Global Workplace Law & Policy

Is addressing working conditions the response to the great resignation?

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The Great Resignation has been a frequent discussion point in the United States. The following graph from Pew Research outlines the top reasons US workers have left a job in 2021. Broadly we may categorise these as working conditions issues. Aside from pay which is a common consideration, some of the reasons pertain to the type of work ("no advancement opportunities"), while others are based upon a subjective feeling ("felt disrespected"), lack of work-life balance, and in particular problems with working time such as lack of flexibility, working too many or too few hours.

While the "great resignation" trend is not as strong in Europe as in the US, the EU also experiences

a rise in disenchantment with work and a "major reconsideration of work". Workers are increasingly quitting jobs, not only from sectors traditionally characterized by low pay and volatile working conditions, but also because of the blurred boundaries between work and personal life stemming from remote work. This situation requires some reflection from the point of view of the regulatory setting applicable to working conditions – not only at the national, but also at the EU level due to the global nature of the phenomenon.

European Union and Working Conditions

European Commission President Ursula von der Leyen has taken the European Pillar of Social Rights (proclaimed in 2017) as a guiding force in recalibrating the Commission's approach to the regulation of labour market. Over the period of the pandemic (which continues), the European Commission has released some significant proposals that aim to improve working conditions. In particular, it has released the *Proposal for a Directive on adequate minimum wages in the European Union* COM/2020/682 final, the *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work* COM/2021/762 final, and the *Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons*.

This commentary is not suggesting that the EU measures are in response to the "great resignation". Instead, instruction is taken from the collection of proposals (a larger scale addressing of working conditions at a time of workplace/workforce change), as well as their timing (arising as they do when there is evidence of workers re-evaluating their relationship to work). Article 151 of the Treaty on the Functioning of the European Union (TFEU) sets out a joint effort between the Union and Member States regarding "the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion." The European Commission's broad premise to support and complement the Member States in regulating working conditions (see Article 153(1)(b) TFEU) is set out in the proposed Platform Work Directive and the proposed Adequate Minimum Wage Directive. The EU's competence to move forward on these matters has been contested.

Example: working conditions in platform work

The challenge is considerable. Let's look at platform work; arguably a difficult area for regulation of working conditions. While platforms want to present themselves as a "stepping stone" sector, where workers begin their experiences with labour market, this has been proven to be largely untrue and platform work is increasingly recognised as an area of the labour market negatively impacting long-term employability of workers. At the same time, the high turnover characteristic for platform work seems largely related to highly precarious working conditions which workers try to escape. For instance, unpaid labour has been a feature (it may be said a primary feature) of platform work.[1] It means that a facet of the business model is to narrowly define what constitutes service time (i.e., the time for a food delivery rider to complete a delivery), thereby minimising the financial outlay by the platform which reduces overall costs (including those passed on to consumers). There is an argument that could be made that this model constitutes an unfair restriction to the concept of work, particularly the concept of working time as well as the working conditions of these individuals. This argument is, in part, premised on the notable costs borne by those performing work on platforms. The financial outlays for individuals providing these services

include the supply and maintenance of their equipment (such as vehicles and technology). There are also what may be called 'hidden costs' to performing this work, such as searching for tasks, researching tasks, and waiting time between assignments. For instance, the Commission's impact assessment on the proposed Platform Work Directive finds that "[o]n average, people working through platforms spend 8.9 hours per week doing unpaid tasks (such as researching tasks, waiting for assignments, participating in contests to get assignments and reviewing work ads), against 12.6 hours doing paid tasks. The unpredictability of platform work may be detrimental to the work-life balance of those performing it".[2] Pulignano and others found that on some platforms food delivery couriers do unpaid tasks during more than half of their workdays, while online freelancers provide them practically every day.

An EU standard for working conditions

The activity initiated by the European Union has relied upon its power under Article 153, particularly activities to support and complement working conditions. While there are other instruments that could be applied, such as Article 2 of the European Social Charter, Article 31 of the European Union Charter of Fundamental Rights[3] (CFR) may afford a more formidable foundation from which to develop EU parameters on working conditions. Article 31(1)'s wording is derived from a number of EU laws which gives the provision a broad scope: where "working conditions" has the same meaning as Article 156 TFEU (which itself "encourage[s] cooperation between the Member States and facilitate the coordination of their action in all social policy fields", particularly "labour law and working conditions"); and the health and safety considerations of Directive 89/391/EEC ("on the introduction of measures to encourage improvements in the safety and health of workers at work").[4] Article 31(2) draws from Directive 2003/34/EC (Working Time Directive). As the CJEU set out in *UK v Council*, "working environment", "safety", and "health" are to be interpreted broadly regarding the powers conferred upon the European Council "for the health and safety of workers."[5]

Article 31 CFR contains broader and more abstract statements about (1) working conditions which respect worker's health, safety and dignity and (2) narrower and more specific provisions providing for limitations of a maximum number of working hours, rest and leave periods, and annual period of paid leave. Most importantly, the list provided within article 31(2) CFR should be treated as illustrative of working conditions but not exhaustive.

This article thus poses challenges. With Article 31 being both specific and abstract, the provision seems limited, and yet broad. Article 31 applies to workers, instead of the broader term "everyone" used elsewhere, such as Article 29. And yet, the provision is not limited to the definitions of employment status used within Member States' law. Its breadth, then, remains a matter for further consideration as to the scope of applicability of the notion of "working conditions" resulting from the definition of a "worker". Information technology used by platform companies further complicates a search for clarity given the pervasive nature of algorithmic management increasingly resembling typical managerial prerogatives.

Reconsidering the legal status quo

Innovations in information technology have challenged the *legal status quo* of work based upon the binary divide between employment status and self-employment. The CJEU's decision in *Yodel**[6]* may compel further consideration. It relies upon the orthodoxy of employment status: "more leeway in terms of choice of the type of work and tasks to be executed, of the manner in which that

work or those tasks are to be performed,[[7]] and of the time and place of work, and more freedom in the recruitment of his own staff are the features which are typically associated with the functions of an independent service provider."[8] Still, the court adds that the aforementioned applies if "first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer. However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88."[9] This statement of the law emphasises subordination, but does so in a way that characterises a broad notion of "leeway" in the performance of this work as antithetical to labour law, and therefore a commercial matter. On the point of the court's dependence upon subordination, the decision has been characterised as revealing "the difficulties of a 'subordination' test in situations of casual work where there is no contractual stability between the parties."[10]

It may be contended that subordination extends to an individual like the delivery person in *Yodel*. This reading could capture the self-employed without employees, who constitute around 10% of the total employment in the EU. And yet, such an approach may delve further into the qualification posed by the *Yodel* court when it stated that courts should take "account of all the relevant factors relating to that person and to the economic activity he carries on".[11] The type of economic activity would seem to be one area for deliberation. For example, the food delivery and care industries evidence a situation where work is widely performed personally by self-employed workers who are insufficiently protected. With this in mind, it is argued that Article 31(1) should not be read as narrowly as a worker in the sense laid out in *Yodel*. Instead, worker should be understood as both an individual in an employment relationship, as well as an individual in a contract for services where the individual provides these services on his/her own account within the food delivery and care sectors.[12] This would be consistent with the approach taken by the European Commission with its *Guidelines on solo self-employment* which treat "solo self-employed" as "persons who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labour for the provision of the services concerned"[13], as well as Article 10 of the proposed Platform Work Directive which provides that some form of protection "shall also apply to persons performing platform work who do not have an employment contract or employment relationship."[14]

These two proposals by the European Commission represent thoughtful progress. Nevertheless, there is scope for further development. Article 10, for example, travels part-way down a path towards a meaningful approach.[15] Amongst other points, it is drafted in a less than clear manner as Article 6 applies to "platform workers", but Article 10 purports to extend its application to "persons performing platform work". Part of the challenge with the proposed Platform Work Directive is that it puts into one cohort of "person[s] performing platform work" groups with different problems. As has been noted, there are common challenges facing persons performing platform work, such as defining their actual working time. Still, there are distinct considerations affecting certain members of this broad cohort. For example, freelancers are in a particularly vulnerable situation from a legal standpoint; lacking the opportunity set prices with clients, and even being restricted to certain platforms due to 'lock in' effects caused by the lack of transferability of 'reputation' amongst platforms. Addressing the issues facing this group may require a combination of labour market regulation assuring compliance with minimum rights and standards, and product market regulation lowering competitive pressures that such freelancers face.

A further challenge with depending upon Article 31 is that much more attention has been on Article 31(2) than (1). As noted above, the content of these two subsections can be viewed as

differing significantly because (2) is more specific, but (1) is more abstract. Nevertheless, this Article not only offers a premise upon which to set general parameters on working conditions, it can also ground the EU Commission's recent legislative efforts (i.e., proposed directives in adequate minimum wages, platform work, and the guidelines on solo self-employment). The Charter definitively sets out the fundamental rights applicable within the EU. Its standing in EU law is that of primary law pursuant to Article 6(1) of the Treaty of Lisbon.[16]

The prospect of engaged discussion regarding working conditions at EU level, precipitated by the European Commission's proposals, offers much to consider at an important time.

We believe that addressing the working conditions' gap by extending protection of working standards to non-standard employees might be one of the ways of improving the labour market situation in the era of the "great resignation" and discussions about post-COVID economy. Improving the quality of work and work-life balance is a necessary step out of this creeping societal crisis.

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[1] "Our research indicates that unpaid labour leads to an overestimation of the value produced by platform work and an underestimation of its costs, as completion of tasks that are paid does not represent workers' entire temporal and financial investment, effectively lowering their earnings".

[2] European Commission, *Commission Staff Working Document Impact Assessment Report* SWD/2021/396 final (9 December 2021), 7.

[3] Article 31 (1) "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

(2) "Every worker has the right to working conditions which respect his or her health, safety and dignity."

[4] A. Bogg & M. Ford, "Article 31" in S. Peers, T. Harvey, J. Kenner & A. Ward, (eds) *The European Charter of Fundamental Rights: A Commentary* (Oxford: Hart/Beck/Nomos, 2021), [31.01].

[5] Case C-84/94 *United Kingdom V EU Council* [1996] ECR I-5755, [15]. Article 31 should be understood as containing a similar ("constitutionalised") conception of health and safety: as argued in A.C.L. Davies, *EU Labour Law* (Cheltenham: Edward Elgar, 2013), 201 and Bogg & Ford, n.4, [31.47].

[6] Case C-692/19 *B v Yodel Delivery Network Limited.*

[7] Including the use of substitutes *Yodel* [45].

[8] *Yodel* [32]

[9] *Yodel* [45].

[10] Bogg & Ford, n.4, [31.41].

[11] *Yodel* [45].

[12] The careful wording of and balancing in Points 8 and 11(a) in ILO Recommendation No.198 of 2006 are noted in this regard.

[13] European Commission, *Annex to the Communication from the Commission. Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons, C-2021/8838 final*, 1.

[14] European Commission, *Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work*, 2021/0414 (COD).

[15] Article 10 is not the only point for consideration. The application of Directives (EU) 2019/1150 and 2019/1152 are also unclear.

[16] As stated by the CJEU: “the Charter of Fundamental Rights of the European Union, which Article 6(1) EU recognises as having the same legal value as the Treaties”: Case C-155/10 *Williams v British Airways*, [18].

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