

European Labour Law Conference

(Frankfurt, 15/16th February
2019)

ELW european
lawyers
for workers
network

*New forms of labour and
new structures of
enterprises- challenges for
labour law*

“Employee status”

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Hypothesis

Impacts of the Labour Law in the economic growth: Facts or *mantras*?

3. *A long way deconstructing employee status*

- **Different techniques to determine status**
- **Employment public policies**

2. Employee status and Labour Law social function

- **Integrative function**
- **Balance between work and capital**

1. Relationship between labour law and economic growth

- **Blaming Labour Law**
As an obstacle for the economic growth
As responsible of unemployment and the poor living and working conditions
- **Employee status adaptability**
Compulsorily respectful with productive and economic needs

Economic growth, Labour Law & Employee status

- **Factors of Employee status evolution-*trivialization***
 - Working conditions precarization
 - Transformation of the economic structure (*from the industry to the services*)
 - Interpretation of the content of the enterprise freedom
 - The cultural hegemony of individual freedom
- **Unresolved relationship between labour law and economic growth**
 - Cultural hegemony: “Excessive protection is contrary to economic growth”
 - Economic growth and Labour Law
 - *Almost all the reforms have been implemented after the “explosion” of each crisis*
 - *Economic growth and Labour Law to combat mass unemployment (up 20% in times of crisis)*
 - Permanence of the labour market reforms contents after the economic crisis
 - *Estatuto de los Trabajadores, an incomprehensible Monster!*
 - Since 1984, more than 60 labour market reforms in the Spanish legal system

Labour Law social function & Employee status

Social function of Labour Law (Employee status)

- Integrative function/ Structural balance
- Legitimizing the social system and its economic order

Juridical techniques to ensure Labour Law social function

Juridical techniques for employment status recognition

- Common labour relations (*Relación laboral común*)
- Special labour relations (*Relaciones laborales especiales*)
 - Self-employed (*Trabajador autónomo*)
- Economically dependent self-employed (*Trabajador autónomo dependiente económicamente*)

An overview of the Spanish case (...beyond the current crisis)

Crisis, unemployment and labour reforms

- Decade 1980s:
 - Temporality as the most important employment public policy (1984-1997)
 - Public subsidies/ Tax incentives/ Reductions Social Security fee
 - Temporary Employment Agencies/ Multiservice Companies
- Decade 1990s:
 - Working conditions unilaterally modified
 - Derogations *in peius*
 - Unjustified dismissal effects over *stability principle*
 - Employers has the right to choose between readmission or compensation (since 1994 till nowadays)
- Decade 2000s:
 - Reducing dismissal compensation (*Processing salaries suppression*)
 - Trivialisation of the dismissal (Employer recognition unjustified dismissal in the worker's communication)
 - *Express dismissal* /No judicial control
- Labour market reforms during the current crisis: (under the austerity policies/ salary devaluation)
 - *New fix-terms contracts types*
 - *Flexibilization of the economic dismissal reasons/ Cheapening dismissal compensation*
 - *Intervention of the Collective Autonomy principle* (application preference of the company collective agreement)
 - Replacement representative bodies by workers *ad hoc commissions*

Precarization of work & Employee status

- The poverty risk rate in Spain is almost 30% (Eurostat)
- According to Eurostat, the first tranche of 20% of the Spanish population with more income, perceives 12.2 times more than the last tranche of 20% lower income (Eurostat)
- Spain has a rate of temporality in the recruitment of 26.71% (Eurostat)
 - High speed of rotation of the temporary contracts. In only four months, 4.748.542 "initial contracts" have been registered
 - 1.268.625 contracts has a duration equal to or less than 7 days
 - 30.96% of the temporary contracts – almost a million and a half of contracts – are part-time
- In Spain, 14.1% of workers are at risk of hardship (European Network for the fight against poverty and social exclusion)
 - “Unemployment is not what defines poverty”
 - “The largest group is that of the people employed”.

Working on Digital Platforms & Employee status

- A **productive and consumption model** for the *austeriry age*
 - *Attention!! The austerity policies are still well alive*
- How improving competitiveness?
 - Goods and services quality
 - Intensification of working conditions
- Information societies or services providers?
 - Self-employees or workers?
- Deepening the model of productive decentralization
- Not with self-employed or small employers, but with unemployed and poor workers

Working on Digital Platforms and Employee status: the Spanish experience

- Glovo, Deliveroo, Uber...
 - Economical, social and juridical conflicts
 - Unfair competition/ Poor working & *social dumping*/ Entrepreneur and workers legal nature
- Academic doctrine, Work Inspection and Court decisions
 - *What controversy?*
 - *A buried political fight*
- Political interventions
 - *The Great Absent*
- Trade union action, *intentionally hidden*
 - Economic and Social Conflict
 - *Everywhere, trade unions have been main protagonists (social movilization/legal defense)*
 - Workers organization
 - Studies/ Publications/ discussion forums promotion (Fundación 1º Mayo CCOO, TURI)
 - Advicing and organizing workers
 - Collective Bargaining
 - *An union to the offensive, CCOO Industry Federation*
 - *Including these workers in the scope application of many sectoral collective agreements*

Brief review: employee status juridical conflicts

- Deliveroo case

- Contractual relation is expressly qualified by the parties as a self-employment relation, stipulating the price of each delivery. Deliveroo makes the payment every two months.
- Deliveroo offers weekly services to each vendor that will be determined (days and times) by the company. Usually, timetables are unilaterally fixed by the company, but “riders” could participate in choosing timetables when they had a suitable level of excellence.
- “Riders” may accept or reject the offers using an *app* provided by the company.
- “Riders” provide their own tools and materials and, specifically, a bike, a mobile phone and a Data connection.
- They are urged to be part of an instant messaging group managed by the company that aims to solve the problems that they can occur during the service.
- To carry out the deliveries, “riders” must remain in a control point, so-called "centroid", waiting for company authorization (mobile message) to start their working day. In addition, they must register each delivery made using the app provided by the company, noting the possible incidents (“distortion of metrics”).
- Deliveroo also imposes other obligations related with the clothing they must wear, dealing with the customer or the maintenance of the work instruments.

Brief review: employee status juridical conflicts

- Glovo case

- In this case, contractual relation was qualified, at first, as a self-employment relation, and later as self-employed economically dependent (TRADE) once the TRADE informed to the company that he received more than 75% of his income from it.
- After booking the time slot in which the TRADE wants to work, this activates the auto-assignment position (available) on your phone mobile. Once the order is accepted the TRADE must carry it out in the place required by the customer. It is also possible to reject a pre-order accepted half-run.
- To carry out the activity the TRADE uses his own motorcycle and the connection of his cell phone through which he is «geolocated» by the company. If he had to buy products for the client, he pays by (Glovo) credit card.
- The TRADE could refuse orders, though the company has established a “glovers” scoring system, classifying in three categories on which the preference for access to services depends.

Brief review: employee status juridical conflicts

- **Principle of reality (principio de realidad)**
 - *"The qualification of contracts does not depend on the denomination given by the parties but the effective configuration of the obligations in the contractual agreement» (Spanish Supreme Court criteria).*
 - *Non-disputed by SJS (Valencia), 1st June 2018:*
 - *"Employee status qualification is something unavailable by the contract-parties".*
 - *Disputed by SJS (Madrid), 3 September 2018:*
 - *"The will freely expressed in the contract by the parties should be taken into consideration, at least, as a point starting for the exam of the contractual relation qualification".*

Brief review: employee status juridical conflicts

- **Personal work:** *“It is admitted in this way that worker can decide his own replacement on sporadic occasions” (Spanish Supreme Court criteria). So, entrust work activity execution to a third party does not constitute a sufficient argument to deny the employee status”.*
 - *Non-disputed: “This is a possibility needed of the company acceptance, but nevertheless has never been verified. Therefore, this aspect (personal work) has not disputed” (SJS Valencia).*
- **Paid work:** *“Periodic remuneration/ calculation in accordance to criterion that keeps certain proportion to the work activity”.*
 - *Non-disputed.*

Brief review: employee status juridical conflicts

- **Dependent work:** *“Assistance to the work center of the employer or another work place decided by employer/ insertion in the productive organization planned by employer” (Spanish Supreme Court criteria).*
 - *Disputed by Madrid Court of Justice in the follow terms:*
 - *“Vendor decides fringe time he wished and had no obligation to justify his absences, just communicate”.*
 - *“He chooses his periods of rest, as well as the annual interruption of the activity”.*
 - *“Work activity is autonomously organized by vendor, choosing the number of orders he wants to make. Vendor even could reject company's orders in the middle of work activity execution”.*
- **Aliened work:** *“Employer's disposition of goods or services produced by workers/ market relations decisions adopted by employer, as rates or clientele selection” (Spanish Supreme Court criteria).*
 - *Non-disputed.*

“The history of labour law is in all national scenarios, certainly, the very nature of its content mobility, including the permanent subjective variation of its field of application, but there is no doubt that these regulatory operations are but other so many political translations in the exercise of the social function attributed to this branch of the legal system”.