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French Supreme Court says Uber drivers are employees!

More than a year after the Take Eat Easy[1] decision in which the Labor Chamber of the *Cour de Cassation* (French Supreme Court) had for the first time (as we commented on our Blog[2]) ruled on the legal classification of the contract between a deliverer and a digital platform and recognized the existence of an employment contract, it recently took position once again on the issue of platform workers, this time in a case concerning the very famous company Uber.

The Labor Chamber reiterated its position in a decision dated March 4, 2020[3] and upheld the ruling of the Paris Court of Appeals of January 10, 2019[4]: the contract between Uber and its 28,000 drivers in France is to be analyzed as an employment contract!

The status as employee

Following lengthy legal considerations, the Labor Chamber of the *Cour de Cassation* confirmed the reasoning of the Paris Court of Appeals that we had analyzed in March 2019[5]: it upheld the judgment of the trial judges who had acknowledged the absence of independent activity by an Uber driver and the existence of a link of subordination with the platform, a decisive element to ascertain the existence of an employment contract[6].

Specifically, the Labor Chamber relied on a number of factual elements highlighted by the Court of Appeals:

- the driver had joined a transportation service created and entirely organized by Uber, a service which exists only through this platform, and was therefore unable to gain his/her own customer base, to freely

set the fares or determine the terms and conditions for conducting his/her transportation business, as an independent driver would do;

- fares were fixed contractually through the platform's algorithms using a predictive mechanism, thereby imposing on the driver a particular route which he/she was not free to choose and fares adjustments could be applied if the driver did not follow that particular route;
- the transportation service was carried out by means of a trip acceptance system that gave the driver very limited freedom of choice and allowed Uber to exercise control;
- the driver could be temporarily disconnected from the application as of 3 refusals of rides, lose access to his/her account if a given order cancellation rate was exceeded, or lose access to the application if users reported a problematic behavior, regardless of whether the reported facts were established or whether the penalty was proportionate to such facts (if established).
- Uber's argumentation according to which drivers were free to log on and free to choose their own working hours was held irrelevant since whenever a driver logs on to the platform, he/she is joining a service organized by the company.

These conditions under which work was performed made it possible to highlight the power to give orders and instructions, to oversee performance thereof and to sanction breaches, which are characteristic of a relationship of subordination which is itself an essential criterion to ascertain the existence of an employment contract. As a result, gone is the status of self-employed worker and the recognition of the existence of an employment contract becomes unavoidable.

Towards a third status?

In their decision of November 28, 2018, the judges of the Labor Chamber of the *Cour de Cassation* had however already alerted the legislator to the risk of reclassification of the contractual relationship between a platform worker and a digital platform as an employment contract, in the absence of a specific status for this type of workers[7].

This signal, echoed by the French Constitutional Council in a decision dated December 20, 2019[8] and reiterated by the decision commented herein, has probably been heard.

Indeed, as a matter of fact, the French Ministry of Labor, Mrs. Muriel Pénicaud, has announced her intention to set up a committee on the status of platform workers. The idea of a third status between salaried employees and self-employed workers, such as the "*workers scheme*" in the United Kingdom or the Italian "*collaborazione coordinata e continuative*" or "*collaborazione a progetto*" contracts, is resurfacing.

In other words, the saga continues…

[1] Labor Chamber of the *Cour de Cassation*, November 28, 2018, No. 17-20.079

[2] Cf. article entitled Reclassification of the contract between a delivery rider and a digital platform: A strong message sent by the *Cour de Cassation* published on our Blog in December 2018

[3] Labor Chamber of the *Cour de Cassation*, March 4, 2020, No 19-13.316

[4] Paris Court of Appeals, January 10, 2019, 6-2, No. 18/08357

[5] Cf. article entitled Uber drivers are employees according to the Paris Court of Appeals! published on our Blog in March 2019

[6] The judgement expressly refers to the following legal ground initially set forth in the Société Générale decision (Labor Chamber of the *Cour de Cassation*, November 13, 1996, n°94-13.187): "*a relationship of subordination is characterized by the performance of work under the authority of an employer which has the power to give orders and directives, to control the performance of work and to sanction the lack of performance of its subordinate*".

[7] Cf. article entitled Reclassification of the contract between a delivery rider and a digital platform: A strong message sent by the *Cour de Cassation* published on our Blog in December 2018

[8] Decision No. 2019-794 DC of December 20, 2019 in which the French Constitutional Council partially invalidated the provisions relating to the social responsibility charters of electronic platforms and recalled that it is up to the judge to reclassify the relationship between the worker and the platform as an employment contract whenever such relationship is in fact characterized by the existence of a legal subordination link.