On Demand Work as a Legal Framework to Understand the Gig Economy

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Abstract:

This chapter aims to demonstrate the usefulness to scholars, practitioners and policy-makers of characterising gig work as part of a wider category of 'on demand work'. Here, as elsewhere, I understand 'on demand work' or 'work on demand' broadly as comprising different forms of contractual and organisational arrangement that are each designed to keep the worker hungry for the next shift, and so – in effect – 'on call', ready and willing to work whenever the employer requires it, often at short notice. My main argument is that characterising gig work as an example of on demand work highlights several matters of importance: the weakness of the platforms' claims to novelty and uniqueness when it comes to gig work, and the applicability of an existing legal framework and lines of legal reasoning, which recognise gig work as wage work, rather than self-employment, and gig workers as the bearers of employment rights.

Keywords (4-8): gig work, platform work, work on demand, domestic work

Introduction

The aim of this chapter is to demonstrate the usefulness to scholars, practitioners and policy-makers of characterising gig work as part of a wider category of 'on demand work'.[2] By gig work, I mean both crowd- or cloud-work involving the completion of a series of tasks through online platforms, and 'work on demand via app', meaning the execution of traditional working activities such as transport, cleaning and logistics, through apps managed by firms ('platforms') that also intervene in setting minimum quality standards of service and in the selection and management of the workforce (De Stefano 2016). Here, as elsewhere, I understand 'on demand work' or 'work on demand' broadly, as comprising different forms of contractual and organisational arrangement that are each designed to keep (or have the effect of keeping) the worker hungry for the next shift, and so – in effect – 'on call', ready and willing to work whenever the employer requires it, often at short notice. I use the term

'employer' broadly, too, meaning an organisation which contracts – directly or via a contractual chain – for work in exchange for a wage or a fee.

Categorising gig work as an example of on demand work shines a light on at least three matters of importance when it comes to understanding and regulating gig work. First it highlights the weakness of the platforms' claim to novelty in respect of gig work: the claim that gig work is quite different to work relations of the past. In several important respects, gig work resembles work relations prevalent in early capitalism, before the growth of trade unions and collective bargaining and the creation of modern employment law,[3] and much can be learned from a comparison of the two. Similarly, it demonstrates the weakness of the claim to contemporary uniqueness or difference – the claim that gig work is quite different to other forms of work today and that, therefore, existing employment laws do not apply. Lastly, it suggests a legal framework and lines of legal reasoning that have already been developed by legislatures, courts and scholars, which recognise gig work as wage work, rather than self-employment, and gig workers as the bearers of employment rights.

On Demand Work

In recent decades, the working relations of increasing numbers of workers have been characterized by impermanence and precarity (Fudge, McCrystal and Sankaran 2012). The once 'standard' employment relationship – full-time employment, on an 'open-ended' rather than 'fixed-term' basis – has tended to become simply one form of work relation among many, often less secure and more casual, arrangements: for example, agency work, zero-hours contracts and self-employed 'gigging' (Stone and Arthurs 2013). In respect of working relations, and their regulation, there is now much greater variety – and inequality – between and within sectors, companies and workplaces.

In this story of fragmentation and precarisation, the weaking of trade unions figures as both cause and effect. Since the 1980s and 1990s, the membership of unions and employers' associations has fallen, in some cases dramatically, and national umbrella organisations have largely lost the positions of authority that they once had within industry and within government (Streeck 2009; Mŭller, Vandaele and Waddington 2019). The weaker they are, the more difficult the unions find it to resist the kinds of institutional and organisational

change that result in precarious work relations. The more precarious work becomes, the more difficult it is to organise workers and to increase union strength. The transformation of previously comprehensive systems of social welfare into a combination of labour market activation devices and, increasingly, only the barest of provision for the otherwise destitute (Glyn 2006) also serves to weaken the ability of workers to refuse low paid, precarious work, since they can't any more rely on an alternative and adequate source of income in the form of unemployment benefits (Adams and Deakin 2014).

As systems of collective industrial relations are dismantled or marginalised, the choice of form of work contract and the drafting of specific terms are increasingly for the employer alone. In some sectors and some organisations, contracts are routinely drafted to take workers outside of the scope of employment rights, including the right to guaranteed hours of work, or to render their situation so precarious that they are ill-placed to enforce any rights that they have. Workers may be designated self-employed within their contracts for work, or hired through an agency, or on a zero-hours contract, or on informal, 'underground' terms, outside of the purview of the authorities and the law. Even where they are hired on contracts of employment, workers may be intentionally underemployed – guaranteed far fewer than the 40 or so hours per week that they would need to earn a full-time wage – and therefore always eager to take on extra shifts should they be offered. As a consequence, work is 'on demand' in the sense that the employer is empowered, in one way or another, to decide when and even if the worker is required. The economic risk of periodic dips in demand – across the course of the day, week, or year – is offloaded wholesale onto the worker.

Significant organisational change is a further important part of this story: the shareholder revolution that began in the 1970s and the 'fissuring' of companies and workplaces, to use David Weil's useful term, that has taken place since (Weil 2014). The shareholder revolution was directed at the then dominant idea of the corporation, familiar from Berle and Means (1932), as an organisation much like any other, with professional managers who sought steady growth and who recognised the importance of priorities other than profit-making: 'providing employment, eliminating discrimination [and] avoiding pollution' as Milton Friedman famously put it (1970, 17). According to the new revolutionary creed, managers who pretended to act with 'social responsibility' were in fact pursuing a-social special interests, namely their own (ibid.). In failing to devote themselves to the maximisation of profit, they stole from their principals, the shareholders, and made the capital entrusted to them less productive than it could

have been. Only the market, with its strict principles of ruthless competition on penalty of elimination, kept business honest, and only maximised profits ultimately served a society that depends on a capitalist economy. As eventually facilitated by law reform and, more so, deep-seated cultural change, the shareholder revolution involved a re-privatisation of the corporation, extricating it from its social entanglements and quasi-public status and instituting as supreme the objective of profit-making in the service of capital accumulation. When, in the 1980s and 1990s, globalisation created an unprecedented degree of both capital mobility and competition, the profit constraint on businesses became increasingly tight, and with it the constraints on governments trying to impose social responsibilities on national economies other than the maximisation of profits in increasingly global markets and global value chains (Klare 2002; Bercusson and Estlund 2008; O'Higgins 2004).

As coined by Weil (2014), the term fissuring refers to the variety of means employed by companies to create a legal gap or 'fissure' between themselves and the workers who would otherwise be employed 'in-house', directly by them. Typically, fissuring is achieved through the outsourcing of work to other, smaller firms, or to the workers themselves, who are categorised in that case (in their contracts, and in the eyes of the law) as self-employed. For a lead company, such arrangements involve savings in labour costs as wages are replaced by a price payable for 'labour services', and liability is offloaded for tax and social security contributions and for compensation for workplace accidents and other injuries to the workers' health. For workers, fissuring can mean that jobs that once resided inside lead companies, providing decent earnings and stable employment, now reside with often smaller firms who set wages and other terms under far more competitive conditions. Alternatively, it can mean that jobs disappear entirely to be replaced by offers of contracts for services: offers to perform the work as self-employed workers. In any case, workers are forced into intense competition 'outside' of the lead firms, ensuring that they cannot capture a significant share of those firms' profits, nor rely on the bureaucratic decision-making, disciplinary and grievance procedures typical of larger firms. Union organising and the collective representation of workers' interests become more difficult as decision-making is dispersed along contractual chains, the employer function split between two or more organisations, and workers taken outside of the scope of labour rights. At a societal level, fissuring leads to decreases in tax revenue and social security contributions and to an increase in inequalities as income is transferred from workers to share-holders, company executives and – to a lesser but still significant extent – consumers.

At the same time as globalisation and financialisation have created pressures on businesses and other organisations to shed large parts of their workforces, advances in technology have made it possible both to set quality standards and to monitor compliance without having to take or keep production – and work – in house. An ever-expanding array of new technologies has been developed including bar codes, electronic data inter-change protocols, product identification, GPS, and other methods of tracking products through supply chains and monitoring the provision of services to customers (Weil 2014, 60-72; Rogers 2023). These may make it possible, too, for lead firms or their subcontractors to contract with workers or labour intermediaries in countries of the global south, likely in a position in which they are forced to accept lower wages or a lower price for the work. Global value chains materialise in the form of global chains of contracts, with the sum that will eventually be paid to the workers squeezed further with each new link (LeBaron 2021; LeBaron and Roberts 2010).

While fissuring may signal the demise of huge organisations as measured by the size of the workforce, it has not entailed the disappearance of firms with huge market shares. Simultaneous to fissuring, an additional contemporary trend has involved, on the contrary, the consolidation of capital and the creation of companies that – if not quite monopolies – exercise sufficient control over essential resources within their sectors to enjoy quasi-monopoly power. Like fissuring, consolidation is facilitated by law – especially weak anti-trust or competition rules and strong intellectual property rights – and by technological advances (Rogers 2023). From a worker's perspective, it results in power disparities of breath-taking proportions between the worker, or the small firm that employs her, and the lead firm; the latter acting either as the employer (and perhaps the only or major employer in a particular locality), or more likely the purchaser of labour services, looking to bring production costs down (Weil 2009).

Something New?

Gig work is an extreme example of fissuring, where the entire labour process is designed to meet the objective of not directly employing *any* workers, bar a tiny core of directors, brand managers and so on. It is central to the business model of platforms such as Uber and TaskRabbit that they should be able to provide services more cheaply than their competitors – at least for as long as it takes for them to achieve monopoly or quasi-monopoly status within a

particular market, with winner-takes-all returns (Tucker 2019; Rahman and Thelen, 2019). Contracting with self-employed workers not only allows the platform to save on wages, tax and social security, and potentially to avoid liability for accidents at work, it also allows them to offload the costs of machinery and tools (Prassl 2018). Uber drivers must buy or lease their own cars, DoorDash and Deliveroo couriers use their own bikes or motorcycles. The only thing that the platform owns is the app.

In order to justify the characterisation of workers as self-employed, platforms describe themselves as mere third parties, facilitating contracts of sale between customers and drivers, couriers and domestic workers, and providing clever algorithms and sophisticated ratings and other technology to keep transaction costs low to negligible. Workers are actively encouraged to think of themselves as 'entrepreneurs', enjoying freedom, flexibility and autonomy (Ravenelle 2017, 286-8). Innovation is an important part of the platforms' branding and they present themselves accordingly as doing something truly novel – not taxi provision but 'ride-sharing'; not cleaning and ironing but 'neighbours helping neighbours' – something, importantly, to which existing laws and regulations do not apply (Prassl 2018). Indeed, to insist upon the application of burdensome rules and regulations to these activities, so the narrative goes, would stifle innovation in a way that was damaging not only to the platforms but also to customers and 'entrepreneurs' alike (Tucker 2019).

When the most prominent platforms launched around a decade ago,[4] commentators in business schools willingly parroted the platforms' lines, hailing the arrival of a truly novel form of institution (Sundararajan 2017, 69). Sociologists and scholars of employment law, in contrast, were quick to call the platforms out on the purported novelty of gig work (De Stefano 2016; Huws, Spencer, Syrdal 2018). As empirical analysis soon revealed, it was categorically *not* the case that platforms had invented a modus operandi which obviated the need for the kind of top-down control of the labour process under managerial prerogative, typical of vertically-integrated employing organisations (De Stefano 2016; Dubal 2017). For Uber, TaskRabbit, and the like to function as intended, they require at a minimum that a sufficient number of drivers, couriers, or taskers make themselves available for work at the right times of day and, secondly, that those workers readily agree to undertake whatever gigs are assigned to them. In some cases, platforms also require that the gigs be completed in a particular way, for example, with a particular level of customer service.

While they have not done away with the need for control and direction, however, the platforms have succeeded in minimizing or obviating their reliance on contractual obligations to ensure that workers perform as required. In part this is achieved through technological innovation, including close monitoring and the embedding within the app of a ratings system (which transfers arbitrary power over workers from managers to consumers). Technology of this kind can depersonalize managerial control making it appear impartial and 'objective', in the sense of a natural condition of the material world. At a time when weakened employment rights and rights to social welfare have significantly lessened the attractiveness of exit options for gig workers, the constant threat of "deactivation" – summary dismissal, by any other name – or lesser forms of punishment, such as the withholding by the platform of better (more lucrative) gigs, also contribute significantly to ensuring good behaviour (Ravenelle 2019). To orchestrate a supply of labour that is always sufficient to meet demand for services, meanwhile, platforms wield the promise of the award to a worker not only of a better rate of pay – 'surge-pricing' – but of a higher rating and, consequently, better gigs; the threat of a lower rating and poorer gigs (Cant 2020). There is nothing transparent about these ratings systems, however, and of course no right of appeal for workers when they don't function as promised or expected (Prassl 2019).

In his 2018 book, *Humans as a Service*, Jeremias Prassl argued that it was precisely on the question of the nature of work and working relations in the gig economy that the platforms' claims to innovation could most resolutely be refuted. Gig work had been said to herald a 'revolution' in economic activity; an 'interesting hybrid of a market and a hierarchy', involving, in particular, a reversal of previous trends to ever greater specialization in work organization and a previously unknown immediacy of labour supply (Sundararajan 2016, 69; Prassl 2018, 73). With reference to two examples from the nineteenth century – outwork (or 'homework') and dock work – Prassl demonstrated convincingly that these aspects of gig work were anything but new. Like gig workers, outworkers relied on middlemen to bring them orders from buyers. As such they could find their earnings squeezed by the middlemen taking their cut and, yet further, by the obligations imposed upon them to buy and maintain their own equipment and machinery. If orders dried up, they received no income at all. At the docks, where there was a perennial oversupply of labour, workers were made to stand – literally in 'crowds' – hoping to be one of the chosen few to be offered work that day. Even when work was offered, there was no guarantee of a full day's employment and pay. Both kinds of work were characterised, then, by extreme precarity, vulnerability and low pay.

If neoliberalism implies a desired return to the political economy of the nineteenth century – the stateless, globally integrated world economy of the gold standard (Streeck 2019) – then there is indeed a logic to scrutinizing the labour and service markets of that era for precursors of gig work: markets that were characterised by gross inequalities of wealth, by only minimal public services, and by the fragmented, non-universal, provision of social welfare, or charity in lieu of welfare. A prominent but frequently under-acknowledged feature of those markets was the magnitude of the percentage of the workforce that was employed in domestic service. At its height, at the end of the nineteenth century, 40% of women workers in the UK were domestic workers and in 1902, over 200,000 men were also employed in that sector, mostly in gardening, the care of horses, or as drivers (Delap 2011, 12, 14). Moreover, the employment of domestic servants was very widespread, and not at all confined to the upper classes: middle and even working class families also frequently employed 'help' (Delap 2011, 63-97). If we define domestic service broadly to include stable hands, chauffeurs, and governesses as well as maids, cooks and manservants, then we might conclude that, in time, domestic workers were replaced by motor cars and kitchen appliances, and by the improved provision of public services: schools, nurseries, transport. Domestic work did not, however, disappear and, since the 1980s, has been on the increase again in the UK and other developed economies (Delap 2011, 3). Today it might take a similar form to the domestic service of the nineteenth century, albeit with an updated nomenclature – 'personal assistants', 'cleaners', 'housekeepers', 'nannies' – or it might be arranged via online platforms: TaskRabbit, Uber, Deliveroo.

That domestic service is so often overlooked in discussions of gig work is regrettable since there is much to learn from a comparison of the two. In addition to functional continuities between domestic service in the nineteenth and twentieth centuries and many kinds of platform work today, for example, the manner of their management and regulation is comparable by reason of the key role played, in each case, by employer or customer ratings. In the nineteenth and early twentieth centuries, the reference that a domestic worker might request of her employer was known as a 'character', emphasising that this would be testament, first and foremost, to the servant's moral qualities rather than her experience or qualifications (Flanagan 2019). Although the worker's ability to find new employment might rest to a very great extent on the possession of a good reference, the current or former employer was under no legal obligation to provide one. The ability to withhold or to threaten

to withhold a reference was thus an extremely powerful tool of management or control of the servant, and went some way towards giving the working relationship the form of something more like servitude than service or (arm's length contractual) employment (Flanagan 2019, 51-2, 74-5). In the gig economy today, customer ratings are amalgamated and displayed to future users as an aid to their decision whether or not to choose the worker in question (Prassl 2018, 53-5). They are also used by the platform itself as a tool of management; as data fed into the algorithms which determine such critical matters as the distribution of gigs: who will be offered which work. As a result, workers can feel pressured to undertake a good deal of additional, unpaid labour, including emotional labour, aimed at 'optimizing the customer experience', or, more simply, making the customer like them. Moreover, the higher the rating they achieve, the more tightly they become bound to a particular platform, since leaving that platform for another will mean leaving the rating behind too (Prassl 2018, 111-13).

Like gig work, domestic work poses particular challenges when it comes to the collective organisation of the workforce. In the late nineteenth and early twentieth centuries, several attempts were made to unionize domestic servants but faltered, in part, at least, because of the workers' isolation from one another, and their singularly long hours of work (Delap 2011, 89-93; Schwartz 2014). It was also the case that the major trade unions were reluctant to include domestic workers as members, Ernest Bevin declaring in 1931 that he would not seek to recruit (the mostly female) servants in private employment to the Transport and General Union, but only the (mostly male) gardeners, chauffeurs and other servants employed in public institutions (Delap 2011, 89-90). Where efforts at organisation were partially or temporarily successful, it is interesting to note that – contra the purportedly 'voluntarist' tradition in British industrial relations – the demands made on behalf of the membership were formulated in terms of decidedly legal rights and obligations (Delap 2011, 50, 87ff). The primary desire was to transform domestic service from a status to a contractual relationship (Streeck 1992). Given the imbalance of power in the anticipated relationship, however, not only the emancipatory but also the potentially exploitative elements of this move were recognised by the workers. Consequently, their desiderata included not only the contract but also a series of statutory rights that would function to limit the parties' contractual freedom (in practice, the employer's freedom to exploit): both those rights already accorded to other types of worker – maximum hours, holiday pay, health and safety inspections – and additional rights tailored to the particularities of domestic service, such as to decent accommodation and to a fair reference (Schwartz 2014, 187-8).

Without either significant membership or the support of the stronger, better established trade unions, domestic workers' unions found their demands for decent work easily neglected by the British state. In contrast to other sectors in which unions remained weak and wages low, no trades board or wages council was every created in respect of domestic service, and no legislation ever passed to extend the statutory rights of industrial workers to that sector. At the end of the First World War, when women's enforced redundancy from wartime factory and agricultural jobs inflated the numbers of unemployed workers registering at Employment Exchanges, and as eligible for state unemployment benefits, a policy decision was taken to encourage women workers, very actively, into domestic service (Aiken 2002). In 1922, for example, new regulations required the Exchanges to offer female claimants domestic work. This placed a woman in a double bind: if she rejected the job, she would be ineligible for unemployment benefit on the basis that she had refused work that she was capable of doing. If she accepted it, she left the unemployment scheme completely, since domestic service was not among the specified 'insured trades' (Whiteside 2015).

The experience of these workers in the 1920s raises important questions regarding the role of the state in the emergence and growing prevalence today of gig and other forms of precarious, low-paid work. As Noel Whiteside has carefully illustrated with detailed historical and comparative accounts, governments can construct different definitions of 'the unemployed' – meaning quite specifically those to whom unemployment benefits of one kind or another may be paid – in accordance with the policy aims of the day.

> The category of "unemployed" can never be a given fact … but is largely a socio-political product derived from prevalent assumptions about how labour markets should work and the role (if any) public authorities are expected to play in this operation (Whiteside 2015, 152).

If a government is so minded, legal definitions of unemployment, and the provision of welfare payments consequent upon them, may be fashioned so as to contribute to the creation of a 'floor' of minimum wages and other terms and conditions below which workers needn't accept work. If they refuse lower paid or more insecure work, they will not lose their entitlement to benefits.

At the beginning of the twentieth century in the UK, a system of government funded and administered social security was introduced with the primary aim of addressing poverty and

pauperism consequent on a 'want of work' (ibid., 154). The terms of the new legislation were shaped by a rationale which sought to concentrate available work in the hands of the most productive workmen so as to promote industrial efficiency and, at the same time, decasualization. As the then young William Beveridge put it in 1907:

> Irregular work and earnings make for irregular habits; conditions of employment in which a man stands to gain or lose so little by his good or bad behaviour make for irresponsibility, laziness, insubordination […] The line between independence and dependence, between the efficient and the unemployable, must be made clearer. Every place in 'free' industry, carrying with it the rights of citizenship – civil liberty, fatherhood, conduct of one's own life and government of a family – should be a 'whole' place involving full employment and earnings up to a definite minimum (Beveridge 1907, 326-7, cited Whiteside 2015, 155).

In the National Insurance Act of 1911, an unemployed worker was defined as he who was capable of work but unable to find a 'suitable' position. Importantly, 'suitable' was here interpreted to mean suitable for the particular worker in question – his particular trade, skills and experience – and this, in turn, was understood to mean that a worker should not be expected to work for less than the going (ie collectively agreed) rate (Deakin and Wilkinson 2005, 166-7). In line with the aim of combatting casualization, in other words, the Act was used to support rather than to undermine the collective negotiation of decent wages by trade unions and employers' associations.

By reason of the exclusion of domestic service from this system of social welfare, as we have seen, a gap in the floor was created through which domestic workers were allowed to fall. And they were allowed to fall, moreover, quite deliberately, and not at all by accident, so as to ensure an adequate supply of domestic workers (solving the 'servant problem' that was so much discussed in the media of the day) and, at the same time, to limit the costs to the public purse of the new National Insurance (Aiken 2002). Today, in this post financial crisis age of austerity, can we assume that cuts to welfare benefits are partly to blame for the emergence and growth of gig work? What of welfare systems that actively incentivise workers to accept low paid and 'low hour' work through the provision of tax credits (Adams and Deakin 2014); or through the institution of a universal minimum income of the type advocated for – and this should come as no surprise – by Silicon Valley insiders (Sadowski 2016)? To what extent are governments complicit, in other words, in the prevalence of 'indecent' work, perhaps actively

encouraging people into insecure and poorly paid jobs with the aim of keeping unemployment figures low?

Further clues as to government complicity or hesitancy in respect of the regulation of gig work can be found in the growing literature on the political economy of 'platform capitalism' (Srnicek 2017; Rahman and Thelen 2019). Here we learn the secrets of the platforms' ability to provide services at such very low prices; lower even than routine tax and social security avoidance would otherwise allow. A first point to note is the extent to which platforms' business models can rest on the capacity to extract ('harvest') immense amounts of data from all those who interact with the platform: workers, customers, producers, advertisers. That data is then either harnessed by the platforms themselves in their interactions with platform users, and/or sold on to third parties. As Nick Srnicek has shown, data can serve a number of 'key capitalist functions': educating and giving competitive advantage to algorithms; enabling the coordination of workers; allowing for the optimisation and flexibility of productive processes; making possible the transformation of low-margin goods into high-margin services (Srnicek 2017, 41-2). That the 'visible' element of platforms' activities – taxi provision, food delivery, odd jobs – is often quite secondary to such data harvesting goes some way to explaining why platforms are able to undercut competitor service providers (ibid., 60). Amazon, for example, regularly makes losses on its sale and delivery of consumer goods, but cross-subsidizes these from other branches of its empire (ibid., 60-1).

A second explanation for the capacity of platforms to sustain losses lies with their easy access to 'patient capital' (Rahman and Thelen 2019). Since the financial crisis of 2008, a cash glut has arisen in the global economy by reason of the monetary policy interventions of national governments, combined with increases in corporate savings and the expansion of tax havens (Srnicek 2017). Tech start-ups have been among the main beneficiaries of investors who are in no great hurry to turn a profit. As Rahman and Thelen explain, however, this patient capital is quite different to the patient capital characteristic of coordinated market economies in the twentieth century: patience is no longer exercised in the interests of all stakeholders, including labour, but rather to facilitate the concentration of control in the interests of powerful managers and investors pursuing monopoly or near-monopoly status in service markets and – eventually – winner-takes-all-returns (Rahman and Thelen 2019).

In addition to user-friendly apps and clever marketing, platforms' ability to provide services at very low and even loss-making prices explains, in turn, their great popularity with consumers (ibid.). As wages fall or stagnate across the board, and public services are cut and cut again, consumers can become reliant on cheap services; platforms can come to form part of the infrastructure of their lives – as domestic servants did 100 years ago. Capitalizing on this, platforms portray themselves as the champions of consumer interests and enlist the – captive – consumers as political allies. Here then is a further explanation of the apparent reluctance of government in some jurisdictions to enforce laws, including employment laws, against the platforms. Politicians face the risk that regulation might alienate their constituents, denying them access to the cheap goods and services upon which they have come to depend (Culpepper and Thelen 2019).

Something Different?

With political will lacking, in many jurisdictions, to protect the rights of gig workers by means of legislation, workers and trade unions have increasingly turned to the courts. Time and again, judges have rejected the platforms' claims that the terms of their contracts with workers and specifically, the lack of contractual obligations on the part of workers to turn up for work, mean that the workers are self-employed (De Stefano et al. 2021). Instead, courts have tended to focus on the powers that the platform has *in reality* to direct the worker and control the manner of work, finding variously that workers are employees or dependent contractors with employment rights, rather than independent self-employed workers (ibid.). In doing so, they have relied in part on precedent that predates the emergence of platform-mediated gig work and dealt instead with other forms of precarious and on demand work (ibid.).

However welcome these court decisions may be, they do not constitute a happy-ending to the story of gig workers and employment law. In jurisdictions in which employment status is tied to the terms of the contract, any court decision declaring workers to be employees or dependent contractors applies directly only to those workers named in the litigation and, by implication, others employed on *identical contractual terms*. It serves, from the platforms' point of view, as an invitation to redraft their contracts, working around the terms of the new ruling, so as to be able to claim, again, that the workers on the new contracts are self-

employed. Even where it seems highly likely that those employed under the new contracts are also employees or dependent contractors, it will take a new decision of the court to confirm that this is so, creating the opportunity for further years-long appeal processes. In many jurisdictions today, moreover, the employment rights accorded to workers as a result of a court victory can be rather meagre. Minimum wages may be set at a level below the cost of living, for example, and other employment rights (including rights to a measure of job security) may not apply for one reason or another. By reason of their precarity, finally, gig workers are likely to face particular difficulties in attempting to enforce those rights that they have.

Looking beyond the question of employment status, there are aspects of platform-mediated work that are – if not, or no longer, unique to such work – genuinely novel, and worthy of consideration by policy and law-makers. From the perspective of the worker, 'management by algorithm' and the associated lack of easy access to any human representative of the platform can result in extremely time-consuming and highly frustrating efforts to solve work-related problems, such as non-payment or under-payment of wages (Ravenelle, 2019; Kantor, Weise, and Ashford, 2021). When the problem in question involves emotive matters such as perceived unfair treatment, an 'accidental' firing, or work-related illness, frustration may be compounded by feelings of hurt and humiliation at the lack of a human response (Kantor, Weise, and Ashford, 2021). Management by an algorithm raises questions of the rightful limits of managerial control (Wood, Graham, Lehdonvirta, Hjorth 2018; Ravenelle 2019), the dignity and health and safety of the worker, including her mental health (Cefaliello in this volume), and her rights to privacy (Rogers 2023). Where customers repeatedly rate female and black workers lower than their white, male counterparts, with significant consequences for the terms and conditions of the workers in question, the possibility arises of breach of equality law (Kullman 2018).

Conclusion

Court decisions from around the world have tended to confirm the view of legal scholars that gig work is not *sui generis* but rather a further example of highly precarious, casualized work relations, designed by platforms to keep them supplied with work on demand. Platforms propagated the claim to newness as a deliberate strategy of liability avoidance: attempting to characterise the activity as something other than work, and themselves as something other

than employers, so as to avoid having to comply with employment laws and to pay taxes and social security contributions (Tucker 2019). Some features of gig work are novel and will require the development of new rules, or the reasoned application of existing rules and principles, by legislatures and courts. The fragility of court decisions regarding employment status points to the desirability of legislation to settle the matter once and for all provided that the necessary political will can be built.

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[2] The chapter draws on two earlier publications (Dukes 2020; Dukes and Streeck 2022). The project leading to these publications is funded by the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 757395).

[3] I use 'employment law' widely in this chapter to include what in some jurisdictions is called 'individual' and 'collective' employment law and in others, 'employment law' and 'labour law'.

[4] TaskRabbit 2008, Uber 2009, Lyft 2012, Deliveroo 2013, Foodora 2014.

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