

# Regulating for decent work: Reflections on classification of employees

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## Abstract

The International Labour Organisation hosted the Sixth Regulating for Decent Work Conference in its centenary year of 2019. As part of these three days, I had the pleasure to chair a panel posing the prescient question: ‘Are the Categories of “Employee” and “Self-Employed” Still a Valid Tool to Allocate Labour Rights?’ In this brief introduction, I outline the product of that panel by situating classification as part of an interplay between labour and commercial law.

## Keywords

Contract of employment, self-employed, SMEs, commercial law

## An emblem of work regulation in the 21st century

In a recent edition of the *European Labour Law Journal*, three contributors wrote briefly about the pervasive query of classification in multiple labour law settings: ‘Workers are generally included or excluded from protection depending on where they find themselves placed on a blurred line that characterises people as employed or self-employed.’<sup>1</sup> The classification question can be looked upon as an emblem of the challenges to labour law orthodoxy in the early part of the 21st century.

Labour law does not stand alone, however, as it reconsiders the binary approach to classification. Commercial law has also broadly employed a binary classification between consumers and commercial entities. Just as recognisable a problem in the labour law context, so, too, here the binary approach works well for more definitive instances, but compounds the difficulty where

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1. Keith Ewing, John Hendy QC and Carolyn Jones, ‘The universality and effectiveness of labour law’ (2019) 10 *European Labour Law Journal* 334, 335.

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there are more nuanced scenarios. The existence and importance<sup>2</sup> of small to medium-sized enterprises (SMEs)<sup>3</sup> illustrate the oversimplification of a binary approach in the commercial context. Micro-employers constitute the smallest version in the range of SMEs.<sup>4</sup> They have fewer than ten employees. Based on the absence of a minimum threshold, the self-employed would seem to be included in the SME cohort. Within this range of enterprises, the self-employed are in a more vulnerable position compared to larger SMEs, let alone large companies who have greater financial resources. As in labour law, size can correlate to power. Collective bargaining endeavours to capitalise on the coordinated aims of a workforce.<sup>5</sup> In commercial law, large enterprises exercise significant influence in the marketplace. In both instances, a binary approach which purports to be an all-purpose tool undervalues the effect of those who fall in the soft middle between two classifications. The strain in the binary classifications of both disciplines highlights their respective emphases: in labour law, the protection of vulnerable individuals; in commercial law, flexibility for contracting business parties.

On the interconnection between commercial concerns and workplace regulation, the United Kingdom will remain a place to watch in the coming years. The UK Supreme Court stated in *Autoclenz v. Belcher*<sup>6</sup> that it will not rely solely upon the written contract to determine the classification of parties. It will look at the ‘the reality of the situation where written documentation may not reflect the reality of the relationship’.<sup>7</sup> It found, in each of *Autoclenz* and *Pimlico Plumbers Ltd v Smith*,<sup>8</sup> the reality was not one of enterprising parties forming a contract, but rather of workers and employers.

If there has been an unwilling example of the clash of views on innovation and classification in labour law, it must be Uber; the transportation company self-identifying as a technology enterprise. In 2019, the Paris Court of Appeal ruled Uber and its drivers were engaged in an employment relationship.<sup>9</sup> Outside of the employment classification issue, but on one of the key arguments of Uber, the Court of Justice of the European Union rejected Uber’s self-identification as a technology instead of being a taxi company.<sup>10</sup> In each of these instances, a common point has been the

2. SMEs account for two-thirds of employers in the EU: European Commission, Annual Report on European SMEs 2017-2018 (November 2018).

3. SMEs are employing enterprises with between 1 and 249 workers. SMEs consist of three sub-groups: micros (1-9 employees); small (10-49 employees); and medium (50-249 employees). This is the breakdown used by the European Commission following EU Recommendation 2003/361. The recent report of the Executive Agency for Small and Medium-sized Enterprises (EASME) followed this division: Annual Report on European SMEs 2018-2019 (November 2019), 15. This report focused on the non-financial business sector.

4. European Commission, ‘What is an SME?’ [https://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition\\_en](https://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en). The definitions are based upon EU Recommendation 2003/361.

5. Collective bargaining recognised the imbalance of bargaining power between employees and employers. To that point, an open question remains as to whether or not trade unions may be marginalised as a result of the classification preoccupation. The Independent Workers’ Union of Great Britain, who litigated the classification of riders for Uber and Deliveroo (amongst others), has taken great strides in this area.

6. [2011] UKSC 21.

7. *Ibid* [22].

8. [2018] UKSC 29.

9. Cour d’appel de Paris – Pole 6, Ch.2, 10 janvier 2019, N°18/08357.

10. C-434/15, *Asociación Profesional Elite Taxi v Uber Systems Spain SL* (20 December 2017). It is a dubious distinction that this same argument was also rejected in the American state of California: *O’Connor et al v. Uber Technologies, Inc.*, C.A. No. 13-03826-EMC (N.D. Cal. 2016).

tremendous amount of control exerted over the individuals who are alleged to be contracting as independent enterprises consisting of one individual. Labour law's protective aim is evident here. The courts found the terms in these impugned contracts vested in the hiring parties the kind of control exerted by employers; and not the clauses normally found in contracts between independent commercial entities. Discussion in the area has emphasised the vulnerable position of these drivers who have been at the frontline of labour law's engagement with the digital economy. And yet, the perception of clinging to orthodoxy will continue to buoy the innovation counterargument. The alleged paternalism in these rulings will be railed against. The present offers an opportunity for meaningful debate on the less charted terrain between employee/worker and self-employed individual.

Comparing the labour and commercial interests as expressed in their respective binary classification models compels considerations that arguably have been underappreciated or underdetermined. It would oversimplify these queries to categorise them as welfare versus innovation; though this is how it may be cast. Still, opinions on the social security or social welfare aspects of employment protections will be difficult to reconcile with the more venerated idea of the individual working for herself. The US State of California passed a law in force as of 1 January 2020<sup>11</sup> that classifies 'gig' workers as employees of the platforms engaging their services 'unless the hiring entity demonstrates that the person is free from the control and direction of the hiring entity in connection with the performance of the work, the person performs work that is outside the usual course of the hiring entity's business, and the person is customarily engaged in an independently established trade, occupation, or business.'<sup>12</sup> This law has been the subject of criticism. A coalition has argued the law ignores the growing trend and choice of Californians to work independently.<sup>13</sup> Business press has contributed its own critique of the outdated nature of the law with the commensurate economic lag it will produce.<sup>14</sup> It is argued, though, that the criticism of the law's lack of innovation is tantamount to an upheaval (with implications for other areas of law), rather than a discrete renovation. The Canadian case of *Heller v. Uber Technologies Inc.*<sup>15</sup> illustrates.

Unlike other Uber cases, this case focused upon the preliminary matter of the venue for a hearing and not the employment status of drivers. The contract between Uber and Ontario-based drivers contained a dispute resolution/forum selection clause. Governed by Dutch Law, mediation/arbitration was to be held in Amsterdam, under International Chamber of Commerce rules of

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11. Before looking at the California law as a panacea, a Massachusetts law with a similar aim, passed about 15 years earlier, should be recalled: Legislative Counsel's Digest for St.2019 c.296, An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor.

12. Legislative Counsel's Digest for St.2019 c.296, An act to amend Section 3351 of, and to add Section 2750.3 to, the Labor Code, and to amend Sections 606.5 and 621 of the Unemployment Insurance Code, relating to employment, and making an appropriation therefor.

13. See I'm Independent Coalition: <https://imindependent.co/about/>.

14. See for example, Matt Cooke, 'California's Gig Worker Law . . . Is Going to Fail' Forbes (30 September 2019) <https://www.forbes.com/sites/mattspoke/2019/09/30/californias-gig-worker-law-is-going-to-fail/>

15. 2019 ONCA 1 (leave to appeal to the Supreme Court of Canada granted 23 May 2019). This decision was discussed in David Mangan, 'Commercial and Labour Law Considerations in the Uber Litigation', *Regulating for Globalization*, 04/03/2019, <http://regulatingforglobalization.com/2019/03/04/the-law-of-obligations-and-smes/>.

mediation and arbitration.<sup>16</sup> Pursuant to ICC Rules, drivers would be required to pay a non-refundable filing fee of USD 3000 in order to initiate mediation proceedings. If the dispute was valued at under USD 200,000, an additional administrative fee of USD 5000 would be applied. If mediation did not yield a settlement, the Ontario Court of Appeal found the cost of initiating the mediation/arbitration process was approximately USD 14,500. The lead plaintiff driver earned in the range of CAD 400 and CAD 600 per week based upon weekly work hours totalling between 40 to 50. Annually, the lead plaintiff grossed CAD 20,800 to CAD 31,200. *Heller* poses an important question: if these individual drivers are small businesses on their own, what private law tools do they have if there is a conflict with Uber? The contract under scrutiny in *Heller* sets an important basis for further consideration. It may be asked to what extent can the imbalance of bargaining power be used to distinguish employees from the self-employed in such a scenario. Additionally, the lopsided nature of this contract provision suggests subordination may be detected in varied situations and so it becomes a less reliable principle upon which to make foundational distinctions. Classification places the self-employed individual within the remit of private law, particularly contract, because this individual engages in a contract for service instead of one of service. The implication of the binary determination is profound: not only does the individual fall outside the protections afforded to employees, but the self-employed person may only rely upon contract law arguments (if they can afford to have legal counsel and litigate the matter). And so, the treatment of all commercial entities as one homogenous group arguably further facilitates existing advantages. The question is whether or not the advantage crosses a line and is deemed repugnant to the law. The plaintiffs in *Heller* argued the impugned contract clause was unconscionable (a position derived from common law contract), but, the case pushes into a less definite area of the law.<sup>17</sup> As has been seen in labour law, private law has also been called upon to expand the application of its concepts; a key difference though is the different history and premise of labour law.

Although the reality of equal commercial parties contracting with each other has been hollow in the Uber litigation and maybe so in *Heller*, Western economies believe in and rely upon small businesses. Between 2000 and 2013, UK SMEs grew rapidly, increasing in number by about 41%.<sup>18</sup> While perhaps not necessarily grounded in empirical evidence, there is a rhetorical link between SMEs and the notion of innovation. (The rhetorical superseding the empirical (or its absence) is a familiar occurrence in labour law.)<sup>19</sup> The potential must be there for an individual with her own car driving passengers to their destinations to subscribe to a modified form of autonomy at work in order for innovation, represented by the platform economy, to persist. The fact that so far courts have found the reality not to be one of commercial parties contracting measures how embedded within discourse the characteristic of subordination has

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16. The ICC's rules for mediation and arbitration, respectively: <https://iccwbo.org/dispute-resolution-services/mediation/mediation-rules/>; <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>.

17. For a recent discussion see Stephen Waddams, *Sanctity of Contracts in a Secular Age: Equity, Fairness and Enrichment* (New York 2019), chapter 7. which was published prior to release of the Ontario Court of Appeal's decision in *Heller*.

18. Department of Business, Innovation & Skills (BIS), *Business Population Estimates for the UK and Regions 2013* (Sheffield 2013), 5.

19. For an elaboration of this critique see Sara Slinn, 'The Limitations of Pieces of Paper: A Role for Social Science in Labour Law' (2006) 12 CLELJ 291.

been.<sup>20</sup> The question here is how to balance a purpose of labour law and a purpose of commercial law; facilitating entrepreneurial activity which requires the legal system to be ‘flexible and responsive to rapid change.’<sup>21</sup>

## Considerations for a new framework

With the above offered as an entry point, in this issue of the *European Labour Law Journal*, three contributors challenge the precepts of labour law’s approach to classification in order to move towards an adapted or adaptable framework.

Adalberto Perulli offers a multi-jurisdictional discussion of classification; making reference to not only Italian, but also German, French and English law. He criticises the reliance upon subordination as the juridical means of assessing employment status. As well, he considers the ‘expansion tendency’ of labour law, implemented through a mixture of universality and selectivity.<sup>22</sup> Drawing from his prior research, Perulli adds that this expansion may be identified as arising in two ways: ‘through a *re-definition* (interpretative or legislative) of the notion of “employee” and of the underlying element of subordination which characterises the employment relationship or through a *selective extension* of the protection provided by labour law to non-subordinate forms of labour’.<sup>23</sup>

Federico Fusco commences his contribution by amending the *Philadelphia Declaration* as ‘labour is not a commodity . . . but a service.’ He critically discusses subordination as a foundation for the allocation of labour protections for a contemporary economy. He contends that the ‘gig economy’ has transformed the employee into a service provider; a movement attributable to a shift towards a market transaction-based model. The result is a cohort of individuals who fall outside of the orthodox classification for protections afforded to employees, but who also demonstrate similar levels of vulnerability to the employee group. Fusco advocates for a rethinking of the allocative criteria premised upon the individual’s needs. This leads to his conclusion that digital platforms should be classified as ‘job-placement service providers’ and therefore subject to relevant labour legislation.

Annamaria Westregård considers the challenges located in labour and social security legislation as it pertains to crowdworkers in the digital economy. She addresses the topic using the Nordic model where collective agreements are the standard means of regulating working conditions. Westregård commends the work of social partners who have improved crowdworkers’ conditions in some industries through collective bargaining. This points out the absence of

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20. ‘The employer-employee relationship is contractual, with particular rights and obligations on either side, and is characterised by legal subordination. It is governed by its own legal rules, which differ considerably from those generally applicable to relations between individuals’: Bărbulescu (Grand Chamber) [117] which is a translation of the Court of the Fifth Section’s ruling in Saumier v. France, Application 74734/14, [60] (12 January 2017).

21. Roy Goode, ‘The Shaping of Commercial Law’ in Roy Goode, *Fundamental Concepts of Commercial Law: Fifty Years of Reflection* (Oxford 2018), 169.

22. Referencing Guy Davidov, ‘Setting Labour Law’s Coverage: Between Universalism and Selectivity’ (2014) 34 *OJLS* 543.

23. Citing his own Adalberto Perulli, *Economically dependent/quasi subordinate (parasubordinate) employment: Legal, social and economic aspects* (Brussels 2003); as well as Nicola Countouris and Valerio De Stefano, *New Trade Union Strategies for New Forms of Employment* (Brussels 2019).

collective agreements in the digital economy (or for platform entrepreneurs). Complicating the matter, digital platforms consider themselves coordinators of the self-employed and not employers.

**Author contribution**

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