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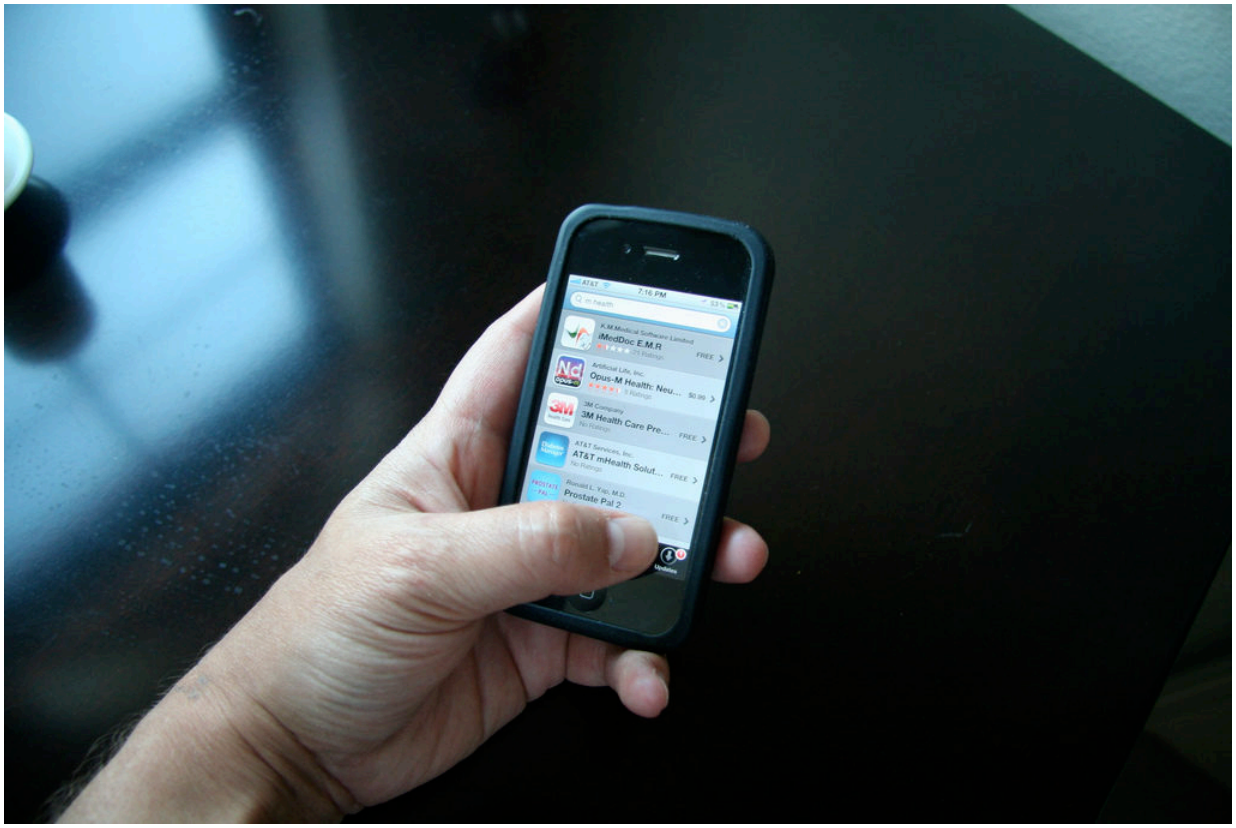
EU Court of Justice's decision on employment status does not leave platforms off the hook

Valerio De Stefano (Osgoode Hall (Canada)) · Wednesday, April 29th, 2020



Jeremias Adams-Prassl, Antonio Aloisi, Nicola Countouris, Valerio De Stefano

In late April 2020, the Court of Justice of the EU handed down an order in response to a request for a preliminary ruling on working time protection from a UK employment tribunal. The case dealt with the distinction between genuine self-employed persons excluded from the Directive's protection and persons included in its scope. At first glance, elements of the opinion (especially if taken out of context) might give the impression that EU working time protection does not cover workers, including those in the platform economy, who find themselves in bogus self-employment. This is not the case: we suggest that the order turns on a quite specific set of facts, is out of line with the Court of Justice's well-established jurisprudence on employment status, and in any event

limited in precedential value given that it is not a formal ruling handed down by the Court.

The case was filed by a courier working for a parcel delivery company. The agreement stipulated that couriers were "self-employed independent contractors". They would use their vehicle to deliver parcels and their mobile phones to communicate with the company. The terms and conditions offered an unusual amount of leeway: Couriers were also able to appoint a subcontractor or a substitute for the whole or part of the service provided while remaining personally liable for any fault of the subcontractor or substitute.

They were also free to deliver parcels for the benefit of other companies, concurrently to the provision of services to the company. Moreover, couriers were not required to accept any parcel for delivery and were able to fix a maximum number of deliveries. A fixed rate for remuneration was set for each parcel. As to working hours, couriers were able to decide the time of the delivery, their order and their own route within a time frame between 7.30 am and 9 pm and Monday through Saturday each week.

The courier had filed a claim to be reclassified as a worker under UK law and as such to be entitled to working time protection. "Workers", in the UK, are not employees under a contract of employment but rather a broader and intermediate category, including some self-employed, who provide personal work and services to another party, who is not a mere customer or client.

The Employment Tribunal's reference must be read against this context: the questions referred very much turn on a narrow set of facts and an arguably over-simplified assertion that couriers under those circumstances are not employees.

Add to this the fact that EU law does not have an intermediate category of workers such as the one at stake in the preliminary reference, and the order appears in quite distinct a light. The Court of Justice distinguishes between workers entitled to the full protection of employment legislation and the genuinely self-employed, and quite properly stuck to its own longstanding jurisprudence concerning that distinction. It thus decided to issue a mere "order" instead of a full judgment. This is done, as the Court recalls, where the "question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law or where the answer to the question referred admits of no reasonable doubt".

The Court, therefore, referred to its case law whereby the worker concept has an "autonomous meaning specific to EU law". Any court's classification dealing with this concept must be based "on objective criteria" and requires "overall assessment of all the circumstances of the case brought before it". The "essential feature of an employment relationship", under EU law, "is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration". Therefore, even if a worker is classified as an independent contractor under national law, they could still be "classified as an employee, within the meaning of EU law, if [their] independence is merely notional, thereby disguising an employment relationship". ". These are words that echo the Court's established jurisprudence in cases such as *Allonby* and *FNV Kunsten*. It is, in principle, for the national court to carry out that classification, paying heed to the case law of the CJEU.

Having recalled these long-established principles, the Court then looks at the situation at hand, with specific regard to the very particular circumstances of the case. It is only on that basis that the Court suggests that that the EU Working Time Directive might preclude "a person engaged by his

putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive", where that person "is afforded discretion: to use subcontractors or substitutes to perform the service which he has undertaken to provide; to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks; to provide his services to any third party, including direct competitors of the putative employer, and to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer".

Crucially, however, the Court concludes, all those circumstances are only relevant where "first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer".

This determination clearly does not only depend on the wording of the contract or national laws, as the Court's jurisprudence has consistently found.

This is crucial, since many platforms, and other firms, include boilerplate clauses in their terms and conditions that provide workers with notional rights to use substitutes or to refuse work and to decide their work schedules precisely to reduce the risk of workers being reclassified as employees. Senior courts in several European countries, including Spain , France, and the United Kingdom, have readily disregarded those clauses when they did not reflect the actual reality of the jobs or when the putative employers where able to direct their workforce notwithstanding them. More often than not, for instance, substitution clauses are hardly practicable, partly because of restrictions on the identity of the substitute, partly due to the complexity of the replacement procedure. As to flexible work schedules, until when the algorithms used to assess the workers' performance will be made fully transparent it will be impossible to exclude that workers with more unstable schedules are penalized when assigning shifts and tasks.

When control is exerted via technological tools such as GPS, algorithms, and rating systems, substitution clauses or flexibility of work schedules cannot prevent workers from being reclassified as employees and thus entitled to the full protection of employment and labour laws. The Court of Justice's Order is fully consistent with this approach. Boilerplate clauses cannot exclude an employment relationship when the circumstances of the case point to the opposite. Arguing otherwise would not only misrepresent the content of the Order, but also put it entirely at odds with the longstanding case law of the Court on proper employment classification.

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Union. Primary legislation most importantly refers to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Secondary EU legislation, such as Directives and Regulations, is based on the principles and objectives as laid down in the Treaties (TEU and TFEU).“>EU Law, Labor Law

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