Employment Law Remark

# The nature of the contractual legal relationship in the model of Collaborative Economics, Platform Economics among others

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Regarding the Judgments of March 22 and June 1, 2018

The media have recently echoed two judgments handed down by the Social Courts assessing the existence of an employment relationship in those who had been providing their services as self-employed workers. In the following, and in a brief but didactic way, we will analyse the published judgments (Race and Deliveroo cases).

**1.-** On March 22, 2018, the Social Court No. 37 of Madrid issued its judgment (Court Order No. 971/2017) upholding the ex officio action filed by the General Treasury of Social Security against the Real Automóvil Club de España (RACE), declaring that five tennis instructors who worked in the company's sports facilities had an employment relationship. In this way, a sanction was confirmed for the commission of a very serious infraction for lack of registration in the General Social Security System.

The events that served for the aforementioned qualification of the legal nature of the relationship were:

a.- Their job was to give tennis lessons to the club's students, who were assigned to them by the school director, and in some cases they acted as trainers accompanying them to the competitions. When, due to illness or other reasons, they were unable to attend classes assigned to them, RACE was responsible for placing a substitute without the defendants having to pay the substitute's fee and they received the remuneration even though they had not taught those classes.

b.- In August, no classes were given and no remuneration was paid, nor were the workers with an employment contract, starting the season in September, regardless of whether the groups of students were fully trained or not.

c.- The schedules of the classes they gave were determined by RACE and that the groups formed according to the needs of the students. On any day that the classes they were to teach had no students, the director of the school entrusted them to share another class with a colleague as, despite the non-attendance of students, they charged as if they had taught it. All the classes were given on the RACE courts, with balls, trolleys and other equipment being the property of the RACE.

d.- Each hour of class was paid to them at 19.15 euros by issuing RACE the corresponding invoices that were paid by bank transfer, reverting the benefit of the activity exclusively to RACE and in the event of non-payment by any student the teachers received their remuneration, without them being charged anything in what they received. None of the monitors contracted their classes with the students or the price of the classes and provided their services only to RACE.

**2.-** More recently, and with much greater impact given the importance of this being one of the first existing pronouncements related to collaborative platforms, the Social Court No. 6 of Valencia issued a judgment on June 1, 2018 (proceedings 633/2017) declaring the inappropriateness of the dismissal of a distributor or "rider" of the company Roofoods Spain, SLU (owner of the virtual platform known as Deliveroo), after declaring the existence of an ordinary employment relationship. The court decision concludes that the characteristics of an employment contract were given in the case: dependence and requirements.

Dependence is based on the following facts:

a.- The plaintiff worked on the company's instructions and under the conditions unilaterally set by the company. Thus, after joining the company, the application developed and managed by the company had to be downloaded on their mobile phone, receiving authorization and, with it, a user name and a personal password to access it.

b.- The company decided the area in which the employee was to perform his functions. As regards the timetable, although it is true that the applicant offered the company the shifts they wanted to work, it is also true that those shifts had to be within the timetable previously established by the company, and that it was the company that had the final decision on the timetable at which the employee would perform his duties each week, and that this was sometimes reduced to a part of the timetable requested by the employee.

c.- With regards to the delivery service, the company gave specific instructions to the delivery drivers about the way in which this had to be carried out, setting times and rules of behaviour that they had to comply with. At the beginning of each shift, the workers had to go to the place fixed assigned by the company so that they could assign services through the platform. They had to return to the same place each time they finished a shift.

d.- The company had the employee geoloacted at all times, could request explanations at any time about the service, keeping a time control of each delivery, with the company being the one that decided at all times on the deliveries to be made and the effective allocation of each.

e.- Once a delivery person had been assigned a delivery schedule, he or she needed to find another employee to replace him or her and request the company's authorization to change the shift. On the other hand, the worker was not free, within his own shift, to refuse orders.

f.- Any employee wishing to temporarily stop providing services had to give two weeks' notice to the company.

g.- The worker, even though he provided his own bicycle and mobile phone for the provision of services, did not have a business organisation, the company being the owner of the virtual platform, with the trade name 'Deliveroo', in which the business activity was organised through a computer application (APP).

h.- The possibility of subcontracting was totally residual, with no evidence that the worker made use of it at any time, and it also emerged from reading the contract that the subcontracting of the services agreed with third parties required prior written authorisation from the company.

With regard to the third-party note, it is worth mentioning the aforementioned ruling that:

a.- It was the company that decided the price of the services provided by the employee, which the employee received independently of the company's payment, and after the company had drawn up the corresponding invoice. In addition to tips, he received a fixed remuneration for service rendered (3.38 euros gross) and, until August 2017, a sum for availability which ensured that he received the amount of two orders per hour, and he did not participate in any way in the benefits that the defendant could obtain.

b.- The company established the conditions of the participating restaurants and of the clients to whom it provided its services, the worker did not know which restaurants adhered to the platform at any given time and the identity of the clients who requested its services.

c.- It is the company that sets the price of the service to the customers and charged it through the application, with the employee to collect any amount in cash, except for a tip.

Without prejudice to the fact that one will have to be particularly attentive to forthcoming judicial rulings given, on one hand, the proliferation of this type of service under the protection of the so-called collaborative economy and, on the other, the necessary individualising criteria that must preside over and govern each specific case, the truth is that a first and obligatory conclusion would be to warn that in the future of business contracts with third-party service providers it is not so much the formal contracts signed that matter, nor the appearance of being before a self-employed professional, but the reality of the content of the benefits that, in short, would be the one that could define whether or not we are in the presence of an employment contract.

The question, therefore, is whether the same work-life solution will occur with other well-known companies that also use distributors, drivers, etc.?

For your information and knowledge, please consult the SJS of Madrid, 22 March 2018 on this link and the SJS of Valencia, 1 June 2018 on this link.

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