HUNGARIAN LABOUR LAW
E - J O U R N A L

The Digitalisation of Work

An assessment of the rights and protections afforded to platform workers

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1. Introduction

The 'gig economy', has rapidly emerged as a new method of goods and services provision, which challenges former business models, management and regulation. The gig economy has been described as "organisations operating digital platforms that connect customers directly with service like providers who are classified as a self-employed independent contractor, rather than an employee. Workers complete hyper-flexible tasks for a defined time, with minimal commitment between the parties".[1] Digital platform workers are remunerated for each job completed, with the service provider deducting an agreed percentage. Whilst Healy, Nicholson, and Pekarek suggest that the platform economy is structured around multiplatform interactions, where platform companies create apps, which users download.[2] It is important to emphasise that the platform is not new. Keane argues the gig economy "is a case of old wine in new bottles",[3] and thus digital labour platforms are simply a new facet of the gig economy. Digital labour platforms "represent a digital version of the offline atypical, casual, freelance, or contingent work arrangements characteristic of much of the economy prior to the middle of the twentieth century and that have reappeared in the past thirty years".[4]

It may be argued that digital labour platforms have provided the most visible technological reform of work provision in recent decades. Persoe et al. define digital labour platforms as "digital networks that coordinate labour service transactions in an algorithmic way".[5] Whilst De Groen et al. suggest

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1 James Dargan – Ultan Sherman – Ronan Carbery – Anthony Mcdonnell: The rise and rise of the gig economy. *RTÉ* (02 June 2018) available: https://www.rte.ie/brainstorm/2018/0530/967082-the-rise-and-rise-of-the-gig-economy/ [Accessed on 03 February 2020].

2 Joshua Healy – Daniel Nicholson – Andreas Pekarek: Should we take the gig economy seriously? *Labour & Industry: a journal of the social and economic relations of work,* vol. 27., n. 3, (2017) 232–248.

3 Eddie Keane: Making a Good Job of the Gig. *Irish Employment Law Journal,* vol. 15., n. 3. (2018) 76–81.

4 Arne L. Kalleberg – Michael Dunn: Good Jobs, Bad Jobs in the Gig Economy. *Perspectives on Work,* vol. 20., (2016) 10.

5 Annarosa Pesole – Cesira Urzì Brancati – Enrique Fernández-Macías – Federico Biagi – Ignacio González Vázquez: Platform workers in Europe. Evidence from the COLLEEM Survey. *JRC Working Papers*, (2018) 112–157.

digital platform work is "an employment form in which organisations or individuals use an online platform to access other organisations or individuals to solve problems or to provide specific services in exchange for payment".[6]

In Ireland, a recent report by the Economic and Social Research Institute (ERSI) estimates that 8% of the Irish workforce are in 'temporary' employment.[7] Contrastingly, 14.3% of all employees in the EU are subject to a temporary contract,[8] and digital platforms provide the main source of income for approximately 4-5% of the total working population of Europe.[9] Novitz, writing in the 2016 Dublin University Law Journal suggests that since the Global Financial Crisis, correlating with unemployment, the number of people working in the gig economy, through digital labour platforms, has increased significantly. Hiring platform workers has reduced costs associated with individual employment rights and protections for businesses.[10] Similarly, if a platform worker receives negative feedback, it may influence the algorithm of the digital platform and have severe implications for the person's future work prospects.[11] Friedman adds that the digital platform economy provides a lack of income security for its workers.[12] The aforementioned lack of labour protection afforded to workers is believed to be balanced by the flexibility associated with being an independent worker: workers may choose their hours and offer their services whenever they want. Such flexibility may be of benefit to those who have other commitments, such as study, other work, family or leisure activities.[13]

This paper shall begin by outlining how one's employment status is assessed in Ireland; the paper shall then examine the current legal framework for platform workers and subsequently, whether there are collective bargaining processes available for platform workers.

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6 Eurofound: *Digital Age Employment and working conditions of selected types of platform work*. [Publications Office of the European Union] Luxembourg, 2018.

7 Economic and Social Research Institute: Measuring Contingent Employment in Ireland. *RSN*, 74., August 2018., available: https://www.esri.ie/system/files/media/file-uploads/2018-08/RS74.pdf [accessed on 10 February 2020].

8 Eurostat: How common is temporary employment in your country.; available: https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180523-1 [accessed on 10 February 2019].

9 Director-General of DG Connect at the European Commission Robert Viola: The platform economy: revolutionising the world of work. European Commission, 18 November 2019., available: https://ec.europa.eu/digital-single-market/en/blogposts/platform-economy-revolutionising-world-work [Accessed on 18 February 2020].

10 Tonia Novitz: Changes in Employment Status Under Austerity and Beyond – Implications for Freedom of Association. *Dublin University Law Journal,* vol. 39., n. 1. (2016) 27–50.

11 Valerio De Stefano: The rise of the just-in-time workforce: On-demand work, crowdwork, and labor protection in the gig-economy. *Comp. Lab. L. & Pol'y J.,* vol. 37. (2015) 471.

12 Gerald Friedman: Workers without employers: shadow corporations and the rise of the gig economy. *Review of Keynesian Economics,* n. 2.2. (2014) 171–188.

13 Sett Harris – Alan Krueger: *A Proposal for Modernizing Labor Laws for Twenty-First- Century Work: The "Independent Worker".* (The Hamilton Project) Discussion Paper, 2015. available: https://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [accessed on 04 February 2019].

2. Employment status

The status of one's employment continues to be a contentious issue due to the protections afforded to those deemed employees. Otto Kahn-Freund describes the contract of employment as 'the cornerstone' of the modern labour law system.[14] The contract of employment, comparable to an eternal cornerstone, has always been an issue of conflict, Professor Vic Craig states "[since] the time of the common law's development into the early 19th century, the term or concept of 'status' was apt to describe the position of workers whose relationship with the provider of the work was essentially non-consensual, *adscripti glebae,* for example, agricultural workers and colliers whose employment and tenure ran with the land which they toiled".[15] This author acknowledges that throughout history the concept of employment has rapidly evolved, however, it is noteworthy that disputes over employment have continuously occurred throughout history and are likely to continue to occur in the future. Disputes over employment status arise in a variety of contexts, most frequently to see whether employment protection legislation applies to a worker. [16] Whilst Deakin notes contracts of employment "underpinned the common law of 'managerial prerogative' through the open-ended duty of obedience, whilst simultaneously supporting the edifice of social legislation aimed at providing the individual with protection against economic risks".[17] A contract of employment has significant consequences, for both employers and employees: the employer is vicariously liable for the wrongs of the employee; rights and obligations are imposed upon either party by the law, relating to health and safety, termination of employment, redundancy, leave and holiday entitlements; furthermore, in the case of the employer's company winding up or the business being placed into receivership, employees are classed as preferential creditors.[18]

In Ireland, workers are treated as either employees or independent contractors.[19] The Revenue Commissioners of Ireland in their 'Code of Practice for Determining Employment or Self-Employment Status of Individuals' convey the factors which are used in Ireland to establish one's employment status: an employee cannot control the work; they supply labour only; employees receive a fixed wage; employees cannot sub-contract their work; the employer provides the materials for the job; employees are not exposed to financial risk during work; employees cannot profit from the work; employees cannot work for competitors and employees are entitled to extra pay or time off for overtime. In contrast, an independent contractor is described as owning their own business; exposed to financial risk; can profit from the performance of the work; have control over the work; are entitled to hire

14 Otto Kahn-Freund: *Labour and the Law.* (London, Stevens, 1977.), cited in: Brenda Daly – Michael Doherty: *Principles of Irish Employment Law.* Clarus Press, 2010. 40.

15 Vic Craig: Who are the workers? *Employment Law Bulletin,* n. 139 (2017) 2–5.

16 Michael Forde: *Employment Law* . Round Hall, ³2009. para 2-06.

17 Simon Deakin: The Contract of Employment: A Study in Legal Evolution. *ESRC Centre for Business Research, University of Cambridge, Working Paper,* No. 203. (2001).

18 Maeve Regan – Ailbhe Murphy: *Employment Law.* Bloomsbury Professional, ²2017.

19 Eddie Keane: Are Collaborative Workers Employees? *Hungarian Labour Law E-Journal,* Vol 2. (2016).

people to do the work; can provide the same service to competitors; may provide equipment for the jobs; provide their insurance and control the hours of work.[20] However, Rush identifies where a dispute arises between an employer and worker over the worker's employment status, the Irish Courts have utilised a variety of tests to determine an individual's employment status: the 'control test', the 'enterprise test', the 'mutuality of obligation test', and the 'integration' test.[21] Whilst all tests have been applied, there have been several seminal decisions by the Superior Courts of Ireland.

2.1. Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare[22]

In *Henry Denny & Sons (Ireland) Ltd v. Minister for Social Welfare*,[23] both the High Court and Supreme Court considered a case brought by Sandra Mahon, a food demonstrator in supermarkets. Ms. Mahon was paid a fee per demonstration whilst submitting an invoice and payment was made without deduction of tax or PRSI. Her contract of employment was renewed annually and contained exclusion clauses expressly stating: "you will not be an employee of Kerry Foods, you will be providing it with your services as an independent contractor, as and when they are required, during the term of the contract".[24] Keane J. provided the factors to consider when differentiating between a contract of service (employee) and contract for service (independent contractor):

> "[…] in general, a person will be regarded as providing his or her services under a contract of service and not as an independent contractor where he or she is performing those services for another person and not himself or herself. The degree of control exercised over how the work is to be performed, although a factor to be taken into account, is not decisive. The inference that the person is engaged in business on his or her own account can be more readily drawn where he or she provides the necessary premises or equipment or some other form of investment, where he or she employs others to assist in the business and where the profit which he or she derives from the business is dependent on the efficiency with which the work is conducted by him or her".[25]

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20 Revenue Commissioners: *Code of Practice for Determining Employment or Self-Employment Status of Individuals.* (2019) available: https://www.revenue.ie/en/self-assessment-and-self-employment/documents/code-of-practice-on-employment-status.pdf [accessed on 17 April 2020].

21 Síobhra Rush: The gig economy and employment law in Ireland. Lewis Silkin (19 November 2018, Dublin) available: https://www.lewissilkin.com/en/insights/the-gig-economy-and-employment-law-in-ireland [accessed on 31 January 2020].

22 [1997] IESC 9; [1998] 1 IR 34.

23 Ibid.

24 Ibid.

25 Ibid.

In dismissing the appeal and finding Ms. Mahon was an employee, the Supreme Court ignored the description placed on the relationship between the parties and examined the reality of the situation that existed between them.[26]

2.2. Minister for Agriculture v Barry[27]

Cox, Corbett, and Ryan argue that the Supreme Court in *Henry Denny & Sons*,[28] "had not intended to create a single overarching test".[29] This was confirmed in *Minister for Agriculture v Barry*,[30] a case which concerned five individuals engaged by the Minister for Agriculture and Food as temporary veterinary inspectors who argued that, as employees, they were entitled to statutory redundancy payments and minimum notice of the closure of the meat plant, where some had worked for more than thirty years.

Edwards J. stated "contrary to a misapprehension held in some quarters, I do not believe that it is a correct interpretation of the passage in question to regard it as the formulation by Keane J. of 'a single composite test', either for determining the nature of the work relationship between the parties. […] this passage from his judgment has given rise to a degree of confusion, I believe that this confusion derives primarily from misguided attempts to divine in his judgment the formulation of a definitive, 'one size fits all', test in circumstances where the learned judge was not attempting to formulate any such test".[31]

Furthermore, Edwards J. emphasised the importance of mutuality of obligation: "The requirement of mutuality of obligation is the requirement that there must be mutual obligations if the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract for services".[32]

In the last 36 months, there have been several actions taken by workers against digital labour platforms before the UK and EU Courts. Such cases provide an insight into this "global battleground",[33] and how the judiciary are examining the employment status of digital platform workers.

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26 Ubaladus De Vries: Labour Law and Employment Law. *Annual Review of Irish Law,* vol. 11., n. 1. (1997) 581–521.

27 2008] IEHC 216, [2009] 1 IR 215, [2008] ELR 245.

28 *Henry Denny & Sons (Ireland) Ltd. V Minister for Social Welfare* [1997] IESC 9; [1998] 1 IR 34.

29 Neville Cox – Val Corbett – Desmond Ryan: *Employment Law in Ireland*. Clarus Press, 2009. para 3-06.

30 [2008] IEHC 216, [2009] 1 IR 215, [2008] ELR 245.

31 Ibid. 239.

32 Ibid. 230.

33 Lucy Trevelyan: The gig economy: a new global battleground. *IBA Global Insight,* (2018) 45–49.

2.3. Karshan (Midlands) Limited t/a as Domino's Pizza v Revenue Commissions[34]

Karshan (Midlands) Limited t/a as Domino's Pizza v Revenue Commissions,[35] concerns an appeal to the Irish High Court pursuant to section 949 of the Tax Consolidation Act 1997. The Tax Appeals Commissioner determined that the pizza delivery drivers engaged by the appellant worked under contracts of service. The appellant contended that the drivers worked under contracts for service, and were therefore self-employed.[36]

Counsel for the appellant argued that the Commissioner had erred in law, in her interpretation and application of the following concepts: mutuality of obligation; substitution; integration and terms of the contract.[37]

2.3.1. Mutuality of obligation

The appellants argued that the fact that the drivers were free to choose their hours and availability did not convey an employment relationship. The court found that the relationship between the parties consisted of an overarching umbrella contract supplemented by individual contracts in respect of each assignment or roster of work. Whilst "mutuality of obligations can occur under an umbrella contract which is modified by the operation of ongoing relationships that carry obligations for both sides of the contract of employment".[38] The court's assessment that the requirement of mutuality of obligation was satisfied in each instance of hiring, by the requirement for a driver cancelling a shift to provide Domino's with advance notice; to source a substitute approved by Domino's, and to work out the remainder of the shifts agreed".[39]

2.3.2. Substitution

Dominos argued the driver's ability to substitute work, as provided in their contract, could not reflect an employment relationship. The court held that a substitute was not a sub-contractor of the driver.

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34 [2019] IEHC 894.

35 Ibid.

36 Ibid. para 1.

37 Ibid. para 3.

38 Ibid. para 51.

39 Elizabeth Ryan: Employment Update: The Gig is UP – Domino's Pizza Drivers are Employees. *Mason Hayes Curran,* 11 February 2020, available: https://www.mhc.ie/latest/insights/employment-update-the-gig-is-up-dominos-pizza-drivers-are-employees [accessed on 12 March 2020].

One driver was simply replaced with another driver from the appellant's pool of drivers. Similarly, the driver and the substitute left it to the appellant to prepare invoices for them.

2.3.3. Integration

The appellants argued that the drivers were not integral to their business but may be regarded as "only accessory" to it. However, the High Court upheld the Commissioner's argument that pizza delivery service "is fundamental to the business". [40] Factors such as drivers wearing uniforms and placing logos on their cars; reassuring customers that they were dealing with personnel of the appellant; maintaining a coherent operation under the care of the appellant, and; taking telephone orders from the appellant and not customers of the appellant, supported the Commissioners conclusion that the drivers were integral to Domino's business.

2.3.4. Terms of the contract

The High Court referred Keane's J. description, in *Henry Denny & Sons (Ireland) Ltd.*[41] at p.53, of the "marginal" value that the terms of a contract have. Furthermore, the Court cited Geoghegan J. in *Castleisland Cattle Breeding v Minister for Social Welfare* at p.150, who stated: "[…] look at how the contract is worked out in practice as mere wording cannot determine its nature".[42] 'Connor J. expressly stated: "in short, this Court sees no real merit in the submissions made on behalf of the appellant under this heading".[43]

The Court held that Domino's delivery drivers are employees, for the purposes of being taxable according to schedule E of the Tax Consolidation Act 1997.

40 *Karshan (Midlands) Limited t/a as Domino's Pizza v Revenue Commissions* [2019] IEHC 894 at para 61.

41 *Henry Denny & Sons (Ireland) Ltd. V Minister for Social Welfare* [1997] IESC 9; [1998] 1 IR 34 at p.53.

42 *Castleisland Cattle Breeding v Minister for Social Welfare* [2004] IESC 40, [2004] 4 I.R. 150.

43 *Karshan (Midlands) Limited t/a as Domino's Pizza v Revenue Commissions* [2019] IEHC 894 at para 61.

2.4. Uber B.V & Ors. v Aslam & Ors (Uber v Aslam)

2.4.1. Employment Tribunal [ET][44]

The case of *Uber v Aslam* has been one of the most high profile and reported employment law cases in recent years. At the time of the hearing of the first instance, approximately 30,000 Uber drivers operating in the London area and 40,000 in the UK as a whole. Whilst Uber has an estimated two million users in the London area.[45] The claimants, who were Uber drivers, argued that their employment status should be defined as "worker"[46] as per S.230(3) of the Employment Rights Act 1996, which would entitle them to the national minimum wage as per the Employment Rights Act 1996 Part II as amended by the National Minimum Wage Act 1998 and entitled to paid leave provided by the Working Time Regulations Act 1998.[47] Counsel for the claimants argued "that the nature of the relationship was substantively more akin to a contract of employment than a contract for service. Uber contested these claims and asserted that they merely offered drivers an opportunity to connect with customers through the app".[48]

The Tribunal relied extensively on the Supreme Court judgment of *Autoclenz v Belcher & Ors*.[49] *Autoclenz* permitted the court to ignore written contractual terms which did not reflect what reasonable people would consider the reality of the actual working relationship.[50]

The Tribunal found that the drivers were workers and that Uber operated "a transportation business".[51] The Tribunal's reasoning is discussed below by the Court of Appeal, at section 2.3.3. of this paper.

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44 *Aslam & Ors. V Uber B.V & Ors* [2016] EW Misc B68 (ET).

45 Ibid. para 1.

46 Section 230(3) of the Employment Rights Act 1996 defines "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment, or (b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not under the contract that of a client or customer of any profession or business undertaking carried on by the individual.

47 Ibid. para 7.

48 Adam Elebert: Uber B. V. Aslam: The Contract of Employment in Theory and in Practice. *Irish Law Times,* vol. 37., n. 19. (2019) 279–283.

49 [2011] UKSC 41.

50 IDS Emp. L. Brief 2019, 1109, 3–7.

51 *Aslam & Ors. V Uber B.V & Ors* [2016] EW Misc B68 (ET).

2.4.2. Employment Appeals Tribunal [EAT][52]

Uber appealed the decision of the Employment Tribunal to the Employment Appeals Tribunal. The Employment Appeals Tribunal delivered its judgment on 10 November 2017. Her Honour Judge Eady QC dismissed the appeal and held:

> "I am satisfied that the ET [Employment Tribunal] did not err either in its approach or in its conclusions when rejecting the contention that the contract was between the driver and passenger and that ULL was simply the agent in this relationship, providing its services as such to the drivers. Having rejected that characterisation of the relevant relationships, on its findings as to the factual reality of the situation, the personally undertook work for ULL as part of its business of providing transportation services to passengers in the London area".[53]

2.4.3. Court of Appeal[54]

The Court of Appeal rejected the appeal by a majority (Sir Terence Etherton MR and Lord Justice Bean, with Lord Justice Underhill dissenting). The majority held that in deciding whether someone comes within s.230(3) of the Employment Rights Act 1996, the fact he or she signed a document will be relevant, but not conclusive evidence, where the terms are non-negotiable and there is unequal bargaining power between the parties.[55]

The Court of Appeal upheld the Employment Tribunal's reasoning, on the following grounds: the contradiction in the Rider Terms between the fact that ULL purports to be the driver's agent and its assertion of "sole absolute discretion" to accept or decline bookings; [56] the fact that Uber interviews and recruits drivers;[57] the fact that Uber controls key information and excludes the driver from it;[58] the fact that Uber requires drivers to accept trips and/or not to cancel trips; and enforces the requirements by logging off drivers who breach those requirements;[59] the fact that Uber sets the route and the driver departs from it at his peril;[60] the fact that Uber fixes the fare and the driver cannot agree a higher sum

52 *Uber B.V & Ors v Aslam & Ors* [2017] UKEAT 0056_17_1011.

53 Ibid. para 116.

54 *Uber B.V & Ors v Aslam & Ors* [2018] EWCA Civ 2748.

55 IDS Emp. L. Brief 2019, 1109, 3–7.

56 *Uber B.V & Ors v Aslam & Ors* [2018] EWCA Civ 2748 at para 96(1).

57 Ibid. para 96(2).

58 Ibid. para 96(3).

59 Ibid. para 96(4).

60 Ibid. para 96(5).

with the passenger;[61] the fact that Uber imposes numerous conditions on drivers, instructs drivers on how to their work, and in numerous ways, controls the performance of their duties;[62] the fact that Uber subjects drivers through the rating system to what amounts to a performance management/ disciplinary procedure;[63] the fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected;[64] the fact Uber handles complaints by passengers, including complaints about the driver;[65] and the fact Uber reserves the power to amend the driver's terms unilaterally.[66]

Whilst Underhill L.J. dissented finding "no inconsistency between the contractual terms and the reality of the situation and likened the Uber operation to minicab drivers whose services have pre-booked using an intermediary model".[67]

It is noteworthy, that this matter is still not concluded. Uber is set to launch a final appeal to the UK Supreme Court.[68] Once a judgment is provided by the Supreme Court, one will have a clear and definite illustration of the employment status of platform workers. Furthermore, one could expect the legislature to act swiftly to provide much needed-guidance and resolution on such an increasingly contentious area of employment law.

2.5. Independent Workers Union of Great Britain v Deliveroo[69]

On 14 November 2017, the Central Arbitration Committee (CAC) rejected an application from the Independent Workers Union of Great Britain (IWGB) for collective bargaining rights in respect of Deliveroo riders.[70] The Central Arbitration Committee held Deliveroo drivers are not "workers" as per the definition in section 296 of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides:

61 Ibid. at para 96(6).

62 Ibid. para 96(7).

63 Ibid. para 96(8).

64 Ibid. para 96(9).

65 Ibid. para 96(12).

66 Ibid. para 96(13).

67 DWF: *Employment Status: Court of Appeal finds Uber drivers are workers.*, available: https://www.dwf.law/Legal-Insights/2018/December/Court-of-Appeal-finds-Uber-drivers-are-workers [accessed on 20 February 2020].

68 Natasha Bernal: Uber heads for Supreme Court after losing appeal on worker rights. *The Telegraph,* London, 19 December 2018.; available: https://www.telegraph.co.uk/technology/2018/12/19/uber-heads-supreme-court-losing-appeal-worker-rights/ [accessed on 20 February 2020].

69 *Independent Workers Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo* [2017] TUR1/985(2016).

70 Colin Leckey: Trade union's Deliveroo judicial review challenge fails. *Lewis Silkin*, (2018) available: https://www.lewissilkin.com/Insights/Trade-unions-Deliveroo-judicial-review-challenge-fails [accessed on 21 February 2019].

> "An individual is a worker if he or she works, or normally works or seeks work: (a) under a contract of employment; or (b) under any contract whereby he or she undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his or her."

O'Byrne states that a Deliveroo rider's ability to substitute work was of significance to the CAC.[71] The CAC heard evidence of how riders often substitute work by exchanging passwords. One rider "explained that he took 15-20% of the fee he received from Deliveroo, passing on the balance to his friend: he was exercising the substitution provisions for his own potential profit. Deliveroo does not object to this".[72]

IWGB's claim failed on part (b) of the above-mentioned definition ie riders do not provide personal work. The CAC concluded:

> "in light of our central finding on substitution, it cannot be said that Riders undertake to do personally any work or services for another party. It is fatal to the Union's claim. If a Rider accepts a particular delivery, their undertaking is to either do it themselves in accordance with the contractual standard or get someone else to do it. They can even abandon the job part-way only to telephone Rider support to let them know. A rider will not be penalised by Deliveroo for not personally doing the delivery himself, provided the substitute complies with the contractual terms of the Rider."[73]

One notes that there is no appeal from a CAC ruling, however, CAC decisions are not binding but merely persuasive to the Employment Tribunals and the Courts.

2.6. Conclusions on case law

One notes that previous disputes over employment status were both traditional and personal. In contrast to traditional business models and employment relations, "digital labour platforms represent a fundamentally new model as they allow business processes to be outsourced… clients post jobs and workers bid on them".[74] Through the development of digital labour platforms, it is now possible

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71 Louise O'Byrne: Employment Status and the Gig Economy – Where are we now? *Irish Employment Law Journal,* vol. 15., n. 1. (2018) 10–18.

72 *Independent Workers Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo* [2017] TUR1/985(2016) at para.80.

73 Ibid. para 101.

74 Mark Graham – Isis Hjorth – Vili Lehdonvirta: Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods. *Transfer: European Review of Labour and Research*, 23.2, (2017) 135–162.

for individuals to work via their smartphones by renting a spare room (Airbnb), doing DIY tasks (TaskRabbit), delivering food (Deliveroo) or by transporting people (Uber). However, as a result of advancements in technology, correlating with new systems of work, "it is not easy to apply [the principles established in *Henry Denny & Sons and Barry,* respectively] with certainty".[75] Freedland suggests the employment relationship should be re-conceptualised so that labour law protects a wider set of relationships categorised by personal service and economic dependence, despite the likelihood that such relationships do not conform to the traditional employment relationship.[76] As the number of employment actions being litigated regarding the employment status of those working in the digital platform economy continues to rise, one opines that Lord Wedderburn's infamous description of the contract of employment being like an elephant "an animal too difficult to define, but easy to recognise",[77] aptly applies to the precarious position of those who work from digital labour platforms. The next chapter of this paper shall assess the status of platform workers by examining publications by assessing the current legal framework for platform workers.

3. Current legal framework for platform economy workers

"The war on the gig economy has turned [digital platforms] into a legislative bloodbath", cybersecurity pioneer John McAfee ominously declares.[78] The' digital platform economy is an increasingly popular sector to work in because of its accessibility through online applications and platforms. As the popularity of the platform economy continues to grow, the employment status of platform workers and the classification of the categories of work engaged in by the latter are some of the issues facing legal systems throughout the world. The European Commission has published several reports on the legal framework of platform workers within the EU.

3.1. Legal issues

The provision of work through digital platforms can be categorised under "the umbrella definition of app-driven casual arrangements, a subgroup of non-standard forms of work, rather than under the

75 Jeffrey Greene: Gig economy turns the spotlight on who is really self-employed. *The Irish Independent*, 21 June 2018. available: https://www.independent.ie/business/world/gig-economy-turns-the-spotlight-on-who-is-really-self-employed-37032209.html [accessed on 03 February 2020].

76 Mark Freedland: From the contract of employment to the personal work nexus. *I.L.J.,* vol. 35. n. 1., (2006) 1–29.

77 Lord Wedderburn: *The Worker and the Law.* Harmondsworth, Penguin, ³1986. 116.

78 John Mcafee: The War on the gig economy has turned AirBnb and Uber into a legislative bloodbath. *International Business Times*, 27 April 2016., available: https://www.ibtimes.co.uk/john-mcafee-war-gig-economy-has-turned-airbnb-uber-into-legislative-bloodbath-1557107 [accessed on 31 January 2020].

self-employment category.[79] Eurofound notes that such work is often erratic and lacking continuity, whilst the employer is under no obligation to provide work and often only does so when required by demand.[80] Whilst the European Parliament has described such a working relationship as "work which is irregular or intermittent with no expectation of continuous employment".[81]

Such forms of employment result in the worker being situated in a precarious position. Digital platform workers are without a guarantee of contracted hours, therefore providing an insecure income, which would have adverse consequences for future financial planning. Digital platform workers are only paid for each 'gig' completed, thus workers are constantly reliant on the platform to provide future work. Furthermore, "the employer can reduce the hours to the contractual minimum, which may be zero,[82] without any limitation, equates to a situation where the worker can de facto be dismissed without notice".[83] The above-mentioned obstacles may inhibit an aggrieved worker from enforcing his rights and entitlements, due to the possibility that the worker's contract may be subject to ad hoc termination.

Throughout the European Union, each Member State is responsible for defining who is considered a worker within their domestic legal system; across the Union, the Court of Justice (CJEU), through case-law, has defined the concept of 'worker'.[84] For an individual to benefit from the protections and rights of workers as a worker under EU law, the individual must be in a 'hiring relationship'. In Case C-66/86 *Lawrie Blum v Land Baden-Württemberg*, a case which concerned the free-movement of persons, the Court of Justice provided: "objectively defined, a 'worker' is a person who is obliged to provide services for another in return for monetary reward and who is subject to the direction and control of the other person as how the work is done".[85] Fairhurst states "to be considered a worker an individual must undertake effective and genuine economic activity which must not be on such a small scale as to be 'purely marginal and ancillary".[86]

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79 Valerio De Stefano – Antonio Aloisi: *European Legal framework for digital labour platforms.* Luxembourg, European Commission, 2018. doi:10.2760/78590, JRC112243.

80 Eurofound: *New forms of employment, Publications Office of the European Union.* Luxembourg, 2017. 46.

81 European Parliament: *Atypical work in the EU.* SOCI 106-EN. Luxembourg, 2000.

82 In Ireland, as a result of section 5 of the Employment Relations (Miscellaneous Provisions) Act 2018, which amends section 18 of the Organisation of Working Time Act 1997 prohibits zero-hour contracts, save where: (1) the work involved is casual in nature; (2) they are essential for providing cover in emergency situations; or they are necessary to cover short-term absences.

83 Sacha Garben – Claire Kilpatrick – Elise Muir: Towards a European Pillar of Social Rights: upgrading the EU social acquis. *College of Europe Policy Brief,* vol. 1. (2017) 4–5.

84 Stefan Nerinckx: The 'Uberization' of the labour market: some thoughts from an employment law perspective on the collaborative economy. *ERA Forum*, vol. 17. (2016) 245–265.

85 Case C-66/86 *Lawrie Blum v Land Baden-Württemberg* [1986] ECR 02121 at para.14.

86 John Fairhurst: *Law of the European Union.* Essex, Pearson, [10]2016)

3.2. Classification of platforms

However, in the context of online platforms, it is often argued that no employment relationship exists and the apps are simply 'intermediaries' between the service user and provider.[87] Garben refers to this as a "triangular relationship", consisting of "three parties in every transaction: (i) the person/entity who wants some kind of work performed for them, (ii) the person/entity who provides that work as requested and (iii) the online platform that brings these two together". [88] Due to their position at the fulcrum of the transaction, digital platforms "argue that they are simple intermediaries, digital bulletin boards, that merely serve to bring people together, and that it is those people that they bring together that engage in the real economic activity in question – not the online platforms themselves".[89] Many scholars disagree with the contention that digital labour platforms are simply intermediaries, who have no control over the platform worker. Flanagan notes "digital intermediaries provide the potential for far stricter mentoring and recording of response times than the masters of old, including punishments to workers with slow response times through lowered ratings or financial sanctions".[90] However, Langley and Leyshon suggest that the legal lacuna, in which digital platforms are situ, offers those previously excluded from licensed practices, such as taxi-driving, the opportunity to avail of employment which was previously unavailable.[91] Thus, legislators across the EU, in attempting to regulate the platform economy must ensure that platform works are adequately protected whilst also ensuring the flexibility which makes platform work attractive to the millions of people engaged in it remains.[92]

The classification of whether a digital platform is a service provider or not shall be a significant factor in determining the existence of employment relationships for claimants, as shall be illustrated below. Directive 2006/123/EC on services in the internal market provides that platforms which provide services are exempt from being subject to market access requirements, such as authorisation schemes and licensing requirements unless the market access requirements are non-discriminatory, the public interest requires it or the objective pursued cannot be achieved in a less restrictive measure.[93] A European Commission Communication provides: "as long as collaborative platforms provide for

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87 European Economic and Social Committee: Impact of digitalisation and the on-demand economy on labour markets and the consequences for employment and industrial relations. (2017) available: https://www.eesc.europa.eu/resources/docs/qe-02-17-763-en-n.pdf [accessed on 11 March 2020].

88 Professor Sacha Garben: Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU. *European Risk Observatory Discussion Paper,* 2017.15.

89 Ibid. at 14.

90 Frances Flanagan: 'Theorising the gig economy and home-based service work. *Journal of Industrial Relations,* Vol, 61., Issue 1, (2019) 57–78.

91 Paul Langley – Andrew Leyshon: Platform capitalism: the intermediation and capitalisation of digital economic circulation. *Finance and society,* vol. 3., n. 1. (2017) 11–31.

92 Vili Lehdonvirta: Flexibility in the gig economy: managing time on three online piecework platforms. *New Technology, Work and Employment,* 33. (2018) 13–29.

93 Article 9 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376.36, 27.12.2006, p. 36–68.

remuneration, at a distance, by electronic means and at the individual request of a recipient of services, they provide an information society service. Therefore, they cannot be subject to prior authorisations or any equivalent requirements that are specifically and exclusively targeting those services…a platform may also be a provider of the underlying service (e.g. transport or short term rental service). In such a case, collaborative platforms could be subject to the relevant sector-specific regulation, including business authorisation and licensing requirements generally applied to service providers".[94] Whilst the E-Commerce Directive provides the same criteria in assessing whether a platform should be subject to pre-authorisations and licensing requirements.[95] Furthermore, the above-mentioned Commission Communication recommends several factors which should be considered in examining whether a digital platform is a service provider: (a) does the collaborative platform set the final price paid by the user, as the recipient of the underlying service. Where the collaborative platform is only recommending a price or where the underlying services provider is otherwise free to adapt the price, this indicates that this criterion has not been met. (b) does the collaborative platform set terms and conditions, other than the price, which determines the contractual relationship between the underlying services provider and the user? (c) does the collaborative platform own the assets used to provide the service? Smorto concludes "as a first rule of thumb, when sharing platforms exert a high level of control and influence over peers, they should be regarded as a service provider; conversely, when platforms limit their activity to the matching demand and supply, enabling peers to deliver the underlying service, they should be deemed, intermediaries".[96]

Sundararajan suggests that whilst the current regulatory framework may apply to digital platform workers, legislators must note "it is important to think beyond simply trying to retrofit the old regulatory regimes onto new models",[97] of employment, particularly when the platform economy is in its infancy. Di Stefano and Aloisi identify that there are two opposing strains of thought: those who suggest that digital labour platforms have "outgrown" the current labour laws. Whilst others opine that new digital platforms are undeserving of their own particular regulatory framework.[98] To add further precarity to already 'muddy waters', the European Parliament "recognises that while certain parts of the collaborative economy are covered by regulation, including at local and national level, other parts may fall into regulatory grey areas as it is not always clear which EU regulations apply, platform workers is classifying their work as employment. Following such classification, digital

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94 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: *A European agenda for the collaborative economy (2016).* [SWD (2016) 184 final] Brussels, 2.6.2016. p. 5. [hereinafter: European agenda (2016)]

95 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') OJ L 178, 17.7.2000, p. 1–16.

96 Guido Smorto: Regulating (and Self-regulating the Sharing Economy in Europe: An Overview). In: Maurizio Bruglieri (ed.): *Multidisciplinary Design of Sharing Services.* Springer International Publishing, 2018.

97 Arun Sundararajan: *The Collaborative Economy: Socioeconomic, Regulatory and Policy Issues.* Luxembourg, European Parliament, 2017.

98 De Stefano – Aloisi op. cit. 27.

thus causing significant differences among the Member States due to national, regional and local regulations as well as case-law thereby fragmenting the Single Market".[99]

The next part of this paper **(3.3.),** examines whether the pre-existing regulatory requirements for non-standard forms of employment apply to platform workers.

3.3. Applicability of classifying platform workers as being in a non-standard form of employment

As aforementioned, platform work is a non-standard form of employment. A Tripartite Meeting of Experts (TME) on Non-Standard Forms of Employment describes non-standard forms of employment, which was endorsed by the Governing Body of the International Labour Organisation (ILO): non-standard forms of employment "include among others, fixed-term contracts and other forms of temporary work, temporary agency work and other contractual arrangements involving multiple parties, disguised employment relationships, dependent self-employment, and part-time work".[100] Problems such as unpredictable working hours and unreliable sources of income are associated with non-standard forms of employment.[101] Whilst Professor Jeremias Prassl suggests "the challenges to fair digital working conditions by elements of the platform economy are not limited to the individual dimension: just as importantly, prevalent business models can threaten workers' exercise of fundamental collective rights, including freedom of association, the right to collective bargaining, and access to information and consultation machinery".[102] To assess which category of a non-standard form of work is applicable, one shall outline the implications of platform workers being treated as agency workers and temporary workers.

3.3.1. Agency workers

Garben notes the triangularity of the employment relationship between digital labour platforms and workers is comparable to work provided through working agencies.[103] Directive 2008/104/EC defines a "temporary agency worker [as] a worker with a contract of employment or an employment

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99 European Parliament resolution of 15 June 2017 on a European Agenda for the collaborative economy (2017/2003(INI)). Para. 14.

100 *Governing Body, 323rd Session (Geneva, 12–27 March), Conclusions of the Meeting of Experts on Non-Standard Forms of Employment.* Geneva, International Labour Office, 2015., available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_354090.pdf [accessed on 11 March 2020].

101 Janine Berg – Valerio De Stefano: Beyond "casual work": Old and new forms or casualization in developing and developed countries and what to do about it. Presentation at the IV Regulating for Decent Work Conference. Geneva, ILO, 8–10 July 2015., available: https://www.ilo.org/global/about-the-ilo/multimedia/audio/WCMS_381964/lang--en/index.htm [accessed on 11 March 2020].

102 Jeremias Prassl: Collective Voice In The Platform Economy: Challenges, Opportunites, Solutions. *Report to the European Trade Union Confederation,* September 2018. 14.

103 Garben (2017) op. cit. 16.

relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction".[104] Whilst a temporary work agency has been defined as "any natural or legal persons who, in compliance with national law, conclude contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction".[105] When a Member State ratifies Directive 2008/104/EC, it provides temporary agency workers with equal treatment rights in relation to the duration of working time, rest periods, night work, annual leave, public holidays and pay.[106]

Whilst the above-mentioned Directive would provide protections for platform workers, who satisfy the criteria to be classified as an agency worker, a recent UK Court of Appeal decision illustrates that despite such protections, agency work is still particularly unsecure form of employment. Whilst Garben notes that there may be some difficulty in applying the above-mentioned 'temporary work agency' definition to online platforms, as "many persons who assign work via online platforms would be difficult to qualify as 'user undertakings' since they act as private persons".[107] Furthermore, establishing the second limb of the above-definition, proving that an employment relationship exists, to qualify as an agency worker shall also be burdensome for platform workers. Often, where contracts do exist, there shall be exclusion clauses expressly denying the existence of any employment relationship.[108] Thus, as Rideout aptly notes "the contractual simplicity of the arrangement has defied even the skill of statutory draftsmen to devise some form of restriction".[109]

3.3.2. Temporary/Fixed-term worker

A fixed-term worker has been defined as "a person having an employment contract or relationship entered into directly between an employer and worker where the end of the employment contract or relationship is determined by objective conditions such as reaching a specific date, completing a specific task, or the occurrence of a specific event".[110] Directive 1999/70/EC provided that temporary workers shall be entitled to be treated equally to permanent workers in the company where they are

104 Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2009 on temporary agency work [2008]. *OJ L* 327/9 at Art 3 1(c).

105 Ibid. Art 3 1(b).

106 Michael Doherty: New Morning? Irish Labour Law Post-Austerity. *Dublin University Law Journal,* vol. 39. n. 1. (2016) 51–73.

107 Garben (2017) op. cit. 16.

108 Aziz Choudry – Mostafa Henaway: Temporary agency worker organizing in an era of contingent employment. *En Global Labour Journal,* vol. 5., n. 1. (2014) 51–22.

109 Roger Rideout: The Lack of Principles in Labour Law. *Current Legal Problems,* vol. 53. n. 1. (2000) 409–477.

110 Council Directive 1990/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and, CEEP at 3(1).

temporarily employed.[111] Garben suggests "while the application of this Directive itself to online platform workers is, once again, not straightforward, because of the need of an 'employment contract or relationship' (between the platform worker), the fact the work is temporary and/or on a task basis does not in itself rule out the existence of such relationship".[112] However, Garben adds it may be untenable to qualify every micro-task of the platform worker as a separate fixed term contract.[113] Furthermore, perhaps the more repugnant issue for platform workers is that fixed-term workers only have the right to be treated equally to a full-time comparator,[114] – a person who may be difficult to identify, given the disparity and precarity associated with the platform economy.

3.3.3. Zero-hour worker

Zero-hour contractual arrangements occur "where the employer unequivocally refuses to commit itself in advance to make any given quantum of work available".[115] Similarly, Mark Freedland and Nicola Kountouris bring out this diversity even more clearly, when they refer to "work arrangements in which the worker is in a personal work relation with an employing entity […] for which there are no fixed or guaranteed hours of remunerated work. These arrangements are variously described as 'on-call', 'intermittent', or 'on-demand' work, or sometimes referred to as 'zero-hours contracts'."[116] Whilst Fabellas conveys that platform workers are in a precarious position, as they are not hired for a specific number of hours, but "they are hired on-demand, they are hired for the duration of the specific service. As a result, they are not guaranteed a minimum number of working hours nor, consequently a minimum remuneration amount".[117] Prassl and Adams differentiate between zero-hour work arrangements and the independent contractor labelled platform worker: the independent contractor is not entitled to labour law protections including minimum wage, whereas the zero-hour worker is.[118] Whilst platform working is comparable to a zero-hour contractual arrangement, regarding their temporariness and intermittency, the comparison does not provide a complete solution to the issues faced by platform workers.[119]

111 Ibid.

112 Garben (2017) op. cit. 16.

113 Ibid.

114 Section 5 of the Protection of Employees (Fixed-Term Work) Act 2003.

115 Simon Deakin – Gillian Morris: *Labour Law*. Hart, ⁶2012. 167.

116 Mark Freedland – Nicola Kountouris: *The Legal Construction of Personal Work Relations.* OUP, 2012. 318–319.

117 Anna Ginés Fabrellas: The zero-hour contract in platform work: Should we ban it or embrace it? *Revista de Internet Derecho Y Política,* 2019.

118 Adams Abi – Jeremias Prassl: *Zero-hours work in the United Kingdom*. Geneva, International Labour Organization, 2018.

119 Garben (2017) op. cit. 16.

3.3.4. Assessment of the current legal framework for platform workers

As Desmond Ryan, writing in the Annual Review of Irish Law 2016 notes, "no two cases are the same and each case must be decided on its own particular merits".[120] De Stefano suggests that the applicability of each of the above-mentioned Directives are now challenged by the increasing popularity of platform-based work.[121] Therefore, it may be suggested that time has come for the drafting of a new Directive, outlining the Union's position on the rights of platform workers' and ultimately ending the speculation and uncertainty relating to the classification and status of platform workers. Risak suggests "the appropriate legal basis for the regulation of platforms focusing on working conditions for workers would be Article 153(2) TFEU, which provides for the adoption of directives setting minimum requirements with respect to inter alia working conditions as set out in Article 153(1) TFEU. As a matter of fact, it explicitly establishes that directives are the legal instrument to be used to establish minimum requirements governing working conditions to be gradually implemented by Member States".[122] Furthermore, a 2016 European Commission Communication suggests "to help people make full use of their potential, increase participation in the labour market and boost competitiveness while ensuring fair working conditions and adequate social protection, Member States should: assess the adequacy of their national employment rules considering the different needs of workers and self-employed people in the digital world as well as the innovative nature of collaborative models; provide guidance on the applicability of their national employment rules in light of labour patterns in the collaborative economy".[123] However, a 2017 European Commission Thematic Factsheet provides that if Member States were to enact strict and rigid employment protection legislation, it would increase the duration of unemployment and reduces job creation.[124] Therefore, across the EU, Member States have adopted varying measures in attempts to protect non-standard forms of work: "a number of Member States have tightened limits on fixed-term contracts, and more specifically on the use of temporary agency work (e.g. Denmark, France, Italy, Slovakia, and Slovenia). By contrast, others have facilitated access to fixed-term contracts (e.g. Czech Republic) and temporary agency work (e.g. Greece). Some (e.g. Croatia, Italy, and Portugal) have increased the duration or renewal possibilities of fixed-term contracts in order to encourage creation".[125] One suggests the ambiguous position Member States find themselves posited, in regard to legislating for digital labour platforms, may be aptly described as 'laying somewhere between alpha and omega' i.e an obscure position.

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120 Desmond Ryan: Employment Law. *Annual Review of Irish Law*, vol. 1., n. 1., 2016. 322–331.

121 De Stefano – Aloisi op. cit. 30.

122 Martin Risak: *Fair Working Conditions for Platform Workers: Possible Regulatory Approaches at the EU Level.* Berlin, Friedrich Ebert Stiftung, 2018.

123 European agenda (2016) op. cit. 5.

124 European Commission: *European Commission Thematic Factsheet: Employment Protection Legislation*. 16 November 2016., available: https://ec.europa.eu/info/sites/info/files/european-semester_thematic-factsheet_employment-protection-legislation_en.pdf [accessed on 12 March 2020].

125 Ibid.

Following the discussion regarding the classification of platform workers, the next section of this paper **(4)** shall assess the collective bargaining process for platform workers.

4. The collective bargaining process for platform workers

De Stefano suggests to promote labour protections for platform workers, the first thing that is required is strong advocacy to have platform jobs classified as work.[126] Whilst Irani, in his 2015 article entitled 'Justice for Data Janitors', argues for a cultural struggle for the avoidance of platform work being perceived as extensions of apps to prevent the dehumanisation of platform workers and the creating of invisible workers, but also to highlight the human nature of work in the platform economy.[127] Prospective solutions to protect platform workers should include the "most basic human rights such as freedom of association and the collective bargaining".[128] However, as discussed further in this paper, depending on the employment status of the worker, collective action may be seen as a breach of competition law.[129] The International Labour Organisation (ILO) has declared that the right to freely associate and the right to collective bargaining "are universal and that they apply to all people in all States – regardless of the level of economic development".[130] Therefore, no individual irrespective of their employment status should be denied the right of freedom to associate and the right to collective bargaining.[131] Thus, one notes that policies that are inclusive of the abovementioned ILO's declared rights would minimise the shortcomings of current legislation and provide protections irrespective of an individual's employment status.

And section 4.1. shall examine the collective bargaining processes available to digital platform workers.

4.1. Collective bargaining

Traditionally, the alignment of common interests along collective lines has been the optimum method of achieving an alternative power to the employer and ensure a balanced, egalitarian relationship

126 De Stefano (2015) op. cit. 21.

127 Lilly Irani: Justice for "Data Janitors". 2015., available at www.public books.org/nonfiction/justice-for-data-janitors

128 De Stefano (2015) op. cit. 22.

129 Dagmar Schiek – Andrea Gideon: *Outsmarting the gig-economy through collective bargaining - EU competition law as a barrier?* [CETLS Working Paper Series] ²2018. https://doi.org/https://www.qub.ac.uk/schools/SchoolofLaw/Research/European/FileStore/Filetoupload,815527,e n.pdf

130 International Labour Organisation: *ILO Declaration on Fundamental Principles and Rights at Work.* 2010., available: https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm [accessed on 16 March 2020].

131 Organisation for Economic Co-operation and Development: *The Future of Work: Expert Meeting on Collective for Own-Account Workers Summary Report.* 2020., available: http://www.oecd.org/els/emp/Summary_Expert_Meeting_CB.pdf [accessed on 16 March 2020].

between workers and their employer.[132] Collective bargaining has been defined as: "a collective voice mechanism expressly based on a rationale which can be construed as "anti-competitive"—that labour is not a commodity and individual workers should not be required to compete over the terms and conditions on which they sell their labour".[133] Thus, Aloisi and Gramano state "unionisation is aimed at levelling the bargaining field between capital (or management) and labour. Because of the ever-present threat of a withdrawal of labour-power, collective bargaining tends to be far more effective than individualised bargaining".[134] Similarly, the reorganisation of labour is influenced by technological advances driven by artificial intelligence, robotization, and digitalisation complemented by advances in automation.[135] However, both workers and trade unions have stipulated concerns regarding new digital management processes, particularly about data concerns and control.[136] These concerns are premised on electronic tracking, the behaviour and performance management and surveillance of platform workers by technology companies, who use such data to control and discipline workers.[137] Furthermore, platform workers are outside "the scope of social protection".[138] Therefore, the agency of platform workers and their bargaining power comes to the fore for tackling these issues and for getting the state to take action".[139] Prassl suggests that "once work in the on-demand economy is properly classified as employment, on the other hand, workers will be able to organise themselves and form trade unions to bargain directly with platforms on their terms and conditions – backed up if necessary by the power to mandate negotiations and threaten industrial action".[140] However, there appears to be a variety of barriers inhibiting a platform worker's right to collective bargaining, including EU Competition Law, a dispersed workforce and how to encapsulate the needs of a variety of workers.

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132 S. Liebman: *Individuale e collettivo nel contratto di lavoro.* Milano, Giuffré, 1993.

133 Philip A. J. Syrpis – Shae Mccrystal: Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union. In: A. Bogg – T. Novitz (ed.): *Voices at Work: Continuity and Change in the Common Law World.* Oxford, OUP, 2014. 421–435.

134 Antonio Aloisi – Elena Gramano: Workers Without Workplaces and Unions Without Unity: Non-Standard Forms of Employment, Platform Work and Collective Bargaining (March 21, 2019). Forthcoming in *Bulletin of Comparative Labour Relations.* Available at SSRN: https://ssrn.com/abstract=3363185

135 Kurt Vandaele: *Will trade unions survive in the platform economy? Emerging patterns of platform workers' collective voice and representation in Europe.* Working Paper. European Trade Union Institute, 2018., available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3198546 [accessed on 16 March 2020].

136 Christophe Degryse: *Digitalisation of the economy and its impact on labour markets.* Working Paper. European Trade Union Institute, 2016., available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2730550 [accessed on 16 March 2020].

137 Phoebe V. Moore: *The threat of physical and psychosocial violence and harassment in digitalized work*. Geneva, International Labour Organization, 2018.

138 *The Social Protection of Workers in the Platform Economy.* Brussels, European Parliament, 2017., available: https://www.eurofound.europa.eu/data/platform-economy/records/the-social-protection-of-workers-in-the-platform-economy [accessed on 16 March 2020]

139 Vandaele op. cit.

140 Prassl (2018) op. cit. 19.

4.1.1. Competition law

Schiek and Gideon state "collective agreements could be viewed as limiting competition between individual workers as well as, in cases of multi-employer bargaining (i.e. if several employer associations are party to a collective agreement), collective agreements may be classified as collusion (i.e. a cartel) between undertakings not to compete on the price of labour. Second, multi-employer bargaining, in particular, if coupled with the option to extend a collective agreement for general application, may contribute to the creation of institutions holding a dominant position, which may then be fined on the grounds of abusing such a dominant position".[141] In C-22/98 *Becu & Ors,* the CJEU established that employees in an employment relationship are not undertakings, for the purposes of EU competition law, and therefore their collective agreements were not in breach of EU competition law.[142] Whilst in *Albany International BV v Stitching Bedriffspensioenfonds* Textileindustrie, the CJEU held that collective agreements are exempt from EU competition law rule where such an agreement is between management and the workers and has the objectives of improving the conditions of work and employment.[143] However, in *FNV Kunsten*, the CJEU held the *Albany* exemptions did not apply to self-employed workers.[144] Advocate General Wahl opined: "when trade unions act on behalf of self-employed persons, and not of workers, they can hardly be regarded as 'associations of employees'. In those circumstances, in fact, they would rather appear to be acting in another capacity: that of a professional organisation, or an association of undertakings".[145] One notes that an interesting aspect of the *FNV Kunsten* judgment is the Court's implicit suggestion that there should be a specific classification of 'worker' for EU competition law, which would apply to those who are wrongly classed as self-employed.[146] Whilst, *Consiglio nazionale dei geologi and Autorita garante della concorrenza e del mercato,* the CJEU held where a professional organisation of geologists recommended minimum fees for their self-employed members, they were in breach of EU competition law.[147]Therefore, if platform workers collectively agree not to engage any app which does not provide a minimum price

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141 Schiek–Gideon op.cit. 4.

142 Case C-22/98 Criminal Proceedings Against Jean Claude Becu [2001] 4 C.M.L.R. 96.

143 Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [2000] 4 C.M.L.R. 446, [AG206].

144 Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411.

145 Opinion of AG Wahl, in *FNV Kunsten Informatie en Media v Staat der Nederlanden (2014)* ECLI:EU:C:2014:2215.

146 Case C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411 at para 33: "a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking". Whilst at para 36, the Court stated: It follows that the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work (see judgment in *Allonby*, EU:C:2004:18, paragraph 72), does not share in the employer's commercial risks (judgment in *Agegate*, C3/87, EU:C:1989:650, paragraph 36), and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking (see judgment in *Becu and Others*, C22/98, EU:C:1999:419, paragraph 26).

147 Case C-132/12 *Consiglio nazionale dei geologi and Autorità garante della concorrenza e del mercato [2013]* EU:C:2013:489.

or minimum data protection, it is likely they would be in breach of EU competition law.[148] Thus, to ensure that competition law doesn't inhibit the ability of platform workers to collective bargaining, Schiek and Gideon suggest a combination of a specific definition of worker for competition law with "a re-interpretation of the *Albany* exemption would constitute a convincing and compelling route to avoid collective agreements being captured by Article 101 TFEU".[149]

4.1.2. Dispersed workforce

Johnston and Land-Kazlauskas state platform "workers seeking to organise new unions have struggled with the 'boundless' of platform-based work. They are geographically dispersed, isolated and sometimes highly mobile. These facets, in concert with the short-term, task-based, and on-demand nature of platform work, often place gig workers in direct competition with each other".[150] Therefore, while traditional collective bargaining processes might not be able to engage platform workers, digital campaigns are most applicable due to the geographical dispersion of platform workers. Prassl suggests "whether it is through dedicated online for a gig worker apps, or even just through widely available messaging software: in engaging platform workers, geographical dispersion can easily be overcome".[151] Platform workers are provided with their tasks via a smartphone app. Similarly, platform workers are organising collective action through their smartphones via social media. This is illustrated through drivers organising protests outside Deliveroo's London office in response to the alteration of their payment structure, which resulted in the proposed alteration being abandoned.[152] Thus, one opines that initially the geographically dispersion of platform workers may appear to be an inhibiting factor to prospective collective bargaining, it has been illustrated through the above-mentioned example of Deliveroo Drivers' striking, that the technology used by platforms may also be used to unite and organise platform workers.

148 Schiek–Gideon op.cit. 11.

149 Ibid. 15.

150 Hannah Johnston – Chris Land-Kazlauskas: *Organizing on-demand: Representation, voice, and collective bargaining in the gig economy.* [Conditions of work and employment series, No. 94.] Geneva, ILO, 2018.

151 Prassl (2018) op. cit. 20.

152 Jack Shenker: Strike 2.0: how gig economy workers are using tech to fight back. *The Guardian,* 31 August 2019., available: https://www.theguardian.com/books/2019/aug/31/the-new-resistance-how-gig-economy-workers-are-fighting-back. [accessed on 18 March 2020].

4.1.3. Objectives of the collective bargaining process Ratings

Birgillito and Birgillito state that the issue of ratings shall be the central subject of the collective bargaining process "to protect [platform workers], a first challenge would be to identify and remove those ratings that can be considered discriminatory".[153] Prassl argues that workers should be able to challenge a received rating, particularly where the low rating is as a result of the worker's refusal to break the rules or exceed the description of the job provided.[154] Therefore, one opines that it is essential for the future of platform work that both platform workers and the platforms ensure that the rating system is accurate and regulated as the higher the rating a worker receives, the more favourable the algorithm shall be in selecting them for future work and thus affecting their pay, with the corollary also being true.[155]

4.2. Dispute resolution

Prassel recommends that "a collective agreement should set out clear procedures for the resolution (or escalation) of such conflicts, including for example the evidence admissible in disputes and workers' rights to explain their position and if appropriate be accompanied to a disciplinary hearing".[156]

4.3. Deactivation

Due to the absence of wider employment protection, termination processes between platforms and platform workers are likely to be determined by the contents of their service level agreement, which may place few obligations on a platform to provide notice and may not be subject to an appeal.[157] Therefore, it is proposed that platform collective agreements should include clear criteria and an easily accessible process for deactivation, including a system of escalating warnings, an explanation of reasons, the worker's right to make a defence, and the opportunity to appeal any negative finding.[158]

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153 Giovanni Birgillito – Marialaura Birgillito: Algorithms and ratings: tools to manage labour relations. Proposals to renegotiate labour conditions for platform drivers. *Labour & Law Issues,* vol. 4., n. 2. (2018) 25–50.

154 Prassl (2018) op. cit. 22.

155 Elena Gramano: Digitalisation and work: challenges from the platform-economy. *Contemporary Social Science,* (2019) 1–13.

156 Prassl (2018) op. cit. 23.

157 *The Social Protection of Workers in the Platform Economy.* Brussels, European Parliament, 2017., available: https://www.eurofound.europa.eu/data/platform-economy/records/the-social-protection-of-workers-in-the-platform-economy [accessed on 16 March 2020] at p.77.

158 Prassl (2018) op. cit. 23.

4.4. Data

The European Parliament recommends that platforms should provide full and easily accessible information to platform workers regarding their rights and entitlements.[159] One notes that as if 25 May 2018, platforms must be compliant with the General Data Protection Regulation. Prassl recommends "collective bargaining should also cover topics such as data access and protection against online fraud".[160] Additionally, one recommends that data ownership and intellectual property rights of data harvested should also be subject to collective bargaining considerations.

5. Conclusion

In the 6th century B.C, the Greek philosopher Heraclitus famously stated: "everything flows, nothing stands still".[161] Heraclitus' aptly encapsulated that change and variety are fundamental to mankind. One opines that throughout history technology has been the catalyst for change in working arrangements, as exemplified by the flexibility provided by platforms in the digital labour economy.

The recent case law such as *Uber* and *Karshan T/A Dominos Pizza* indicates that where the employment relationship is indicative of an alternative employment arrangement existing, the Courts (Ireland and UK) shall not be hesitant to re-classify an individual's employment status. However, in the writer's view, such decisions do not represent a significant departure from the principles established already in the jurisprudence of both nations, respectively.

As Mark Freedland argues in labour law the protection of workers must be paramount, thus for the protection of workers to occur, jurists, legislators, and academics collectively must be willing to forgo the belief that employment contracts are autonomous, when in reality there is an inequality of bargaining power between large technology companies and a solitary individual. This would result in the inclusion of employments which previously may have been regarded as business contractors with independent contractors.[162] Keane aptly notes such action would occur "moving some of the risks associated with working in the gig economy from the individual gigger to the broader shoulders of the hirer".[163] This author concurs with Prassl[164] that the foremost pressing issue in protecting digital

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159 *The Social Protection of Workers in the Platform Economy.* Brussels, European Parliament, (2017) available: https://www.eurofound.europa.eu/data/platform-economy/records/the-social-protection-of-workers-in-the-platform-economy [accessed on 16 March 2020] 103.

160 Prassl (2018) op. cit. 23.

161 Director-General of DG Connect at the European Commission Robert Viola: The platform economy: revolutionising the world of work. European Commission, 18 November 2019. available: https://ec.europa.eu/digital-single-market/en/blogposts/platform-economy-revolutionising-world-work [accessed on 19 March 2020].

162 Freedland (2006) op. cit. 1–29.

163 Keane (2018) op. cit. 76–81.

164 Prassl (2018) op. cit. 19.

platform workers would be enabled to obtain labour law and social security protections. Similarly, obtaining such classification would allow digital platform workers to avoid the precarious position of being in breach of European competition law, regarding collective bargaining. Ultimately, it is time for labour law to hail an Uber and catch up with technology.