

The right of a platform worker to decide whether and when to work: An obstacle to their employee status?

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journals.sagepub.com/home/ell**Annika Rosin** 

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Abstract

The employment status of platform workers has been vividly discussed in recent years. Digital platforms often argue that the workers' freedom to decide whether and when to work speaks to their self-employment. The scarce case law of the Court of Justice of the European Union (CJEU) as well as the new proposal for a Directive on platform work appears to indicate that opinion is shared. However, the Member States can guarantee better protection to platform workers. The working arrangements of platform workers are similar to zero-hours work in which the worker also has the right to refuse offered tasks. In some countries, such as Finland, zero-hours workers are explicitly considered as employees. Nevertheless, the general definition of the employment contract requires the commitment on behalf of the employee to perform work. This contradiction makes the employment status of zero-hours workers as well as platform workers unclear.

In this article I analyse whether and how the right to decide whether and when to work affects the employment status of food delivery couriers working through digital platforms. I use Wolt and Foodora as examples. The issue is analysed in the light of Finnish regulation and European Union law.

I argue that even though the case law of the CJEU and the proposal for a Directive on platform work regard the right of a food delivery courier to decide whether and when to work as evidence against their employee status, the couriers can obtain this status through the regulation of zero-hours contracts. Regardless of the fact that generally the conclusion of an employment contract requires the commitment on behalf of the worker to perform work, zero-hours workers are explicitly and exceptionally exempted from this requirement. As the couriers can be classified as zero-hours workers, their freedom to choose whether and when to work does not preclude their classification as employees.

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Keywords

Platform work, employment status, zero-hours work, proposal for a Directive on platform work, Finland

1. Introduction

Platform work can be described as the matching of the supply of and demand for paid work through an online platform.¹ Even though platform work can be categorised in several ways, commonly two types are identified. In the case of crowdwork an online platform matches employers and workers and the services are arranged, provided and paid entirely online.² Work-on-demand via app (app work) is a form of work in which the execution of traditional service activities (transport, food delivery, cleaning etc.) is channelled through apps managed by firms that intervene in setting minimum quality standards of service and in the selection and management of the workforce.³

One of the challenges related to platform work is the unclear labour law status of the worker.⁴ The classification of platform workers as employees brings them within the scope of labour law and broadens most of the labour (and possibly social) law protection applicable to these workers. Therefore, the answer to the question of whether they should be regarded as employees is crucial from the point of view of their labour rights. The issue has been discussed in recent years among researchers⁵ and in the courts. Although an already considerable amount of case law can be found all over the world⁶ determining the labour law status of platform workers

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1. Eurofound, *Employment and working conditions of selected types of platform work* (2018) 1 <<https://www.eurofound.europa.eu/publications/report/2018/employment-and-working-conditions-of-selected-types-of-platform-work>> accessed 29 April 2022.
 2. Eurofound, *New Forms of Employment* (2015) 7 <<https://www.eurofound.europa.eu/publications/report/2015/new-forms-of-employment>> accessed 29 April 2022.
 3. Valerio de Stefano, "The Rise of the 'Just-in-time Workforce': On-demand Work, Crowdwork, and Labor Protection in the 'Gig-Economy'" (2016), 37 *Comparative Labor Law & Policy Journal* 471, 472.
 4. European Commission, *Second-phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work C(2021) 4230 final* 6, <<https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&langId=en&newsId=10025>> accessed 29 April 2022.
 5. See, e.g., Antonio Aloisi, "Facing the Challenges of Platform-Mediated Labour: The Employment Relationship in Times of Non-Standard Work and Digital Transformation" (2018) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3179595> accessed 29 April 2022; Mark Freedland, Jeremias Prassl, "Employees, Workers, and the "Sharing Economy": Changing Practices and Changing Concepts in the United Kingdom" (2017) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932757> accessed 29 April 2022; Guy Davidov, "The Status of Uber Drivers: A Purposive Approach" (2017), 6 *Spanish Labour Law and Employment Relations Journal* 6; De Stefano (n 3); Adrián Todolí-Signes, "The "Gig Economy": Employee, Self-Employed or the Need for a Special Employment Regulation?" (2017) 23 *Transfer* 193; Miriam A. Cherry, "Beyond Misclassification: The Digital Transformation of Work" (2016) 37 *Comparative Labor Law & Policy Journal* 583 (2016); Jeremias Prassl, Martin Risak, "Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork" (2016), 37 *Comparative Labor Law & Policy Journal* 619; Miriam Cherry, Antonio Aloisi, "Dependent Contractors' in the Gig Economy: A Comparative Approach" (2017), 66 *American University Law Review* 635.
 6. See, e.g., *United Kingdom Supreme Court Judgment Uber BV & Ors v Aslam & Ors* [2021] UKSC 5 (19 February 2021); *Tribunal de l'Entreprise francophone de Bruxelles*, Case 311, 29/05/2018; *Juzgado de lo Social n° 11 de Barcelona*, Case 213/2018; *Decision of District Court Amsterdam* 15 January 2019, ECLI:NL:RBAMS:2019:198; *Cour de Cassation, Chambre sociale, Arrêt 374* (19-13.316) 04/03/2020.

(mostly app workers), the final decision on whether they are employees or self-employed entrepreneurs remains open. The triangular and often temporary nature of the arrangements, the relatively high autonomy of the worker in terms of working place and time, and the lack of a common workplace seem to challenge the idea that platform workers could be classified as employees.⁷

One of the reasons why platform workers can be regarded as self-employed is their (putative) freedom to choose whether and when to work. If the main characteristic of an employment relationship is the subordination of the employee to the employer, the flexibility in choosing one's own working time and the possibility of refusing tasks can infer the existence of independence typical of entrepreneurs. This is how it has been interpreted in the Directive on improving working conditions in platform work proposed by the European Commission (the Commission) on 9 December 2021 (the Proposal).⁸ According to Article 4 **Section 2d** of the Proposal, the effective restriction to the workers' 'freedom...to organise one's work, in particular the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks...' is one of the criteria indicating control of the performance of work by the platform. Hence, the opposite refers to the non-existence of control.

This freedom not only affects the control of the performance of work on behalf of the putative employer, but raises the question of whether there need to be mutual obligations between the parties of the employment contract. If the platform worker has no obligation to accept work and the platform has no obligation to provide work, the parties have no mutual obligations and the existence of the contract can become questionable. The doctrine of mutual obligations is particularly important in the United Kingdom. However, in other countries the formation of an employment contract can also require the existence of commitment on behalf of the parties to provide and/or accept work.

Finally, if the platform worker does not need to accept any work, the arrangement becomes similar to a zero-hours contract. As a result, the specific regulation of zero-hours contracts (i.e., a possible explicit inclusion of these workers within the category of employees) can affect the employment status of the platform worker.

The issues listed above have arisen in the context of Finnish law. In its opinions the Finnish Labour Council has argued that the working arrangements in food delivery platforms Wolt and Foodora are similar to contracts with variable working hours, including zero-hours contracts.⁹ The Council found that the courier's right to decide whether to accept or not to accept offered tasks is not a factor indicting the existence of control or subordination. It argued that the parties of the employment contract can agree that the work will be performed only if separately requested.¹⁰ The Council classified the couriers of Wolt and Foodora as employees. The Finnish Labour Council gave the opinions before the proposal for the Directive on platform work was published, and also before the order of the CJEU in *Yodel*.¹¹ Both of these appear to interpret the right of a platform worker to decide whether or not to accept offered tasks and to organise her/his working time differently than the Council. Additionally, Finnish national labour law is unclear

7. European Agency for Safety and Health at Work, *Protecting Workers in the Online Platform Economy: An overview of regulatory and policy developments in the EU* 15(2017) <<https://osha.europa.eu/en/publications/protecting-workers-online-platform-economy-overview-regulatory-and-policy-developments>> accessed 29 April 2022.

8. Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, Brussels, 9.12.2021 COM(2021) 762 final 2021/0414 (COD).

9. TN 1481-20, 5.10.2020; TN 1482-20, 5.10.2020.

10. TN 1481-20, 5.10.2020, 14-15.

11. Case C-692/19 *B v Yodel Delivery Network Ltd.* [2020], ECLI:EU:C:2020:288.

on the issue. The variable hours contracts (including zero-hours contracts) are explicitly regarded as employment contracts in Finland.¹² Nevertheless, the explicit treatment of zero-hours contracts as employment contracts contradicts with Finnish general definition of an employment contract that requires the commitment on behalf of the worker to perform work in order that the relationship could be regarded as one of employment.¹³ As this contradiction makes the employment status of zero-hours workers unclear, it is questionable whether platform workers categorised as zero-hours workers should be regarded as employees or whether their freedom to decide whether and when to work removes their employment status.

The aim of this article is to answer the question of whether and how the right to decide whether and when to work affects the employment status of food delivery couriers working through digital platforms in the Finnish context. I analyse the national regulation in the light of EU law. I use the examples of Wolt and Foodora.¹⁴ In describing the arrangements, I rely on the decisions of Finnish Labour Council.¹⁵

First, I will describe the working arrangements of the food delivery couriers of Wolt and Foodora to clarify whether and at what stage of the arrangement the couriers have a right to decide whether and when to work. Second, I will analyse the effect of the couriers' freedom to choose their own working time on their employment status in the light of EU law and specific regulations concerning platform work. There is no special regulation of platform work in Finland. Third, I discuss how the similarity between the working arrangements of the couriers to zero-hours contracts affects their employment status. The focus is on their right to refuse tasks and its influence on the employment status of zero-hours workers.

2. The freedom of food delivery couriers to choose their own working time

In discussions concerning the labour law status of platform workers, platforms such as Wolt and Foodora have argued that because of the workers' freedom to decide whether and when to work, they should not be considered as employees. In order to clarify how much flexibility food delivery couriers have in practice, I will briefly describe the working arrangements in Wolt and Foodora.

Wolt couriers conclude a service agreement with Wolt. Based on this agreement, they undertake to provide courier services to Wolt and receive the right to use Wolt platform. In the platform, the courier chooses the time period that he or she is available for work. The courier informs Wolt about his or her availability to accept work by registering as being online. The courier can cancel the reserved shift eight hours before the start and inform Wolt, or he or she can decide not to register as being online without any sanction. However, if the courier reserves time periods in which he or she will be available and continuously refrains from accepting offers during the shift, he or she loses the possibility of reserving these shifts. Couriers who have accepted more offers can reserve shifts for the next week before those who have accepted fewer offers. It is also possible not to reserve any

12. Työsopimuslaki 55/2001, <<https://finlex.fi/fi/laki/ajantasa/2001/20010055>> accessed 29 April 2022, Chapter 1, Section 11.

13. *Ibid.* Chapter 1 Section 1.

14. The aim is not to take over the role of the court and determine the labour law status of the specific couriers, but to illustrate how the freedom of a food delivery courier in deciding whether and when to perform work can affect his or her classification as an employee.

15. TN 1481-20, 5.10.2020; TN 1482-20, 5.10.2020.

shift, but only register as being online to receive offers of work. The courier can stop accepting work by going offline. He or she also has the right to decline any individual delivery request on the platform provided by Wolt. If the courier has accepted the individual delivery request, he or she can cancel the acceptance by informing the Wolt support service.¹⁶

Foodora has concluded agreements on terms and conditions for food delivery by assignment with most of the couriers. Foodora regards the latter as being self-employed. The courier reserves his or her working shift through the app provided by Foodora. The courier cannot choose the shift freely, but according to his or her ranking. The ranking depends on the earlier performance of work and its quality; not showing up to work or logging in late to platform tasks during reserved shifts influence the ranking. Based on ranking, the couriers are divided into different groups. The first group with higher rankings can reserve the shifts first and the other groups with lower rankings can do so after that. After logging in to platform, the courier receives offers of assignments. According to the agreement, the worker can always refuse assignments offered. If the assignment is agreed, the courier is obligated to perform the assignment in accordance with laws and regulations as well as the general guidelines using the X Driver application or some other communication device. The courier can cancel the reserved shift with 24 hours' notice through the platform with no sanctions. If the shift is cancelled less than 24 hours before the start and other couriers accept the assignments, the courier is not sanctioned; otherwise, the cancellation influences his or her ranking as a no-show. In the case of illness, the ranking is not influenced if the courier contacts the support service before the beginning of the shift. The courier can also cancel an already-accepted assignment by asking the support service to assign the delivery to another courier. There are no sanctions for this cancellation applied to the courier except losing the payment for the delivery.¹⁷

The descriptions above show that there are two or three main stages in the process of providing and accepting work. The first step is the conclusion of a service agreement, in which none of the parties commit to provide or perform work. The possible second step is the reservation of the shift by the courier. At this stage, the platform does not commit to provide work. As discussed above, in the case of Wolt the courier can also perform work without reserving a shift and skip the second step. At the third stage the platform offers an individual assignment to the courier, and the courier can accept or refuse the assignment.

It appears that the couriers can effectively decide whether and when to perform work only after stage one. If the courier has already reserved a shift his or her freedom to decide whether to work (accept assignments) during the shift becomes rather fictitious. Although the cancellation of reserved shifts is allowed, it is only possible with notice periods determined by the platforms and sanctions can be applied if the periods are not followed. Also, even though after the reservation of the shift the courier is separately asked to accept individual assignments and has the right to refuse these, non-acceptance has direct influence on the income of the courier. Furthermore, the non-acceptance of assignments also restricts the possibility of the courier reserving new shifts in the case of Wolt, and influences his or her ranking in Foodora. In this way, the future possibilities of the courier earning money become limited. Therefore, the courier's freedom to accept or to refuse tasks is effectively restricted.

16. TN 1481-20 (n 10).

17. TN 1482-20 (n 9).

3. The effect of the courier's freedom to choose their own working time on their employment status

As discussed above, after the conclusion of a service agreement food delivery couriers can decide whether to reserve a shift or to log in to the platform to receive assignments. At least at this stage they have the freedom to decide whether and when to work. It is not, however, clear whether this freedom excludes their categorisation as employees from the beginning of the conclusion of the contract.

There is no specific regulation in Finland concerning platform work. However, the EU has taken steps to regulate in this field. The first mention of platform work is in the Directive on Transparent and Predictable Working Conditions¹⁸ (TPWCD). Article 1(2) of the TPWCD provides that

the Directive lays down minimum rights that apply to every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice.

Recital 8 of the preamble of the TPWCD specifies that 'provided that they fulfil those criteria, domestic workers, on-demand workers, intermittent workers, voucher based-workers, platform workers, trainees and apprentices could fall within the scope of this Directive'.

Bednarowicz argues that Article 1(2) reflects a hybrid legal definition of worker that has not been known in the social *aquis* before. As the employment relationship needs to be defined according to national law with consideration of the CJEU concept of 'worker', it is unclear how to reconcile these two concepts, particularly if the national concept is different from that of the CJEU. In principle, in this case the concept of the EU should prevail.¹⁹

In the Commission's proposal²⁰ it is explained, that the criteria establishing worker status are based on the case law of the CJEU as developed since case C-66/85 *Lawrie-Blum*, and most recently recalled in C-216/15 *Ruhrlandklinik*. In *Ruhrlandklinik*²¹ the CJEU stated that

in accordance with the settled case-law of the Court, the essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration, the legal characterisation under national law and the form of that relationship, as well as the nature of the legal relationship between those two persons, not being decisive in that regard.

The definition of a worker set out in *Ruhrlandklinik* does not give any straightforward guidance as regards the influence of the person's right to decide whether and when to work on his or her employment status.

The CJEU dealt with this issue in *Yodel*.²² The case concerned the applicability of the Directive 2003/88/EC (Working Time Directive) to a parcel delivery courier who worked exclusively for

18. Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union, *OJ L 186*, 11.7.2019, p. 105–121.

19. Bartłomiej Bednarowicz, 'Delivering on the European Pillar of Social Rights: The New Directive on Transparent and Predictable Working Conditions in the European Union' (2019), 48 *Industrial Law Journal* 604.

20. Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Brussels, 21.12.2017 COM(2017) 797 final, 2017/0355(COD).

21. Case C-216/15 *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, ECLI:EU:C:2016:883, para.27.

22. Case C-692/19 *B v Yodel Delivery Network Ltd.*, ECLI:EU:C:2020:288.

Yodel on the basis of a service agreement. Neither Yodel nor the courier committed to provide or perform work. The courier was not required to accept any parcel for delivery and could fix a maximum number of parcels, which he was willing to deliver. The CJEU needed to decide whether the courier could be regarded as a worker according to the Community meaning.

The CJEU found that the courier should not be classified as a worker if that person has a right to use subcontractors or substitutes to perform the service; to accept or not accept the various tasks offered, or unilaterally set the maximum number of those tasks; to provide his services to any third party, and to fix his own hours of work within certain parameters and to tailor his time to suit his personal convenience, provided that,

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.

Here, the CJEU considered the lack of an obligation to accept work as one of the factors indicating the courier's non-worker status. Nevertheless, this was not the only factor taken into consideration in this case. The CJEU remained cautious in its final determination of the status of the courier by noting that the courier should not be considered as a worker only if his independence is not fictional and there is no subordination between Yodel and the courier. According to Aloisi, the model used in Yodel is similar to the working arrangements of different digital platforms. However, the order cannot be implemented in such a way that platform workers should be regarded as self-employed. Aloisi criticises the focus of the CJEU on the formal description of the relationship instead of investigating more profoundly the problematic elements of the arrangement. Nevertheless, he concludes that the Court urges the domestic court, to 'tak[e] account of all the relevant factors relating to B and to the economic activity which he carries on, [...], in the light of the criteria laid down in the [settled] case-law'.²³ Therefore, based on *Yodel* alone it cannot be determined that the aim of the CJEU has been to exclude persons who are not obligated to accept work from the category of worker.

The proposed Directive on platform work regulates the employment status of platform workers more specifically. According to Article 3(1) of the Proposal, the Member States (MS)

shall have appropriate procedures in place to verify and ensure the correct determination of the employment status of persons performing platform work, with a view to ascertaining the existence of an employment relationship as defined by the law, collective agreements or practice in force in the MS with consideration to the case-law of the Court of Justice, and ensuring that they enjoy the rights deriving from Union law applicable to workers.²⁴

The Proposal emphasises the primacy of facts in the determination of the existence of an employment relationship.²⁵ The model of the determination of the employment status of platform workers is the same as used in the TPWCD. However, there are some significant differences between the TPWCD and the Proposal. First, in addition to the hybrid model the Proposal outlines the conditions

23. Antonio Aloisi, "'Time Is Running Out'. The Yodel Order and Its Implications for Platform Work in the EU" (2020) 13 Italian Labour Law E-Journal, 67 < <https://doi.org/10.6092/issn.1561-8048/11777> > accessed 29 April 2022.

24. Proposal (n 8), Article 3(1).

25. Proposal (n 8), Article 3(2).

of control in fulfilment of which the existence of the employment status can be presumed. Second, the Proposal not only defines ‘worker’ for the purposes of the proposed Directive but also for the purposes of national and other EU law. Additionally, it guarantees certain rights connected to the algorithmic management (i.e., transparency and human monitoring of automated systems and human review of significant decisions) to persons performing platform work regardless of their employment status.²⁶

According to the Proposal, controlling the performance of work means that the platform fulfils at least two of the following conditions:

- (a) the platform effectively determines, or sets upper limits for the level of remuneration;
- (b) requires the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
- (c) supervises the performance of work or verifies the quality of the results of the work including by electronic means;
- (d) effectively restricts the freedom, including through sanctions, to organise one’s work, in particular the discretion to choose one’s working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes; or
- (e) effectively restricts the possibility to build a client base or to perform work for any third party.²⁷

From the point of view of the platform worker’s right to decide whether and when to work, the fourth criteria is important. The effective restriction of the freedom to organise one’s work, in particular the discretion to choose one’s working hours or periods of absence, to accept or to refuse tasks infers the existence of control. To put it differently, if the platform worker can decide whether and when to work and to choose whether to accept or refuse tasks (i.e. has no obligation to accept), this infers he or she is self-employed. The criteria outlined in the Proposal seem at least to partly stem from the decision in *Yodel*. Nevertheless, the Proposal appears to respond to the critics of the *Yodel* ruling by emphasising the consideration of factual circumstances. By using the term ‘effectively’ at the beginning of Article 4(2)(d) it aims to ensure that the freedom of the platform worker to decide whether and when to work is not only formally written into contractual terms, but can be used in practice. However, here, too, the existence of the platform worker’s right to decide whether and when to work alone does not exclude the consideration that he or she is employed, it can be a factor that supports this consideration.

When returning to the issue of the Wolt and Foodora couriers, we can therefore say that their non-commitment to perform work on the conclusion of the service agreement can be an obstacle to them being considered employees from the beginning of this agreement. Instead, their employment status can be confirmed at some later stage of the arrangement. As discussed earlier, both platforms start to effectively restrict the courier’s freedom to choose whether and when to work after a shift has been reserved, or after the acceptance of the assignment in the case of Wolt if a shift has not been reserved. Hence, if the platform fulfils one more condition indicating control of the performance of work besides the fourth condition, the couriers are presumed to be employees from the moment of reservation of a shift or acceptance of an assignment. As the criteria of control should also be considered in the determination of the scope of national labour law, the outcome

26. Proposal (n 8), Article 10.

27. Proposal (n 8), Article 4(2).

would be the same if the employment status of the courier was determined for the purposes of Finnish law.

Although the influence of the worker's right to decide whether and when to work on his or her employment status seems straightforward, the issue is more complicated. Not only can specific regulations concerning platform work affect the determination of the employment status of the courier, but also the regulation of zero-hours contracts. I will discuss this issue in the next part of the article.

4. Zero-hours work regulation affecting the couriers' employment status

Even though the Proposal aims to regulate the employment status of platform workers also for the purposes of national labour law, Article 20 of the proposed Directive does not allow the reduction of the general level of protection already existing in the Member States before the acceptance of the Directive. Therefore, the Directive itself, if adopted, does not constitute a ground on which to exempt platform workers from more protective legislation already in force in the Member States.

In Finnish law variable hours contracts (including zero-hours contracts) are separately regulated. According to Chapter 1, Section 11 of Finnish Employment Contracts Act (Työsopimuslaki, TSL)

variable working hours clause means a working hours arrangement in which the employee's working hours, as a specified period, vary between a minimum and maximum amount under the employment contract, or a working hours arrangement in which the employee undertakes to perform work for the employer when separately asked to do so.²⁸

The legal definition of variable hours contracts includes three types of arrangements: contracts in which the minimum and maximum number of working hours is agreed and the minimum number is more than zero; contracts with a minimum and maximum number of working hours, the minimum number zero; and contracts according to which the work is performed only at the request of the employer. From the viewpoint of food delivery couriers the two latter types of contracts are important. The term 'variable hours contract' is not broadly used in other countries. Instead, work arrangements in which there are no fixed or guaranteed hours of remunerated work are variously described as on-call, intermittent, on-demand work, or zero-hours contracts.²⁹ Although there is also no consensus as regards the exact meaning of zero-hours contracts, I will use this term to denote arrangements in which the employer has no obligation to provide any work and the minimum number of agreed working hours is zero.³⁰ As such, it will cover the contracts with a minimum and maximum number of working hours, the minimum being zero; and contracts according to which the work is performed only at the request of the employer as set out in Chapter 1, Section 11 of the TSL.

Even though Finnish law provides for different guarantees to zero-hours workers to improve their working conditions, in the context of platform work the most important is the explicit reference of the TSL 1:11 that variable hours contracts (including zero-hours contracts) are regarded as employment contracts. It is clear that in the case of zero-hours contracts the employer has no

28. TSL (n 12).

29. Mark Freedland, Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press 2012) 318-319.

30. ILO, *On-call work and "zero hours" contracts* (Information Sheet No. WT15, 12 Dec. 2021), <https://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-travail/documents/publication/wcms_170714.pdf> accessed 29 April 2022.

obligation to provide any work. However, it is not that clear whether the employee is obligated to accept work provided under a zero-hours contract by the employer. If the employee has no obligation to accept work, the freedom of food delivery couriers to decide whether and when to work will not be an obstacle to their employment status.

According to the Government proposal introducing Section 11, the contract in which the employee undertakes to perform work at the request of the employer does not have to include any quantitative commitments on behalf of the parties.³¹ Nevertheless, regarding zero-hours contract as an employment contract seems to contradict the the legal definition of the employment contract. Chapter 1, Section 1 of the TSL provides that the Employment Contracts Act applies

to contracts (employment contracts) entered into by an employee, or jointly by several employees as a team, agreeing personally to perform work for an employer under the employer's direction and supervision in return for pay or some other remuneration.³²

According to this definition, the formation of the employment contract requires the commitment on behalf of the employee to perform some amount of work. In the academic literature there has been criticism of the fact that in the legislation on variable hours contracts, the opinion of Finnish Supreme Court in the decision KKO:2017:37 has not been addressed.³³ In this decision, the Court analysed the employment status of a worker who had concluded a framework agreement with the employer. In this agreement, the parties agreed on the conditions applicable in fixed-term employment contracts concluded by the worker and the employer in the future. The framework agreement did not include any agreement on the applicable working time. Because the worker did not agree to perform any work under the framework agreement, but committed to perform work in every separate fixed-term employment contract, the Court regarded the framework agreement as not being an employment contract. The worker was classified as an employee during each separately concluded fixed-term contract.³⁴

Although the definition of an employment contract requires the commitment on behalf of the employee to perform some work, the provision should not be interpreted as strictly as requiring the employee to accept all tasks provided by the employer. If the contract provides for an overall commitment of a worker to perform work, but includes the possibility to refuse certain tasks (in certain conditions), an employment contract will have been concluded.

If TSL 1:1 requires some commitment on behalf of the worker to perform work, it appears that in the case of zero-hours contracts the aim of the legislator has been to abandon this requirement. This interpretation seems to be confirmed not only in the explicit reference that the zero-hours contracts are regarded as employment contracts, but also in the regulation of Finnish Working Time Act (TAL).³⁵ According to Section 30, Chapter 7 of the TAL

31. Hallituksen esitys HE 188/2017 eduskunnalle vaihtelevaa työaikaan noudattavan työntekijän asemaa parantavaksi lainsäädännöksi (12 Dec. 2021), <<https://finlex.fi/esitykset/he/2017/20170188?search%5Btype%5D=pika&search%5Bpika%5D=188%2F2017>> accessed 29 April 2022.

32. TSL (n 12).

33. Jaana Paanetoja, "Lausunto Eduskunnan työelämä- ja tasa-arvovaliokunnalle hallituksen esityksestä 188/2017 vp" <<https://www.eduskunta.fi/FI/vaski/JulkaisuMetatieto/Documents/EDK-2018-AK-175444.pdf>> accessed 29 April 2022.

34. Finnish Supreme Court Decision KKO:2017:37 from 8 June 2017, <<https://finlex.fi/fi/oikeus/kko/kko/2017/20170037?search%5Btype%5D=pika&search%5Bpika%5D=KKO%202017%3A37>> accessed 29 April 2022.

35. Työaikalaki 5.7.2019/872 <<https://www.finlex.fi/fi/laki/ajantasa/2019/20190872>> accessed 29 April 2022.

when an employer wishes to assign hours in excess of the minimum working time agreed in the employment contract to an employee who works varying hours, the employee shall be provided with a deadline by which to state the extent and terms on which the employee agrees to work such hours. The deadline shall fall no earlier than one week prior to the preparation of the work schedule.

Hence, the employee needs to agree separately to accept work in the case of zero-hours contracts and we cannot expect his or her commitment to agree with possible work offers beforehand.

Similar to zero-hours workers, the couriers of Foodora and Wolt do not commit to perform work when the service agreement is concluded. At this stage, they have genuine freedom to decide whether and when to work. Regardless of that, Finnish law appears to classify them as employees under the specific regulation of zero-hours contracts. This has been confirmed in the opinions of Finnish Labour Council in which it has argued that the working arrangements in the Wolt and Foodora food delivery platforms are similar to contracts with variable working hours.³⁶ The Council found that the courier's right to decide whether to accept or not accept tasks is not a factor indicating the existence of control or subordination. It argued that the parties of the employment contract can agree that the work will be performed only if separately requested.³⁷ The Council did not separately evaluate the influence of the courier's freedom to decide whether and when to work onto the fulfilment of the requirement of the employee's commitment to perform work. However, both of the opinions of the Council were accompanied by dissenting opinions, in which three members of the Council out of nine regarded as relevant the courier's freedom to decide whether and when to work in the determination of the existence of subordination. The dissenting members found that the right of a person not to accept offered tasks infers that the agreement between the parties is not an employment contract.³⁸

If Finnish law were to be interpreted in a way that the courier's freedom to decide whether and when to work had no influence in its employment status, it would contradict the proposal of the Directive on platform work. However, as discussed earlier, the Member States can provide better protection to platform workers than provided for in the Proposal. It can therefore be concluded that even though, according to the Proposal, the freedom of a courier to decide whether and when to work could be an obstacle to his or her classification as an employee from the conclusion of the service contract, this is not the case in Finland.

Although it appears that the Finnish regulation that enables zero-hours workers who make no commitment to perform work to be regarded as employees does not conflict with EU law, one more problem can arise. In the Government's proposal introducing Section 11 of the TSL it is explained that the regulation of variable hours contracts does not cover framework agreements. In framework agreements, the parties agree on the conditions applicable in the case of fixed-term employment agreements concluded by the worker and the employer in the future. Employment relationships are formed on the basis of separately concluded fixed-term agreements, not on the basis of the framework agreement.³⁹ This explanation seems to contradict the idea that the conclusion of the zero-hours contract does not require the commitment of the employee to perform work. It is unclear where the line is drawn between zero-hours and framework contracts, and whether it is even

36. TN 1481-20, TN 1482-20 (n 9).

37. TN 1481-20 (n 10), 14-15.

38. TN 1482-20 (n 9) 23.

39. Hallituksen esitys HE 188/2017 eduskunnalle vaihtelevaa työaikaa noudattavan työntekijän asemaa parantavaksi lainsäädännöksi <<https://finlex.fi/fi/esitykset/he/2017/20170188?search%5Btype%5D=pika&search%5Bpika%5D=188%2F2017>> accessed 29 April 2022.

possible to use successive fixed-term contracts covered with a framework agreement without the latter turning into a zero-hours contract from the beginning. According to the interpretation above, the conclusion of some kind of framework agreement would suffice to create an employment relationship. This conclusion does not mean that the employer cannot conclude fixed-term agreements, but if these are concluded successively and so regularly that the conclusion of a separate framework agreement is needed, the framework agreement is to be regarded as a zero-hours contract. The opposite interpretation would nullify the whole idea of Section 11 of the TSL, because zero-hours workers would not be regarded as employees.

5. Conclusion

In the discussion concerning the employment status of platform workers, digital platforms often use the argument that the worker has the freedom to decide whether and when to work. Platforms regard this fact as a proof of the self-employment of the worker. The scarce case law of the CJEU as well as the proposal for the Directive on platform work regard the worker's right to decide whether and when to work as one of the criteria inferring his or her self-employment. Nevertheless, the Member States cannot reduce the general level of protection already existing in the Member States before the acceptance of the Directive. When analysing the employment status of food delivery couriers, the regulation of zero-hours contracts also needs to be considered. The similarity of the working arrangements in the platforms to zero-hours work can bring these workers within the scope of labour laws regardless of their right to decide whether and when to work.

Food delivery couriers working through digital platforms have certain freedom in choosing their working time. In the case of Foodora and Wolt, the couriers do not commit to perform work on conclusion of the service agreement with the platform. The platform begins to effectively control their working time after the couriers have reserved their shifts, or if the couriers have logged into the app in the case of Wolt. From this stage their freedom to decide whether and when to work and whether or not to accept tasks is rather fictitious. It is therefore clear that a courier's freedom to choose his or her working time is not an obstacle to considering him or her to be an employee from the time of the reservation of the shift or the logging in to the app.

However, through the regulation of zero-hours contracts the couriers may be given status of employee on conclusion of a service contract. In Finland, zero-hours workers are considered as employees, regardless of the fact that on the conclusion of the contract they do not undertake to perform any work. Therefore, the food delivery couriers of Foodora and Wolt can also be considered as employees from the conclusion of the service agreement. Differently from EU law, in Finland the courier's freedom to decide whether and when to work does not influence his or her classification as an employee.


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