Employment

Self-employment on digital labour platforms

Following the introduction of the presumption of employment in the provision of services on delivery platforms, there is still a discrepancy between legislative reality and business needs. Many of these businesses have adapted, others have revised their business activity so that it is provided through self-employment, some are not carried on in the delivery sector and there are many that still have open disputes with penalties imposed pending characterisation of their workers.

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1. At the time (Act 12/2021 of 28 September and previously Royal Decree-law 9/2021 of 11 May), the passage of the amendment to the Workers' Statute Act (Art. 64 and 22nd Add. Prov., respectively) to establish a presumption of employment in respect of those who provide their services for digital delivery platforms, generated a certain amount of concern in the sector. A little over a year has passed and it is time to take stock of the situation, now with more calm.

   The amendment was triggered, to a large extent, by judicial actions, in particular by the Supreme Court Judgment of 25 September 2020, Ar. 5169. Based on this, the legislator will establish the presumption of employment in respect of "the activity of persons who provide paid services consisting of the delivery or distribution of any consumer product or merchandise, by employers who exercise business powers of organisation, management and control directly, indirectly or implicitly, by means of an algorithmic management of the service or of the working conditions, through a digital platform. This presumption does not affect the provisions of Article 1(3) of this piece of legislation" (23rd Add. Prov. of the Workers' Statute Act, hereinafter LET).

   As admitted to by the legislator, the notes on dependent self-employment and third party engagement had to be adapted to social

reality. In addition, there are margins of flexibility or freedom in the provision of work that can lead to confusion in respect of working conditions. On the other hand, the company's powers of management, organisation and control are now executed in a very different way to what is usual, with an algorithmic management of the service provided, and it is therefore necessary to guarantee "equal treatment between "traditional" companies and those that use digital means of control based on algorithmic data management, on the basis of transparent and fair competition between them" (Explanatory Notes to Royal Decree-law 9/2021).

2. Well, in these months of the new legislation being in force, all sorts of things have happened. Companies that have employed their delivery drivers, normally opting for permanent contracts, including the seasonal contract type; companies that are still involved in a previous dispute, with events that took place before the new amendment came into force, even though they have employed their staff after it came into force; companies that have not employed their staff and maintain the provision of services with self-employed workers until the Labour and Social Security Inspectorate's actions have concluded or, where appropriate, until a final and conclusive court decision has been obtained; or companies that have adjusted their workforces to the new amendment, although with the space that the same allows for the performance of self-employed work on these platforms, even, in the latter case, with a hybrid workforce - partly with employees and partly with self-employed workers, depending on the description of the service they provide in the company.

   Thus, some platforms offer riders full freedom to establish not only working conditions such as working hours or the acceptance of the order without penalty or assessment by the customer, but, more importantly, to freely set the rate to be applied to the service. In this way, the worker - characterised as self-employed - is allowed to set the minimum price per kilometre covered in each delivery, and can freely reject those services that do not compensate him or her. What is more, the rate can be modified by the delivery driver at any time, with upward or downward fluctuations to his or her convenience. Furthermore, he or she can decide whether to receive the compensation in cash or by means of a previously selected payment platform.

3. An analysis of these actions necessarily leads us to state that the Workers' Statute Act has not established a "finding" of employment but rather a "presumption" regarding the same. However, "this presumption does not affect the provisions of Article 1(3) of this piece of legislation", which, as is well known, sets out the exclusions from the application of the employment law. Among others, "the activity of persons providing transport services under administrative authorisations of which they are holders, carried out, for the corresponding price, with commercial public service vehicles which they own or have direct power of disposal over, even when these services are carried out continuously for the same shipper or marketer".

   It should be pointed out that Article 8(1) LET regulates the form of the employment contract and it is there that it states that such a contract "shall be presumed to exist between anyone who provides a service on account and within the scope of organisation and management of another and the person who receives it in exchange for remuneration". Like any presumption, it constitutes proof, whether legal, i.e. the demonstration of facts that may be established under the law (Articles 1250 and 1251 of the Civil Code) or factual, by being inferred from other facts proven according to

the rules of logic, as per Article 1.253 of the aforementioned piece of legislation. But the presumption is proof of a fact. And, in this case, the fact contained in Article 8(1) LET is not very different from the one indicated in Article 1(1) LET. The description of the fact of providing paid services on account of another leads to a legal characterisation which is the existence of the employment contract, something which, by the way, would already be deduced directly from the application of Article 1(1) LET.

However, *a contrario*, if there is no proof of the existence of the substantive circumstances of employment and no proof of the existence of remuneration, subordination and third party engagement in the fruits or risks, the relationship must be considered as one of self-employment, despite the safeguard made explicit by the new amendment, given that the latter also envisages a space for the carrying out of self-employed work on these platforms. It is true that this piece of legislation does not include the proviso of proof to the contrary, but it is Article 385(3) of the Civil Procedure Act which establishes how "the presumptions established by law shall admit proof to the contrary, except in cases where the law expressly prohibits it". Because the application of the presumption does not operate automatically, but rather, even if the elements of the piece of legislation are established, the parties can present evidence to the contrary that destroys the presumption.

4. Moreover, the legal reference itself contains limitations. Thus, it refers only to platforms "for the delivery or distribution of any consumer product or merchandise", excluding from its scope of application any other digital platform or algorithmic management of services. Furthermore, the employer is required to exercise its business powers "of organisation, management and control", and it may be asked whether one of these is sufficient or whether all of them must be present in order to consider that not only the characteristics of employment in Article 1(1) LET are met but also the concept of employer in Article 1(2) LET. And, here, it could be questioned whether the reference that the latter provision makes to employers as any person, natural or legal, or joint property partnership that receives the provision of services from the employees is included in this case, since, not surprisingly, the platform or the algorithm manager is not going to receive the services from the worker. It is the customer who receives such provision directly.

This is why it is crucial to know who organises, who directs and who controls, because the concept of dependence that characterises the employer-employee relationship is derived from this definition. Not in vain, it is a matter of performing paid services "within the scope of the organisation and management" of the employer. Consequently, in order for there to be a presumption of employment, there must be proof of dependence. It is true that, aware of the presence of these "liquid" relationships in which the features of third party engagement and dependence are disfigured as a consequence of technological interference in the adoption of business decisions, the legislator admits that this power can be exercised "directly, indirectly or implicitly, by means of an algorithmic management of the service or of the working conditions, through a digital platform".

But this does not mean that all and any service provision on these platforms or algorithm managers is in employment. It will depend on how it is set up. Because if the provision of services, even if it is regular, personal or direct, is carried out on one's own account and outside the scope of the platform's management and organisation, with the platform operating as

a mere intermediary of the service provided and the customer, Article 1(1) of the Statute of Self-Employment Act will apply, and if carried out "predominantly" for a platform or an algorithm manager on which the worker is economically dependent because he or she receive from it at least seventy-five percent of his or her "earnings from employment" and revenue from economic and professional activities, he or she will be an economically dependent self-employed worker in accordance with Article 11 of the Statute of Self-Employment Act.

5. In addition to the consequences of the application or exclusion of labour law, there is also everything related to algorithmic management and the obligation to inform workers' representatives, as per Article 64 LET, about "the parameters, rules and instructions on which the algorithms or artificial intelligence systems are based that affect decision-making that may affect working conditions, access to and maintenance of employment, including profiling" [Article 64(4)(d) LET]. If the platform only provides its services through self-employed workers, this obligation will be neutralised by the fact that the service provided is outside the scope of an employer-employee relationship, but if the platform, as is becoming frequent, operates in a hybrid manner and has part of its staff under employment contracts, this obligation must be made effective in order to "discern whether the conditions of service provision expressed in a specific relationship fit into the situation described by this provision, always with the utmost respect for the industrial and trade secrets of the companies in accordance with legislation, which are not called into question by this information on the employer-employee derivatives of the algorithms or other mathematical operations at the service of the business organisation" (Explanatory Notes to Act 12/2021).

   This information, which covers "parameters, rules and instructions" on which the algorithms or artificial intelligence systems are based, must respect industrial secrecy and intellectual property, limiting the information only to those data that may affect decisions on "working conditions, access to and maintenance of employment, including profiling". It is true that, unlike the provisions of the 23rd Add. Prov. LET, which restricts its application to the platforms or algorithms of companies that "deliver or distribute any consumer product or merchandise", Article 64(4)(d) LET does not restrict its application so that, consequently, any platform or algorithmic management that affects working conditions will be subject to this legal obligation, regardless of the company or sector in which it is carried out.

6. As with any employment law transition, as of the application of the amendment, undertakings have operated in the terms described above, but many are the businesses carried on through a digital platform that still have disputes, in administrative or judicial proceedings, over the characterisation of the provision of services carried out on the same. The case law of the employment jurisdiction has settled a large part of the collective proceedings and in relation to a large part of the companies on the employer-employee or non-employer-employee characterisation of the services provided. The casuistry is complex, but, taking into account the cases described above, the greatest concern will be that of those companies which, before the entry into force of the amendment, received a proposed sanction, appealed against until the characterisation of the relationship as one of employer and employee or not, or of those which, after the amendment came into force, keep their workers as self-employed in the same terms as before, while awaiting said sanction and/or, if applicable, characterisation, or after

having novated the contractual conditions of the service provider to adapt them to work as an employee.

The solution is far from simple. Except in the last case, in which the company and the worker agree to the provision of services in terms that clearly involve self-employed activity, the rest of the situations are not without conflict. It may happen, firstly, that the company gives the service non-employee features that are not really such, in which case the presumption of employment will apply. Secondly, it may be that the company has maintained the same conditions prior to the entry into force and is awaiting the correct characterisation, assuming the penalising consequences of the possible finding of an employer-employee relationship. Finally, however, and without being exhaustive, it is possible that the company has complied with the new legislation since it came into force, but is still in administrative or judicial litigation over the penalties - and, consequently, over the characterisation - arising from the provision of services prior to the amendment. In this case, the *ex tunc* or *ex nunc* condition of the application of the legislation should be assessed. And, bearing in mind that the entry into force of this amendment was delayed by three months after its publication (2nd Fin. Prov. of Royal Decree-law 9/2021) in order to facilitate the "adaptation" of the different companies with this format and with employees for whom there will be no final and conclusive judgement regarding their employee status, the solution lies in a systematic interpretation of the legislation. Thus, in those proceedings described above in which there is obviously no final and conclusive judgement, no penalty or consequence derived from the employer-employee nature of the provision will be applicable, beyond the period of time for which the legislation and compliance therewith is not applicable.

7. If the provision contained in the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work [COM(2021) 762 final 2021/0414] is implemented, the listed criteria must be met in order to determine whether a digital labour platform exercises control over a person, which would give rise to a presumption of employment, which is, moreover, rebuttable. It would be sufficient if at least two of the criteria adopted by the European legislator were met, namely the establishment of the level of remuneration or the setting of upper limits; the supervision of the performance of work by electronic means; the restriction of the freedom to choose working hours or periods of absence, to accept or refuse tasks or to use subcontractors or substitutes; the establishment of specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work; or, finally, the restriction of the possibility to build a client base or to perform work for any third party.

   This is based on the platform's status as an employer, as in many cases they are presented as mere intermediaries of services offered virtually. If this is the case, self-employed status will be easier to defend as the platform is merely an instrument of connection between the worker and the customer. The defence of self-employed status may be based on the lack of exclusivity, on the autonomy of the service, on the full availability of the profits obtained from the service or, finally, on the possibility of substitution or even outsourcing of the activity.

   For the time being, and with the legislation in force, in the face of any controversy, it will be the judge who will have to determine the existence of subordination or independence in the service provided. To this end, and as a guideline, the judge may review whether the

orders for the provision of services are received by the platform or whether it is the worker who organises their provision themselves; whether the platform geolocates the worker; whether the latter must work exclusively or can provide simultaneous services for several platforms; whether there is a system of distribution of services according to algorithmic criteria set by the company; whether there is freedom in respect of working hours, of order acceptance, of subcontractors; whether they receive their compensation directly from the customer or through the platform; whether they must pay a fee to the platform for their membership; or, finally, whether the platform operates as a mere intermediary company or as the worker's employer. In any case, and without a shadow of a doubt, future changes in employment legislation will have to cover realities that are difficult to adjust to the classic concepts of third party engagement and dependence or subordination, having to create new categories that allow for a more comfortable pursuit of the option to provide services on the part of the worker and also on the part of the company.

Undoubtedly, the Government's announced project on a possible Workers' (or Work) Statute Act for the 21st century will have to integrate these realities which, with the protection of salaried work, operate within an autonomy that is difficult to reconcile with paid employment, as it is currently defined. In fact, there is a reference to a hybrid formula, perhaps envisaged exclusively for platform work, which brings together both characteristics, autonomy in professional development and protection in their employment scheme. In a way, the idea is to achieve a certain homogenisation of worker rights and social protection, regardless of whether the activity is carried out as an employee or independently. For the employer it will be easier, as the similarity of rights will allow for a more fluid relationship with the worker who subject to control by the employer will be an employee and in the absence thereof will carry on as a self-employed worker.