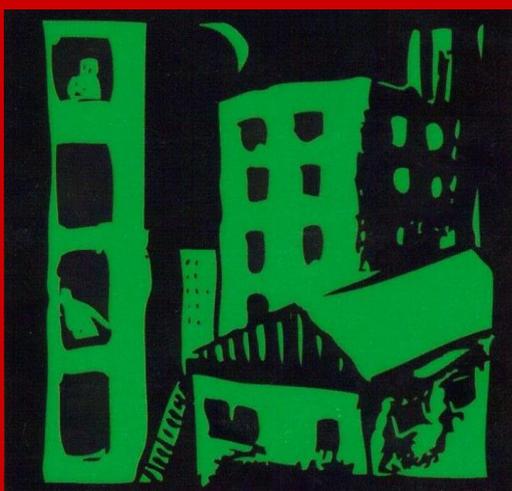


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**An overview of
categories of
vulnerability
among on-
demand workers
in the gig
economy
(Part 2)**

DINA MARIA (DENINE) SMIT

*Associate Professor, Department of
Mercantile Law, University of the
Free State, Bloemfontein, South
Africa*

<https://orcid.org/0000-0002-8471-0100>

GREY STOPFORTH

*Lecturer, Department of Mercantile
Law, University of the Free State,
Bloemfontein, South Africa*

<https://orcid.org/0000-0001-7958-3496>

Abstract

Platform work in the gig economy has become a universal phenomenon, even more so in the socially distanced landscape of COVID-19. Characteristic of the Fourth Industrial Revolution,

hundreds of thousands of on-demand workers across the globe today earn a living by performing tasks assigned to them via digital platforms. The gig economy undoubtedly offers certain appealing benefits, including work flexibility and independence. As established in part 1 of this article, platform work holds vast potential to create much-needed jobs, especially for the youth, who are facing a higher degree of job precarity than any generation before them. At the same time, though, the very structure of platform work – with a peculiar triangular contracting relationship between the parties involved – renders on-demand workers vulnerable, having to carry most of the risk.

In part 2, we delve deeper into the various forms of vulnerability among on-demand workers in the gig economy, with a particular focus on developing countries such as South Africa. After a brief look at the extent to which the classification of labour could be regarded as a contributing factor to vulnerability, we draw on the International Labour Organisation (ILO) definition of vulnerability to categorise the types of vulnerability on-demand gig workers are exposed to. Four broad categories are identified, namely vulnerability relating to conditions of employment, individual and collective labour rights, dispute resolution structures, and social security protection. Each category is concretised by a brief discussion of the applicable South African statutory provisions as well as practical examples. This is followed by an overview of various international standards and recent steps taken by the ILO and the European Union to protect platform workers in the gig economy.

The article concludes with proposals on how to expand the traditional idea and categories of work in an effort to afford rights and protection – and so provide decent work – to new, future-oriented types of workers in South Africa. It is argued that South Africa needs to develop a uniquely South African approach to the future of work that has on-demand workers and their vulnerabilities at its centre.

Keywords: Platform work; on-demand work; gig; vulnerability; precarious work.

1 INTRODUCTION

The rise in technology has facilitated new forms of work, which continue to test the boundaries of the traditional employment relationship. In an increasingly digital world, technology-facilitated types of work, including on-demand platform work, are here to stay, and will continue to shape the future of work.

In part 1 of this article, we examined the significant growth in platform work against the backdrop of the Fourth Industrial Revolution (4IR). It was concluded that platform work emerged as a new form of work due to increased use and reliance on 4IR technologies. Consequently, people have taken up platform work as a means to supplement their income or as a means to earn a living. Considering South Africa's double-digit unemployment figures, the extreme job precarity facing our youth, and the ever-growing need for employment, there is no denying that we need the gig economy

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

to provide access to jobs. However, for the gig economy to play its part in mitigating the unemployment crisis, it needs to provide decent work, in line with the ILO's goals.¹ Judging by the precarious triangular relationship underlying on-demand gig work, this is could raise concerns in respect of the parties' legal obligations.

In this second part of our research, we take a more in-depth look at the specific types of vulnerability experienced by on-demand workers in South Africa. To this end, we start off by briefly stating the problem associated with the classification of labour as it pertains to gig workers, as an essential departure point to understand the barriers to full labour and social protection that these workers face. Following a discussion of the meaning of vulnerability in general, the focus then shifts to on-demand workers' specific categories of vulnerability, with a particular focus on those vulnerabilities arising from a lack of provision for this type of work in South Africa's labour laws. Finally, alternative measures (other than the classification of labour) that might help alleviate platform workers' vulnerabilities are suggested against the backdrop of the perspectives and steps taken by the International Labour Organisation (ILO) and the European Union (EU).

2 THE CLASSIFICATION OF LABOUR

The classification of labour rests on businesses' responsibility to respect the human rights of those working for them.² Work is recognised as fundamental to a person's being, and provides status, esteem and meaning to those fortunate enough to engage in it.³ Nevertheless, not all types of work enjoy the same legal rights and protection. In South Africa, everyone has the right to fair labour practices.⁴ To give effect, the labour statutes prescribe definitions as to who is deemed an 'employee' or a 'worker'. However, platform workers fall outside of the scope of labour protections, mainly due to the statutory definitions that classify them as independent contractors.

The classification of on-demand workers, for instance, has been subject to rigorous judicial interpretation and legal debate in several jurisdictions across the world. And in the absence of a universal, well-defined model to regulate platform work in the modern-day gig economy, it will continue to be a contentious question. Except for the United Kingdom, most jurisdictions remain in a state of uncertainty as the gig economy business model continues to be tested.⁵ Importantly also, each country has a unique and

¹ International Labour Organisation (ILO) "Decent work and the 2030 Agenda for Sustainable Development" (2021) at <https://bit.ly/3i2eQ8Z> (accessed 31 May 2021).

² Zorob M "The future of work: litigating labour relationships in the gig economy. business & human rights resource centre: Corporate Legal Accountability annual briefing" (2019) at <https://www.business-humanrights.org/en/from-us/briefings/the-future-of-work-litigating-labour-relationships-in-the-gig-economy/> (accessed 31 May 2021).

³ Van Niekerk A & Smit N (eds) *Law@Work* 5th ed (2018) at 3.

⁴ S 23(1) of the Constitution of the Republic of South Africa, 1996.

⁵ See *Uber BV & Others v Aslam & Others* [2021] UKSC 5 (19 February 2021), which concerned the employment status of one of Uber BV's drivers, Mr Aslam. The issue before the court was whether Mr

intricate statutory framework that regulates the employer-employee relationship, making a universal approach to classifying on-demand workers virtually impossible.⁶ Although classification is not the main purpose of this article, we acknowledge that deliberations on why gig workers should not be classified as employees or other categories could contribute to the legal debate. It is acknowledged that much had been written on the classification of gig workers, our stance on the creation of a third category will be shared at a later stage.⁷ It must be kept in mind that the overview of categories of vulnerability as reflected in this article remains the main focus irrespective of classification.

The significant problem faced in the platform economy and its associated forms of work is that on-demand platform workers do not classify as “employees” of the gig businesses.⁸ These classification “errors” are likely to persist, and courts across the globe continue to grapple with the problem of interpreting traditional labour laws in the context of the gig economy.⁹

Precisely because of the speed at which the world of work evolves, the legal classification of the employment relationship remains relevant and crucial as a gateway to the activation of prescribed statutory measures aimed at protecting both employer and employee.¹⁰ Now, more than ever before, clarity on who would qualify as an employee is essential because of the different rights and duties that flow from the various types of modern-day work agreements and contracts.¹¹ In the absence of such a clear classification, digital platforms’ tendency to serve as active labour and product

Aslam was an independent contractor or a worker of Uber BV. The UK Supreme Court dismissed an appeal brought by Uber and upheld the 2016 Employment Tribunal ruling to rule that Mr Aslam was indeed a “worker” of Uber BV.

⁶ International Labour Organisation (ILO) "World employment and social outlook - the role of digital labour platforms in transforming the world of work" (2021); Malos S, Lester G & Virick M "Uber drivers and employment status in the gig economy: should corporate social responsibility tip the scales?" (2018) 30 *Employee Responsibilities and Rights Journal* at 239.

⁷ See for example Du Toit D, Fredman S & Graham M "Towards Legal Regulation of Platform Work: Theory and Practice" (2020) 41 *ILJ* 1493 where du Toit et al opine that “case-by-case litigation does not offer a viable means of addressing the lack of legal protection experienced by platform workers in general.”

⁸ Fairwork Project "Gig workers, platforms and government during Covid-19 in South Africa" (2020) available at <https://fair.work/wp-content/uploads/sites/97/2020/05/Covid19-SA-Report-Final.pdf> (accessed 29 January 2021).

⁹ Ramaswamy KV 2019 "Non-standard employment, labour laws and social security: learning from the US gig economy debate" in Shyam Sundar KR (ed.) *Globalization, labour market institutions, processes and policies in India* (2019) at 289.

¹⁰ Black CM "The future of work: the gig economy and pressures on the tax system" (2020) 8(1) *Canadian Tax Journal* at 74; Grogan J *Workplace Law* 13th ed (2020) at 13, 15. Grogan argues that the definitions of “employee” prescribed by the LRA and the BCEA raise similar questions than those raised by the common law.

¹¹ Grogan (2020) at 13.

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

intermediaries, and to classify on-demand workers as independent contractors, legislatively places the gig worker outside the realm of any organisation¹² and, thus, outside the scope of current labour law protection.

In the meantime, whether those engaged in on-demand work are engaged in recognised classifications of work, and the extent to which labour protections can be afforded to this vulnerable group, remain subject to litigation in labour courts and tribunals in numerous jurisdictions, including South Africa.¹³ Labour law aims to regulate the relationship between those who hire others for their labour, and those who hire out their labour to others.¹⁴ Yet labour legislation is never immune to critical reflection and, if necessary, revision.¹⁵ Indeed, most studies to date have focused on a reworking of the classification of labour to extend existing rights to on-demand workers as well. As explained in Part 1, the position of platform workers remains uncertain and precarious in the absence of a judicial interpretation of their classification or a suitable solution proposed by the legislator. Keeping this in mind, the following section of the article aims to investigate the specific South African statutes and components of labour law that exclude on-demand workers and render them vulnerable, this paper too argues that the vulnerability of the gig worker is partly a problem of classification.

3 VULNERABILITY IN THE LEGAL CONTEXT

3.1 Defining employment vulnerability

The ILO¹⁶ has described vulnerability, in the context of vulnerable work, as workers that:

"... are less likely to have formal work arrangements, and are therefore more likely to lack decent working conditions, adequate social security and 'voice' through effective representation by trade unions and similar organizations. Vulnerable employment is often characterized by inadequate earnings, low productivity and difficult conditions of work that undermine workers' fundamental rights."

The ILO's approach to defining vulnerability brings into focus purely legal aspects associated with decent work considerations such as working conditions, social dialogue

¹² Barratt T, Goods C & Veen A "'I'm my own boss...': Active intermediation and 'entrepreneurial' worker agency in the Australian gig-economy" (2020) 52(8) *Environment and Planning A: Economy and Space* at 13.

¹³ Van Niekerk & Smit (2018) at 6. Also see *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)* 2018 39 ILJ 903 (LC) relating to the misclassification of Uber's drivers. However, since it was not in the Labour Court's powers to confirm these drivers' correct classification, this is yet to be done.

¹⁴ Grogan (2020) at 1.

¹⁵ Van Niekerk & Smit (2018) at 17.

¹⁶ International Labour Organisation (ILO) "Vulnerable employment and poverty on the rise. Interview with ILO chief of Employment Trends Unit" (2010) available at https://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_120470/lang--en/index.htm (accessed 31 May 2021)

and a worker's earning capacity. However, from a broader perspective vulnerability encapsulates much more than just legal consideration. From a more philosophical point of view, vulnerability is seen as a situation where an exploiter uses the vulnerable conditions of the other party, such as the on-demand worker, who may have no other source of income, to get them to agree to arrangements that would benefit the exploiter, while violating fairness and other moral norms.¹⁷ Therefore, with reference to on-demand work, what seems to be a voluntary contractual agreement may not be that innocent. It would seem that the description of vulnerability tendered by Wolff¹⁸ is the best fit for the context of on-demand workers, namely that a group of people, in this case on-demand workers in the gig economy, are considered vulnerable when they find themselves at a common structural disadvantage that renders them all exploitable.

While personal and social vulnerability due to class characteristics is not the focus of this article, we do acknowledge that vulnerability may exist in class structures.¹⁹ This could also be exacerbated by the law where lawmakers are aware of these vulnerabilities,²⁰ though calls for legal reform and accountability fall on deaf ears.

Vulnerability in the platform economy is real: In a study of 27 developing countries, it has been found that transparency in platform architecture, design and algorithms is urgently needed to protect platform workers from the vulnerabilities they are exposed to in performing digital work.²¹ Ultimately, companies' primary drive is to increase profits and keep labour costs low,²² and the more precarious work becomes, the more irregular businesses' treatment of their labour appears to be. Businesses are using new models and employment structures, such as the platform economy, to perpetuate established practices that are exploitative and add to an already existing power

¹⁷ Wolff J "Structures of exploitation" in Collins H, Lester G & Mantouvalou V (eds) *Philosophical foundations of labour law* (2018) at 178. From the perspective of political vulnerability, one should ask whether there is a structural vulnerability, which is not attributable to gullibility or personality factors, but can be objectively measured. For more on the different theories about exploitation and the difference between exploitation of the person vs structural exploitation, see Wolff (2018) at 179-180. Giving greater protection to employment, labour exploitation takes on many forms, from the extreme – such as slavery and forced labour – to the more subtle – such as taking unfair advantage of someone's bargaining weakness. More specifically, exploitation in the South African labour law context refers to violating workers' rights to basic working conditions, including the right to a minimum wage, the regulation of working hours, and other social protection.

¹⁸ Wolff (2018) at 181.

¹⁹ Mantouvalou V "Legal construction and structures of exploitation" in Collins H, Lester G & Mantouvalou V (eds.) *Philosophical foundations of labour law* (2018) at 195.

²⁰ Mantouvalou (2018) at 197.

²¹ Rani U & Furrer M "Digital labour platforms and new forms of flexible work in developing countries: algorithmic management of work and workers" (2020) 25(2) *Competition & Change* at 1.

²² Zorob (2019).

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

imbalance.²³ It comes as no surprise, therefore, that an increasing number of cases are ending up in our courts where gig workers challenge their “employers”.

Vulnerability varies according to its legal, social or political context. From this point of reference, the following section adds to the discussion above by providing an overview of vulnerability in the South African employment context.

3.2 Employment vulnerability in South Africa

Different social structures place workers in varied positions of vulnerability.²⁴ In South Africa in particular, specific groups are rendered vulnerable because of racial exclusions, gender inequality and socioeconomic disposition. The vulnerability associated with these factors has historically and systematically been exploited.²⁵

Also, vulnerability to exploitation can be either personal or structural.²⁶ A personal reason would be when an employer exploits workers’ vulnerability by violating their labour rights. Structural exploitation, on the other hand, relates more to the statutory structures that exclude certain groups of workers from enjoying the labour and social protection that labour law offers.²⁷ It was in this context that South Africa’s extensive framework of labour legislation was enacted to regulate the employment relationship and address the power imbalance between employer and worker,²⁸ which puts employed individuals at risk of ongoing poverty and injustice.²⁹ As will be demonstrated below, the discussion considers the structural vulnerabilities of on-demand workers. It, therefore, seeks to provide an overview of the categories of vulnerability created by labour legislation as opposed to personal reasons. The succeeding discussion aims to categorise the different vulnerabilities of irrespective of the current classification of on-demand workers. In doing so, we take cognisance of and draw from existing South African literature proposing possible solutions, such as the incorporation of principles

²³ Zorob (2019).

²⁴ Mantouvalou (2018) at 195.

²⁵ Mantouvalou (2018) at 196.

²⁶ Mantouvalou (2018) at 203.

²⁷ Mantouvalou (2018) at 203.

²⁸ Van Niekerk & Smit (2018) at 4.

²⁹ Anwar MA & Graham M "Between a rock and a hard place: freedom, flexibility, precarity and vulnerability in the gig economy in Africa" (2020) 25(2) *Competition & Change* at 7. Structural vulnerability as a concept focuses on legal structures that exclude workers from enjoying full protection. In the labour law context, this statement applies to the legal (legislative) structures that exclude on-demand work. It must be kept in mind that this paper does not aim to discuss in detail the classification of on-demand work. Instead, it brings into focus the categories of vulnerability brought about by strict statutory provisions.

of good practices in the platform's terms and conditions³⁰, or extending social protection rights to independent workers³¹.

While the South African courts may seem the obvious choice to resolve the current dilemma by simply having on-demand workers reclassified as employees, a bottom-up reworking of the labour law regime may, in the long run, be a more effective solution to remedy the unique vulnerabilities faced by gig workers. To this end, the following paragraphs outline on-demand workers' vulnerabilities as created by current South African statutory provisions that exclude them from social and labour protection.

4 CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS IN SOUTH AFRICA

The traditional function of labour law is to ensure labour and social protection to those in an employment relationship.³² The various legislative interventions in the employment sphere serve as a portal to both minimum conditions of employment and an established framework to engage in collective bargaining.³³ Ironically, however, to on-demand workers in the South African context, most aspects contributing to their vulnerability can be linked to the very laws designed to regulate work relationships, creating a common structural disadvantage that renders all gig workers exploitable.³⁴

4.1 Vulnerability in respect of basic conditions of employment and minimum wage

The principal statute that gives effect to statutory minimum terms and conditions of employment is the Basic Conditions of Employment Act (BCEA).³⁵ The act aims to advance economic development and social justice by fulfilling its primary objective of giving effect to and regulating the right to fair labour practices as enshrined in section 23 of the Constitution of the Republic of South Africa, 1996.³⁶ The BCEA prescribes fundamental and other basic conditions of employment that the South African legislature regarded as fundamental,³⁷ and provides for their enforcement.³⁸ These

³⁰ Du Toit, Fredman & Graham (2020) 1493.

³¹ Govindjee A "Extending Social Protection in the Digital Age: The Case of Transportation Network Company Drivers in South Africa" (2020) 83 *THRHR* at 56.

³² Van Niekerk & Smit (2018) at 4. Labour law serves as a balancing measure by establishing minimum standards of employment and prescribing various procedural requirements aimed at counterbalancing employees' bargaining rights against employers' economic powers.

³³ Van Niekerk & Smit (2018) at 5.

³⁴ Mantouvalou (2018) at 181.

³⁵ 75 of 1997. Van Niekerk & Smit (2018) at 105.

³⁶ Hereinafter "the Constitution". Du Toit D et al *Labour relations law: a comprehensive guide* 6th ed (2015) at 289.

³⁷ Grogan (2020) at 6.

³⁸ Grogan (2020) at 6.

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

include provisions regulating working time,³⁹ statutory paid leave,⁴⁰ the payment of remuneration,⁴¹ and the periods applicable to the termination of employment.⁴² The BCEA is supplemented by the National Minimum Wage Act (NMWA),⁴³ which entitles South African authorities to prescribe a national minimum wage, and also regulates it.

On-demand workers are bound by the terms and conditions of the contract they enter into. Therefore, their work relationship is contractual and does not rely on labour law for its regulation.⁴⁴ In the gig economy, workers typically lack the minimum safety nets afforded to traditional employees and carry the sole responsibility for their own economic survival. While, as independent contractors, they enjoy considerable flexibility in choosing their working hours and maintaining a work/life balance, this flexibility does come at a cost: Their “business relationship” with the gig business is neatly designed so as to limit the business’s responsibilities in various ways.⁴⁵ The parties agree that their relationship is solely that of a principal and independent contractor, excluding the platform business from the rights and duties of an employer under the restrictions of various labour laws.⁴⁶

³⁹ Including provisions relating to ordinary working hours (s 9 and 9A), overtime (s 10), meal intervals (s 14), daily and weekly rest periods (s 15), Sunday work (s. 16), work on public holidays (s 18) and night work (s 17).

⁴⁰ Including provisions relating to annual leave (s 20 and 21), sick leave (s 22 to 24), maternity leave (s 25 and 26), parental leave (s 25A), adoption leave (s 25B), commissioning parental leave (s 25C) and family responsibility leave (s 27).

⁴¹ Including provisions relating to information about remuneration (s 33), deductions (s 34 and 34A) and the calculation of remuneration and wages (s 35).

⁴² S 37 of the BCEA.

⁴³ 9 of 2018. The NMWA establishes a minimum wage of R23,19 for every ordinary hour worked. The NMWA’s definition of a worker must be noted. The NMWA defines a worker as “...any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.” Unfortunately, is not possible to provide a comprehensive analysis of this definition as a possible ‘third’ category of employment in the South African context due to the scope of the study. This said, we opine that the definition could serve as a practical basis for a third category of employment in South Africa.

⁴⁴ Similarly, if a court classifies an on-demand worker as an employee the contract between the parties will be regarded as an employment contract. As such the labour legislation will apply.

⁴⁵ Uber “Uber community guidelines – Europe and Sub-Saharan Africa” (2021) at <https://www.uber.com/legal/en/document/?name=general-community-guidelines&country=south-africa&lang=en> (accessed 31 May 2021).

⁴⁶ Uber (2021). Uber, for example, does not guarantee its drivers a minimum number of tasks. Clause 5 of the service agreement states: “... Uber makes no representation, warranty, or guarantee regarding the reliability, timeliness, quality, suitability or availability of the services or any services or goods requested through the use of the services, or that the services will be uninterrupted or error-free ... You agree that the entire risk arising out of your use of the services, and any service or good requested in connection therewith, remains solely with you, to the maximum extent permitted under applicable law.” Therefore, on-demand workers remain responsible for generating their own income and managing their own expenses.

Workers who are managed by platforms often have little understanding of how these platforms operate, such as that the very design of platforms may exclude workers from certain countries and groups from performing jobs through pre-screening, with very little recourse.⁴⁷ Workers also often work seven days a week, without taking breaks, for fear of decreasing their earnings. And because it is so difficult to establish “what counts as work”,⁴⁸ they easily fall into the trap of excessive working hours, on average working much longer hours than those in formal employment relationships.⁴⁹

Low remuneration and non-payment could also be seen as a form of exploitation associated with platform work.⁵⁰ The voting system often deployed by these platforms means that tasks deemed unsatisfactory may simply be rejected, without supplying any reasons, resulting in the non-payment of jobs completed.⁵¹ Further contributing to the vulnerability seen in on-demand work are platform glitches.⁵² In addition, workers are sometimes paid in vouchers that they cannot access, which raises serious ethical concerns⁵³ not typically found in the traditional employer-employee model.

Due to the race for good ratings and the acquisition of enough tasks to earn a proper living, 42% of on-demand workers work on several platforms simultaneously.⁵⁴ It has been found that 91% of platform workers would like more tasks and spend long hours, up to 17 minutes for every hour worked, searching for additional work.⁵⁵ Altogether 44% of workers work seven days a week, and 56% also at night.⁵⁶ In the ride-sharing and delivery industries, working hours are particularly long – the average ride-sharing worker in a developing country works approximately 65 hours per week – and work intensity is high.⁵⁷

On-demand businesses also implement gamification techniques to incentivise long working hours. In this way, workers are in effect forced to increase their working hours

⁴⁷ Rani & Furrer (2020) at 5-6. It should also be noted that many of the gig platforms utilise a sophisticated algorithmic control system to manage on-demand workers. In addition, the ILO’s Home Work Recommendation 184 of 1996 must be kept in mind. Paragraph 5 of the recommendation provides that a homeworker should be kept informed of his/her conditions of employment in “an appropriate, verifiable and easily understandable manner”. This principle could be applied to a gig contractual relationship.

⁴⁸ Rani & Furrer (2020) at 6.

⁴⁹ Balliester T & Elsheikhi A *The Future of Work: A Literature Review. Working Paper 29* (2018) at 20.

⁵⁰ Wolff (2018) at 180.

⁵¹ Rani & Furrer (2020) at 14.

⁵² Rani & Furrer (2020) at 14.

⁵³ Amazon has done away with this practice and pays out earnings directly to workers, and not through vouchers that either have no use in workers’ home countries or cannot be accessed. Also see Rani & Furrer (2020) at 15.

⁵⁴ Rani & Furrer (2020) at 13.

⁵⁵ Rani & Furrer (2020) at 13.

⁵⁶ Rani & Furrer (2020) at 13.

⁵⁷ ILO (2021) “World employment” at 168.

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

to be eligible for more earning opportunities or bonuses.⁵⁸ In some instances, the platform algorithm even controls on-demand workers' break times to such an extent that the worker can be penalised for staying offline for too long.⁵⁹

None of the above would be tolerable or acceptable by law in a traditional employee-employer relationship.

4.2 Vulnerability in respect of labour rights and protection

4.2.1 Individual labour rights and protection

The Labour Relations Act (LRA) ⁶⁰ serves as the primary labour statute in South Africa. It prescribes the various individual and collective labour rights afforded to "employees" engaged in traditional employment relationships as well as several other, non-standard forms of employment.⁶¹ The LRA has been amended a number of times in the past two decades to keep up with the growing demands of South Africa's dynamic labour market.⁶² The 2014 amendments in particular were aimed at broadening the scope of non-standard forms of employment and have drastically changed the status and protection afforded to employees not engaged in permanent employment relationships.⁶³ Yet only "employees" can be regarded as victims of unfair labour practices⁶⁴ and be dismissed in terms of the LRA's definitions.⁶⁵

As they are not regarded as employees, on-demand workers fall outside the scope of the LRA's provisions on unfair labour practice and dismissal. As their version of "dismissal provisions", on-demand workers are at risk of their services being deactivated should they commit any of a vast array of contraventions of the gig business's service agreement and community guidelines.⁶⁶ Moreover, gig businesses such as Uber use a customer satisfaction feedback system to rate their drivers. This has been said to be among the leading factors why drivers and partner drivers refuse to contest any changes to their terms of service, for fear of attracting bad ratings and being excluded

⁵⁸ ILO (2021) "World employment" at 168.

⁵⁹ ILO (2021) "World employment" at 168.

⁶⁰ 66 of 1995.

⁶¹ Grogan (2020) at 6.

⁶² Van Niekerk & Smit (2018) at 17. Also see the *Labour Relations Amendment Act 6/2014*.

⁶³ Van Niekerk & Smit (2018) at 17, 19. Although the 2014 amendments sought to extend the labour protection to non-standard forms of employment, labour legislation continues to reflect the interests of those in formal employment.

⁶⁴ See s 185(b) of the LRA.

⁶⁵ Grogan J *Employment Rights* 3rd ed (2019) at 7. See s 185, 186 and 193 of the LRA for more in this regard.

⁶⁶ The official Uber Community Guidelines are aligned with the clauses of the service agreement. The guidelines for Europe and Sub-Saharan Africa reflect principles relating to safety, law-abiding practices, and respect for all. Uber (2021).

from the platform.⁶⁷ A major concern is that a platform can immediately terminate the agreed terms, amend terms or add a supplemental term to the agreement at any stage of the business relationship.⁶⁸

4.2.2 *Collective labour rights and protection*

The rules of collective labour law recognise that both employees and employers constitute distinct and opposing interest groups in modern industrial society, who each seek to promote and protect their respective interests.⁶⁹ From an international perspective, we note that the Freedom of Association and Protection of the Right to Organise Convention⁷⁰ applies to on-demand workers, seeing that the convention refers to workers, inclusive of self-employed.⁷¹ The LRA provides extensive protection and rights associated with freedom of association,⁷² which is also regarded as the cornerstone of collective bargaining.⁷³ In exercising these rights, an employee is entitled to form or join a trade union and participate in union activities. This is vital, considering trade unions' crucial role in safeguarding employees' rights in South Africa:⁷⁴ In addition to representing employees in labour disputes, unions also have an oversight and monitoring function to ensure that employers comply with the labour rights granted in terms of the Constitution and labour laws.⁷⁵ This said, the peculiar working conditions of on-demand workers in the gig economy in itself poses challenges for organising.

⁶⁷ Aloisi A "Commoditized workers: case study research on labor law issues arising from a set of 'on-demand/gig economy' platforms" (2016) 37(3) *Comparative Labor Law & Policy Journal* at 676.

⁶⁸ As stated in clause 1 of the Uber service agreement. Uber (2021).

⁶⁹ Grogan (2020) at 321.

⁷⁰ Art 2 of the Freedom of Association and Protection of the Right to Organise Convention 87/1948.

⁷¹ ILO (2021) "World employment" at 204. The key importance of the Convention lies in the fact that it prescribes that workers, including self-employed individuals, can join organisations of their own choosing. Similarly, Art 1 of the Right to Organise and Collective Bargaining Convention 98 of 1949 provides that all workers should enjoy adequate protection against discrimination (including victimization and retaliation) on the basis of their union activities and employer interference in their organisations. Both the Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention are ratified by South Africa and given effect in terms of the LRA. However, due to the application of the LRA, platform workers are still excluded in the South African context. We opine that a broader application of a "worker" as prescribed by the afore-listed conventions includes on-demand workers as well.

⁷² Du Toit et al (2015) at 217.

⁷³ Van Niekerk & Smit (2018) at 396. Chapter 2 of the LRA provides that employees, employers, trade unions and employers' organisations have the right to freedom of association, which includes the right to organise, engage in collective bargaining and strike.

⁷⁴ Nxumalo L "The role of trade unions in South Africa: towards the inclusion of persons with disabilities in the workplace" (2020) 41 *ILJ* at 2311.

⁷⁵ Nxumalo (2020) at 2311. In addition, chapter 3 of the LRA establishes different organisational rights applicable to trade unions. Van Niekerk & Smit (2018) at 406-407.

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

Yet Du Toit correctly notes that the LRA does little to protect platform workers. Although the Constitution afford every “worker” the right to form and join a trade union, the LRA restricts trade union membership to “employees”.⁷⁶ In addition, only registered “trade unions” are eligible to participate in collective bargaining.⁷⁷ This is troubling, since social dialogue could and, indeed, should be implemented to address many of the vulnerabilities that on-demand workers face.⁷⁸ In most countries, including South Africa, dependent contractors⁷⁹ may not access the bargaining rights and processes afforded to employees,⁸⁰ a problem merely exacerbated by the cross-border dimension⁸¹ of on-demand work. This is in stark contrast to countries such as Australia, Canada and Japan, where the self-employed enjoy collective bargaining rights.⁸²

Work performed in the on-demand economy weakens the worker’s bargaining position,⁸³ as many of the collective bargaining structures cater for traditional forms of employment only. It is acknowledged that statutory restrictions alone are not the main contributor in this regard and that organisational circumstances also play a role. For example, the weakened bargaining position is also mostly due to on-demand workers’ inability to organise for lack of a fixed, physical workplace.⁸⁴ It is further argued that the platform’s extension of labour market intermediation restricts workers’ agency potential, which isolates workers from one another, reduces the workability of trade unions, and creates a disconnect between the gig worker and the platform.⁸⁵

The sheer size and scope of the global market in which gig workers operate⁸⁶ further undermines their bargaining power, in effect nullifying the efforts of workers and unions who struggled to eradicate labour exploitation and replace it with civilised

⁷⁶ Du Toit, Fredman & Graham (2020) at 1519.

⁷⁷ Du Toit, Fredman & Graham (2020) at 1519; Van Niekerk & Smit (2018) at 404. Not all trade unions qualify for organisational rights – only registered trade unions that are “representative” may acquire such rights.

⁷⁸ ILO (2021) “World employment” at 249.

⁷⁹ Workers who have contractual arrangements of a commercial nature (but not a contract of employment) to provide goods or services for or through another economic unit.

⁸⁰ Stewart A & Stanford J “Regulating work in the gig economy: what are the options?” (2017) 28(3) *The Economic and Labour Relations Review* at 428. Various Canadian provinces, for example, permit dependent contractors to access bargaining rights and processes.

⁸¹ Stewart & Stanford (2017) at 428.

⁸² ILO (2021) “World employment” at 249. The ILO flagship report on the role of digital labour platforms in transforming the world of work suggests that social dialogue could resolve various issues relating to the terms of engagement on platforms, ratings and deactivation, pricing, data use, and the evaluation system.

⁸³ Balliester & Elsheikhi (2018) at 19.

⁸⁴ Balliester & Elsheikhi (2018) at 19.

⁸⁵ Barratt, Goods & Veen (2020) at 7.

⁸⁶ Stewart & Stanford (2017) at 431.

employment relationships.⁸⁷ It is, after all, difficult to fathom how employees in the new digital economy could form unions and engage in labour action against a multinational online platform.⁸⁸

Therefore, with no access to collective bargaining, being the conventional way to improve terms and conditions of employment, platform workers are yet again left exposed and vulnerable. As a result, efforts to address this vulnerability vary from one jurisdiction to the next, and include anything from calls for legal reform, to the reconsideration of union strategies in light of the altered work landscape, and lawmakers exploring legislative bills, executive orders and task forces.

4.2.3 *Protection against unfair discrimination*

The primary statute safeguarding employees against discrimination in the South African workplace is the Employment Equity Act (EEA),⁸⁹ which ensures that the country's international obligations and the provisions of the Constitution are adhered to.⁹⁰ The EEA aims to correct the country's demographic imbalance in the workforce by advancing members from the designated groups⁹¹ through affirmative action measures.⁹² The act applies to all "employees", as well as applicants for employment.⁹³ In addition to the EEA, the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA)⁹⁴ extends equivalent protection to all persons not covered by the EEA.⁹⁵

As with the other South African labour laws, on-demand workers sadly do not fall within the scope of the EEA either, even though a considerable proportion in both the ride-sharing and delivery sectors have experienced discrimination or harassment while providing their services, mostly from clients.⁹⁶ This has resulted in a suggestion that gig

⁸⁷ Stewart & Stanford (2017) at 431.

⁸⁸ Bellace JR "The changing face of capital: the withering of the employment relationship in the information age" in Hendrickx F & De Stefano V *Game changers in labour law. Shaping the future of work* (2018) at 11-26.

⁸⁹ 55 of 1998.

⁹⁰ Van Niekerk & Smit (2018) at 123.

⁹¹ Section 1 of the EEA. Members from the designated groups refer to Africans, coloureds and Indians, women, and persons with disabilities.

⁹² Grogan (2020) at 75.

⁹³ Van Niekerk & Smit (2018) at 123.

⁹⁴ 4 of 2000.

⁹⁵ Du Toit, Fredman & Graham (2020) at 1515. The BCEA and the LRA contain provisions that protect employees against discrimination for exercising their rights in terms of the respective statutes. Du Toit et al (2015) at 646. See secs. 5(1) and 187(1)(d) of the LRA and secs. 78 and 79 of the BCEA.

⁹⁶ ILO (2021) "World employment" at 189.

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

businesses should protect their on-demand workers' anonymity; if not, discrimination may worsen due to a lack of regulation and policy enforcement.⁹⁷

Moreover, the algorithmic management⁹⁸ central to the gig economy model⁹⁹ is associated with an inherent vagueness and a lack of disclosure of data sources and algorithmic outcomes.¹⁰⁰ In effect, therefore, platform workers are subject to algorithmic control by the platform, resulting in algorithmic discrimination.¹⁰¹

4.3 Vulnerability in respect of dispute resolution structures

In South Africa, only persons defined as "employees" in terms of current labour laws enjoy the complete labour protection and remedies prescribed by law, which include having recourse to the dispute resolution structures established in terms of the LRA.¹⁰² Once established that workers are indeed "employees", they have access to the Commission for Conciliation, Mediation and Arbitration (CCMA) to enforce their rights.¹⁰³ If not, workers have to rely on the civil law and the dispute resolution clauses agreed to by the disputing parties. Much like any contractual dispute, and in the absence of a specialised process to resolve labour disputes, this process can be time-consuming, stressful and costly – all undesirable features for gig workers.¹⁰⁴

⁹⁷ Lane M "Regulating platform work in the digital age. Going Digital Toolkit Policy Note, No. 1" (2020) available at <https://goingdigital.oecd.org/toolkitnotes/regulating-platform-work-in-the-digital-age.pdf> (accessed 20 March 2021).

⁹⁸ The ILO defines algorithmic management as "giving the responsibility of assigning tasks and making decisions to an algorithmic system of control, with limited human involvement. The algorithmic management system improves through self-learning algorithms based on data." ILO "World employment" (2021) at 33.

⁹⁹ Vallas S & Shor JB "What do platforms do? Understanding the gig economy" (2020) 46 *Annual Review of Sociology* at 78.

¹⁰⁰ Bucher E, Schou P & Waldkirch, M "Pacifying the algorithm - anticipatory compliance in the face of algorithmic management in the gig economy" (2021) 28(1) *Organization* at 45.

¹⁰¹ ILO (2021) "World employment" at 179. In a recent ILO study, 37% of ride-sharing workers and 48% of on-demand workers in the delivery sector indicated that they could not decline or cancel tasks, as doing so would negatively affect their ratings. Declining or cancelling tasks via the platform could also result in a reduction of work opportunities, financial penalties or, in severe cases, deactivation by the platform. The control and monitoring are done by the algorithm also play a significant role when on-demand workers are rated. Algorithms are mainly used to match workers and clients. The deactivation of workers if they are rated below a specific threshold is also algorithmically managed.

¹⁰² Grogan (2019) at 17.

¹⁰³ Du Toit, Fredman & Graham (2020) at 1517.

¹⁰⁴ Lane (2020) 11. Also see ILO (2021) "World employment" at 182. The majority of the complaints referred to gig businesses related to payment issues, conflict with customers, technical issues with the use of the application, and cancelled tasks. A substantial number of the complaints also concerned the deactivation of on-demand workers' accounts. The reasons stated in the report include low ratings, non-acceptance of work or tasks, taking leave, and ratings from customers. It is especially important to note that the deactivation of on-demand workers' profiles lasted an average of seven days before the dispute was resolved, during which time the on-demand worker was unable to generate an income.

Dispute resolution mechanisms in the gig business relationship are prescribed and agreed to in the business's terms-of-service agreement.¹⁰⁵ These provisions are typically written in legal jargon, which on-demand workers often either misunderstand or fail to understand at all. In fact, according to a recent study, almost 50% of on-demand workers agreed to terms and conditions without having seen them.¹⁰⁶ Of those who had seen the terms and conditions of service, a third reported not having read, not remembering or not having understood them.¹⁰⁷ All Uber contracts, for instance, require prospective drivers to sign away their rights to legal redress in favour of private arbitration.¹⁰⁸ Therefore, the lack of an easily understandable and adequate dispute resolution process reinforces the imbalance that exists in the platform relationship.¹⁰⁹

Due to financial insecurity, very few gig workers are in a position to take on large companies through civil means, which makes them more inclined to accept settlements out of court.¹¹⁰ In addition, the fact that gig workers often use a variety of platforms¹¹¹ makes it even more difficult to standardise dispute resolution. At the same time, gig businesses go out of their way to prevent the passing of pro-labour regulations, and, in the United States, have been lobbying to rewrite state employment laws and overrule local regulations.¹¹²

4.4 Vulnerability in respect of social security protection

If Collins is correct, social protection's very objective is to afford a certain minimum level of social welfare to all,¹¹³ thus focusing on more than only the traditional employee. Sadly, for on-demand workers, performing work in the platform economy in no way guarantees a social safety net of any kind.

On-demand workers' social security coverage is extremely limited, increasing their vulnerability even further.¹¹⁴ If one considers that platform work affects almost half a million citizens in South Africa,¹¹⁵ this becomes a significant economic and social problem. On-demand workers' lack of social protection has specifically also jeopardised

¹⁰⁵ ILO (2021) "World employment" at 182.

¹⁰⁶ ILO (2021) "World employment" at 182. This statistic accounts for 58% in the ride-sharing sector and 49% in the delivery sector.

¹⁰⁷ ILO (2021) "World employment" at 182.

¹⁰⁸ Stewart & Stanford 2017 at 424.

¹⁰⁹ Lane (2020) at 11.

¹¹⁰ Zorob (2019)

¹¹¹ Ramaswamy (2019) at 289.

¹¹² Zorob (2019).

¹¹³ Albin (2018) at 188.

¹¹⁴ Mudongo O & Chinembiri T "South African Uber drivers set for court challenge to assert gig worker rights" (2021) at <https://www.dailymaverick.co.za/article/2021-03-04-south-african-uber-drivers-set-for-court-challenge-to-assert-gig-worker-rights/> (accessed 4 March 2021).

¹¹⁵ Mudongo & Chinembiri (2021).

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

their health and safety during the COVID-19 pandemic,¹¹⁶ with many of them entirely dependent on task-based work to earn an income.¹¹⁷

The ILO regards social security as a human right, that comprises of various benefits in respect of unemployment, occupational injury, illness, old age, disability, survivors and health protection, as well as maternity, children and families.¹¹⁸ However, the inclusion of social protection as a fundamental right varies between jurisdictions.¹¹⁹ Apart from the statutes listed above, several other South African statutes regulate different social security protections as well as the health and safety measures applicable to workplaces in different sectors of the economy.¹²⁰

While a focus on human rights and dignity lie at the very foundation of South African labour law,¹²¹ most on-demand workers forgo their right to social security.¹²²

Moreover, whatever type of platform work workers are engaged in, accidents and injuries are bound to happen.¹²³ Yet the wording of platform user agreements reveals complete circumvention of liability for accidents on the part of the platform, to the extent that, should any accident occur, the agreement would not prove the existence of an employment relationship between the platform and the gig worker. The standard

¹¹⁶ International Labour Organisation (ILO) "Can digital labour platforms create fair competition and decent jobs?" (2021) at <https://ilo.org/infostories/en-GB/Campaigns/WESO/World-Employment-Social-Outlook-2021#covid-19> (accessed 12 April 2021).

¹¹⁷ ILO (2021) "World employment" at 174. Of the 348 platform-based and traditional taxi and delivery drivers surveyed in Chile, Kenya, Mexico and India, 32% had worked throughout the pandemic due to economic necessity. Even more important is that the income of 9 out of 10 taxi drivers and 7 out of 10 delivery drivers had reduced, further increasing their vulnerability.

¹¹⁸ ILO (2021) "World employment" at 174. See also ILO "International Labour Standards on Social Security" (2022) available at <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (accessed 28 April 2022). It should be noted that South Africa has yet to ratify the Social Security (Minimum Standards) Convention 102/1952. We agree with Govindjee's observation that the Social Security (Minimum Standards) Convention 102 of 1952 remains relevant and that the Social Protection Floors Recommendation 202 of 2012 provides guidance in respect of the establishment and maintenance of social protection floors as a fundamental element of the national social security system in South Africa.

¹¹⁹ Albin E "Social inclusion of labour law: meeting particular scales of justice" in Collins H, Lester G & Mantouvalou V (eds.) *Philosophical foundations of labour law* (2018) at 291.

¹²⁰ With reference to the protections afforded by the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the benefits prescribed by the Unemployment Insurance Act 63 of 2001.

¹²¹ Albin (2018) at 304.

¹²² Ramaswamy (2019) at 296.

¹²³ Zhou I "Digital labour platforms and labour protection in China" (2020) available at https://www.ilo.org/beijing/information-resources/WCMS_757923/lang--en/index.htm (accessed 31 May 2021).

electronic contract exempts the platform from all legal liability, with no regard for workers' rights.¹²⁴

This lack of specific labour and social protection has a long-term detrimental effect on on-demand workers' capacity to invest in housing and pensions.¹²⁵ They are also less likely to have access to professional development training opportunities, which hamper their career progression.¹²⁶ Moreover, many of these workers are exposed to severe stress because of traffic congestion (for those in the mobility and delivery sectors), low pay, excessive working hours, a lack of gig opportunities, as well as the timeframe within which a task needs to be completed. Workers' every move is monitored by the platform and can be tracked by the client in real time. This puts them under severe strain to reach their destination as quickly as possible to prevent the gig from being cancelled or the client from giving them a bad review. In addition, 83% of on-demand workers in the ride-sharing sector and 89% of those in the delivery sector have reported major concerns about their safety while performing tasks, mainly due to road safety, theft or physical assault. Ongoing stress of this kind can have serious long-term consequences for on-demand workers' health and safety, which, in a traditional employment relationship, would have been provided for through adequate social protection.¹²⁷

5 INTERNATIONAL LABOUR ORGANISATION PERSPECTIVES ON ON-DEMAND WORK

5.1 Introduction

The provisions of the Bill of Rights bind not only the judiciary, the executive, the legislature and all organs of state, but also juristic and natural persons to the extent that a right is applicable.¹²⁸

The ILO plays a pivotal part in supporting research and publications to enhance law-based policymaking¹²⁹ and has significantly contributed to African countries' ability to

¹²⁴ Iossa A "Anti-authoritarian employment relations? Labour law from an anarchist perspective" in Blackham A, Kullmann M & Zbyszewska A *Theorising labour law in a changing world. Towards inclusive labour law* (2019) at 232.

¹²⁵ Balliester & Elsheikhi (2018) at 19.

¹²⁶ Balliester & Elsheikhi (2018) at 20. This is especially true of youth gig workers.

¹²⁷ ILO (2021) "World employment" at 171.

¹²⁸ S 8(1)-(2) of the Constitution of the Republic of South Africa, 1996. The aforesaid rights, therefore, have both a vertical and horizontal application. Section 39 of the Constitution confirms the previously mentioned principles by stating that when courts, tribunals and forums interpreted the Bill of Rights, it must be done in such a manner that promotes the values that underlie an open democratic society. In addition, s 39(1)(b) stipulates that international law must be considered. The following section thus aims to provide a discussion on specific international instruments applicable to on-demand work.

¹²⁹ Bellucci S & Otenyo EE "Digitisation and the disappearing job theory: a role for the ILO in Africa?" in Gironde C & Carbonnier G *The ILO @ 100: addressing the past and future of work and social protection* (2019) at 215.

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

standardise their labour policies.¹³⁰ The ILO's role in creating forums for dialogue, especially those associated with the African Union, remains critical in ensuring that programmes for development in the African context are Africa-led.¹³¹ Yet, fundamentally, the ILO's views and efforts are geared towards the traditional labour law view of work, and of vulnerability in work.¹³²

Like jurisdictions across the globe, the ILO too is faced with a gig economy that is testing the boundaries of the traditional employment relationship, and the organisation continues to grapple with how basic labour and social protection could be extended to on-demand workers.¹³³ Therefore, while the principles and rights expressed in ILO standards remain relevant,¹³⁴ exactly how these should operate and be applied in the on-demand work relationship is yet to be clarified.¹³⁵

Of course, it is ultimately the responsibility of the state to incorporate ratified international standards in its national laws, and to ensure that gig platforms comply. To date, however, the regulatory frameworks that could offer protection to on-demand workers differ vastly from one jurisdiction to the next. Although some progress has been made to afford some of the protection offered by international standards, many other standards are yet to be implemented.¹³⁶ This does not mean to say that unratified or unimplemented instruments do not serve any purpose at all, since they still serve as a useful reference for national policy and legislative design.¹³⁷

In the following paragraphs, we examine recent ILO trends, developments and steps that could guide South Africa in minimising the vulnerabilities of its on-demand workers.

¹³⁰ Bellucci & Otenyo (2019) at 214; International Labour Organisation (ILO) "Conventions and Recommendations" (2021) available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 31 May 2021).

¹³¹ Bellucci & Otenyo (2019) at 216.

¹³² Rodgers L *Labour Law, vulnerability and the regulation of precarious work* (2016) at 95.

¹³³ ILO (2021) "World employment" at 249.

¹³⁴ ILO (2021) "World employment" at 249.

¹³⁵ See, for example, Development Goal 8 of the ILO Decent Work Agenda that focuses on the creation of jobs, sustainable livelihoods and equitable growth, with target 8(a) focusing on the number of good and decent jobs and livelihoods to be created by 2030. As commendable as this goal may be, the ILO is still battling with how to achieve it in the platform economy. Indeed, seen against the backdrop of the vulnerabilities of on-demand workers discussed above, it will take some doing to make gig work to fit the requirements of decent work.

¹³⁶ ILO (2021) "World employment" at 249.

¹³⁷ ILO (2021) "World employment" at 249.

5.2 Guiding ILO standards

The ILO is on record for expressing its support for the notion that all platform workers¹³⁸ should enjoy the right to participate in collective bargaining, be protected against discriminatory conduct, and be safeguarded against unsafe work.¹³⁹ Moreover, its Declaration on Fundamental Principles and Rights at Work,¹⁴⁰ along with specific key recommendations and conventions, apply to all workers, regardless of their classification.¹⁴¹

The Employment Relationship Recommendation (ERR)¹⁴² addresses the formulation of national policy to guarantee adequate protection for workers who perform work in the context of an employment relationship, to establish criteria to determine the existence of an employment relationship, and to adopt measures to monitor developments concerning employment relationships.¹⁴³ Of particular relevance to this article is paragraph 4(b) of the ERR, which recommends that national policy should at least include measures to:

"... combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due ..."

The ERR provides important guidance to enable legislatures and judiciaries to ensure greater consistency in the treatment of all workers, in both developed and developing countries, including on-demand workers.¹⁴⁴ Moreover, the Govindjee correctly notes that the ERR acknowledges the need for special protection for vulnerable workers advocating for measures that counter false employment relationships.¹⁴⁵

¹³⁸ In this context, "platform workers" include both crowdworkers and on-demand workers.

¹³⁹ ILO (2021) "World employment" at 248. This also entails that on-demand workers be provided with health and safety protection, as well as social security protection.

¹⁴⁰ Adopted at the ILO's 86th session, Geneva, June 1998.

¹⁴¹ ILO (2021) "World employment" at 248. For example, article 2 of the Declaration on Fundamental Principles and Rights at Workplaces a constitutional obligation on all member states, including those who have not ratified any conventions, to realise and promote the underlying principles of freedom of association and the right to collective bargaining, the elimination of forced labour, the abolition of child labour, and the elimination of discrimination.

¹⁴² Recommendation 198, adopted at the ILO's 95th session, Geneva, June 2006.

¹⁴³ International Labour Organisation (ILO) "Regulating the employment relationship in Europe: A guide to Recommendation No. 198" (2013) available at <https://bit.ly/3i9kkii> (accessed 15 March 2021).

¹⁴⁴ ILO (2021) "World employment" at 250.

¹⁴⁵ Govindjee (2020) at 56.

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

Another key ILO instrument to consider is the ILO Transition from the Informal to the Formal Economy Recommendation.¹⁴⁶ This is of particular relevance in the African emerging-economy context, where the informal sector is a key player.¹⁴⁷ South Africa, as a leading emerging economy on the African continent, is no exception.¹⁴⁸ It calls on member states to extend various rights relating to health and safety, decent work conditions and a minimum wage to all workers in the informal economy.¹⁴⁹

In addition, it has been suggested that other ILO instruments, such as the conventions relating to minimum wages and working time regulation, should also be extended to platform workers.¹⁵⁰ Similarly, various conventions relating to non-discrimination¹⁵¹ should serve as a guide in dealing with discrimination on platforms and from platform clients.¹⁵²

5.3 Findings from the Global Commission on the Future of Work

Since 2015, the ILO has been investigating the adverse effects of labour platforms on workers and employment in general.¹⁵³ The vulnerability of on-demand workers was also highlighted in the landmark report by the Global Commission on the Future of Work, who examined how to achieve a better future of work at a time of unprecedented changes in the world of work.¹⁵⁴

¹⁴⁶ Recommendation 204, adopted at the ILO's 104th session, Geneva, June 2015.

¹⁴⁷ Beghelli S "The changing nature of work: challenges and opportunities for Sub-Saharan Africa" (2019) 2 *FEEM Policy Brief* at 6.

¹⁴⁸ Over the past decade, South Africa has seen a massive increase in its informal economic sector, and it is anticipated to expand even further now that the COVID-19 pandemic has weakened the formal employment sector. Importantly, in South Africa and on the rest of the continent, the informal sector and the gig economy are gradually converging due to grey areas in their respective regulatory frameworks. In this regard, the ILO recommendation prescribes guidelines for developing an integrated policy framework to facilitate an economic transition from the informal to the formal economy, while preventing further informalisation.

¹⁴⁹ Zhou (2020) at 44-45.

¹⁵⁰ ILO (2021) "World employment" at 251. See, for example, the Occupational Safety and Health Convention 155 of 1981, the Promotional Framework for Occupational Safety and Health Convention 187 of 2006, and the Employment Policy Convention 122 of 1964, which are currently not ratified by South Africa.

¹⁵¹ See in this regard the Discrimination (Employment and Occupation) Convention 111 of 1958, and the Equal Remuneration Convention 100 of 1951 that are ratified by South Africa. As such, South Africa has a legal obligation to give effect to these core conventions.

¹⁵² ILO (2021) "World employment" at 251.

¹⁵³ International Labour Organisation (ILO) "Digital labour platforms" (2021) available at <https://www.ilo.org/global/topics/non-standard-employment/crowd-work/lang--en/index.htm> (accessed 3 January 2021).

¹⁵⁴ International Labour Organisation (ILO) "Global Commission on the future of work - work for a brighter future" (2019).

The report acknowledges the challenges faced by platform workers by calling for the establishment of an international governance system for online platforms, which should require platforms to respect certain minimum rights and protections.¹⁵⁵ Viewing social protection as a “human right”, the Global Commission on the Future of Work called on all governments to adapt their systems to the evolving world of work and guarantee universal, equal and adequate social protection for all forms of work and all categories of workers, including the self-employed and vulnerable workers in the informal economy,¹⁵⁶ regardless of contractual agreement or employment status.¹⁵⁷

The report further advocates for a universal labour guarantee, which includes fundamental rights at work, adequate living wages and fair working hours to ensure a safe and healthy workplace.¹⁵⁸

5.4 The ILO Centenary Declaration

The ILO Centenary Declaration for the Future of Work¹⁵⁹ encourages all member states to build the capacities of all people to benefit from the opportunities of the changing world of work, including strengthening institutions’ ability to achieve adequate protection for all workers.¹⁶⁰ This must be done in the context of the considerable growth in informality, and the need for effective action to achieve a transition to formality.¹⁶¹ The declaration also reaffirms the importance of the Decent Work Agenda by stating that all workers should enjoy adequate protection, taking into account their fundamental rights, adequate minimum wages, the regulation of working time, and health and safety at work.¹⁶² Moreover, the declaration calls for measures to ensure adequate privacy and personal data protection.¹⁶³ Of specific importance here, and outlined in the discussion above, is that various conventions could apply to work performed as part of the gig economy. Moreover, as the ILO Social Outlook Reports suggest, specific key instruments, inclusive of the Declaration on Fundamental Principles and Rights at Work, apply to all categories of work irrespective of their classification.

¹⁵⁵ ILO (2019). The report also highlighted that technological advances require the regulation of data use and algorithmic control in the world of work.

¹⁵⁶ Zhou (2020) at 45.

¹⁵⁷ Zhou (2020) at 46.

¹⁵⁸ Zhou (2020) at 46.

¹⁵⁹ Adopted at the ILO’s 108th session, Geneva, June 2019.

¹⁶⁰ Zhou (2020) at 46.

¹⁶¹ ILO (2021) "World employment" at 249.

¹⁶² Zhou (2020) at 46.

¹⁶³ ILO (2021) at 255.

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

6 EUROPEAN UNION PERSPECTIVES ON ON-DEMAND WORK

A number of terms are used to describe the broader scope¹⁶⁴ of platform-based work across the EU, including the “sharing economy” and the “collaborative economy”.¹⁶⁵ Since 2015, the European Commission (EC) has been engaged in public consultations, which in 2016¹⁶⁶ resulted in two communications on online platforms¹⁶⁷ and the collaborative economy¹⁶⁸ respectively. These communications aimed to resolve the classification of activities separating professionals from individuals occasionally working on collaborative platforms.¹⁶⁹ In addition, the 2017 European Pillar of Social Rights delivered new rights and improved existing ones, and specifically provided that employment relationships that led to precarious working conditions had to be prevented.¹⁷⁰ It also addressed several policy changes associated with innovative and new forms of work, including on-demand work.¹⁷¹

In 2019, the European Parliament and Council announced the Directive on Transparent and Predictable Working Conditions in the European Union,¹⁷² which clarified the status of on-demand workers by confirming that on-demand work could fall within the directive’s scope.¹⁷³ This directive was followed by the Council’s Recommendation on Access to Social Protection for Workers and the Self-Employed.¹⁷⁴ The recommendation underlines that recent forms of work, such as on-demand work, has increased in

¹⁶⁴ The broader scope of platform-based work includes aspects relating to capital goods as well as non-commercial activities, therefore going beyond localised paid work, such as on-demand work.

¹⁶⁵ Eurofound "Platform work" (2021) available at <https://www.eurofound.europa.eu/topic/platform-work> (accessed 21 January 2021).

¹⁶⁶ Bogliacino F, Codagnone C, Cirillo V & Guarascio D "Quantity and quality of work in the platform economy GLO Discussion Paper Series 420, Global Labor Organization (GLO)" (2019) available at <https://ideas.repec.org/p/zbw/glodps/420.html> (accessed 31 May 2021).

¹⁶⁷ European Commission (EC) 2016 "Commission to the European Parliament, the Council, the European Committee of the Region. Online platforms and the digital single market opportunities and challenges for Europe" (2016) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0288> (accessed 15 February 2021).

¹⁶⁸ European Commission (EC) "Commission to the European Parliament, the Council, the European Committee of the Region. European agenda for the collaborative economy" (2016) available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52016DC0356> (accessed 31 May 2021).

¹⁶⁹ Bogliacino, Codagnone, Cirillo & Guarascio (2019).

¹⁷⁰ European Pillar of Social Rights 2017, art. 5(d). Art. 5(d) states that employment relationships that lead to precarious working conditions shall be prevented, including by prohibiting abuse of atypical contracts.

¹⁷¹ Eurofound (2021).

¹⁷² Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019.

¹⁷³ Art. 8.

¹⁷⁴ Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed 2019/C387/01. It must be noted, for purposes of this part of the study, that “self-employed” and “independent contractor” are used interchangeably.

importance since the 2000s,¹⁷⁵ and expressly states that on-demand workers are excluded from social protection schemes, which adds to their vulnerability in the employment context.¹⁷⁶ The EC's 2020 communication reiterated the need for improved working conditions for platform workers to ensure the sustainable growth of the platform economy.¹⁷⁷

The EC's Inception Impact Assessment on Collective Bargaining Agreements for Self-Employed – Scope of Application of EU Competition Rules is of great importance to those working on online platforms.¹⁷⁸ The purpose of the initiative is to invite European social partners to submit their views on the need for, and direction of, possible responses to improve the working conditions on digital platforms.¹⁷⁹ Realising that digitisation and the need for more flexible work have led to an increase in platform economic activity,¹⁸⁰ the EC's consultations aim to ensure that:

"... EU competition law does not stand in the way of initiatives to improve working conditions through collective agreements for solo self-employed where they choose to conclude such agreements, while guaranteeing that consumers and SMEs continue to benefit from competitive prices and innovative business models, including in the digital economy."¹⁸¹

Bearing the above in mind, the European Commission introduced the Draft Directive (Draft Directive) on 9 December 2021 which seeks to introduce measures to determine the status of gig workers working on digital platforms. By doing so, the Draft Directive aims to improve the protection of platform workers by proposing a comprehensive

¹⁷⁵ Section 11.

¹⁷⁶ Section 18.

¹⁷⁷ European Commission (EC) "Commission Work Programme 2020: a Union that strives for more" (2020) available at https://ec.europa.eu/info/publications/2020-commission-work-programme-key-documents_en (accessed 31 May 2021). More specifically, the communication confirms the several opportunities that online platforms have created for labour. However, it also outlines the vulnerabilities and risks associated with this type of work, such as the workers' employment status, poor working conditions, lack of access to social protection, and lack of representation and collective bargaining.

¹⁷⁸ Citron P & Little D "European Commission invites comments regarding collective bargaining for the self-employed" (2021) available at <http://competitionlawblog.kluwercompetitionlaw.com/2021/01/13/european-commission-invites-comments-regarding-collective-bargaining-for-the-self-employed/> (accessed 10 April 2021).

¹⁷⁹ European Commission (EC) "Protecting people working through platforms: Commission launches a first-stage consultation of the social partners" (2021) available at https://ec.europa.eu/commission/presscorner/detail/en/IP_21_686 (accessed 10 April 2021). The second-stage consultations were launched in mid-June 2021 and drew to a close by mid-September, with the publication of the proposal planned for the fourth quarter of 2021.

¹⁸⁰ European Commission (EC) "Questions and answers: first stage social partners consultation on improving the working conditions in platform work" (2021) at https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_656 (accessed 12 April 2021).

¹⁸¹ EC (2021) "Questions and Answers".

AN OVERVIEW OF CATEGORIES OF VULNERABILITY AMONG ON-DEMAND WORKERS

framework for the classification of gig workers across the EU.¹⁸² The aforesaid framework also consists of procedures to ensure the correct determination of the status of platform workers based on the primacy of facts and a rebuttable presumption of an employment relationship.¹⁸³ The Draft Directive also advocates for improved conditions of work by promoting transparency, fairness and accountability in algorithmic management systems. It must be noted that algorithmic discrimination is certainly a contested topic in the regulation of platform work in the gig economy and warrants future research. Other initiatives in the EU context include regulations that promote fairness and transparency for business users of online intermediation services¹⁸⁴ and grant workers certain rights concerning personal data protection.¹⁸⁵ Supplementary to the Draft Directive, the European Commission published draft guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (draft Guidelines).¹⁸⁶ Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings. In terms of the current EU Competition Rules, self-employed individuals are classified as ‘undertakings’ which means that the cooperation between the self-employed risks breaching article 101 of the TFEU. While acknowledging the vulnerable situation that platform workers find themselves in, the European Commission explained that its concerns go beyond the scope of platform work and include the vulnerable disposition of the self-employed by acknowledging that “some solo self-employed people struggle to have a say on their working conditions”.¹⁸⁷ In light of this, the draft Guidelines aim to clarify the circumstances where the EU competition laws stand in the way of collective agreements aimed at improving the working conditions of certain self-employed people.¹⁸⁸ In doing so, the draft Guidelines cover self-employed individuals with little to no influence over their working conditions because they are in a ‘comparable situation’ similar to workers, or considering that they are in a weaker

¹⁸² Art 1(1) of the Draft Directive of the European Parliament and the Council on Improving Working Conditions in Platform Work 2021.

¹⁸³ Art 1(2) of the Draft Directive of the European Parliament and the Council on Improving Working Conditions in Platform Work 2021.

¹⁸⁴ EU Regulation 2019/1150.

¹⁸⁵ EU Regulation 2016/679.

¹⁸⁶ European Commission (EC) “Antitrust: Commission invites comments on draft Guidelines about collective agreements regarding the working conditions of solo self-employed people” (2021) available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6620 (accessed 29 August 2022).

¹⁸⁷ EC (2021) “Antitrust: Commission invites comments on draft Guidelines about collective agreements regarding the working conditions of solo self-employed people”.

¹⁸⁸ European Commission (EC) “Draft Guidelines on collective bargaining of self-employed” (2021) available at https://competition-policy.ec.europa.eu/public-consultations/2021-collective-bargaining-2_en (accessed 29 August 2022).

negotiating position when compared to the other party.¹⁸⁹ It must be kept in mind that the draft Guidelines do not only apply to platform work but go far beyond that.¹⁹⁰ In line with this, we agree with Countouris and De Stefano who assert that it is possible to extend specific labour rights by way of ‘ad hoc mechanisms’ that ascribe particular labour rights to particular sectors of the labour market.¹⁹¹

What emerges from this discussion is that the EU has made significant progress in regulating platform work in its member states. Keeping in mind that the policy approaches suggested by the EU are not binding to South Africa, we argue that South Africa can learn a great deal from the way in which the social partners were consulted. Valuable lessons can be drawn from the classification criteria prescribed by the Draft Directive on Improving Working Conditions in Platform Work.

¹⁸⁹ European Commission (EC) “Questions and answers: Commission invites comments on draft Guidelines on collective agreements of self-employed people” (2021) at https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_6621 (accessed 29 August 2022).

¹⁹⁰ Engels C “Self-employed collective bargaining in the EU gig economy: new proposals” (2022) at <https://iuslaboris.com/insights/self-employed-collective-bargaining-in-the-eu-gig-economy-new-proposals/> (accessed 29 August 2022). It is trite law that collective bargaining not backed up by a right to strike is tantamount to collective begging. Engels rightfully asks the question of whether a collective refusal to work by solo self-employed platform workers would be covered by this right to bargain collectively seeing that most of them have the freedom not to log into a particular system for a given counterpart. Furthermore, he asks the question of whether a solo self-employed person can be ‘represented’ in collective bargaining with multiple counterparts whom they are delivering service for. There are no firm answers to these questions, and will the European Court of Justice have the final say in this matter unless out-of-the-box thinking could lead to a different solution?

¹⁹¹ Countouris N & De Stefano V 2021 “The Labour Law Framework: Self-Employed and Their Right to Bargain Collectively” in Waas B & Hießl C (eds) *Collective Bargaining for Self-Employed Workers in Europe: Approaches to Reconcile Competition Law and Labour Rights* (2021) at 9. The authors explain that examples of the extension of labour rights to specific types of work or within a particular sector in the labour market can be found in the French Labour Code which provides for a presumption of employment. In addition, the Irish Competition (Amendment) Act 12 of 2017 is also illustrative of the extension of specific work-related rights to categories of self-employed persons, such as voice-over actors, musicians and freelance journalists. The aforesaid Competition Amendment Act introduced two new categories of self-employed persons, namely persons who are ‘false self-employed workers’ and the ‘fully dependent self-employed worker’. In both aforementioned categories, a representative union may apply to the Minister to bargain collectively and conclude collective agreements on behalf of the group of workers. Of importance here is the fact that this legislation aims to extend the ‘traditional’ collective bargaining rights to vulnerable workers who, in terms of the binary classification system, would normally be excluded from such. See secs. 15D and 15F (1). Although the extension of specific labour rights by way of ad hoc mechanisms, inclusive of extending collective bargaining rights via competition laws, could better the bargaining position of platform workers in general, it does not form part of the primary focus of this research. This said, it is a unique perspective that requires further research.

7 CONCLUSION AND THE WAY FORWARD

The growth in on-demand gig work presents vast potential for job creation in an increasingly job-scarce world and particularly among our youth. At the same time, however, it creates an array of legal issues as to on-demand workers' lack of protection under labour law, and the set of vulnerabilities to which they are exposed as a result.

In this second part of our research, we have identified four distinct areas where on-demand workers in South Africa experience structural vulnerability from enjoying basic social and labour rights. This, in turn, also paints a picture of the current working conditions that on-demand workers are subjected to. Firstly, on-demand workers are rendered vulnerable in respect of basic conditions of employment, having limited control over (or insight into) unilateral changes to the contractual terms that regulate their relationship. Secondly, due to limitations prescribed by the LRA's definition of an employee and other labour laws, they lack protection at the level of both individual and collective labour rights, and, therefore, experience unfair deactivation, discrimination by both clients and the platform, and poor collective bargaining power. In the third instance, dispute resolution for on-demand workers is highly technical, and mostly occurs through time-consuming and costly civil legal action, putting it beyond the average individual platform worker's reach. Finally, with lacking social security protection, on-demand workers are unable to invest in housing and pensions, lack skills development opportunities and have little if any career progression prospects, while their excessive stress puts them at risk of occupational health and safety issues. These structural vulnerabilities are in addition to the precarity built into the peculiar triangular platform work relationship discussed in part 1.

Both the ILO and the EU have taken steps to achieve decent work for, and extend basic labour and social protection to, those working in the gig economy. From an ILO's perspective, we opine that many of the applicable conventions could be extended to on-demand workers if one considers the extent to which they extend to "workers" and not "employees". It is thus a broader approach as compared to the binary approach to the classification of employment in the South African context. However, uniform approaches and policy considerations to regulate platform work are still lacking. While the classification of on-demand workers was not the focus of this research, we do foresee that an increasing number of matters involving gig workers and big gig business will reach our courts and be subjected to judicial interpretation in the years ahead until such time as a universal solution to the classification dilemma is found. Nevertheless, the research and approaches of the ILO and EU to help resolve the issues associated with on-demand gig work could indeed serve as a roadmap to direct our domestic legislative responses to the broader gig economy.

Considering viable alternatives to alleviate on-demand workers' vulnerability is still in its infancy in South Africa, and the classification of on-demand workers has not been adequately judicially tested to date. It was, nonetheless, noted that a legal solution could be the NMWA's definition of a "worker" as a basis for extending minimum wage rights

to on-demand workers. Cognisance needs to be taken of the fact that the definition, for purposes of extending minimum payment rights to on-demand workers, has yet to be tested in our courts. In the meantime, we argue that the time has come for lawmakers to engage all stakeholders to reconsider traditional work categories with a view to including new forms of work, such as on-demand work, which currently do not fit the traditional work model. In addition, we opine that, in the interim, the time is ripe for gig businesses must consider ways in which they themselves can mitigate the identified structural vulnerabilities. This could include changes to their terms of service to extend certain minimum rights and protections to on-demand workers.

Reflecting on the existing research having been done internationally, as well as in South Africa, we opine that the easiest interim regulation seems to be to expand on the definition of a “worker” as defined by the NMWA.

In conclusion, we call on lawmakers not to forget the human being behind the faceless online work environment, but to develop a suitable response that specifically addresses on-demand workers’ vulnerabilities.

Authors’ contributions:

Both authors (Smit DM and Stopforth G) conceptualised the study. Smit DM was primarily responsible for the drafting and overseeing of Part 1 of this integrated study. Stopforth G was primary responsible for the drafting and overseeing of Part 2 of this integrated study. Both authors contributed in equal parts to the editing and the finalisation of this project.

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