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The Employment Relationship and the Law

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Future of Work, Dublin Castle, May 12th 2017

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Outline

- The ‘binary’ divide in employment law
- Who is an ‘employee’?
- A third way?
- Reform?

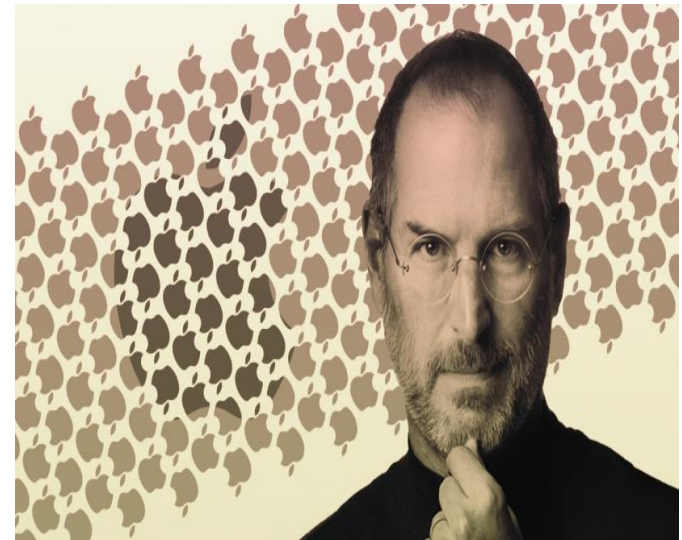
1. The Binary Divide

- The starting point for the analysis of legal obligations arising in the context of working relations must always be the terms of any contractual arrangement
- Labour law systems have historically privileged subordinate labour as the object of protection



1. The Binary Divide

- In most legal systems the employment relations are distinguished into two categories:
- Employees (subordinated labour)
- Self-employed (autonomous work relations)



1. *The Binary Divide*

- Employment status is significant because, e.g.:
 - *Protective Legislation* often only covers employees (e.g. unfair dismissal)
 - Certain *duties* are implied into employee contracts
 - Tort law (*vicarious liability*)
 - *Tax and social security*
 - Company *insolvency* (employees=preferential creditors)

2. Who is an employee? Enter the Eurovision

- There is no unified EU definition of employee: “The essential feature of an employment relationship, however, 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.” (C-66/85 *Lawrie Blum*)



2. Who is an employee? Enter the Eurovision



- “any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of [freedom of establishment]” (C-268/99 *Jany*)



2. Who is an employee? Enter the Eurovision

- C-268/99 *Jany*: Prostitution is an economic activity pursued by a self-employed person where it is being carried on by the person providing the service:
 - outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;
 - under that person's own responsibility;
 - and in return for remuneration paid to that person directly and in full



2. Who is an employee? Enter the Eurovision



- ***FNV*** (C-413/13)

- a worker acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work;
- does not share in the employer's commercial risks;
- for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking

2. Who is an employee? Bringing it all back home

- an employee is someone who works under a “contract of employment” ...
- A contract of employment is “a contract of service...”



2. Who is an employee? Bringing it all back home



- ‘contract of employment’ [...] or (b) any other contract whereby an individual agrees with another person to do or perform personally any work or service for that person or a third person (whether or not the third person is a party to the contract)

2. Who is an employee? Bringing it all back home



Employment Equity Act, No 55 of 1998

- ‘contract of employment’ [...] or (b) any other contract whereby individual agrees with another person personally to execute any work or service for that person...

2. Who is an employee? The Courts...

- Mixed question of fact and law- ***Henry Denny & Sons (Ireland) Ltd. v. Minister for Social Welfare*** [1998]



Control



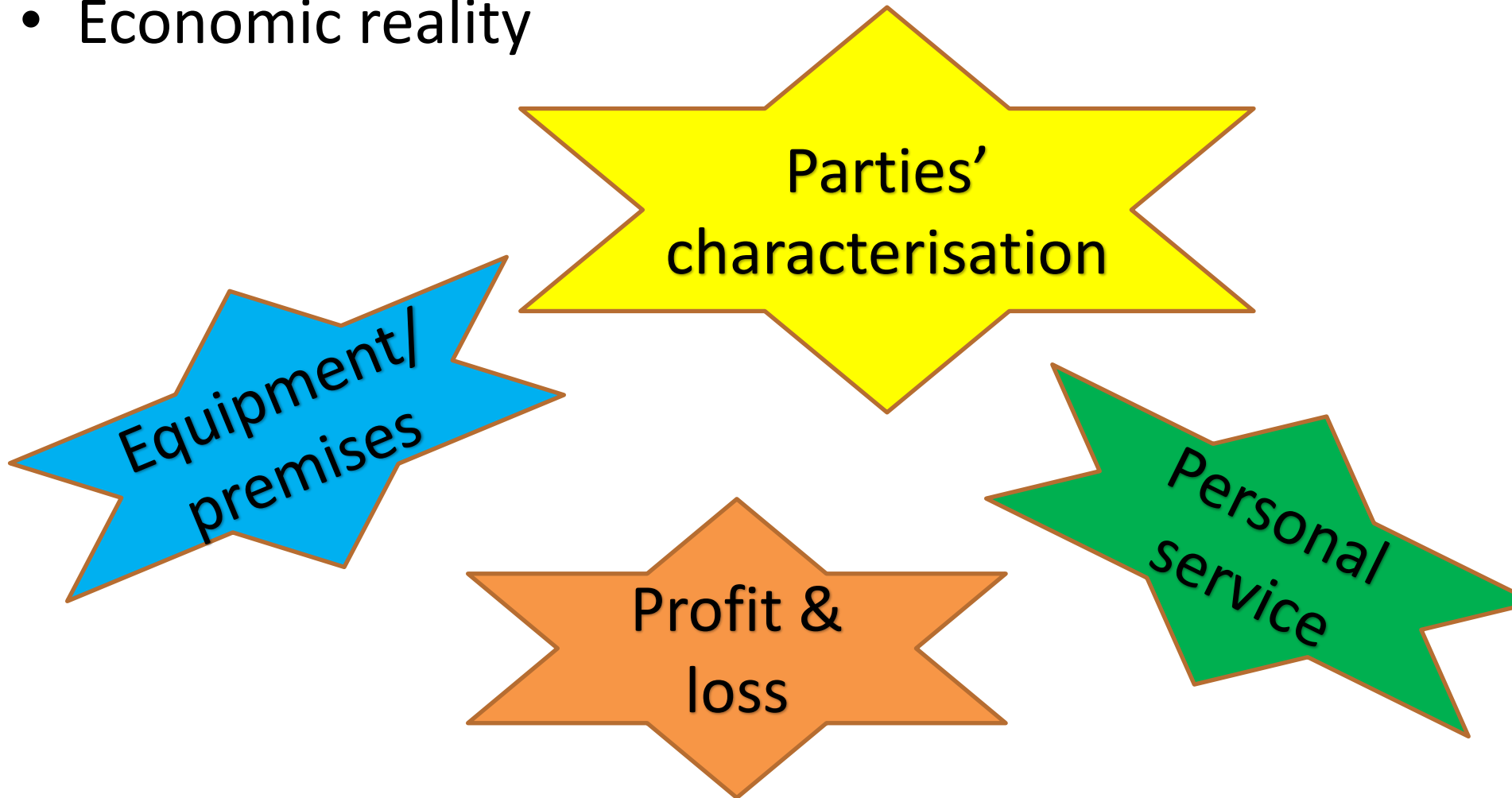
Integration



Enterprise

2. Who is an employee? The Courts...

- Economic reality



Minister for Agriculture v Barry [2009]

- “I think it can sometimes be unhelpful to speak of a ‘control test’, or of an ‘integration test’, or of an ‘enterprise test’, or of a ‘mixed test’, or of a ‘fundamental test’ or of an ‘essential test’, or of a ‘single composite test’ because, in truth, none of the approaches so labelled constitutes a ‘test’...(i.e.) a measure or yardstick of universal application that can be relied upon to deliver a definitive result”.



Minister for Agriculture v Barry [2009]

- The question of whether a ‘mutuality of obligation’ existed between the parties is an ‘important filter’
- ‘Mutuality of obligation’ exists where there is an obligation on a body to provide work to an individual, and a corresponding obligation on the individual to perform the work...
- The mutuality consideration is not a determinative test, but is ‘an irreducible minimum of a contract of service’... without mutuality no contract of service can exist...
- It would be logical, therefore to begin analysis of the employment relationship by determining whether such mutuality exists

Minister for Agriculture v Barry [2017]

- EAT determination in March 2017 (after 13 years; 3 EAT hearings; 2 High Court hearings; 1 Supreme Court hearing...)
- Majority decided no mutuality of obligation existed as no obligation on the Minister to provide work to panel members, and TVIs could refuse work
- Dissenting opinion:
 - a mutuality of obligation existed though an osmosis of the imperative contained in the EU regulations (which meant the presence of a TVI was essential to the operation of the business), and the seniority of the claimant TVIs on the panel (on which the Minister relied to ensure the work was carried out)

3. A Third Way? Workers



- *Employment Relations Act, s 230:*
- ‘worker’ = an individual who works under a contract of employment or
 - any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual
- Does not equate to employee, but workers are protected under laws relating to NMW, working time, non-discrimination, ‘whistleblowing’

3. Gigs, Apps, and the Employment Relationship

- ***Aslam v Uber [2016]***: Uber exerts a lot of control over drivers when their app is on: it sets the fee; it does not tell them where customers want to go until after they have been picked up; and it “deactivates” drivers whose average customer ratings drop too low
- ET satisfied that the ‘supposed driver/passenger contract is a pure fiction which bears no relation to the real dealings and relationships between the parties’

The Uber logo is displayed in white, uppercase, sans-serif font against a solid black rectangular background. The letters are widely spaced and have a slightly futuristic, blocky appearance.

UBER

3. Gigs, Apps, and the Employment Relationship

- Uber runs a transportation business and the drivers provide the labour that enables the service to be provided
- The notion that Uber in London ‘is a mosaic of 30,000 small businesses linked by a common “platform” is faintly ridiculous’
- any organisation that resorted in ‘its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism’.



3. FNV Kunsten (C-413/13)- Dutch Gold?

- Dutch collective agreement for ‘substitute’ orchestra musicians- provisions on minimum fees to be paid to substitute employees *and* to self-employed substitute musicians
- self-employed musicians should ‘in principle’ be treated as ‘undertakings’ (and therefore cannot be covered by collective agreements)



3. **Orchestral Manoeuvres in the Dark...FNV Kunsten (C-413/13)**

- But... boundaries between the self-employed (as undertakings) and employees are not easy to determine in a fluid employment market
- The ‘false self-employed’, namely ‘service providers [who are] in a situation comparable to that of employees’ could be covered by collective agreements



3. The 'false self-employed'

- **Freelancers**: long-running issue in Ireland relates to the interaction between collective bargaining rights and competition law when it comes to self-employed and freelance workers (voiceover actors, session musicians and freelance journalists)



3. The 'false self-employed'

- **Competition (Amendment) Bill 2016**- rules on price-fixing will not apply to these workers
- formal process set out to enable trade unions to apply to the Minister for a similar exemption for other groups of false, or dependent, self-employed workers



3. 'False self-employed worker'

- (a) performs under a contract the same activity or service as an employee of the other person,
- (b) has a relationship of subordination in relation to the other person for the duration of the contractual relationship,
- (c) is required to follow the instructions of the other person regarding the time, place and content of his or her work,
- (d) does not share in the other person's commercial risk,
- (e) has no independence as regards the determination of the time, schedule, place and manner of performing tasks
- (f) for the duration of the contractual relationship, forms an integral part of the other person's undertaking

3. 'fully dependent self-employed worker'

- (a) performs services for another person under a contract (whether express or implied, and if express, whether orally or in writing), and
- (b) main income in respect of the performance of such services under contract is derived from not more than 2 persons
- Trade union can apply to the Minister to prescribe a class of workers for the purposes of the Act
 - must be no or minimal economic effect on the market in which the class of worker operates,
 - must not lead to or result in significant costs to the State,
 - must be appropriate

4. Conclusions and Reforms

- We still struggle with defining employment status in the ‘old economy’
- ‘Subordination’ remains key
 - not necessarily dependent on the actual exercise of management/supervision on a continuous basis
 - ‘organisational subordination’
- So, too, do the issues of economic dependency, risk and reward, and the ‘embeddedness’ of the worker in the organisation
- De Stefano: must not be assumed that growth of non-standard work is a ‘natural and irreversible economic phenomenon independent from the relevant regulatory framework’

4. Reform- Platform Work?

- Specific definition of platform workers (and specified protections?)
- Specific definition of what amounts to ‘subordination’ in the context of platform work?
- Focus less on ‘control’ and more on ‘coordination’/ ‘organisation’
- Prohibit ‘unfair terms’ in platform agreements
 - ‘The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship’ (Elias J; ***Kalwak*** [2007])

4. Reform- Platform Work?

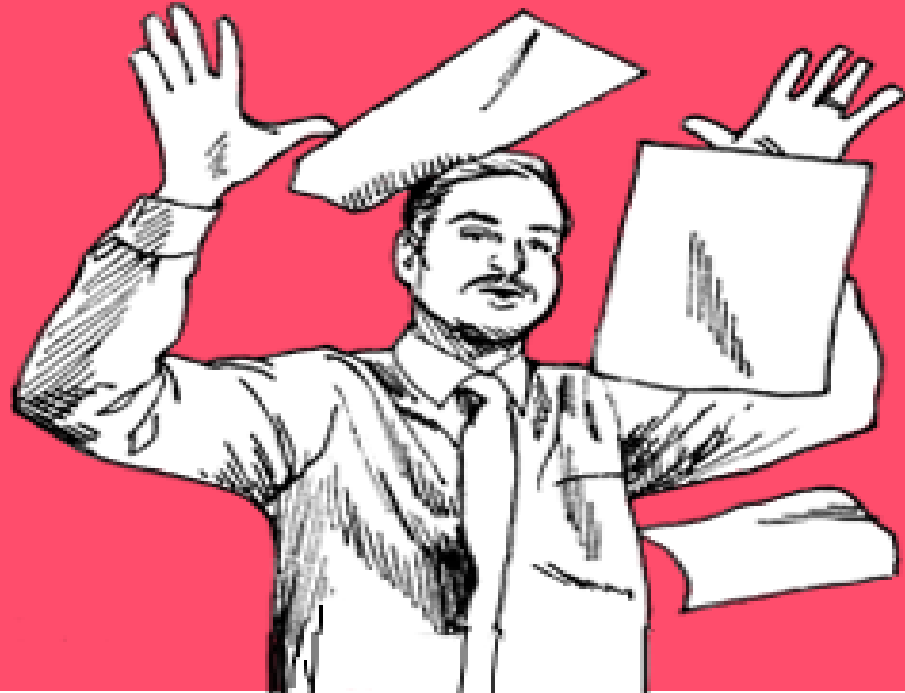
- Esther Lynch (ETUC)- regulate the platforms:
 - Confirm the ‘place of work’ is where the worker carries out the work;
 - Make it an offence to offer work at rate lower than minimum wage/or the collective agreement in the Member State concerned;
 - Prohibition on charging the worker (similar to Employment Agency Directive) or making % deductions from wages
 - Ensure that workers can enforce their rights cross border- e.g. joint and several liability in the case of non-payment for work

4. Reform- Reconfiguring the Employment Relationship?

- Broaden the definition of ‘employee’?
(statutory presumption of employment status)
- Continue to look at ‘intermediate’ categories?
- Extend benefits/protections to the self-employed (e.g. sick pay, social security, etc)?
- OR accept that, actually, we need to reconfigure our thinking completely and focus on the employer...

Over to Prof Prassl....

And with that I'm outta here!



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Thank you for listening

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