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AMERICAN CASE LAW AND THE UBERIZATION OF WORK

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The distinction between self-employed and salaried workers is a recurring theme in labour tribunal litigation insofar as the employment contract is the cornerstone of social law and requires its application. The development of technology that has enabled the emergence of Internet platforms and mobile applications has given new impetus to this issue. Economic actors such as Uber, Deliveroo, Lyft, Amazon Mechanical Turk, Freelancer.com are a priori only intermediaries putting two potential contractors in contact. In reality, these are economic actors who will play an increasingly important role in the lives of workers. According to a survey by the renowned Gallup Institute¹, more than a third (36%) of American workers are affected by this new form of employment, representing 57 million people.

With the rise of these platforms, more and more workers are using them to benefit from additional pay. The profiles of these workers are very diverse: some use them between two permanent contracts, others during unpaid layoffs, and still others to increase their income by using the flexibility offered by these employers. The latter are interested because the growing popularity of the collaborative economy, as a point source of work, allows some companies to build up a constantly renewed pool of workers without any duty in the event of a breakdown in the contractual relationship.

1 S. Mcfeely, R. Pendell, «What Workplace Leaders Can Learn From the Real Gig Economy», 16th august 2018: <https://www.gallup.com/workplace/240929/workplace-leaders-learn-real-gig-economy.aspx>

Indeed, assuming that the workers of these companies are self-employed, they do not offer any of the benefits to which an employee is entitled: health insurance, pension schemes and paid leave. It also allows companies to avoid paying social security contributions, unemployment insurance and workers' compensation insurance. This qualification is therefore particularly lucrative for employers, but it is currently encountering increasing resistance from their workforce, which is taking legal action to have their employment relationship reclassified as salaried.

Requests for requalification are made in two ways. Either an application is filed by an individual before a state or federal court alleging the violation of rights reserved for employees such as the payment of overtime, or a public body is seized because, in some States, the qualification of employee or self-employed is of direct interest to the labour administration. The amounts claimed in damages are particularly significant because of the possibility of bringing a class action.

The difficulty faced by applicants is the divergence of definitions concerning the status of employee. Each State has adopted its own, whether by case law or administrative decision. Although there is a common point between these definitions (the degree of control of the company over the worker), they use different criteria so that it is more or less difficult for workers in a company to claim their status as employees depending on the country in which they work.

In addition, some federal laws granting rights to employees have their own definitions. This is the case with the National Labor Relations Act, which provides guarantees for collective bargaining. In order to be eligible for it, the worker must satisfy the following definition: He must be «a person employed to provide services for the benefit of others and who, in the exercise of his activity, is subject to the control of the other party»². To this legal definition are added 11 optional criteria that are indicators of the existence of a wage relationship but are not decisive. Among these indicators: the extent of control exercised over the work performance, the duration of the engagement, the question of whether the work is done with the company's tools...

The emergence of this litigation will be the subject of a first part **(I)** before analysing the changes in case law **(II)** and, finally, the possible developments **(III)**.

I - THE EMERGENCE OF LITIGATION IN THE PARTICIPATORY ECONOMY

In recent years, the number of legal claims has increased in the states of New York and California, not surprisingly enough given that labour law is relatively favourable to employees. It was therefore in the applicants' interest to have a court in that State admit the existence of an employee relationship. In order to determine whether a worker is properly qualified, both States focus on the level of control that the company has over him or her. California has until recently used the economic reality test (also known as the multifactorial control test), which emphasizes the employer's right to control the employee, both in terms

2 This definition is not contained in the Act itself, but the body responsible for monitoring the Act, the National Labor Relations Board, uses the definition of employee contained in Article 220 of the Restatement (Second) of Agency.

of the work performed and the way it is performed, and also takes into account a number of factors. New York States use a similar approach. To determine whether the worker is self-employed, it must be established that he or she is exempt from supervision, direction and control in the performance of his or her duties by taking into account a number of factors, such as the fact that he or she determines his or her own schedule and provides services to other companies.

The first cases did not give rise to decisions insofar as the applicants agreed to settle, making it impossible for the judge to adapt his case law to the gig economy. However, the size of the sums paid by the companies shows that this issue is destined to become a major issue in the case law.

For example, in September 2013³, several Lyft drivers filed a class action alleging that they had been wrongly classified as independent contractors and seeking wages and compensation for professional expenses. Lyft is a company that provides a service similar to that of Uber by bringing together people seeking to be driven and drivers. Rejecting the claims, the defendant argued that drivers could access the platform at any time and freely determine their geographical area of intervention. They also used their own equipment and were paid after each race, not by the week or month.

The complainants, on the other hand, argued that Lyft controlled the performance of their service and could terminate the relationship at any time. Indeed, this company did not hesitate to break its contractual commitments with drivers deemed recalcitrant to Lyft's instructions. Indeed, the defendant had provided the drivers with documents explaining how to do the work, including a driver's guide and a reminder of the highway code.

Initially, the decision was to be rendered by a professional magistrate who refused to decide and chose to refer the case to a popular jury. The judge did so because, in his opinion, there were valid arguments on both sides. On the one hand, Lyft did exercise a power of control and sanction over the workers, but also, on the other hand, the workers had a great deal of independence insofar as they could freely determine their working time.

Was it the fear of facing a popular jury that led Lyft to compromise? In any event, the defendant made a first settlement offer to extinguish the action: the payment of \$12.25 millions. This sum was refused by the judge as insufficient. The decision is explained by the fact that the action taken was a collective action and that the number of people potentially included in the group was 100,000. In relation to the number of beneficiaries, the compensation offered was therefore considered «grossly insufficient».

The defendant then proposed 27 millions and this was accepted by the court in July 2016, on the additional condition that Lyft change three things in its management of workers:

- He could no longer arbitrarily deactivate the drivers' accounts and could only do so for certain reasons communicated in advance;
- It should set up a dispute resolution system in the company allowing workers to assert their claims without having to resort to the courts;
- Drivers will be able to benefit from additional information on passengers before deciding whether or not to accept their travel request.

3 *Cotter v. Lyft Inc.*, no. 13-cv-04065-VC (N.D. Cal.).

While this decision appears to be financially satisfactory to the applicants, it was not of such a nature as to help the subsequent applicants because one of the counterparts obtained by Lyft, in addition to the abandonment of the legal action, was that the drivers did not obtain the status of employees.

In March 2015⁴, workers under contract with Postmates also brought a group action before the judge requesting that their relationship be reclassified as an employment relationship and claiming the corresponding benefit of the legal provisions on wages. Postmates, a meal delivery service, had, like Deliveroo, recourse to non-professional drivers who had accepted their initial status as self-employed before changing their minds about the material difficulties caused by this status. Here again, the parties settled for \$8.75 millions and the claimants obtained additional benefits such as insurance in the event of a work accident. However, as in the above-mentioned case, the applicants waived the qualification of employees.

In November 2016⁵, a group action was brought against Uber by some of its drivers claiming to be employees. As such, they demanded the application of New York labour law on wages, involving damages for non-compliance with minimum wage legislation, payment of overtime, tips and reimbursement of professional expenses. Procedural reasons led to the failure of some of the claims, so Uber only had to compensate three drivers for up to \$40,000.

II - A DIVIDED CASE LAW

But the American judge could not be kept away indefinitely from the problem of the status of workers through court settlements. The first decisions on the legal qualification of these contractual commitments were not favourable to the applicants. However, more recently, the California Supreme Court has given hope to workers in the gig economy.

Among the decisions rejecting employee status is that of Judge Michael Baylson of the Pennsylvania District Court, rendered in April 2018⁶. According to this judgment, Uber limousine drivers must be considered as self-employed workers. The plaintiffs, who had grouped their claims on behalf of all of Uber's limousine drivers, UberBLACK, worked in Philadelphia. Relying on federal law (the Fair Labor Standards Act), they demanded overtime pay and the enforcement of minimum wage legislation. They were dismissed on the grounds that Uber did not exercise sufficient control over his drivers. Drivers had the necessary independence to work when they wanted, where they wanted, and were free to go about their personal business between trips.

However, there has been an evolution in the position of judges and in this respect, the example of Californian case law is particularly relevant.

4 *Singer v. Postmates Inc.*, no. 4: 15-cv-01284-JSW (N.D. Cal.).

5 *Burgos v. Uber Technologies Inc.*, no. 1: 16-cv-08512 (S.D.N.Y.).

6 *Razak v. Uber Technologies Inc.*, U.S. District Court for the Eastern District of Pennsylvania, Case no. 2:16-cv-00573.

UBERIZATION OF THE WORK

The distinction between an employee and a self-employed worker was at the heart of many decisions before the solution was decided in California by the California Supreme Court in the 1989 Borello decision on a cucumber farmer⁷. In this decision, the California Supreme Court listed the factors to be considered in order to distinguish between a self-employed worker and an employee. This set of clues is presented in the form of questions:

- Does the employer provide tools and a workplace?
- Does the worker have to invest in equipment, materials or aids?
- Does the service require special expertise?
- Does the worker share the company's profits and losses?
- Is the worker's activity similar to that carried out in the company?
- Is the work performed under the direction of the employer?

From all these criteria emerge two essential conditions for the recognition of employee status:

- Work personally performed by the employee in exchange for remuneration;
- A power of control of the employer.

It is on the basis of this traditional jurisprudence that the first Californian judges ruled when they received requests for reclassification as employment contracts.

Thus, on 8 February 2018, a California District Court dismissed a GrubHub contractor claiming to be an employee. GrubHub is a company specializing in meal delivery that brings together restaurant owners and customers interested in buying food. Delivery is made by couriers, self-employed workers, who own their own vehicle or bicycle. One of the drivers, Mr. Lawson, sued for violation of minimum wage legislation and non-payment of overtime, and also claimed reimbursement of transportation costs. These claims for compensation could only be successful if the judge granted the applicant the status of employee. The Court adopted the opposite solution because of GrubHub's weak control over the worker. Indeed, the platform did not carry out any kind of control over the applicant's work. In addition, no instructions were given to him regarding the delivery time or the road to be taken. Finally, the driver could freely decide on his schedule by temporarily deactivating his account and reactivating it whenever he wished.

By a unanimous decision handed down on 30 April 2018⁸, the Supreme Court of this State, creating surprise, put an end to the now outdated Borello case law by adopting a new definition of employment contract, broad enough to potentially include workers on collaborative economy platforms. This decision, described as an «earthquake»⁹, potentially calls into question the employment models used by Uber, Lyft and dozens of other companies using self-employed workers.

7 *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) - 256 Cal. Rptr. 543, 48 Cal. 3d 341, 769 P.2d 399.

8 *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*.

9 L. Sumagaysay and E. Baron, «Gig economy 'earthquake': California Supreme Court rules on worker classification The Mercury News», 1st may 2018: <https://www.mercurynews.com/2018/05/01/gig-economy-earthquake-california-supreme-court-rules-on-worker-classification/>

In its 85-page judgment, the highest court in that State rejected the classic test that distinguishes employees from self-employed workers in favour of a simpler definition, called «ABC», already used in New Jersey and Massachusetts. Under the new test, a worker can only be considered an independent contractor if three criteria are met:

- The company is able to establish that the applicant has full control over the work performed;
- His work includes tasks that do not fall within the company's usual field of competence;
- The worker usually carries out his activity in complete independence in a company whose activity competes with that of the employer who hired him.

The second criterion is particularly problematic for employer platforms because it is impossible for them to prove that the activity of the deliverymen or drivers is foreign to the company's main activity. Thus, delivery is Deliveroo's main activity, as well as the conduct of private individuals is Uber's main activity. In so doing, the judge makes it difficult to classify the workers on these platforms as self-employed and no longer allows them to exempt themselves from their legal obligations as employers.

According to some experts¹⁰, this decision will have significant legal consequences because it should trigger an avalanche of legal proceedings against various companies that use falsely qualified self-employed workers. Societies involved in the gig economy are mainly targeted, but they are not the only ones. Alongside Uber, employers such as McDonald's and Fedex could be called to appear before the judge because of this judicial reversal.

III - POSSIBLE DEVELOPMENTS

This divergent case law has led the doctrine and the legislator to react. First, some authors, rescuing the judges, proposed a new definition of the status of employee that would better reflect modern forms of employment. Thus Professor Grant Brown¹¹ proposes a new test with two parts:

- Can the worker, through his or her skills, improve his or her economic situation in the company?
- Does the employee's activity overlap with the company's activity?

The first step of this test is specially adapted for low-skilled workers who have no way to progress hierarchically. Uber drivers have no professional horizon other than driving. In addition, this lack of specific skills makes it impossible to improve their working conditions because they are not in a position to negotiate tariffs.

The second step is already used by the judge. It consists in checking whether the worker's activity corresponds to that of the company.

¹⁰ *Ibid.*

¹¹ G. E. Brown, «An Uberdilemma: Employees And Independent Contractors In The Sharing Economy», *Maryland Law Review*, 2006, vol. 75, p. 15.

An application of the new test to workers on participatory platforms will most certainly lead to the reclassification of their relationship as an employment contract.

Another part of American doctrine advocates the creation of a hybrid status that would borrow from both the self-employed and the employee categories. In a way, these authors are calling for the creation of a third way. Megan Carboni¹² uses the terminology of «dependent contact person», while Professors Seth Harris and Alan Krueger¹³ would prefer the term «independent employees». These atypical workers, without being able to claim all the rights of employees, should be granted some of their prerogatives, in particular the right to organize and the right to collective bargaining.

This proposal has not yet met with any success. It is not up to the judge to make such a significant change and the legislator, rather than this third way, intervened by classifying collaborative platform workers as self-employed. North Carolina, Arkansas, and Indiana have intervened in this direction¹⁴.

Other public authorities, without commenting on the qualification of these workers, granted them additional rights that were immediately challenged by the collaborative platforms. For example, in December 2015, the city of Seattle adopted an ordinance allowing Uber drivers to join a union. The idea behind this measure is to put these atypical workers in a position to collectively negotiate better wages. This order was appealed on the initiative of the American Chamber of Commerce, which has Uber and Lyft among its members.

It argued that by allowing drivers to negotiate their wages, which are based on passenger fares, Seattle would allow them to set prices in violation of federal antitrust legislation. The first judge dismissed it, but on appeal, the applicant was successful. On May 11, 2018, a San Francisco-based Federal Court of Appeal overturned the judgment on the grounds that Seattle had violated federal law¹⁵.

In conclusion, although some American authors deplore the «harmful» effects of labour law on the collaborative economy¹⁶, others ironically point out that this economy, which is sometimes described flatteringly as a sharing economy, is not by its very nature. This expression of «sharing economy» is inappropriate for a sector that is fundamentally commercial and not focused on generosity or altruism¹⁷. Similarly, the apparent freedom

12 M. Carboni, «A New Class of Worker for the Sharing Economy», *Richmond Journal of Law & Technology*, 2016, vol. 22, no. 4, p. 1.

13 S. D. Harris, A. B. Krueger, «A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The 'Independent Worker'», *The Hamilton Project*, Discussion Paper 2015-10: http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf

14 T. Devlin, S. Chiu, «Is Your Uber Driver or Lyfter an Employee or Independent Contractor and Why Does It Matter?», *Westlaw's Secondary Source Analytical Content, Emerging Areas of Practice Series*, 2018.

15 *U.S. Chamber of Commerce v. City of Seattle*, 9th U.S. Circuit Court of Appeals, n°17-35640.

16 E. Atmore, «Killing the Goose That Laid the Golden Egg: Outdated Employment Laws Are Destroying the Gig Economy», *Minnesota Law Review*, 2017, vol. 102, no. 2, p. 887.

17 S.-Y. Oei, «The Trouble with Gig Talk: Choice of Narrative and the Worker Classification Fights», *Law and Contemporary Problems*, 2018, vol. 81, no. 3, p. 107.

left to workers quickly turns into economic dependence toward a powerful platform against which only contract law is able to provide assistance to the most vulnerable contracting parties.

Labour law is without influence when these workers are unable to convince a judge that they are employees.

The creation of a specific status for workers on collaborative platforms is an option, but it faces two difficulties: on the one hand, it would be necessary to determine a minimum level of protection for both employees and these atypical workers. On the other hand, this solution meets with only very moderate enthusiasm if one excepts part of the doctrine. For example, at the 2015 White House Summit on Workers' Voices, President Obama warned against creating a third category of workers who, in his view, would receive only a «lighter version of the protections and rights provided by a union»¹⁸.

Pending legislative action to resolve this problem, American case law is reduced to using definitions, sometimes old, of the employment relationship to determine the status of these particular workers. However, even if it is not unanimous, the case law is sometimes bold, such as the Supreme Court of California, which reversed a well-established judicial trend to bring workers of these platforms into the employee category.

18 T. Devlin, S. Chiu, «Is Your Uber Driver or Lyfters an Employee or Independent Contractor and Why Does It Matter?», *op. cit.*