COUR DE CASSATION

# EXPLANATORY NOTE TO THE UBER RULING

## Ruling n°374 – 4 march 2020 (Appeal n° 19-13.316)

This is the second decision rendered by the Labour Chamber of the Court of Cassation concerning platforms workers, following the ruling handed down in the *Take Eat Easy* case (Soc., 28 November 2018, Appeal n° 17-20.079, published).

The company Uber BV uses a digital platform and an application establishing contacts between clients and ride-hailing drivers working as independent contractors in view of urban transportation.

After a driver's account was permanently closed by Uber BV, the driver brought the case before the industrial tribunal calling for the contractual relations to be reclassified as a contract of employment. The Court of Appeal reversed the decision and ruled that the partnership agreement signed between the driver and Uber BV was a contract of employment. It referred the case before the industrial tribunal for a ruling on the merits of the driver's claims for indemnities, retroactive payment of salaries, compensatory damages for non-compliance with maximum working hours, concealed labour, and dismissal without real and serious grounds.

According to established case law, the existence of a salaried employment relationship does not depend on the will expressed by the parties or on the name they have given to their agreement, but on the factual conditions under which the business activity is carried out (Soc., 17 April 1991, appeal n° 88 40.121, Bull. V n 200; Soc., 19 December 2000, appeal n° 98 40.572, Bull. V, n° 437; Soc. 9 May 2001, Appeal n° 98 46.158, Bull. V, n 155).

*Translated from the French original*

The Court of Cassation inferred from this, in the above-mentioned *Take Eat Easy* ruling, that the provisions of Article L. 8221 6 of the French Labour Code, according to which natural persons, in the performance of the activity calling for persons to be filed in the registers or directories listed in this text, are presumed not to be bound with the principal by a contract of employment, establish only a simple presumption which may be reversed when such persons provide services under terms and conditions placing them in a relationship of permanent legal subordination with regard to the principal. This solution is reiterated in the Uber ruling of 4 March 2020.

With regard to the criterion of salaried employment, the case law of the Labour Chamber of the Court of Cassation has been established since the Société Générale ruling of 13 November 1996 (Soc.., 13 November 1996, Appeal n° 94 13.187, Bull. V n° 386) according to which: *"The relationship of subordination is characterised by the performance of a job under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof, and to sanction the subordinate for any breaches; Working within an organised service may indicate a relationship of subordination when the employer unilaterally determines the terms and conditions for performing the job".*

In the ruling handed down on 4 March 2020, the Labour Chamber considered that it was not possible to depart from this now traditional definition and refused to adopt the criterion of economic dependence suggested by certain authors.

Indeed, the Court of Justice of the European Union, both on the ground of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time and on the ground of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, decides that the notion of worker referred to in these two Community texts is an autonomous notion, i.e. defined by European Union law itself, and whose definition does not refer to the national law of each Member State (cf. in particular CJEU, 14 October 2010, *Union syndicale Solidaires* Isère, C-428/09; CJEU, 7 April 2011, Dieter May, C-519/09; CJEU, 26 March 2015, Fenoll, C-316/13; cf. also Article 3 of the above-mentioned Directive 89/391). It is to be noted that the definition of worker given by the Court of Justice is similar to that of the Labour Chamber since the Société Générale ruling, i.e. the relationship of subordination criterion (CJEU, Fenoll judgment, 26 March 2015, cited above).

Furthermore, in its decision n° 2019-794 DC of 20 December 2019, in which the Constitutional Council partially censured Article 44 of the French Law on the orientation of mobility insofar as it ruled out the power of the courts to reclassify the employment relationship of a platform worker as an employment contract, the Constitutional Council referred to the criterion of legal subordination on several occasions (see paragraphs 25 and 28).

Without in any way altering the case law established since the Société Générale ruling of 1996, the Court of Cassation approved the Court of Appeal's decision to reclassify the employment relationship between a ride-hailing driver and Uber BV as a contract of employment.

Indeed, the criterion for the relationship of subordination test consists of three elements:

- the power to give instructions

- the power to supervise performance thereof

- the power to sanction non-compliance with instructions given.

As for self-employed work, it is characterised by the following elements: the possibility of building up one's own clientele, the freedom to set one's own tariffs, the freedom to set the terms and conditions for providing the service.

However, the Court of Appeal noted in particular that:

(1) the driver has joined a transport service created and entirely organised by that company, a service which exists only thanks to this platform, through the use of which the driver does not constitute a proprietary clientele, does not freely set his fares or determine the terms and conditions for conducting his/her transportation business;

(2) the driver is required to follow a particular route which he is not free to choose and for which fares adjustments are applied if the driver does not follow that route;

(3) the final destination of the journey is sometimes not known to the driver, who is not really free to choose, as a self-employed driver would, the journey which befits him/her or not;

(4) the company has the right to temporarily disconnect the driver from its application as of three refusals of rides and the driver may lose access to his account in the event that an order cancellation rate is exceeded or in case of reports of *"problematic behaviour".*

The Court of Cassation therefore approved the Court of Appeal for having deducted from all these elements the performance of work under the authority of an employer who has the power to give orders and instructions, to oversee performance thereof and to sanction breaches, and for having ruled that the driver's self-employed status was therefore fictitious.

In this case, the existence of a relationship of subordination when the ride-hailing driver connects to the Uber application is thus recognized, the Court of Cassation having ruled out taking into consideration the fact that the driver has no obligation to connect and that no sanction exists in the event of the absence of connections for any length of time (unlike what existed in the *Take Eat Easy* application). Indeed, the Court of Justice of the European Union holds that the qualification of *"self-employed service provider"* given by national law does not exclude that a person must be qualified as a *"worker",* within the meaning of Union law, if that person's independence is merely fictitious, thus disguising a genuine employment relationship (CJEU,13 January 2004, Allonby, C 256/01, point 71; CJEU, 4 December 2014, C 413/13, FNV Kunsten Informatie en Media, point 35) and that the fact that there is no obligation on workers to accept a shift is irrelevant in the context in question (CJEU, 13 January 2004, Allonby, cited above, point 72).

While an intermediate scheme between salaried employees and self-employed workers exists in some European countries, such as in the United Kingdom (the *"workers"* scheme: an intermediate scheme between *"employees"* and *"self-employed workers"*) and in Italy (contracts of *"collaborazione coordinata e continuativa", "collaborazione a progetto"*), French law has only two statuses: that of self-employed persons and that of salaried employee.