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The digital revolution of the Uber Economy. Redefining employment relations

La revolución digital de la economía Uber. Redefiniendo las relaciones laborales

Abstract: The present study focuses on the figure of gig workers in digital platforms such as Uber or Deliveroo and the necessity for a specific regulation that adjusts to the particularities of these new work relations. The above to prevent the lack of certainty regarding their legal status. Following how courts and tribunals in the UK (common law) have sought to redefine and adequate the concept of subordination and dependence, this work seeks to analyse how those elements have been interpreted to apply or not the regulation of the traditional employment figure to the new work relations that digital platforms have created. These most recent decisions demonstrate that this is not a settled topic. The current tools available to judges are insufficient to provide either certainty or security to gig workers, as this new form of labour relations does not fully present the traditional characteristics of subordination and dependence. However, they also demonstrate the need for effective regulation that responds to the demands and interests of these new workers so as not to discourage the creation of new sources of employment by regulating essential aspects such as social and health security.

Keywords: “Gig Workers”; subordination and dependence; new employment relations; employee status; new digital employment regulation.

Resumen: El presente estudio se focaliza en la figura de los “Gig Workers” de plataformas digitales tales como Uber y Deliveroo, así como en la necesidad de una regulación específica que se ajuste a las particularidades de estas nuevas relaciones de trabajo. Lo anterior, para efectos de prevenir la falta de certeza en relación con el estatus legal de aquellos. Siguiendo como los tribunales en Reino Unido (*Common Law*) han buscado la manera de redefinir y adecuar el concepto de subordinación y dependencia, este trabajo busca analizar cómo aquellos elementos han sido interpretados para efectos de determinar si aplicar o no la regulación tradicional de las relaciones laborales a las nuevas formas de trabajo que las plataformas digitales han creado. Estos fallos recientes demuestran que no es un tema resuelto. Las herramientas actuales para los tribunales son insuficientes para proveer tanto de certeza como de seguridad a los “Gig Workers” toda vez que estas nuevas formas de trabajo no representan totalmente las características tradicionales de subordinación y dependencia. Sin embargo, aquellas también demuestran la necesidad de una regulación efectiva que responda a las demandas e intereses de este nuevo tipo de trabajadores en materias de seguridad social, pero de manera tal de no desincentivar la creación de nuevas formas de trabajo.

Palabras clave: “Gig Workers”; subordinación y dependencia; nuevas relaciones laborales; estatus del trabajador; nueva regulación para el trabajo digital.

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“Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them a tiny amount of money, and then get rid of them when you don’t need them anymore”¹.

Thomas Biwald’s² phrase reflects the “ideal” way to manage on-demand work, which is tailored as closely as possible to the precise needs of the contractor, simple to contract, and easy to detach (Rodríguez-Piñero, 2019, p. 4). This has been the widespread phenomenon that new business models created by digital platforms have brought to the market and employment relations systems. Customers can enjoy the provision of fast and low-cost tasks or gigs; a “gig worker” can decide when to work, where to work, and what kind of gigs to accept; and the digital platform provides the technological means and system to connect the customer with the gig worker (Prassl, 2018).

In a broader sense, the “gig economy” has been defined as the pre-settled tasks carried out by independent contractors and mediated by online platforms, representing the trend of increasingly contingent work, labour market flexibility, and outsourcing of work to independent contractors and providers (Todolí-Signes, 2017). Within this new digital economy, there are different kinds of “gig work”. One is the business model exemplified by Uber, Pedidos Ya, and Deliveroo, where the digital platforms take a job – such as driving passengers – traditionally performed by an employee and outsource it to an undefined, large, group of individuals in the form of an open call under a tripartite structure. Within the latter, there is a “requester” or customer who needs a specific service to be provided, a “partner” who will physically undertake the job by performing the required service through direct contact with the customer, and a

“provider” in the shape of the digital platform that connects the requester with the gig worker (Prassl & Risak, 2016; Todolí-Signes, 2017). This work focuses on these new work relations which have been shown to be on the rise in most countries³.

Tribunals around the world have sought to accommodate the new structures of the gig economy in existing legal systems by considering gig workers as employees, workers,⁴ or self-employed workers, which translates into different forms of social protection, working conditions, worker representation, and the rights and obligations of these statutes (Koutsimpogiorgos et al., 2020). This kind of work is rapidly expanding, and full-time employment in the traditional manner may become the exception rather than the rule in the coming years (Aloisi, 2016, p. 663). These new employment relations have decentralised the power of the traditional employer through a triangular employment relationship structure and created a series of diffuse networks of connected individuals. The “Uber economy” has challenged the very existence of the contract of employment, leaving individuals without the protective employment legislation that traditional employees enjoy, resulting in a new working class with new characteristics, or even, as some authors have argued, provoking the disappearance of the classical figure of the worker (Aloisi, 2016; Collins, 1990; Todolí-Signes, 2017).

Thus, can we define gig workers as self-employed workers, workers, or employees under the classic criteria of subordination and dependence? Is the so-called vulnerability of the gig worker sufficient to justify the application of labour statutes? Or can we say they represent a new form of work that deserves a new legal status that matches their economic and labour interests?

Considering the varieties of positions in the literature

¹ As cited by Moshe Z. Marvit in The Nation. <https://www.thenation.com/article/archive/how-crowdworkers-became-ghosts-digital-machine/>

² CEO of CrowdFlowers.

³ For more details see the Appendices.

⁴ The concepts of employee and worker should be considered the same, except in the case of the UK, where they are two different categories.

regarding the gig workers legal statute and the fact that it is a phenomenon arising in all employment relations systems, it appears relevant to research the way these have been defined in the common law (UK) system, as the subordination and dependence seem to crosscut to define the personal scope of gig workers. The aim, then, is to shed light on the way we understand the new working relations and the way we want to regulate them.

According to the latter, the study of UK Case law reveals that the Uber drivers cannot be classified as traditional employees, as they do not entirely fulfil the traditional elements that define the latter: subordination and dependence⁵ However, according to these recent rulings, those gig workers were defined within the concept of the “limb worker” according to the Employment Right Act of 1996 (ERA) section 230 (3) (b)⁶.

The fact that Uber drivers are under no obligation to provide services; rather, they decide if they work or not, and once they are working, they make the decision about when, how, and for how long they are going to do the work, reflects that they do not fulfil the traditional characteristics of employment relations. Nevertheless, as French Uber drivers claimed back 2016, “*Behind every low cost-benefit, there is a low-cost worker*” (Sánchez, 2018). It cannot be denied that there is some control on behalf of the platform, and that the gig economy’s result is *work*, meaning that gig workers are exposed to similar vulnerabilities to traditional workers (Prassl, 2018; Todolí-Signes, 2018); however, the latter does not justify forcing a concept that is neither suitable nor effective in protecting their interests and needs.

In this sense, it is not adequate to use the solution of judicial intervention for the reinterpretation of valid contracts through the principle of the *purposive approach* of the labour law system to qualify as employees or limb workers those who are not. The latter will suppose the expansion of the labour law to impose a uniform manner of organising work within new and complex organisational settings instead of effectively protect and satisfy the interest of those gig workers due to the nature of the services provided.

Thus, even though the traditional concept of employee and employer may not be suitable for the digital platforms of gig workers, it is necessary to re-establish the social balance in these relationships created by the evolution of production systems, and to regulate the new economy that digital platforms have installed (Escorsa, 2006; Todolí-Signes, 2017). Consequently, there must be a socio-political will to regulate a new legal protection for them, adequately adapted to the new forms of work. The solution does not lie in resorting to judicial interpretation to justify the forced application of the labour statute to relationships that do not fall within that regulation. Furthermore, it is necessary to provide certainty, because even within one country, the same tribunal may reach opposite conclusions in different but related cases (Zekic, 2019). The solution, then, to the categorisation of gig workers must come from a socio-political decision that generates certainty, uniformity, and an environment where everyone benefits (Plaza A. et al., 2018; Taylor Review, 2017).

⁵ Para. 85 Court of Appeal’s decision.

⁶ Limb workers are those defined under the ERA 1996 section 230 (3) (b): (3) In this Act “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 personally perform any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

1. Adapting subordination and dependency into gig work

1.1. Flexibilisation of the Concept of Subordination and Dependence on the Application of the Labour Statute to Gig Workers

Under its common law system, the UK has identified the subordination and dependence as the control exercised by the employer over the person's work through the control test; however, new elements such as the obligation of the employee to provide the work (mutuality of obligation), the personal obligation to carry out the work, and economic dependency draw a fundamental distinction between subordinates and independent workers (Mason, 2020; Prassl, 2015).

Therefore, traditionally in the literature, the external manifestations of subordination and dependence are identified, for example, in the employer's issuing of instructions as the owner of the means of production; the worker merely providing labour; the employee's fixed working hours; and most of the service being provided on the employer's premises (Aloisi, 2016; Todolí-Signes, 2018). Nevertheless, the digital platforms' business model presents characteristics that do not allow us to find these external manifestations of subordination and dependence as clearly as set out above. Thus, to make the concept of the employee or worker applicable to gig workers, most of the literature has sought new manifestations of subordination and dependence in the business model of digital platforms.

One of the arguments is that gig workers should be considered as employees because subordination relies on the extent of control that the platform exercises over them, even though, from a first glance, it may seem that workers have a significant amount of independence based on the flexibility that the nature of the business model provides to them (Aloisi, 2016). However, the control of the digital platform over the gig worker still

exists; the difference is that the technology has changed the way that the work is controlled (Todolí-Signes, 2018).

One expression of the latter is found in the employers' blurred figure due to the interruption of the customer as part of the employment relation, through the ranking system that digital platforms provide as a significant decentralised and scalable management technique (Van Doorn, 2017). These rankings place the disciplinary and organisational power of the employer with the customer, who through the star system chooses whether to reward a driver. The customer expresses disciplinary power in the sense that he/she directly controls whether the driver performs the work as it should be done. Organisational power is placed with the customer because the rankings technique outsources the quality control of the performed task, and because their performance review will determine the retention of the gig workers as part of the pool of drivers that the digital platforms offer to connect with the customers (Todolí-Signes, 2018; van Doorn, 2017).

Rankings allow digital platforms to enforce their business standards and control the quality of their services; for most of the literature, this is an essential element when assessing the nature of the relationship between a digital platform and its gig workers (Davidov, 2017; de Stefano, 2017; Sánchez, 2018). Ratings, then, are an expression of the subordination relationship – which is not dependent on continuous control or supervision – because they are an indirect manner of imposing discipline and control over the driver's behaviour, and a means to guarantee that their behaviour is aligned with what the rating requires (Cockayne, 2016; de Stefano, 2016; Sánchez, 2018). In the same vein, algorithmic control – like “surge prices” – has been identified as an expression of the gig workers' subordination because it generates a specific and desired behaviour in the drivers to provide the services offered by the platform, which is ultimately the main instrument

for exerting power over gig workers (Rosenblat & Stark, 2016).

Furthermore, control has also been constituted by the underlying control that the digital platform maintains over the gig worker, which emanates from: (i) the rights that the platform reserves for itself to act against the gig worker under some circumstances, i.e. platform owners reserve the right to modify the agreement at any time, and they also reserve their right to terminate workers' user accounts when they decide that the gig workers have breached the agreement (Aloisi, 2016; van Doorn, 2017); and (ii) the inconsistencies between the terms and conditions of the agreement and the classification of the independent contractor or worker referred to within it, because digital platforms impose exacerbated clauses of independence on gig workers yet simultaneously regulate the way the service will be provided to the customer. The digital platform is imposing and dictating the terms and conditions of employment between the gig worker and the customer, interfering significantly with the relationships between them, even though the gig economy business model professedly claims to remain external to such relationships because of the independent nature of the gig worker (de Stefano, 2016).

Regarding dependency, the literature has mostly analysed it as a concept relating to the economic dependence that gig workers develop regarding the digital platform as they should be available "around the clock" to earn enough money, and the way the latter is dependent on these workers as they are an essential part of the production means of the organisation. The promised flexibility does not entail greater freedom; it only reflects how economically dependent the workers are regarding the platform (Aloisi, 2016). This dependency is also reflected in the impossibility of transferring customer rankings from one digital platform to another, which indicates that platforms are not just merely service intermediators but also employers (de Stefano, 2016; Florisson & Mandl, 2018). The latter makes workers economically dependent on the specific digital platform by placing them in an endless probation period due to the

impossibility of transferring the ranking, which ties them down, increases their vulnerability and decreases their opportunities to provide services for other competitors (Aloisi, 2016).

Another relevant perspective regarding dependency is that gig workers are as vulnerable as any traditional employees due to the unequal power between them and the digital platform, and the lack of freedom and autonomy that they have when accepting the conditions under which they will perform the task. This imbalance is the cause of all the risks workers are subject to (Todolí-Signes, 2017). Digital platforms establish working conditions to their advantage, and the gig worker must accept them, or they cannot work. As a result, the contract is based primarily on mandatory rules that parties cannot change, and the power imbalance among the parties means there is no absolute contractual freedom for the gig worker; consequently, employment protection must be imposed (Todolí-Signes, 2017).

Finally, the majority of the literature agrees that digital platforms are businesses that run transport or food delivery services and not merely a digital space where the provision and demand of services are matched. Customers use these platforms because they need a specific service that the specific platform offers, and not because the platform offers a list of drivers who are available to provide them with the service (Todolí-Signes, 2017).

1.2. Inapplicability of Employee Status Due to Particularities of Gig Workers

Some arguments suggest that the classification of gig workers under the traditional concept of "employee" is unsuitable.

One of the arguments found in part of the literature and jurisprudence is that an essential part of an employment contract is that the provision of services is personal. In the case of gig workers, there is no such obligation, since, in some cases, the person providing the services can be

substituted. If the gig worker can work for other digital platforms due to having no obligation of exclusivity or non-competition, we cannot define them within the concept of a traditional worker (Mercader U., 2018). Mobility and occasionality are essential characteristics in digital platforms services, unlike for traditional workers. Since gig workers move from one assignment to another and from one platform to another, they create a transitional work system between different professional situations and employers, which is structural and characteristic of digital platforms. Gig workers do not generate stable or permanent relationships with a particular platform (Rodríguez-Piñero, 2019).

Furthermore, digital platforms' business model impedes defining gig workers as employees because there may be more than one single employer that exerts control. After all, in theory, the driver or the delivery person is allowed to work for more than one platform simultaneously. Thus, if the gig worker uses two different platforms, which is the employer that exerts control? It is unclear how to allocate worked hours between two or more companies if we consider that the driver is under the control of the digital platform, since they simply log into the app and advertise their availability to provide rides (Harris & Krueger, 2015).

Gig workers' economic dependency regarding these digital platforms has also been challenged. On the one hand, it is argued that they can turn the app on and wait for one task opportunity while carrying out another job for another platform or even while engaged in nonworking activities. Thus, the hours spent waiting for work cannot be allocated to a specific employer, and even if the gig worker is only providing services through one specific digital platform, they can spend their waiting time as they please; they are not expected to be exclusively available and at the disposition of the platform. In this sense, they are working for themselves and on their own time (Harris

& Krueger, 2015). On the other hand, the fact that it is the gig worker who owns the car, or the bike means that they have control over their assets and can choose how to use them. The ownership of the assets, to the extent that it can be used to spread risk, is a sign of independence, because the platform is allowing the driver to use a private asset to create an income that would otherwise not be possible to earn (Davidov, 2017).

Another sign of economic independence is that, while some drivers use digital platforms as their primary source of income and spend all their working hours logged into the app, others use them to complement their income and only spend part of their working time logged in. They are free to choose. There are some gig workers who have an exclusive relationship with the digital platform, and others who do not; the intensity of the subordination and dependence manifests in dissimilar manners, which impedes a general definition when determining whether an employment relationship is existent (Muñoz, 2018). The extent and intensity of the subordination and dependence between the gig worker and the digital platform depends on the will of the former. Thus, complete incorporation of gig workers into the definition of "traditional employee" may be neither effective nor efficient.

Furthermore, the intermittent nature of the activity is an obstacle in terms of applying labour statutes and employment rights for employees because gig workers do not have an indefinite relationship with any employer. Only by establishing an umbrella relationship through the connection of the different periods where the gig worker performs and completes jobs for a specific platform, which may allow the definition of an employment relationship with a clear start and end, could employment protection be applied (de Stefano, 2016). However, the lack of legal certainty due to the obstacles to defining when the relationship starts and ends for a specific platform puts a

⁷ Furthermore, the same Employment Tribunal in *Uber v Aslam* para 85 declared that Uber drivers are not obligated to switch on the app, and while it is switched off there can be no question of any contractual obligation to provide driving services. Consequently, there is no overarching "umbrella" contract.

question mark over this possibility.⁷ Furthermore, the gig worker is the only one who has the power to decide for whom, when, and where they will work. Thus, the legal protections available to employees, such as overtime and unemployment insurance, are not suitable for them (Harris & Krueger, 2015).

Some of the literature has argued that the existence of labour principles such as the principle of primacy of reality, which has been adopted by some judicial decisions to apply the labour statute to gig workers, is not enough to defend the employment status of any provision of services whose qualification is doubtful or controversial. The latter is because it implies an *ex-post* revaluation of the contractual will of the parties —based on factual elements through the behaviours of the parties— in the qualification of the contract as an employment contract, generating an expansive tendency of labour law and imposing a uniform and centralised form of the latter (Mercader, 2018). Besides, applying the expansive scope of labour law to satisfy the expectations of an excessively large and heterogeneous group can lead precisely to a reduction in its effectiveness. To apply the same level of protection to everyone would result in much less than what workers who are really in need of protection might require (Davidov, 2017).

1.3. A new perspective: The employer's functional approach

The novel approach regarding the figure of the employer in triangular relationships can be applied to the current discussion concerning how we interpret the new tripartite structure of the employment relationship that digital platforms created with the disintegration of the traditional vertical structure of control and the blurring of the employer figure⁸. Jeremías Prassl proposes that the

discussion of the applicability of the scope of employment protection in the UK should move from the different judicial tests —the control test— which is focused on the figure of the employee analysis of the functional figure of the employer.

According to this new literature, the unitary concept of the employer as the *locus of control* does not sit easily with the different distributional models of employer that in practice are developed, and where there can be multiple figures that have the potential to fulfil an employer function — like Uber- and others that exercise some of them — like the customer or even the same driver— and which in the end falls outside the narrow unitary paradigm of the employer, leaving individuals without access to the protective employment norms — like precisely the drivers (Prassl, 2015).

Prassl suggests there is nothing inherent in the judicial tests that work only with the unitary concept of the employer as a singular party in the contract of employment. Thus, it is necessary to create a functional concept⁹ of an employer capable of defining the party or parties performing the functions of an employer, being that concept is resistant to time and the rapid changes that the market brings about in labour relations. In Prassl's perspective, no one of the employer's functions is determinative in and of itself. Instead, it is the ensemble of them. Each of the functions covers the necessary facets to create, maintain and commercially exploit the employment relationships, and that coming together, they make the legal concept of employing workers or acting as an employer (Prassl, 2015, p. 32).

Even though the perspective of the functional figure of the employer was developed regarding employment relations in triangular structures in the UK, like agency

⁸ The author explains his approach of the multi-entity employer function in relation with temporary agency works and private equity where it becomes clear that in practice these functions are shared between different entities, which makes it clear that the challenge of applying the current concept of a single employer (Fenwick, 2016).

⁹ The author identifies five essential functions of the employer: (i) initiates and terminates the employment contract; (ii) is the depository of the work performed and its fruits; (iii) provides the tasks and the remuneration; (iv) coordinates and controls the factors of production; (v) manages the company's commercial activity.

workers, it could bring an overall new perspective to the current discussion of the employment status of the “Gig Workers.” The latter because the *locus of control* is precisely blurred in the employment relations with digital platforms as they relocate many traditional functions of the employer to the “Gig Worker” like managerial coordination and risk (Deakin & Wilkinson, 2005).

In that sense, the flexibilization of the rule of law in the application of the judicial test by switching to the functional approach of the employer may help to avoid the assumption of homogeneity where the employer must always be the same, substantively identical, singular entity across a unified body of employment law which is precisely the problem that nowadays digital platforms present (Prassl, 2015, p. 189). However, by applying this new approach digital platforms do not gather all the functions of the employer, which demonstrate precisely that this new employment relationships do not fall within the binary relation of the employer and employee, and that they are something different which need a special regulation.

The latter because on the one hand, an overly formalistic structure – like the unitary concept of employer- allows digital platforms to avoid applying norms that provide protection to “Gig Workers” by

creating employment relations that lack elements that the unitary concept seeks. On the other hand, the employer’s unitary and formalistic structure is being applied by the tribunals in an absolute manner in the classification of “Gig Workers”, without being present all the employer’s functions in the digital platform. Consequently, it imposes a homogeneity concept of the employment relationship to a specific economic, organizational model that does not match the reality of the market-driven structural changes in employment relations.

In that sense, coupled with a specific regulation for digital platform workers and using the functional approach, the real employer may be formally and substantially identified to protect the “Gig Worker effectively”. Formally, it will identify the employer via the exercise of one or a combination of the five functions that Prassls identify as proper of the employee, and substantially, as the socio-economic consequences of adopting that combination of entities as the one best placed to perform the risk/control trade-off in the employment relation. Thus, obligations will be imposed on the entity that takes the actions employment law seeks to regulate, bearing each entity the obligations attached to the exercise of relevant employer functions as required in that layer regardless the formal structure shaping the employment relationship (Prassl, 2015, pp. 213–220).

2. UK Court and Tribunal Case Law

The UK has adopted a flexible concept of subordination and dependence focused on the economic dependence and control of the gig worker, adapting the *purposive approach* of the statute to the new employment relations that digital platforms have created.

2.1. Uber B.V. v Aslam

The critical issue in this case was whether, for the

statutory definition, the drivers were to be regarded as working under contract with Uber London whereby they undertook to perform services for Uber London, or whether, as Uber contended, they were to be regarded as performing services solely for and under contracts made with passengers through the agency of Uber London. Firstly, the Employment Tribunals ruled that the drivers were not employees because the drivers were not under any obligation to switch on the app, there were

no prohibitions against “dormant” drivers, and while the app was switched off there could be no question of any contractual obligation to provide driving services. Therefore, the discussion focused on the figure of limb (b) workers under s.230 (3) (b) of the Employment Right Act of 1996.¹⁰

The Employment Tribunal (ET) decided that Uber did not sell software; instead, it sold rides,¹¹ and the drivers simply provided the skilled labour through which the organisation delivered its services and earned its profits; “Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits”.¹²

It was considered unrealistic to treat Uber drivers as performing their services *for*, and *under*, a contract with the passengers rather than *for*, and *under* a contract with Uber. Henceforth, the ET identified a dependency from an economic perspective because Uber recruited and retained the drivers, who were an integral component of the organisation as they enabled it to operate its transportation business. Secondly, the economic perspective was also applied to identify the drivers’ dependence; the ET remarked that the drivers were economically dependent on Uber because they could not run and grow a business on their own, unless *grow* supposed spending more hours driving. Furthermore, drivers did not offer a range of products, sell transportation services, or subscribe to any agreement with the passengers.

Thirdly, in order to identify the subordination element, the ET highlighted that the worker status of the drivers also derived from the control rights that Uber retained and exerted regarding the way the work must be carried out, and that the agreement between Uber and the drivers was not just simply the conditions of the licence to use the app. Henceforth, the subordination of the drivers to

Uber can be seen in the different stages in the process of carrying passengers. Furthermore, the ET pointed out that although the drivers were expressly authorised to provide services to other digital platforms, the reality was that Uber held most of the market in London, making it impossible for the drivers to make themselves available to other operators. Consequently, they were at Uber’s disposal.

For the ET, drivers fell on the “limb workers” side of the line because they were economically dependent and an integral part of Uber’s business, and because of the control that the latter exerted. As such, when (i) the app was switched on, (ii) the driver was in the territory where they were licenced, and (iii) when the driver was ready and willing to accept trips, they should be considered as workers. To arrive at this conclusion, the ET recognised these subordination and dependency elements by use of the dominant purpose test; this allowed them to identify the essential nature of the contract according to the way the relationship had developed.

To achieve the above, the ET used the *purposive approach settled* by Lord Clarke in *Autoclenz v Belcher and Others [2011] ICR 1157 SC*. The latter set out that, when deciding whether the terms of any written agreement in truth represent what was agreed, it will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part, and that the parties’ relative bargaining power must be taken into account. Henceforth, the ET considered that the written documents had been established in order to deny any kind of employment relationship, and they did not correspond with the true reality of the relationship, and that an unequal bargaining power was present in this case, which was clearly demonstrated by Uber’s dense legal documents created by armies of lawyers¹³ and imposed on the drivers, misrepresenting the true

¹⁰ For the details in regard to this figure see the Appendices.

¹¹ The ET directly referred to the decision of the North Carolina District Court in the case of *O’Connor v Uber Technologies Inc.* at para 10.

¹² In para 92 of the ET’s decision.

¹³ Expression adopted by the ET accordingly with Elias J in the EAT in *Consistent Group Ltd V Kalwak [2017] IRLR 560*.

rights and obligations of both sides. Consequently, the ET considered that they were able to disregard them. The Employment Appeal Tribunal and the Court of Appeal dismissed Uber's appeal under very similar grounds to the ET.

In this sense, the Court of Appeal in the paragraph 96 of the decision confirms the thirteen considerations – below– that the ET's decision that led it to the conclusion that Uber drivers were limb (b) workers under the s. 230 (b) (3) of the ERA 1996:

(1) The contradiction in the Rider Terms between the fact that ULL purports to be the driver's agent and its assertion of "sole and absolute discretion" to accept or decline bookings.

(2) The fact that Uber interviews and recruits drivers

(3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.

(4) The fact that Uber requires drivers to accept trips and/or not to cancel trips, and enforces the requirement by logging off drivers who breach those requirements.

(5) The fact that Uber sets the (default) route and the driver departs from it at his peril.

(6) The fact that UBV fixes the fare and the driver cannot agree a higher sum with the passenger. (The supposed freedom to agree a lower fare is obviously nugatory)

(7) The fact that Uber imposes numerous conditions on drivers (such as the limited choice of acceptable vehicles) instructs drivers on how to do their work, and in numerous ways, controls them in the performance of their duties.

(8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/disciplinary procedure.

(9) The fact that Uber determines issues about rebates, sometimes without even involving the driver whose remuneration is liable to be affected.

(10) The guaranteed earning schemes (albeit now discontinued).

(11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall upon them.

(12) The fact that Uber handles complaints by passengers, including complaints about the driver.

(13) The fact that Uber reserves the power to amend the driver's terms unilaterally.

However, Lord Justice Underhill in the Court of Appeal (CA) presented a dissenting judgment. He considered that the relationship argued by Uber, where the contract was between the driver and the passenger, was neither unrealistic nor fake. On the contrary, it was in accordance with the recognised model of the private hire car business. Uber did not impose false characterisation, and if the conditions were disadvantageous, protection against abuse of inequality of bargaining power was the role of legislation, and it did not permit the re-writing of agreements. Therefore, LJ Underhill disregarded the interpretation of the subordination and dependence mentioned above to change the nature of the agreement.

Regarding *Autoclenz's purposive approach*, LJ Underhill stated that there were no sham clauses, and that the Court's intervention in the interpretation of the contract should not have proceeded, as it did not have free rein to disregard the agreements. Drivers were bound by the terms of the agreement they signed even if they did not read them, because the written contractual terms were consistent with the way the parties worked in practice – albeit unfairly disadvantageous.

It is interesting that LJ Underhill disregarded the argument of the vulnerability of the drivers used by the CA when re-interpreting the contract. He highlighted

that even though the paperwork and the language of the agreement was complicated, it effectively reflected what the parties performed. He disregarded the interpretation of dependency from the economic perspective, where Uber's actual business was transportation services rather than just booking. LJ Underhill considered that the actual obligation of Uber was to provide transportation services through a booking service, and that the CA had not analysed this true nature of the obligation.

Regarding the control that Uber exerted and retained, LJ Underhill argued that it could not be regarded as an actual feature of the relationship between Uber, the drivers, and the passengers. On the contrary, the Uber system was no different from minicabs or taxi services, and their drivers were not regarded as workers. He argued mainly that Uber was an intermediary and had an interest in maintaining the quality of the product, and the fact that it provided guidance and required a minimum level of documentation before accepting drivers did not demonstrate that they were under a contract of employment with Uber. He recognised that there could be a contract between the passengers and the drivers, so the exception of the s.230 (b) (3) applied, and the only way that agreement could be disregarded was if it did not match the reality, which was not the case. The fact that passengers may have assumed that they were dealing directly with Uber rather than with the driver did not necessarily mean that this was true.¹⁴

As to the last point, LJ Underhill made a remarkable analysis where he recognised that drivers may have been economically dependent on Uber and ruling that they were not workers did not reject that fact. Henceforth, if the current legislation did not go far enough to provide protection, the solution was to amend it and not to lean on the limited tools that judges had for dealing with limited statutory definitions that did not fit with new business and employment relationships. The purposive approach set out in *Autoclenz*, he stated, could not be treated as a tool to rewrite any disadvantageous contractual provision that

resulted from the disparity of bargaining power between (putative) employer and (putative) worker. In these cases, the problem was not that the written terms covered the true relationship, but instead that the relationship created by them was one that the law did not protect. Abuse of superior bargaining power by the imposition of unreasonable contractual terms is, of course, a classic area for legislative intervention, and not only in the employment field.

Finally, the Supreme Court (SC) confirmed the decision of the CA, based on mostly similar arguments. However, they incorporated an interesting element as they applied the *Autoclenz purposive approach* but grounded on a different perspective from the CA. In this sense, the SC argued that the question was not contractual – what was really agreed between the parties – but instead statutory – the claimants were those whom the legislation was designed to protect irrespective of what had been contractually agreed. Consequently, the SC made a further step towards the reinterpretation of the elements of subordination and dependence, moving beyond them and the way parties developed them in practice or in agreement, and attributed the legal status of “worker” to the drivers based on their vulnerability, which meant that they deserved the statutory protection.

The SC included economic dependence in their analysis because drivers' inability to market themselves meant that they were dependent on the platform, which exerted control. The latter increased this dependency, which derived from the economic, social, and psychological vulnerability of the worker, making them the target for which the statute protection was created. The SC also highlighted the economic dependence that the digital platform had regarding the drivers, as they were an integral part of the business; this was a crucial feature in classifying the drivers under s. 230 (3) (b).

The SC then went further, emphasising the purpose of the statute as to protect the contracting party

¹⁴ For more details about the comparison between taxicabs and Uber drivers made by LJ Underhill, see the Appendices.

in relationships where it was more vulnerable and dependent due to unequal bargaining power. As the SC stated, “the primary question was one of statutory interpretation, not contractual interpretation”.¹⁵ Therefore, the agreements needed to be analysed not only as they had been put into practice but also considering the purpose of the legislation, which was precisely to protect workers in vulnerable situations. The SC determined that the elements that defined a worker’s vulnerability lay in the subordination and dependence regarding the work performed and the employer’s control over the work performed by the worker. The greater the extent of such control, the stronger the case for classifying an individual as a “worker” employed under a “worker’s contract”.

Faced with the absence of the classic elements of subordination and dependence within digital platforms,¹⁶ the SC made a move to distinguish between workers and independent workers. This was because it was the control exercised by digital platforms due to bargaining inequality that gave rise to worker vulnerability and thus generated subordination and dependence. Hence, control was not evidence of the structural existence of subordination and dependence but instead its source. Consequently, the source of vulnerability reflected a social structure in respect of which the legal status would be called upon to protect, and not because of the nature of the legal relationship between the parties. In seeking a “worker”, the SC was looking for someone vulnerable to the harms of unequal bargaining.

This new perspective of the SC on the source of subordination and dependency has left the door open to contradictions. Can it be the case that a person is financially dependent but not vulnerable?¹⁷ “[A] small business may be genuinely an independent business but be completely dependent upon and subordinate to

the demands of a key customer”,¹⁸ so according to the Supreme Court’s criteria, would it then be vulnerable? Which part of the statute should be applied? Would it cease to be an independent worker? This new flexible and expansive interpretation of the concept of subordination and dependence, while seeking to broaden the scope of protection of legal status, risks fragmenting the concept of “worker”.

The wording of the SC in *Bates van Winkelhof* reflects the present criticism of the flexible and expansive interpretation of the concept of subordination and dependence to suit the worker status to the drivers: “There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do. But in my view they are not solved by adding some mystery ingredient of ‘subordination’ to the concept of employee and worker”.

LJ Underhill and his dissenting opinion reflect this contradiction, which originated from extending the concept of subordination and dependence to the vulnerability arising from the bargaining inequality. At the same time, this has become the key that allows judges to reinterpret the contracts validly agreed between parties, which effectively reflect the reality of the way they are exercised in practice. The contracts correspond with reality but have created a relationship that is simply not contemplated in the legal statute. Henceforth, the effect is the homogenising of a system of employment that does not correspond to the reality of new legal relationships, leaving the Courts with tools that are not suitable for effective protection of drivers.

Continuing to attend to reinterpretations of labour law elements that were conceived for different counterfactual structures than those currently in question will simply

¹⁵ Para 69.

¹⁶ This is because drivers can choose how, when, for how long, and where to provide services.

¹⁷ For example, in *Bates*, where the appellant was a Senior Equity Partner, we could say that there was no difference in bargaining power, which would give rise to vulnerability, but at the same time she was economically dependent on the law firm by not being able to market herself as a solicitor to others and she was an integral part of their business.

¹⁸ *Jivraj v Haswani* [2011].

dilute the protective effect of labour law. As Lord Justice Underhill pointed out, if legal protection does not go far enough, the solution is to amend it.

2.2. Independent Workers' Union of Great Britain (IWGB) v RooFoods Limited T/A Deliveroo

Part of the issue was whether the riders fell within the concept of “worker” under s.296 TURLCA // s. 230 (b) (3) of the ERA 1996. The Central Arbitration Committee (CAC) decided that they did not qualify as such. The central argument was that the riders were free to substitute for each other at will when providing food delivery services. Henceforth, it could not be said that the riders personally undertook the carrying out of any work or services for another party exactly as the definition of the statute required.

However, according to the criteria presented by the Supreme Court for Uber, to be classified as a worker, a person must be in a position of vulnerability – due to unequal bargaining power – which will result in economic dependence and therefore cause subordination and dependence. If we look at the Deliveroo case through these lenses, do its riders count as those who the statute is meant to protect?

The CAC ruling expressly acknowledged that the terms of all contracts with riders had been issued at a point in time by Deliveroo and were set by Deliveroo, and that there was no scope for individual negotiation. Riders were obliged to sign the contract if they wished to become a Deliveroo rider. In this sense, under the lens of the SC interpretation of subordination and dependence, we could say that the source of vulnerability – unequal bargaining power – and therefore dependence of riders should be expressed in a similar way as in the Uber case.¹⁹

However, since riders were expressly authorised to use substitutes and in practice some riders did make use of them – although only a very small proportion – this excluded them from the definition of “worker”, since they were not assuming an obligation to carry out the agreed work personally. Now, if we apply the purposive approach established in *Autoclenz*, the reality of the case was that only a minority of riders used substitutes, and if they did, they used the username and password of the incumbent rider, so can we say that it was really a substitute for these purposes? Where, then, lie the boundaries of a right to substitute consistent with personal performance?

The *Pimlico Plumbers*²⁰ case is the precedent for this question. In this case, it was decided that the plumbers fell under the concept of limb (b) workers, and the Court considered that the dominant feature of the plumbers' contracts with Pimlico was an obligation of personal performance. The extent to which there was a facility to appoint a substitute was the product of a contractual right, with the significant limitation that the substitute should be another Pimlico operative. As such, if Deliveroo riders were authorised to use substitutes, but they had to use the user details of the incumbent rider, could we not then draw a similarity with *Pimlico*? Deliveroo was surely limiting the use of substitutes by only authorising their use if they delivered through the original rider's app. On the other hand, according to the ruling itself, witnesses testified, and the CAC acknowledged that it was not commonly used, so if we apply the purposive approach, would the prevailing view not be that rider substitution did not occur in practice? Furthermore, applying the Supreme Court's purposive approach in Uber, riders remain vulnerable and under the control of Deliveroo, so are they not the object of protection of the statute? The latter demonstrates that the current legal tools are not enough to regulate and protect a legal – or employment- relationship that has not been considered within the traditional boundaries.

¹⁹ I.e., limited information available to the driver at the point of acceptance, lack of rider control over key terms, control of the route from digital platforms, payment arrangements, recruitment and training, and disciplinary actions such as logging the rider out if they do not make a journey within three months.

²⁰ *Pimlico Plumbers Ltd & Anor v Smith* [2017] EWCA Civ 51.

The ruling stated that riders were expressly authorised to provide services for other competing companies. However, this was not a common practice due to the practical difficulties involved. Nevertheless, the ruling of the CAC did not elaborate on this element, unlike in the Uber case. Both the ET and the CA in Uber stated that although Uber drivers were not prohibited from registering with other platforms, the drivers were still available to Uber because they could not make themselves available to any other PHV operator. Otherwise, if it was indeed the case that drivers could also remain at the disposal of other PHV operators when waiting for a ride, the same analysis would not apply because they would not have been under the disposal and thus the exclusive control of Uber.

However, if we follow *Autoclenz*'s interpretative line used by the CAC to determine that riders were free to use substitutes, even if there were only a few of them, why then could such a criterion not be used in the Uber case to determine that drivers were not under the disposition of Uber if they were entitled to be registered on other platforms simultaneously? The statement set out by LJ Smith, approved, and endorsed in *Autoclenz*, may

reflect the latter: "(...) But the mere fact that the parties conducted themselves in a particular way does not of itself mean that the conduct accurately reflects the legal rights and obligations. For example, there could well be a legal right to provide a substitute worker and the fact that that right was never exercised in practice does not mean that it was not a genuine right".

The latter may be debatable and vary from case to case. However, it illustrates the point of this paper: that gig workers do not have the traditional characteristics of subordination and dependence or even of workers, even if they are more subtle than employees. The flexible and broad interpretation that judges can make regarding the elements providing gig workers with statutory protection is insufficient. Digital platforms may create other contractual alternatives in such a way as to escape the previous criteria established by the Court on a case-by-case basis, and those who share the same basis of vulnerability will see their right to be protected by the statute diminished because of the absence of a legal figure that would effectively regulate the new relations created by digital platforms.

3. Conclusion

According to the analysis of the case law in the UK, as well as the literature in general regarding the category of digital platform workers, we find dissimilar positions, but they all fall under the same dilemma. What do we understand by subordination and dependence as the elements that identify traditional employees?

Traditionally, the control element and its expressions such as power of command, direction, and disciplinary power, has been one of the most important factors in terms of drawing a distinction between the subordination or independence of the employee. In addition to control,

other elements have been added to the distinction such as the mutuality of obligation, the worker's alienation from the results of the work, economic dependency, and the obligation to perform the work personally to adjust the traditional binary relationship to the emerging realities of work structures. However, many of these factors make the classification of gig workers' employee status problematic, as the inherent characteristics of their work such as the fragmentation of the figure of the employer, the casual nature of gigs, and the independence of the drivers are not coherent with the traditional contract of employment (Mason, 2020).

Nevertheless, the UK, through the purposive approach of the labour statute, have adopted a flexible concept of subordination and dependence based on the social category of vulnerability of the worker to declare gig workers as limb (b) workers. The latter coincides with the section of the literature concerning the argument that labour law exists to protect the economically weaker party and any worker with an objectively weak bargaining position regardless of the way the work is executed, whether under dependency or autonomy (Todolí-Signes, 2017). Consequently, employment contracts have been applied in the UK to “workers” working in a socio-economic context like that of “employees”, regardless of any subordination as presented by traditional employment relations.

It is striking that the UK, by having a third category of workers – limb (b) workers – rules out the notion that Uber’s gig workers could be employees. It is indirectly recognised that this new form of work cannot be considered in the same way as that existing between an employer and a traditional worker, as there is simply no obligation to remain at the disposal of the employer in the same way; it is the gig worker who decides whether, when, and for how long to provide services. It is interesting that the concept of subordination and dependence as an element that defines the employment relationship of a dependent worker or employee is similar, since it implies being at the complete disposal of the employer under the requirement of continuous employment to carry out work personally, and therefore the Uber drivers do not fall under that category.

However, while it is true that a gig worker can develop an economic dependence on a platform, this cannot define the overall concept of gig workers, as the way in which those relations have been created in the Uber economy is occasional and intermittent. This is precisely what attracts these workers, who prefer to trade the stability of a traditional employment relationship for the flexibility and independence that digital platforms offer.

The vulnerable situation of these workers and their need for protection cannot be denied. In this sense,

the UK Supreme Court’s position regarding vulnerability because of a social or class structure and thus the origin of dependence and subordination, and LJ Underhill’s dissenting opinion that subordination and dependence reflects the structure of the agreement made by the parties, can be reconciled. Drivers are in a position where they have less bargaining power with respect to the digital platform and this can put them in a vulnerable position, regardless of whether the contract they have entered is valid and in accordance with the way they have handled it in practice. As such, the call for regulate these relationships is justified, but it should be done in a nouvelle manner where the will of the parties to maintain the proper flexibility and independence of the digital platforms services is guaranteed, and provides legal protection in order to avoid the precarisation of this new employment system, especially in terms of social security and health and safety issues.

This confirms that the only way, currently, to consider gig workers as workers or employees is to reinterpret labour relations and redefine subordination and dependence to fit them into existing categories. However, this is not the best solution for effectively protecting gig workers’ rights, nor for encouraging the creation of new sources of work. The homogenisation of forms of work through the imposition of regulation relating to employees or limb (b) workers on gig workers could dilute the real effectiveness in the protection of those workers, remaining in practice a dead letter, as it would not efficiently adapt to the reality in which these workers provide services.

Resorting to the judicial reinterpretation of subordination and dependence to adjust these new forms of work to traditional canons implies maintaining an unclear status for gig workers. Contractual arrangements with other platforms may differ in significant respects to those considered in the cases that have already emerged; consequently, there is no certainty that they would be decided in the same way. In the Uber economy, those contractual arrangements are frequently transformed, so there is also the possibility that the case law that does emerge will be obsolete by the time it is decided, even if the same companies are involved (Mason, 2020, p. 335).

The above reasoning can be seen in the UK. Deliveroo riders would fall outside s.230(3)(b) because they can use replacements, but are they not equally vulnerable? Do they not have broadly the same job characteristics as Uber drivers? Are they not also in an unequal bargaining position with the platform? Are they not also economically dependent because of the way Deliveroo's business is structured?

The problem, then, is that there is indeed a situation of uncertainty that requires the intervention of the law, but current relation between the gig worker and the digital platform is causing a problem that neither the legal systems nor the courts have the tools to regulate, and this legal vacuum and uncertainty pose a risk to all forms of work that we know today. Most employment relationships, even those of a smaller economic dimension, can be restructured under the logic of "on-demand" digital markets, making them precarious. Digital platforms' business forms have created an economy unprepared to deal with these new forms of casual labour that are becoming legally relevant as they become visible through digital marketplaces (Rodríguez-Piñero, 2019).

Therefore, a form of regulation of the digital labour market that also considers a tax and social security

perspective is needed and must specifically target the new characteristics of these labour relations so that digital platforms can employ workers on decent yet flexible terms. It cannot be ignored that the independence and flexibility offered by these platforms are highly valued by gig workers and are the reason why they decide to adopt such a work structure despite the risks involved (Collins et al., 2019). The construction of a digital law to regulate these new forms of work is essential to deal with this new industrial revolution (Ermida Uriarte & Hernández, 2002)

On the other hand, part of the proposal of this paper is the creation of a new legal figure that would effectively guarantee the flexibility and independence that platforms offer but also ensure a level of legal protection adequate for these new forms of work, specifically in terms of social security and health and safety measures. However, creating a completely new labour category is politically risky and, if it is not properly developed according to the requirements of the new relations, there could be far-reaching and unintended consequences. If a third category is established, digital platforms may find a way to adapt and create different structures, and workers may lose rights if their employment status is downgraded to that category, as has happened in Italy with para subordinates (Cherry & Aloisi, 2018).

Appendices

Appendix 1: The rise of gig workers

In Germany, France, Spain, Sweden, the UK, and the US, around nine million people earn money by providing labour through platforms such as Deliveroo, TaskRabbit, or Uber (McKinsey & Company, 2016). Furthermore, the CIPD (2017) has stated that 4% of UK working adults aged between 18 and 70 are working in the gig economy, which means approximately 1.3 million people are

engaged in gig work (Willmot, 2017). In the US, according to a study by *Time* magazine, up to 2016 over 14 million people worked in the provision of services within the gig economy (Steinmetz, 2016). In Chile, according to the Boletín No. 13.496 de Comisión del Trabajo del Senado, in 2020 more than 300,000 people provided services through the system of digital platforms (Álvarez & Weidenslaufer, 2020).

Appendix 2: Data Collection UK

- a. Uber v Aslam case
Employment Tribunal
<https://www.judiciary.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>
- b. Court of Appeal
<https://www.baillii.org/ew/cases/EWCA/Civ/2018/2748.html>
Supreme Court
<https://www.supremecourt.uk/cases/uksc-2019-0029.html>
- c. RooFoods Limited T/A Deliveroo case
Central Arbitration Committee
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/663126/Acceptance_Decision.pdf
- d. Autoclenz Limited v Belcher and others case
https://moodle.lse.ac.uk/pluginfile.php/458583/mod_resource/content/2/Autoclenz%20v%20Belcher%20UKSC_2009_0198_Judgment%5B1%5D.pdf
- e. Pimlico Plumbers Ltd and others v Smith case
<https://www.supremecourt.uk/cases/docs/uksc-2017-0053-judgment.pdf>
- f. Bates Van Winkelhof v Clyde & Co LLP case
<https://www.supremecourt.uk/cases/docs/uksc-2012-0229-judgment.pdf>
- g. Good Work: The Taylor Review of Working Practices
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf
- h. Employment Right Act 1996
<https://www.legislation.gov.uk/ukpga/1996/18/contents>

Appendix 3: Current regulation of personal scope: Employment Right Act 1996 & Equality Act 2010

The UK employment law distinguishes between three types of subjects: those employed under a contract of employment; those self-employed people who are in business on their account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but who provide their services as part of a profession or business undertaking carried on by someone else. The latter is the one who has been defined as “worker” by section 230 (3)(b) of the Employment Rights Act 1996. Hence, the statutory definition of a “worker’s contract” – limb (b) worker – is focused on three elements: (i) a contract whereby an individual undertakes to perform work or services for the

other party; (ii) an undertaking to do the work or perform the services personally; and (iii) a requirement that the other party to the contract is not a client or customer of any profession or business undertaking carried on by the individual. As Lady Hale in the Supreme Court explained in *Bates van Winkelhof v Clyde & Co LLP [2014]*, limb workers are self-employed people who provide their services as part of a profession or business undertaking carried by someone else.²¹

According with Mr. Recorder Underhill QC²² in the EAT case *Byrne Brothers LTD v Baird & Others [2002]* ICR 667²³ the reason behind the existence of the figure of the limb worker is the extension of benefits of protection to workers who substantively and economically are in the exact need of protection as employees. The latter,

²¹ Para 24-25.

²² As he then was.

²³ Judgment para 17.

because they cannot be regarded as carrying on a business, and because workers are in a dependent and subordinate relationship position in regard with the employer but failed to reach the mark necessary to qualify for the protection as employees.

Now, from the perspective of the development of employment rights in the “Uber Economy”, it can be said that the extension of the limb (b) worker into the

Appendix 4: LJ Underhill comparison between taxi cabs and Uber

The more detailed arguments are the following: (i) The limited information that the drivers have in regard with the passenger and the destination is not relevant neither different from the street taxis services or minicabs. The drivers business is to drive passengers whoever they are and wherever they wanted to go, without it being relevant to know the destination once they accept the journey, (ii) The driver’s lack of control over the key terms like fares or the route is not inconsistent with the latter contracting directly with the passenger and cannot make any fundamental difference. Even more, taxis and minicabs services are currently using apps to set the route and the fares nonetheless they contract as principals, (iii) The fact that Uber collects that fare does not deny that the debt is owed to the driver even though the passenger pays to Uber directly, and this system is not unusual for minicabs operators and booking services for taxis, (iv) The fact that there are conditions to drivers like how to behave in front of passengers or even the ranking system is not

on-demand economy has been reinforced by the latest judicial decisions²⁴. In that sense, the fact that the work relations of those cases were considered under the limb (b) concept of worker of the ERA 1996 marks out limb (b) as unequivocally more extensive and therefore inclusive than limb (a)²⁵, seems to confirm that there is a less stringent requirement of mutual obligation for personal work contracts to be admitted under limb (b) than applies under limb (a) (Freedland & Prassl, 2017).

inconsistent with the drivers being independent from Uber and contracting with the passenger. (v) The fact that the passengers should provide with documentation is entirely neutral, (vi) Uber’s essential relationship with the driver is to license them to use the App, so it is consistent with that to disincentive them to log in when in fact they are not available to take rides, (vii) The passenger is a customer of the driver so the exception of the s. 230 (3) (b) apply and they would never be responsible for any obligations of an employer under the legislation protecting workers. The contrary argument of the Court is wrong and there can be a contract between them, (viii) passengers contract with the driver and that only can be disregarded if it fails with the reality which is not case, and the fact that passengers may assume that they are dealing directly with Uber rather than with the driver does not necessarily mean that they are, (ix) The cases exposed by Uber confirm that there can be cases in which , on a proper legal analysis A can provide services to B’s customers under contract with the latter notwithstanding that the services are integral to B’s business.

²⁴ Uber v Aslam, Autoclenz v Belcher and Pimlico Plumbers Ltd v Smith.

²⁵ The employee.

Appendix 5: The Taylor Review's "Dependent Contractor"

All regulation in the UK directly refers to gig workers as a separate category or explicitly within the concept of "worker" under s. 230 (b) (3) ERA 1996. An independent report commissioned by the government entitled *Good Work: The Taylor Review of Working Practices* proposed more detailed legislation regarding the personal scope of employment protection to guide employers and tribunals in the classification of workers (Collins et al., 2019).

Regarding the atypical works that are being created, the Review proposed the creation of a new category of the worker as a "dependent contractor" where the focus should relay on the control exerted by the employer, with the legislation outlining what does it means in a modern labour market and not simply in terms of the supervision of day-to-day activities. It also proposed that to classify within the scope of those new "dependent contractors," the absence of a requirement to perform work personally should no longer be an automatic barrier to accessing basic employment rights.

Consequently, it proposed that within the new concept of dependent contractor, the Government should adapt the piece rates legislation to ensure to "Gig Workers"

enjoy maximum flexibility while also being able to earn the National Minimum Wage. If a change of this type were to result in a loss of the flexibility that so many platform workers desire, this would represent failure so it should be protected. As such, these changes must be accompanied by a new approach that supports genuine two-way flexibility enabled by digital platforms (Taylor Review, 2017, p. 36). Nevertheless, until this date no recommendations of the Review has been adopted in the legislation.

The Review reflects precisely that the figure of "Gig Workers" does not meet the requirements of subordination and dependence of a limb (b) worker in the case of the UK regulation, and that therefore it is the judicial interpretation of these concepts adapted to the new forms of work that is the only current tool that would allow them to be protected. However, the fact that the same current concept of subordination and dependence excludes the absence of personal services or the possibility of simultaneously providing services to more than one platform reflects the need for specific regulation for this type of employment relationship. The latter, since the current regulation is not in line with the reality of these relationships, although "Gig Workers" are indeed in a situation of vulnerability that labour law is called upon to protect.

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