EMPLOYMENT STATUS ANXIETY: ONE STEP FORWARD AND ONE STEP BACK

A MIXED PICTURE FOR PRECARIOUS PLATFORM WORKERS UNDER ENGLISH LAW

INTRODUCTION

- General picture: Taylor Review, July 2017; Good Work Plan, December 2018
- Uber judgment, December 2018 – one step forward
- Deliveroo judgment, December 2018 – one step back
- Legal strategy – judicial recognition of the right to collective bargaining as per Demir v Turkey and international [labour] law instruments
- Aligned political strategy: A Manifesto for Labour Law

DECEMBER 2018 GOVERNMENT REVIEW

- Taylor Review of Modern Working Practices 2017 / Good Work Plan 2018: fundamental point is that the "British Way" of structuring the labour market works [!]
- Conclusion: the balance between flexibility and rights is broadly correct [!] but there is some work to be done on improving the quality of work.
- Suggests codification of the test for employment status.
- A worker is to be called a "dependent contractor".
- Reversal of the burden of proof: a presumption that someone is an employee or dependent contractor (depending on the right asserted) unless the employer proves otherwise.
- A lot of academic and political criticism – employment status not addressed in GWP 2018.

ONE STEP FORWARD: UBER JUDGMENT, DECEMBER 2018 (1)

- CA, by a majority, upheld an ET's decision that Uber drivers are 'workers' within the meaning of S.230(3)(b) of the Employment Rights Act 1996 and the equivalent definitions in the National Minimum Wage Act 1998 and the Working Time Regulations 1998 SI 1998/1833.
- A "high degree of fiction" in the wording of the standard agreement between Uber and its drivers.
- Automatic generation of an invoice from the driver to the passenger after each ride was also a 'fiction'.
- Not helpful to compare Uber's operation with minicabs in general, or black cabs.

ONE STEP FORWARD: UBER JUDGMENT, DECEMBER 2018 (II)

- ET entitled to disregard terms of the contractual documents portraying the drivers as self-employed service-providers who contracted directly with passengers, with Uber acting as intermediary, on the basis that they did not reflect the reality of the working arrangements.
- Drivers are working for the purposes of the 1998 Act and the Regulations at any time when they are logged into the Uber app, within the territory in which they are authorised to work, and ready and willing to accept assignments.
- Strong dissent – permission to appeal to Supreme Court

ONE STEP BACK: DELIVEROO JUDGMENT, DECEMBER 2018

- The High Court rejected a judicial review challenge brought by the IWGB trade union against the Central Arbitration Committee's decision that food delivery riders are not 'workers' and so cannot rely on Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 to establish the right to collective bargaining arrangements.
- The dispute before the CAC focused on whether the riders' contracts contained an obligation of personal service, which is a crucial element of 'worker' status.
- The Court dismissed IWGB's argument that the restriction of statutory recognition to conduct collective bargaining to 'workers' breached Article 11 of the European Convention of Human Rights, (i.e. the requirement of 'personal service' should be interpreted not to exclude these riders), holding that Article 11 was not engaged.

LEGAL STRATEGY: BREXIT PROOFED!

- Right to collective bargaining - one of the essential elements of the "right to form and to join trade unions for the protection of [one's] interests" set forth in Article 11 ECHR as held by the ECtHR in *Demir and Baykara v Turkey [2009] 48 EHRR 54*.
- The opening words of Article 11(1) explicitly state that the rights contained therein apply to "everyone".
- The only exceptions are the categories of work specified in the last sentence of Article 11(2) which refer to "members of the armed forces, police and the administration of the State".
- Yet these categories the ECtHR has held, in *Demir*, are to be construed strictly and should be confined to the 'exercise' of the rights in question and must not impair the very essence of the right to organise.

PARA 154 IN *DEMIR* AND COLLECTIVE BARGAINING IN INTERNATIONAL LAW INSTRUMENTS

- Article 23(4) of the United Nations Declaration of Human Rights 1948
- Article 2 of ILO Convention No.87 on Freedom of Association and Protection of the Right to Organise (ratified by the UK in 1949): " … workers … without distinction whatsoever …"
- Article 4 of ILO Convention 98 on the Right to Organise and Collective Bargaining (ratified by the UK in 1949)
- Article 8(2) of the International Covenant on Economic, Social and Cultural Rights 1966
- Article 22(1) of the International Covenant on Civil and Political Rights 1966
- ILO Recommendation No 198 of 2006 concerning the employment relationship.
- CEACR in its *General Survey on the Fundamental Conventions concerning Rights at Work in the light of the ILO Declaration on Social Justice for a Fair Globalisation*, 2008, ILO, 2012 at para 209 refers to **the right to collective bargaining covering organisations representing, *inter alia*, the self-employed.**

TWO STEPS FORWARD: RESOLVING THE DILEMMA? THE VALUE OF COLLECTIVE BARGAINING

- 4 February 2019: courier company, Hermes, agreed to settle litigation and offer drivers guaranteed minimum wages and holiday pay in the first UK deal to provide trade union recognition for gig economy workers.
- Under the agreement with the GMB union, Hermes' 15,000 drivers will continue to be self-employed but can opt into contracts with better rights ('self-employed plus'!).
- The deal comes after almost 200 Hermes couriers won the right to be recognised as "workers" at an employment tribunal in June 2018 in a case backed by the GMB.

ALIGNED POLITICAL STRATEGY: A MANIFESTO FOR LABOUR LAW

- The 25 principal recommendations are based on the need to ensure that workers' voice is heard and respected through a Ministry of Labour, a National Economic Forum and Sectoral Employment Commissions.
- These recommendations are supported by the 'four pillars of collective bargaining' with transformative implications across four spheres of social life: (i) workplace democracy; (ii) social justice; (iii) economic policy; and (iv) the rule of law (requiring the UK to comply with international labour standards).

CONCLUSION

- Brexit and the UK Government's 'Good Work Plan' – unclear future
- Uber and Deliveroo judgments – legal strategy for incorporation of international labour law norms regarding employment status into UK case law – broadens scope to self-employed
- Legal strategy is necessary but not sufficient as it is limited in its ability to protect workers without an institutional political strategy to underpin it - Manifesto for Labour Law.