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Judgment designating Deliveroo 'rider' an employee and analysis of its impact on the 'gig economy'

On 1 June 2018 a Labour Court in Valencia[1] declared that one of Deliveroo's so-called 'riders' was an employee rather than self-employed. The person in question had been working for Deliveroo for a year when he received an email in which he learnt that Deliveroo had terminated his services. The 'rider' considered this to be unfair dismissal and sued the company.

The merits of the case are as follows:

The irrelevance of the contract agreed on by the parties

According to well-established case-law in Spain,[2] the legality of the contract follows from its terms, regardless of how the parties may classify it. Consequently, in order to establish its legal status, attention must be paid to its content, as revealed by the activities performed in accordance with its terms rather than to the '*nomen iuris*' (legal term) used by the parties. Thus the legal designation of the employment relationship is not at the disposal of the parties, but depends upon the real content of the obligations it entails and compliance with the legal requirements that define the type of contract in question.

Accordingly, the Deliveroo judgment considers the fact that the 'rider' accepted and signed a civil contract to be irrelevant. Ultimately, the law overrides the will of the parties.

Guidelines of the firm

The Deliveroo case establishes that 'riders' work in accordance with the firm's instructions and conditions, fixed unilaterally by the latter. Specifically, the court believes it to be sufficiently proven that, after a worker joins the firm, they are required to download on their mobile phone an online application (app) developed and managed by the company, obtain authorisation and, together with it, a personal password to access the platform. In addition, there is substantive evidence that Deliveroo decides the area in which a 'rider' has to carry out their tasks.

Schedule

Concerning schedules, the judge established that, even though it is true that the firm offered time slots from which workers can choose, they have to be within schedules given by the firm and thus it is the latter that decides the time frames in which riders carry out their duties each week. In other words, the judge maintained that there is no real freedom of choice as regards the schedule. It

1 Judgment No. 244/2018 of Labour Court No. 6 of Valencia (Spain).
2 Judgment of the Spanish Supreme Court of 11 June 1990 and 5 July 1990.

should also be pointed out that Spanish courts[3] take the view that, even if workers had a totally free choice with regard to schedules and an absolute entitlement to reject particular commissions, that does not mean that the relationship is not an employment relationship. The reason for this is that Spanish courts give more weight to other indications with regard to classification as an employee, such as to whom customers give orders or whether a worker truly functions as a business.

Monitoring

The Valencian judge deemed it to be proven that the firm gives specific instructions to 'riders' concerning how food deliveries must be carried out, timing and behavioural guidelines or norms. Furthermore, the firm uses geo-location monitoring (GPS) on workers, who may be asked for explanations concerning their services at any moment, thereby constituting supervision of every delivery performed. In my opinion, particular attention has to be paid to the fact that the judge believed it relevant that the platform decides at all times what deliveries ('gigs') have to be performed by each worker and their effective allocation. Indeed, considering that Deliveroo hinges on an algorithm distributing delivery services, the judge's assumption seems logical: the platform assigns riders (gigs) through an algorithm.

Substitution and outsourcing

The judge understood that any subcontracting performed by a 'rider', even when allowed by the agreement between the parties, is irrelevant to the case. Anyway, it has to be pointed out that, according to Spanish case-law,[4] subcontracting or sporadic substitution/replacement does not preclude an employment relationship because it is done in the firm's interest. That is, even though when a worker is unable to complete a job assigned they may call on a replacement, because it is in the firm's interest it does not entail any loss of rights for the worker nor their classification as self-employed.

Platform as means of production rather than the bicycle

The judge underlined that even if a 'rider' uses their own bicycle and phone, they have no control over the organisation of work. It is the firm, the owner of the online platform and of the commercial brand 'Deliveroo' that, through the online application (app) manages the business activity. That is, the main or essential means of production is the online platform, rather than the bicycle. For this reason, it was argued that the owner, which controls the platform, has to be considered an employer. According to Spanish case-law, neither a car nor a small van are sufficiently relevant means of production.[5]

Price

The judge considered it of particular relevance when making her decision that Deliveroo was in charge of setting prices for the services. Additionally, she took into account that 'riders' are paid

3 See Judgment of the Spanish Supreme Court 20 January 2015 (rec. 587/2014).
4 Judgment of the Spanish Supreme Court of 20 July 2010 (rec. 3344/2009).
5 Judgment of the Spanish Supreme Court of 18 May 2018 (rec. 3513/2016).

whether Deliveroo are paid or not. Finally, the payment mechanism through Deliveroo's platform (app) played a major role in the classification of 'riders' as workers.

Business activity

Furthermore, the judge considered that 'riders' should be considered employees because they have no means of participating in the profits that Deliveroo will eventually make. As stated by the UK court in the Uber case[6] and the Spanish Supreme Court on several occasions,[7] business growth restrictions plus the inaccessibility to profits are both crucial facts.

Third party information control

The lack of awareness of 'riders' concerning both the restaurants associated with the platform and the identity of the customers was one indication appraised by the judge in her decision. In fact, as already stated,[8] information is an essential means of production in the 21st century. Therefore any person who does not own the essential data of a business (for instance, the identity of customers) can hardly be regarded as operating freelance.

Working under a third party's brand

Finally, in my opinion the most important feature pointed out by the court relates to the fact that 'riders' are the public face of the brand towards its customers. In fact, as has been pointed out in the literature, customers do not choose specific riders; rather they trust them (to open their homes' doors) because they are part of Deliveroo. They are not the 'riders'' customers, but Deliveroo's. 'Riders' are only agents on behalf of Deliveroo.[9] And this is a distinguishing feature of the 'gig economy'. Courts in other countries are currently considering the fact that workers perform their duties under the umbrella of a third party brand as a key element in classifying them as workers.[10] Thus the brand becomes the most important means of production in the 21st century because clients are crucial to services (on-demand economy).

Analysis of the case

The judge presents good arguments in ruling on whether Deliveroo's workers are in an employment relationship with it. The case also includes what the literature claims to be a 'new employee test'. This is a set of requirements that make it possible to recognise and identify workers in the new gig economy. These are new questions that have to be posed by a judge in order to discern when we are dealing with an employee and when with a freelancer. Among other things one might mention the ability of a 'business' to grow, the business structure of a freelancer and platform, data or brand (immaterial means of production) ownership.

Also worth adding, in my opinion – although this significant consideration was not considered in the case – is online reputation; that is, the ability to monitor workers through customers'

6 Judgment *Mr Y Aslam, Mr J Farrar and Others v Uber* (UK).
7 Judgment of the Spanish Supreme Court of 6 November 2017 (rec. 2806/2015).
8 Todoli-Signes, 'Nuevos indicios de laboralidad en la era digital', Argumentos de Derecho Laboral. Available at: https://adriantodoli.com/2017/09/14/nuevos-indicios-de-laboralidad-en-la-economia-digital/
9 Todoli-Signes A (2017) *El trabajo en la era de la economía Colaborativa*, Tirant lo Blanch, Spain.
10 The Supreme Court UK [2018] UKSC 29 *Pimlico Plumbers Ltd and another v Smith*.

assessments of their performance. These evaluations are also used by the platform to make organisational or management decisions (to assign more working hours) and disciplinary decisions (dismissal). Online reputation and its use by Deliveroo should be looked at as a further indication of an employment relationship that plays an important role in the gig economy, although it was not considered by the judge in this instance.

Nevertheless, the case brought forth sufficient arguments to justify the fact that Deliveroo 'riders' are employees and in keeping with European and Spanish case-law. Schedules and instructions are less and less relevant in identifying subordination (classic control test), while, by contrast, having one's own production structure will have an increasing impact (new control test). To determine whether there is such a structure, judges should look at immaterial means of production, such as ownership of brand, customer data, app, platform or algorithms (technological means).

If this interpretation of the notion of 'employee' is followed by EU Member State courts and the CJEU, platform workers will benefit both from labour and union rights.

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