Workers in legally constituted online platforms in France: should the courts determine their professional categorization?

Isabelle Desbarats

Electronic version

URL: <https://journals.openedition.org/rdctss/1413>

DOI: 10.4000/rdctss.1413

ISSN: 2262-9815

Publisher

Centre de droit comparé du travail et de la sécurité sociale

Printed version

Date of publication: 1 December 2019

Number of pages: 158-165

ISSN: 2117-4350

Electronic reference

Isabelle Desbarats, "Workers in legally constituted online platforms in France: should the courts determine their professional categorization?", *Revue de droit comparé du travail et de la sécurité sociale* [Online], 4 | 2019, Online since 01 November 2021, connection on 11 November 2021. URL: <http://journals.openedition.org/rdctss/1413> ; DOI: <https://doi.org/10.4000/rdctss.1413>

Revue de droit comparé du travail et de la sécurité sociale est mise à disposition selon les termes de la
Licence Creative Commons Attribution - Pas d'Utilisation Commerciale - Pas de Modification 4.0
International.

WORKERS IN LEGALLY CONSTITUTED ONLINE PLATFORMS IN FRANCE: SHOULD THE COURTS DETERMINE THEIR PROFESSIONAL CATEGORIZATION?

ISABELLE DESBARATS

Professor
Toulouse 1 Capitole University

«Should the “worker 2.0” be categorized as an employee or as an independent contractor¹? Although this is an «old new question», it is one that harkens back to old problems, the stakes of which have been renewed in the era of the digital platforms, defined by Article L. 111-71 of the Consumer Code as «any individual person or legal entity offering an online communication service to the public, on a professional basis, free of charge or for a fee, based on (...) brokering the establishment of relations among multiple parties for the sale of goods, the provision of services, or the exchange or sharing of content, goods or services». It is in fact rather an old issue, one that has to do with the limits of labour law; the approach taken to the matter by the courts has been to use legal subordination as the criterion that makes it possible to distinguish what constitutes an employment situation and what does not. But new challenges have also arisen, generated by the expansion of digital platforms, whose success has been based precisely on the elimination of this right by recourse to the independent contractor category².

In this context, and at a time when litigation against the platforms is proliferating at the initiative not only of individual workers but also of social welfare organizations, special consideration must be given to the decision just handed down in France by the Labour Chamber of the Supreme Court³. First of all, it was the first decision issued by that Court to deal with the

---

1 L. Gamet, «Le livreur à vélo, la plateforme et le droit du travail», *AJ Contrat*, 2019, p. 46.

2 M. Julien and E. Mazuyer, «Le droit du travail à l'épreuve des plateformes numériques», *Revue de Droit du Travail*, 2018, p.189.

3 *Droit Social*, 28 November 2018, no. 17-20.079, pending publication in Bulletin.

nature of the contractual relationship between workers and digital platforms, whereas, until then, only lower courts had ruled on the matter, and only in a piecemeal manner⁴; there was thus some uncertainty about the issue, but it has now been removed by the Supreme Court, with its ruling that an employment relationship does in fact exist. This action is all the more striking, furthermore, in that it has had the effect of making the courts a kind of guarantor of the rights of digital workers, and therefore a bulwark of those rights **(I)**. There may however be a risk that the scope of this solution could be restricted and the protective role of the courts bypassed by certain acts of the legislature⁵ **(II)**. At the heart of these issues is the role of the courts as arbitrator.

I - TODAY - THE COURTS: GUARANTOR OF THE RIGHTS OF DIGITAL WORKERS

The digital platform economy relies on the workers who use their services being categorized as independent contractors, so a response based on Article L 8221-6 item I of the Labour Code needed *a priori* to be made to the question of what conditions would require them to be recategorized as employees. Since these workers are presumed not to be bound to their clients by any employment contract in their execution of the activity underlying their enrolment or registration, it is necessary to establish the existence of a relationship of «permanent legal subordination» with respect to that client in order for such a recategorization to take place; the establishment of such a relationship is all the more in the worker's interest when the platform enters compulsory liquidation, as was the case here. However, whereas the Labour Chamber was attentive to the existence of the relationship of legal subordination, no mention was made of the requirement of permanence. The result is a solution that, on the one hand, seems characteristic of the «classic approach»⁶ while also presenting an innovative aspect **(A)**, and on the other seems both thorough and pragmatic **(B)**; ultimately, it is a nuanced solution, but one whose impact on the collaborative economy domain should not be underestimated⁷, as it was in fact described as a «terrible blow» by the Observatoire du Travail Indépendant⁸.

A - THE (RE)CATEGORIZATION OF RELATIONS ESTABLISHED VIA A DIGITAL PLATFORM: A CLASSIC ANALYSIS WITH A MODERN ASPECT

How did it work? A worker, registered as an independent contractor, would enter into a service contract with the company *Take Eat Easy* to provide home delivery of meals for a fee. To carry out this activity, the company used a platform and an application to connect the partner restaurants, customers ordering meals through the platform, and the bike delivery agents. Having been injured in various traffic accidents, a delivery agent brought a suit before the Paris Employment Tribunal, seeking to have his contract recategorized as

-
- 4 A. Fabre, «Les travailleurs des plateformes sont-ils des salariés? Premières réponses frileuses des juges français», *Droit Social*, 2018, p. 547.
  - 5 L. Bento de Carvalho and S. Tourneaux, «Actualité du régime juridique du contrat de travail», *Droit Social*, 2019, p. 57.
  - 6 J-Y. Huglo, «Take Eat Easy: une application classique du lien de subordination», *Semaine Sociale Lamy*, 24 december 2018, no. 1842-1843.
  - 7 V. Roche, «Travailleurs indépendants et plateformes numériques: l'union impossible? Le cas de Take Eat Easy», *JCP, G*, 21 January 2019, no. 3, p. 46.
  - 8 *Liaisons sociales Quotidien - L'actualité*, 3 December 2018, no. 17705.

an employment contract, but the lower court found his claims inadmissible. Meanwhile, the company *Take Eat Easy* went into compulsory liquidation, but the liquidator refused to include among the liabilities of the liquidation the delivery agent's claim for payment of deliveries performed, on grounds that the agent had never been an employee of the company⁹.

So, when the Supreme Court was called upon to make a finding as to whether or not a relationship of subordination existed between the delivery agent and the platform, it took an approach that was simultaneously classic and modernist. Classic, since it made reference, in view of Article L. 8221-6, II of the Labour Code, to the two principles that characterize the existence of a contractual employment relationship: «the existence of an employment relationship does not depend upon the expressed will of the parties or on such name as they may have given to their agreement, but upon the *de facto* conditions under which the workers engage in their activity»¹⁰; «what characterizes a relationship of subordination is the performance of work under the authority of an employer with the power to issue orders, give instructions, oversee their execution, and punish non-compliance by persons under their authority»¹¹ **(1)**. And innovative as well, because it attributes a significant role to the system that serves as the keystone of uberized work: geolocation **(2)**.

1) «No revolutionary expectations; no new principles; a well-known legal text cited for support [...] The ruling of 28 November 2018 is hardly very original from the perspective of labour law»¹² ... Undeniably, «the decision is a very sober one, [since] the Labour Chamber was content simply to reiterate the realistic basis and classic criteria of subordination, [without venturing onto] other less stable ground»¹³ particularly that of the employee's participation in an organized service: a choice approved by some¹⁴ but deemed unjustifiable by others¹⁵. It should be pointed out in this connection that «while it is within the sovereign power of lower court judges to evaluate the evidence and determine the presence or absence of a relationship of subordination, [...] it is the Supreme Court that must evaluate the underlying motives, to ensure that the appropriate legal consequences have been drawn from their findings»¹⁶ and indeed, it is precisely because the lower court failed to draw the appropriate consequences from the facts observed that the Supreme Court invalidated the lower courts' decision, declaring that it was not in compliance with the law, and finding that these facts did in fact demonstrate the existence of such a relationship.

So, first of all, although for the Appeals Court the fundamental issue preventing the delivery agent from being recategorized as an employee was the fact that he had the ability to choose his days and working hours, which implied «total freedom» exclusive of any subordination, that argument was rejected by the Supreme Court, reflecting the position of the Advocate General, which had held that such freedom is no more than one

9 See explanatory note to the ruling of 28 November 2018, *op.cit.*

10 «Labbanne», *Soc.*, 19 Dec. 2000, no. 98-40.572, *Bull. civ. V*, no. 437.

11 «Société générale», *Soc.*, 13 Nov. 1996, no. 94-13.187, *Bull. civ. V*, no. 386.

12 See V. Roche, *op.cit.*, and J-Ph. Lhernould, «Les plateformes électroniques de mise en relation rattrapées par le salariat», *Jurisprudence Sociale Lamy*, 28 January 2019, no. 468.

13 L. Bento de Carvalho and S. Tourneaux, *op.cit.*

14 J-Y. Huglo, *op.cit.*

15 L. Bento de Carvalho and S. Tourneaux, *op.cit.*

16 B. Bossu, «Plateforme numérique: le droit du travail fait de la résistance», *JCP, E*, 2019, no. 3, p. 1031.

out of many indications for determining the absence of a relationship of subordination¹⁷. We note furthermore that the Supreme Court «mentioned two elements which, in its view, should have led the Appeals Court to find the existence of [such] a relationship, and thus to recategorize the service provision agreement as an employment contract»¹⁸.

The first involved the fact that the platform had power to impose sanctions, as evidenced by its ability to apply several graduated penalties to non-compliant delivery agents, up to and including their de-listing: that system had been considered insignificant by the lower court judges, and justly so according to some observers¹⁹. The second criteria involved the existence of a «geolocation system allowing the company's to monitor the delivery agent's position in real time and count the total number of kilometres he or she had travelled»: this is an essential element, part of the «DNA»²⁰ of the digital platforms, the use of which renders innovative a solution that would otherwise be commonplace.

The Labour Chamber makes clear in its explanatory statement that it attributes an important role to the geolocation device, since the conditions of its use show that the Principal's role cannot be reduced to one of mere brokerage²¹. Much to the contrary, those conditions demonstrate «real supervisory power over the routes taken, and the sanction system [illustrates] the disciplinary power of an employer»²²: this analysis, however, remained unconvincing for some, for whom it was not clear «in what sense geolocating the delivery agent in order to calculate his or her remuneration according to the number of kilometres travelled [would constitute] proof of subordination»²³, as well as for others, who complained in turn that the «power to issue orders and directives» had «not been clearly proved»²⁴.

The Supreme Court, however, determined that such findings were unavoidable. In holding that no relationship of subordination existed, the Appeals Court failed to draw the full legal consequences from its findings, from which nevertheless it can be deduced that a supervisory and directive authority did indeed exist. However, the recategorization brought about by the Supreme Court is not reducible exclusively to an application of the criteria for a relationship of subordination as defined by law, even if adjusted to suit the specificities of the digital platforms; it is also based on strict legalism - because it makes no reference to the requirement of «permanence» - a notion characteristic of legal pragmatism.

B - THE CHANGE FROM «INDEPENDENT CONTRACTOR» TO «EMPLOYEE»: A STRICT YET PRAGMATIC JUSTIFICATION

Though it contradicts the reasoning hitherto generally accepted by the lower courts²⁵, the solution adopted in the Take Eat Easy ruling is hardly intended to apply to all the platforms: «a [...] generalization [which would contradict the] realistic basis that "recategorization" must

17 Opinion of C. Courcol-Bouchard, Cass. Soc., 28 Nov. 2018, no. 17-20.079, *JCP, S*, 2018, p. 1398.

18 V. Roche, *op.cit.*

19 L. Gamet, *op.cit.*

20 F. Champeaux, «Travailleurs des plateformes : la CJUE probablement saisie», *Semaine Sociale Lamy*, 4 February 2019, no. 1847.

21 CJUE, 20 Dec. 2017, aff. C-434/15, para. 38.

22 V. Roche, *op.cit.*

23 L. Gamet, *op.cit.*

24 L. Bento de Carvalho and S. Tourneaux, *op.cit.*

25 A. Fabre, «Le droit du travail peut-il répondre aux défis de l'ubérisation », *Revue du Droit du Travail*, 2017, p. 167.

be grounded in the de facto conditions under which the activity is exercised». Consequently, each platform should «be led to examine the validity of its model based on the guidelines formulated by the Supreme Court»²⁶, particularly with regard to any system appearing to have a disciplinary capacity, and the conditions of use of any geolocation system. In addition, it should be noted that although the ruling of 28 November 2018 is silent on certain elements likely to have an impact on the employment relationship recategorization process, those elements nevertheless must be taken into consideration by any platform wishing to avoid such a process. In particular, these include the «ownership of the equipment used for the performance of the service, [the] impact of the ratings attributed by consumers to delivery agents, [the] integration into an organized service, [the] determination of prices, etc.»²⁷, as well as any possible fraudulent circumvention of law²⁸.

Yet, not all relationships with digital platforms will systematically need to be recategorized; the case law is far from firmly established on the matter, especially since cases in the field remain pending before the Second Civil Chamber and Criminal Chamber, and their positions are still unknown. For the moment, however, the facts speak for themselves: the Labour Chamber has chosen a nuanced solution that is simultaneously classic and innovative, strict and pragmatic; it is a solution that may be problematic for these economic operators, but some consider it a «courageous» one at a time when «independent contracting work [seems to be taking over] as the dominant model of activity for electronic brokerage platforms»²⁹, it is thus a solution favourable to digital workers, but how far-reaching it will be is uncertain. The converging approaches attempted by lawmakers since 2016 may ultimately risk limiting the scope of this jurisprudential analysis or circumventing it entirely, though it is an analysis which is in fact part of a global movement toward recategorization³⁰.

II - THE FUTURE - WILL A LEGALLY CONSTITUTED PROFESSIONAL CATEGORY FOR DIGITAL WORKERS REPLACE THE ROLE OF THE COURTS?

To the question of how relations between workers and legally constituted online platforms should be understood, lawmakers seem intent on opting for a response manifestly aimed at helping to secure the platforms against the possible risk of court-ordered recategorization; this has been apparent in various initiatives taken since 2016 **(A)**. These have tacitly provided support for the independent contractor status, as corroborated by the increase, as of 1 January 2018, in the income ceilings set for independent contractor activity³¹, which can be interpreted as «a sign of support for “non-wage work” in the context of the emerging collaborative economy»³². But might the development of such a legal status perhaps ultimately reduce the scope of the previously

---

26 V. Roche, *op.cit.*

27 V. Roche, *op.cit.*

28 A. Jeammaud, «Uber, Deliveroo: requalification des contrats ou dénonciation d’une fraude à la loi?», *Semaine Sociale*, 12 February 2018, no. 1802.

29 J-Ph. Lhernould, *op.cit.*

30 B. Gomez, «Take Eat Easy: une première requalification en faveur des travailleurs des plateformes», *Semaine Sociale*, 17 December 2018, no. 1841.

31 General Tax Code, Art 50-0 (from €33,200 to €70,000 for services rendered).

32 J-Ph. Lhernould, *op.cit.*

analysed jurisprudence and the protective role of the courts? It is a valid question, but the answer is uncertain **(B)**.

A - THE DEVELOPMENT OF A LEGALLY CONSTITUTED PROFESSIONAL CATEGORY FOR DIGITAL WORKERS: A RECURRING OBJECTIVE OF LAWMAKERS

In 2016, without taking a position on the legal status of Uberized workers, and without creating a presumption of non-waged labour, lawmakers³³ for the first time imposed certain obligations on digital platforms in view of ensuring their social responsibility, by including in the Labour Code certain new rights and obligations for operators³⁴. These rights include the right of access to vocational training and the right to accreditation of prior work experience³⁵, with the corresponding costs being borne by the platform under conditions set forth by decree³⁶; the right to form and join a trade union³⁷, and the right to instigate collective refusals to provide service so as to press labour demands, without this being deemed, except in case of abuse, as incurring contractual liability nor justifying a break of established relations with the platform³⁸. The obligations in turn include the requirement for the platform to pay contributions toward voluntary insurance (occupational injury or illness) policies subscribed by workers³⁹.

The law on «Professional Futures»⁴⁰ then more recently had to pass through another phase: its growth was impeded by the Constitutional Council⁴¹, but it came back on the agenda thanks to the framework law on mobility (the «LOM» bill), presented at the 26 November 2018 meeting of the Council of Ministers. Article 20 of that bill provides that all platforms would have to develop a charter establishing the terms and procedures for their exercise of social responsibility, defining their rights and obligations as well as those of the workers with whom they have a relationship.

Intended to be published on the platform's website and attached to the contracts or general terms of use binding it to its workers, this charter - optional (?)⁴² and intended to be like a «code of ethics» in nature⁴³ - would specify in particular:

- conditions for the exercise of professional activity among workers using the platform, particularly the rules governing the establishment of their relations with users;
- terms intended to ensure they receive a reasonable price for their services;
- procedures for the development of their professional skills and to secure their career advancement;

33 Law no. 2016-1088 of 8 August 2016 on labour, the modernization of social dialogue and career path security, *JO*, 9 August 2016, text no. 3.

34 Art L. 7341-1 to L. 7341-6. Decree no. 2017-774 of 4 May 2017 on the social responsibility of the electronic brokerage platforms.

35 Labour Code, Art L 6111-1 and L 6411-1.

36 Labour Code, Art L. 7342-4.

37 Labour Code, Art. L. 7342-6.

38 Labour Code, Art. L. 7342-5.

39 Labour Code, Art. L. 7342-2.

40 Law no. 2018-771, 5 Sept. 2018, *JO*, 6 Sept. 2018, text no. 1.

41 Cons. const., 4 Sept. 2018, no. 2018-769 DC, *JurisData* no. 2018-015955.

42 In this regard, see G. Loiseau, «Travailleurs des plateformes numériques: le droit du travail en embuscade», *JCP*, S, 2018, 1398.

43 M. Peyronnet, «Take Eat Easy contrôle et sanctionne des salariés», *Revue de Droit du Travail*, 2019, p. 36.

- measures to help improve working conditions and prevent occupational hazards;
- procedures for information sharing and dialogue between the platform and the workers concerning the conditions for the exercise of their professional activity;
- the procedures by which workers will be informed of any change in the conditions of their exercise of professional activity;
- the quality of service expected on each platform and the circumstances likely to incur a termination of commercial relations as well as the guarantees provided to workers in such case;
- the supplementary social protection guarantees negotiated by the platform that its workers can benefit from, particularly including coverage for the risks of accidental death, physical injury or damages related to maternity, disability or temporary inability to work or incapacitation, as well as benefits in the form of retirement pensions, late-career or retirement allowances or bonuses.

And in exchange for all that? The text provides that the establishment of such a charter and respect for these commitments «[shall not] in itself constitute the existence of a legal relationship of subordination between the platform and the workers». In other words, «the conditions of the workers' exercise of occupational activity shall not be construed as justifying the recategorization of their contracts as salaried employment, where (such) conditions, firstly, are set forth in the charter provided by the platform, and, secondly, can be linked to one of the topics enumerated by the text of the law». «The charter would therefore not only protect the workers by offering them a more advantageous social status, it would also protect the platforms against the risk of recategorization»⁴⁴.

Under these circumstances, and considering that the «bill is part of the current trend towards flexibilizing labour relations»⁴⁵ are we to understand that the role of the courts is likely to be eliminated, to be replaced by the legally constituted professional category now being developed for uberized workers? It remains to be seen.

B - THE ADOPTION OF A LEGALLY CONSTITUTED PROFESSIONAL CATEGORY FOR DIGITAL WORKERS: AN ALTERNATIVE TO OVERSIGHT BY THE COURTS?

While it is true that the introduction of a legally constituted professional category for digital workers would a priori exclude any subsequent intervention by the courts, there are still two reasons to imagine that the courts might continue to play such a role, much to the chagrin of course of the digital operators concerned about legal certainty. The fact is that, for the latter, a court-ordered recategorization of these relationships as salaried employment would be fraught with consequences, since the following could result as well: convictions for undeclared work, as provided under Article L. 8224-1 and seq. of the Labour Code; debt recovery actions conducted by URSSAF; payment of employment contract-related charges (payroll adjustments, pay in lieu of leave, bonuses, etc.), as well as contract termination-related charges (pay in lieu of notice, severance pay, lump sum penalty for undeclared work, etc.)

Such action by the courts may thus be made possible, first of all, by the introduction of a new type of presumption of non-salaried employment, the scope of which is, however, uncertain. Indeed: «would this presumption be rebuttable, or would it be irrefutable? If the former is the case, could it be overturned by proof of the existence of a "permanent"

---

44 V. Roche, *op.cit.*

45 B. Bossu, *op.cit.*

legally constituted relationship of subordination? If so, it will still be indispensable to remain attentive to developments in case law regarding the interpretation of this notion»⁴⁶.

The second reason is pointed out by M. Loiseau⁴⁷, who states that the establishment of such a presumption «would not prevent a court from finding that such a relationship existed, in light of the factual circumstances, as soon as the elements upon which it is based were not the same as those with regard to which the platform had made commitments»; this capacity for intervention could prove quite significant, some argue, if the courts were to deem that economic dependence should be taken into consideration in determining whether a relationship of subordination exists.

This is probably the reason why, spurred on by the courts, and even whilst confirming their professional categorization as independent contractors, lawmakers have seen fit to strengthen the rights of digital workers to be guaranteed by the platforms, so as to limit the possible grounds on which the courts might possibly order the recategorization of these contractual relationships as employment relationships⁴⁸. Yet, the public authorities seem to favour a «logic of hybridization»⁴⁹ a trend that has clearly been initiated, but whose outcome remains uncertain for two overlapping reasons. On the one hand, it «highlights the discrepancy between two opposing dynamics (legal defence of the employment relationship/legal framework of the non-employment relationship), [which] will need to be addressed in order to establish a complete and consistent legally-constituted professional category for platform workers»⁵⁰ - a goal that certainly needs to be achieved in a context where the number of small independent contractors is steadily increasing, though their legally-constituted professional category, many say, often favours unfair competition⁵¹. On the other hand, however, there is also the question of how far to go in this process of bringing professional categories into alignment, from the perspective both of labour law and of social protection, an alignment that is ultimately illustrated by the extension, under specific conditions, of unemployment compensation to independent contractors, as provided under Art. 51 of Law no. 2018-771 of 5 September 2018. Indeed, at this rate, online platform workers may one day soon no longer have a «great interest in requesting their recategorization as employees»⁵², least with regard to social protections: for such a development to be credible, the online platforms must «pay their share to the welfare state»⁵³, even though their «business model» is based on the contrary objective of limiting their social security contributions⁵⁴.

46 L. Bento de Carvalho and S. Tourneaux, *op.cit.*

47 G. Loiseau, *op.cit.*

48 G. Loiseau, *op.cit.*

49 J-Ph. Lhernould, *op.cit.*

50 J-Ph. Lhernould, *op.cit.*

51 «Micro entrepreneurs. Un succès en trompe-l'œil», *Le Monde*, 31 January 2019.

52 A. Taché (cited), «L'exécutif plaide pour une protection sociale des travailleurs «ubérisés»», *Le Monde*, 10 May 2018.

53 *Ibid.*

54 O. Montel, «L'économie des plateformes : enjeux pour la croissance, le travail, l'emploi et les politiques publiques», *Dares Analyses*, 9 August 2017, no. 2017, p. 213.