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*Towards Legal Regulation of Platform Work: Theory and Practice*¹

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ABSTRACT

Digital platform work, while playing an increasingly important part in low- as well as high-income countries, is characterised by an absence of effective labour regulation. In particular, the norm is for workers to be classified as ‘independent contractors’, thus placing them beyond the ambit of labour legislation. The article, based on interactive research by the Fairwork project,² examines ways of protecting workers’ basic rights in this environment. This is seen as part of the long-standing effort to include non-standard workers within the framework of labour legislation. However, the premise is that dedicated regulation rather than a simple extension of existing labour rights is required. The article starts by considering the category of dependent ‘workers’ who are deserving of such protection over and above ‘employees’, while excluding genuinely independent entrepreneurs. It then uses five standards of decent work

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² See 3 below for details of the project.

developed by the Fairwork project (fair earnings, fair conditions, fair contracts, fair management and fair representation) as a basis for working out forms of regulation that would bring about the effective protection of workers' rights. While reputational pressure exerted by Fairwork's rating system provides a critical impetus for improvement, it is argued that binding legal rules are needed to prevent exploitation by platforms that reject voluntary compliance. It concludes by considering the practical prospects of implementing legislative reform, and the importance of generating the political will to do so on the part of policy-makers, with reference to the precedent of the enactment of labour legislation during the first and second industrial revolutions.

PART 1

1 INTRODUCTION

Digital platform work has become increasingly widespread in low-income as well as high-income countries. There are estimated to be up to 40 million platform workers in the global South alone.³ Platform work offers income and opportunities to some of the large numbers of those without formal jobs in South Africa. However, platform workers generally lack the right to bargain collectively or the opportunity to do so at an individual level, and are almost invariably unprotected by labour law. It is therefore not surprising that unjust and unfair practices abound, including low pay, wage theft, unreasonable working hours, discrimination, precarity and unsafe working conditions.⁴ Setting minimum decent work standards for such workers will therefore be challenging, both in relation to the substance of such standards, which may need to be adjusted to fit the particularities of platform working, and in relation to compliance.⁵

The article draws on the research findings of the Fairwork project in addressing this challenge. Fairwork is a multi-disciplinary project of social scientists and lawyers seeking to develop a set of decent work standards for platform workers.⁶ The research has been conducted in South Africa where, despite the high standard of rights provided in labour law for employees, platform workers are almost invariably classified as self-employed and therefore excluded. The project has developed a rating

³ R Heeks 'How Many Platform Workers Are There in the Global South?' ICT4DBlog 29 January 2009 <https://ict4dblog.wordpress.com/2019/01/29/how-many-platform-workers-are-there-in-the-global-south/>.

⁴ M Graham et al 'The Fairwork Foundation: Strategies for improving platform work in a global context' 2020 *Geoforum* (in press).

⁵ S Fredman et al 'Thinking out of the box' 2020 *Kings College Journal* (in press).

⁶ <https://fair.work/about/>. The project is funded by the UK Economic and Social Science Research Council, through the Global Challenges Research Fund. Mark Graham is the principal investigator, and Sandra Fredman and Darcy du Toit are co-investigators of the legal team.

scheme based on five principles: fair pay, fair conditions, fair contracts, fair management and fair representation. By creating publicly available rating tables scoring platforms out of 10 points, the project aims to create reputational pressure on platforms to improve their decent work scores. At the same time, it aims to develop substantive standards of decent work for platform workers that are capable of being incorporated into binding law. Because the empirical research underpinning this paper has been carried out in South Africa, the focus is on South African law.

2 THE PROBLEM

‘Digital platform’ is understood to mean ‘a set of digital resources ... that enable value-creating interactions between external producers and consumers’⁷ — or, in plain language, transactions between workers (service⁸ providers) and customers (users). There is a wide range of governance models by means of which platforms interact with those that provide the service. Geographically tethered platforms, such as ride-hailing, delivery, and domestic and care work platforms, have a high degree of control over where their workers do their work. For micro-working and free-lance platforms, workers can carry out their work anywhere at all provided they have internet connectivity. Similarly, whereas the former tend to manage tightly the rates workers can charge, rates in the latter tend to be left to individual negotiation in the virtual market-place.⁹

This leaves open the question whether the user in the case of geographically tethered platforms is a customer of the worker, as many platforms will have it. This paper assumes the opposite: the user is unaware of the identity of the worker who may provide the actual service, but engages with the platform marketing that service and, as a rule, makes payment to the platform. It is thus a triangular relationship in which users contract with the platform to access the service of their choice, while the platform contracts with workers to deliver it. Perhaps the best-known example is the Uber app that an estimated 110 million people worldwide have on their mobile phones,¹⁰ but more and more similar apps have been developed in various sectors offering a wide range of services. It is difficult to measure how many workers are performing platform work, either regularly or occasionally.¹¹ However, the available

⁷ P Constantinides, O Henfridsson & G Parker ‘Platforms and infrastructures in the digital age’ June 2018 (29) (2) *Information Systems Research* 381.

⁸ ‘Service’ is used generically to include work of any kind, including physical services as well as online products.

⁹ J Woodcock & M Graham *The Gig Economy: A Critical Introduction* (Polity Press 2020) 62.

¹⁰ More precisely, this is the estimated number of people using Uber on a monthly basis — E Mazareanu ‘Monthly users of Uber’s ride-sharing app worldwide 2016–2019’ *Statista* 9 August 2019 at <https://www.statista.com/statistics/833743/us-users-ride-sharing-services/>.

¹¹ Organisation for Economic Co-operation and Development *Measuring the Digital Transformation: A Roadmap for the Future* (OECD 2019) 176–7.

evidence indicates that the number is significant and almost certainly rising.¹² For growing numbers of people, reliance on digital platforms is becoming an alternative way of conducting their everyday lives as workers and consumers.

All the more concerning is its dark side. Apart from a small but vibrant cooperative sector, the platform economy represents a relatively unregulated part of the global free market economy that, with some honourable exceptions, brings back echoes of the exploitative conditions of industrialising economies prior to the age of labour legislation, which, of course, linger on in societies where labour regulation is weak.¹³ Perhaps its most notorious feature is the reliance by most platforms on independent contracting as opposed to employment as the basic model for providing the services that the platform offers to the public.¹⁴ This means that, regardless of the services that workers provide on behalf of the platform, owners are exempt from the requirements of labour law while workers are deprived of its protection, and relations between platforms and workers are very much at the discretion of platform owners as the stronger contracting party by far.

This is problematic in human as well as legal terms. International labour standards, and many national legal systems, extend equal rights to all people, yet platform workers are excluded from the standards that apply to employees performing work similar or identical to their own.¹⁵ Although the focus of this article is on South Africa, where the relevant research of the Fairwork project has taken place, the problem is universal.¹⁶ It has been encapsulated by a South African judge in terms that will strike a chord in countries around the world:

‘The nature of the engagement of drivers who use the Uber App (and indeed the many others who provide services in what has been described as the “gig economy”) poses a challenge to traditional conceptions of employment worldwide, and has

¹² According to one estimate, there may have been up to 40 million people doing platform work in 2018 in the global South alone — Heeks n 3 above, <https://ict4dblog.wordpress.com/2019/01/29/how-many-platform-workers-are-there-in-the-global-south/>.

¹³ For a range of insights, see T Scholz & N Schneider (eds) ‘Ours to hack and own: The rise of platform cooperativism, a new vision for the future of work and a fairer internet’ in *Platform Capitalism: Part 2* (OR Books 2016). On monopolisation, see N Srnicek *Platform Capitalism* (Polity Press 2017).

¹⁴ Some platforms use complicated sub-contracting arrangements to achieve the same result.

¹⁵ The Decent Work Agenda of the International Labour Organisation (ILO) is used as a point of departure in what follows — see ILO ‘Decent Work’ <https://www.ilo.org/global/topics/decent-work/lang-en/index.htm>.

¹⁶ South Africa is also a useful area of research for other reasons: first, as a society representing a crossroads between advanced technology and the conditions of the developing world, it demonstrates global challenges in an integrated form; and, second, its legal system is an amalgam of common law and civil law traditions, including a distinction between employees and independent contractors that has much in common with other jurisdictions.

tested the boundaries of the protection extended to working people by domestic labour legislation.’¹⁷

This article considers measures by which this anomaly could be addressed. It does not assume the existence of a silver bullet. Instead, it starts from the recognition that identifying potential solutions and securing their application are two fundamentally different propositions that will vary across jurisdictions. However, the former is a precondition for the latter, and the more carefully a theoretical framework is conceptualised, the stronger will be the case for its implementation.

3 INDEPENDENT CONTRACTING, EMPLOYMENT AND THE FAIRWORK MODEL

The contrast between employment and the provision of services by an independent contractor is trite and need not be repeated. For present purposes the cardinal point is that the worker — typically an isolated individual — contracting with a platform — typically a corporate entity more powerful than the worker — is deemed to be the latter’s legal equal. Except in very few jurisdictions, independent contractors enjoy no legal protection against the power of corporate ‘clients’.¹⁸ This is not to say that they are entirely at the mercy of the law of contract. In South Africa and elsewhere, certain general principles — for example, the prohibition of contractual terms that are against the public interest — and certain statutes — for example, consumer protection laws — may offer a limited degree of protection.¹⁹ But such provisions are exceptional and can be circumvented by structuring contracts to place them beyond the parameters of legal limitations. As a result, the differences between the position of independent contractors and that of employees is stark and goes a long way towards explaining platforms’ general insistence on independent contracting and the avoidance of employment in their relations with workers performing the services that they (the platforms) offer. Some of the key differences in South Africa, which are replicated to a greater or lesser extent in other legal systems, are the following:

¹⁷ *Uber SA Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others* (2018) 39 *ILJ* 903 (LC) para 2. For commentary, see K Malherbe, K Mokoena & D du Toit ‘Revolutionary change in technology must be translated into labour law’ 2019 (4) *J of Comparative Labor Law and Social Security* (English electronic edition of *Revue de Droit Comparé du Travail et de la Sécurité Sociale*).

¹⁸ Such as Australia’s Independent Contractors Act of 2006 and Italy’s Law 81 of 2017 — measures for the protection of non-entrepreneurial self-employment and measures aimed at favouring flexible articulation in the times and places of subordinate work (17G00096) *GU* n.135 of 13-6-2017.

¹⁹ D du Toit ‘Independent contractors have rights too’ (2019) 40 *ILJ* (SA); S Fredman & D du Toit ‘One small step towards decent work: *Uber v Aslam* in the Court of Appeal (2019) 48 (2) *ILJ* (UK) 260.

- Employees' remuneration is subject to legally enforceable minimum rates in terms of minimum wage legislation,²⁰ collective agreements — both sectoral²¹ and plant-level — and administrative decree.²² Independent contractors' earnings are not subject to any regulation and employers may use the services of independent contractors at rates of payment below the minimum wage that employees would have earned for doing the same work.
- Employees are protected against unfair dismissal, unfair discrimination²³ and unfair labour practices; in the case of dismissal, there must be a fair reason and a fair procedure must be followed. In the case of dismissals based on operational requirements, employees are entitled to severance pay.²⁴ Independent contractors, like all other persons, are protected against all forms of discrimination²⁵ but, beyond this, have no specific protection. Thus, their contracts may be terminated without any reason or procedure, subject only to the terms of the contract itself.
- Employees may form or join trade unions, which enjoy legally protected organisational rights in the employer's workplace. Unions may enter into legally binding collective agreements and take strike action in support of bargaining demands or any other matter of mutual interest between employer and employee. Independent contractors are free to form associations (provided they do not violate competition law) but these will have no protected rights to organise or take collective action. Any agreements that they may enter into will be subject to the ordinary rules of contract.
- Employees have access to a dedicated dispute resolution system, including conciliation of all disputes and arbitration of most disputes free of charge, and a specialist Labour Court for more complex disputes and the review of disputed arbitration awards. Trade unions may represent employees in all labour dispute resolution fora.²⁶ All this makes it relatively easy for employees to challenge disputed actions by employers, including dismissals. Independent contractors have recourse to the ordinary courts only, which is beyond the means of all except the most highly paid or those with institutional support, and no right to anything more than the terms stipulated by the platforms for which they work.

²⁰ ie, the National Minimum Wage Act 9 of 2018 (NMWA).

²¹ ie, in terms of ch III part C of the Labour Relations Act 66 of 1995 (LRA).

²² Such as sectoral determinations by the Minister of Labour in terms of ch 8 of the Basic Conditions of Employment Act 75 of 1997 (BCEA). Sectoral determinations may be issued in respect of sectors that are not subject to collective agreements.

²³ In terms of ch 2 of the Employment Equity Act 55 of 1998 (EEA).

²⁴ Ch VIII of the LRA regulates protection against unfair dismissal and unfair labour practices.

²⁵ In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

²⁶ See ch VII of the LRA.

One consequence has been that independent contractors (or workers classified as such) seeking to assert any right to fair treatment have no practical alternative but to claim ‘employee’ status.²⁷ This has been manifested in a series of court actions in various countries in recent years, particularly by drivers working for ride-hailing platforms such as Uber or delivery platforms such as Deliveroo, where working conditions closely resemble those of employees.²⁸ The outcomes have been mixed, with some cases being decided in favour of workers while others were decided against them, and have been analysed and debated in a growing body of literature that falls beyond the scope of this article. However, two conclusions drawn by the Fairwork project are central to the argument that follows.²⁹

First, case-by-case litigation does not offer a viable means of addressing the lack of legal protection experienced by platform workers in general. While instances of disguised employment must be exposed, and workers who are in fact employees are entitled to be treated as such, the outcome will always depend on the details of the working arrangements, the peculiarities of the legal framework in each jurisdiction and the weight that different judges give to different factors. In addition, platform owners are quick to learn from judgments that go against them and, where possible, adjust their contracts or working arrangements in order to eliminate factors that might lead courts to find that their workers are employees.

Secondly, even if platform workers are held to be ‘employees’, the benefits they gain will be qualified. A persistent theme of labour law scholarship over the past thirty years has been the relative ineffectiveness of labour law in extending protection to the growing numbers of ‘precarious’ or ‘non-standard’ employees — for example, migrant workers — in developing as well as developed economies.³⁰ Historically, the evolution of labour law has been premised on the conditions and the struggles of ‘standard’ (full-time, permanent) employees, typically in large workplaces. The result is that its content as well as its institutions, notably collective bargaining and the right to strike, may have little

²⁷ Or, in the case of the UK, ‘worker’ status — s 230(3)(b) of the Employment Rights Act of 1996 (ERA) provides that a worker is an individual who has entered into or works under a 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’. See further the discussion under ‘Who must be protected?’ below.

²⁸ A detailed overview is provided in G Bhatia ‘The Legal Status of Platform Workers: A Briefing Note’ (unpublished research paper, Fairwork Project 2019).

²⁹ For discussion, see S Fredman & D du Toit n 19 above.

³⁰ See S Fredman ‘Labour law in flux: The changing composition of the workforce’ [1997] 26 *ILJ* (UK) 337 — in particular, part-time, temporary and agency workers, but including migrant workers, zero-hour workers and others working under insecure conditions. Indeed, in many developing countries the role of labour law has always been marginal and ‘non-standard’ work has always been the norm.

bearing on the situation of workers on the periphery. Platform work by and large represents extreme forms of precariousness and conditions far removed from those of standard employment. Without fixed workplaces, and typically working in isolation or relative isolation, employee status may give platform workers a degree of individual protection but little prospect of exercising collective rights. As a consequence, their ability to monitor, enforce and improve individual rights against powerful employers will be correspondingly limited.

Thus, even if platform workers do fall within the definition of ‘employee’, the rights of standard employees may have little applicability to their situation and may, at worst, be a dead letter.

Against this background, the Fairwork project does not regard the mere extension of the traditional employment model to platform workers without appropriate modifications as an adequate means of securing their right to decent work. Litigation exposing sham employment is important but does not address the underlying problem: the incongruity between standard employment rights and the widely divergent conditions of platform work. Rather than focusing on merely extending employment rights to platform workers, therefore, the project sets out to identify appropriate individual and collective rights that should apply to platform workers regardless of their contractual status, unless they are genuinely in business on their own account or working purely for themselves.

This approach is in line with the concept of ‘decent work’ developed by the International Labour Organisation (ILO) as a range of standards applicable to all workers³¹ as well as South Africa’s constitutional guarantee of individual and collective labour rights to all workers.³² The five principles on which Fairwork’s research is based — fair pay, fair conditions, fair contracts, fair management and fair representation — emerged from wide consultation with stakeholders, including extensive engagement with platform workers in different countries. Each principle was then developed into concrete minimum standards for assessing the fairness of platforms’ relationships with workers, which are revised annually in the light of experience and further research.

These standards serve as a basis for challenging unfairness by two complementary strategies. The first, drawing on the precedent of

³¹ Declaration on Social Justice for a Fair Globalization (ILO 2008); and see G Rodgers, E Lee, L Swepston & J van Daele *The International Labour Organization and the Quest for Social Justice, 1919-2009* (International Labour Office 2009). Ten years on, the ILO’s proposed Universal Labour Guarantee reiterates that ‘[a]ll workers, regardless of their contractual arrangement or employment status, should enjoy fundamental workers’ rights’ — ILO *Work for a Brighter Future — Global Commission on the Future of Work* (ILO 2019) 12. See also art 2(1) of the ILO’s Violence and Harassment Convention 190 of 2019 that protects not only employees but also ‘persons working irrespective of their contractual status, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants’; and Directorate General for Internal Policies ‘The Social Protection of Workers in the Platform Economy’ (European Parliament 2019).

³² s 23 of the Constitution of the Republic of South Africa, 1996 (Constitution).

organisations such UK's Living Wage Foundation,³³ has been to evaluate and rank platforms by assessing their working practices against the abovementioned standards. Ranking takes place at two levels: one point is awarded for achieving the minimum ('basic' level) in each case, and a second point for exceeding the basic level ('advanced' level).³⁴ Although platforms are encouraged to engage with the process, the assessment is made on the basis of objectively available evidence, whether or not the platform participates. These rankings are then made public as a means of encouraging platforms to improve their rankings through the implementation of fairer standards.³⁵

It is recognised, however, that voluntary compliance with rating standards will not be achieved in all cases but will depend on the perceived business interests of each platform. As in every area of social reform, legally binding standards are ultimately indispensable as a basis for general compliance in the form of the extension of decent work standards to all platform workers. For the project, this raises the challenge of translating its rating principles into appropriate legal standards that will not only address the needs of platform workers but will also be consistent with the realities of the platform economy and, therefore, practically enforceable.

4 FROM RATING PRINCIPLES TO LEGAL STANDARDS

The need for legal regulation of the platform economy and the protection of platform workers in particular, is widely acknowledged. The ILO, in its Centenary Declaration for the Future of Work, called on all member states 'to work individually and collectively, on the basis of tripartism and social dialogue ... to further develop [the ILO's] human-centred approach to the future of work' by adopting, amongst other things, policies and measures in response to 'challenges and opportunities in the world of work relating to the digital transformation of work, including platform work'.³⁶

This could be a slow process. The ILO itself is unlikely to produce a convention or recommendation to require or guide such policies before 2024, if at all. However, nothing prevents member states from enacting measures to address the problem, as the declaration urges them to do so. In South Africa, as noted already, the state is under a duty to extend fair

³³ <https://www.livingwage.org.uk/living-wage-foundation>. See also 'What is Fairtrade?' <https://www.fairtrade.net/about/what-is-fairtrade>.

³⁴ One point is awarded for providing evidence of meeting the 'basic' level for each of the five principles, and a second point for providing evidence of meeting the 'advanced' level. Ranking is therefore based on a score out of ten.

³⁵ For an overview, see Fairwork's report *The Five Pillars of Fairwork: Labour Standards in the Platform Economy* (October 2019) <https://fair.work/wp-content/uploads/sites/97/2019/10/Fairwork-Y1-Report.pdf> (hereafter 'Fairwork Report 2019').

³⁶ International Labour Conference *ILO Centenary Declaration for the Future of Work* — adopted by the Conference at its One Hundred And Eighth Session, Geneva, 21 June 2019, s IIIC(v).

labour practices to all workers, and the recently established Presidential Commission on the Fourth Industrial Revolution has, amongst others, the task of advising on 'skills development and future of work' in this context. The possible content of legal standards for platform work, based on existing research, is considered against this background.

5 WHO MUST BE PROTECTED?

The first question is one of definition. The extension of protection to platform workers 'regardless of legal status' requires a concept of workers qualifying for such protection that will be wider than the existing definition of 'employee'. In other words, such a definition would overlap with the existing definition of 'employee' but would be less restrictive. At the same time, it would need to be specific in its application. As in the case of employment, the bottom line would be that 'worker' protection does not apply to persons conducting businesses of their own. The need for protection arises from the very fact that the person is engaged in conducting the business of another. This implies a degree of economic dependency and a lack of genuine independence, manifested by some form of direct or indirect subordination or 'control'. As with employment, the answer will depend on the objective relationship between the worker and the person for whom he or she is working rather than the wording of their contract. Thus, self-employed workers involved in carrying on the business operations of another, as opposed to performing once-off services, could be 'workers' in terms of such a test.

There are a number of precedents, or partial precedents, for broadening the concept of 'employee' in this way. As noted already,³⁷ the UK Employment Rights Act (ERA) defines 'worker' as including a person who provides personal services to another who is not a client or customer, also in the absence of a contract of employment.³⁸ Similarly, the UK Equality Act of 2010 defines 'employment' as work done not only under a contract of employment but also under 'a contract personally to do work'.³⁹ However, the danger of a hard-and-fast rule such as this was demonstrated by a recent High Court judgment disqualifying Deliveroo drivers from exercising the right to engage in collective bargaining on the basis that their contracts did not compel them to do their work personally but allowed them to let others work in their place.⁴⁰ Likewise, a beauty consultant working at a retail outlet of a cosmetics company was denied protection under the Equality Act because she provided her

³⁷ See n 27 above.

³⁸ In South Africa, in contrast, the definition of 'employee' is not dependent on the existence of a valid contract of employment — see, eg, *Discovery Health Ltd v CCMA & others* (2008) 29 ILJ 1480 (LC); *Kylie v CCMA & others* (2010) 31 ILJ 1600 (LAC).

³⁹ s 83(2)(a).

⁴⁰ *R. (on the application of the Independent Workers Union of Great Britain) v Central Arbitration Committee* [2018] ewhc 3342 (Admin) 5 December 2018.

services through a limited liability company that had contracted with the cosmetics company.⁴¹

To avoid technical exclusions of this kind, an approach based on the objective and substantive nature of the relationship, as opposed to its legal nature, is essential. In both cases discussed above the true question was, or should have been, whether the contractual arrangements in question meant that the worker was objectively conducting a separate business, independent of that of the hiring entity and, therefore, that the worker's services were not part and parcel of the hiring entity's business. In both the above instances this was manifestly not the case: Deliveroo can hardly operate a delivery service without drivers⁴² and a retail cosmetic outlet can hardly operate without persons acting as beauty consultants.

Similarly, the concept of 'working for' another person should be understood in a substantive sense; for example, as being *primarily* responsible for doing the work in question and *predominantly* doing so in person. This would prevent platforms putting in clauses permitting workers to substitute others to do the work and thereby make them appear self-employed, but would equally prevent 'workers' from employing others to work regularly on their behalf.

Against this background, the new statutory definition of 'employee' adopted in California in 2019 is particularly interesting.⁴³ Following the *Dynamex* judgment of the California Supreme Court,⁴⁴ it creates a presumption that *all* workers are employees unless the hiring entity can prove that

- (a) the worker is free from its control in performing the work; AND
- (b) the worker performs work that is outside the course of the hiring entity's business; AND
- (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work that he or she has performed for the hiring entity.⁴⁵

Such an approach, used to define 'workers' in the context of platform work, means that a person will be presumed to be a worker where —

- he or she performs work on terms that are effectively, even if not expressly, determined by the platform (ie, the worker is NOT free from the platform's direct or indirect control in performing the work);

⁴¹ *Halawi v WDFG UK Ltd (t/a World Duty Free)* [2014] EWCA Civ 1387.

⁴² That is, until such time as self-driving vehicles become commercially viable.

⁴³ s 2750.3 of the Californian Labour Code.

⁴⁴ *Dynamex Operations West Inc. v. Superior Court* (2018) 4 Cal. 5th 903, in which drivers working as 'independent contractors' for a personal delivery service were held to be employees.

⁴⁵ The statute contains a list of exceptions — eg, doctors, stock-brokers, real estate agents and persons who truly run their own businesses.

- he or she performs work that forms part of the service or product offered by the platform (ie, the worker is NOT performing work outside the course of the platform's business); and
- he or she does not have an independent business performing work of the same nature for other customers as that performed for the platform (ie, she is not in business on her own account).

It follows that a genuine independent contractor will have full control over the service that he or she provides, including the price and terms of performance. The service performed for the platform would be different from the platform's main business and, instead, would be part of the service provider's own distinct and separate business. Thus, an electrician fixing a fault at Uber's offices would meet all three criteria whereas drivers offering rides for Uber would meet none.⁴⁶ On this basis, drivers would be presumed to be 'workers' who are working for Uber and, as such, entitled to the rights of a worker (discussed below). Platform workers would only fall into the category of independent contractors if the platform in fact is no more than an intermediary, enabling workers and users of their services to make contact and strike their own bargains independently of any substantive preconditions imposed by the platform.⁴⁷

This raises a further question: what should be the relationship between the suggested new category of 'worker' and the existing category of 'employee' — should the definition of 'worker' provide a gateway to all the existing rights of employees, or only to a selection of appropriate rights?⁴⁸ In other words, does 'worker' presuppose a third category in between employees and independent contractors?

Answering this question fully will require a more detailed analysis than this article can provide. In principle, however, the answer should be 'no'.⁴⁹ Inevitably, there will be an overlap between the two categories, in that all 'employees' would meet the basic criteria outlined above and would therefore qualify as 'workers'. However, not all 'workers' might meet the stricter criteria for defining employees. But this does not make

⁴⁶ Uber's business model in certain jurisdictions is based on the proposition that Uber is not engaged in a passenger transport service but merely leases an app to members of the public. For the reasons given by the European Court of Justice this proposition must be regarded as a fiction — see *Asociación Profesional Elite Taxi v Uber Systems Spain, SL* case C-434/15 (20 December 2017) especially paras 37–40.

⁴⁷ These criteria are obviously not limited to the platform environment but are potentially applicable to all workers performing work for others.

⁴⁸ In the UK, for example, a hierarchy of rights has been established, with those falling within the definition of 'employee' being eligible for the fullest spectrum of rights, including protection against unfair dismissal, whereas the wider definition of 'worker' gives access to certain rights, such as minimum wages and maximum hours, but does not include protection against unfair dismissal.

⁴⁹ For more discussion, see M Cherry 'The cautionary tale of the intermediate worker category in Italy: A response to Del Conte & Gramano' (2018) 39 *Comparative Labor Law and Policy J* 639.

a case for a dualistic regulatory regime with less protection for ‘workers’ than for ‘employees’, in that there can be no justification for a blanket exclusion of ‘workers’ from certain crucially important rights, such as protection against unfair termination. Certainly, the argument that ‘workers’ in the UK include highly-skilled individuals who do not require the full range of employee rights⁵⁰ cannot be generally applicable. Many workers without employee status, including most platform workers in South Africa, are among the more vulnerable sections of the working population and require no less protection than employees against often powerful corporations that utilise their services.

A better starting point, as suggested already, is that of a floor of basic worker rights, as embodied in ILO standards and the South African Constitution, to be given legislative effect in forms that are appropriate to different sections of the workforce, regardless of their contractual status but, instead, determined ultimately by the nature of their work. Increasingly divergent conditions of work — exemplified by the diversity of platform work itself — make this essential: rights must be capable of addressing the different situations in which different categories of workers find themselves.

This is nothing new in labour law; collective agreements have always been based on the conditions within different industries or workplaces, just as sectoral determinations are aimed at specific sectors. Below we apply the same approach to platform work by considering forms in which the key rights reflected in the Fairwork principles could be extended to workers in this environment.

PART 2

In Part 1 of this article we made out a case for extending equal rights to all workers performing work for digital platforms, regardless of the way their contracts describe them. In this part we suggest the forms that worker rights could take under the highly peculiar conditions of platform work, based on the five principles developed by the Fairwork project: fair earnings, fair conditions, fair contracts, fair management and fair representation.

⁵⁰ *Clyde & Co LLP & Anor v van Winklehof* (Rev 1) [2014] UKSC 32 (21 May 2014); *Pimlico Plumbers Ltd & Anor v Smith* [2018] UKSC 29 (13 June 2018).

1 'DECENT WORK' FOR PLATFORM WORKERS

1.1 *Fair earnings*⁵¹

It should be uncontroversial to argue that platform workers, like other workers, should earn no less than the minimum wage for employees. Quantifying this, however, is not straightforward. Two of the characteristics of platform work are that (a) workers may have extremely flexible hours and (b) workers bear many (or most) of the costs of delivering the platform's services. Setting a legal minimum for their earnings will only be meaningful if all the time that they make available in order to perform the services offered by the platform, and all the costs that they incur to do so, are taken into account. Thus, Fairwork understands 'fair pay' to mean 'a decent income in their home jurisdiction after taking account of work-related costs'.⁵²

This approach accords with the ILO's concept of working time as periods during which workers 'are not free to dispose of their time as they please' but must be available 'to respond to possible calls' by an employer.⁵³ It also accords with the understanding that the cost of running a business (such as a platform) comprises both labour and material costs.⁵⁴ Labour costs represent all costs incurred by an employer in using the services of workers, which, apart from remuneration and agreed or statutory benefits, will include 'miscellaneous items, such as transport of workers, work clothes and recruitment'.⁵⁵ Material costs include tools, equipment, overhead expenditure and everything else required for the performance of the service offered by the business.

Platforms typically require workers to be on stand-by without payment and transfer (part of) their labour and material costs to workers. We argue that workers cannot in fairness be required to subsidise platforms by contributing part of the cost of providing its services out of their

⁵¹ Given that platform workers are normally not paid any regular remuneration by the platform but more often receive payment for their work from customers on a job-by-job basis, the concept of 'earnings' is used rather than 'wages'. Wages relate essentially to employees (art 1, ILO Protection of Wages Convention 95 of 1949), whereas the concept of earnings in relation to the welfare of workers affects all classes of workers, including the self-employed — M Castillo 'Wages statistics: Concepts, definitions & derived variables' ILO Department of Statistics (2015) 4 at https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-pretoria/documents/publication/wcms_413782.pdf.

⁵² Fairwork Report n 35 above 13.

⁵³ art 3(10) Domestic Workers Convention 189 of 2011. Though specific to domestic workers in this instance, the same principle should apply to all workers who are similarly 'on call' — eg, Uber drivers 'hovering' with their apps switched on while waiting to be hailed.

⁵⁴ International Labour Office *Improve Your Business (IYB): Costing* (ILO 2015) 3ff.

⁵⁵ 'Earnings and Labour Cost' https://www.ilo.org/ilostat-files/Documents/description_EAR_EN.pdf — Resolution Concerning Statistics of Labour Cost, adopted by the Eleventh International Conference of Labour Statisticians (October 1966).

minimum earnings.⁵⁶ Fair minimum earnings must be calculated net of such costs.

For example, transport costs are significant for workers who must travel to jobs that the platform assigns them — for example, domestic and care workers — and take up a significant part of their earnings.⁵⁷ It involves travelling not only between assignments but also to the first assignment of the day. The issue was highlighted in the UK in 2016 when Caroline Barlow, a carer, brought a claim against one of the biggest homecare providers in the UK on the grounds that she was not paid for travel time between appointments. This, she argued, led to an underpayment of the minimum wage.⁵⁸ The case was settled, but it is now expressly provided in official guidelines to the application of the minimum wage that time spent by workers who travel from one assignment to the next during the day is counted as time for which the minimum wage is payable.⁵⁹

More difficult is the question of the journey to the first assignment. On the one hand, the principle that employers do not pay for workers' transport to and from work might seem reasonable in the platform economy also.⁶⁰ On the other hand, since platform workers do not have a settled workplace, and therefore cannot make regular transport arrangements, it can be argued that platform work should be treated as an exception. Whether it is the first or last assignment of the day, a platform worker will in all cases incur travel costs as an essential part of performing that assignment.

The argument is reinforced by the finding of the Court of Justice of the EU (CJEU) that for 'mobile workers', or workers who do not have a settled place of work, working time begins when they leave their homes to set out for the first place to which they have been assigned and continues until they reach their homes at the end of the day.⁶¹ Because of the limits of the CJEU's jurisdiction, the judgment was confined to working time rather than remuneration, and it also applied to employees

⁵⁶ Similarly, s 5(1)(a) of the NMWA defines 'wage' as 'the amount payable in money for ordinary hours of work excluding ... any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation allowance, unless specified otherwise in a sectoral determination'.

⁵⁷ See, eg, A Hunt & F Machingura *A Good Gig? The Rise of On-demand Domestic Work* (Overseas Development Institute 2016) 22-3; *Overcoming Poverty and Inequality in South Africa* (The World Bank 2018) 88.

⁵⁸ L Day 'Settlement for Carer in Legal Action over National Minimum Wage' (2016) <https://www.leighday.co.uk/News/News-2016/March-2016/Settlement-for-carer-in-legal-action-over-national>.

⁵⁹ Department for Business, Energy and Industrial Strategy 'National Minimum Wage and National Living Wage: Calculating the Minimum Wage' (2019), accessed 18 October 2019 36.

⁶⁰ In terms of the UK National Minimum Wage Regulations, time spent travelling between home and one's 'normal place of work' and back does not count as time when the minimum wage is payable — Department for Business, Energy and Industrial Strategy *ibid*.

⁶¹ *Federación de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL* (C-266/14) [2016] CMLR 22 c-266/14 (CJEU).

who were required to use a company car to reach their destination. Nevertheless, it leaves scope to argue that, in calculating minimum earnings, the cost of workers' travel to and from each assignment, whether or not it is the first of the day, should be factored in.

A further question is the manner in which minimum earnings are calculated. If working time is used as a point of reference, it could be expressed in terms of a minimum hourly rate for all 'active hours'. However, many platforms pay for workers' services on a basis akin to piecework; that is to say, based on completion of a specific task or 'gig' (such as delivering a parcel) rather than working time. But this, too, can be reduced to an hourly rate. In the UK, the National Minimum Wage Act of 1998 requires that piece-rate workers must be paid a fair rate for each task they do. This is calculated by finding the average number of tasks or pieces completed within an hour and dividing this by 1.2 (so that new workers with less experience are not prejudiced). The hourly minimum wage is then divided by that number to work out how much should be paid per piece or task. Alternatively, if a lump sum is paid for a fixed task, then the sum should be divided by the hours worked to find the hourly pay.⁶²

In South Africa, the Basic Conditions of Employment Act (BCEA)⁶³ defines 'piece-work' as 'any system by which earnings are calculated upon the quantity or output of work performed', and certain sectoral determinations make provision for piece-work.⁶⁴ In effect, however, piece-work is treated as a form of incentive and piece-work rates must be paid in addition to the normal wage. The provisions are aimed at full-time employees and do not apply to workers who are dependent on piece-work only. In contrast, the bargaining council agreement for the motor industry provides that piece-work may be done by agreement only and that payment shall be no less than the prescribed wage that would have been payable if the worker had been employed on a time-work basis to perform the work in question.⁶⁵

Finally, what would be a fair level of minimum earnings for platform workers? South Africa's National Minimum Wage Act⁶⁶ does not deal with piece-work.⁶⁷ In any event, the very low minimum wage that it

⁶² Department for Business, Energy and Industrial Strategy n 59 above 39–40.

⁶³ See n 22 above.

⁶⁴ Sectoral Determination 4: Clothing and Knitting Sector, South Africa (GN 1007 GG 21643 of 13 October 2000); Sectoral Determination 2: Civil Engineering Sector, South Africa (GN 204 GG 22103 of 2 March 2001).

⁶⁵ Main Agreement for the Motor Industry (GN 321 GG 40771 of 7 April 2017) clause 3.10. For an overview of different national regimes for the regulation of piece-work rates, see Report of the Committee of Experts on the Application of Conventions and Recommendations *General Survey of the Reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135)* (International Labour Office 2015) 81–2.

⁶⁶ Act 9 of 2018.

⁶⁷ It does in s 5(2), however, provide that an employee who works for less than four hours per day must be paid for four hours' work as per s 9A of the BCEA.

sets has little relevance in a context where workers may bear significant overhead costs,⁶⁸ and platforms in general do not experience the economic constraints on small employers that are the rationale for a low minimum wage.⁶⁹ For these reasons, we argue that an appropriate legal formula for net minimum earnings in the platform economy should be based on the concept of a net living wage rather than the legal minimum wage.

According to the Global Living Wage Coalition, a living wage means ‘remuneration sufficient for a basic but decent standard of living for a worker and his/her family’, which should cover ‘food, water, housing, education, health care, transport, clothing, and other essential needs, including provision for unexpected events’.⁷⁰ What this adds up to in South Africa has been calculated in different ways but in all cases it is significantly higher than the national minimum wage. Fairwork is currently using a figure of R6 590 per month, based on a triangulation of three sources.⁷¹ Given that maximum ordinary working hours in South Africa are set at 45 per week, it is assumed that no-one should have to work more than 45 hours per week to achieve the minimum level. This translates into minimum earnings of approximately R34 per hour of working time, exclusive of work-related expenses.⁷² As with all workers, however, ‘minimum’ does not mean ‘actual’ and workers whose skills are in demand will command higher levels of pay.⁷³

However, a fair minimum rate alone would not guarantee a decent living for workers who cannot find continuous work. Platform workers also need social security rights to protect them during periods of transition. The ILO social protection floor requires that everyone should be eligible at least for access to essential health care, maternity care and basic income security for workers who are unable to earn sufficient income due to

⁶⁸ The basic minimum wage is R20,76 per hour (approximately US\$1,30) for all workers not covered by collective agreements or sectoral determinations providing higher wages, and R15,57 (US\$1) per hour for domestic workers. The reasoning is that the minimum wage must be sustainable and must therefore proceed from the ‘lowest common denominator’ among employers, including small and emerging enterprises. However, no platform falls into this category and some, such as Uber, are multinational corporations with massive resources.

⁶⁹ Wage-setting regulations in SA, including the NMWA, routinely provide for employers to seek exemptions if they can show genuine inability to comply. The same could apply to platforms.

⁷⁰ Global Living Wage Coalition ‘What is a Living Wage?’ <https://www.globallivingwage.org/about/what-is-a-living-wage/>; and see ILO Minimum Wage Fixing Convention 135 of 1970 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131.

⁷¹ ie, the databases Trading Economics <https://tradingeconomics.com/south-africa/living-wage-individual>, OpenUp <https://living-wage.co.za/> — corrected for inflation, and WageIndicator.org <https://wageindicator.org/salary/living-wage/south-africa-living-wage-series-december-2018>.

⁷² See ‘Fair conditions’ below for discussion of the recording of working time.

⁷³ In the case of freelance software developers, for instance, rates on the NoSweat platform vary from R59 to R1 260 per hour — see Fairwork Foundation https://nosweat.work/fairwork_foundation.

maternity, illness, unemployment and disability.⁷⁴ Legal measures should be designed for providing all workers with social security rights at least equivalent to those of employees, including contributions by platforms where appropriate.⁷⁵

1.2 Fair conditions

1.2.1 Health and safety

The main focus of the Fairwork project has been on health and safety protection. The basic standard is that '[t]here are policies to protect workers from risks that arise from the processes of work' and to achieve a second point in the assessment process (see section 3 above) platforms must show that '[t]here are proactive measures to protect and promote the health and safety of workers or improve working conditions'.⁷⁶

In South Africa it is arguable that the requirements of the Occupational Health and Safety Act⁷⁷ (OHSA) may be applicable to platform workers, including independent contractors. The definition of 'employee' in the OHSA is wider than in other labour statutes and does not expressly exclude independent contractors.⁷⁸ However, case law is mixed. On the one hand, it has been held that an independent contractor does not fall within the health and safety obligations of the employer.⁷⁹ But it has also been held that an employer's obligation⁸⁰ is broad enough to include subcontractors and the public at large if they may be affected by the employer's activities.⁸¹ Also important is the finding that employers' liability in relation to health and safety at work is strict.⁸² To remove any uncertainty, it is submitted that a clear principle should be introduced

⁷⁴ ILO Social Protection Floors Recommendation 202 of 2012 para 5.

⁷⁵ A step in this direction is the judgment of the SA High Court in *Mahlangu & others v Minister of Labour & others* (case no 79180/15, 23 May 2019 https://www.seri-sa.org/images/Mahlangu_Court_order.pdf) that declared the exclusion of domestic workers from the Compensation for Occupational Injuries and Diseases Act of 1993 (COIDA) to be unconstitutional. An Amendment Bill to reverse the exclusion is before Parliament. See F Mullagee 'Domestic Workers in South Africa Lead the Way in Advancing Social Protection for Precarious Workers' (Oxford Human Rights Hub 5 November 2019) <https://ohrh.law.ox.ac.uk/domestic-workers-in-south-africa-lead-the-way-in-advancing-social-protection-for-precarious-workers>.

⁷⁶ Fairwork Report n 35 above 15.

⁷⁷ Act 130 of 1993.

⁷⁸ See s 1 of OHSA in contrast to s 213 of the LRA, s 1 of the BCEA and s 1 of the EEA.

⁷⁹ *Du Pisanie v Rent-a-Sign (Pty) Ltd & another* (2001) 22 ILJ 1063 (SCA). The court reasoned that employers are not necessarily liable for risks that are not obvious and that independent contractors are best equipped to make such judgments for themselves.

⁸⁰ That is, in terms of s 9(1) of OHSA, which reads: 'Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.'

⁸¹ *Joubert v Buscor Proprietary Ltd* [2016] ZAGPPHC 1024 para 22. See also *Industrial Health Resource Group and Others v Minister of Labour and Others* 2015 (4) All SA 78 (GP), where it was held that inquiries into accidents under s 32 of the OHSA extends also to non-employees.

⁸² *ibid* para 32.

extending protection against harm to all forms of work and all those affected by the activities of the enterprise concerned.⁸³

Even if the OHSA does extend to platform workers, however, the protection it provides does not fit easily with the digital environment. Section 1 defines a workplace as ‘any premises or place where a person performs work in the course of his employment’. But platform work is seldom performed on the premises of the platforms. A better approach for covering dispersed activities of this nature is suggested by the ILO Violence and Harassment Convention,⁸⁴ which requires governments to extend protection to workers against harm ‘in the world of work occurring in the course of, linked with or arising out of work’, not only in the workplace but in all places where workers take rest or meal breaks, work-related trips, ‘through work-related communications, including those enabled by information and communication technologies’, and when commuting to and from work. A similar formulation would meet the realities of platform work.

Given the wide variety of conditions under which platform work is performed, it is important to clarify what such a duty would entail. As suggested by the Fairwork project, there should at least be a policy to identify risks — such as psychological harm to online workers,⁸⁵ road accidents in the case of drivers and injuries suffered by domestic workers in the premises of the client — and call for measures to counter them. For example, certain platforms take out insurance on behalf of workers against certain risks. This could be made into a legal requirement. The Minister of Labour could also issue regulations regulating the responsibilities of enterprises towards workers and members of the public.⁸⁶

To complement such protection, the right to compensation for occupational injuries and illness, which is currently limited to employees, should also be extended to all workers, either through the amendment of Compensation for Occupational Injuries and Diseases Act (COIDA) or special legislation. Platforms should be responsible for contributions on behalf of their workers to the relevant fund.

⁸³ On ‘enterprise liability’, see *Bazley v Curry* 174 DLR (4th) 45 at 514–517; *Lister v Hesley Hall Ltd* [2001] UKHL 22 at 517–20; D Brodie ‘Enterprise liability: Justifying vicarious liability’ 2007 (27) *Oxford J of Legal Studies* 493. For its application in SA, see *Grobler v Naspers Bpk & another* (2004) 25 *ILJ* 439 (C); D du Toit ‘Enterprise Responsibility for Sexual Harassment in the Workplace: Comparing Dutch and South African Law’ in F Pennings, Y Konijn & A Veldman (eds) *Social Responsibility in Labour Relations: European and Comparative Perspectives* (Kluwer Law International 2008) 183.

⁸⁴ art 3 n 31 above.

⁸⁵ For example, trauma suffered by social media content moderators through exposure to distressing material — J Berg, M Furrer, E Harmon, U Rani & M Silberman *Digital Labour Platforms and the Future of Work* (ILO 2018) 86–7.

⁸⁶ ie, in terms of s 43 of the OHSA.

1.2.2 *Working time*

Fair conditions include fair working hours and annual leave. It is submitted that the maximum working times applicable to employees should apply to all workers.⁸⁷ This is particularly important in the platform environment where, given the absence of physical supervision, workers may be more prone to self-exploitation in response to low pay than those in workplaces that close at set hours. To counter this, it should be obligatory for apps to be programmed to record hours of work as a first step towards preventing the legal limits from being exceeded,⁸⁸ while the requirement of guaranteed minimum earnings should discourage self-exploitation.

Similarly, all workers should have the same entitlement to paid and unpaid leave as that provided for employees.⁸⁹ Where workers work irregular hours it would mean that, as with employees, paid annual leave would accrue pro rata.⁹⁰ Again, it should be required that apps are programmed to record periods of leave.

1.3 *Fair contracts*

In terms of Fairwork's rating standards,⁹¹ 'basic' contractual fairness requires platforms to show that terms and conditions are 'transparent, concise, and provided to workers in an accessible form'.⁹² To achieve the 'advanced' level, '[t]he party contracting with the worker must be subject to local law and must be identified in the contract'. And, if workers are genuine independent contractors, their terms of service must be 'free of clauses which unreasonably exclude liability on the part of the platform'.⁹³

These criteria address two widespread problems: firstly, that contracts are either inaccessible to workers or framed in legalese and, secondly, that platforms contract through legal entities that are located in different jurisdictions from the place where the work is done. Uber, in particular, has become adept at fragmenting its corporate personality to avoid claims

⁸⁷ ie, 45 ordinary hours and 10 hours overtime per week in South Africa — ss 9 and 10 of the BCEA.

⁸⁸ Such programming should be designed to take account of situations where workers are active on more than one platform. This implies a centralised system of registration for workers across all platforms.

⁸⁹ ss 19 to 27 of the BCEA.

⁹⁰ Section 20(2) of the BCEA stipulates one day's leave for each 17 days worked or one hour's leave for every 17 hours worked.

⁹¹ As discussed in Part 1 of this article.

⁹² This also implies that the relationship between the platform and the worker must be correctly described. However, the wider definition of 'worker' proposed above would supersede the distinction between 'employees' and 'independent contractors', thus removing any incentive for platforms to mischaracterise workers as 'self-employed' when they are not.

⁹³ Fairwork Report n 35 above 5.

against it within the jurisdiction where work takes place, thus ensuring that litigation by workers against platforms is practically excluded.

This was demonstrated in the first court case brought against Uber in South Africa, where the Labour Court dismissed a claim by drivers against Uber South Africa on the basis that their sole contractual relationship was with Uber BV in the Netherlands.⁹⁴ In the UK, on the other hand, the Court of Appeal rejected Uber's argument that the driver's only contract was with Uber BV and held, instead, that the contract was with Uber London.⁹⁵ This finding, however, was premised on a different statutory framework.⁹⁶

As a starting point, therefore, the documents should specify the party with which the worker is contracting — namely, the platform⁹⁷ — and the latter should be within the jurisdiction where the worker's activities take place. But fairness goes further. In all cases, freedom of contract is subject to certain limitations. In South Africa, an otherwise lawful contract will be declared invalid if it is found to be contrary to public policy.⁹⁸ Among the indicators for determining the validity of an impugned term is the relative bargaining power of the contracting parties. Thus, harsh terms imposed by the stronger party (a platform) on the weaker party (the worker) may be open to challenge. The South African Constitutional Court⁹⁹ has endorsed the principle that 'inequality of bargaining power could be a factor in striking down a contract on public policy and constitutional grounds'.¹⁰⁰ Similarly, the UK Supreme Court has held that 'the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part.'¹⁰¹

Where there is clear inequality, and especially in the case of standard terms imposed by the stronger party, it can also be argued that the

⁹⁴ *Uber SA Africa Technology Services (Pty) Ltd v National Union of Public Service & Allied Workers & others* (2018) 39 ILJ 903 (LC). See also *Uber SA Technology Services and Others v NUPSAW obo Mostert* case no WECT 18234-17 where the arbitrator declined jurisdiction on the questionable basis that Uber BV conducted its business in the Netherlands and not in South Africa, where the applicant driver was working.

⁹⁵ *Uber BV v Aslam and Others* [2018] EWCA Civ 2748.

⁹⁶ The critical difference was that Uber London Ltd, and not Uber BV, was the licence holder in terms of the Private Hire Vehicles (London) Act of 1998 under which the drivers' transport services were provided — see ss 2-5 of the Act. In South Africa, on the other hand, individual drivers are required to obtain operating permits from local government.

⁹⁷ See, eg, s 1 of the UK ERA 1996.

⁹⁸ *Barkhuizen v Napier* 2007 (5) SA 323 (CC). See also *Sasfin (Pty) Ltd v Beukes* 2007 (5) SA 323 (CC). Legislative provisions to this effect can be found in the Australian Independent Contractors Act of 2006 and Italy's Law 81 of 2017, discussed more fully in Du Toit (n 19 above) and sources cited there.

⁹⁹ *Barkhuizen v Napier* *ibid* para 59.

¹⁰⁰ *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) para 8.

¹⁰¹ *Autoclenz Ltd v Belcher* [2011] UKSC 41 (UK Supreme Court).

contract should be interpreted in favour of the weaker party. Statutory support for this proposition comes from consumer protection law that, in South Africa, must give effect to the constitutional right to equality. For example, the Consumer Protection Act (CPA)¹⁰² states that ‘any standard form, contract or other document’ prepared by a ‘supplier’¹⁰³ should be interpreted ‘to the benefit of the consumer’, and prohibits contractual terms which are ‘unfair, unreasonable or unjust’.¹⁰⁴ We submit that provisions to similar effect, based on the right to equality and human dignity, should be part of new legislation protecting platform workers’ rights.

In addition, where platforms have a business model defining themselves as ‘service providers’ offering the app as a ‘service’ to workers, workers are by definition ‘consumers’ and, as such, directly entitled to the full range of protections offered by the CPA.¹⁰⁵

The analogy with consumer contracts was relied on in a recent case concerning Uber drivers in the Court of Appeal for Ontario,¹⁰⁶ where Uber’s arbitration clause requiring all disputes to be settled in the Netherlands (as it does in South Africa) was held to be ‘unconscionable’. In this regard Nordheimer JA added:

‘I do not see any reasonable distinction to be drawn between consumers, on the one hand, and individuals such as the appellant [an Uber driver], on the other. Indeed, I would note that, if Uber is correct and their drivers are not employees, then they are very much akin to consumers in terms of their relative bargaining position. Alternatively, if Uber is wrong, and their drivers are employees, we are not speaking of employees who are members of a large union with similar bargaining power and resources available to protect its members. Rather, the drivers are individuals who are at the mercy of the terms, conditions and rates of service set by Uber, just as are consumers. If they wish to avail themselves of Uber’s services, they have only one choice and that is to click “I agree” with the terms of the contractual relationship that are presented to them.’¹⁰⁷

To sum up: the invalidation of contractual clauses that are unfair, unreasonable or unjust will provide a safety net of fairness for all platform workers in addition to the specific statutory entitlements suggested in this article.

1.4 *Fair management*

Fairwork’s rating principles require platforms to have ‘due process for decisions affecting workers’. This means ‘a documented process through

¹⁰² Act 68 of 2008.

¹⁰³ Defined in s 1 as ‘a person who markets any goods or services’.

¹⁰⁴ ss 4, 40 and 48 of the CPA. The Act contains numerous other provisions — for example, detailed stipulations enjoining ‘fair and honest dealing’ (Part F) — which resonate with challenges of the platform economy.

¹⁰⁵ See, in particular, the definitions of ‘consumer’ and ‘service’ in s 1 of the CPA.

¹⁰⁶ *Heller v. Uber Technologies Inc.*, (2019) ONCA 1 (Ontario Court of Appeal).

¹⁰⁷ *ibid* para 71.

which workers can be heard, can appeal decisions affecting them, and be informed of the reasons behind those decisions'. To achieve a second point, the criterion is 'equity in the management process or informed consent for data collection', including 'a clear policy which guarantees that the platform will not discriminate against persons on the grounds of race, gender, sex, sexual orientation, gender identity, disability, religion or belief, age or any other status which is protected against discrimination in local law' as well as 'concrete measures to prevent discrimination and advance equality of opportunity on the basis of these grounds, including reasonable accommodation for pregnancy, disability, and religion or belief'.¹⁰⁸

For purposes of defining due process, there is a wealth of rules and precedent in employment law explaining the content of fair procedure relating to management practices of every description.¹⁰⁹ In essence, it means that managerial decisions should be based on objective criteria and that employees should be given a fair hearing before any decision affecting their rights is taken. These principles could be adapted to the platform environment in the form of regulations setting minimum criteria, which could be adapted by agreement to the conditions of particular types of platform work or in the form of policies for individual platforms.

1.4.1 *Discrimination*

When it comes to discrimination, perhaps surprisingly, Fairwork's criteria are already part of South African law. Two statutes, the EEA and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),¹¹⁰ have been enacted to give effect to the constitutional right to equality and, while the EEA is restricted to employees, PEPUDA extends equivalent protection to all persons not covered by the EEA. Thus, whatever their status, platform workers are protected under one of these statutes.¹¹¹ Both prohibit discrimination on the grounds identified by Fairwork as well as any other ground that is considered unfair, and both exclude affirmative action measures from the definition of 'unfair discrimination'.¹¹² The Employment Equity Act

¹⁰⁸ Fairwork Report n 35 above 16–17.

¹⁰⁹ As reflected in Code of Good Practice: Dismissal (Schedule 8 to the LRA). On 'unfair labour practices' relating to promotion, demotion and other managerial decisions, see s 186(2) of the LRA. Inevitably, the bulk of case law relates to dismissal (termination) on grounds of the employee's misconduct (breach of contract), poor work performance or physical incapacity or the employer's operational requirements. For an overview, see John Grogan *Dismissal* 3ed (Juta 2017).

¹¹⁰ ie, the EEA — see n 23 above and PEPUDA n 25 above.

¹¹¹ See *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009) 30 ILJ 868 (EqC) where the Equality Court upheld the claim by an independent contractor (a music teacher) in terms of PEPUDA for discrimination on grounds of sexual orientation by the church for which he worked.

¹¹² s 6 of the EEA; ss 6 and 14 of PEPUDA.

(EEA) requires designated employers¹¹³ to implement affirmative action measures, while PEPUDA places a duty on the state and ‘all persons’ to promote equality.¹¹⁴ This would include ‘concrete measures to prevent discrimination and advance equality of opportunity’, as called for by Fairwork.

The practical picture, however, is less positive. Even where platforms do have policies excluding discrimination and committing to fair practices, the fieldwork suggests that these might not always be fully implemented. This reinforces the case for binding regulations, as suggested above, as well as external enforcement through an accessible dispute resolution mechanism.

To be effective, we would argue, such regulations will require sufficient consultation with and input from stakeholders, including workers. The aim should be to identify and eliminate forms of discrimination to which workers are most commonly exposed, setting minimum standards which platforms can adapt and incorporate in their internal policies. Platforms should also provide workers with notices informing them of their statutory rights as well as the platform’s anti-discrimination policy.¹¹⁵

1.4.2 *Privacy*

The right to fair treatment includes the right to privacy. Platforms have extensive access to workers’ personal details and are under a duty to ensure that such data is protected in line with the Protection of Personal Information Act (PIA).¹¹⁶ This means, amongst other things, that platforms are required to inform workers of the collection of data concerning them and the use to which such data is put.¹¹⁷ Workers also have the right to rectify inaccurate data and request the erasure of personal data.¹¹⁸

In addition, we argue that workers should be entitled to —

- a human- and machine-readable copy of all data collected relating to their activity on the platform; and
- clear explanations of all automated decision-making.

¹¹³ In essence, the definition of ‘designated employer’ includes the public sector and medium to large enterprises in the private sector — see s 1 of the EEA.

¹¹⁴ ss 24, 25 and 28(3) of PEPUDA. ‘Equality’ is defined in s 1 of PEPUDA as including ‘the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes’.

¹¹⁵ Cf s 25 of the EEA. A code of good practice could provide platforms with templates for the relevant rules — compare the Summary of the EEA (Employment Equity Regulations GN 595 GG 37873 of 2014, Form EEA3) and the Code of Good Practice on the Preparation, Implementation and Monitoring of the Employment Equity Plan (GN 424 GG 40840 of 12 May 2017).

¹¹⁶ Act 4 of 2013, giving effect to s 14 of the Constitution.

¹¹⁷ s 5 of the PPIA read with s 18.

¹¹⁸ *ibid* read with s 24.

The latter point is critical. Workers, including those described as ‘partners’ rather than employees, do not necessarily have knowledge of the manner in which fundamental terms and conditions governing their work — for example, relating to work allocation and pay — are determined. Fairness requires that algorithms relating to such matters must be transparent. Even where algorithms are regarded as business secrets, workers should be made aware of the criteria that are used and what their outcomes are.

1.4.3 *Dispute resolution*

Rules, however, have little value if they can be disregarded with impunity. Enforcement of regulations or platforms’ policies should be possible through an independent dispute resolution process at no cost or at an affordable cost to the worker. To the extent that workers are ‘employees’, they will have access to the Commission for Conciliation, Mediation and Arbitration (CCMA) to enforce their statutory rights. This, however, will be exceptional, and the proposed regulations should provide for the establishment of an equivalent mechanism for the platform economy. One option would be to require platforms to establish in-house dispute resolution processes in compliance with the prescribed requirements. A more cost-effective option, however, could be a sectoral dispute resolution service akin to that of a bargaining council to which all subscribing platforms — or, indeed, other service-providers — could have access. The ombud’s office established by the Fair Crowdwork project in Germany to resolve disputes between workers and platforms that have adopted a shared code of conduct¹¹⁹ can be seen as an example of this model.¹²⁰

Again it should be emphasised that effective and sustainable rules for achieving these objectives, addressing the needs of platforms as well as workers and enjoying credibility on both sides, can only be arrived at on the basis of meaningful consultation aimed at reaching consensus.¹²¹ Given different business models and philosophies, it is to be expected that consultation of this nature may not be voluntarily embraced by all platforms. As in the labour field, therefore, the regulatory framework of a new dispensation should include an appropriate process for bringing it into existence.

¹¹⁹ ie, the Crowdsourcing Code of Conduct <http://crowdsourcing-code.com/>. Nine platforms as well as the German Crowdsourcing Association currently subscribe to the code.

¹²⁰ ‘Ombuds Office for German Crowdsourcing Platforms Established’ (8 November 2017) <http://faircrowd.work/2017/11/08/ombudsstelle-fuer-crowdworking-plattformen-verein-bart/>.

¹²¹ A possible precedent is set in the context of dismissal based on operational requirements by the requirement in s 189(2) of the LRA that employers and trade unions or other consulting parties must ‘engage in a meaningful joint consensus-seeking process and attempt to reach consensus’ on a specified range of topics.

1.5 *Fair representation*

Collective representation, though receiving relatively little emphasis in the context of platform work, is arguably the most critical element in constructing a fair working environment. Indeed, it is integral to securing each of the five principles dealt with above on a sustainable basis. As one of the founders of twentieth century labour law has put it, ‘Everywhere the effectiveness of the law depends on the unions far more than the unions depend on the effectiveness of the law.’¹²² This is so because, without effective worker organisation, employers have a relatively free hand in determining working conditions and, where legal rules do exist, they could be disregarded. Yet the past thirty years has seen a widespread decline in the extent and effectiveness of trade union organisation and collective bargaining, coinciding to a large extent with the rise of the digital economy.

Against this background the fifth Fairwork principle states:

‘Platforms should provide a documented process through which worker voice can be expressed. Irrespective of their employment classification, workers should have the right to organise in collective bodies, and platforms should be prepared to cooperate and negotiate with them.’¹²³

To achieve a second point, it should further be demonstrated that ‘[t]here is a collective body of workers that is publicly recognised and the platform is prepared to cooperate with collective representation and bargaining (or publicly commits to recognise a collective body where none yet exists)’.¹²⁴

The LRA, although one of the most union friendly labour statutes in the world, does little to assist platform workers. It limits trade union membership to ‘employees’,¹²⁵ and only trade unions are recognised for purposes of collective bargaining. Yet the Constitution extends the right to fair labour practices to ‘everyone’ and entrenches the right of every ‘worker’ to ‘form and join a trade union’, to participate in its activities and to strike.¹²⁶ There is thus a legal basis as well as a basis in fairness for arguing that the law should provide for equivalent recognition of member-based organisations (MBOs) representing workers who are not employees, whether in the platform economy or in other sectors where the same exclusion exists.

¹²² P Davies & M Freedland *Kahn-Freund's Labour and the Law* 3 ed (Stevens 1983) 22.

¹²³ Fairwork Report n 35 above 17.

¹²⁴ *ibid.*

¹²⁵ s 213 of the LRA.

¹²⁶ s 23(1) and (2) of the Constitution.

Such recognition could be implemented by amending the definition of ‘trade union’ or through special legislation.¹²⁷ Less simple would be the process of creating appropriate mechanisms for the exercise of collective rights in the platform economy. Section 23 of the Constitution implies that MBOs representing workers’ interests should be entitled to rights equivalent to those of trade unions, subject to a similar requirement to register as a means of ascertaining their status. Once registered, they should be entitled to engage in collective negotiation or bargaining with platforms over matters of mutual interest and should have a right of access to relevant information equivalent to that of trade unions, subject to similar restrictions applicable to confidential or privileged information.¹²⁸

Like trade unions, MBOs would require organisational rights enabling them to build their membership and to prevent hostile platform-owners from frustrating their right to freedom of association.¹²⁹ Even though trade unions’ rights are almost exclusively based on the physical workplace where their members are employed, certain of these rights could be exercised via platforms with little or no adaptation; for example, stop-order facilities for payment of membership fees. Similarly, MBOs could be given the right to represent their members or other workers in grievance and disciplinary proceedings. Other rights, however, would need to be tailored to the unique conditions of the platform economy. As an equivalent to unions’ right of access to the workplace, for example, MBOs could have the right to communicate with their members via their apps, and members could have scope for direct person-to-person communication via the app, without surveillance or interference by platform management.

As with collective bargaining, there could be scope for different levels of negotiation, for example, at a sectoral level (affecting the platform economy as a whole) or at the level of individual platforms. The right to bargain collectively should include the right of workers to withhold their labour in the event of deadlock. Collective agreements should likewise be legally binding and capable of enforcement by means of the applicable dispute resolution system.

As with collective bargaining, engagement between platforms and MBOs can also serve as an element of social dialogue and policy

¹²⁷ The question is addressed in a growing body of literature — see, eg, H Johnston & C Land-Kazlauskas ‘On Demand and Organized: Developing Collective Agency, Representation and Bargaining in the Gig Economy’ paper presented to the 5th conference of the Regulating for Decent Work Network, ILO, 3-5 July 2017; R Berins Collier, V B Dubal & C Carter ‘Labor Platforms and Gig Work: The Failure to Regulate’ IRLE working paper 106-17 (2017) <http://irle.berkeley.edu/files/2017/Labor-Platforms-and-Gig-Work.pdf>.

¹²⁸ See s 16 of the LRA.

¹²⁹ Trade unions’ organisational rights are set out in ch III part A of the LRA.

development, with a view to ensuring that the rules that are produced are sensitive to stakeholders' interests and rights.¹³⁰

A number of issues remain that require further study, ranging from the relatively simple (for example, amending competition law to allow collective action by nominally independent contractors as for employees)¹³¹ to more complex challenges, such as the atomised nature of the workforce in many cases and the need to develop mechanisms for realising the social and individual benefits of collective regulation. The decline of traditional trade unions and collective bargaining coverage in much of the private sector is a reminder that obstacles to organisation are not limited to the platform economy, that the challenges faced by platform workers are part of broader challenges and any steps forward in the platform economy would depend on or contribute to more widely applicable measures. But, having said that, a breach of the organisational barrier remains a precondition for meaningful progress towards the protection of platform workers' rights. Addressing this issue could be the subject of a dedicated research project.

2 COMPLEMENTARY PATHWAYS TO CHANGE: THE NEXT FRONTIER

There is evidence that Fairwork has had a positive impact in promoting improved conditions for platform workers, in some cases persuading platforms to change their practices as a result of exposure to the rating principles, while in other cases reinforcing platforms' own efforts to improve working conditions by giving positive publicity to such initiatives. The following are some of the (claimed) improvements relating to earnings, benefits and safety at work introduced by a number of South African platforms following engagement with the Fairwork project:¹³²

- Committing to a higher earnings level ('living wage') for freelancers in job advertisements;
- Providing guarantees against non-payment by clients;
- Making the worker's contract accessible via the app and trying to ensure that the language is as simple as possible;
- Introducing a panic button system for drivers;

¹³⁰ For example, one of the powers of sectoral bargaining councils in terms of s 28(1)(h) of the LRA is 'to develop proposals for submission to NEDLAC or any other appropriate forum on policy and legislation that may affect the sector and area'.

¹³¹ For example, in terms of s 3(1) of the SA Competition Act 89 of 1998 collective bargaining 'within the meaning of section 23 of the Constitution and the Labour Relations Act' and collective agreements are expressly excluded from the application of that Act. Given that the LRA (n 21 above) is the only statute currently regulating collective bargaining, the reference to s 23 of the Constitution creates scope for inferring a broader concept of 'collective bargaining' involving non-employees as well as employees.

¹³² The information below is contained in unpublished fieldwork reports updated to 28 December 2019 and is in some cases subject to the provision of evidence.

- Providing access to an e-learning platform allowing drivers to do an online safety course;
- Providing workers with various forms of insurance, such as liability for damage or costs, and subsidies for funeral policies.

Over and above these direct benefits, the rating principles are helpful in providing research-based criteria for legal regulation of platform work. This, then, is the next challenge: generalising the substance of these principles into binding legal standards, informed by practical experience and enacted in forms most appropriate to the conditions under which different types of platform work are performed.

To be effective, it has been argued, regulation needs sufficient involvement by all stakeholders in framing appropriate rules as well as ensuring their application. In the case of the platform economy, this calls for organisation of workers as well as platforms in voicing their collective interests and seeking to ensure that rules are responsive to their needs.¹³³ Given the general lack of such organisation, it may be that policy measures will need to be developed and legal steps taken to create the necessary institutional framework for designing and implementing a suitable regulatory regime.

Achieving this will be a formidable challenge. As noted already, the question presents itself in the context of a protracted decline in trade union organisation and collective bargaining coverage. Decades of research have convincingly analysed the economic, technological and structural causes of this process but, given the embedded nature of these causes, measures taken to adapt the existing system have had limited effect. It is now broadly accepted that the industrial and trade union model arose under particular socio-economic conditions that are increasingly being superseded, and that new negotiating mechanisms underpinned by appropriate organisational infrastructure should be considered for sectors where the preconditions for effective collective bargaining are not, or no longer, present.

The platform economy is an area where these insights can be put to the test. A number of premises for doing so are suggested by what has been said. To recapitulate:

- The basis for traditional trade union organisation and collective bargaining institutions remains relatively strong in sectors where the conditions for its historical growth — in particular, large-scale

¹³³ For more on the concept of responsive regulation, see B Hepple 'Negotiating social change in the shadow of the law' (2012) 129 *SALJ* 248; B Hepple 'Transformative Equality: The Role of Democratic Participation' LLRN conference paper, Barcelona (2013); I Ayres & J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (1992); S Marshall et al 'Labour Law and Development: Creating an Enabling Regulatory Environment and Encouraging Formalisation' Regulating for Decent Work Network Conference, ILO, Geneva, 8–10 July (2009). See also the literature on 'reflexive law' and obstacles to change — eg, C Barnard, S Deakin & R Hobbs 'Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time' working paper 294 (2004) ESRC Centre for Business Research, University of Cambridge.

workplaces relying on standard employment — have been least undermined.¹³⁴

- Where this basis is absent, the purpose may be described as reconstructing rather than reinventing the wheel: that is, adapting and reapplying the principles of collective labour law developed during the 20th century under different conditions that have emerged and are emerging in the 21st century.
- Doing so will be an uneven process, with varying momentum and outcomes in different sectors and different jurisdictions.
- The best-case scenario of enlightened legal reform followed by structural innovation is highly unlikely. Worker organisation cannot be and has never been dependent on a supportive institutional framework based on the implementation of the relevant ILO principles.
- A more likely scenario is suggested by the historical development of trade and industrial unions in the face of employers' opposition and legal obstacles. Historically, as we know, trade unionism ultimately prevailed and the law followed suit to accommodate the new dispensation that had arisen in practice.¹³⁵ It is by no means certain that similar outcomes will be achieved in the platform economy or non-unionised sectors generally but, if this happens, the practical unfolding of events will be shaped by different conditions and take different forms from those that brought about the development of labour law in the 20th century. Indeed, platform workers around the world are already making significant efforts to organise themselves in whatever spaces, digital or otherwise, that are available.¹³⁶
- It follows that political will to implement legal reform cannot be taken for granted. Labour legislation has always been a contested terrain, and there is every prospect of opposition on the part of platforms to any limitation of their freedom to contract with workers on terms of their own choice. In addition, the contest between platforms and workers is largely one-sided in terms of resources, power and influence. A crucial question is how the social and political momentum can be mobilised to address the imbalance. Unless this happens, ideas of change will remain on paper only.

Self-organisation of workers, ultimately into powerful trade unions that gave birth to political movements, was the key to legal reform in the first and second industrial revolutions, and is likely to remain an essential ingredient of meaningful legal reform in the foreseeable future. Though driven by the need to overcome adverse conditions, such organisation is not a given and is only likely to emerge if it is seen by a critical mass of the workers concerned as offering a convincing prospect of

¹³⁴ In general, therefore, in the public sector to a much greater extent than in the private sector.

¹³⁵ B Wedderburn *The Worker and the Law* 3 ed (Pelican 1986).

¹³⁶ J Woodcock & M Graham in *C Cant Riding for Deliveroo* (Polity Press 2020).

improvement.¹³⁷ How this comes about, if indeed it does, is a complex process that will vary from situation to situation, but is important in the mobilisation of political momentum as well as in giving content to any legal reform that may ensue.

But, as noted above, the beginnings of organisation have already emerged and certain legal means for promoting reform are already in existence, though platforms may be unwilling and unorganised workers may be unable to make use of them. However, interventions by government can provide at least temporary expedients in addressing non-participation by parties that need to be involved. An example is offered by recent amendments to the LRA, providing for compulsory interest arbitration as a last resort in resolving strikes that are considered dysfunctional, whereby a mechanism is created for ensuring representation at least by proxy of parties that are unwilling to participate in the proceedings, and thus ensuring the issue of a binding award.¹³⁸

This extraordinary intervention was driven by the perceived need for urgent action to curb a rising trend of unprocedural and violent industrial action. The question is whether and how similar political will can be mustered to create a process for protecting workers' rights and bringing legal order to a relatively unregulated sector of the economy. An indicator of government's capacity to take innovative action, even in the absence of a crisis, is the draft notice recently issued of the Minister of Labour's intention to deem persons in the film and television industry to be 'employees' for purposes of a range of labour law provisions from which they are currently excluded.¹³⁹ It is the first time that this ministerial power has been exercised in the 23 years since the enactment of the relevant legislation, and similar action in respect of platform workers could be an element in a broader process of legal reform. The final phase of the Fairwork project will be devoted to exploring strategies for setting such a process in motion.

¹³⁷ Similarly, the broader challenge of addressing South Africa's structural economic and socio-political problems is described as involving 'the hard intellectual labour of crafting a credible vision for South Africa's future' coupled with 'the harder task of constructing a new organisation to take this project to the masses and build support for a new political project'—B Fogel 'Future of the Left in South Africa. Left? What Left?' *Mail & Guardian* 3–9 January 2020 27.

¹³⁸ See ss 150, 150A, 150B, 150C and 150D of the LRA. Representation of employers and trade unions is required on the arbitration panel as well as in the presentation of the parties' cases. If a party declines to sit on the panel, the Act provides for two lists of assessors to be drawn up by the tripartite National Economic Development and Labour Council (NEDLAC), representative of employers and trade unions respectively, from which the director of the CCMA can appoint an assessor if necessary — see s 150B(2) and (3). A similar procedure can be followed if a party declines to present its case — see s 150B(4). For discussion, see S Godfrey, D du Toit & M Jacobs 'The New Labour Bills: An overview and analysis' (2018) 39 *ILJ* (SA) 2161 at 2172–76.

¹³⁹ R 1591 — Draft Notice in terms of s 83(2) of the Basic Conditions of Employment Act 75 of 1997. The provisions include the NMWA, COIDA, sections of the BCEA providing for annual leave, sick leave, maternity leave and severance pay, and s 198B(10)(a) of the LRA requiring an employer to pay severance pay to temporary employees employed for longer than 24 months.