Global Workplace Law & Policy

The first Hungarian platform work judgment:'self-employment'

Tamás Gyulavári (Pázmány Péter Catholic University (Hungary)) and Péter Sipka (University of Debrecen (Hungary)) · Tuesday, May 28th, 2024

On 13 December 2023, the Hungarian Supreme Court (Curia) ruled on the classification of platform work relations between a food delivery platform (Platform) and a delivery driver. This is the first platform work ruling in Hungary, and also in the Central and Eastern European region. The Curia stated that the platform worker is self-employed; therefore, the judgment deserves a appraisal.

The platform work story

The Platform company is the leading food delivery platform in Hungary. The plaintiff worked for the Platform as a food delivery driver between 17 October 2019 and 15 January 2020. The parties agreed that the work of the plaintiff is based on a civil law contract between the platform and the individual entrepreneur (self-employment).

The following employment conditions were arranged unilaterally by the employer in the "General contractual terms" (signed by the employee):

- Work is organized by the Roadrunner app. The Platform sets the active periods (open for work) every Wednesday for one week in advance, and the worker can freely choose the days, the length of each working day (2, 4, 8 hours), and the working time. The worker must answer the app in the chosen periods within 75 seconds.
- The worker must use the Platform's design clothes and delivery box, but use his own phone and vehicle.
- Pay includes an hourly rate, an extra amount per delivery (defined unilaterally by the actual table of fees on the website), and 30-minute paid break in case of 6 or 8 hours of work. The Platform logs in the worker's billing program and manages all billing and payments.
- The Platform rates the worker every week (never the clients) based on: availability in the chosen active periods, number of deliveries per hour, and number of refused invitations for deliveries. The General Contractual terms defines the reasons for cessation, including two successive delivery refusals, or even one unavailability in the undertaken active period.

The worker had an accident and technical (car) problems in December 2019, so his activity dropped on the app (very low availability). As a result, on the proposal by the Platform, they agreed on termination of work. After the termination of their civil service work relationship on 15 January 2020, the worker (plaintiff) asked the labour court to declare the existence of an open-ended employment relationship in the above period (almost three months) with the monthly minimum wage (circa 450 euros), as it would guarantee him better health care and pension rights based on respective social security and tax payments by the employer. The first instance court found the worker to be in 'self-employment', but the second instance court reversed this classification to 'employment'.

Hungarian law and case law on the notion of employment

Hungarian regulation of work relations is based on the binary model consisting of an employment relationship under the Labour Code with full employment protection, and self-employment under the Civil Code without protection.[1] The third category (employee-like person) does not exist due to the deletion of this concept from the last draft of the Labour Code in 2012.[2]

The Labour Code[3] does not contain any specific rule on classification, but it provides a definition of the employment relationship (Article 42), and rules on the rights and obligations of the parties (e.g. Articles 45, 52, 86). The applicable sanction of false self-employment is invalidity (Article 27).

On the basis of the above provisions, labour courts have elaborated an extensive case law in the last decades on the notion of employment, which serves as the basis to delineate employment contracts and civil law contracts (self-employment). This case law was compiled by the Ministries of Labour and Finance in Guidelines creatd in 2005 (henceforward: Guidelines).[4] Although it is not in force (since 2012), but still followed by the labour courts and labour inspectors, as it synthetizes former case law.

The Guidelines make a distinction between primary and secondary characteristics:

- The primary (highly relevant) assessment characteristics are: a) scope of work, nature of activity; b) personal work obligation; c) mutual obligations to employ and be available; and d) hierarchical subordination.
- The secondary (less important) characteristics are: a) employer's right to direct, order and

monitor work; b) employer's right to schedule working time; c) place of work; d) pay; d) employers provide tools, materials; e) employers ensure health and safety.

Consequently, the Hungarian mixed test (the Guidelines) incorporates, although at differing weight, the customary civil and common law employment tests (under varying names): subordination/control; organisational integration; and mutuality of obligations/legal continuity. As an exception, the economic dependence/reality test is missing from both the Hungarian Labour Code and case law.

According to the legal practice developed under the Guidelines, the presence of one characteristic does not determine the nature of the legal relationship itself, but the predominance of the characteristics may lead to the conclusion that an employment relationship exists after examining all the circumstances of the case.

First and second instance court decisions

The first instance court[5] stated that the platform worker was self-employed. This decision put the emphasis on the lack of mutuality of obligations, and particularly on the employment obligation of the employer, which is substantiated by the lack of fixed working time. It was percieved as fundamental that the unfixed number of working hours is unknown by the Labour Code. Besides, the plaintiff did not perform work in the organization of the employer, and the hierarchical relationship and strict personal subordination was also missing. Economic dependence was not proven by the plaintiff. As an outcome of all these tests, the worker was considered self-employed. The court did not examine the legal relationship solely on the basis of its content, but left the question slightly open, and declared that the claimant had failed to prove the existence of the employment relationship's requirements.

The second instance court[6] reversed the first judgment and stated an undefined employment relationship with a basic pay (at minimum wage). The second instance court relied on the same factual conditions, legal provisions, case law and resulting employment tests like the first instance decision, however, it came to the opposite conclusion. The judgment was based on the substantial features of work conditions and stated the existence of personal subordination and control, as well as mutual obligation of the parties, putting aside the absence of fixed working time by the employer.

Final decision of the Curia

The final decision of the Curia (supreme court) overturned the second instance court judgment and approved the first instance decision with a similar reasoning. The Curia went through the classification marks (employment tests) in accordance with the former two judgments and the Guidelines, and stated the lack of the attributes of employment concerning these tests. At the same time, the Curia neglected the alternative path offered by the sophisticated and progressive second-instance decision.

In essence, the Curia judgment (alike the first instance decision) was based on two outstanding tests: primarily the control (personal subordination) test, which included in a light way the economic integration test; and the mutuality of obligations test consisting of the two obligations to employ (employer) and be available for work (employee). Even if the Curia emphasized, that subordination (control) is the primary employment test, the judgment put more emphasis on the lack of mutual obligations, which was explained above all by the absence of fixed working time by

the employer. The Curia also stated that where a legal relationship can be performed both as an employment relationship and as an agency relationship, it is up to the will of the parties to decide which legal relationship to establish. In this case, the Curia found a real and equal bargaining position between the parties, which led to the conclusion that they did not intend to create an employment relationship.

The first and the final judgments attributed too much importance to one condition, namely the freedom of the worker (in theory, not in fact) to define the amount of working time. As a contrast, former case law requires the judge to make classification on the basis of considering classification characteristics individually and also altogether, therefore, they must be evaluated with different weights depending on the conditions and nature of the case. This overall assessment will define, which classification characteristics will be decisive in the given case.[7] We question if the lack of regulating fixed working time is such a decisive factor considering the interests at stake.

In our view, the fundamental question is if this platform worker's relationship with the Platform, and the related need for employment protection, is similar to that of employees, as it has been settled in CJEU case law (e.g. *FNV Kunsten*[8]). The theoretical opportunity to define the amount of working time and refuse work (with serious sanctions, including termination) does not provide a solid basis to say no to this underlying question. We find this platform work job as full-time employment with a flexible working time regime. What is clear from the Curia judgment is that strict control and mutuality of obligations, as the basic two tests, are missing, if working time may be canceled by the parties and its length is *de jure* defined by the worker. Platforms can easily adapt their business model to this judgment to simply avoid classification as 'employment'. Overall, the judgment seems to close the door for platform workers to successfully litigate their work status. However, this may call for a revision of the present framework, both in legislation and case law.

References

[1] Act 5 of 2013 on the Civil Code, Articles 6:238-250 (contract for works), 6:272-280 (mandate contract).

[2] Tamás Gyulavári, 'A bridge too far? The Hungarian regulation of economically dependent work' Hungarian Labour Law: E-Journal (2014) 1,82-103.

[3] Act 1 of 2012 on the Labour Code.

[4] Joint Guidelines of the Ministers of Labour and Finance on assessment caracteristics of works contracts No. 7001/2005.

[5] Debrecen Court 13.M.70.070/2021/27, on 26 October 2022.

[6] Debrecen Regional Court of Appeal: Mf.I.50.063/2022/7. on 18 April 2023.

[7] Supreme Court published decision: BH 1993/775.

[8] C-413/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411.

This entry was posted on Tuesday, May 28th, 2024 at 7:00 am and is filed under Case Law, EU, Hungary, Platform work
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.