile application for delivery, from July 3, 2019 to May 15, 2020. When he was denied access to the app, he filed a suit claiming ‘unjustified, undue, or improper dismissal.’ In order for the Court to find an improper dismissal, it had to first determine whether there was an employment relationship between Montoya and PY.

The lower court [decided](#) that PY exercised control over the riders and thus established an employment relationship. In so doing, it found:

- PY conducted the selection process, background check and training on the app
- Riders were required to wear the PY-branded gear (jacket, backpack, t-shirt and raingear)
- PY exercised control over the riders through a rating system based on monitoring of the riders’ performance. Lateness, rejection of too many orders or pauses on the app would lower the rating, meaning lack of access to better shifts and potentially suspension and deactivation. If drivers refused a particular delivery, then he would not be assigned new assignments for at least 30 minutes. Punctuality and continued work meant a higher rating and access to better shifts.
- Drivers were not allowed to choose any shift. These were determined by PY based on the ratings.
- Each delivery was assigned to a zone determined by PY and were not free to operate in any other zone or to alter their routes. Riders also had to appear at a connection site at the beginning of the shift. If they did not, they were instructed to head to that area and were penalized if they did not do so.
- The riders were not free to set the rates for their delivery services

The court found that the dismissal dated May 15, 2020 was unjustified, undue or improper because he was dismissed without cause in violation of the Labour Code. PY appealed seeking to set aside the decision below on that basis that it misapplied the existing law and jurisprudence on subordination and independence in the facts of the case.

The Court of Appeals took note that, “[W]e must bear in mind that the existence of a new productive reality, based on the provision of services through digital platforms, with technological innovations that even favor the establishment of digitalized control systems for the execution of such services, represents an apparent difficulty when determining the presence of the defining elements that allow us to conclude whether or not we are in the presence of a labour contractual relationship.”

The Court further explained that “the employment relationship is often asymmetrical between the employer and the worker. On numerous occasions, the latter has to accept the conditions that the former proposes for the latter contract, which is why the protective nature of this branch of law obliges the judge to take particular care that his decisions tend to balance this relationship. Therefore, when there is controversy in the interpretation of a rule applicable to the employment relationship, the rule that is more in line with the interests of the worker should be preferred.”

Chile

Accepting the facts as found by the lower court, Court of Appeals found no error of law and dismissed the appeal.

News:

Nicolas Valenzuela, [Tribunal declara existencia de relación laboral de repartidores con Pedidos Ya](#), Revista de Frente, 6 de octubre 2020

Dayana Sanchez, [Juzgado del Trabajo de Concepción reconoce vínculo laboral entre Pedidos Ya y repartidor, y abre fuerte debate](#), La Tercera, 6 de octubre 2020

Camilo Espinosa, [Histórico fallo: Juzgado reconoce por primera vez en Chile que repartidores de delivery son trabajadores, no socios](#), The Clinic, 6 de octubre 2020

France

Mr X v. Uber France and Uber BV Ruling No. 374

Date: March 4, 2020
 Tribunal: Labour Chamber of the Court of Cassation
 Issue: Unlawful dismissal
 Finding: Employee

Mr. X, the driver for Uber BV since October 12, 2016, was permanently de-platformed in April 2017. He filed a claim with the industrial tribunal seeking to reclassify his contract as an employment contract and sought backpay and termination indemnities. On January 10, 2019, the Paris Court of Appeal finding an employment relationship. The Court of Cassation was asked to review the determination as to whether a driver for Uber BV is properly classified as an employee or an independent contractor.

The decision of the Court turned on the question whether the driver was in a relationship of permanent legal subordination with regard to the principal. This is demonstrated when there is “the performance of a job under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof and to sanction the subordinate for any breaches.” The Court further explained that working within an organized service may constitute subordination where the employer unilaterally determines the terms and conditions of performing the job.

In finding for the driver, the Court of Appeal found:

- In order to become a “partner” had to agree to provide transportation services per the terms and conditions set for the in agreement. The driver was unable to organize his operations, seek out clients, or shoes suppliers.
- With regard to fares, the driver was unable to set them but rather they were set by contract based on Uber’s algorithms.
- The driver was unable to choose the route but was instead directed which route to take by the GPS
- The app oversees the acceptance and rejection of rides. Failure to accept three rides could lead to temporary suspension. Drivers were pushed to remain connected to provide a ride and remain at Uber BVs disposal. They were unable as such to choose rides as they saw fit.
- Drivers had only seconds to decide whether to take a job, without any information other than the point of pickup.
- Uber had the power to sanction drivers, including permanent loss of access, in the event of negative regardless as to whether the allegations were true or the sanction was proportionate.

These factors were sufficient to establish subordination. As such, the Court of Cassation rejected the appeal and order Uber BV to pay costs.

News:

Mathieu Rosemain and Dominique Vidalon, [Top French court deals blow to Uber by giving driver ‘employee’ status](#), Reuters, March 5, 2020

Sam Schechner & Preetika Rana, [Uber Ruling in France Boosts Gig Workers’ Rights](#), Wall Street Journal, March 4, 2020

[Le statut d’indépendant d’un chauffeur Uber est « fictif », selon la Cour de cassation](#), Le Monde, 4 mars 2020

France

Before the Court of Appeals

Charles Platiau, [Le modèle d'Uber menacé par une décision de la justice française](#), Le Monde, 12 janvier 2019

Thomas Oliva, [Le lien unissant un chauffeur et Uber reconnu « contrat de travail »](#), Le Monde, 11 janvier 2019

[Mr B. v. Take Eat Easy \(Judgment N 1737\)](#)

Date: November 28, 2018
Tribunal: Labour Chamber of the Court of Cassation
Issue: Unlawful dismissal
Finding: Employee

Decision: Take Eat Easy used a web platform and an application to bring together partner restaurant owners, customers and bicycle delivery drivers. Mr B applied to the company and registered as a self-employed entrepreneur. He then entered into a service contract on January 13, 2016. On April 27, 2016, Mr. B filed a complaint with the labour court to have his contract reclassified as an employment contract. The Court of Appeals had found that there was no contract of employment, and Mr. B appealed.

The Court of Cassation explained that the existence of an employment relationship does not depend on the will of the parties nor the designation in the contract but rather on the facts under which the activity is carried out. To establish subordination requires the performance of work under the supervision of an employer who has the power to give orders, to control the performance and to sanction any failures.

Contrary to the Court of Appeals, the Court of Cassation found subordination citing factors including that the app had a geolocation system which allowed the company to monitor the courier and ascertain the total number of kilometers travelled. Further, the company had the power to sanction the courier.

News:

Claire Padych, [Pour la justice, un coursier de Take Eat Easy est un salarié](#), L'Express, 29 novembre 2018

Germany

[Case No. 9 AZR 102/20](#)

Date: December 1, 2020
 Tribunal: Federal Labour Court
 Issue: Unjust Dismissal
 Finding: Employee

The Roamler case sets an important precedent for crowd-workers in the digital platform economy. This is vitally important because the platform economy is expanding rapidly, and a growing number of people are being forced to turn to it to support their livelihoods.

Decision:

The plaintiff is a micro jobber who carried out small work tasks (micro tasks) for money. By 10 April 2018, he had completed more than 4.000 tasks (or “tool checks” as Roamler called them). He worked between 15 and 20 hours per week (excluding on-call times). According to the platform rules, he was free to accept work tasks. However, he was actually controlled by a level system and tracked by GPS. The number of work tasks to be reserved simultaneously and scheduled and executed immediately one after the other depends on the level reached. The number is relevant for the income. He had reached level 15.

In its retail division, Roamler offers its clients real-time information about product availability, product presentation, product positioning, and store and service quality. The platform company produces customised analysis tools for its clients. This includes a dashboard that enables clients to view key performance indicators; a client portal to access location based data and picture, as well as custom reports that provide a complete account of the client’s data. Roamler can be regarded as a digital factory because its app is the infrastructure that micro jobbers use to carry out small dependent production steps as part of Roamler’s process. As such, the plaintiff is integrated in the production process governed by Roamler. In this regard, Roamler exercises the right of employers to issue instructions telling the micro jobber how, where and when the Tool Check has to be done—by determining the physical or analogue place of work as well as the virtual place of work, which is the digital interface of the virtual factory.

On 1 December 2020, the German Federal Labour Court issued a [press release](#), which explained:

“The overall assessment of all circumstances required by law may show that crowdworkers are to be regarded as employees. An employment relationship is deemed to exist if the client controls the cooperation via the online platform operated by him in such a way that the contractor is not free to organise his activities in terms of place, time and content. This is the decisive case. **The plaintiff performed work in a manner typical for employees, which was bound by instructions and determined by third parties in personal dependence.** It is true that he was not contractually obliged to accept the defendant’s offers. However, the organisational structure of the online platform operated by the defendant was designed to ensure that users registered and trained via an account continuously accepted bundles of simple, step-by-step, contractually specified micro-orders in order to complete them personally. Only a higher level in the evaluation system, which increases with the number of orders carried out, enables the users of the online platform to accept several orders at the same time in order to complete them on one route and thus in effect achieve a higher hourly wage. This incentive system induced the applicant to carry out continuous control activities in the district of his habitual residence.”

Germany

News:

Christian Rath, [Erfolg für Crowdworker](#), Taz, December 1, 2020

Marcus Jung, [Minister Heil will mehr Rechte für Crowdworker](#), Frankfurter Allgemeine, December 2, 2020

[Digitales Arbeiten: Bundesarbeitsgericht stuft Crowdworker erstmals als Arbeitnehmer ein](#), Juve, December 2, 2020

Commentary:

[Can 'crowdworkers' be employees? A German Federal Labour Court ruling and its potential consequences for restructuring](#), Kliemt.HR Lawyers, December 23, 2020

Italy

[Cass. n. 1663/2020 \(Foodora\)](#)
[Unofficial English Translation](#)

Date: January 23, 2020
 Tribunal: Court of Cassation (Supreme Court)
 Issue: Unjust dismissal
 Finding: Independent Contractors but Covered by Labour Protections

Foodora delivery workers brought this case alleging unfair dismissal arguing that they had a substantial relationship of subordination. The Supreme Court determined that riders working for Foodora are self-employed contractors. However, the Court interpreted art. 2 of Legislative Decree 81/2015, commonly known as the “Jobs Act” to apply to all workers whose work was organized by someone else (etero-organizzato). As such, the law’s protections apply to riders without regard to the classification. The Court focused in particular on the issue of the economic weakness of the worker and their exposure exploitation.

“In any case, it has been established that when hetero-organization, accompanied by personality and continuity of service, is marked to the point of making the collaborator comparable to an employee, equivalent protection is required and, therefore, the remedy of the full application of the discipline of subordinate work. This is a choice of legislative policy aimed at ensuring that workers are afforded the same protection as employees, in line with the general approach of the reform, in order to protect workers who are obviously considered to be in a condition of economic “weakness”, operating in a “grey area” between autonomy and subordination, but considered worthy of equal protection.”

Note: Before this decision, employment tribunals and appellate courts had found riders to be self-employed (rather than employees) based on the fact, among others, that riders could refuse orders without consequences. The Court of Appeal of Turin created a new, third category (*tertium genus*), finding that while the riders were not employees, they were subject to ‘employment discipline’ and thus some labour protections. The tertium genus was expressly rejected by the Supreme Court on appeal.

Italy introduced a new law in September 2019 (and amended in November), Law 128, that governs workers for digital platforms.

Commentary:

Antonio Aloisi & Valerio de Stefano, [Delivering employment rights to platform workers](#), Il Mulino, January 31, 2020

Italy

[Yiftalem Parigi v. Just Eat Italy](#)[Unofficial English Translation](#)

Date: April 21, 2020
Tribunal: Ordinary Tribunal of Florence
Issue: PPE
Finding: Just Eat must provide PPE to riders

Just Eat Riders deliver food on behalf of affiliated business to customers on the Just Eat Platform, and the riders filed a complaint because they were not given sufficient personal protective equipment (PPE) to protect against COVID-19. Italy has specific legislation it has adopted regarding minimum levels of protection required for workers who delivery goods on behalf of another via a digital platform. The Court found that Just Eat violated its obligations by not providing PPE to its deliverers, and the 'imminent and irreparable damage' from the lack of PPE given the infectiousness of COVID-19 needed to be taken into account in this decision. Just Eat was ordered to provide adequate PPE to its riders going forth.

European Union

[B v. Yodel Delivery Network](#)

Country: United Kingdom
Date: April 22, 2020
Tribunal: European Court of Justice
Issue: Application of Working Time Directive
Finding: Employee of the subcontractor

Decision:

Here, B brought a claim in the Employment Tribunal in the UK against Yodel arguing that he should be deemed a worker for purposes of the Working Time Directive (WTD). The Employment Tribunal sought a ruling from the CJEU on the matter. Under UK law, the status of ‘worker’ assumes that the person undertakes a personal work or service. The status of worker is therefore incompatible with that person’s right to provide services to several customers simultaneously. Given that couriers for Yodel enter into agreements that contemplate the possibility of subcontracting the tasks, they cannot be deemed a ‘worker’.

The CJEU noted that while the WTD does not have a definition of Worker, the CJEU has a concept of worker developed in its jurisprudence. The essential feature of an employment relationship is “that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.” The Court observed that the WTD does not cover independent contractors, who are those who have discretion to: use subcontractors or substitutes, choose to accept tasks or unilaterally set the maximum number of tasks, provide services to any third party, and fix their own working hours to suit their personal convenience. However, this assumes that “the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer.”

With regard to Yodel, the Court found that the independence of the courier did not appear to be fictitious and there did not seem to be a relationship of subordination. However, this was a question of fact for the national court to determine.

Commentary:

Gabriel Morrison, [Yodel courier case: European Court decision raises questions about correct test for a ‘worker’](#), Leigh Day Blog, May 11, 2020

Valerio De Stefano, [EU Court of Justice’s decision on employment status does not leave platforms off the hook](#), Regulating for Globalization, April 29, 2020

Ricardo Buendia, [United Kingdom - “The Court of Justice of the European Union’s Order on B v Yodel Delivery Network”](#), Comparative Labor Law & Policy Journal, June 2020

Netherlands

[Deliveroo v. Federation of the Dutch Trade Movement \(FNV\)](#) [Unofficial English Translation](#)

Date: February 16, 2021
Tribunal: Amsterdam Court of Appeal
Issue: Unjust Dismissal
Finding: Employee

Decision:

The Amsterdam Court of Appeal has upheld the [lower court decision](#) which finds that deliverers of Deliveroo are employees and should be afforded the rights and protections of Dutch labour laws, including coverage by sectoral collective agreements.

The Court of Appeals took note of the various changes that Deliveroo made to its contracts, bonus and incentive schemes, and work operations to try and ensure its riders would not be considered employees. The Court found that most of these changes led to workers making 40% of the minimum wage and thus the group of workers most in need of employment law protections. The changes made between 2018-2020 of Deliveroo's business model does not lead the Court to disqualify any of the workers nor make a distinction in its judgment.

The Court of Appeals reaffirmed that in determining the employment relationship the decision is based on whether the 'agreed rights and obligations comply with the legal description of an employment contract' and not whether there is a contract attesting to that.

The factors determining such an employment relationship are:

- Work
- Employed by
- Wages
- For a certain period of time

In relation to work, the main question was whether deliverer had the freedom to accept or not accept an order. Court found that in the various systems employed by Deliveroo to connect delivery drivers to restaurants, there was the possibility of control by Deliveroo. While deliverers did have some choice whether to log on or not, this was not be conclusive. In terms of the 'employed by' element, and whether the role of the deliverers was a core business operation of Deliveroo, the Court found deliverers were a core function of Deliveroo based on its own website, its name, and its terms and conditions. Further, the evidence of Deliveroo unilaterally changing its operations, contracting, and incentivizing systems further points to Deliveroo's control over the delivery drivers. Although deliverers could decide on the route for delivery, that was not seen as sufficient independence, since truck drivers often had similar independence. With regard to wages, the Court found that because Deliveroo paid its deliverers on a set schedule and had unilateral control over the wages paid with the deliverers not being able to influence the amount per delivery they made all indicate an employment relationship to the Court. Finally, most deliverers work more than a negligible period of time, and even if they do not work every month, that is not an indication that they have not worked a 'certain period of time.' Based on the analysis of the lower court, and all the changes made to Deliveroo's model, the Court of Appeals found in favor of an employment relationship between deliverers and Deliveroo.

Netherlands

News:

[Deliveroo to appeal to Supreme Court after judges say riders are not freelancers](#), DutchNews.NL, February 17, 2021

See also

Marieke de Ruiter, [FNV takes Uber to court](#), de Volkskrant, December 15, 2020 (Trade union FNV is taking Uber to court. The union wants to enforce that the tech company hires its freelance drivers and pays according to the taxi collective labour agreement)

New Zealand

[Atapattu Arachchige v. Rasier New Zealand Limited & Uber B.V.](#)

Date: December, 17, 2020
 Tribunal: Employment Court of New Zealand
 Issue: Unjust Dismissal
 Finding: Independent Contractor

Decision:

Mr. Arachchige was previously a taxi driver where he worked on his own account. He sold that business to a friend and became an Uber driver on May 15, 2015 and continued to June 20, 2019. However, his account was deactivated in June following a complaint from a passenger. He then sought a declaration from the court that he was an employee of Uber and thus able to file a claim of unjust dismissal.

The Court took note of Section 6, which defines an employee as “any person of any age employed by an employer to do any work for hire or reward under a contract of service.” The Court further took note that this was to be determined not only by the terms of the contract but also how the relationship operated in practice. The Court considered the following:

- The Services Agreement expressly states it is not an employment agreement
- The agreement did not require exclusivity and allowed for other work, including work for competitors
- While there were qualifications and performance expectations, these are also true of franchise agreements
- While the Services Agreement was a contract of adhesion, the driver was not vulnerable or lacked comprehension of what was agreed
- That the practice did not depart from what was stated in the Services Agreement
 - He decided when and how long he worked
 - He provided all of the tools and equipment
 - He was responsible for taxes
 - He decided which vehicle to use
 - He had the choice to undertake other transportation services

The Court found that Mr. Arachchige’s principle argument was the lack of control in building a client base and determining what fare to charge. The court was unmoved by these arguments and found that he had means to develop his business further if he had wanted to do so.

The Court did reject the argument that Uber was not a transportation business but found that Uber had very little control over the way Mr. Arachchige carried out his end of the arrangement. For these reasons, the court found that he was not an employee. Notably, the Court reviewed the jurisprudence in Australia and the UK. It distinguished the Aslam case in that the UK maintains an intermediate classification, namely a limb b “worker”, which does not have all of the protections of an employee. Here, Mr. Arachchige was seeking to be deemed an employee.

News:

Almee Shawm [Former Uber driver has app cancelled, claims unjustifiable dismissal as ‘employee’](#), New Zealand Herald, December 22, 2020

New Zealand

Commentary:

Alison Maelzer and Chante Fourie, [Employment Court Deems Uber Driver a Contractor](#)
Hesketh Henry, February 12, 2021

South Africa

[Uber South Africa Technology Services \(PTY\) Ltd v National Union of Public Service and Allied Workers \(NUPSAW\)](#)

Date: January 12, 2018
 Tribunal: Labour Court of South Africa
 Issue: Unfair dismissal
 Finding: Vacated prior judgment, left open whether drivers are employees of Uber BV

Decision:

The Court determined that the Commissioner failed to join Uber BV and had further conflated Uber SA and Uber BV. As such, the Commissioner's decision was in error and thus reviewable and set aside.

The Court held that the facts before the Commissioner supported a finding that Uber SA provided only administrative and marketing support to Uber BV. The drivers had no contractual relationship with Uber SA, but instead the various agreements were between them and Uber BV. The Court declined to consider whether those contracts reflect the reality of any relationship between Uber BV and the drivers, as Uber BV was not a party to the proceedings. The Court did determine that Uber SA was not an employer, and at best facilitated aspects of the relationship between the drivers and Uber BV.

The Labour Court did not take up the question whether the drivers were employees of Uber BV and left that open for further deliberation.

[Uber South Africa Technology Services \(PTY\) Ltd v National Union of Public Service and Allied Workers \(NUPSAW\)](#)

Date: July 7, 2017
 Tribunal: Commission of Conciliation, Mediation and Arbitration
 Issue: Unjust dismissal
 Finding: Employment relationship

Decision:

All driver petitioners were deactivated by Uber and filed a claim with the CCMA challenging unfair dismissal. Uber SA objected to CCMA's jurisdiction claiming that the drivers were not employees of Uber BV, with whom they have a contract. By extension, they are not then employees of Uber SA, which is a subsidiary of Uber BV.

Section 213 of the Labour Relations Act defines an employment relationship as a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and b) any other person who in any manner assists in carrying on or conducting the business of the employer.

In determining the line between the employee and independent contractor, the CCMA surveyed a variety of related approaches, including that set forth in the *Code of Good Practice: Who is an Employee? The Code adopts a "dominant impression" test based on numerous factors meant to determine the reality of the employment relationship.*

South Africa

The CCMA made the following findings:

- The drivers render personal services, as they are on-boarded personally with the necessary personal details, licenses and applications. They drive in their own name and may not out-source driving to someone else.
- The relationship is indefinite as long as the driver complies with requirements.
- Drivers are subject to the control of Uber. While drivers choose their hours of work and they may accept, decline or ignore a request, Uber controls the manner in which they work through its standards and performance requirements. It can exercise this power by suspending or deactivating access to the app.
- Uber retains control over the performance of each driver and it has the ultimate power to deactivate a driver. As such it can depriving the driver of the opportunity to work and earn an income.
- If the driver does not meet the required standards, the driver is effectively dismissed by deactivation.
- The driver has no say over the fare and is not aware of the destination until the rider is picked up. The driver has minimal knowledge of the rider's personal details and is prohibited from further contact in terms of the service agreement.

The CCMA concluded that the driver is not running her own transportation business but is economically dependent on Uber. Further, Uber drivers are the essential part of Uber's service. The CCMA found therefore an employment relationship between the drivers and Uber SA. It found further that Uber BV was distant and anonymous and that while Uber BV provided the contracts and technology, it is Uber SA that appoints, approves and controls the drivers.

While recognizing there is some ambiguity, the CCMA was influenced by the Constitution, which provides that everyone has a right to fair labour practices, as well as the extreme asymmetry in power between the drivers on one hand and Uber BV and Uber SA on the other. Applying this approach, the CCMA refused to apply the arbitration clause or consider Uber BV as the employer.

News:

Lyse Comins, [SA Uber drivers' court action to be declared "employees", The South African](#), February 25, 2021

[Uber facing class action lawsuit in SA](#), Connecting Africa, February 24, 2021

Luke Daniel, [Uber labor fight: SA may soon get a third kind of worker, says gig employer SweepSouth](#), Business Insider SA, March 4, 2021

South Korea

[Do-Hyun Kwak v SoCar et al](#) (in Korean)

Date: May 28, 2020
 Tribunal: National Labour Relations Commission
 Issue: Unjust dismissal
 Finding: Employee

Decision:

The driver Do-Hyun Kwak signed a freelance driver contract and provided driving services to passengers who rented a Tada vehicle owned by SoCar using the Tada app. He lost his job when he was de-platformed in 2019. He filed a complaint in the Seoul Regional Labour Relations Commission in October 2019 against Tada, SoCar (vehicle rental service company) and VCNC (which operates the Tada app) alleging that he was a worker and had been unfairly dismissed. The Seoul Regional Labour Relations Commission decided that he was not unfairly dismissed because he could not be regarded as a worker under the Labour Standards Act. He appealed.

National Labour Relations Commission reversed the Seoul Regional Labour Relations Commission's decision and found that the driver was in fact an "employee", and that the employer was SoCar. The Commission looked at the reality of the relationship and, specifically, whether the worker provided labour to an employer in a relationship of subordination at the business or workplace in exchange for wages. The Commission based its decision on several factors, including:

- Drivers wear designated uniforms and operate according to extensive procedures set forth in the Tada manual.
- Drivers provided his own labour for a wage during fixed working hours according to the employer's instructions through the Tada app. In the event of violating the instructions, the employer could sanction the driver through warnings, trainings, and contract termination.
- Driver were paid a regular monthly allowance calculated by by multiplying a certain rate per hour by the hours worked including driving time and waiting time.
- Drivers were evaluated for their work performance and were paid differentially according to the evaluation results (in addition to a customer's star rating, the evaluation included the number of rides, the distance, the number of workdays, the number of non-acceptances and cancellations, etc.)
- Drivers do not own the Tada vehicle or any work tools that are indispensable for performing the service for Tada.

In considering these factors, the Commission determined that Mr. Kwak was an employee. The Commission then determined that the notice of a reduction in workforce that he received by text in July 2019 did not comply with the procedures set forth in the Labour Standards Act to dismiss a worker.

Note: At the time the case was filed, ride-hailing services could only be offered by licensed taxis. Tada got around this rule by renting out chauffeur-driven vans to run its ride-hailing services. In March 2020, the Korean National Assembly passed an amendment to the Passenger Transport Service Act that banned much of Tada's business, including Tada Basic and Tada Assist. The amended law does permit vans with chauffeurs to be rented out for at least six hours, with the pickup and drop-off limited to airports or seaports. The law was passed just as the CEOs of SoCar and VCNC were acquitted in the Seoul Central District Court of violating the Passenger Transport Service Act. The amended law however does allow, as of March 2021, various new forms of ride-hailing services and the hiring of "gig" drivers in limited circumstances.

South Korea

News:

Kwak, Young-hee, [Central Labour Committee “Tada driver, worker is right...specific employers are not yet confirmed](#), Worklaw, May 29, 2020

Park Tae Woo, [Middle-aged senior Tada driver recognized as ‘worker’... Who are the real users?](#), Hankyoreh, June 29, 2020 (Korean)

Ha Nam-hyun, [Unfair dismissal of middle-aged senior citizens was recognized](#), Joong Ang Ilbo, July 1, 2020 (Korean)

Other Resources:

Joyce Lee & Hyunjoo Jin, [Uber joins forces with SK Telecom to crack tough South Korea market](#), Reuters, October 15, 2020

Spain

Spain has seen perhaps the greatest number of decisions on the digital platform model, with dozens of cases decided by lower and appellate courts around the country. We outline here the recent decision of the Spanish Supreme Court against Spanish delivery giant Glovo.

[Rider v. Glovo App 23, S.L.](#) [Unofficial English Translation](#)

Date: September 25, 2020
Tribunal: Supreme Court of Spain
Issue: Unjust dismissal
Finding: Employee

Decision:

In December 2017, Plaintiff filed a lawsuit against Glovo contending that, despite having signed a contract as an independent contractor, the legal nature of its relationship with Glovo was that of employment. When Glovo terminated the professional services agreement, plaintiff argued that he was entitled to termination benefits in accordance with Spanish employment laws.

The Supreme Court held that riders work under the control, and for the benefit, of Glovo; as such, they must be construed as employees within a labour relationship. In arriving at its conclusion, the Supreme Court noted:

- riders, although free to reject deliveries, are subject to significant penalties if they refuse to work for long periods of time;
- riders are geographically tracked by Glovo for the purpose of assessing their performance;
- from an economic perspective, assets employed by riders in the course of their activity (i.e. motor-bike and cell phone) are immaterial as compared to assets utilized by Glovo in the delivery business (i.e. the app);
- the detailed instructions provided by Glovo to its riders are beyond what a client would typically require from independent professionals;
- circumstances that would allow Glovo to rescind its contract with the riders are analogous to those contained under Spanish employment laws; and
- various key commercial decisions (e.g. price charged to users, payment method of rider fees, etc.) are taken exclusively by Glovo.

News:

Manuel Gomez, [Spanish Supreme Court rules food-delivery riders are employees, not self-employed](#), El Pais 24 Sep 2020

Manuel Gomez, [El Supremo falla que los 'riders' son falsos autónomos](#), El Pais, 23 Sep 2020

Emmanuelle Michel, [Spain declares delivery riders to be staff, in EU first](#), 11 March 2021

Commentary:

Adrián Todolí Signes, [Notes on the Spanish Supreme Court ruling that considers riders to be employees](#), Dispatch 30, Comp. Labor Law & Pol'y Journal (2020)

Switzerland

[Cour d'appel civile du Canton de Vaud. Ruling no. P317.026539-190917/380 of 23 April 2020](#)
[Unofficial English Translation](#)

Date: April 23, 2020
 Tribunal: Court of Appeal of the Vaud Canto
 Issue: Unjust Dismissal
 Finding: Employment Relationship

Ruling: In February 2015, the driver filled out an application form online and was invited to attend an information session. At the end of the session, the driver was handed a standard form contract and signed it (though he could not read it) in order to access the app and begin work. He was subsequently provided his ID, his driver's license, and a criminal background check and started to drive exclusively for Uber as of April 2, 2015. After several passenger complaints between June and December, the driver was de-platformed. The driver sued Uber in 2017. On *April 29, 2019*, the *Tribunal des Prud'hommes de Lausanne* ruled that the agreement between the plaintiff driver and Uber concluded in 2015 met all the characteristic elements of an employment contract. The court went on to find that the arbitration clause in favor of an arbitral tribunal in Amsterdam was invalid and that the choice of law contained in the agreement was without effect since it deprived the plaintiff, the weaker party to the contract of employment, of the protection afforded to him by Swiss law (art. 34 CPC).

The ruling was affirmed on appeal. The Court explained that an employment relationship is established by the performance of a service, the subordination of the employee to the employer, a duration element and remuneration. Courts should consider the real and common intentions of the parties without regard to formal designations. With regard to the issue of subordination, the Court of Appeals made the following findings:

- The driver provided a transportation service per the conditions of the contract.
- Uber exercised control over the vehicle the drivers were to use
- Uber provided the phone on which the app was loaded and the codes to use it and reserved the right to revoke its use at any time in its sole discretion
- Uber required annual submission of their criminal record
- Uber alone had control of the data necessary to match the driver to the customer, as well as the data necessary to make payment from the customer to the driver and organized the payments – there was no intention that the driver would be able to operate autonomously.
- Uber required drivers to perform in accordance with its parameters. The drivers had to present themselves as working on behalf of Uber. The driver was also required to ensure that the drive was direct and uninterrupted and to follow a specified route.
- Uber, via the app, also monitored driving performance and received message concerning vehicle maintenance and cleanliness
- Uber unilaterally fixed the price to be paid by the customer and the amount to be received by the driver, and indeed managed the finances of the entire process and even prohibited tips.

In light of these facts, there was no question that the driver was in a subordination position to Uber, which controlled and supervised every aspect of the performance of work. The Court was unpersuaded by Uber counterarguments that drivers could provide transportation services independent of Uber and that drivers were free to accept or reject customers. On the first point, it found that the contract was ambiguous and could have required exclusive service to Uber in general, and certainly was to provide exclusive service once connected. On the second point, the court found that the right to accept or reject was constrained by the few seconds in which the driver had to make the decision, that the driver was not paid for waiting time and could not provide rides except to Uber clients, the lack of information about the proposed trip other than

Switzerland

the point of pick up, or the expected fare. Such constraints made it impossible for a driver to truly decide whether to accept or reject a job. Further, the refusal of too many jobs led to a temporary disconnection from the app. Further, drivers were pushed to connect and offer rides by SMS when they had not been connected. Once the ride was started and the destination given, the driver had no ability to refuse the request without committing a breach of the contract.

Note: Uber did not appeal the decision the federal court. As such, the decision is final. However, no precedent was set and thus each driver must go to court to try to obtain employment status.

News:

[Swiss court confirms Uber status as 'employer](#), Swissinfo.ch, September 16, 2020

[Victoire en appel pour un ancien chauffeur d'Uber](#), Swissinfo.ch, September 16, 2020

[UberPop driver wins 'landmark' unfair dismissal case](#), Swissinfo.ch, May 5, 2019 (concerning the decision of the Tribunal des prud'hommes de Lausanne)

[Décision du 29 mai 2020 n°ATA/535/2020](#)

[Unofficial English Translation](#)

Date:	May 29, 2020
Tribunal:	Geneva Administrative Court
Issue:	Whether Uber Eats is subject to the LSE
Finding:	Uber Eats was classified as a personnel hirer and subject to the LSE

Decision:

In early 2019, the City of Geneva shut down Uber Eats on the basis that it had hired staff appealed without a permit. Uber Eats appealed.

The dispute relates to whether the activity of making delivery personnel available to restaurateurs via a platform is classified as hiring of services within the meaning of the federal law on the employment service and leasing of services (LSE). The LSE regulates among others things the private placement of personnel and the hiring of services. Service providers who deal in the transfer of workers' services to third parties are required to have a permit from the cantonal labour office. The companies at issue, including Uber Eats, were not so registered and argue that they are not subject to the LSE.

The Court found that even if delivery personnel are not obliged to log on to the platform or to accept an assignment, repeated refusals to deliver have negative consequences for the delivery workers. Indeed, Uber Eats can deactivate access if the deliverer no longer meets its standards and policy for providing delivery services.

The Court also found that the absence of an exclusivity obligation was not decisive, since any activity carried out part-time assumes the absence of exclusivity. On the other hand, once the rider is connected and has accepted an assignment on behalf of the platform, the deliverers cannot in fact have any other activity. It is

Switzerland

also necessary to accept several deliveries in order to earn an adequate wage.

The Court noted that once they are connected to the app, they are closely monitored through the app, which has geolocation information. In case the rider takes an “inefficient” route, they may face a reduction in their remuneration. In addition, the remuneration received by the riders is not determined by them but unilaterally by Uber Eats

The Court found that the relationship between the couriers and Uber Eats was an employment relationship and that the LSE applied to its activity as a hirer of personnel.

Note: Uber Eats appealed to the Federal Administrative Court in Lucerne, which will decide the matter in 2021. However, the appeal did not stay the ruling of the Geneva Administrative Court. Following the decision, Uber Eats agreed to an arrangement where it would contract with workers hired as employees through a third party. Delivery workers were invited to register as employees with a company called Chaskis as of August 25, 2020. Delivery workers are able to indicate their schedules, will receive a salary and will be entitled to unemployment. The wages of these delivery workers will be established according to a collective labour agreement.

News:

[Swiss say Uber Eats must register as postal service provider](#), AP, December 17, 2020

Richard Etienne, [A Genève, Uber Eats doit désormais recourir à des employés](#), Les Temps, 1 Sept 2020

[Uber Eats suffers setback in Geneva court ruling](#), Swissinfo.ch, June 11, 2020

United Kingdom

[Uber BV v. Aslam, \[2021\] UKSC 5](#)

Date: February 19, 2021
 Tribunal: Supreme Court
 Issue: National Minimum Wage and Working Time Regulations
 Finding: Employment Relationship

Decision:

The Supreme Court unanimously upheld the decision of the lower court that drivers for Uber are 'limb (b)' employees and thus fall within the National Minimum Wage and Working Time Regulations.

The Court clarified that when determining whether there is an employment relationship, it is necessary to consider the reality of the relationship and that written contracts are not conclusive proof because of the imbalance of bargaining power between the parties contracted. It found that is because employers often have the power to dictate the terms of a contract, and conversely that the worker has little to no ability to negotiate those terms, that there is statutory protection in place for workers. In this case, it found there was no practical way for drivers to negotiate or challenge the terms of the contract with Uber.

The Supreme Court further affirmed the findings of both the [Employment Appeal Tribunal](#) and [Court of Appeals](#) that drivers are "limb (b) workers", finding:

- Uber determined the amount paid to drivers, with no input of the drivers themselves. Uber sets the fares, sets the service fee, and has sole discretion to refund any portion of a fare to a passenger in response to a complaint.
- Uber dictates all the contractual terms both with drivers and passengers. Drivers have no ability to negotiate changes in the contract.
- Uber exercises substantial control over drivers' ability to accept a fare. This is because Uber controls the information given to drivers. Drivers do not know the destination and how much they will earn until they have picked up the passengers. Uber also monitors the rate of acceptance of its drivers and will send an escalating series of warnings before logging that driver off the app as a penalty for not increasing their acceptance rate.
- Uber exercises substantial control over how a driver delivers their service because it specifies the type of vehicle, directs the driver to a pick-up location, and provides a route to the fare's destination. It is possible for drivers to deviate from the route provided, though often that will lead to a driver receiving a lower rating from the passenger. The ratings that drivers receive from passengers allow Uber to further control its drivers, since it expects drivers to maintain a certain rating before issuing warnings or termination. Finally, Uber uses a technology for its operations that is exclusively controlled by Uber.
- Uber restricts communication between passenger and driver to prevent any relationship forming between the passenger and driver. Drivers are specifically prohibited from exchanging contact information with a passenger or contacting the passenger after the trip ends.

The service performed by the driver of transporting passengers is substantially and directly controlled by Uber. Importantly, the Court further affirmed the lower court's finding that 'working time' includes all the time spent by a driver logged in as 'on duty,' even if not accepting or transporting a passenger. Uber itself provides guidance that logging into the app is 'going on duty' and that it obligates the drivers to accept work if offered.

United Kingdom

News:

Adam Satariano, [Uber Drivers Are Entitled to Worker Benefits, a British Court Rules](#), New York Times, February 19, 2021

Mary Ann Russon, [Uber drivers are workers not self-employed, Supreme Court rule](#), BBC News, February 19, 2021

Commentary:

Alan Bogg, [For Whom the Bell Tolls: “Contract” in the Gig Economy](#), Oxford Human Rights Hub, March 7, 2021

[Independent Workers’ Union of Great Britain \(IWGB\) v. RooFoods Ltd. T/A Deliveroo \[2018\] EWHC 3342](#)

Date: December 5, 2018

Tribunal: High Court of Justice (Administrative Court)

Issue: Recognition as Collective Bargaining Agent for Deliveroo Riders under the ECHR

Finding: No employment relationship

Decision:

The High Court found that neither UK Law nor the European Court of Human Rights (“ECHR”)’s case law supported the Independent Workers Union of Great Britain (“IWGB”)’s arguments that Deliveroo riders were workers in an “employment relationship” with Deliveroo. The High Court stated that the correct and sole test for determining whether someone is a worker — the test in [Pimlico Plumbers Ltd & Anor v Smith](#) -- is the existence of a contractual obligation of ‘personal performance.’ Personal performance is determined by whether a person has a personal obligation to work. Thus, if there is a generalized right of substitution, there cannot be a personal obligation, because no specific person that must perform that obligation. In this case, the Court found that the contract does not require the rider to work personally, and thus substitutions are allowed. Thus, since riders are not employees, the Riders cannot be recognized as a union to negotiate pay and terms of work. The High Court noted that “gig economy” cases such as this one are fact specific, so the outcome in this case may not apply to another “gig economy” company with a different operating model. This case was appealed from a [Central Application Committee decision](#).

United Kingdom

[Addison Lee Ltd v Lange & Ors UKEAT/0037/18/BA](#)

Date: November 14, 2018

Tribunal: Employment Appeal Tribunal

Issue: Entitlement to holiday pay and the national minimum wage

Finding: Drivers are Limb b workers entitled to holiday pay and minimum wage

Decision:

Addison Lee operates a business of professional private drivers for hire firm for both commercial and private customers. Drivers for the business alleged that they were entitled to holiday pay and the national minimum wage as required under the Working Time Regulation 1998 and the National Minimum Wage Act. The Employment Tribunal (ET) found the drivers were limb (b) workers and thus entitled to holiday pay and the national minimum wage. The ET further found that times where drivers were 'logged on' should be considered working time.

The Employment Appeal Tribunal (EAT) found that the ET was correct in ruling that the drivers were limb (b) workers entitled to both holiday pay and the minimum wage under the law. It further found that being available when logged on was an essential part of the service and thus should be considered working time. The EAT found that the key issue in determining limb (b) status was whether drivers undertook to perform any work for Addison Lee. If drivers were found to have undertaken work for Addison Lee, then they were rightly classified as 'limb (b)' workers. The EAT found that a contractual relationship need not be present to determine the working relationship. The lower tribunal found that working relationship both through the contract and through the actions taken by the drivers, who by virtue of logging on were undertaking work for Addison Lee.

[Addison Lee Ltd v Gascoigne UKEAT/0289/17/LA](#)

Date: May 11, 2018

Tribunal: Employment Appeal Tribunal

Issue: Entitlement to holiday pay

Finding: Drivers are Limb b workers entitled to holiday pay

Addison Lee operates a business of professional private drivers and couriers for hire. The claimant was a cycle courier for Addison Lee. The Employment Appeal Tribunal upheld the ET's decision which found that the courier was a 'limb (b) worker and thus entitled to holiday pay. The ET found that despite contractual terms specifically designating the courier as an independent contractor, the reality of the relationship was that of a 'limb (b) worker.' The EAT found the ET's determination to be correct. It found that when the courier was logged on, there was a contract with mutual obligation of jobs offered and accepted and thus the courier fell within the meaning of a limb (b) worker and was entitled to holiday pay.

United States of America

[Matter of Lowry \(Uber Tech., Inc—Commissioner of Labor\) 2020 NY Slip Op 07645](#)

Date: December 17, 2020
Tribunal: Appellate Division, Third Department
Issue: Unemployment Insurance
Finding: Uber owes UI contributions

Ruling:

Uber appealed the decision of the Unemployment Insurance Appeal Board which held that Uber was liable for unemployment insurance contributions on remuneration paid to Lowry and others similarly situated. The Appellate Division (the highest New York state court) affirmed the ruling of the Appeal Board finding that the record contained substantial evidence that Uber exercised control over the drivers sufficient to establish an employment relationship. In particular, the court took note of the fact that Uber sets and collects fares and determines the drivers' compensation, has sole access to the customers, monitors the trip through GPS and can adjust the fare if the route is inefficient, controls which vehicle can be used, and uses its rating system to influence driver behavior.

[Islam, et al v. Cuomo, et al, No. 1:20-cv-02328, 2020 WL 4336393 \(E.D.N.Y. July 28, 2020\)](#)

Date: July 8, 2020
Tribunal: United States District Court for the Eastern District of New York,
Issue: Payment of unemployment insurance benefits
Finding: Preliminary injunction issued to UI pay benefits

Ruling:

Drivers for various app-based companies filed for unemployment insurance benefits with the New York State Department of Labor (DOL). The DOL denied benefits to many of the drivers for lack of sufficient wage and earnings data from the platform companies. The drivers filed a lawsuit in federal court alleging the violation of the Social Security Act and the Equal Protection Clause of the 14th Amendment of the Constitution and sought a preliminary injunction ordering payment of the unemployment insurance benefits.

The District Court granted the drivers' motion for a preliminary injunction. It found that the continued denial of subsistence benefits caused a substantial harm to the plaintiffs, that they had a substantial likelihood of success on the merits of their complaint, and that there was a strong public interest in government agencies following federal law. It ordered New York to establish a Workgroup with 35 claims processors to review all backlogged unemployment insurance benefits within 45 days and to maintain the Workgroup to address claims on an expedited basis, as well as other relief.

United States of America

[Razak v. Uber Techs., Inc., 951 F.3d 137 \(3rd Cir. 2020\)](#)

Date: March 3, 2020
 Tribunal: Third Circuit Court of Appeals
 Issue: Entitlement to minimum wage and overtime compensation
 Finding: Remanded to District Court

Decision:

Plaintiffs, who are Uber Black drivers, filed a complaint arguing that they are employees of Uber, not independent contractors, and thus entitled to receive a minimum wage and overtime compensation under the Fair Labor Standards Act. Uber filed a motion for summary judgment arguing that the drivers are independent contractors, and the District Court [granted](#) the motion. However, given the genuine dispute of material facts between plaintiffs and defendant, the Circuit Court vacated the decision and remanded the case to the District Court. Specifically, the court found that there were disputes of fact as to several of the *DialAmerica* factors, including the “right to control”, the “opportunity for profit or loss depending on managerial skill” and “degree of permanence of the working relationship.”

News:

Kirsten Errick, [Third Circuit Remands UberBLACK Driver Classification](#), March 4, 2020

Commentary:

Alisha Jarwala, [Razak v. Uber: The Third Circuit Addresses Driver Classification](#), On Labor Blog, March 4, 2020

[Dynamex Operations W., Inc. v. Superior Court \(2018\) 4 Cal. 5th 903](#)

Date: April 30, 2018
 Tribunal: Supreme Court of California
 Issue: Payment of minimum wage
 Finding: Employee/minimum wage applies

Decision:

Two delivery drivers alleged violations of minimum wage laws because they were misclassified as independent contractors for Dynamex, a nationwide package and document delivery company. The Court discussed that the main test to use to determine whether a worker is an independent contractor or an employee is the “ABC” test. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity’s business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity. The Court further stated that each of these requirements need to be met in order for the presumption that a worker is an employee to be rebutted, and for a court to recognize that a worker has been properly classified as an

United States of America

independent contractor.

Note: While Dynamex is not a digital platform company, the test it established would be applicable to them. As such, the case became the battleground over the regulation of digital platform companies in California and across the United States. Following Dynamex, the State of California passed [AB5](#) on September 18, 2019 codifying the ABC test. Under the law, workers for digital platform companies like Uber and Lyft would clearly be deemed employees.

On December 30, 2019, Postmates and Uber filed a lawsuit alleging that AB 5 violates the California and US Constitution and sought a preliminary injunction blocking the application of AB5. See, [Lydia Olson, et al. v. State of California, et al.](#) The Court denied the motion finding that plaintiffs did not establish a likelihood of success on the merits or that serious questions exist as to any of their claims.

Following the passage of AB5, Uber, Lyft and other companies continued to misclassify workers. On May 5, 2020, the Attorney General of California and others filed a lawsuit seeking injunctive relief to order Uber and Lyft to not misclassify their drivers as independent contractors. The injunction was granted on August 10, 2020. See, [People of California v Uber Technologies.](#)

Losing consistently in court, Uber and Lyft succeeded in getting a proposition, Proposition 22, onto the ballot in California which would exclude app-based drivers from the scope of AB5. After spending over \$200 million to get the issue on the ballot and to promote the “yes” campaign, [“Prop 22”](#) passed on November 3, 2022 by a 59-41 margin.

On January 12, 2021, a group of drivers and the Service Employees International Union (SEIU) filed a complaint with the California Supreme Court challenging Prop 22 under the California Constitution. That complaint was dismissed without prejudice on February 3, 2021. On February 11, 2021, they again filed the [complaint](#) with the Superior Court of the State of California.

News:

Tony Marks, [The California Supreme Court Deals A Blow To Independent Contractors](#), Forbes, May 29, 2018

Commentary:

Cherry, Miriam A., [Dispatch – United States: “Proposition 22: A Vote on Gig Worker Status in California”](#) (January 25, 2021). Comparative Labor Law & Policy Journal

Dubal, Veena, [Testimony: ‘Dynamex and Beyond: Understanding the Legal & Policy Landscape of Worker Classification in CA’](#) in Hearing Before CA Assembly Committee on Employment and Labor (February 26, 2019).

Valerio De Stefano [“I now pronounce you contractor”: Prop22, labour platforms and legislative doublespeak](#), UK Labour Law Blog, November 13, 2019

Celine McNichols & Margaret Poydock, [How California’s AB5 protects workers from misclassification](#), EPI, November 14, 2019

United States of America

[Lawson v. Grubhub, Inc., 302 F. Supp. 3d 1071 \(N.D. Cal. 2018\)](#)

Date: February 8, 2018
 Tribunal: U.S. District Court for the N.D. of California
 Issue: Eligibility for CA minimum wage, overtime and reimbursements
 Finding: Independent Contractor

A driver for Grubhub alleged being misclassified as an independent contractor rather than an employee and thus violated minimum wage, overtime and employee reimbursement laws. In order to make that determination, the primary factor is “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.”

The court also looked to a number of secondary “Borello” factors:

- whether the one performing services is engaged in a distinct occupation or business;
- the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
- the skill required in the particular occupation;
- whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- the length of time for which the services are to be performed;
- the method of payment, whether by the time or by the job;
- whether or not the work is a part of the regular business of the principal; and
- whether or not the parties believe they are creating the relationship of employer-employee

With regard to the right to control, the Court found that Grubhub exercised little control over its delivery drivers, it did not control: how he made deliveries, what vehicle he used to make deliveries, what he wore during those times, nor was he required to have any Grubhub signage visible. Further, there was no training that their drivers had to attend and Grubhub never performed a ride-a-long. The driver decided when and how long to work, not Grubhub and he had the ability to reject any order. Grubhub did not proscribe how long a delivery should take nor what route should be followed. Grubhub did determine the rates per delivery, what blocks a deliverer would cover, and determined geographic boundaries. While the Court did recognize that Grubhub could terminate the agreement at will, this was insufficient to overcome the other factors weighing against the finding of an employment relationship.

In applying the secondary factors, the Court found that some of them favored a finding of an employment relationship, namely that the delivery work was part of Grubhub’s regular business, that the work was low-skilled and that Lawson was not engaged in a distinct delivery business of which Grubhub was just one client. However, the other factors supported the finding of an independent contractor status. Foremost, Grubhub did not control the manner or means of work, did not provide any of the tools other than the app and neither party expected the work to be long-term or regular.

Note: Two months after the Grubhub decision was handed down, the California Supreme Court decided the Dynamex case which set forth the ABC test. Lawson appealed the District Court’s decision to the 9th Circuit Court of Appeals and argued that the ABC test should apply to him. In July 2019, the 9th Circuit asked the Supreme Court of California to decide whether the ABC test is retroactive. On January 14, 2021, the California Supreme Court answered in the affirmative in the [Vazquez v. Jan-Pro Franchising International, Inc.](#) litigation. Thus, the Lawson appeal might now move forward. However, even the Court finds that Lawson should have been deemed an employee under the ABC test, any recovery would likely end as of the date of Prop 22, which exempted such workers from the application of the ABC test.

Uruguay

[Esteban Queimada v. Uber BV](#)
[Unofficial English Translation](#)

Date: 2020
 Tribunal: Labour Court of Appeals
 Issue: Eligibility for vacation pay and Christmas bonus.
 Finding: Employee

Decision:

This decision was appealed from a [lower court decision \(unofficial English translation\)](#).

The Court was tasked with determining the nature of the relationship between drivers and Uber, namely a contract between two commercial entities or an employment relationship. In so doing, the Court referred explicitly to international and regional norms, including [ILO Recommendation No. 198](#) (ILO R198) and the American Declaration for Human Rights. In particular, it determined that ILO R198 supplied the framework to be applied to determine the labour relationship between Uber and its drivers (apparently the only case to do so explicitly). The decision also squarely put the burden of proof on the party seeking to exclude an individual performing work from the coverage of the labour law.

According to the Court, the indicators to determine the nature of the relationship supplied by ILO R198 are:

- The integration of the worker into the organization of the company
- The performance of the work according to instructions or under the control of another person
- Work performed solely or mainly for the benefit of another person
- The personal performance of the work at a specific time and place
- Work of a certain duration and continuity
- The availability of the worker
- The supply of tools, materials, and machinery
- Periodic remuneration

Of note, the Court found that while subordination was sufficient basis to find an employment relationship, it was not a necessary and exclusive basis. Based on a review of the facts, the Court found:

- Uber benefitted from the work: While both Uber and the driver benefit from the relationship, it is Uber which is the primary beneficiary. Uber controls the technology and earns a percentage of every ride at a rate it unilaterally sets. The driver is also does not know at the time of accepting the ride the destination and the amount of the fare that they will earn. Drivers are unable to negotiate a different amount with the passenger, and must accept the rate set by the algorithm.
- The integration of the worker into the organization: Uber uses the app to organize its productive process – to connect the demand for transportation with the driver and manage the collection of the fee. The driver does not organize any stage of the productive process. The driver is a link in the productive process organized by Uber, to which they submit themselves. The driver is integrated into this process with a specific function that is consistent with Uber’s purpose, without which the work of transporting passengers could not exist.
- Performance of work under the instructions/ control of another: The driver carries out rides per the rules in the service contract and which were unilaterally imposed by Uber. The driver transports customers referred to them via the app, they do not know the passengers’ information until Uber provides it, they cannot contact customers directly, they must transfer them in the car which is registered with Uber and maintained to Uber’s standards, they must not stop or make deviations from

Uruguay

the indicated route, and they cannot drive more than 8 consecutive hours. Further, access to the app can be suspended or discontinued at the sole discretion of Uber.

- Continuity and periodic remuneration: Queimada had worked from September 2016 until the filing of the lawsuit and was paid during that time as arranged by Uber.
- Supply of Tools: Both parties supplied tools, though it is Uber that supplied the app that made the operation function and set the rules of its use.
- that drivers were integrated into the work of Uber, because without the drivers transporting a person from one destination to another, there would be no remuneration. Furthermore, this action of transportation was to benefit Uber, who gained more financially than did any one driver. Further, it found that since Uber controlled who was picked up, what the fare should be, the type of tools needed, and penalized lower performing drivers, that drivers were under the control of Uber. Although Uber provided the app that was used for connecting drivers and passengers, the driver's provided the car, a factor though indicative was not enough to find against the driver.

The Court of Appeals found that by weighing the indicators developed by ILO R198, Uber is in an employment relationship with its drivers and thus must abide by such laws. It should be noted the Court also found that the arbitration clause within the contract between Uber and its driver was invalid because of the inability of the driver to truly negotiate his contract and it being a violation of both Constitutional and labour law in Uruguay.

News:

[Tribunal confirmó un fallo que obliga a Uber a pagar aguinaldo y salario vacacional a un exchofer](#), El Observador, 3 de junio 2020

Commentary:

Monica Tepfer, Gabriel Salsamendi, & Jesus Garcia Jimenez, [Efectividad jurídica de los Comentarios de la Comisión de Expertos en Aplicación de Convenios y Recomendaciones de la OIT: Análisis a partir de un estudio de caso](#), febrero 2021

**NOTEWORTHY DIGITAL PLATFORM CASES NOT DETERMINING THE
EXISTENCE OF AN EMPLOYMENT RELATIONSHIP**

ENFORCEABILITY OF ARBITRATION CLAUSES

A number of tribunals in this publication have addressed the question of the enforcement of arbitration clauses as part of the overall discussion as to whether the driver could bring a claim. However, these cases from Canada and the US, contain extensive discussions on the enforcement of arbitration clauses and notably reach very different conclusions. Two recent decisions in the US did refuse to enforce arbitration clauses for drivers based on the extent to which drivers are engaged in “interstate commerce”.

[Uber Technologies Inc v Heller, 2020 SCC 16](#)

Country: Canada
 Date: 2020
 Tribunal: Canadian Supreme Court
 Issue: Enforceability of Arbitration Clause
 Finding: Clause Unenforceable

When Heller became a driver for Uber, he had to click to agree to a standard contract with no ability to negotiate its terms. The contract contained a clause that required the driver to bring any dispute to arbitration in the Netherlands at the International Chamber of Commerce. The clause would impose extremely prohibitive costs to the driver, including a US\$ 15,000 fee to initiate the arbitration – nearly his annual incomes from driving for Uber - as well as travel to the Netherlands. He brought a class action lawsuit turned on whether he and other drivers were employees of the company. Uber sought to enforce the arbitration clause.

The Supreme Court of Canada found that the arbitration clause at issue was unconscionable. The Supreme Court explained that an unconscionable contract is one where there is both an inequality of bargaining power and a resulting improvident bargain.” Here, there was clearly inequality of bargaining power. The contract between Uber and Heller was a standard form contract and Heller was powerless to negotiate any of its terms. There was also improvidence in the high costs of arbitration including initiation fees, travel and legal costs. Thus, the arbitration clause cannot be enforced against Heller. The Court the set aside the arbitration clause and allowed the \$400 million class action litigation to proceed in Canadian courts in Ontario. In a concurring opinion, one judge held that arbitration clause was unenforceable as it was contrary to public policy because it deprived the driver of the ability to obtain a remedy. The class action litigation is arguing that drivers have been misclassified as self-employed and should be classified as employees of Uber Eats.

Commentary:

David Doorey, [Heller v. Uber: Supreme Court Must Guard Access to Class Action Lawsuits](#), November 21, 2020, Law of Work Blog

Alan Bogg, [Uber v Heller and the Prospects for a Transnational Judicial Dialogue on the Gig Economy](#), Oxford Human Rights Hub

Alan Bogg, [Uber v Heller and the Prospects for a Transnational Judicial Dialogue on the Gig Economy – II](#), Oxford Human Rights Hub

David Doorey, [Uber Reinvents its Controversial Arbitration Clause After Uber v. Heller](#) Law of Work Blog

[O'Connor v Uber Techs., 904 F.3d 1087 \(9th Cir. 2018\).](#)

Country: United States
 Date: September 25, 2018
 Tribunal: Ninth US Circuit Court of Appeals
 Issue: Enforceability of Arbitration Clause Prohibiting Class Action on Employment Status
 Finding: Class Action Prohibited

Decision:

Uber drivers had filed several class actions against Uber that, among other issues, it misclassified drivers as independent contractors rather than as employees. These cases were consolidated. The District Court denied Uber's motions to compel arbitration and issued orders granting class certification. Uber appealed to The Ninth US Circuit Court of Appeals.

The Ninth Circuit reversed the class certification order on the basis that Uber's arbitration clause prohibits class actions. This was in fact the second time that the Ninth Circuit had done so. The first time, plaintiffs had sought a declaration from the district court that the arbitration agreement was unconscionable, or that Uber was required to provide enhanced notice and the ability to opt out.

In this round, the plaintiffs made two new arguments. First, they argued that lead plaintiffs had opted out of arbitration on behalf of the class. The Court had found that the lead plaintiffs did not have the authority to do that on behalf of other drivers. The second was that arbitration agreements are unenforceable because they contain class action waivers that violate the National Labor Relations Act. The majority of the Supreme Court determined in *Epic Systems Corp. v. Lewis* that such class action waivers in arbitration agreements do not violate the NLRA. The decision drew a strong dissent from Justice Ginsburg who characterized the *Epic Systems* decision as "egregiously wrong."

News:

Andrew Hawkins, [Uber scores a big win in legal fight to keep drivers as independent contractors](#), The Verge, September 26, 2018

[Wallace v. Grubhub Holdings, Inc., 970 F.3d 798 \(7th Cir. 2020\)](#)

Country: United States
 Date: August 4, 2020
 Tribunal: Seventh Circuit Court of Appeals
 Issue: Enforceability of Arbitration Clause
 Finding: Clause enforceable

Decision:

Drivers for Grubhub in several cities filed class action lawsuits against Grubhub alleging that it violated the Fair Labor Standards Act when it failed to pay overtime. However, Grubhub moved to compel arbitration based on the terms of the service agreement each driver had signed that required them to submit any claims arising out their relationship with the company to arbitration. The district courts rejected the argument that their contracts fall into the exemption from the Federal Arbitration Act for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or inter-

state commerce.” The U.S. Court of Appeals for the Seventh Circuit found that while delivery drivers transport goods that are the product of interstate commerce, they themselves don’t engage in “interstate commerce.” As such, they are unable to avoid the arbitration agreements they signed with their employer.

News:

Erin Mulvaney, [GrubHub Ruling Draws New Line in Battles Over Driver Arbitration](#), Bloomberg Law, August 6, 2020

[Waithaka v. Amazon.com, Inc., 966 F.3d 10, 13 \(1st Cir. 2020\)](#)

Country: United States
 Date: July 17, 2020
 Tribunal: First Circuit Court of Appeals
 Issue: Enforceability of Arbitration Clause
 Finding: Clause unenforceable

Decision:

In August 2017, Waithaka, an Amazon Flex driver, filed a complaint in Massachusetts state court on behalf of himself and others similarly situated, arguing that Amazon misclassified Amazon Flex drivers as independent contractors, violated the Massachusetts Wage Act by requiring drivers to “bear business expenses necessary to perform their work” and violated the Massachusetts Minimum Wage Law. Amazon removed the case to federal court and subsequently sought to enforce its arbitration clause. While the drivers did not travel interstate, the Court determined that the drivers delivered goods in the “last mile” of an interstate commerce journey. As such, they fell within an exemption of the Federal Arbitration Act exemption, which applies to exemption for “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

See also, [Rittmann v. Amazon.Com, Inc.](#), (9th Cir. 2020)(reaching same conclusion)

News:

Kathleen Daily and Erin Mulvaney, [Amazon Drivers Can Bypass Wage Arbitration, 1st Cir. Says](#), Bloomberg Law, July 17, 2020

Note: The Seventh Circuit and the First Circuit draw a very thin distinction between goods that are “in the stream of interstate commerce” (Amazon) and goods that have been “at rest” (Grubhub). This distinction arises from the US Supreme Court’s decision in [Circuit City v. Adams](#).

COMPETITION LAW**[Samir Agrawal v. Competition Commission of India & Ors](#)**

Country:	India
Date:	2020
Tribunal:	Supreme Court of India
Issue:	Anti-competitive behavior (price fixing)
Finding:	No price-fixing

This case was brought as an appeal from a decision of the Competition Commission of India (CCI). The initial inquiry was brought to the CCI under the Competition Act on India alleging anti-competitive conduct of Ola and Uber because they had entered into price-fixing agreements. Ola is an app-based taxi service similar to Uber. The allegation to CCI was that because both Ola and Uber used a mobile application that determined fares through a price algorithm – neither riders or drivers were able to negotiate the fare – thus it took away the freedom of drivers and riders to choose the best price. It was further alleged that the business models of Uber and Ola functioned closer to a ‘cartel’ and because of their greater bargaining power are able to implement price discrimination. The complaint alleged that the collusion was between the drivers not the Ola and Uber. The CCI found that the Uber and Ola business models did not function as a ‘hub-and-spoke cartel,’ because that would require an agreement between all drivers to set prices through the platform, and CCI did not find such an agreement in place. It found no collusion between the drivers. It further did not find a meeting of the minds as generally seen when determining whether a business operation functions akin to a cartel. The CCI found that the argument that because the drivers are independent third-party operators, the price determination by the app algorithm should be considered price fixing to be false. Finally it did not find Ola and Uber operating as a joint venture or either one holding the greatest market share to influence prices of all the other platform based taxi operators. The Supreme Court of India upheld the CCI’s findings and dismissed the complaint.

[Uber Singapore Technology et. al v. Competition and Consumer Commission of Singapore](#)

Country:	Singapore
Date:	2020
Tribunal:	Competition Appeal Board of the Republic of Singapore
Issue:	Anti-competitive behavior
Finding:	Merger of Uber and Grab anti-competitive

The Competition and Consumer Commission of Singapore (CCCS) issued an infringement decision in 2018 arising from the sale of Uber’s Southeast Asian business to Grab. CCCS found that this merger would lead to a substantial lessening of competition (SLC) in the market for platform-based transportation services. Uber appealed the decision of CCCS to the Competition Appeal Board (CAB). The CAB upheld the directives issued by CCCS which required: (1) that Uber and Grab lessen the impact of their merger and ensure that the platform-based transportation market would still be open to new companies; and (2) Uber had to pay a financial penalty of \$6,582, 055 Singaporean dollars (equivalent to about \$4,900,000 USD). The CAB found that although Singapore has a voluntary notification regime, that does not mean there are no risks for parties who elect not to notify CCCS, particularly where mergers are irreversible. When such parties do not inform CCCS in advance, they run the risk of infringing the Competition Act and the possibility of the remedies suggested being rejected as inadequate by CCCS. The CAB found that CCCS should consider the need to deter businesses from anti-competitive practices when asserting its discretion regarding penalties and

commitments. The CAB found that the merger between Uber and Grab would ‘substantially lessen competition’ which is prohibited in Singapore.

News:

Justin Ong, [Uber’s appeal against S\\$6.58m fine for anti-competitive Grab merger dismissed](#), Today, January 13, 2021

Competition and Consumer Commission of Singapore, [Press Release: Competition Appeal Board upholds CCCS’s Infringement Decision Against Uber for Anti-competitive Merger with Grab](#), 13 January 2021

[Chamber of Commerce v City of Seattle, 890 F.3d 769 \(9th Cir. 2018\)](#)

Country: United States
 Date: 2018
 Tribunal: US 9th Circuit Court of Appeals
 Issue: Whether municipal statute allowing drivers to bargain collectively is anti-competitive
 Finding: Municipal statute enjoined

Decision: The City of Seattle enacted a new ordinance that authorized a collective bargaining process between ‘driver coordinators’ (Uber, Lyft, etc.) and independent contractors who work as for-hire drivers. The ordinance only applied to independent contractors and required the Director of Finance and Administrative Services (Director) approval at various stages. In summary, the Ordinance allowed approved ‘qualified driver representatives (QDR)’ to receive information from driver coordinators about any qualifying driver. If a majority of qualified drivers consent to representation by the QDR, they become the exclusive driver representative and can bargain on behalf of all for-hire drivers of that driver coordinator on a variety of issues including nature and amount of payments to be made or withheld by driver coordinators or drivers. If an agreement is reached it must be reviewed and approved by the Director.

The U.S. Chamber of Commerce (Chamber) argued that this ordinance is preempted by Section 1 of the Sherman Act (a federal anti-trust law) because the scope of bargaining amounts to price fixing. The Ninth Circuit found that state-action immunity does not apply in this case, and thus, the ordinance may be preempted by this federal antitrust law. The Court articulated a clear two-part test to determine whether immunity would attach: (1) clear articulation test and (2) active-supervision requirement. Under the first prong, the Court found that there needed to be both express state authorization and a concept of foreseeability because the ordinance does not plainly show the state legislature contemplating price fixing. The Court stated that driver coordinators contract with providers of transportation services but do not provide such transportation services. It further made a distinction between the referral service provided by driver coordinators and the for-hire drivers actually transporting individuals when analyzing the legislature’s actions. It found that although the State of Washington does allow municipalities to regulate for-hire transportation, it does not seem to have adopted a policy authorizing for-hire drivers to fix rates. Under the second prong, the Court determined that because this ordinance relates to private parties, there must be active supervision by the State of Washington. Although the Director is involved in approvals of the QDR and agreement, there is not direct supervision by the State of Washington, and thus there is no active state supervision, furthering the Court’s determination that state action immunity does not apply.

The Chamber also argued that the ordinance is preempted by the National Labor Relations Act (NLRA). There are two discrete preemptions found by the U.S. Supreme Court: (1) forbids the National Relations

Labor Board (NLRB) or the States to regulate conduct Congress intended to be unregulated and left up to market forces; and (2) precludes state interference with NLRB's interpretation and active enforcement of the NLRA. The Ninth Circuit found neither preemption reason was applicable in this case, and thus, the ordinance is not preempted by the NLRA. The Chamber argues that the first preemption applies because Congress chose specifically to exclude independent contractors from the NLRA's definition of employee. The Court reiterated the interpretation that whether the term employee in the NLRA includes particular workers should be evaluated based on history, terms, and purpose. It further found that even where specific groups of workers were excluded, they have still been the subject of state regulation. Here, the exclusion of a group of workers from the definition in and of itself does not compel a finding of preemption. With regards to the second preemption, the Chamber argues that the ordinance is preempted because it requires a determination that for-hire drivers are employees. However, the Court found that the ordinance specifically decrees that it makes no determination as to employee status but is providing a process of collective bargaining. The Court stated that to assert the second preemption, a party must provide enough evidence for the Court to determine that the activity is subject to the NLRA. The Chamber has not shown that for-hire drivers are employees covered by the NLRA, and thus, the ordinance is not preempted by the NLRA.

News:

David Gutman, [Seattle's Uber unionization law on hold after 9th Circuit rules against city, Seattle Time, May 11, 2018](#)

Analysis:

[Chamber of Commerce v. City of Seattle](#), 132 Harv. L. Rev. 2360 (2019)

Ryan Wheeler, [Ninth Circuit Puts the Brakes on Uber Unionization](#), OnLabor Blog, May 23, 2018

Sanjukta Paul, [Amicus Brief in Seattle Case: Antitrust and Worker Cooperation](#), OnLabor, December 18, 2017

SOCIAL PROTECTION

[The Independent Workers' Union of Great Britain \(IWGB\) v. Secretary of State for Work and Pensions, et al. \[2020\] EWHC 3050 \(Admin\)](#)

Country:	United Kingdom
Date:	November 13, 2020
Tribunal:	High Court of Justice (Administrative Court)
Issue:	Application of the EU Framework Directive and the EU PPE Directive
Finding:	Directives apply to Limb (b) workers

Decision:

The IWGB argued that the UK violated EU Directives concerning worker health and safety protections because UK law excluded 'limb (b) workers.' The two EU Directives, the Framework Directive and the PPE Directive, require improvements in the health and safety of workers at work and set minimum health and safety requirements for the use of personal protective equipment by workers. The issue is whether the Directives require Member States to ensure adequate health and safety protections and requirements for all workers or just those defined as 'employees.'

The High Court looked to the definition of an employment relationship used by the European Court of Justice. In *Lawrie-Blum v Land Baden-Württemberg* [1987] ICR 483, the ECJ held that "the essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he received remuneration." Thus, the High Court found that the UK was violating its obligations under the Framework Directive because its legislative framework excluded categories of workers that did not fall within the UK definition of an employment relationship. Further, it found that the UK did not properly implement the Framework Directive with regards to protection of workers who take steps to protect themselves from injury at work, because the UK law requires that worker to make a protected disclosure and not all workers may do so, but may still take steps to protect themselves. Finally, the High Court found that the UK failed to implement the PPE Directive with regards to limb (b) workers because the UK law has gaps in protecting such workers and ensuring they receive adequate PPE.

News:

IWGB Press Release, [IWGB wins groundbreaking health and safety legal challenge against the Government](#), November 13, 2020

[Ahmed Adiatu & Independent Workers Union of Great Britain \(IWGB\) v HM Treasury \[2020\] EWHC 1554](#)

Country: United Kingdom
 Date: June 15, 2020
 Tribunal: High Court of Justice (Administrative Court)
 Issue: Exclusion of limb b workers from sick pay scheme
 Finding: Exclusion did not violate EU law

Decision:

In response to COVID-19, the UK government changed various laws to allow for broader and quicker access to resources in the wake of business closures, illness, and related COVID-19 economic hardships. The claimants, the Independent Workers' Union of Great Britain (IWGB) and an Uber driver, argued that excluding certain workers, such as limb b workers who are not paid through a particular payment scheme or excluding limb b workers completely from the sick pay scheme violated Article 14 of the European Convention on Human Rights (ECHR)(prohibiting discrimination), and violating article 157 of the Treaty of the Functioning of the European Union (TFEU)(requiring equal pay), and EU Directive 2006/45 on equal treatment and opportunities for employment. The claimants were not asking the court to adjudicate the status of Uber drivers as employees.

With regards to violation of the ECHR, the Court found that in order to determine whether there was a violation, it must determine whether there was a legitimate aim and did not have disproportionate impact with regards to differential treatment. In this case, it found that the government's aim was legitimate and justified because the global pandemic created unforeseen circumstances on a vast scale with utmost urgency, and thus the exclusion of limb b workers was justified. By including limb b workers within either of these statutory compensation schemes, it would have led to much higher expenditures, and a real risk of fraud.

In reviewing whether EU law had been violated by such exclusions, the Court found that the UK government had not violated EU law. The crux of its analysis was based on whether there was a proportionate means of achieving a legitimate aim, and it found that when the court identifies a legitimate aim, the government should be given broad discretion in determining a response, however that does not mean there can be no judicial review. In this case, the Court found that the government had a legitimate aim and had to balance a wide-ranging list of considerations and thus it should be afforded a broad margin of discretion. Thus, the exclusion of limb b workers in these statutory compensations schemes does not violate EU law.

TRANSPORTATION v. INFORMATION SERVICES

While several cases have taken up the question whether Uber and similar companies are providing transportation services or information technology services, these two opinions by the Court of Justice of the European Union (CJEU) addresses this question directly.

[Star Taxi App SRL v. Uitateea Administrativ Teritoiala et. al](#)

Country: Romania
 Date: December 3, 2020
 Tribunal: European Court of Justice
 Issue: Transport activities v information society services
 Finding: It is an information society service

Star Taxi App connects registered taxi drivers with passengers through its smartphone app. It does not forward bookings to drivers, does not recruit drivers and does not control the quality of the vehicle the driver uses. Passengers directly pay the fare to their driver, not Star Taxi. Romania amended its laws requiring prior authorization for the activity of 'dispatching' to cover operators of IT applications, such as Star Taxi.

The case was brought before the CJEU to determine whether Star Taxi is transportation company or an 'information society service' and, if the latter, what EU law would apply. The CJEU found that Star Taxi is an information society service unlike Uber, which is to be considered a transport service. This is because the Court found that Star Taxi does not control integral aspects of the service because it does not recruit drivers, does not determine the fare, nor determine the type or quality of vehicle. Furthermore, it was determined that a non-transport company could provide the same service as Star Taxi, and thus there was no inherent link between the app connecting drivers and passengers with the transport service provided by those drivers. It further found that the directive on electronic commerce does apply and the services directive may apply, but it is up to the national court to make that determination.

News:

[Court of Justice of the European Union](#)
 Press Release No 149/20, 3 December 2020

Melissa Heikkilä, [EU court ruling delivers win for Uber, ride-hailing apps](#), Politico, December 3, 2020

[Asociación Profesional Élite Taxi v Uber Systems Spain SL](#)

Country: Spain
 Date: December 20, 2017
 Tribunal: European Court of Justice
 Issue: Transport activities v information society services
 Finding: Transportation Service

This case was brought by a taxi drivers' association alleging that Uber Spain's activities amount to misleading practices and unfair competition because neither Uber Spain nor its drivers have taxi licenses as required

under Spanish law. The Spanish Court had to determine whether Uber Spain's activities amount to transport activities or information society services, which would determine whether Uber Spain is required to obtain licenses and has committed activities amount to unfair competition. The CJEU has determined that an intermediary service such as Uber Spain, whose main function is to connect non-professional drivers with passengers is to be considered a transport service within EU law. Thus, Member States can regulate transport services as they see fit within the scope of EU law.

News:

Court of Justice of the European Union, [Press Release No 136/17](#), 20 December 2017

Commentary:

Małgorzata Sieradzka, [Asociación Profesional Elite Taxi vs Uber Systems Spain SL: Differences between the Internet Platform and the Transport Service](#), *Journal of European Competition Law & Practice*, Volume 11, Issue 5-6, May-June 2020,

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