

3x3 FinTech Lecture Series

THE DIGITAL WORKPLACE

Internal and External Trajectories of Work in the Digital Era

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Work and Workplace

- Work – Job – Workplace – Virtual workplace
 - virtually no place!
- Law applicable to ‘work’?
 - No more property law
 - No more family law
 - No more the private law of things
- A specific discipline to regulate workplace relationships
 - Still a place for labour law?

Internal and External Trajectories

- **Internal** → traditional workplaces
 - How
 - Where and when
 - With whom
- Labour law issues
 - Law applicable
 - Balance between fundamental rights

Internal and External Trajectories

- **External** → newly created jobs
 - Gig-/Sharing-/Collaborative-/Platform-Economy

Transportation



Finance



Consumer goods



Space



Personal services



Professional services



External Trajectories

- Main models (description)
 1. Work on demand via app
 1. Crowdwork
 1. Work intermediation

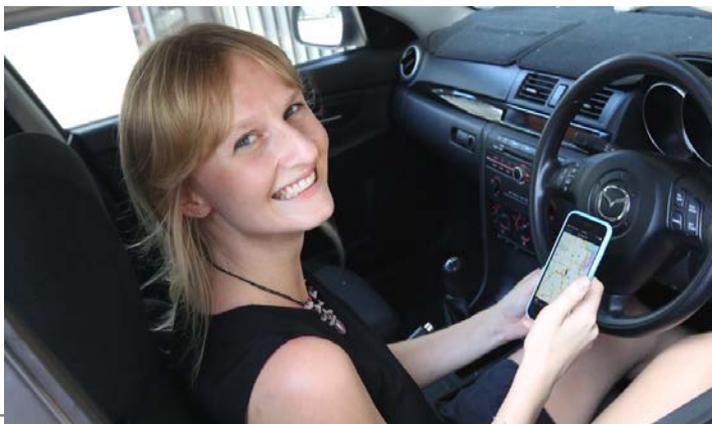


Amazon Mechanical Turk

Find an interesting task

Work

Earn Money

Three circular icons arranged horizontally. The first is yellow and contains a white notepad with two red checkmarks. The second is light blue and contains a black silhouette of a person sitting at a desk with a laptop. The third is light green and contains a large white dollar sign.

Common features

- Platform-based job
- Addressed to the crowd
- Freedom to accept/refuse jobs (tasks)

But...

- Virtual/ non-virtual work
- Global/ local execution of work
- Methods of adjudication
- Payment (bid/defined rate)
- Complexity of task and control over performance
- Specialised vs. general platforms

Two Opposite Narratives

(1) Optimistic

- Enhanced way of matching supply and demand of labour using online technologies
- Reduce transactions costs and market frictions by facilitating outsourcing to individuals
- Customer-oriented services
- Job creation
- Flexible schedules
- Social emancipation
- Increase flexibility based on a “pay-as-you-go” workforce

Two Opposite Narratives

(2) Pessimistic

- “Humans-as-a-service” and commodification
- Dehumanized perception of individuals
 - Devaluation and disguising of work (“gigs”, “tasks”, “services”, “favours” or “microbusinesses”)
 - New forms of invisible labour
 - Adverse impact on rates and ratings
- Demutualisation of risks
- Unilateral flexibility: the trap of zero-hours jobs
- Casualization of work and informalization of the formal economy

Two Opposite Narratives

(2) Pessimistic (labour law)

- Misclassification
- Elusion of minimum wages
- Unilateral change of terms and conditions and pay, e.g.:
 - waivers of cancellation fees
 - application of discounts
 - changes of platforms' fees
- Equality and non discrimination
- Abusive termination or “deactivation” whilst subject to lock-in effects



VOCABULARY : Double Speak

Not to USE

- Working *for* Deliveroo
- Equipment
- Shifts/sessions/hours
- Absence/time-off request
- Disciplinary meeting and firing
- Wage/salary/pay

To Use

- Working *with* Deliveroo
- Branded clothing
- Availability
- Unavailability notification
- Supplier agreement review and termination
- Fees

Samples of clauses: *misclassification*

- ***You acknowledge that, while Providers are agreeing to perform Services for you as independent contractors and not employees, repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification of that employment status (AMT)***
- ***You agree to indemnify, hold harmless and defend Company from any and all claims that a Tasker was misclassified as an independent contractor, any liabilities arising from a determination by a court, arbitrator, government agency or other body that a Tasker was misclassified as an employee (Taskrabbitt)***

Samples of clauses: availability

- 3.2 [...] when applying to join Deliveroo's supplier pool and at regular intervals thereafter **you will provide an indication of the time periods during the week in which you typically expect to be available to work. Deliveroo places reliance on such indications provided by suppliers in planning to meet customer demand. We accordingly expect you to inform a member of the Operations Team if this changes materially, and reserve the right to terminate this Agreement if you are no longer able to work at time periods which meet Deliveroo's needs.**
- 3.4 **During your onboarding process, you will have discussed with a member of the Operations Team the level of demand for suppliers within your zone and consequently the level of availability to perform Services which Deliveroo expects you to provide. You are expected to be as flexible as you can to meet Deliveroo's needs.**
- 3.7 **You must immediately notify a member of the Operations Team if you become unable to work during a time period that you have previously agreed to work in accordance with clause 3.4, and explain the reasons for this. (Deliveroo)**

Samples of clauses: “light” exclusivity clauses

- “Light” exclusivity clauses
 - *You will **only accept work product from Providers that has been submitted through the Site (AMT)***
 - *You may not solicit, advertise for, or contact in any form **Users for employment, contracting, or any other purpose not related to Professional Services facilitated through the Handy Platform without express written permission from us (Handy)***
 - *You will not provide your topcoder information including, but not limited to, your topcoder handle and rating, to any third party for the purpose of pursuing employment opportunities without the written consent of topcoder. **If you are contacted by a third-party regarding employment opportunities and/or media interest as a result in your participation in topcoder Competitions, you agree to promptly notify topcoder of such contact” (Topcoder)***

Reactions ?



The Uber and Lyft litigation (US)

Before administrative bodies (Florida, Oregon, California), the US District Court, and North. California

- Uber is not a technological company
 - No viable business without drivers
 - Do not sell software, they sell rides
 - Detailed instructions to drivers
- Right to control
 - Guidelines:
 - *“be the only non-passenger in the car”, “keep [the] car clean on the inside and outside”, “go above and beyond good service such as helping passengers with luggage or holding an umbrella for passengers when it is raining”, “greet every passenger with a big smile and a fist bump” (Lyft)*
 - Background checks and city knowledge test
 - Expectation that jobs will be accepted
 - Reviews, rates and consequent termination

The Uber litigation (UK)

The (London) Employment Tribunal **(ET)** [2016]

- Uber fixes the fares and drivers cannot agree higher one
- Uber imposes numerous conditions and instruct drivers and sets (default) route
- Rating system amounts to performance management and disciplinary power

→ Uber drivers are ‘workers’ under UK law = WTR+NMWA

The Employment Appeal Tribunal **(EAT)** [2017]

confirmed the first instance decision

- Relying on Autoclenz [2011]: purposive approach
- The assessment by ET was fact- and context-specific

→ The EAT confirmed that **Uber drivers are ‘workers’**

The Uber litigation (EU)

CJEU Uber Spain (C-434/15) AG Szpunar 11/5/2017

CJEU Uber France (C-320/16) AG Szpunar 4/7/2017

- Legal context: dir. 2006/123 on services
- Exclusion of transport services
- Intermediary service or an information society service?
- Are restrictions (licence) on the freedom to provide electronic intermediary service imposed by MSs valid measures to constitute derogations from dir. 2000/31?

Conclusion

How to fit square pegs into round holes?

- **Digital work is mercurial in nature**
- **The “traditional” labour law approach leads to misclassification cases**
- **“Indirect” approach calls for different legal constructions**
 - **Digital work and intermediaries**
 - **Fair Crowdwork platform**
 - **Non discrimination**
- **The trick of normative arguments**
- **The need to reverse the paradigm**