**Purposive Reading of Uber BV v Aslam and IWGB v CAC (Deliveroo): Performance-For-Pay or Fee-for-Access**

**Abstract:**

This paper examines how UK employment law should classify and protect individuals who work through digital platforms such as Uber and Deliveroo. It traces the gap between platform work and the existing tripartite structure—employees, limb (b) workers, and the self-employed—and shows how the recent Supreme Court judgments in *Uber BV v Aslam* and *IWGB v CAC* have deepened that gap. By treating contractual freedoms such as the right to substitute another individual to perform an accepted job, or the ability to engage in multi-apping (remaining logged in to more than one platform at the same time), as conclusive evidence of autonomy, those decisions move away from the purposive, protective reasoning adopted in *Autoclenz* and *Pimlico* and leave many platform workers in a 'legal non-place' where none of the three recognised statuses apply.

This paper argues that the statutory scheme itself is sound; the difficulty lies in its quasi-formalist application by the courts. Reapplying *Autoclenz's* purposive method, centred on economic control and dependency, would restore coherence and address the unequal distributions of risk without inventing a fourth category. To achieve this, tribunals should recast platform arrangements into one of two mutually exclusive economic options: the performance-for-pay or the fee-for-access model.

Keywords: Uber BV v Aslam; IWGB v CAC (Deliveroo); Autoclenz–Pimlico purposive approach; Fee-for-access/performance-for-pay models; Substitution clauses; Multi-apping

TABLE OF CONTENTS

## I. INTRODUCTION

This paper deals with the unsettled question of how UK employment law should treat individuals who supply labour through digital platforms. Its central concern is not whether the law ought to create yet another status category, but whether—read purposively—the existing triad of employee, limb-(b) worker (the statutory category in s 230(3)(b) ERA 1996 for those who perform work personally for another who is not their client or customer) and the self-employed already provides a workable map once tribunals focus on economic control rather than contractual labels. Put differently, the guiding question is: can the statutory, purposive, and protective reasoning[1] that informed the UK Supreme Court's decisions in *Autoclenz Ltd v Belcher*[2] and *Pimlico Plumbers Ltd v Smith*[3] be given concrete effect without legislative invention, and if so, by what doctrinal route?

The answer to the first question is in the affirmative. It is argued that the present uncertainty stems less from gaps in the statutes than from a judicial method that extracts isolated contractual indicators—substitution clauses, freedom to reject tasks, the possibility of multi-apping (i.e., remaining logged in to and available for work on more than one platform at the same time)—from their operational setting and treats them as dispositive evidence of independence.[4] This logic, evident in the recent Supreme Court decisions of *Uber BV v Aslam*[5] *(Uber)* and *Independent Workers' Union of Great Britain v Central Arbitration Committee*[6] *(Deliveroo)*, severs status assessment from the very economic realities the case law insists are paramount. The result is what is termed here a 'legal non-place': platform workers are found to lack the mutuality expected of employees, the personal-service core expected of workers, and the entrepreneurial freedom expected of the self-employed, such that they end up with none of the protective incidents of any category. [7]

To restore coherence, this paper proposes a fee-centred test. Where a platform (i) sets the end-user price and the worker's remuneration formula (fares, delivery fees, surge rules);[8]

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[1] Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

[2] *Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] ICR 1157.*

[3] *Pimlico Plumbers Ltd v Smith [2018] UKSC 29, [2018] ICR 1511.*

[4] Alan Bogg and Michael Ford, 'Legislating for Control: The Employment Status of Platform Workers' (2020) 49 Industrial Law Journal 137.

[5] *Uber BV v Aslam [2021] UKSC 5, [2021] ICR 657.*

[6] *Independent Workers Union of Great Britain v Central Arbitration Committee [2023] UKSC 43, [2024] 1 WLR 108.*

[7] Davidov (n 1).

[8] Nicola Countouris, 'Not Delivering – the UK "Worker" Concept before the UK Supreme Court in Deliveroo' (Global Workplace Law & Policy, 23 January 2024) <https://global-workplace-law-and-

(ii) controls the customer relationship (i.e., presenting itself as the service provider, owning the customer account and goodwill, and managing branding, communications, refunds, and ratings while restricting direct contact);[9] and (iii) disciplines performance through ratings, acceptance/cancellation thresholds, allocation penalties, and the threat of suspension or deactivation,[10] it is effectively purchasing labour time and should be treated as an employer or, at minimum, an engager of limb (b) workers for every minute the app is active: *a performance-for-pay model*. On the other hand, where the platform merely sells access to its infrastructure—charging a commission or subscription while leaving providers to set prices, contract directly with customers, retain client data and goodwill, and determine service methods without algorithmic discipline—it operates a *fee-for-access model*, which corresponds to genuine self-employment. Unlike the prevailing approach in *Uber* and *Deliveroo* that elevates isolated contractual freedoms (e.g., substitution or multi-apping) as dispositive,[11] the fee lens ties status to who sets price, who owns the customer, and who polices performance, and so reunites control with responsibility and makes adjudication consistent with the protective purpose of employment statutes.[12]

This argument is developed in four stages. Part One revisits the statutory and doctrinal building blocks of UK employment status, tracing how the protective, relational reading adopted in *Autoclenz*, later echoed in *Pimlico*, requires attention to bargaining power and economic dependency. Part Two subjects *Uber* and *Deliveroo* to a close reading and demonstrates how both decisions slip into quasi-formal reasoning that produces the current impasse. Part Three shows how those cases could have been resolved had the courts followed the purposive route, with particular emphasis on the statutory prohibitions on contracting out of protective rights. Part Four translates that doctrinal correction into practice by detailing the

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policy.kluwerlawonline.com/2024/01/23/not-delivering-the-uk-worker-concept-before-the-uk-supreme-court-in-deliveroo/> accessed 8 February 2026; Jeremias Adams-Prassl and Martin Gruber-Risak, 'The Legal Protection of Platform Workers' in Heinz D Kurz and others (eds), The Routledge Handbook of Smart Technologies: An Economic and Social Perspective (Routledge 2022) 189.

[9] Kenneth Button, 'The "Ubernomics" of Ridesourcing: The Myths and the Reality' (2020) 40 Transport Reviews 76; Pierre de Gioia Carabellese and Camilla Della Giustina, 'The Uber Case and Gig-Individuals against the Backdrop of the Gig-Economy: Dilemmas between Labour Law and Techno-Law' (2022) 1 Journal of Law, Market & Innovation 76.

[10] Riyaj Isamiya Suraiya Shaikh, 'The Work Practice of Platform-Mediated Food Delivery: An Ethnographic Study of Bridging Algorithmic Workflows and Situated Action' (PhD Thesis, Department of Computer and Systems Sciences, Stockholm University 2025); Veena Dubal, 'An Uber Ambivalence: Employee Status, Worker Perspectives, & Regulation in the Gig Economy' *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (Cambridge University Press 2020).

[11] Zoe Adams, 'One Step Forwards for Employment Status, Still Some Way to Go: The Supreme Court's Decision in Uber v Aslam under Scrutiny' (2021) 80 The Cambridge Law Journal 221.

[12] Davidov (n 1).

performance-for-pay and fee-for-access templates and explaining how each distributes risk, control, and reward in a way that is both administratively simple, commercially intelligible, and broadly consistent with the implicit settled view of previous government and parliamentary reports such as the Taylor Review of Modern Working Practices (2017).[13]

The article contributes to the current literature in three respects. First, while existing commentary either applauds *Uber* for extending worker status or criticises *Deliveroo* for retrenching it,[14] little attention has been paid to how the two judgments together leave many platform providers floating in legal limbo; it is here shown how that outcome arises from the courts' handling of control and substitution. Second, although limited commentary has faulted *Deliveroo* for drifting towards formalism,[15] there has been no sustained effort to reclaim the purposive technique of *Autoclenz* and to apply it rigorously to platform work; the analysis in this article supplies that missing link. Third, comparative writings have looked abroad for solutions,[16] but they have not seized upon fee structure as the domestic key. By foregrounding the economic terms through which platforms monetise their services, this article offers a pragmatic yardstick that courts can apply without new statutory text and that businesses can accommodate by choosing the revenue model that best suits their commercial strategy.

Thus, this article aims to restore the protective reach of UK employment law to those who, in substance, labour under another's commercial direction, while preserving genuine autonomy for those who truly trade on their own account. It answers the key question—how to classify and protect platform workers—by arguing that an economically grounded reading of existing statutes, filtered through the fee the platform charges and the control it wields, achieves that objective. The analysis proceeds through doctrinal analysis, case study, and economic reconstruction, and its principal contribution is to redirect scholarly and judicial attention from

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[13] Matthew Taylor, 'Good Work: The Taylor Review of Modern Working Practices' (Department for Business, Energy and Industrial Strategy (UK) 2017).

[14] Dalia Gebrial, 'Racial Platform Capitalism: Empire, Migration and the Making of Uber in London' (2024) 56 Environment and Planning A: Economy and Space 1170; Jeremias Adams-Prassl, 'Uber BV v Aslam: "[W]ork Relations… Cannot Safely Be Left to Contractual Regulation"' (2022) 51 ILJ 955; Luca Deon, 'Regulating the Scope of Employment in the Gig Economy: Towards Enhanced Rights at Work in the Age of Uber' (2020) 5 LSE LR 190; Zoe Adams, 'One Step Forwards for Employment Status, Still Some Way to Go: The Supreme Court's Decision in Uber v Aslam under Scrutiny' (2021) 80 CLJ 221.

[15] Nicola Countouris, 'Not Delivering – the UK "Worker" Concept before the UK Supreme Court in Deliveroo' (*Global Workplace Law & Policy*, 2024) <https://global-workplace-law-and-policy.kluwerlawonline.com/2024/01/23/not-delivering-the-uk-worker-concept-before-the-uk-supreme-court-in-deliveroo/>.

[16] Valerio De Stefano, 'The Gig Economy and Labour Regulation: An International and Comparative Approach' (2018) 4 Law J Soc & Lab Rel 68; Christina Hiessl, 'The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis' (2021) 42 Comp Lab L & Pol'y J 465.

abstract status debates to the concrete mechanics of price, control, and risk that define contemporary platform work.

## II. BARONESS HALE'S THREE TIERS OF UK EMPLOYMENT STATUS

Baroness Hale explained in *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, especially at paragraph 31 (with related distinctions at paragraphs 24–25), that UK employment law recognises three distinct groups.[17] First, employees who work under a contract of employment, performing work personally under the engager's control and with mutual obligations. Second, there are people who are genuinely self-employed and run their own business, offering services to clients or customers. Third, there is a middle category: individuals who are not self-employed or employees but carry out their work as part of someone else's business or enterprise. Some legal protections, such as protection from unfair dismissal, are only available to employees. However, other rights are extended to this broader group of 'workers', including the whistleblowing protections at issue in *Bates* (protection from detriment for making a protected disclosure under ERA 1996, s 47B and Part IVA), as well as core floors of protection such as the National Minimum Wage Act 1998, and paid annual leave under the Working Time Regulations 1998.[18]

### *A. Employees: mutuality, control, and integration (ready mixed concrete)*

This is codified in section 230(1) of the Employment Rights Act 1996, which defines an employee as someone who has entered into or works under a 'contract of employment'. [19] As MacKenna J [20] explains in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance,*[21] section 230(1) reflects a deep-rooted conception of employment as a relationship fundamentally based on subordination—one where the worker (or 'servant') is subject to the control of the employer (or 'master') to such a degree that the latter determines the manner and means of the work. That control is what marks out the relationship as one of

[17] *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] 1 WLR 2047.

[18] Abi Adams, Mark Freedland and Jeremias Prassl, 'Rethinking Legal Taxonomies for the Gig Economy' (2018) 34 Oxford Review of Economic Policy 475; Christina Hiessl, 'The Classification of Platform Workers in Case Law: A Cross-European Comparative Analysis' (2021) 42 Comp. Lab. L. & Pol'y J. 465; Adams-Prassl and Gruber-Risak (n 8).

[19] *Autoclenz* (n 2) [9]–[14].

[20] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 (QBD).

[21] ibid 515.

employment rather than independent contracting. The 'master' has authority not merely over the result, but over the process—how, when, and sometimes even where the work is done. [22]

However, this hierarchy is not absolute. It is tempered by reciprocal obligation. The employer must provide work (or at least the opportunity for work) and pay for it; the servant must personally perform the labour. This exchange distinguishes employment from forms of pure servitude. The servant is not a chattel, nor wholly dependent on the master's whim. The law embeds a minimal level of bilateral duty: a promise of income in return for labour, framed by legal recognition of mutual commitment. Still, the form and logic remain heavily weighted towards subordination. Control and direction are central. The concept of mutuality exists, but not on equal terms; it operates within and is shaped by the inequality in power. The employment contract thus functions as *regulated subordination*, with legal safeguards placed around a structurally unequal relationship.[23]

### *B. The limb-(b) worker: personal service and dependency*

Parliament has nevertheless long recognised that some people who are not party to a contract of service still warrant partial statutory protection. An intermediate statutory category was foreshadowed in the Employers and Workmen Act 1875, where 'workman 'included those bound by a contract personally to execute any work or labour'. [24] This early recognition laid the groundwork for a more formal articulation of the category in section 167 of the Industrial Relations Act 1971, which for the first time used the term 'worker 'to refer to individuals who perform work personally under a contract, but whose contractual counterparty is not their client or customer.[25] That extended definition now appears, in materially identical language or effect, in section 230(3)(b) of the Employment Rights Act, section 54 of the National Minimum Wage Act 1998 and regulation 2(1) of the Working Time Regulations 1998,[26] Section 83(2)(a) of the

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[22] Nicola Countouris, 'Not Delivering – the UK "Worker" Concept before the UK Supreme Court in Deliveroo' (*Global Workplace Law & Policy*, 2024) <https://global-workplace-law-and-policy.kluwerlawonline.com/2024/01/23/not-delivering-the-uk-worker-concept-before-the-uk-supreme-court-in-deliveroo/>.

[23] Nicola Countouris, 'Not Delivering: The UK 'Worker'Concept before the UK Supreme'.

[24] *Autoclenz* (n 2) [9]–[14].

[25] ibid.

[26] *Uber (n 5)* [34]–[37].

Equality Act 2010,[27] and Section 296(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992.[28]

The key indicators for this status are twofold: an undertaking of personal service, and the absence of a commercial relationship in which the recipient of the work is, by virtue of the contract, the individual's own client or customer.[29] Where both conditions are met, the individual is understood as subordinate enough to merit specified rights, such as: (1) the national minimum wage under the National Minimum Wage Act 1998; (2) paid annual leave under the Working Time Regulations 1998; (3) protection for whistleblowing under section 43K of the Employment Rights Act 1996, protection against discrimination under section 83(2)(a) of the Equality Act 2010; (4) and rights to collective bargaining and trade union recognition under section 296(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992.[30]

### *C. Self-employment: working on one's own account*

Finally, individuals who fall outside both of these statutory categories—those who are neither employees nor workers—may be treated as self-employed if, in substance, they are 'in business on their own account.'[31] In practice (and as elaborated below), tribunals look for a constellation of indicia, including: (a) genuine freedom to delegate or hire assistance; (b) meaningful control over the commercial proposition, such as setting or negotiating price; (c) ownership of customer goodwill, and the ability to build a client base; (d) bearing financial risk and providing significant equipment; (e) an opportunity to profit by entrepreneurial skill and efficiency; and (f) only limited integration into the engager's undertaking. These criteria reflect the classic tests in *Market Investigations Ltd v Minister of Social Security* (Cooke J) (the 'own account' inquiry) and *Hall (HM Inspector of Taxes) v Lorimer*[32] (multi-factor evaluation), alongside the control analysis in *Ready Mixed Concrete* and the 'client or customer' focus later affirmed in *Pimlico Plumbers Ltd v Smith*.[33]

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[27] *Pimlico Plumbers* (n 3) [12]–[15]

[28] Guy Davidov, 'Who Is a Worker?' (2005) 34 Industrial Law Journal 57; Michael Ford and Alan Bogg, 'Between Statute and Contract: Who Is a Worker?' (2019) 135 Law Quarterly Review 347.

[29] *Autoclenz* (n 2) [9]–[14].

[30] Davidov (n 28); Ford and Bogg (n 28).

[31] *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 (QBD) (Cooke J)

[32] *Hall (HM Inspector of Taxes) v Lorimer* [1994] 1 WLR 209 (CA).

[33] Davidov (n 28); Ford and Bogg (n 28); Barry Collins, 'Defining the Employee in the Gig Economy: Untangling the Web of Contract' *Conflict and shifting boundaries in the gig economy: An interdisciplinary*

When viewed against other categories, the defining feature distinguishing self-employment from both employee and worker status is the absence of a master–servant relationship—or, more precisely, the absence of control, subordination, and dependency that characterise such a relationship.[34] In both statutory and common law reasoning, the hallmark of self-employment is that the individual operates with a high degree of autonomy.[35] They are not subject to the direction, control, or supervision of another party in how they carry out their work.[36] Instead, they contract to provide a result or outcome, not to personally perform work under the authority of another.[37] This contrasts sharply with both employees (who are subordinate in almost all aspects of their working relationship) and workers (who, while not subject to the full suite of employment obligations, must still perform work personally and not as part of their own business dealing with clients or customers).[38]

Accordingly, if there is a relationship of control or dependency—especially if the putative self-employed person is required to perform work personally, under conditions set by the engaging entity, without genuine freedom to negotiate terms, set prices, or decline work—[39]then it would not be accurate to classify them as self-employed.[40] In other words, if the individual is embedded within another's business and does not bear the commercial risk or enjoy the structural freedoms associated with independent trading, then the formal label of 'self-employed' cannot stand.[41]

## JURIDICAL APPROACH TO INTERPRETING CONTRACTS OF EMPLOYMENT

When courts are asked to decide an individual's employment status, their enquiry is not limited to the written clauses in an employment contract. Because the interpretive approach applied to status disputes in modern UK law is largely set by the Supreme Court's treatment of two

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*analysis* (Emerald Publishing Limited 2020); Lisa Rodgers, 'The Uberization of Work Case Developments in the UK' [2019] Revue de droit comparé du travail et de la sécurité sociale 174.

[34] *Ready Mixed Concrete* (n 20) 515C–E; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173, 184–85; *Hall (HM Inspector of Taxes) v Lorimer* [1994] 1 WLR 209 (CA), 944–45.)

[35] *Market Investigations* (n 31) 184–85; *Uber (n 5)*, [76]–[81], [101].

[36]*Ready Mixed Concrete* (n 20) 515; *Uber (n 5)* [94]–[101].

[37]*Pimlico Plumbers* (n 3) [29]–[34].

[38]*Pimlico Plumbers* (n 3) [45]–[47]; Employment Rights Act 1996, s 230(3)(b).

[39] Collins (n 33).

[40]*Market Investigations* (n 31) 184–85; *Hall v Lorimer* (n 32) 944; *Pimlico Plumbers* (n 3) [45]–[47]; *Uber (n 5)* [94]–[101].

[41] *Pimlico Plu*Collins (n 33); The Pensions Regulator, 'Employer Duties and Defining a Worker' (31 May 2025) <https://www.thepensionsregulator.gov.uk/en/employers/employer-duties-and-defining-a-worker>.*mbers* (n 3) [41], [45]–[47]; *Hall v Lorimer* (n 32) 944.

emblematic misclassification disputes, *Autoclenz Ltd v Belcher [2011]*[42] and *Pimlico Plumbers Ltd v Smith [2018],*[43] it is helpful to note, in outline, the working arrangements that generated those appeals.[44] *Autoclenz*, arose from a group of car valeters engaged to clean vehicles for Autoclenz, whose written documentation described them as self-employed sub-contractors and included terms suggesting they were not obliged to accept work, that the company was not obliged to offer it, and that they could provide substitutes. In practice, however, the valeters worked regular patterns set by the business, were paid on a set basis, and carried out the work within an operational structure determined by Autoclenz. The proceedings concerned claims for statutory employment protections that depended on status, and the dispute therefore turned on whether the written terms reflected the working arrangement as it actually operated.

*Pimlico* concerned a plumbing and maintenance operative, Mr Smith, who worked for many years within Pimlico's branded service model. Although the contractual paperwork characterised him as an independent contractor, the day-to-day arrangement involved Pimlico allocating and organising jobs through its system, presenting the service to customers under Pimlico's branding, and requiring him to operate within rules and procedures associated with the business; the contractual substitution provision, in particular, was framed in a way that did not amount to an open right to send any substitute of his choosing. The litigation was triggered when the relationship broke down and Mr Smith pursued statutory rights that depended on whether he was properly treated as a limb-(b) worker (and, for some purposes, whether he was in "employment" under the Equality Act framework), making classification the central issue.

While in ordinary commercial contracts the written terms are generally treated as defining the nature of the relationship,[45] the Supreme Court, in *Autoclenz*,[46] held that a different approach is required for employment contracts due to the frequent inequality of bargaining power.[47] The court's duty is thus to ascertain the 'true agreement' between the parties. [48] This involves rejecting the narrow test for a 'sham' transaction established in *Snook v London and West Riding Investments Ltd* [1967],[49] which requires a common intention to deceive a third

[42] *Autoclenz* (n 2).
[43] *Pimlico Plumbers Ltd v Smith [2018] UKSC 29, [2018] ICR 1511.*
[44] Alan L Bogg and Michael D Ford, 'The Death of Contract in Employment Status' (2021) 137 Law Quarterly Review 392; Zoë Adams and Jeremias Prassl, 'Uber BV v Aslam: "[W]Ork Relations…cannot Safely Be Left to Contractual Regulation"' (2023) 51 Industrial Law Journal 955; Rodgers (n 33).
[45] cf *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (CA).
[46] *Autoclenz* (n 2).
[47] ibid [34]–[35].
[48] ibid [29].
[49] *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA).

party. The Supreme Court found this test 'too narrow'[50] for employment relationships. Instead, the essential question is simply to discover the 'actual legal obligations of the parties' by examining all the relevant evidence. [51] This evidence includes the written terms as well as how the parties conducted themselves in practice and their expectations of each other. A tribunal must take a 'realistic and worldly wise'[52] approach, recognising that written terms may not reflect the reality of the relationship, especially when dictated by the more powerful party.[53] Ultimately, the goal is to determine what was objectively agreed, whether expressly or impliedly.[54]

In addition, in determining employment status, the Supreme Court in *Uber* ( clarifying the approach of *Autoclenz*) made it clear that the interpretation of employment contracts, *per se*, is subject to (i.e., must yield to and be informed by) the *purpose* of the governing and applicable legislation (the purposive method), such as the Employment Rights Act 1996, the National Minimum Wage Act 1998, and the Working Time Regulations 1998.[55] The aim of these statutes, the Court recognised, is to protect vulnerable individuals who, owing to their 'subordinate and dependent position vis-à-vis their employers', require statutory safeguards.[56] As the Court further explained, the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects'. [57]

In other words, the purpose of employment law, at least in so far as it governs statutory rights, is to distinguish between individuals whose economic position and contractual autonomy enable them to engage with others on broadly commercial terms, and those whose relationship to the person or entity receiving their labour places them in a position of dependency, control, or structural vulnerability.[58] The law protects the latter category not simply because they lack formal contractual power, but because the *substance* of their working

[50] *Autoclenz* (n 2) [23]–[28].
[51] ibid [31].
[52] ibid [34]–[35].
[53] Bogg and Ford (n 44); Robert Upex, 'Workers and the Gig Economy: An Appraisal of the Supreme Court's Decision in the Uber Case' (2021) 26 Coventry Law Journal.
[54] ibid [32].
[55] *Uber (n 5) [70]–[75].*
[56] *Uber (n 5)* [71]; *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) [17].
[57] *Uber (n 5)* [71].
[58] Bogg and Ford (n 44); Adams and Prassl (n 44); Rodgers (n 33); Upex (n 53); Davidov (n 28).

relationship renders them open to abuse or exploitation—due to inequalities of bargaining power, economic reliance, or subordination in the performance of their work.[59]

Employment law, in this sense, is relational: its concern is not the contractual label but the real dynamics of control, dependence, and economic risk.[60] As the Supreme Court stressed in *Uber BV v Aslam* [2021] UKSC 5, echoing and agreeing with the Supreme Court of Canada in *McCormick v Fasken Martineau DuMoulin LLP* [2014] SCC 39, the correlative of subordination or dependency is the degree of control exercised by the putative employer over working conditions and remuneration. The more closely an individual's working life is controlled in this way, the greater their dependency and, consequently, their economic and social vulnerability.[61]

Given this protective purpose, the Court held that it would be 'inconsistent with the purpose of [employment] legislation to treat the terms of a written contract as *the starting point.*'[62] To do so would 'reinstate the mischief which the legislation was enacted to prevent',[63] as it would allow employers, who are often in a position to dictate terms to parties with little or no bargaining power, to contract out of statutory protections.[64] Rather than applying a neutral or commercially orthodox construction, courts are required to adopt an interpretation that furthers the protective aim of the legislation: that is, to secure rights for individuals who are economically dependent, subordinate, or vulnerable within the employment relationship.[65] This includes *avoiding interpretations that would dilute the substance of statutory rights*, legitimise contractual arrangements designed to evade them, or otherwise shift the burden of vulnerability onto the worker contrary to the legislative intention. For, to allow that to happen would mean, as the Court explained in *Uber,* that:

> The efficacy of such protection would be *seriously undermined* if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act *were manifestly enacted to*

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[59] Bogg and Ford (n 44); Davidov (n 28); Rodgers (n 33); Joe Atkinson, 'Zero-Hours Contracts and English Employment Law: Developments and Possibilities' (2022) 13 European Labour Law Journal 347.
[60] Bogg and Ford (n 44); Rodgers (n 33); Atkinson (n 59).
[61] ibid, citing *McCormick v Fasken Martineau DuMoulin LLP* 2014 SCC 39, [2014] 2 SCR 108 [23].
[62] ibid [76].
[63] ibid [71].
[64] ibid [76]–[77].
[65] Davidov (n 1).

*protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it* (emphasis added). [66]

## III. INDICIA OF EMPLOYEE, WORKER, AND SELF-EMPLOYMENT STATUS

The leading Supreme Court authorities have developed three quite distinct clusters of indicia—one that signals a contract of service, a second that signals limb-(b) worker status, and a third that signals genuine self-employment. Each cluster derives from a different doctrinal foundation, but the courts treat the presence or absence of the same concrete features—personal service, control, mutuality of obligation, entrepreneurial risk, and market exposure—as the factual *touchpoints* for deciding where a relationship falls.[67]

### *A. Employee status: contract of employment under era 1996 s 230(1)*

As already noted, the classic test for determining employee status was established by MacKenna J in *Ready Mixed Concrete*.[68] A contract of service exists if three conditions are fulfilled. First, the individual agrees to provide their own work and skill in the performance of a service in return for a wage or other remuneration. This requires an 'irreducible minimum of obligation' on each side,[69] meaning there must be at least some obligation on the individual to perform work and on the employer to provide it.[70] As the Supreme Court clarified in *Uber*, even if an individual has the right to turn down particular assignments, this does not prevent them from being an employee, provided this *minimum level of mutual obligation exists*.[71] Secondly, it requires that the individual agree, expressly or impliedly, that, in performing the service they will be 'subject to the other's control in a sufficient degree to make that other master'.[72] This condition examines the degree of managerial supervision and the power of the engaging party to direct how the work is done. For example, in *Pimlico Plumbers Ltd v Smith,*[73] the combination of branded uniform and van, tight administrative rules, and close supervision of scheduling and conduct pointed to control notwithstanding some freedom to refuse particular jobs. Thirdly, it requires that the other provisions of the contract are consistent with its being a

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[66] *Uber (n 5)* [76].

[67] Adams, Freedland and Prassl (n 18); Countouris, 'Not Delivering: The UK 'Worker'Concept before the UK Supreme' (n 23).

[68] *Ready Mixed Concrete* (n 20).

[69] Nicola Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' in Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart Publishing 2014).

[70] *Nethermere (St Neots) Ltd v Gardiner* [1984] ICR 612 (CA).

[71] *Ready Mixed Concrete* (n 20).

[72] Ibid.

[73] *Pimlico Plumbers* (n 3) [18]–[19].

contract of service.[74] This involves a broader assessment of the relationship. A key factor under this limb is *personal performance*; as MacKenna J noted, a genuine and unrestricted 'freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service'.[75] Other considerations include whether the individual is integrated into the employer's organisation and the degree of financial risk they bear, such as providing their own significant equipment or having autonomy in setting prices.[76]

### *B. Limb-(b) workers: era 1996 s 230(3)(b) three-part test*

For limb-(b) workers (that is, individuals falling within section 230(3)(b) of the *Employment Rights Act 1996*), [77] the legal test for a 'limb (b) worker' is grounded in a three-part statutory definition.[78] As outlined in *Uber*, the three elements are: (1) a contract for an individual to perform work; (2) an undertaking to perform the work personally; and (3) that the other party is not a client or customer of a business undertaking carried on by the individual. [79]

Thus, the requirement of personal service is the foundational requirement.[80] As confirmed in *Autoclenz Ltd v Belcher*,[81] a genuine, unfettered right of substitution is inconsistent with an obligation to perform work personally. The courts will nonetheless adopt a 'sensible and robust view' to prevent form from undermining substance, looking at the reality of the situation to determine if a substitution clause is genuine or simply 'window-dressing'.[82] In *Pimlico Plumbers Ltd v Smith*,[83] the Supreme Court emphasised that the mere presence or use of a substitution right does not necessarily negate the obligation of personal service required for worker status under section 230(3)(b) ERA 1996. The question is whether personal performance remains *the dominant feature* of the contract. Thus, as the Court stated in paragraph 29, 'the right to substitute another Pimlico operative did not negative [the claimant's] obligation of personal performance', likening the limited facility to 'the swapping of shifts

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[74] *Uber (n 5)* [126].
[75] *Ready Mixed Concrete* (n 20).
[76] *Uber (n 5)* [126].
[77] ibid [112]. A definition that the Supreme Court has held carries over, in materially identical form, to other key statutes such as section 54(3) of the *National Minimum Wage Act 1998*, regulation 2(1) of the *Working Time Regulations 1998*, section 83(2)(a) of the *Equality Act 2010*, and section 296(1)(b) of the *Trade Union and Labour Relations (Consolidation) Act 1992*).
[78] ibid [71], [76].
[79] ibid [41].
[80] Rodgers (n 33); Davidov (n 28); Bogg and Ford (n 44).
[81] *Autoclenz* (n 2) [19].
[82] ibid [25], [36].
[83] *Pimlico Plumbers* (n 3) [29].

within a workforce.'[84] In this way, the Supreme Court rejected any rigid rule that the existence, or even occasional use, of a substitution right automatically negates personal service, insisting instead on a contextual assessment of the substance and scope of such provisions.

Accordingly, the central proposition, of particular significance for the subsequent discussion of *Deliveroo*, to be emphasised here is that occasional substitution, or the existence of some delegation, does not itself dislodge the legal requirement of personal service where that remains the *structural centre* of the relationship.[85] What matters is not whether substitution has *ever* occurred, but whether the contractual and operational practicalities continue to rest on the expectation that the individual will personally carry out the work in the ordinary course of events.[86]

This has two significant implications. First, evidence that substitution is permitted or has taken place is not *determinative*—courts are not conducting a tick-box exercise. The presence of a substitution clause or its sporadic use must be assessed in the broader context of the working arrangement.[87] If, despite this, the economic and practical reality is that the business relies on the individual performing tasks themselves, under conditions of ongoing engagement, that is likely to support a finding of personal service. Second, and more importantly, what the jurisprudence *resists is a disqualifying logic*—a mode of analysis in which the mere availability or occasional exercise of substitution rights is used by a platform or employer to defeat statutory protections.[88] The fact that someone may have swapped a shift, or arranged for someone else to cover a job on one or more occasions, does not transform the relationship into one of autonomous contracting.[89] It must be shown that such substitution is meaningful in its effect: that it genuinely shifts the responsibility and expectation of who

[84] ibid.

[85] Upex (n 53); Adams and Prassl (n 44); Adams (n 11); Countouris, 'Not Delivering: The UK 'Worker'Concept before the UK Supreme' (n 23).

[86] Countouris, 'Not Delivering: The UK 'Worker'Concept before the UK Supreme' (n 23).

[87] Bogg and Ford (n 44).

[88] *Uber (n 5)* [75], *citing McCormick* (n 51) [23]; Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) 137 LQR 392, arguing that Uber signals a purposive, statute-led inquiry that displaces contractual formalism; see also Jeremias Adams-Prassl, 'Uber BV v Aslam' (2022) 51 ILJ 955, 961–63. (surveying commentary and emphasising Lord Leggatt's statutory starting point).

[89] Bogg and Ford (n 44); Countouris, 'Not Delivering: The UK 'Worker'Concept before the UK Supreme' (n 23); ibid.

performs the service, and that it forms a *regularised* or structurally significant part of the working model.[90]

Further, the third limb of worker status is determining whether the engaging party is a client or customer—that is, whether the individual is genuinely self-employed, sometimes expressed as working 'on their own account'. However, the Supreme Court has emphasised that an individual cannot be regarded as working on their own account merely by virtue of possessing the contractual freedom to accept or decline particular tasks.[91] The Court has repeatedly rejected simplistic reliance on isolated contractual rights (such as refusing work or substituting oneself) as determinative of self-employment.[92] Instead, it emphasises a multi-factorial analysis that centres on economic dependency, control, and integration into the business of the engaging party.[93]

For example, in *Pimlico*, the Supreme Court made clear that the right to accept or reject assignments, while relevant, does not conclusively establish self-employment. As Lord Wilson noted, the issue of whether someone is working for their own account cannot be resolved by asking only whether there are mutual obligations between assignments.[94] Instead, the Court supported a 'purposive construction' of the contract, focusing on whether the person is integrated into the other party's business and economically dependent on it.[95] In that case, the Court accepted that Mr Smith, the claimant, could reject specific jobs,[96] and even take on outside work.[97] However, it nonetheless upheld the Employment Tribunal's conclusion that Pimlico, the entity Mr Smith engaged with, was not a client or customer. Key to this finding was the *degree of control* Pimlico exercised and how *closely integrated* Mr Smith was into its operations—he wore a branded uniform, drove a tracked van, and followed tight administrative rules.[98] These factors outweighed his formal freedom to refuse work.[99]

### *C. Control, risk, and the client/customer boundary*

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[90] Bogg and Ford (n 44).
[91] *Uber (n 5)* [91]–[101].
[92] *Autoclenz* (n 2) [35]; *Pimlico Plumbers* (n 3) [29], [34]; *Uber (n 5)* [76], [93]–[95].
[93] *Byrne Bros* (n 56) [17]; *Uber (n 5)* [70]–[75].
[94] *Pimlico Plumbers* (n 3) [36]–[41]*, citing Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721 [23].
[95] ibid [47(a)].
[96] ibid [47(b)].
[97] ibid [41].
[98] ibid [48].
[99] Bogg and Ford (n 44).

The test for whether the engaging party is a client or customer of the individual (rather than an employer) was clarified by the Court in *Pimlico*. Drawing on previous authorities, including *Cotswold Developments Construction Ltd v Williams*[100] and *Hashwani v Jivraj*,[101] the Court held that the key is whether the individual *markets services independently to the world at large*, or whether they work as an *integral part of the other's undertaking*. If the individual is subject to the other's direction and control and does not share in commercial risk, they are likely to be a limb (b) worker, not genuinely self-employed.[102]

Thus, in determining whether someone is genuinely self-employed (working for their own account) or a *limb (b)* worker, how the individual appears not only to the engaging entity but also to the end-user or customer is part of the broader assessment into economic dependency and business integration.[103] In *Pimlico*, the Supreme Court supported the approach in *Cotswold Developments Construction Ltd v Williams*, where Langstaff J explained the central distinction: ' … whether the purported worker actively markets his services as an independent person to the world in general … or whether he is recruited by the principal to work for that principal as an integral part of the principal's operations'. [104]

The key test, then, asks who the customer is actually engaging with. If the customer reasonably perceives the individual as an agent or representative of the business, and not as a business in their own right, that is a strong indicator that the individual is not truly self-employed.[105] For instance, in *Pimlico*, although Mr Smith had the ability to turn down jobs or take work elsewhere, the *external presentation of his role*—the van, the uniform, the administrative structure, the branding—meant that *clients experienced him as a Pimlico operative*, not as a trader in his own right.[106] That customer-facing role reflected a *functionally subordinate position* that reinforced his classification as a *worker* under limb (b).

Another dimension that is often overlooked in formalistic approaches is whether the individual can build up their *own* reputation or client base based on the work they perform. This goes to the question of whether they operate a business where, according to the Supreme

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[100] *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 (EAT).
[101] *Hashwani v Jivraj* [2011] UKSC 40, [2011] 1 WLR 1872.
[102] Bogg and Ford (n 44).
[103] ibid; Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (n 69); Davidov (n 28); Ford and Bogg (n 28).
[104] *Pimlico Plumbers* (n 3) [44].
[105] Countouris, 'Not Delivering: The UK 'Worker'Concept before the UK Supreme' (n 23); Rodgers (n 33).
[106] ibid [39]–[41], [46].

Court, they 'benefit of customer loyalty and goodwill', [107] or whether that goodwill accrues solely to the engaging party. That is, the fact that the individual cannot convert successful delivery of work into future client relationships, solicit clients for repeat or separate engagements, or use the completed task to promote their own brand or identity can indicate that they are not in a position to act as an independent economic unit—even if they control aspects of how they deliver the work.[108] This means that, if the economic value and market presence of the individual's labour *belong to the principal*, not the worker, then even substantial freedoms in scheduling or rejection of tasks do not change the fundamental economic dependence. The inability to carry over goodwill, acquire clients, or transfer reputation outside the structure of the engaging party means that the person is operating *within* another's business, not on their own account.[109]

If an individual cannot present themselves to the market as carrying distinct value independent of the engaging entity's infrastructure, then they are not operating as a self-standing business. In other words, economic independence requires more than discretion over logistics or performance mechanics; it demands recognisability as a differentiated market actor. This means that being perceived merely as an extension or instrument of someone else's brand—where the economic value generated flows upward to the principal and the worker remains invisible in their own right—undermines the claim to true self-employment.[110] The legal system, in this context, is not just concerned with who does the work or how; it must also account for *who owns the market identity* and *who accumulates the long-term value* generated by that identity. So, if the person is presented to the outside world only through the shell or face of another organisation—uniformed, branded, rated through another's platform, prevented from client retention or solicitation—they are not differentiated in a way that signals independence, since they are incapable of carrying forward their labour's market effects outside the host enterprise.[111]

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[107] *Uber (n 5)* [101].
[108] ibid.
[109] ibid.
[110] Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (OUP, Oxford 2018).
[111] ibid.

## IV. FROM SUBORDINATION TO SUBSTITUTABILITY: REDEFINING WORKER STATUS IN *UBER* AND *DELIVEROO*

Those principles were tested in two recent Supreme Court decisions—*Uber BV v Aslam* [2021] and *IWGB v CAC* (*Deliveroo*). Taken together, they reconfigure how platform-mediated work is analysed. For clarity, they will be addressed sequentially: *Uber* first, with *Deliveroo* considered in the following subsection.

In *Uber,* the claimants were London private-hire drivers who accessed passengers through Uber's app-based booking system. They brought proceedings seeking statutory protections that turn on "worker" status (including minimum wage and paid leave), while Uber maintained that drivers contracted as independent third-party operators. Following a preliminary hearing, the Employment Tribunal found for the drivers on worker status (and on the related working-time point), and that conclusion was upheld on appeal through the Employment Appeal Tribunal and the Court of Appeal, culminating in Uber's appeal to the Supreme Court.[112]

Thus, in *Uber*, the key legal questions were whether drivers using the Uber app in London in 2016—when Uber London was the dominant operator of its kind—qualified as 'workers' within section 230(3)(b) ERA 1996 and, if so, during which periods they were 'working' for the purposes of associated statutory protections—specifically, the National Minimum Wage Act 1998 and the Working Time Regulations 1998, which adopt the same underlying definition of 'worker'. The Court held that Uber drivers were not *employees* because there was insufficient mutuality of obligation and control outside active engagements—drivers were free to log in and out at will, had no guarantee of work, and Uber was under no obligation to provide it—meaning the relationship lacked the necessary continuity and commitment to sustain a contract of employment.[113] However, the Court held that drivers *could*, under certain circumstances, qualify as workers because of the significant control Uber exercised over the contractual and operational terms of the relationship: Uber set the fare, determined the route, controlled the rating system (which it used to manage performance and discipline drivers), restricted the drivers' ability to communicate directly with passengers, and prohibited price negotiation or any form of personal client relationship.[114]

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[112] Countouris, 'Not Delivering: The UK 'Worker'Concept before the UK Supreme' (n 23); Adams and Prassl (n 44).

[113] *Uber (n 5)* [93].

[114] ibid [93]–[101].

Drivers could not build their own customer base, and any deviation from Uber's stipulated terms—including rejecting too many rides or falling below rating thresholds—risked deactivation. [115] Together, these features established an '*irreducible minimum of obligation'*:[116] while logged in and accepting trips, drivers were not operating independently but were instead subject to Uber's functional subordination and operational command that made them *workers* for the duration of those periods.

However, that conclusion on worker status—for the purpose of working time and minimum wage regulations—was based on *a specific factual context*: Uber's near-total market dominance in London at the relevant time, which made multi-apping (i.e., the practice of drivers simultaneously working across multiple ride-hailing platforms) effectively impossible.[117] In other words, this status existed only where a platform held near-total market dominance. Outside that context—when awaiting rides or logged off—the relationship did not meet the threshold for worker status for the purposes of counting as 'working time'. As Lord Leggatt explained in paragraphs 136-137, agreeing with the Court of Appeal:

> …*If* the reality is that Uber's market share in London is such that its drivers are, in practical terms, unable to *hold themselves out as available* to any other PHV operator, then, as a matter of fact, [when they have the Uber app switched on] they are working at [Uber London's] disposal *as part of the pool of drivers* it requires to be available within the territory at any one time. … *if*, however, it is genuinely the case that drivers are able to also *hold themselves out* as at the disposal of other PHV operators *when waiting for a trip* [i.e., multi-apping], *the same analysis would not apply*.'

And in paragraph 137:

> So far as this court has been shown, no evidence was adduced at the hearing in the employment tribunal *in 2016* that there was at that time any other app-based PHV transportation service operating in London or that drivers logged into the Uber app were as a matter of practical reality also able *to hold themselves out as at the disposal of other PHV operators when waiting for a trip*… *In these circumstances* I do not consider that the tribunal was wrong to find that periods during which its three conditions were met [i.e., that the driver had the Uber app switched on, was within the territory in which

[115] ibid [101].
[116] ibid [129].
[117] ibid [136]–[137].

they were authorised to work, and was willing and able to accept trips] constituted 'working time' for the purpose of the Working Time Regulations 1998. [118]

The effect of this reasoning is a subtle but consequential shift in how worker status is conceived. Market dominance, or its absence, is elevated from a background commercial fact to a factor capable of determining whether the protective purpose of employment law is engaged at all for the purposes of what counts as working time.[119] On this view, the level of competition in the ride-hailing market operates as a proxy for dependency: in a monopolistic market, dependency is presumed—or at least indicators of dependency within the driver–platform relationship carry greater weight—whereas in a competitive market it is presumed absent during periods when the driver is not on an active trip (i.e., logged in and available but awaiting an assignment). What is most striking is the reorientation of the legal focus. Previously, in *Autoclenz* and *Pimlico*, status turned largely on the internal, vertical relationship between individual and engager—control and subordination within that dyad.[120] Paragraphs 136–137 of *Uber*, however, make the meaning of that vertical relationship contingent on an external, horizontal one: inter-platform competition. In this reframing, the driver's legal rights vis-à-vis Uber depend not only on Uber's conduct but also on the structure of the relevant market; a core element of the status test is effectively outsourced from the immediate work relationship to market dynamics.

What is also significant in these paragraphs—and what *Deliveroo* later appears to treat as decisive—is the Court's framing of the key issue not around what any *particular* driver does in practice, but around whether drivers as a group, *as part of a 'pool'* in a competitive or monopolistic market, are in a position to *hold themselves out* as being available to other operators. That is, although there has been comparatively little sustained analysis of the judgment's treatment of 'holding oneself out' during waiting time, a recent Employment Tribunal in *Bandi v Bolt* addressed it directly, reading *Uber* as *not* suggesting that a driver who merely had the *ability* to multi-app (but did not in fact do so) falls outside 'working time,' and treating multi-apping as a matter to be proved by period-specific evidence of actual simultaneous availability.[121]

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[118] ibid.

[119] Davidov (n 1).

[120] Bogg and Ford (n 44); Countouris, 'Not Delivering: The UK 'Worker' Concept before the UK Supreme' (n 23).

[121] *Bandi v Bolt* (ET, 2201382/2021) [74]–[177].

That approach, however, does not sit comfortably with the Supreme Court's own language. In *Uber*, Lord Leggatt framed the test in terms of practical capability at the pool/class level: '*If the reality is that Uber's market share in London is such that its drivers are, in practical terms, unable to hold themselves out as available to any other PHV operator…*' then waiting time is working time; '*if, however, it is genuinely the case that drivers are able to also hold themselves out…* the same analysis would not apply.'[122] The decisive factual inquiry, as confirmed in paragraph 137, was market reality at the relevant time (in 2016, no other app-based PHV service in London and no practical ability to hold out), not whether any *particular claimant* actually multi-apped. Read this way, *Uber* establishes a capability/feasibility threshold (grounded in conditions that apply to the *pool of drivers*), rather than a requirement that the putative employer prove *actual* multi-apping by an individual driver in the periods claimed.

If the Supreme Court had intended an *individual-conduct* test—i.e., that Uber must prove a particular driver actually multi-apped during each period claimed—its reasoning would look very different. One would expect: (i) an *individualised frame*, keyed to the claimant and to what *he/she did*, with language such as 'whether the claimant *did* hold themselves out to other operators during the periods in question,' not class-level phrasing about what 'drivers are *able* to do'; (ii) directions for *period-by-period findings*, instructing tribunals to resolve for each slice of waiting time whether simultaneous availability actually occurred, supported by *data and logs* (device/app activity, GPS, parallel sessions); (iii) an allocation of the *burden of proof* at the driver level (e.g.,, waiting time presumed working time unless the respondent proves actual multi-apping in those periods, or vice versa); and (iv) a construction of 'at the employer's disposal' in WTR 2(1) that turns on exclusive individual availability in fact, with a corollary remittal if the record lacked person-specific proof.

But paragraphs 136–137 of *Uber* indicate none of those signals. The Court grounds its analysis in capability and market reality—whether, as a matter of the London 2016 market, drivers were able to hold themselves out to other operators. The lens is the driver pool and market structure, not the named claimant's minute-by-minute behaviour. Its evidential touchstone is *aggregate feasibility* (the presence or absence of viable competitors) rather than proof that this driver, in this period, actually multi-apped. The vocabulary is consistently one of *ability/feasibility* ('drivers are able to…', 'if it is genuinely the case that drivers are able…')

[122] *Uber (n 5)* [136].

rather than *actuality* (‘did’, ‘was’, ‘in fact’). And instead of remitting for individualised findings, the Court in *Uber* upholds the Employment Tribunal’s (ET) conclusion based on market-level facts (no other app-based private hire vehicle (PHV) service in London at the time), which would have been inadequate had an individual-conduct test been intended.

The significance, then, of using *’hold oneself out‘* as a benchmark is that it creates a fragile and performativity-based standard for legal protection. What is meant is this: During waiting time, the concrete indicia of subordination remain in place: the driver is logged into the system, geofenced within the operating area, surfacing on the allocation grid, subject to acceptance and cancellation thresholds, nudged by routing prompts and disciplined by ratings. Those are classic markers of managerial control. Yet the analysis does not turn on that lived subordination. It turns instead on whether, as a matter of market structure and technical possibility, the driver could simultaneously present themselves as available to a rival operator. In other words, legal attention shifts from what the platform is doing to the worker in that moment to what the worker could plausibly signal to others in that market.

Once the assessment is framed that way, the dispositive evidence becomes capability and visibility rather than conduct. Non-exclusive terms, the ability to keep multiple apps open, and the presence of viable competitors take centre stage, while the platform’s ongoing control during waiting time is treated as insufficient if simultaneous availability is feasible. The worker’s status is therefore filtered through a hypothetical posture of outward availability. If that posture is possible, the law treats the worker as not being at the engager’s disposal even if, functionally, the engager continues to set price, allocate work, and police performance. This is why the standard is performative: the potential to project independence displaces the reality of experienced dependence, and the outcome turns on the external possibility of holding oneself out rather than on the internal dynamics of the relationship.

## V. FROM PERSONAL SERVICE TO PLATFORM ALLEGIANCE: THE RISE OF THE LOYALTY TEST

This matters because the requirement of personal service should not be read as importing a *quasi*-loyalty test or *de facto* exclusivity; as Nicola Countouris cautions, ‘personality’ ought not to be fetishised or turned into a new legal technique replacing the former stranglehold of

mutuality of obligation.[123] This essay argues that such a move produces a flawed conception which the Supreme Court appears to have assumed or elided in both *Uber* and *Deliveroo*: the conflation of personal service with undivided loyalty. The contention here is that personal service and exclusivity are not the same.

Personal service, the *who* question, under section 230(3)(b) ERA 1996 asks whether the individual undertakes to personally perform work for another who is not the individual's own client or customer. This goes to the *identity of performance*: does the engager bargain for that person's labour, skill, reputation, and accountability, rather than a free ability to send someone else? Hence the centrality of substitution analysis. A genuine, unfettered substitution right negates personal service, while a limited or conditional substitution right (such as swapping jobs internally, using a substitute only with the engager's consent, choosing only from the engager's workforce, or substituting only when unable to work) can coexist with it, as clarified in *Pimlico Plumbers*. Exclusivity, the *how many question*, concerns whether the individual can simultaneously or intermittently hold themselves out to others, for example by multi-apping, accepting parallel gigs, or similar. This goes to *allocation of time and availability*, not to identity of performance. A violinist who must play a concert herself, which is personal service, can still accept another concert the next night, which reflects non-exclusivity. Likewise, a plumber who personally attends jobs for Firm X may also take ad hoc jobs for Firm Y; none of that alters who performs the work when engaged by X.

Treating non-exclusivity as if it is the same as personal service subtly swaps the question of who performs for the question to whom else the individual might also be available. Yet a person may remain personally bound to perform for Platform A whenever a task is accepted and in force, even if that person is also capable of signalling availability to Platform B during idle intervals. The existence of external options does not convert the work performed for A into non-personal performance; it merely shows contestable access to the worker's future time.

When exclusivity is allowed to eclipse personal service, analysis shifts away from the substance of the engager–worker relationship, such as price setting, method control, ratings

[123] Nicola Countouris, 'Not Delivering – the UK "Worker" Concept before the UK Supreme Court in Deliveroo' (*Global Workplace Law & Policy*, 2024) <https://global-workplace-law-and-policy.kluwerlawonline.com/2024/01/23/not-delivering-the-uk-worker-concept-before-the-uk-supreme-court-in-deliveroo/>.

discipline, route restrictions, customer contact prohibitions, branding, and integration, and into a market-structure proxy about competitors. And, once the ability to hold oneself out is treated as determinative, availability theatre can trump the concrete indicia of control in the focal dyad. A platform that fixes price, controls method, and sanctions performance still looks like the recipient of personal service. Yet the mere feasibility of non-exclusive signalling elsewhere is allowed to dilute that finding. This, it is contended here, replaces a relationship-based assessment, which focuses on control, dependence, integration, and economic risk, with an external-options test that says little about what the putative employer is actually doing to, and with, this worker when work is performed.

More than that, there is the risk of folding the entire logic of the limb (b) worker category into that of employee status. The UK statutory model—as Baroness Hale explained in *Bates van Winkelhof v Clyde & Co LLP* [2014]—[124] is designed to recognise that not all subordinated or dependent working relationships meet the threshold of full employment but still warrant protection. If courts start to treat exclusivity as a precondition for recognising personal service or dependency, they are implicitly importing a core element of employee status (namely, the expectation of undivided commitment characteristic of the master–servant model) into the lower, more flexible threshold meant for workers.[125]

This undermines the very rationale for having a distinct intermediate category. *Limb (b)* is intended to capture relationships where the individual may have some degree of flexibility or even work across multiple engagements, but still lacks the economic independence or structural bargaining power to be truly self-employed.[126] If exclusivity becomes the evidentiary test for subordination, then only those who operate under conditions very close to employment will qualify as workers; that is, only those who exhibit the kind of total, one-directional commitment typical of a master–servant relationship—characterised by continuous availability—will be deemed sufficiently subordinate.[127] In effect, this reintroduces the core logic of employment into a category meant to capture forms of economic dependence

[124] *Bates van Winkelhof* (n 17).

[125] Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (n 69).

[126] Bogg and Ford (n 44); Countouris, 'Not Delivering: The UK 'Worker'Concept before the UK Supreme' (n 23).

[127] Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (n 69); Bogg and Ford (n 44).

that fall short of that strict hierarchy. The result is that *limb (b)* status loses its identity and becomes a shadow version of limb (a)—a diluted employee category in everything but name.

This has a number of dangerous effects. First, it narrows access to statutory rights—such as minimum wage, paid leave, and whistleblower protection—by raising the bar for inclusion beyond what, it is argued here, Parliament logically intended.[128] Second, it leaves genuinely dependent workers—those who work personally, lack real autonomy, but do so across multiple platforms—*invisible in law:* not independent enough to be self-employed, not exclusive enough to be workers, and never employees. Third, this creates a paradoxical legal trap for the individual. To qualify for the basic protections of a worker (limb b), they are now implicitly required to demonstrate a key feature of being an employee (limb a). Yet, at the same time, platforms can easily defeat a full employee claim by pointing to *the lack of mutual obligation* to provide continuous work.[129] The individual is caught in the middle: the standard for being a worker rises to demand employee-like loyalty, while the contractual structure means they can never actually become an employee. This loyalty test, then, erodes the distinctiveness of the limb (b) worker category from the bottom up. It raises the bar for entry so high that it begins to merge with the employee threshold, *while leaving open all the contractual restrictions that prevent individuals from ever meeting that higher standard*. In other words, the logical error does not just muddle the categories; it hollows out the protective function of the category that was meant to operate in the space between.[130] What is lost is the recognition that dependency can be fragmented, unequal, and non-exclusive—and still be real.

## VI. REVERSING THE FRAME: FROM PROTECTIVE ASSESSMENT TO FORMAL DISQUALIFICATION IN WORKER STATUS DOCTRINE

In addition, when read alongside *Deliveroo*, what is also clear is that even the limited holding in *Uber*—that drivers could qualify as workers during the narrow window in which they were actively transporting passengers—is now significantly constrained. Even that fractional

[128] Alan Bogg, 'A Purposive Approach to "Personal Work Relations": IWGB v Roofoods' (2019) 135 Law Quarterly Review 219; Guy Davidov, 'The Status of Uber Drivers: A Purposive Approach' (2017) 6 Spanish Labour Law and Employment Relations Journal 5.

[129] Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (n 69).

[130] Davidov (n 128); Bogg (n 128).

recognition of worker status, already restricted to periods of active service, has been further undermined.[131]

In *Deliveroo*, the Independent Workers' Union of Great Britain sought statutory recognition for collective bargaining under Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) in respect of a defined group of Deliveroo riders operating in parts of London. The Central Arbitration Committee (CAC) refused the application on the basis that the riders were not 'workers' for the purposes of s 296(1)(b) TULRCA, principally because the contractual arrangements included a right of substitution and riders were free to work for competitors, log on and off at will, and decline jobs. The High Court and Court of Appeal upheld the CAC's decision, and the Supreme Court dismissed the union's appeal, holding unequivocally that, where rights to multi-app or substitute are available—meaning that the platform does not object to their use *so long as they meet certain conditions imposed by the platform, with regard to substitutes, for example*—[132]those rights alone could be sufficient to preclude worker status altogether for the purposes of collective bargaining.[133] The implication is that even during periods of active service (such as transporting goods or passengers), the availability of these rights displaces the obligation of personal service. As such, the presence of a substitution clause or multi-apping capability, where genuine (i.e., where their exercise is not monitored, restricted, or sanctioned by the platform *even if subject to conditions*) could be treated as determinative.[134] As the Court noted in *Deliveroo*:

> *Particularly significant*, in this regard, were the findings…that there was no policing by Deliveroo of a Rider's use of a substitute [*subject to the account holder and the substitute meeting conditions set by the platform*] and Riders would not be criticised or sanctioned for using a substitute...[and] that Deliveroo did not object to the practice of substitution by a Rider for profit *or to Riders working simultaneously for competitors of Deliveroo. In all the circumstances...*This, *of itself*, *is sufficient to determine* [the] issue [of worker status]' (emphasis added).[135]

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[131] Countouris, 'Not Delivering – the UK "Worker" Concept before the UK Supreme Court in Deliveroo' (n 8); KD Ewing, 'Judicial Backpedaling on Trade Union Rights in the Gig Economy: Deliveroo in the United Kingdom Supreme Court' (2024) 10 International Labor Rights Case Law 143.

[132] *IWGB v CAC (n 6)* [25].

[133] *ibid [70]–[71].*

[134] Ewing (n 131).

[135] ibid [70].

Therefore, *Deliveroo* and *Uber* together mark a significant and arguably radical departure from the interpretive approach set out in *Autoclenz/Pimlico* and reaffirmed in *Uber* (before paragraphs 136–37). In those earlier cases, the Court made clear that the proper starting point in determining employment status is not the formal terms of the contract—nor, by extension, any single clause such as a substitution right—but the *underlying purpose* of employment legislation: to protect individuals who are in a position of *subordination and dependency*, and thus vulnerable to economic exploitation.[136] That purpose, grounded in the reality of unequal bargaining power,[137] was understood as the gravitational centre around which all other considerations must orbit.[138] Contractual terms, including personal service, mutuality of obligation,[139] and even substitution, were not treated as ends in themselves but as evidential components to be interpreted in light of this *overarching context of unequal bargaining power.*[140]

The logic, as articulated in *Autoclenz*, was that employment contracts are not to be read like ordinary commercial agreements, because the parties are not typically negotiating on equal terms.[141] A 'realistic and worldly wise'[142] approach required courts to examine the practical substance of the relationship—how control is exercised, how dependent the worker is on the platform, and what risks and vulnerabilities arise from that dynamic. Under this method, facts such as substitution or multi-apping *might be relevant*, but they would be assessed as *features of the broader relational context*—not as decisive legal tests in their own right. [143]

In *Deliveroo*, however, the Court appears to reverse that logic. Rather than beginning with a contextual assessment of subordination and vulnerability, and reading the substitution or multi-apping rights as facets of that broader relationship, the Court treats these rights as *self-*

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[136] *Uber (n 5)* [75], *citing McCormick* (n 51) [23]; Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) 137 LQR 392, arguing that Uber signals a purposive, statute-led inquiry that displaces contractual formalism; see also Jeremias Adams-Prassl, 'Uber BV v Aslam' (2022) 51 ILJ 955, 961–63. (surveying commentary and emphasising Lord Leggatt's statutory starting point).

[138] *Uber (n 5)* [63], [78].

[139] Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (n 69).

[140] ibid [76]; Alan Bogg and Michael Ford, 'Between Statute and Contract: Who is a Worker?' (2019) 135 LQR 347 (distinguishing "contractual Autoclenz" from "statutory Autoclenz" and urging a purposive, context-sensitive methods)

[141] *Autoclenz* (n 2) [34]–[35].

[142] ibid.

[143] ibid [32].

*standing disqualifiers*—legally determinative without further interrogation. [144] The existence of a genuine and unpoliced right to substitute, or the freedom to work for multiple platforms, is treated as sufficient in itself to negate the obligation of personal service, and by extension, to exclude the individual from limb (b) worker status. [145]

This is a structural reordering of the assessment. It means that the presence of certain contractual freedoms is now read as conclusive of legal status, without asking who controls their use or what they suggest about the underlying power dynamics. [146] It also risks detaching the requirement of personal service from the protective rationale it is meant to serve.[147] That is, instead of asking whether the worker is, in substance, dependent, subordinate, and thus in need of statutory protection, the legal assessment now begins with the existence of a clause (unfettered only to the extent that the platform sets restrictive conditions and does not seek permission for those under its control to attempt to meet these conditions for substitution), and ends with a categorical conclusion.

Yet the fact that a worker may *legally* substitute or *technically* multi-app does not, in and of itself, tell us whether they are in a position of real autonomy.[148] The existence of such freedoms may be largely notional, rarely exercised, or exercised only at significant economic cost, as the Court itself openly acknowledges with regards to multi-apping:

> …The CAC found that some Riders could and did have several apps open at once, taking jobs as and when offered and maximising the chance of work. In practice, however, it would be *tricky and risky* to undertake simultaneous deliveries for different food delivery companies. Since delivery times were monitored and persistent slow deliveries were a cause of termination, there was a disincentive in doubling up orders for different companies.[149]

This brief but telling observation by the Court—describing multi-apping as 'tricky and risky'—is very suggestive. What it recognises, perhaps without fully confronting, is that the existence of a right does not translate into its practical exercise. The reason riders find it

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[144] *IWGB v CAC (n 6)* [70].
[145] ibid.
[146] *Uber (n 5)* [75], *citing McCormick* (n 51) [23].
[147] ibid [80]; Davidov (n 1).
[148] Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (n 69); Davidov (n 28); Ford and Bogg (n 28); Bogg and Ford (n 44).
[149] *IWGB v CAC (n 6)* [30].

difficult and hazardous to engage in simultaneous work across platforms is not due to personal preference or lack of motivation, but because the operating environment engineered by the platforms makes such conduct structurally precarious.[150] For a rider to deliver simultaneously for different companies, they would have to juggle separate orders, timelines, geolocations, and performance metrics—all within systems that impose real-time monitoring and penalties for perceived underperformance. [151]

In that sense, what the Court labels as 'tricky and risky' is a reflection of how tightly constrained the worker is by the platform's algorithmic surveillance, performance expectations, and implicit threat of termination. The difficulty lies not in the act of multi-apping *per se*, but in *the architecture of control* that renders the attempt risky—both economically and personally.[152] A worker might attempt to 'double up' only to find that even a minor delay in one delivery results in a poor rating, a warning, or eventual deactivation.[153] The supposed right, then, is hedged by a series of disincentives and deterrents that make its exercise *technically possible* but *practically implausible, at least for the long term*.[154]

That is, long-term impracticality exists because of what sociologist Cosmin Popan has described as the experience of 'snapping' in the context of platform labour.[155] In his ethnographic research on gig economy riders, Popan uses the concept of snapping to capture the *tipping point at which the accumulation of micro-pressures—economic strain, algorithmic control, customer incivility, bodily fatigue, and lack of organisational support—becomes unsustainable* for the rider.

However, *snapping* is not about a single dramatic incident; rather, it is a *slow build-up of constraints, risks, and frustrations* that riders absorb in the name of flexibility and independence, until they reach a threshold beyond which continuing to endure the platform's working conditions is no longer viable—physically, mentally, or financially. The rider 'snaps' not because of an isolated grievance, but because the structure of the work *systematically*

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[150] Cosmin Popan, 'The Fragile 'Art' of Multi-Apping: Resilience and Snapping in the Gig Economy' (2024) 56 Environ Plan A 802; Nicola Christie and Heather Ward, 'The Health and Safety Risks for People Who Drive for Work in the Gig Economy' (2019) 13 J Transp Health 115.

[151] Ibid.

[152] Popan (n 150).

[153] ibid; Christie and Ward (n 150).

[154] Popan (n 150).

[155] ibid.

*narrows the margin for tolerable effort*, amplifying the emotional and logistical costs of compliance over time.[156]

It is not that riders are incapable of navigating multiple apps—it is that doing so within the *persistent climate of surveillance, threat of deactivation, and optimisation pressures* imposes a cumulative burden.[157] Over time, the attempt to sustain autonomy within a structure that punishes even small deviations from algorithmic expectations *produces diminishing returns*, not just in earnings but in mental and bodily endurance.[158] The very fact that the Court in *Deliveroo* acknowledges these risks shows that the right to multi-app is not fully external to the platform's sphere of control. It does not represent an escape from subordination but rather a site in which subordination is reproduced and enforced—precisely through the mechanisms that make the exercise of that right so fraught.[159] The 'freedom' is one whose exercise is shaped, limited, and, in the end, disciplined by the unequal power relation the worker is embedded in.

This is why it is not analytically coherent to treat the right to multi-app as evidence of independence or contractual autonomy. Its existence—and more importantly, its conditional intelligibility—presupposes the very inequality in power it is then used to disprove.[160] The right only arises, is only legible, within a context in which the platform controls the worker's access to income, governs the metrics of success, and withholds or withdraws opportunity at will.[161] What appears as 'freedom' is, in effect, a tolerance—a margin of *permitted deviation* which is both delimited by the platform and reversible at any time.[162]

We see this same structure at work in the treatment of substitution. In *Deliveroo*, the Court accepted that riders had a contractual right to nominate a substitute—but what was striking, and tellingly under-analysed, was that this right was itself so heavily conditioned as to be nearly unusable in practice. Even the Court acknowledged that substitution was rarely, if

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[156] Cosmin Popan, 'The Fragile 'Art' of Multi-Apping: Resilience and Snapping in the Gig Economy' (2024) 56 Environ Plan A 802; Nicola Christie and Heather Ward, 'The Health and Safety Risks for People Who Drive for Work in the Gig Economy' (2019) 13 J Transp Health 115.

[157] Callum Cant, *Riding for Deliveroo: Resistance in the New Economy* (Polity Press 2019); Alex Rosenblat, *Uberland: How Algorithms Are Rewriting the Rules of Work* (University of California Press 2018).

[158] Will Mbioh, 'Mapping Precarity: How the UK Supreme Court Redistributes Risk and Value in the Gig Economy' [2025] Industrial Law Journal dwaf037. https://doi.org/10.1093/indlaw/dwaf037 accessed 8 February 2026.

[159] Cosmin Popan, 'The Fragile 'Art' of Multi-Apping: Resilience and Snapping in the Gig Economy' (2024) 56 Environ Plan A 802; Nicola Christie and Heather Ward, 'The Health and Safety Risks for People Who Drive for Work in the Gig Economy' (2019) 13 J Transp Health 115.

[160] Mbioh (n 158).

[161] ibid; Christie and Ward (n 150).

[162] Cant (n 157); Rosenblat (n 157).

ever, exercised, stating at paragraph 28 that 'a few, if that, Riders use substitutes. Most Riders did not use a substitute as they did not need to do so'. [163] However, rather than interpreting that rarity as indicative of lack of power and autonomy, it treated the mere existence of the 'unfettered' right as legally sufficient to disqualify worker status.[164]

Yet the reason substitution was so seldom used was symptomatic of the same unequal power dynamics seen with multi-apping. Riders could not simply choose a willing person to step into their role. Deliveroo's standard agreement—unilaterally imposed—required that any substitute satisfy a series of strict and platform-controlled conditions.[165] First, the rider had to notify Deliveroo *in advance*, providing the substitute's full name and contact details, and obtain Deliveroo's prior approval. [166] Second, the substitute had to pass through Deliveroo's internal exclusion checks—meaning they could not be someone previously banned or excluded by the platform.[167] This operated much like a form of pre-screening or person specification, as one might find in a human resources setting, used to control who is deemed acceptable before any engagement takes place. [168] Third, the substitute had to independently satisfy all onboarding and registration requirements applied to riders themselves, including proof of right to work in the UK, a valid passport or ID, a national insurance number, proof of address, and, where applicable, a driver's licence and insurance for food delivery.[169] They were also required to use all appropriate safety equipment—including a helmet and thermally insulated food storage bags. In other words, to be eligible to act as a substitute, one effectively had to meet all the requirements necessary to be a fully registered Deliveroo rider. [170]

At this point, the entire logic of substitution becomes problematic. What rational actor, having gone through the administrative, legal, and financial hurdles to become Deliveroo-compliant, would then choose to work under someone else's account, without direct access to earnings or the ability to build their own profile? The system renders the right illogical in its own terms. Since all value on the platform derives from access to *its* infrastructure—its job flow, pricing system, and branding—there is nothing of residual value left for the principal to

[163] *IWGB v CAC (n 6)* [28].
[164] ibid [70].
[165] *IWGB v CAC* (n 6) [25].
[166] ibid.
[167] ibid.
[168] ibid.
[169] ibid.
[170] ibid.

confer.[171] Once someone is fully Deliveroo-compliant, they are no longer in need of intermediation. Substituting into someone else's account provides no efficiency, no added access, and introduces financial opacity and dependence.[172] Seen this way, the substitution clause fails not merely because it is operationally burdensome or administratively convoluted. It fails because, at the level of economic logic, it is built on a redundancy. The right to substitute cannot be exercised because there is no rational actor on the other side that would possibly be willing to accept the offer because it is commercially devoid of incentive.

Hence, it is illogical for the Court to claim that the substitution right in Deliveroo was *unpoliced* or that the platform *did not object to its use*[173] because the structure of the substitution mechanism *itself* constituted a form of *anticipatory enforcement*. The requirement that any potential substitute must pass through an elaborate vetting and compliance regime—administered solely by the platform—renders externalised enforcement unnecessary. Policing does not have to take the form of *reactive discipline* when *proactive gatekeeping* has already foreclosed most routes of entry.

Deliveroo does not need to object to a substitute *after the fact* when it has already embedded an extensive pre-clearance regime that acts as a screening device. This regime functions as a series of filters: each designed not to monitor behaviour *post hoc*, but to ensure that only those who already meet all platform criteria—and thereby qualify to be account-holders in their own right—can even be considered as substitutes. In effect, the act of substitution is not an open discretionary power but a tightly chaperoned handover that recapitulates the full onboarding journey. This is not 'unpoliced; 'it is structured in such a way that the policing is *front-loaded* and implicitly anticipatory.

Describing the right as 'unfettered' or 'unmonitored' confuses the absence of visible policing with the absence of constraint. In practice, constraint is built in at the front end: the vetting and compliance requirements are configured so that exercising the right is, for most riders, impracticable from the outset.[174] Thus, the platform's 'non-objection' is not a mark of tolerance but a symptom of having engineered a regime in which objection is structurally

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[171] Cant (n 157); Rosenblat (n 157); Mbioh (n 158); Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press 2018).

[172] Mbioh (n 158).

[173] ibid [70].

[174] Mbioh (n 158); Émile Baril, 'Citizen-Rentier-Ship: Delivering the Undocumented to Labour Platforms in Paris' (2024) 56 Antipode 1132; Cosmin Popan, 'The Fragile 'Art'of Multi-Apping: Resilience and Snapping in the Gig Economy' (2024) 56 Environment and Planning A: Economy and Space 802.

unnecessary. This makes the claim of non-interference conceptually incoherent: it presumes freedom where the architecture has already rendered freedom self-defeating.[175]

And, interestingly, the Deliveroo substitution clause, in practice, mirrors the constraints seen and rejected by the Supreme Court in *Pimlico Plumbers Ltd v Smith* [2018]. [176] If we recall, in *Pimlico*, the Supreme Court rejected the idea that a right to substitute negated personal service because the so-called 'right' was so constrained as to be effectively meaningless.[177] The substitution clause permitted substitution only with another Pimlico worker, already approved and integrated into the company's structure. [178] This, the Court held, did not undermine the obligation of personal service; the worker remained tightly embedded within a regime of organisational control and selection. Substitution in that context was not a true expression of autonomy—it was an internal managerial arrangement dressed up as flexibility.[179]

Deliveroo's model echoes this dynamic, albeit through a more decentralised and digitally-mediated structure. The substitution clause in the Deliveroo contract purports to offer riders freedom to appoint substitutes, but in practice, the operational and procedural conditions imposed by Deliveroo recreate a structurally similar constraint. In that, *like Pimlico*, the rider may only substitute someone who is effectively already part of—or immediately able to join—the firm's approved ecosystem: they must satisfy all onboarding, immigration, insurance, and safety checks. Similarly, *like Pimlico*, Deliveroo retains discretion to approve or reject the substitute. Although, unlike Pimlico, Deliveroo's clause is formally broader because it does not require that a substitute already be a Deliveroo rider, its practical operation is equivalent: only individuals who already satisfy, or can immediately satisfy, the platform's full onboarding, compliance, and eligibility conditions can act as substitutes, thereby confining substitution to those effectively within Deliveroo's controlled ecosystem.[180]

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[175] Cant (n 157); Rosenblat (n 157); Mbioh (n 158); Prassl (n 171).
[176] *Pimlico Plumbers* (n 3).
[177] ibid [29], [34].
[178] ibid [34].
[179] ibid.
[180] Countouris, 'Not Delivering – the UK "Worker" Concept before the UK Supreme Court in Deliveroo' (n 8); Ewing (n 131).

## VII. DELIVEROO, SUBSTITUTION CLAUSES, AND THE AVOIDANCE OF THE STATUTORY, PROTECTIVE PURPOSE

However, this essay would further argue that there is a deeper, more structural parallel: in both cases, substitution clauses function as *techniques of avoidance*—legal devices crafted to *simulate* autonomy in order to *defeat statutory worker protections*, while leaving the platform or employer's functional control and benefit untouched. As the Supreme Court recognised in paragraphs 79-80 of *Uber*, UK employment law is based on an anti-avoidance logic. For example, the Employment Rights Act 1996 (s.203), the National Minimum Wage Act 1998 (s.49), and the Working Time Regulations 1998 (reg.35) all include strong *prohibitions on contracting out.* These provisions are designed to prevent employers from evading statutory protections—whether directly or *indirectly*. As Lord Leggatt states in paragraph 80 of *Uber*:

> It is just as inimical to the aims of the legislation to allow its protection to be *limited* or excluded indirectly by the terms of a contract as it is to allow that to be done in direct terms. [181]

The contention here is that there is great significance to Lord Leggatt's emphasis on the words *'limited'* and *'indirectly'* in paragraph 80 of *Uber*. The inclusion of *'limited'* broadens the scope of protection beyond absolute exclusions. A contract does not need to wholly remove a right to fall foul of the statute—it is enough that it diminishes, dilutes, or circumscribes the scope or operation of that right. In the context of substitution clauses, this matters greatly. Deliveroo does not expressly require personal service, but introduces a substitution mechanism so hedged with procedural and operational constraints that it erodes the practical reality of personal service, thus *limiting* the worker's ability to access statutory rights through the constructed fiction of autonomy.

By specifying *'indirectly'*, the statute attempts to achieve avoidance through legal form rather than factual substance: employers cannot bypass employment protections by structuring contracts in ways that formally preserve a right while functionally defeating its exercise. Deliveroo's substitution clause is a textbook example: the right exists *on paper*, but is so procedurally complex, risk-laden, and unequal in liability that it is, in substance, unusable for most riders. The clause becomes a device for the platform to argue the absence of personal service—and hence defeat worker status—while retaining the economic benefit and managerial control. That is to say, the drafters of employment statutes included 'limited' and 'indirectly'

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[181] *Uber (n 5)* [80].

precisely to capture this kind of contractual design. The intent was to make clear that statutory protections cannot be contracted out of *by implication*, manipulation, *or* technical drafting. Substitution clauses that are constructed to *appear* expansive while remaining *effectively unusable* fall within what these provisions were meant to prohibit.

Importantly, it is also worth recognising that Lord Leggatt in *Uber* (drawing on *Autoclenz*) emphasises a significant shift in the legal approach: the test for whether a clause avoids statutory protections does not rest on proving a 'sham' in the narrow, technical sense defined in *Snook v London and West Riding Investments Ltd*.[182] Instead, the key question is whether the written contract reflects the true substance of the agreement. That is, the 'sham' test in *Snook* requires evidence of a mutual intention to deceive—that both parties agreed the term would have no real effect.[183] This is an unusually high bar, and not appropriate for employment contexts, where formal documentation is often unilaterally drafted by the employer or platform, and accepted without negotiation. Lord Clarke in *Autoclenz*[184] and Lord Leggatt in Uber (in agreeing with Lord Clarke) reject the idea that workers must prove bad faith or collusion to displace written terms.[185] Instead, tribunals are directed to ask whether the contract reflects what the parties genuinely agreed and how that agreement operates in practice.[186] Particularly in employment and quasi-employment relationships—where workers often have little choice or voice in shaping terms—the protective purpose of statutory rights would be undermined if courts confined themselves to the written text alone. The law thus requires tribunals to assess factual substance over contractual form, and to recognise structural power inequalities that may produce contracts designed to frustrate or avoid rights.[187]

## VIII. SUBSTITUTION CLAUSES AS JUST ANOTHER *SNOOK*-STYLE SHAM TEST AND QUASI-FORMALISM?

As such, this essay contends that the Supreme Court's reasoning in *Uber* (especially at paragraphs 136–137) and *Deliveroo* in effect undermines the protective purpose of employment law by re-importing a form of formalism that is dressed in the language of factual assessment, but in practice functions to narrow the test to something strikingly close to the *Snook*-style sham test. While the Court does not formally require a mutual intention to deceive,

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[182] *Snook v London & West Riding Investments* (n 23).
[183] ibid.
[184] *Autoclenz* (n 2) [23]–[28].
[185] *Uber (n 5)* [62].
[186] ibid.
[187] ibid [80].

as in *Snook*, it nevertheless sets an evidentiary threshold that requires claimants to show that no one (or close to no one) meaningfully exercises the clause in practice, or that the platform explicitly objects to its use.[188] This shifts the analysis away from structural constraints, economic risks, and embedded deterrents, and instead centres it on observable, binary outcomes—was the clause used, and if so, was it blocked? This version of the 'practical reality' test, whether workers do in fact substitute or multi-app, and whether the platform actually intervenes, *is operationally close to asking whether a clause is sham-like*, in the sense that it is completely unused or explicitly contradicted. It implicitly assumes that unless the clause is illusory *in the most literal sense* (i.e., absolutely nobody uses it or the platform affirmatively blocks its use), it must reflect a true legal arrangement.

This approach reintroduces quasi-formalism by shifting attention away from the internal structure and surrounding context of the clause[189] and instead making the legal test contingent on a visible rupture—an explicit veto, a measurable absence of take-up, a statistical anomaly. However, requiring proof of actual interference or statistical non-usage as the test for 'practical reality' flattens the doctrinal concern into a binary evidentiary threshold. It no longer interrogates the *conditions* under which such clauses could meaningfully be exercised. Instead, it treats formal silence or sporadic usage as sufficient validation, and thus narrows the legal lens to *a logic of contradiction* rather than one of relational dominance.[190]

What this elides is precisely what *Autoclenz* and *Pimlico* had articulated: that the legal character of a work relationship does not rest on whether substitution was *sometimes* used, but on whether the dominant feature of the working arrangement was *personal service*. [191] In those earlier cases, courts refused to be distracted by isolated instances or formal permissions.[192] They assessed how the relationship functioned over time, whether control and dependency persisted even where nominal freedoms were granted.[193] The reasoning now, however, privileges an evidential logic that treats *absence of contradiction as equivalent* with fact.

In doing so, it substitutes a relational analysis—attuned to power, dependency, and structural constraint—[194] with a formal test: if the platform permits it, and does not prevent its

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[188] *IWGB v CAC (n 6)* [70].
[189] Bogg and Ford (n 44).
[190] Bogg (n 128); Davidov (n 128).
[191] *Pimlico Plumbers* (n 3) [29], [34].
[192] Bogg and Ford (n 44); Ford and Bogg (n 28); de Gioia Carabellese and Della Giustina (n 9).
[193] ibid.
[194] Bogg and Ford (n 44); Ford and Bogg (n 28); de Gioia Carabellese and Della Giustina (n 9).

exercise, the right must be genuine.[195] This logic displaces the doctrinal imperative of examining the substance of control and replaces it with a surface-level consistency between written permission and non-objection. That is a form of quasi-formalism and re-entrenchment of the very legal fictions *Autoclenz* was meant to guard against.[196]

## IX. LEGAL NON-PLACE: NOT WORKER BUT SELF-EMPLOYED?

Furthermore, in attempting to resolve the legal status of riders and drivers through a form of quasi-formalism that departs from the purposive, protective approach of *Autoclenz*, the Court in *Deliveroo* and *Uber* instead removes them from worker protections without credibly situating them within any coherent or legally meaningful alternative category. The result is not only exclusion from one status (worker or employee), but a kind of legal *non-place*—a zone of disqualification in which no existing status quite fits.

This stems from a deeper contradiction at the centre of the Court's reasoning. The Court refuses to recognise these individuals as workers because of the presence of 'freedoms' like substitution and multi-apping—interpreted as indicators of autonomy.[197] But those same freedoms, when viewed through the lens of genuine self-employment, fail to establish the strong hallmarks of entrepreneurial independence: there is no real control over pricing, branding, client relationships, or platform design. The riders and drivers are not operating as autonomous business units—they are *entirely dependent* on the infrastructural, algorithmic, and economic system imposed by the platform. As the Court explained in *Uber*, at paragraph 101 in relation to drivers—reasoning that, in general terms, also applies to riders in *Deliveroo*:

> Taking these factors together, it can be seen that the transportation service performed by drivers and offered to passengers through the Uber app *is very tightly defined and controlled by Uber*. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which *drivers are perceived as substantially interchangeable* and from which Uber, rather than individual drivers, *obtains the benefit of customer loyalty and goodwill*. From the drivers' point of view, the same factors - in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers - *mean that they have little or no ability to improve their economic position through*

[195] Ewing (n 131).
[196] Davidov (n 128); Bogg (n 128).
[197] Ewing (n 131).

> *professional or entrepreneurial skill*. In practice the only way in which they can increase their earnings is *by working longer hours while constantly meeting Uber's measures of performance*.[198] (emphasis added)

What the Court is observing is that Uber has constructed a centralised, tightly governed operational system in which the driver functions *not* as a business partner or entrepreneurial actor, but as a *subordinate execution unit*. The system is designed such that all commercially meaningful levers—pricing, customer engagement, branding, route configuration, payment terms—are retained by Uber. The driver, by contrast, is granted only narrow, *conditional access to the app's dispatch interface* and is locked into a position of interchangeability, governed through behavioural metrics and performance analytics. What appears to be 'freedom' in the abstract—choosing when to log on, for example—is, in effect, *a tightly managed interface privilege* that is revocable, tiered, and conditioned by platform performance data.

Within the system described by the Court, the only real lever of control that drivers/riders have is deciding how many hours to work in order to meet a specific income target. They are not in a position to set their own prices, develop their own clientele, adjust the terms of engagement, or improve their margins through skill, strategy, or service differentiation. Their scope of *agency is limited to time allocation*: working more hours, at times when demand might be higher (e.g., surge pricing), and maintaining performance standards as defined by the platform to avoid throttling or deactivation. Even this is constrained, since access to more lucrative periods or areas may be algorithmically gated by past behaviour or platform-determined eligibility. As such, 'control' is reduced to a form of labour quantity management within a tightly bounded, externally programmed environment.

If we take paragraph 101 seriously—if we accept what the Court itself says about the driver's position—then it becomes *legally and conceptually impossible* to claim that these individuals are self-employed. And if that is true, then, it means the Court's quasi-formalist reasoning has resulted in a position where platform-mediated workers are, therefore, *without legal status*. In that, UK employment law, as set out in *Bates van Winkelhof v Clyde & Co LLP*, recognises three distinct categories: employee, worker, and self-employed. Each rests on mutually exclusive criteria. Employees are characterised by mutual obligations and

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[198] *Uber (n 5)* [101].

subordination;[199] workers, by personal service under some measure of control but without the full incidence of mutuality;[200] and the self-employed, by entrepreneurial independence—control over pricing, branding, client relationships, and the assumption of commercial risk.

Platform-mediated labourers fall outside all three. They are not employees, since there is no reciprocal duty on the platform to provide work, nor on the individual to accept it. They are not workers, because the Court has interpreted the presence of substitution rights or multi-apping freedoms as negating the requirement of personal service, even if those rights remain largely notional. Nor are they self-employed, as the platforms retain control over all economically meaningful levers—price, customer access, and service design—leaving individuals with no entrepreneurial discretion beyond the number of hours worked.

The result is what might be described as a 'categorical void.' Although the statutory system presupposes that every working person must fall within one of the three recognised statuses,[201] the Court's reasoning in *Uber* and *Deliveroo* produces the opposite outcome: a workforce that is simultaneously subordinated in practice and excluded in law. By interpreting notional freedoms as disqualifying, while refusing to treat platform-controlled dependency as determinative, the Court has created a legal non-place. These individuals are denied the rights associated with employment and worker status, but they are equally unable to satisfy the criteria for genuine self-employment. The Court's reasoning therefore fails on its own terms and generates a contradiction between the formal insistence on exhaustive classification and the substantive reality of exclusion.

## X. RISK ALLOCATION AND THE POLITICAL ECONOMY OF 'ASSET-LIGHT' PLATFORMS

The doctrinal move that produces this categorical void has a material, distributive consequence: it reallocates business risk from platforms to workers. By treating substitution and multi-apping as self-standing disqualifiers, while declining to recognise dependency during waiting time, the law authorises platforms to externalise the costs of maintaining ready-to-serve capacity.[202] Idle

[199] Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (n 69); Davidov (n 28); Countouris, 'Not Delivering – the UK "Worker" Concept before the UK Supreme Court in Deliveroo' (n 8).

[200] Countouris, 'Uses and Misuses of "Mutuality of Obligations" and the Autonomy of Labour Law' (n 69).

[201] Bogg and Ford (n 44); Davidov (n 28); Ford and Bogg (n 28).

[202] Kelvin Taylor and others, 'Physical and Psychological Hazards in the Gig Economy System: A Systematic Review' (2023) 166 Safety Science 106234; Mbonigaba Celestin and N Vanitha, 'The Gig Economy and Its Effects on Personal Finance' (2021) 5 Indo American Journal of Multidisciplinary Research and Review

time, demand volatility, dead miles, equipment purchase and depreciation, insurance premiums, and reputational penalties tied to ratings are all shifted onto individuals who are constrained by the platform's pricing, allocation, and performance systems.[203] In effect, the worker finances the platform's just-in-time labour supply, absorbing the slack that would otherwise sit on the company's balance sheet.[204]

This pattern dovetails with the 'asset-light' model that underwrites platform profitability. The platform retains ownership of the customer relationship, the pricing architecture, the brand, and the data infrastructure, but it does not carry the fixed costs of fleet, inventory, or a guaranteed wage bill for the capacity it requires to be constantly available.[205] Judicial reluctance to count waiting time as working time, and readiness to treat notional freedoms as dispositive of status, functionally ratify this configuration. The firm keeps the upside of instant fulfilment and market share, while the worker underwrites the downside risk of fluctuation and non-utilisation.[206]

Although the judgments do not articulate a policy rationale in these terms, the structure of the holdings suggests an underlying anxiety about recognising worker status outside moments of active engagement. Two concerns appear to be doing the tacit work. First, a fear of indeterminacy and measurement: if waiting time were treated as working time, tribunals and firms would need to grapple with granular evidence about log-ins, geo-fenced availability, and simultaneous app usage, with consequent back-pay and compliance exposure. Second, an economic fear of 'floodgates': recognising ubiquitous waiting time as compensable would raise labour costs across the sector, potentially altering price, service coverage, and the competitive landscape. In privileging administrability and cost containment, courts have opted for bright-line exclusions that are easy to apply but that ignore how control and dependency operate during the very periods the business model depends on.

The result is a subsidy, borne by workers, that sustains the platform's promise of immediacy.[207] The option value created by a large pool of always-available labour is monetised

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39; Karen Gregory, '"My Life Is More Valuable than This": Understanding Risk among on-Demand Food Couriers in Edinburgh' (2021) 35 Work, Employment and Society 316.

[203] Prassl (n 88).

[204] Celestin and Vanitha (n 202); Pedro Mendonça, Nadia K Kougiannou and Ian Clark, 'Informalization in Gig Food Delivery in the UK: The Case of Hyper-Flexible and Precarious Work' (2023) 62 Industrial Relations: A Journal of Economy and Society 60.

[205] Nick Srnicek, *Platform Capitalism* (Polity Press, Cambridge 2017).

[206] Taylor and others (n 202); Celestin and Vanitha (n 202); Gregory (n 202).

[207] Taylor and others (n 202); Celestin and Vanitha (n 202); Gregory (n 202).

by the firm through customer acquisition and retention, yet the option's carrying cost is imposed on individuals as unpaid availability and heightened exposure to sanction if they try to hedge by multi-apping.[208] In distributive terms, the legal test transforms a managerial choice about staffing into a private risk borne by those least able to price or diversify it.[209]

More than that, the same doctrinal choices also transfer risk from firms to the state.[210] By excluding waiting time from the scope of working time and by treating notional freedoms as dispositive of status, the law depresses and destabilises earnings in a way that increases reliance on publicly funded safety nets. Income shortfalls generated by unpaid availability are partly backfilled through Universal Credit, housing support, and council tax relief; sickness and injury costs that would otherwise be cushioned by employer sick pay and occupational schemes are shifted to statutory benefits and the NHS.[211] The non-recognition of worker status also removes employer national insurance contributions and auto-enrolment pension contributions, shrinking the fiscal base today and increasing pressure on means-tested support in old age tomorrow.[212] In effect, the platform's choice to run an asset light labour model is underwritten twice: workers absorb the volatility privately, and the state absorbs the residual insecurity publicly. Recognising this transfer does not require abandoning legal coherence: it requires returning to a purposive frame in which status determinations track where economic control, benefit, and risk actually reside, including during waiting time.

## XI. WHAT THE COURT SHOULD HAVE DONE: REASSERTING THE PURPOSIVE PROTECTIVE FRAME

The appropriate judicial response, consistent with both the protective purpose of employment legislation and the statutory anti-avoidance provisions, is not to ask whether a clause is *used* or *prohibited* in practice, but whether its *operative logic within the structure of the relationship tends toward exclusion of the rights the legislation is designed to secure*. This requires a return

[208] Celestin and Vanitha (n 202); Pedro Mendonça, Nadia K Kougiannou and Ian Clark, 'Informalization in Gig Food Delivery in the UK: The Case of Hyper-Flexible and Precarious Work' (2023) 62 Industrial Relations: A Journal of Economy and Society 60.

[209] Rosenblat (n 157); Baril (n 174).

[210] House of Commons Work and Pensions Committee, *Self-Employment and the Gig Economy: Government Response to the Committee's Thirteenth Report of Session 2016–17* (HC 644, 2017).

[211] ibid; Volodymyr Bielousov and others, 'The Gig Economy and Its Impact on Social Security and Social Protection of Employees' [2023] Revista de Derecho de la Seguridad Social, Laborum; Valeria Filì and others, 'Platform Workers' Needs and Social Security Challenges' in Emanuele Dagnino, Armando Rocha and others (eds), *Legal Issues in the Digital Economy: The Impact of Disruptive Technologies in the Labour Market* (Springer, Cham 2020) 105.

[212] House of Commons Work and Pensions Committee (n 142).

to a *relational and purposive mode of assessment*, rather than one that rests on binary evidence of uptake or explicit contradiction.

To that end, a practical and legally principled test can be framed as follows: When faced with a clause—whether one permitting substitution, multi-apping, task rejection, client solicitation, or any similar contractual liberty—the question is not merely whether the clause is exercised or blocked, but whether, within the *total architecture of the working relationship*, the clause meaningfully alters the dependency, subordination, or economic control experienced by the individual.

This means courts and tribunals should adopt a *structured evaluative process*—grounded in *Autoclenz*, *Pimlico*, and reaffirmed in part by Lord Leggatt in *Uber* at paragraph 80—that should neither isolate clauses from context nor presume that form equates to substance. That process should involve at least the following considerations. Firstly, practical operability: is the clause capable of being exercised *without imposing disproportionate economic risk, procedural complexity, or exposure to sanctions or reputational harm*? The tribunal should interrogate not whether someone, somewhere, has exercised the right, but whether its routine use is *sustainably available* in light of the surrounding operational conditions (e.g., algorithmic penalties, performance ratings, income dependency, or informal surveillance).

Secondly, courts should consider economic coherence. Would a rational actor, faced with the choice between exercising the clause or operating independently, *have any strategic or economic reason* to choose the former? This identifies when a clause is so illogical in its construction (e.g., substitution where the substitute must be fully onboarded) that it functions more as an instrument of legal positioning than a genuine mode of flexibility.

Thirdly, courts should take into account structural positioning. Does the clause meaningfully displace the individual from the *centre of performance* in the working relationship, or is it peripheral to how work is assigned, valued, and reviewed? A right that exists but does not affect the individual's integration within the platform's operational core should be treated as *non-dispositive* of legal status. Fourthly, courts should assess legal effects in practice.[213] Does the presence of the clause materially *limit, reduce, or exclude* access to the statutory protections in question? If so, the tribunal should treat the clause as falling within the

[213] Davidov (n 128); Bogg (n 128).

statutory concept of *indirect limitation*, as articulated in s.203 ERA 1996, s.49 NMWA 1998, and reg.35 WTR 1998.[214]

This approach, it is contended, offers a method to *weigh contractual freedoms in relation to dependency, not in isolation from it*. It is also compatible with existing doctrine: it does not demand proof of bad faith (as in *Snook*),[215] nor does it presume all clauses are void; rather, it holds platforms to the standard that legal rights must be real in substance, not merely apparent in drafting.[216]

## XII. THE PURPOSIVE, PROTECTIVE APPROACH AND THE PATH TO WORKER/EMPLOYEE OR SELF-EMPLOYMENT STATUS

Had the Court in *Uber* and *Deliveroo* taken this approach, it would have placed platform companies in a position where they would have had to make a definitive choice *between two distinct operating models*. They would have to either accept the responsibilities that come with the control they exert or relinquish that control to create the conditions for genuine self-employment.

Under the first option, if a platform wished to maintain its high-control model—unilaterally setting prices, dictating routes, and managing individuals through algorithmic discipline—the price for doing so would be the automatic recognition of limb (b) worker status for the entire time individuals are logged on and available for work. To manage the resulting cost implications of a guaranteed minimum wage and holiday pay for a fluid workforce, platforms could then adopt the shift- or slot-based booking systems already operational for delivery services in other parts of Europe.[217] This would allow them to arrange labour supply with consumer demand in a structured way, and would incidentally render the legally problematic 'freedoms' of multi-apping and substitution largely redundant, as flexibility would be managed through the booking of scheduled shifts.

Under a slot-based model, Deliveroo could, for example, publish in advance separate blocks of service time that fit with its internal demand forecasts— thirty, sixty or ninety-minute windows tied to defined delivery polygons.[218] Couriers would claim those windows inside the

[214] Davidov (n 128); Bogg (n 128).
[215] Ford and Bogg (n 28).
[216] Bogg and Ford (n 44).
[217] Popan (n 150); Hiessl (n 18).
[218] Popan (n 150); Hiessl (n 18).

app's calendar rather than logging in *ad hoc*. Once a slot is claimed, two reciprocal undertakings materialise: Deliveroo guarantees floor pay for the full window, calculated to meet statutory minimum wage after a mileage allowance, and the courier commits to remaining inside the polygon and accepting all jobs that originate and terminate within it.

Because capacity is now rationed in advance, the platform must run continual demand simulations. If Friday evening forecasts 130 orders in Soho between 18:00 and 19:00 and historical data suggest an average of 2.6 drops per courier, the roster would open perhaps fifty seats for that hour. The first tranche might be offered to couriers whose on-time-completion rate sits in the top quartile, the remainder released to the wider pool on a rolling basis. Once filled, no further log-ins are permitted for that slice; excess labour cost is capped because the wage floor applies only to pre-booked seats.

Operationally, this re-engineering displaces the need for contractual substitution.[219] If a courier realises on Thursday that they cannot work their Saturday-night slot, they simply release it back to the pool and the system reallocates it—no informal side deals, no liability transfer, no shadow log-ins. Likewise, multi-apping becomes moot during duty periods: accepting the slot entails an exclusive service obligation for its duration, but outside the booked window, the courier is free to open other apps.[220] Flexibility is preserved at the macro level (i.e., couriers choose which blocks to claim each week) while the platform secures a predictable, rights-compliant labour force for peak periods.

From a cost perspective, Deliveroo can price each slot by reference to expected order density.[221] A tight urban zone with eight predicted drops per hour might be priced at the statutory minimum plus a small per-drop bonus, whereas an outer suburb with sparser demand might attract a higher guaranteed hourly figure to compensate for dead mileage. Because the company now bears the wage risk for idle minutes, it has a direct incentive to fine-tune release schedules, nudge customers toward pre-ordering and smoothing demand spikes; measures that lower idle time and, by extension, statutory top-ups.[222]

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[219] Popan (n 174).

[220] ibid; Mr MAN van Schadewijk, 'The Classification of On-Demand Platform Workers in Spain; the Intermediate Category'.

[221] Xingguang Chen and Hepu Deng, 'Improving Ride-Hailing Platform Operations in Dynamic Markets: A Drivers' Switching Perspective' (2025) 13 Systems 80; Niels Van Doorn and others, 'From a Wage to a Wager: Dynamic Pricing in the Gig Economy' [2020] Platform Equality; Chiwei Yan and others, 'Dynamic Pricing and Matching in Ride-Hailing Platforms' (2020) 67 Naval Research Logistics (NRL) 705.

[222] Chen and Deng (n 221); Van Doorn and others (n 221); Yan and others (n 221).

Most importantly, the roster architecture translates legal obligations into a controllable business variable: by adjusting the number and length of slots, Deliveroo can match labour costs to revenue flow while delivering the statutory entitlements that follow from worker status. The legally problematic 'freedoms' of simultaneous multi-apping and informal substitution become operationally irrelevant, not by prohibition but by redesign, and the platform's control over price, branding, and route selection is matched by a commensurate acceptance of wage and holiday liabilities during each booked block.

Alternatively, under the second option, if a platform wished to operate a genuinely self-employed model, it would have to fundamentally re-engineer its relationship with its providers to introduce the very indicators of self-employment the Supreme Court in *Uber* found to be absent. It would have to cease its practice of unilateral price-setting and allow providers to set their own fees or bid for work. It would need to facilitate a direct contractual relationship between the provider and the end-customer, allowing the provider to build their own reputation, brand, and client base. Finally, it would have to dismantle its system of disciplinary performance ratings and deactivations, becoming a true marketplace intermediary rather than a remote manager of a service branded as its own.

By way of illustration, for Uber to operate a genuinely self-employed model, the architecture of the platform would need to shift from command-and-control logistics to a peer-to-peer marketplace. In practical terms, this would involve several foundational changes across pricing, contracting, reputational ownership, and governance of behaviour.

First, price autonomy: drivers would set their own fares or negotiate rates within defined parameters. This could take the form of open bidding, tiered pricing, or fixed driver-set minimums that passengers could compare in-app. Rather than the platform calculating fares algorithmically based on time, distance, and surge conditions, drivers would determine what they charge based on their own valuations of time, risk, and opportunity cost. The app could display a range of available drivers, with estimated prices or per-mile rates, leaving the rider to choose between them.

Second, direct contracting with passengers: the relationship would shift from being trip-facilitated by Uber to being transacted between driver and rider, with Uber acting solely as a platform host or payment processor. Upon accepting a ride, drivers and passengers would enter into a specific, direct service contract. This would need to be reflected in the platform's terms of service, removing Uber as the principal service provider. Dispute resolution, feedback, and

service standards would need to be transparently governed on a peer-to-peer basis or mediated by an independent layer, not enforced unilaterally by Uber.

Third, reputational ownership and identity-building: drivers would control and retain their own feedback records, ratings, and performance metrics, ideally in a portable format that could be used across platforms. Branding would shift from Uber's uniform visual identity (e.g., decals, tone, language, or vehicle standardisation) to one where the drivers present themselves as independent providers. Riders would be able to follow or rebook individual drivers, and driver profiles could feature customised bios, qualifications, or niche offerings. That is to say, drivers become market actors with a visible identity rather than interchangeable units under Uber's operational brand.

Fourth, non-disciplining governance: Uber would abandon unilateral deactivation and opaque performance thresholds.[223] Instead, it might implement a transparent set of community standards or service expectations with breach resolution handled via neutral adjudication or customer feedback loops. Sanctions, if any, would be contractual rather than managerial. There would be no hidden rating algorithms or behavioural nudges;[224] instead, providers would operate under general terms, as one would in a digital freelance marketplace.

## XIII. FEE-FOR-ACCESS OR PERFORMANCE-BASED PAY? A MODEL FOR PLATFORM WORK

When considered through a fee lens, what this means is that Uber could continue to monetise this structure by charging drivers a service or transaction fee for use of the platform, app infrastructure, and payment processing. To be clear, the payment, charged by Uber to drivers under the restructured model described, would be equivalent to a *platform access fee*, or *intermediation service charge*.[225] That is, a fee paid by independent economic actors to access the technical, reputational, and logistical infrastructure that connects them to counterparties (passengers). A *service fee* akin to those charged by eBay, Etsy, or Airbnb.[226] It would reflect payment for use of the dispatch and routing software; payment processing and fraud protection; marketing reach and consumer trust associated with the Uber brand; customer support infrastructure; and reputational architecture (ratings, reviews, dispute mechanisms). The

[223] Rosenblat (n 157); Popan (n 174).
[224] Shaikh (n 10); Rosenblat (n 157); Cant (n 157).
[225] Srnicek (n 205).
[226] ibid.

economic structure would then resemble *platform capitalism in its actual form*: monetising access to the platform rather than commanding the labour performed through it.[227] The logic is what is termed a *fee-for-access* model, rather than *performance-for-pay*.

In that, the *fee-for-access* model treats the individual as an *independent economic actor* purchasing access to a market, infrastructure, or toolset. The platform is a *service provider*; it sells the means through which the user can conduct their own business. Key features include: firstly, the user *pays upfront* or per transaction for access (e.g., a commission, subscription, or listing fee). Secondly, the platform does *not control* how, when, or at what price the user offers their service. Thirdly, the user's earnings are *self-determined* as they arise from contracts or negotiations with third parties (e.g., passengers, customers), not with the platform. Fourthly, the platform provides *infrastructure*, not direction or control. This is the model seen in marketplaces like Airbnb or eBay, where the platform monetises *facilitation*, not performance. The legal logic here is *self-employment*: the platform is not responsible for ensuring income, and the *user bears the commercial risk*.

The performance-for-pay model (which, it is contended, better describes the current operational model),[228] on the other hand, treats the individual as a *service provider* working under the direction or operational design of the platform. The platform is not a neutral facilitator but a *principal*, who defines what is done, how it's done, and at what price. Characteristics include, for example, paying the individual based on *work performed*, often according to rates it sets.[229] The platform also retains control over core elements: pricing, service conditions, workflow, branding, and quality metrics. The individual, however, does not negotiate directly with end-users and has limited say over commercial terms.[230] Hence, pay is contingent on meeting the platform's performance metrics, and failure to comply may result in discipline or exclusion.[231] This is closer to *employment or limb (b) worker status,* given that the relationship is one of subordination and dependency.[232] The platform reaps the commercial benefits of the service, and *the individual trades labour for a defined return.* As the Supreme Court acknowledged in *Uber*: 'From the drivers' point of view…*In practice the only way in which*

[227] ibid.
[228] Popan (n 174); Baril (n 174); Shaikh (n 10); Rosenblat (n 157); Cant (n 157).
[229] Popan (n 174); Baril (n 174); Shaikh (n 10); Rosenblat (n 157); Cant (n 157).
[230] Popan (n 174); Baril (n 174); Shaikh (n 10); Rosenblat (n 157); Cant (n 157).
[231] Popan (n 174); Baril (n 174); Shaikh (n 10); Rosenblat (n 157); Cant (n 157).
[232] Sanja Stojkovic Zlatanovic and Ivana Ostojic, 'Labour Law Status of Platform Workers-between Autonomy and Subordination' [2021] Regional L. Rev. 269; Davidov (n 28); Ford and Bogg (n 28).

*they can increase their earnings is* by working longer hours *while constantly meeting Uber's measures of performance'* (emphasis added).[233]

In other words, the only way the individual can increase their return is *by increasing labour time.* They are locked into what might be called a *time-for-money exchange*, stripped of the usual tools of business development or profit optimisation. Because pricing, customer access, and service structure are predetermined, the only adjustable variable is *labour time.* The individual can *work longer hours*, *choose peak times*, if permitted, to maximise per-minute returns, or *improve efficiency within platform constraints*, though often marginally.

Thus, the fundamental difference between fee-for-access and performance-for-pay is who controls the commercial proposition and who bears the risk: In *fee-for-access*, the individual controls the offer and bears the business risk. In *performance-for-pay*, the platform controls the offer and allocates the business risk to the individual, while retaining managerial benefit. Thus, fee-for-access assumes *autonomy and enterprise*; performance-for-pay assumes *dependence and delegation*. In law, this difference maps onto the boundary between self-employment and worker/employment status—not as a mere label, but as a reflection of who holds economic and managerial power in the relationship.

## XIV. WORKER-BY-DEFAULT REVISITED: ACCESS FEES, PERFORMANCE PAY AND STATUTORY PRESUMPTIONS

This approach/proposal, it is contended, is also consistent with the settlement that Whitehall and Westminster have been inching toward for two decades. First, it gives practical effect to the core intuition running through the Department of Trade and Industry, *Discussion Document on Employment Status in Relation to Statutory Employment Rights* (2002-06) ('DTI review')[234] and the Department for Business, Innovation and Skills, *Employment Status Review* (2014-17) ('BIS review'). [235] These institutions have proposed that the legal or statutory framework should 'reflect the underlying economic reality of the employment relationship'. Both reviews hesitated to legislate because they could not see an implementable rule that preserved flexibility for the truly independent while protecting the dependent. What is proposed here—much like others who have expressed significant reservations about the current UK approach—[236]

[233] *Uber (n 5)*.

[234] Department of Trade and Industry, 'Discussion Document on Employment Status in Relation to Statutory Employment Rights' (DTI, July 2002).

[235] Department for Business, Innovation and Skills, 'Employment Status Review' (BIS, March 2015).

[236] Countouris (n 15); Adams (n 11).

supplies that rule: make control, not contractual phrasing, the decisive factor. The more the engaging business dictates price, pace, and performance, the less tenable it is to off-load wage-earner risks. Where the platform steps back—ceding price-setting, customer ownership and brand autonomy—the statutory presumption automatically relaxes.

Second, the suggested approach operationalises Matthew Taylor's *Review of Modern Working Practices* (2017)[237] ('Taylor Review') without importing its semantic detours ('dependent contractor'). Taylor argued that, *inter alia*: control should weigh more heavily than personal service; status tests must be stated in primary legislation; and, critically, that evidence of control should trigger a default allocation of basic rights. The suggested path does exactly that. By treating algorithmic price-fixing and disciplinary ratings as *prima facie* evidence of control, it translates Taylor's high-level prescription into a rule a tribunal can administer and a business can plan around. It also resolves Taylor's most persistent implementation snag—how to separate the genuinely enterprising courier who wants to run a micro-business from the courier whose 'entrepreneurship' lives only in boilerplate. The separation is achieved not by new vocabulary but by observable market behaviour: who names the price, who owns the client, who bears unreimbursed capital risk.

Third, it meets the twin select-committee demand articulated in the Work and Pensions Committee's *Self-Employment and the Gig Economy* (2017)[238] ('W & P 2017') and the Work and Pensions Committee & Business, Energy and Industrial Strategy Committee report, *A Framework for Modern Employment* (2017)[239] ('BEIS/W & P 2017'), both of which called for (i) 'worker-by-default' status where a company relies on sizeable self-employed pools, and (ii) a statutory focus on control rather than substitution. The model proposed here makes these recommendations operational: where control is present, worker status would be presumed; where control is absent, genuine self-employment would remain available. The burden of persuasion thus flips onto the party with superior information and bargaining power—the platform—precisely as those committees urged.

Fourth, it answers the practical implementation question that has stalled successive governments since the Department for Business, Energy and Industrial Strategy, *Good Work*

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[237] Taylor (n 13).

[238] House of Commons Work and Pensions Committee, *Self-Employment and the Gig Economy* (HC 57, 2017).

[239] Work and Pensions Committee and Business, Energy and Industrial Strategy Committee, *A Framework for Modern Employment* (HC 352, 2017).

*Plan* (2018):[240] how to legislate without destroying optional flexibility. The mechanisms suggested here are to tether flexibility to a price: if a platform truly wants an 'open marketplace,' it must prove it by opening price discovery, relinquishing brand exclusivity, and limiting disciplinary supervision to service-level breaches. Providers who value day-to-day autonomy more than guaranteed income can then self-select onto such platforms, while those who prefer security will gravitate to shift-based, worker-status platforms. *The law need only set the default; the market will supply the menu of models*.

## XV. IMPLEMENTATION AND THE STRUCTURAL LIMITS OF INCENTIVES

To avoid any ambiguity, this should not be read as predicting that platforms will spontaneously reorganise themselves. The menu of models will only emerge once Parliament hardwires a default rule into statute and backs it with enforceable consequences. In other words, the market will supply variety only after the law sets the ground rules: a clear presumption of worker status where control is present, a corresponding right of genuine self-employment where control is absent, and a shifted burden of proof together with credible sanctions for misclassification. Without that statutory footing and enforcement architecture, the prevailing incentives of the asset-light model will continue to favour the current allocation of risk, and voluntary uptake of the alternatives is unlikely.

Two structural features of platform competition make voluntary adoption of either model improbable.[241] First, both the shift-booked worker model and the genuinely self-employed marketplace model compress the margin that current platforms extract from opacity and unilateral control.[242] The worker model internalises standby-time and compliance costs and therefore lowers headline take rates or raises consumer prices.[243] The true marketplace model relinquishes price control and customer ownership and therefore erodes the central sources of network-effect rent.[244] Because valuation in this sector is tied to gross transaction volume growth with minimal labour liabilities, any early mover that sacrifices those rents faces an immediate disadvantage in user acquisition, pricing flexibility, and investor sentiment.[245] In

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[240] Department for Business, Energy and Industrial Strategy, 'Good Work Plan' (Cm 9755, 2018).

[241] Mark Armstrong, 'Competition in Two-Sided Markets' (2006) 37 RAND J Econ 668.

[242] Srnicek (n 205); Prassl (n 171).

[243] Michael A Cusumano, Annabelle Gawer and David B Yoffie, *The Business of Platforms* (Harvard Business Review Press 2019) 81–106.

[244] Srnicek (n 205)

[245] David S Evans and Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Harvard Business Review Press 2016).

a game-theoretic sense, the dominant strategy is to free-ride on competitors who assume compliance costs, while continuing to arbitrage classification until compelled otherwise.[246]

Second, there is a collective action and path-dependence problem.[247] Reconfiguring product, pricing, and governance to either model is costly and irreversible in ways that are difficult to signal credibly to markets.[248] The benefits of reconfiguration are partly public goods, such as a level playing field and reputational legitimacy, while the costs are private and front-loaded, such as building slot-allocation infrastructure or ceding control over price discovery and customer relationships.[249] No single firm can capture enough of the upside to justify moving first, and any unilateral shift would invite multi-homing by workers and customers to lower-cost rivals that persist with the current allocation of risk.[250]

This is because ride-hail and delivery are two-sided markets with strong cross-side network effects, and both sides can 'multi-home' with virtually no switching cost.[251] If one platform unilaterally migrates to either of the proposed compliant models, three dynamics follow. To begin with, on the customer side, price is highly elastic. A platform that internalises standby time (worker model) or cedes price control and brand rents (true marketplace) will either raise end-user prices or offer less aggressive discounts. Riders and eaters can keep both apps on their phones and simply choose the cheaper or faster option for each transaction.[252] The compliant firm then bleeds demand to rivals that keep externalising labour risk, which makes it harder to maintain utilisation and spreads fixed costs over fewer orders.[253]

Running in parallel is the worker-side response: strategic selection. If one platform guarantees pay within booked slots, workers will book peak windows there to lock in certainty, and leave off-peak or risky periods to the non-compliant rivals that still push standby time risk

[246] Anand Sriram, 'Decentralized Markets for Public Goods: Solving Collective Action Problems Using Blockchains' (PhD thesis, Brown University 2023).

[247] Charlie Lord and others, 'The sustainability of the gig economy food delivery system (Deliveroo, UberEATS and Just-Eat): Histories and futures of rebound, lock-in and path dependency' (2023) 17 International Journal of Sustainable Transportation 490.

[248] ibid.

[249] Massimiliano Nuccio and Marco Guerzoni, 'Big data: Hell or heaven? Digital platforms and market power in the data-driven economy' (2019) 23 Competition & Change 312.

[250] Francesco Cosenz, Dinor Qorbani and Yoshiki Yamaguchi, 'An exploration of digital ride-hailing multisided platforms' market dynamics: empirical evidence from the Uber case study' (2021) 70 International Journal of Productivity and Performance Management 725.

[251] Juan Manuel Sanchez-Cartas and Gonzalo León, 'Multisided platforms and markets: A survey of the theoretical literature' (2021) 35 Journal of Economic Surveys 452.

[252] Cosenz, Qorbani and Yamaguchi (n 250).

[253] Ibid.

onto labour. If instead a platform becomes a genuine marketplace, experienced workers who can command a premium may concentrate there, while others continue to chase algorithmically set rates on legacy platforms. In both scenarios, the mover faces an adverse selection problem: it attracts the costliest hours or the costliest workers relative to its new revenue model, while competitors skim the profitable residual traffic.[254] That is, the platform that moves first ends up covering guaranteed floors during thin, low-yield windows (long waits, dead mileage, sparse demand) and paying more to workers whose characteristics or bargaining power make them expensive under the new model (e.g.,, those who book only peak slots, trigger higher minimums, or command premium rates), while rivals continue to harvest the short, stackable, peak-time jobs that carry high order density, faster turnarounds, and superior contribution margins.

Compounding these shifts are network effects. Lower order density (i.e., fewer orders per unit time in a given area relative to the number of active couriers/drivers) on the compliant platform lengthens ETAs (the expected wait from request to pickup or delivery), which in turn reduces conversion, which further lowers density. The rival's density improves, allowing tighter batching and faster service, which lets it cut prices a little more.[255] The result is a familiar spiral: the platform that moved first sees both sides of the market drift away, not because its service is worse in absolute terms, but because the relative economics deteriorate once it internalises costs that others still push outward.[256] That is, once a single platform starts paying for idle time or yields price control, its order density thins. Thinner density lengthens ETAs and reduces the likelihood that a user will accept a quoted wait or fare; acceptance falls, so drivers/couriers complete fewer jobs per hour; fewer completions mean higher unit costs and less headroom for discounts; weaker discounts and slower ETAs push even more users back to rivals that still externalise idle-time risk; with each step, the compliant platform's batching and routing efficiencies degrade further, raising its effective cost per order and widening the price/quality gap again. The process feeds on itself; not because the product worsens in design, but because the maths of throughput deteriorate once one firm alone internalises costs that the rest continue to shed.

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[254] Ibid.

[255] Catherine Tucker, 'Network effects and market power: what have we learned in the last decade?' (2018) 32 Antitrust 72.

[256] Nuccio and Guerzoni (n 165).

Put differently, the unilateral mover bears private, front-loaded transition costs while much of the benefit (a fairer market structure) is diffuse and only materialises if others also change.[257] In that setting, multi-homing makes defection painless: workers and customers can reward the non-mover immediately with their next tap. Hence the rational response for each firm is to wait for a sector-wide constraint that forces everyone onto a level footing, rather than volunteering to be the first to compress margins and lose density. That is why a statutory default coupled with credible enforcement is constitutive of the change. It removes the first-mover penalty, converts compliance into a universal constraint, and allows capital markets to price the new equilibrium rather than rewarding firms that continue to externalise risk.

Put in concrete terms: a statutory default plus real enforcement (presumptive worker status where control is shown, burden-shifting, joint-and-several liability for arrears, civil penalties scaled to turnover, public procurement bars for repeat offenders) fixes the cost of compliance across the sector. Once those costs are non-optional, the 'arbitrage' of pushing standby time, equipment, insurance, and misclassification risk onto labour disappears as a competitive edge. Firms must then compete on unit-cost efficiency (better batching, routing, demand smoothing), service quality, and product differentiation, not on who can externalise most risk. For investors, a universal rule makes the cash-flow profile modellable. Margin compression becomes a sector baseline rather than a firm-specific weakness; multiples are adjusted to a new industry cost curve, not to idiosyncratic regulatory exposure. That stabilises valuation dispersion, reduces the reward for non-compliance, and channels capital toward businesses that can operate profitably under the same legal floor (e.g., by adopting shift rosters, dynamic slot pricing, or true marketplace architectures). Said simply, law standardises the constraint; markets then price and reward the most efficient ways of meeting it.

## XVI. CONCLUSION

More than that, bringing status determinations back under a purposive, protective frame—one that treats control and dependency as the decisive indicia, reads contractual liberties in situ rather than in isolation, and polices indirect contractual limitations—yields a far more coherent settlement than the path the Supreme Court charted in Uber and Deliveroo. It restores doctrinal integrity to the tripartite scheme (employee/worker/self-employed) by preventing the collapse of limb (b) into an exclusivity test; it avoids the 'categorical void' generated when notional

[257] Srnicek (n 205).

freedoms are treated as dispositive while platform control is sidelined; and it honours Parliament's anti-avoidance design by rejecting performative autonomy that is unusable in practice. Paired with a statutory default (presumptive worker status where control is shown, with a genuine self-employment safe harbour where it is not), this approach also solves the implementation problem that courts alone cannot solve: it standardises the constraint across the market, re-allocates risk to the party that organises and benefits from the work, and leaves firms free to choose between a compliant shift-roster model or a true marketplace model. That is, it offers a principled, administrable rule that better fits the statute, the case law's protective rationale, and the economic realities of platform production.

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