Troubled times for digital platforms

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Introduction

The way in which new technologies help to provide services has been addressed on numerous occasions by scholars and practitioners alike. As such, it is surprising that the first notable French employment rulings in this regard have only just emerged in recent months.

While French employment law has a reputation for being strict, it is only recently that judges have been faced with the challenge of determining whether individuals who work for digital platforms are employees of said platforms or self-employed.

Supreme Court criteria

The criteria used by the courts to make such a determination have been fairly clear since 1996, when the Supreme Court ruled that so-called 'permanent legal subordination', which defines an employment contract, will exist where an employer gives instructions to, supervise and discipline an individual.

In order to analyse these criteria, the courts can look beyond the terms of the parties' agreement and investigate the day-to-day reality of their relationship, including whether the individual claiming to be an employee is subject to:

- tight deadlines;
- strict reporting obligations;
- working-time constraints; and
- penalties.

As such, the scope of such criteria is wide, but depends on the circumstances of each case and the main characteristics of the activity concerned.

Case law

France has been somewhat reluctant to address the employment status of digital platform workers and has issued only a few pieces of legislation in this regard. This legislation imposes a general 'social responsibility' (whatever that means) on platforms, which has materialised as the partial payment of workers' work accident insurance or the provision of professional training.

Against this framework, recent decisions on the employment status of platform workers have garnered significant interest.

Paris Court of Appeal

In 2017 the Paris Court of Appeal dismissed two claims of Deliveroo and Take Eat Easy workers on the basis that they could choose:

- whether to offer their services;
- when to work;
- where to work;
- who to work for; and
- whether to use their own bicycles.

Although the judges did not explicitly reference it, such freedom of choice can be linked to a historic French employment law criterion under which employees:

- do not have to bear the financial and economic burden of their business; and
- cease to be considered employees when the above no longer applies.

A UK High Court decision of 5 December 2018 echoes this criterion. The court rejected the Independent Workers' Union of Great Britain's judicial review challenge of the Central Arbitration Committee decision that Deliveroo drivers were not employees and therefore could not establish their right to a collective bargaining agreement on the basis that they could accept a job, but subsequently decide not to fulfil it.(1)

This was also the basis of the Paris Court of Appeal ruling in *Take Eat Easy*, in which it was held that the riders were not employees because they were free to register for a shift with no time constraints.

Supreme Court

On 28 November 2018 the Supreme Court overruled the Paris Court of Appeal's *Take Eat Easy* decision. In what appears to be a return to convention, the court considered that the rider concerned was an employee because:

- Take Eat Easy's geolocation system provided his position and the number of kilometres that he had travelled; and
- Take Eat Easy could deactivate his account, which amounted to a disciplinary power.

Following the above decision, the Supreme Court's decision regarding Uber drivers was eagerly anticipated.

On 10 January 2019 the Supreme Court decided that Uber drivers are employees on the following basis:

- Uber imposes the fares; in other words, drivers cannot be independent as they do not control their own prices.
- Uber drivers have no power over the development of their client base; this is an obvious blow to drivers' independence, as independent workers are solely responsible for the development of their business.
- Uber provides its drivers with behavioural guidelines.
- Drivers must be available at any time when connected to the platform.
- Uber can deactivate a driver's account.

The fact that drivers can decide not to work on a given day was dismissed by the court, which focused on the fact that as soon as a driver connects to the platform, they become subordinate to Uber.

These two decisions will soon be followed by others (eg, the Paris Industrial Tribunal was meant to rule on Uber drivers a few weeks ago, but the case resulted in a hung jury and will be pleaded again in a few months). However, it seems that the current trend is for the courts to requalify such relationships as employment relationships.

As regards the role of digital platforms, these decisions are similar to the 20 December 2017 judgment of the European Court of Justice, which held that Uber is much more than an intermediary, and that:

> *[when it's purpose] is to connect, by means of a smartphone application and for remuneration, non-professional drivers using their own vehicle with persons who wish to make urban journeys, [it] must be regarded as being inherently linked to a transport service and, accordingly, must be classified as 'a service in the field of transport' within the meaning of Article 58(1) TFEU.* (Case C 434-15.)

Comment

While further decisions on this matter are expected, it is likely that they will only confuse the issue even more.

It could be argued that an intermediary status between self-employment and employment should be created in order to prevent obvious abuses which are made possible only by an almost complete lack of protection, while simultaneously retaining a level of flexibility for users.

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Endnotes

(1) For further information on this topic, please visit www.templebright.com.