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Putting the brakes on the spread of indecent work

by Ruth Dukes and Wolfgang Streeck on 10th March 2021

Important legal victories for workers against platform corporations remain partial and limited in the absence of legislative and institutional change.

The decision of the UK Supreme Court in the case of *Uber v Aslam* has caused a great deal of excitement, understandably so. The question before the court was whether Yaseen Aslam and others, for some time drivers with Uber, had been self-employed or, alternatively, 'workers' with statutory rights to a minimum wage and paid holidays.

In UK law, 'worker' is defined in statute, with the definition referring to the kind of contract agreed with the putative employer. It had thus been possible to argue, as Uber did, that the written terms of the contract were decisive, taking the worker outside the statutory definition and application of associated legal rights. The contract with Aslam *et al* had been drafted in such a way, Uber argued, that they were self-employed with no employment rights—the company a mere intermediary, matching customers with drivers.

Protecting vulnerable workers

The Supreme Court reasoned that 'worker' status was a matter, principally, of *statutory* interpretation. It was appropriate to consider the purpose of the statutes in question and to interpret the definition of 'worker' accordingly.

The court said that the purpose was to protect vulnerable workers from unfair treatment, including low wages and excessive hours. The statutory category of 'worker'—wider than the category 'employee'—had been used in the statutes precisely to ensure that 'subordinate' and 'dependent' workers enjoyed legal protection.

Because the definition of worker is a matter of statutory interpretation, analysis should not begin with the terms of the written contract, the court ruled: 'It is the very fact that an employer is often in a position to dictate contract terms … that gives rise to the need for statutory protection in the first place.' If too much weight were given to the written terms of the contract, freedom would be handed to the employer to avoid its obligations.

The correlate of worker 'vulnerability'—of 'subordination' and 'dependence'—was control and a key issue was the degree of control wielded by Uber over its drivers. On that measure, the drivers were clearly workers, with Uber making use of the app itself and a customer ratings system to control the manner in which drivers performed the work. Moreover, from the moment when they logged on to the Uber app, the drivers were 'working' for the purposes of determining wages and working time—even as they waited in their cars for the next ride request to ping.

Indecent treatment

The Supreme Court's decision is undoubtedly an excellent one, drawn in broad terms with reference to broad principles. Because of the weight accorded by the court to the degree of control exercised by Uber over the driver, the ruling strikes at the heart of the gig-economy business model. With it, the court has added its voice to that of courts in France, Spain and the Netherlands, all finding that gig workers are not self-employed but workers or employees with employment rights.

It has provided further confirmation that platforms such as Uber have acted as Trojan horses, smuggling indecent treatment of workers from Silicon Valley into Europe, behind a façade of 'ride-share', 'zero-cost transactions' and 'entrepreneurship'. Move fast and break things.

That said, it remains the case that this particular decision applies directly only to those workers named in the litigation and, by implication, others employed on identical contractual terms. Since the legal proceedings began, Uber has amended its contracts and is at liberty to do so again. While it seems highly likely, given the terms of the court's decision, that those employed under the new contracts are also workers, it will take a new Employment Tribunal decision to confirm that this is so, creating the opportunity for another years-long appeal process. Workers employed by platforms other than Uber will also have to bring their own legal challenges before the tribunal.

Under UK law, moreover, the rights of workers—those who are not employees—are meagre. The minimum wage is £8.72 per hour for those aged 25 and over, well below the living wage calculated according to the cost of living (£9.50 per hour, £10.85 in London). Workers have rights to paid holidays but not sick pay or maternity/paternity leave. They have no legal protection against redundancy or unfair dismissal. And by reason of their extreme precarity, and the ability of platforms to deactivate assertive workers without explanation or legal recourse, gig workers face particular difficulties in attempting to enforce those few rights they have.

Political solution

This points to the need for a political solution. Court rulings in the tradition of progressive labour law must be backed up by legislative intervention. The taming of the new world of gig and platform work requires far-reaching institution-building, designed to bring legal concepts such as 'employment' to life. An active, interventionist state is needed to redress the fundamental imbalances in contemporary employment.

Social-democratic parties and governments, in particular, must urgently address three problems, so that progressive interpretations of legal concepts such as employment can realise their full significance for workers on the ground. Through such action, parties of the social-democratic left can re-establish themselves as trustworthy representatives of their original constituency.

First, gig workers' access to legal rights must not be dependent on the willingness and ability of individual workers to bring claims to the courts. Legislation is needed to clarify the employment status of the workers and the rights they have. A reversal of the burden of proof may be useful, with the onus falling on the platforms to prove that workers are self-employed (rather than on the workers, to prove that they are employees).

The European Commission has opened a consultation with the social partners on the rights of gig workers. Given how little power the unions have at EU level, however—and the extent to which European social policy has fallen into desuetude—there must be national action too, by trade unions and political parties.

Where a need for litigation arises, workers must be able to bring a claim without fear of deactivation by the platform: without improvement in the job security of increasingly precarious workers, even the most generous legal entitlements may not be worth much. Job security and employment protection will in any case become central issues as the new forms of gig work and platform employment spread, in ever new iterations as the law tries to catch up with them.

Closing loopholes

Secondly, the practices of Uber and other platforms stand as a stark reminder that employers will always seek new ways to circumvent the legal rights of workers, creating new forms of employment to which such rights don't apply. If labour law is to have effective power to protect workers, escape routes and loopholes must be foreclosed by legislation, in so far as is possible.

A good first step would be the creation of a single employment status for all workers, associated with the same comprehensive rights—doing away with divisive distinctions such as that in the UK between 'employees' and (second-class) 'workers'. Again, governments must be pressed to legislate for more equality and solidarity.

Thirdly, and most importantly, we need a fundamental overhaul of the rights and opportunities for workers to organise in trade unions and pursue their interests collectively, through legal action, political representation and industrial action. Ultimately this requires a further departure from voluntaristic traditions of trade unionism and industrial relations where they persist. Pressure must be mounted on governments to facilitate collective action by creating supportive, legally-grounded institutions, at the workplace and beyond.

The availability of representation by trade unions can no longer be left to the vagaries of the economic and political marketplace. In the big Fordist factories of the past, the organisation of the labour process enhanced the collective organisation of unions. Not so today in the dispersed workplaces of the new service industries, where workers may rarely meet and are anyway placed under sophisticated technological surveillance by their employers.

In the short term, the most significant implication of the *Uber v Aslam* decision is arguably that it recognised that gig workers as 'workers' have rights to freedom of association—including a right to strike and to have a union campaign for recognition for collective-bargaining purposes. Aslam and the other Uber drivers were of course supported by unions in bringing the case to court.

Industrial citizenship

In the longer term, the decision points to the need for political action and legislation to bring the institutional environment of collective organisation in line with the new working and employment conditions. This requires a reinvention of what used to be called industrial citizenship, which can be brought about only by public policy under the pressure of vigorous political action by unions.

A renewal of the institutional and material conditions of freedom of association, adapted to the specific conditions of gig and platform work, would imply new and creative forms of what in American industrial relations was called union security—institutional protections of trade unions against employer attempts to prevent, undermine or take over organisations formed to represent the interests of more fluid workforces. Such provisions are needed everywhere in Europe—not just in the UK—and they need to fit divergent national institutional conditions and traditions.

About Ruth Dukes and Wolfgang Streeck

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