European Labour Law Conference
Frankfurt, 15/16th 2019

NEW FORMS OF LABOUR AND NEW STRUCTURES OF ENTERPRISES – CHALLENGES FOR LABOUR LAW

"EMPLOYEE STATUS"

Francisco Trillo[1]

SUMMARY: 1. Some methodological premises and preliminary analysis of the subject. 2. An overview of the Spanish experience, beyond the current crisis. 2.1. Different legislative techniques adopted to recognize the employee status, since the first Estatuto de los Trabajadores (1980). 2.2. Degradation / precarization of work as the other phenomenon of *trivialization* of the employee status. 3. Working on digital platforms and Employee status. 3.1. Employee status juridical conflicts in the Spanish experience.

1. Some methodological premises and preliminary analysis of the subject

1

Once again, the economic crisis has put Labour Law in crisis. Nothing new on the horizon. Economic crises have been, almost since the capitalism origins, travelling companions of the regulation of labour relations (Labour Law).

In this occasion, Labour Law is seen not only as an obsolete juridical system, closer to the 19th century than to the 21st, according to the ideological current that supports these arguments, but also as an obstacle to economic recovery, and then, to employment creation. These political ideas, hegemonic nowadays, have generated two interrelated effects.

The first of them consists of a sort of blaming Labour Law for the social and economic precariousness suffered by the working classes in Europe -and not only-[2]. This has made it possible to relegate attention to the social effects of the productive model. The same productive model that caused the 2008 crisis is still well alive and the political priority has been located in the regulation of labour relations instead of in the excesses of the economic system.

The second one, understood as a cultural factor, is related to the acceptance by the working classes of the economic principles that have presided over the management of

[1] Associate Prof. Dr Labour Law and Social Security at Castilla-La Mancha.

[2] Something that since 2007 some authors warn in Spain. Among others, http://baylos.blogspot.com/2007/02/nuestra-opinion-sobre-el-libro-verde.html.

the 2008 crisis. One of the relevant factors to take into consideration to understand and to explain the current crisis of the union and political representation of the workers.

Both effects are producing a reformulation on the field of the social, economic and political Governance, in which the collective dimension seems to have no place.

Most of the political, union and academic reactions usually insist on demonstrating the ideological fallacy behind those arguments. They usually understand that Labour Law does not have the capacity to create employment, even less to generate economic activity. What Labour Law determines is the quality of the employment created by economic activity!! I do totally agree with these arguments.

However, the assertions made about the Labour Law as an obstacle to economic growth and the employment creation are, to a large extent, certain. I mean, Labour Law has traditionally combated the social and economic inequalities of the working classes, as well as the economic system that promotes them. This is, Labour Law is opposed to the current economic growth model, in the origin of the current social inequalities. In the same sense, registered employment since the beginning of the economic recovery (2015), extremely precarious, does not compatible with (a protective idea of) Labour Law.

Thus, analysing the Employee status in the Spanish case, or in any other national State, implies, first of all, reflecting on the relationship between the current economic model of growth, especially about the quality of employment that it generates, and the Labour Law. This reflection cannot despise the social function(s) of Labour Law, as socioeconomic integration and guarantee to ensure an acceptable balance of the structural conflict between work and capital.

2

i) Thus, our issue is being addressed incorrectly, from the moment when the legal and political debate is limited to resolve the ability of adaptation -or not- of Labour Law to the "new" economic and productive demands (*enough flexible or too rigid?*). In our view, the question is whether these "new" economic and productive demands are compatible and respectful with the political concept of Decent Work, promoted by ILO, more intensely in his 100th anniversary, and with the social and democratic system behind that concept, still in force, at least from a Constitutional point of view.

ii) Lastly, related to the most recent trends in Employee status regarding the so-called digital platforms, this presentation seeks to highlight the social, labour and economic context in which those are promoted: the austerity policies (set of rules for a new production and consumption model). In the same way**,** the dominant descriptions of these digital business models, which emphasize the autonomy, voluntariness and freedom of the producers that are inserted in these production processes, will be highlighted. All of this, through the analysis of the Spanish Court decisions known until now.

2. An overview of the Spanish experience, beyond the current crisis

Generally speaking, the evolution of the employee status in the Spanish labour legal system finds its origins in an institutional interpretation about the political value of work, and in the role of Labour Law.
It is a construction of certain politics of Law that has been blocked since the 80s of the 20th century. This process has been shaped through two types of legislative interventions. The first relates to the techniques accepted by the legislator to accommodate the social function of Labor Law. The second legislative intervention consisted on the degradation/precarization of work as a *sine qua non condition* to satisfy the economic and productive demands.

2.1. *Different legislative techniques adopted to recognize the employee status, since the first Estatuto de los Trabajadores (1980)*

In effect, since the entry into force of ET`80, the first alterations of the employee status took place, through the exclusions from the field of application of Labour Law (article 1.3 ET) and the appearance, shortly after (the first ones in 1985), of the so-called *special labour relations* (professional athletes, artists in public shows, senior management staff, religion teachers ...).

The common labour relationship, determined by the constitutive elements of personal work, paid, dependent and employed, suffered a first assault as a result of certain exclusions especially controversial as the road hauliers. To this was added an open list of economic activities that, due to their special characteristics, were framed in specific regulations that differed from that envisaged for the common labour relationship. In many cases, the creation of certain *special labour relations*, such as that of lawyers who provide services in individual and/or collective offices, was harshly criticized for responding only to business interests. This was also the case of the religion teachers.

Another normative situation that has impacted on the employee status has to do with the regulation of the so-called special working time regulations -RD 2001/1983, repealed by RD 1561/1995-. Most of these special working time regulations respond to common labour relations, however, their work activity has particular characteristics (transport by road, rail, agriculture, livestock ...). The main characteristic of these lies in the greater flexibility of the regulation of working time, especially in relation to the concept of working time. The distinction between effective working time, waiting time or guard duty implies a prolongation of the subordination of these workers. In addition, as of the entry into force of the aforementioned regulation, there was a phenomenon of extending this flexibility to various productive sectors.

A new attack on the employee status was the entry into force of Law 20/2007, which created the figure of the *economically dependent autonomous worker*. Their distinction with subordinate work, on the one hand, and with autonomous work, on the other, was based on the facts that the TRADE obtained at least 75% of their income from the same employer - called client by the Law 20/2007 - and that he will contribute his own work tools to the work activity. The assumptions of fraud in this sense were immediate. Ultimately, a call should be made about the most recent situation, where the unemployed, normally long-term unemployed, have taken the "decision" to become self-employed workers - entrepreneurs - as a result of the inability of the economic system to offer them a job for others. All this, framed in an institutional impulse of the autonomous work, accompanied by fiscal advantages - sometimes of doubtful utility- (Among others, Law 14/2003).

2.2. Degradation / precarization of work as the other phenomenon of *trivialization* of the employee status

The other phenomenon of banalization of the function assigned to the employee status has to do with the legislative reforms implemented from 1984 until today, so many times promoted and elaborated by the Executive Power in response *to the extraordinary and urgent need*(s) created by each economic crisis (Article 86 Spanish Constitution). This have resulted in more than 60 labour reforms, from 1984 to today, sharing two common characteristics.

The first has to do with the force-idea that the flexibilization (degradation) of working and employment conditions is totally necessary and functional to the activation of the economy, especially in times of crisis. In this regard, it is important to draw attention to the atypical Spanish situation in terms of the duration of the employment contract. Since the years 80 of the 20th century, the rate of temporality is around 30%. It means, among other things, that one third of the workers in Spain have a weakened protective status. To a large extent, this situation is due to the consolidated phenomenon of productive decentralization, whose regulation allows unequal treatment when the activity contracted does not coincide with the nuclear activity of the main company.

The second lies in the public employment policies implemented on the occasion of massive unemployment that have produced in Spain the successive economic crises. These have been based, on the one hand, on the creation of contractual pseudo-modalities with a legal status lower than that foreseen for the common labour relationship. In this regard, the more obvious example was *Temporary Contract to promote Employment Creation* (1984-1997) (lastly, *Indefinite Contract of support for entrepreneurs*, implemented by Law 3/2012, that provides until one-year trial period). On the other, in the segmentation and degradation of the protective status of certain groups of workers with “special difficulties” of access and permanence in employment - mainly women, young people and migrant workers-. In this way, common labour

relations have different protective statutes simply because they are women, young people or migrant workers.

To sum up, the Spanish experience clearly shows the factors that have motivated an intense trivialization of the function of the employee status, related ultimately to the social function of Labour Law, in form of a fragmentation of workers through the creation of pseudo-employee status, and the intense degradation of rights that gave meaning to the employee status as a guarantee of full citizenship for workers.

The precariousness in which work has been installed is, with great probability, the factor that has most contributed to the devaluation of the employee status[3].

> **a) The poverty risk rate in Spain is almost 30% (Eurostat); b) 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); c) Spain has a rate of temporality in the recruitment of 26.71% (Eurostat); d) high speed of rotation of the temporary contracts. In only four months, 4.748.542 "initial contracts" have been registered; e) 1.268.625 contracts have a duration equal to or less than 7 days; f) 30.96% of the temporary contracts - almost a million and a half of contracts - are (no volunteering) part-time and; g) in Spain, 14.1% of workers are at risk of hardship. "Unemployment is not what defines poverty". "The largest group is that of the people employed." (European Network for the fight against poverty and social exclusion).**

5

It is essential to point out, for the purposes of the analysis of the employee status in digital platforms, the fact that the Spanish judicial doctrine has satisfactorily redressed those corporate outrages, based on the fraudulent employer conduct of denying the employee status to workers whose work activity complied with the constitutive requirements of that employee (Article 1.1 ET).

3. Working on digital platforms and Employee status

The impact of digital platforms in the recognition of employee status is more sensationalist than real. The incorporation of digital technologies to recent business models has not significantly altered the way in which the work activity is executed, in relation to the classic criteria of personal work, paid, dependent and alienated.

At a general level, the most relevant legal debate was on the real role of the entrepreneur of digital platforms. That is, to inquire about the true nature of the

[3] The origin of this socio-labour situation lies in the austerity policies imposed by the Troika. A description of these policies in the Spanish case can be consulted in A. BAYLOS & F. TRILLO, "Social dimension of European Union and the situation of the labour law in the member states: evaluation of the Spanish experience (http://revistas.uned.es/index.php/REPPP/article/view/10779)

business subject, as an intermediator in a certain market - connecting demand and supply - or as a provider of a service. This question was solved by the Court of Justice of the Union in the Uber Case (December 20th, 2017), stating that "the intermediation service is an integral part of a global service whose main element is a transport service from which the business profit"[4].

The importance of this matter lies, in our view, in the ability to consolidate the model of labour regulation imposed by austerity policies, still in force in Spain. The work in digital platforms aims to consolidate and expand a productive model where business profit is obtained mainly from the intensification of working conditions (internal devaluation / salary devaluation). But also, digital platforms propose a consumption model that allows the expansion of that one. For this, after almost a decade of experimentation with this model, it is essential to allow workers stable access to consumption. A consumption model that does not differ from the "traditional" in terms of the supply of goods and services, but of the quality of these. In this sense, the employee status constitutes an obstacle to the achievement of such economic and business purposes.

It is in this key that, in our opinion, the subject matter of this presentation must be analysed.

Again, the Spanish experience is interesting because it clearly shows the business idea (dream?) of reduction / elimination of labour costs. The way that has been understood most effectively has been the expulsion of workers from the field of application of Labour Law. The current employment situation in Spain provides favourable conditions (precariousness and unemployment) for the achievement of these ends.

3.1. Employee status juridical conflicts in the Spanish experience

In order to explain juridical conflicts in the field of employee status it has decided to describe, firstly, the facts of both cases, Deliveroo and Glovo. The purpose of the description of the facts is none other than to point out the concomitance between both cases. This will allow us, in a second moment, to analyse conflicting points in relation to the employee status doctrine of the Spanish Supreme Court.

Deliveroo Case Facts:

- The 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.

[4] A commentary on the decision of the Court of Justice of the European Union in F. TRILLO, “Uber, Information society or Transportation service provider? *Revista Derecho Social,* nº 80, pp. 127-138, 2018.

- "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.

Glovo Case Facts:

- In this case, the 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.

As examined, both cases have concomitant assumptions in fact. However, the similarity between both cases, Deliveroo and Glovo, has not been sufficient for judicial decisions have coincided in the qualification of the contractual relationship.

So, how was it possible?

Each Court, Valencia and Madrid, have made a different interpretation about the more relevant requirements to qualify the contractual relation as subordinate work. In order to analyse both, it is essential a synthetic description of the doctrine in this regard, unified by the Spanish Supreme Court.

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".*

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.*

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.*

Last week, we have known another two Court decisions about employee status in Glovo company. The first one, deny the employee status conditions in the same terms examined above (Juzgados de lo Social nº 37 y 17 de Madrid). The second one (Juzgado de lo Social nº 33 de Madrid), more interesting in our view, includes a long reflection about the relations developed between client -qualified as employer by the Court- and the TRADE -qualified as employee by the Court- related to new digital technologies. In this regard, the judge, however, recalls that there are circumstances that the use of digital technologies does not change the employee status. Thus, the fact that Glovo unilaterally drafts the contract of employment to which the worker adheres indicates the working nature of the working relationship. In the same way, the use of one or other technologies by the employer does not avoid qualifying as null the dismissal of a worker as a result of exercising the right to strike in defense of the improvement of his working conditions.