DISPATCH NO. 37 – ARGENTINA

HOW DID A FOOD-DELIVERY PLATFORM'S JUDGEMENT TRANSFORM FREEDOM OF ASSOCIATION INTO A SECOND-CLASS RIGHT?

Kevin Hartmann-Cortés†

INTRODUCTION

In July 2018, food-delivery riders in Buenos Aires spontaneously organized a protest against on-demand (gig) platforms such as *Uber Eats*, *Glovo* and *Rappi,* as a consequence of the sudden reduction of the fixed commission per delivery. Shortly after, on October 1st, 2018, the foundational assembly of the trade union "*Asociación de Personal de Plataformas ("APP")"* was held with an attendance rate of 170 workers from these platforms. All the legal requirements regarding the constitution of a trade union were followed.

These riders aimed to bargain better conditions of work. Their agenda included three central points: (i) fixing a standard commission per ride; (ii) limiting the maximum working hours to avoid potential self-exploitation behavior, and (iii) shared occupational risk insurance as well as social security coverage. Shortly after, three of the Trade Union leaders were dismissed by the platform *Rappi.*

Facing that situation, APP filed a judicial procedure with two claims. (a) The dismissal of the riders was an 'anti-trade union' behavior. Therefore, through an interim injunction [*medida cautelar autónoma*], they aimed at protecting their rights of association and collective bargaining. (b) Platform riders should be considered as typical employees. They aimed at judicial recognition of their employment status.

On March 19th, 2019, a judge of first instance granted the injunction raised by the riders. The judgement ordered the platform to re-engage the three dismissed riders. However, she did not address the second. *Rappi*, did

† PhD Student, University of Louvain (UCLouvain), CRIDES, Law Faculty, Collège Thomas More, Place Montesquieu 2/L2.07.01, 1348, Louvain-la-Neuve, Belgium. E-mail: kevin.hartmann@uclouvain.be.
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not comply with the decision. Its lawyers appealed against this judgement in *Cámara Nacional de Apelaciones del Trabajo* ('CNAT'), the second instance tribunal. On July 19th 2019, the CNAT suspended the application of the interim injunction, therefore reversing the order of re-engagement. The main reason argued by the Tribunal was the "impossibility to determine the relationship between the platform and its riders."[1]

In Argentina, as in other countries, the disruption of the platform economy implied a definitional challenge concerning the nature of the legal relationship between platforms and riders. These platforms use the gray zone in the legislation as a 'gate away' from the respect of fundamental employment rights, such as rights of association and collective bargaining.

This commentary aims to unravel the reasoning provided by the CNAT in its ruling and assess its potential consequences for riders and the development of collective rights in Argentina in the platform economy. These are the only two judgements delivered in Latin America that have decided on labor-related issues about these platforms. They might guide the discussion in other countries where these platforms also operate.

A DEFINITIONAL CHALLENGE

In Argentina, as in other jurisdictions, the platform economy has also raised legitimate questions regarding the nature of the individual legal relationship between a food-delivery platform and its riders. It seems that existing categories in the Argentinian legislation are limited in explaining the nature of the work deployed by riders. Put it differently, as it happens elsewhere, there is a definitional challenge on what kind of legal principles govern the relationship between platforms and riders.

It seems that several aspects of the work deployed by the riders are controlled unilaterally by the platforms' algorithm, starting from the commission's fixation per delivery. Therefore, it would denote a subordination that would amount to a typical employment relationship, as the trade union APP argues.[2] On the other hand, the vast majority of these platforms claim that the relationship between riders and users is that of a civil 'agency' or 'mandate'.[3] For them, riders seem to play the role of self-

1. Cámara Nacional De Apelaciones Del Trabajo - Sala IX [CNTrab] [National Court of Labor Appeals of the Federal Capital], 19/7/2019, "Rojas Luis Roger Miguel y otros c/ Rappi Arg. SAS. / Medida Cautelar," P.1-3.

2. In fact, a similar reasoning was followed by the Spanish Supreme Tribunal. The judgement considered how delivery riders were, in fact, typical employees of the company that administered the platform. The argument was centered on the labor coordination and organization of a standardized service by the platform. S.T.S., Sept. 23, 2020 (No. 805/2020). Moreover, after that ruling, the country issued a new regulation for workers associated to these types of platforms and recognized the relationship between riders and the platform was covered within the typical employment relationship in RD-Ley 9/2020 (B.O.E. 2020,56733).

3. *See Rappi Términos y Condiciones*. Available at: https://legal.*Rappi*.com/argentina/terminos-y-condiciones-*Rappi*-2/ (last visited 6th July 2021).

employed entrepreneurs who serve as 'agents' for a final user, acting as a principal. Therefore, the platform's role is argued to be limited to connect both principals and agents for a food-delivery service.

Categorizing this individual relationship impacts the set of rights and obligations to both the platforms and riders towards each other and *vis-à-vis* the final user. As explained in the next section, the rulings provided by the judiciary in Argentina suggest that fundamental collective rights would also depend on the correct classification of these riders.[4]

THE JUDGEMENTS

On March 19th 2019, was the first ruling in the case of *Rappi* in Buenos Aires, Argentina. It was also the first of its kind on the continent. The judgment resulted from a writ promoted by three *Rappi* riders against the company alleging an unlawful dismissal. They had two core claims: firstly, the protection to their rights to association and collective bargaining that were presumably violated by the company due to their dismissal (they were blocked in their connection to the platform) after having participated at the foundation of the Trade Union. They asked the judge to order their re-engagement to the platform. Secondly, being recognized as employees of the company.[5]

Moreover, in the allegation, they raised a *medida cautelar autónoma* [autonomous interim injunction][6], whose objective is to protect the main claim claimed by the petitionary provisionally.[7] The success of such

4. In some jurisdictions it is also the case: being entitled to the right of association and collective bargaining depends on the definition of a precise legal relationship. As Cherry & Aloisi indicate, "classification as an employee is a "gateway" to determine who deserves the protections of labor and employment laws" See Cherry, M.A. & Aloisi, A. *"Dependent Contractors" In the Gig Economy: A Comparative Approach,* American University Law Review, at, vol. 66 : Iss. 3. (2017) p.638. Moreover, when speaking about the specificities of enjoying collective labor rights for workers in the platform economy, it seems that despite the fragmented nature of the gig-work, there is a possibility of organizing and collective bargain, even outside the formal trade union movement. Finally, in other countries, specifically in Europe and the United States, platform workers have shown their intention to act collectively either by joining existing trade unions or by creating one by themselves. See De Stefano, V. (2017) *Labour is not a technology – Reasserting the Declaration of Philadelphia in times of platform-work and gig-economy* IUSLabor 2/2017. ILO. p. 12. Also refer to Tassarani, A. & Maccarrone, V. (2017) *The mobilisation of gig economy couriers in Italy: some lessons for the trade union movement*. Transfer 2017, Vol. 23(3) 356.

5. Juzgado de la Primera Instancia [1a Inst.] [Provincial Lower Courts of Ordinary Jurisdiction], 19/3/2019, "Rojas Luis Roger Miguel y otros v Rappi Arg. SAS /s Medida Cautelar."

6. Law No. 17.454, 1981 Codigo Procesal Civil y Comercial de a Nación [Arg. Civ. And Comm. Proc. Code.] Article 195: "Interim may be applied for before or after the application has been filed, unless it appears from the law that the application must be filed beforehand. The writ shall state the right to be secured, the measure requested, the provision of the law on which it is based and the fulfilment of the requirements corresponding, in particular, to the measure requested. Judges may not decree any precautionary measure that affects, obstructs, compromises, distracts from its purpose or in any way disturbs the State's own resources, nor may they impose personal pecuniary burdens on civil servants." (Own translation) The purpose of an interim measure is to ensure the right whose recognition is sought through the process. *See* Falcón, E. M. Tratado de Derecho Civil y Comercial 92 (Tomo IV. Ed. 2013).

7. *See* Falcón, E. M. Tratado de Derecho Civil y Comercial 92 (Tomo IV. Ed. 2013).

measures is conditional upon two elements: (i) demonstrating the 'plausibility (*verisimilitude*)' of the right sought to be protected; and (ii) 'the potential harm danger that the delay in solving the process could cause in the enjoyment of such right'[8] Put it differently, the allegedly affected worker must persuade the judge of both: (i) the existence of a right which is sought to be protected through the writ, which in this case amounts to the right of association and collective bargaining; and (ii) how avoiding to protect such right, at least provisionally, might lead to irreversible damage to his or her legal position.

The ruling starts by explaining in detail the establishment of the trade union APP. It explains that after its constitution, the trade union registered before the Labor Authority (Ministry of Labor) and notified the organization's existence to the on-demand platforms of its affiliates. This notification included the identification of the workers who are part of the trade union[9] Furthermore, one month after notifying the union's existence, some employees acting on behalf of *Rappi* had a meeting with APP representatives. The next day of the meeting, these trade unionists were denied access to the platform.[10]

The judge certified the existence of the rights of association and collective bargaining for these riders. Moreover, she acknowledged the danger it might entail for these rights if those riders are not at least temporarily re-engaged, notably being deprived of their main means of subsistence. Therefore she granted the interim injunction. As for the second claim on whether these riders were employees of the platform, the judge avoided to provide a definitive answer. Put it differently, the judge of first instance deemed that the company engaged in an anti-trade union strategy

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8. Law No. 17.454, 1981 Codigo Procesal Civil y Comercial de a Nación [Arg. Civ. And Comm. Proc. Code.] Article 230 and Cámara Nacional De Apelaciones Del Trabajo - Sala IX [CNTrab] [National Court of Labor Appeals of the Federal Capital], 29/12/2012, "Barraza Victor Hugo c/ PAMI Instituto Nacional de Servicios Sociales para Jubilados y Pensionados s/ Juicio Sumarísimo," Fallo (FA12040470).

9. This procedure is important to trigger the protection of those workers who founded the trade union. In essence, the protection is translated into the fact that those workers who created a trade union cannot be dismissed for that reason for at least one year after the union's constitutional assembly. If there would be a dismissal, the law characterizes that conduct as 'anti-trade union behavior'. That behavior has two consequences: i) the obligation for a company to reinstall those workers who were dismissed immediately; ii) the imposition of fines for every day this behavior remains in place. *See* Law No. 23.551, 1988 [Arg. Coll. Lab. Code], Article 52-53. Further on, the legal status of a trade union is only recognized after the registration before the Ministry of Labour, Employment and Social Security and it is what provides the right to collectively bargain whenever certain conditions are met. In principle, the Ministry of Labour has to check whether the basic elements of the constitution of a trade union were completed and grant the recognition of a union's legal status after 90 days. Nonetheless, to be entitled to collective bargain, a trade union must be the 'most representative' association of a sector or activity. Now, although the legal status is an essential element to collective bargain, the law recognizes that this is not a fundamental element to be entitled to the right to strike as it is a non-subordinated right. It means that the right to strike is also triggered, along to the protection to founding unionists, by the mere existence of the trade union and not by its recognition. Nonetheless, until today, the Ministry has not yet recognized the existence of the trade union.

10. *Id.*, P. 3-4.

and ordered to unblock the connection to the platform of the three claimants whilst the question of their legal position was solved.[11]

However, *Rappi*, did not comply with the decision to re-engage these riders and simultaneously appealed against it in *Cámara Nacional de Apelaciones del Trabajo* ('CNAT'). The CNAT's judgement centered in reversing the injunction recognized by the first instance judge. The main reason argued by the Tribunal was the 'impossibility to determine the relationship between the platform and its deliverymen.[12] In fact, the judgement indicates[13]:

"[I]t is clear that it is impossible for this Chamber to qualify the relationship between the parties, because that would imply anticipating the criterion to be applied only when the file can return to the Court for a final judgment establishing the full extent of the parties' rights. Given this impossibility of qualifying the link, there is no other solution—it is reiterated, at this stage of the proceedings—than to annul the measure issued at first instance provisionally."[14]

The 'CNAT' did not address whether the valuation made by the first instance judge regarding the validity of the interim measure was correctly done despite being the central claim of the appeal. Yet, it did considered that recognizing a potential right of association might constitute an anticipation of the final decision regarding the second claim of the original writ promoted by the riders: defining the nature of the link between riders and the platform. For these reasons, the decision of the first instance judge should be revoked. Nonetheless, the Tribunal refrains from quoting the norms on which it is basing its decision.

Seemingly, this interpretation suggests that the definition of the underlying legal relationship between platforms and workers is an *ex-ante* requirement to recognize basic rights, like the right of association and collective bargaining. Moreover, following this precedent, the protection of these rights *vis-à-vis* potential anti-trade union behavior could only be claimed after the definition of the legal status of the employees. Put it differently, with this judgement, the Argentinian judiciary subordinated the

11. *Id*., P. 8-9.

12. Cámara Nacional De Apelaciones Del Trabajo - Sala IX [CNTrab] [National Court of Labor Appeals of the Federal Capital], 19/7/2019, "Rojas Luis Roger Miguel y otros c/ Rappi Arg. SAS. / Medida Cautelar," P.1-3.

13. *"[E]s claro que esta Sala se encuentra imposibilitada de calificar el vínculo entre las partes, porque ello implicaría anticipar el criterio con el que solamente corresponde resolver cuando el expediente pueda volver al Tribunal para dictar una sentencia definitiva que establezca en toda su extensión los derechos de las partes. Dada esa imposibilidad de calificar el vínculo, no cabe otra solución –se reitera, en este momento del trámite del expediente- que dejar provisoriamente sin efecto la medida dictada en primera instancia"* Cámara Nacional De Apelaciones Del Trabajo - Sala IX [CNTrab] [National Court of Labor Appeals of the Federal Capital], 19/7/2019, "Rojas Luis Roger Miguel y otros c/ Rappi Arg. SAS. / Medida Cautelar," P.1.

14. *Id.,* Own translation.

enjoyment of these collective rights to the type of relationship enjoyed by the worker, converting them into second-class rights.

As mentioned, one of the central objections to this particular judgement is that there is not a single reference to the legislation (constitutional, labor, civil, or competition law) with respect to which the CNAT based its decision. The argument according to which the protection of a fundamental right like freedom of association and collective bargaining would depend on the resolution of another procedure demands well-founded reasons. In practice this decision removes the fundamental nature of these collective rights by impeding its autonomous, preferential and direct enjoyment Yet, those reasons are nowhere to be found in the *corpus* of the ruling.

Furthermore, it seems that the decision was contrary to the current legislation. For instance, consider Article 2 of Convention 87 from the ILO, properly ratified by Argentina.[15] This norm protects the right of association for *all workers* independently of whether they are entitled to an employment relationship or not. This has been the established precedent in many instances such as the Committee on the Right of Association of the ILO. Indeed, in several reports it has been clearly stated that the word 'workers' in the mentioned article has to be interpreted not to be restricted to those who have a standard employment relation, but extensively. It means that the underlying relationship between the platform and the rider is irrelevant to assess whether there is a breach of these rights. Furthermore, the Committee of Freedom of Association also highlights that trade union freedoms and guarantees should at all times be enjoyed without being subordinated to any *ex-ante* legal relationship.[16]

The impact of this precedent could be profound to the creation of new trade unions. Moreover, it might encourage anti-trade union behavior from

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15. Int'l Labour Organization [ILO], *Convention 087 Freedom of Association and Protection of the Right to Organize Convention*, art. 2, ILO Doc. 87 (June 17, 1948), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:31223. "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their choosing without previous authorization."

16. To the extent to which the ILO agrees with such vision, see the following report-cases of the ILO: Case No. 2556, *349th Report of the Committee on Freedom of Association* (2008) "The Committee recalls in this regard that the status under which workers are engaged with the employer should not have any effect on their right to join workers' organizations and participate in their activities. The Committee likewise recalls that all workers, without distinction whatsoever, whether they are employed permanently, for a fixed term or as contract employees, should have the right to establish and join organizations of their choosing". ¶ 754; P.174-175. Furthermore, *376th Report of the Committee on Freedom of Association* "the Committee again recalls that all workers must be able to enjoy the right to freedom of association regardless of the type of contract by which the employment relationship has been formalized." ¶ 560; P.145 (2015). Finally *378th Report of the Committee on Freedom of Association* "the legal status of the workers' employment relationship should not have any effect on their right to join workers' organizations and participate in their activities," ¶ 158; P.44 (2016), Dorssemont & Lamine, arrive to a similar interpretation of Convention 87. By quoting the report 2888 of the Committee of Freedom of Association on Poland it is established that the definition of the word 'workers' needs to be extended to cover categories of precarious workers like agricultural workers and independent workers. Moreover, the authors illustrate the consequences of such interpretation and rightfully conclude: "the committee has thus

employers against workers claiming a definition on the nature of their employment relationship in both the platform economy or elsewhere.

CONCLUSIONS

Current legal frameworks fail to explain or capture adequately the type of relationship hidden between users, *Rappi* and riders in Argentina. Subordinating the protection of fundamental rights such as the freedom association and collective bargaining to the outcome of another procedure leaves platform workers in a condition of legal precarity. Moreover, there is a tacit acceptance of the platform's retaliation to the three leaders of the trade union when exercising their collective rights.

Therefore, adopting a new legislation seems urgent. This case opens an opportunity for legislative creativity. It might be an excellent context to conceive a new regulation that might constitute itself a model for other developing countries, especially those where this platform operates. A new regulation needs to be flexible enough and ensure proper regulation of the subtleties of each platform's working conditions and allow the development of this type of economy, but protective enough to avoid potential abuses against these workers.

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decided to not dissociate the recognition of trade union freedoms from collective bargaining rights. In principle, that approach implies that the recognition of the right to create or affiliate to a trade union acknowledges the recognition of the essential means in seeking the defence of the interest of its members. Within them, there is the right of collective bargaining of the trade union in question." *See* Dorssemont, F. and Lamine, A. *Quels droits collectifs pour le travailleur de plateformes? Champ d'application des droits fondamentaux et obstacles à leur exercise*, In Lamine, A and Wattecamps, C. (coord.) (2020) *Quel droit social por les travaillerus de plateformes? Premiers diagnostics et actualités législatives*. UCLouvain. Anthemis (Limal), pp. 299-350.